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SOCIAL SERVICES LAW

Michael Chernau
Senior Deputy County Attorney
Chesterfield County

21-1 THE ORGANIZATIONAL STRUCTURE

21-1.01 Virginia Department of Social Services

The Virginia Department of Social Services (DSS or Department), created under Va. Code § 63.2-200, is responsible for administration of the state's social services system.

21-1.02 Commissioner of Social Services

The Department is headed by the Commissioner of Social Services, who is appointed by the Governor and confirmed by the General Assembly. Va. Code § 63.2-201. Virginia Code §§ 63.2-202 through 63.2-214 set out more specifically the Commissioner's powers and duties.

21-1.03 Virginia Board of Social Services

The Virginia Board of Social Services is established under Va. Code § 63.2-215 as an advisory body to the Commissioner, Va. Code § 63.2-216, though the Board on its own initiative may initiate investigations and make recommendations to the Commissioner and the Governor on various matters. In carrying out its duties, the Board has the authority to hold hearings, administer oaths, and subpoena persons and documents. Va. Code § 63.2-220.

21-1.03(a) Membership and Procedures

The Board consists of eleven members who are appointed by the Governor and confirmed by the General Assembly. Va. Code § 63.2-215. The Code of Virginia establishes certain procedural requirements for the Board's operations.

21-1.03(b) Regulatory Authority

While the Board is described as being advisory, it has the authority to promulgate rules, regulations and standards with which local social services agencies, frequently referred to as local departments of social services, must comply.

The Board has promulgated rules and regulations regarding all programs and services administered by local social services agencies. These rules and regulations are contained in the Virginia Administrative Code (VAC) at 22 VAC 40 and 22 VAC 30 (adult protective services). These regulations can be accessed via Virginia's Legislative Information Services [website](#). An elaboration of these regulations is contained in a series of policy manuals promulgated by the Department for use by local agencies. The manuals can be accessed online through the Virginia Department of Social Services [website](#). The manuals cover adult- (e.g., Adult Protective Services) and child-related programs (e.g., Child Protective Services, Foster Care), as well as benefits-related programs (e.g., Food Stamps (SNAP), Medicaid, Temporary Assistance for Needy Families).

Applicable federal regulations can be accessed at the U.S. Department of Health and Human Services – Children's Bureau [website](#).

21-1.03(c) Personnel Regulations/Grievances

Under Va. Code § 63.2-219, the Board is required to establish minimum entrance and performance standards for the personnel employed by the Commissioner, local boards and local superintendents. The state personnel grievance system, Va. Code § 2.2-3000 et seq., applies to personnel employed by the Commissioner. Local departments and boards must adopt the locality's grievance policy or a policy that is approved by the State Board of Social Services as being consistent with the state's grievance policy.

21-1.04 Local Boards of Social Services (Public Welfare)**21-1.04(a) Variety of Organizational Arrangements Allowed**

Virginia Code §§ 63.2-300 through 63.2-323 allow for a variety of arrangements for local boards of social services and set forth the requirements for membership and voting.

21-1.04(b) Authority to Accept Gifts and Grants and to Set Fees for Investigations

Virginia Code § 63.2-314(A) authorizes local boards to receive and disburse funds from public and private sources in the form of gifts, contributions, grants, etc. for the purpose of serving the needy in their jurisdictions.

21-1.04(c) Authority to Charge Fees for Service

Virginia Code § 63.2-314(B) authorizes local boards to set fee schedules and receive fees for services that the court directs DSS to perform under Va. Code § 16.1-274, such as investigation, mediation, and visitation supervision services in cases of child custody, visitation, or support. Virginia Code § 16.1-274(C) also authorizes local boards to require prior payments of fees for such services when they are requested by agencies in another Virginia jurisdiction or in another state.

21-1.04(d) Authority to Employ Legal Counsel

Virginia Code § 63.2-317 authorizes a local board to employ legal counsel, including in-house counsel, subject to prior approval from the Virginia Department of Social Services.

21-1.04(e) Obligation to Furnish Reports and Budgets

Virginia Code § 63.2-315 requires local boards to provide reports relating to the administration of Title 63.2 to the Commissioner of the Department of Social Services, to the Commissioner for Aging and Rehabilitative Services, and to the local governing body, as these entities may require. Further, local boards, under Va. Code § 63.2-316, must submit their annual budgets to the local governing body (or bodies).

21-1.04(f) Authority to Conduct Hearings

Virginia Code § 63.2-322 authorizes local boards to hold and conduct hearings, as part of the exercise of their powers and duties, and grants the authority to issue subpoenas requiring the attendance of witnesses and the production of documents, as well as the authority to administer oaths and take testimony. Under Va. Code § 63.2-106, failure to obey such a subpoena is a Class 1 misdemeanor.

21-1.04(g) Local Department of Social Services

Virginia Code § 63.2-324 provides for a local department of social services for each county or city under the supervision and management of a local director. The local board of social services appoints and supervises the local director. Va. Code §§ 63.2-324, 63.2-325, 63.2-326. The Federal District Court for the Western District of Virginia has held that, unlike the board of social services, the department does not have the capacity to sue or

be sued and does not have a legal existence separate and apart from the county or the state. *Ross v. Franklin Cnty. DSS*, 186 F. Supp. 3d 526 (W.D. Va. 2016).¹

21-2 OVERVIEW OF SERVICES AND PROGRAMS

21-2.01 Key Services and Programs

The various services and programs of the social services system are set forth in Title 63.2. Key services and programs in Title 63.2 are the following:

21-2.01(a) Child Welfare Services

Virginia Code § 63.2-319 sets out in very general terms that local boards provide, either directly or through purchase of services, “public social services” directed toward: (i) protecting the welfare of all children; (ii) preventing or remedying problems that may result in the abuse, neglect, exploitation, or delinquency of children; (iii) preventing the unnecessary separation of children from their families by identifying family problems and helping families; (iv) returning children to families from which they have been separated; (v) placing children in suitable adoptive homes when such return is not possible; and (vi) assuring adequate care for children who can neither be returned home nor adopted. Virginia Code § 63.2-410 provides that the General Assembly and local governing bodies “shall” provide appropriate sums for use by the local Community Policy and Management Teams (CPMTs) (see Children’s Services Act (CSA), discussed in section 21-8) for children who are in foster care or who are at risk of coming into foster care. Local governing bodies are to provide additional funds for other essential social services “as may be prescribed by the Board in accordance with federally reimbursed assistance and social service programs.” Va. Code § 63.2-410. As costs have increased over time in the CSA program, there has been occasional discussion at the state level of removing the “sum sufficient” funding requirement for the state and capping the state costs. This could be accomplished through the Virginia state budget, which would trump the Code of Virginia.

The Attorney General has opined that the state’s child welfare laws must be enforced within federal enclaves by local departments of social services. 2004 Op. Va. Att’y Gen. 19.

21-2.01(b) Homemaker Services

Virginia Code § 63.2-1600 requires each local board to provide for the delivery of services to help individuals attain or maintain self-care and to prevent or reduce dependency. The obligation to provide these services is limited to the extent to which federal or state matching funds are made available to the locality.

21-2.01(c) Adult Protective Services

Virginia Code § 63.2-1605 requires local boards to provide, to the extent that federal and state matching funds are made available, protective services to adults who are unable to care for themselves and who have no one available to care for them, as well as persons sixty years of age or older who are abused, neglected, or exploited. Related Va. Code § 51.5-148 establishes the Adult Protective Services Unit within the Department for Aging and Rehabilitative Services to develop statewide policies, education and support programs, and a twenty-four-hour abuse hotline. Adult protective services are discussed in more detail in section 21-9.

¹ This case concerns the civil liability of a defendant in an employment discrimination case. Cases cited in this chapter are mostly DSS cases in which DSS is petitioner/appellant/appellee in child welfare cases—cases DSS is statutorily authorized to bring or in which DSS was named as defendant, but this issue was not raised in the lawsuit.

21-2.01(d) Adult Foster Homes

Virginia Code § 63.2-1601 authorizes each local board to provide adult foster home services, in accordance with regulations adopted by the Department for Aging and Rehabilitative Services.

21-2.01(e) Foster Care Services for Children

Virginia Code §§ 63.2-900 through 63.2-915 establish the right of local boards to accept children for placement in "suitable family homes, children's residential facilities or independent living arrangements," subject to the supervision of the Commissioner and in accordance with Virginia Board rules. Local boards have the authority to either operate such homes or facilities themselves or to contract with other entities for these services. If a child cannot be returned to his family or placed for adoption, and if kinship care is not in the child's best interests, then the local board must consider the placement and services that afford the best alternative for protecting the child's welfare. Placements may include, but are not limited to: family foster care, treatment foster care, and residential care. Services may include, but are not limited to: assessment and stabilization, diligent family search, intensive in-home, intensive wraparound, respite, mentoring, family mentoring, adoption support, supported adoption, crisis stabilization, or other community-based services. Va. Code § 63.2-900.

21-2.01(f) Fostering Futures/Independent Living Services

Foster care services include the provision of independent living services, which the local agency must provide to any person between eighteen and twenty-one years of age who is transitioning from foster care to self-sufficiency. The federal Fostering Connections to Success and Increasing Adoptions Act of 2008 permitted states to use "IV-E" funding to provide a greater breadth of supports to these youth, including housing and daily care costs. The General Assembly funded the "Fostering Futures" program beginning in 2016 and codified it in 2020. See Va. Code §§ 16.1-228, 16.1-241, 16.1-283.1, 16.1-283.3, 63.2-905.1, 63.2-917 through 63.2-923. Under the program, all participants must sign a Voluntary Continuing Services and Support Agreement (VCSSA) which becomes effective upon the youth's eighteenth birthday. The agreement is not just a service agreement, but acts as an entrustment agreement and must be approved by the JDR court. The local department must petition the court for approval of the VCSSA within thirty days and the court must schedule a hearing within forty-five days. To be eligible for the program, the youth must be completing secondary or vocational education, be employed for at least eighty hours per month, be participating in an employment training program, or be incapable of doing any of those things because of a medical condition. Va. Code § 63.2-919. A young person may choose to discontinue receiving Fostering Futures services any time before his twenty-first birthday. However, the local department must restore these services if the person requests, provided that the person has not yet turned twenty-one and enters into another VCSSA. Fostering Futures services must also be provided to a person who is committed to the Department of Juvenile Justice out of foster care and chooses to resume such services upon his release. The person must give notice to DSS and enter into an agreement regarding the terms and conditions of such services within sixty days of his release. Va. Code § 63.2-905.1. For details, see VDSS [Child and Family Services Manual, Chapter E. Foster Care, Section 14](#).

For individuals who were in foster care on their eighteenth birthday and who were enrolled in the state's medical assistance program, Va. Code § 32.1-325, local departments must ensure that enrollment continues unless the individual objects. Va. Code § 63.2-905.4.

21-2.01(g) Appeals

Any person whose claim for foster care and adoption assistance benefits is denied or is not acted upon by the local department with reasonable promptness shall have the right to appeal to the Commissioner of Social Services. Va. Code § 63.2-915.

21-2.01(h) Public Aid and Assistance**21-2.01(h)(1) *Funding***

Virginia Code §§ 63.2-400 through 63.2-412 authorize state and local appropriations and payments for such assistance and provide for reimbursement of localities by the Commonwealth for various local expenditures made to carry out the public assistance programs. Va. Code § 63.2-406 authorizes the Virginia Board to amend the standards for such programs to comply with any changes made in federal law or regulation.

21-2.01(h)(2) *General Provisions*

Virginia Code §§ 63.2-500 through 63.2-526 set forth general provisions applicable to the provision of public assistance. Virginia Code §§ 63.2-505 through 63.2-516 describe how decisions are made on the amount of assistance that will be paid to an applicant. Virginia Code §§ 63.2-517 through 63.2-519 describe the applicant's rights to notice, hearing, and appeal to the Commissioner (under Va. Code § 63.2-517, the Commissioner may delegate his review authority to a hearing officer). The decision of the Commissioner is final and binding. An aggrieved applicant has the right to seek judicial review under the Administrative Process Act, but such review is based on the record and the court cannot overturn the Commissioner's decision if there is "substantial evidence" in the record to support the decision. Appeals of local agency decisions regarding Medicaid must be made to the Virginia Department of Medical Assistance Services (DMAS) and appeals of local agency decisions regarding food stamps must be made through the Department of Agriculture and Consumer Services.

21-2.01(h)(3) *Temporary Assistance for Needy Families Program*

Chapter 6 of Title 63.2 (Va. Code §§ 63.2-600 through 63.2-621) sets out the Temporary Assistance for Needy Families program (TANF). These provisions include eligibility requirements, administration, and Virginia Initiative for Education and Work (VIEW) provisions. VIEW is an employment program in which TANF recipients may be required to participate. Those receiving food stamps but not TANF may be required to participate in a separate employment program. As part of the Virginia Independence Program (VIP), VIEW services include job counseling, education and training, job search assistance and support, transportation, day care services, and medical assistance, depending upon the needs of the applicant. In 2020, the Virginia Board of Social Services was directed to adopt regulations to enable TANF-eligible applicants to receive an emergency assistance payment of up to \$1,500 to prevent eviction or address needs resulting from a fire or natural disaster. Va. Code § 63.2-617.

21-2.01(h)(4) *Other Social Service Grants*

- Supplemental Nutrition Assistance Program (SNAP), formerly known as Food Stamps (a Department of Agriculture Program administered through the local social services agencies). Va. Code § 63.2-801.
- State Local Hospitalization (a limited fund that provides payment for some hospitalization services for persons meeting eligibility requirements). Va. Code § 32.1-343 et seq.
- Auxiliary grants to income- and resource-eligible persons to pay for their care in an adult home. Va. Code § 51.5-160.
- General Relief (a very limited financial assistance program for income- and resource-eligible persons, usually those not receiving any other form of relief). Va. Code § 63.2-802.
- Medicaid, a federal/state medical insurance program.

21-3 CONFIDENTIALITY OF RECORDS

DSS gains access to much personal information about children and families because of the breadth of services it provides. Generally, the Code of Virginia specifies that such information is confidential. For instance, Va. Code § 2.2-3705.5(3) exempts social services records from the Virginia Freedom of Information Act. Sometimes, however, it is necessary

for local departments to share some of that information with others. Sometimes, third parties wish to access the information for their own purposes. There is a catch-all provision, Va. Code § 63.2-104, which provides that “records, information and statistical registries of the Department, local departments and of all child-welfare agencies concerning social services to or on behalf of individuals shall be confidential information” that may not be disclosed except to a person “having a legitimate interest in accordance with state and federal law and regulation.” The statute defines “[a] person having a legitimate interest” to include the staff of a court services unit, the Department of Juvenile Justice, a local community services board, or the Department of Behavioral Health and Developmental Services that are providing services for a child who is the subject of the records. Va. Code § 63.2-104(A). A violation is punishable as a Class 1 misdemeanor. While this statute applies to all social services records, other statutes provide more specific guidance in certain circumstances. For an extensive discussion of confidentiality issues, see 2016 LGA Fall Conference handout, [A Monster Mash of Mind-Warping DSS Issues](#).

21-3.01 Public Assistance Records and Child Support

These records are confidential except for purposes “directly connected” with program administration. Va. Code § 63.2-102. Child support enforcement records are to be made available for the purpose of enforcement “to the Attorney General, prosecuting attorneys, law-enforcement agencies, courts of competent jurisdiction and agencies in other states engaged in the enforcement of support.” Information relating to support enforcement actions may be made available to recipients of child support services. Va. Code § 63.2-103. Contact information received and maintained by local departments for purposes of public assistance are confidential except to the extent allowed by Va. Code § 63.2-102. Va. Code § 63.2-501.1.

Virginia Code § 63.2-102 makes it clear that the persons who have a “legitimate interest” include the Commissioner, his agents and employees, and others who need the information for purposes directly connected with the administration of a public assistance program, not private litigants. See *Tyson v. Tyson*, 69 Va. Cir. 92 (Fairfax Cnty. 2005) (DSS motion to quash granted because father in divorce case had no legitimate interest in DSS records related to mother’s participation in childcare program).

21-3.02 Sexual and Domestic Violence

Virginia Code § 63.2-104.1 addresses the confidentiality of information collected in connection with services provided to victims of sexual assault, domestic violence, stalking, human trafficking, or prostitution. The statute limits disclosure to aggregate, non-personally-identifying data; or personal data if required by another statute, by court mandate, or as necessary for law enforcement or prosecution purposes.

21-3.03 Child Protective Service Records

The Virginia Department of Social Services [Policy Manual on Child and Family Services, Chapter C, Child Protective Services, Section 9](#) contains a comprehensive review of the rules related to the confidentiality of child protective services (CPS) investigative records. The Manual references the administrative law on confidentiality, which can be found at 22 VAC 40-705-160.

21-3.03(a) Discretionary Release of Information

Notwithstanding the confidentiality of CPS records, Va. Code § 63.2-105(A) authorizes DSS to release information about a child or family, without court order or consent of the family, if DSS determines that: (i) the person receiving the information has a “legitimate interest” in the records and (ii) such disclosure is in the best interest of the child who is the subject of the records. Persons who have a “legitimate interest” in such disclosure include, but are not limited to: (i) anyone responsible for conducting investigations or providing services to the child or family, including multi-disciplinary teams and family assessment and planning teams, law enforcement agencies, and the Commonwealth’s

Attorney; (ii) child welfare or human services agencies from other jurisdictions that request information to determine whether a person is complying with a CPS plan or a court order; (iii) the child's school, so that the child's ongoing status can be monitored; and (iv) a relative or other person who is considered a potential caretaker for the child if the department has to remove the child. Relevance in a federal civil lawsuit is an insufficient "legitimate interest" to overcome the state's interest in protecting confidential and highly sensitive social services records. *Nelson v. Green*, No. 3:06cv70 (W.D. Va. June 12, 2014).

Virginia Code § 63.2-1505 provides that any information exchanged for the purpose of conducting a CPS investigation is not a violation of the confidentiality provisions in § 63.2-104 or § 63.2-105.

To protect DSS from potential civil liability associated with the disclosure of confidential information, the Code of Virginia provides that when DSS has released CPS information to anyone it determines to have a legitimate interest in the records, it is presumed to have exercised its discretion in a reasonable and lawful manner. Va. Code § 63.2-105. See *Commonwealth v. Williams*, 84 Va. Cir. 325 (Fairfax Cnty. 2012) (criminal defendant denied access to CPS records related to himself and siblings).

21-3.03(b) Mandated Disclosures

Virginia Department of Social Services policy lists categories of people to whom DSS must release CPS records:

1. Commonwealth's Attorney and law enforcement. See Va. Code § 63.2-1503(D) (required disclosure of certain child abuse and neglect reports).
2. Regional Medical Examiner's Office. See Va. Code §§ 32.1-283.1(C) and 63.2-1503(E) (required disclosure in child fatality cases).
3. United States Armed Forces Advocacy Program. See Va. Code § 63.2-1503(N) (disclosure is required to transmit information regarding reports, complaints and investigations involving active duty personnel or members of their household).
4. Division of Child Support Enforcement. See Va. Code §§ 63.2-103, 63.2-1902 (DSS is required to provide all information requested by the DCSE in its efforts to secure support payments for children).
5. Citizen Review Panels. The Child Abuse Prevention and Treatment Act (CAPTA) (42 U.S.C. § 5101 et seq.) requires that case-specific information about child abuse and neglect reports and investigations be made available upon request to citizen review panels. This requirement is implemented through 22 VAC 40-705-160(A)(5). The citizen panels in Virginia include the State Board of Social Services and the State Child Fatality Review Team. See Va. Code § 32.1-283.1(C) (regarding the right of access by the State Child Fatality Review Team).
6. Court Appointed Special Advocate (CASA). The standard court order appointing a CASA to a case pending before the court includes the authorization for the CASA to receive, upon request, CPS information relating to the child to which the CASA was appointed. It can still be argued that the name of the complainant can be kept confidential.
7. Child's guardian ad litem. The guardian ad litem appointed to represent a child in proceedings before the court is entitled to receive DSS information regarding the child. Va. Code § 16.1-266(G); 1998 Op. Va. Att'y Gen. 38.

8. Child's lawyer. The lawyer appointed to represent the child in proceedings before the court is entitled to receive DSS information regarding the child. Va. Code § 16.1-266(F).
9. "Data subject." Under the Government Data Collection and Dissemination Practices Act (GDGCPA), Va. Code § 2.2-3800 et seq., any person who is a "data subject" in the department's records has the right to access those records pertaining to that person. This includes information in a CPS record regarding a person who is alleged to have abused or neglected a child. However, unless a "founded" determination has been made and the matter is on appeal, the alleged abuser only has the right to information regarding the alleged abuser. This right of access does not apply to personal information systems maintained by DSS regarding alleged cases of child abuse or neglect while such cases are also subject to an ongoing criminal prosecution. Va. Code § 2.2-3802(7). At any requested pre-disposition conference, information about the investigator's findings will have to be revealed, but there is no requirement that specific documents be provided to the alleged abuser. The GDGCPA does not specify the rights of a parent to seek records on behalf of the child. The Department's policy on this is to determine whether such release would be in the child's best interest.
10. Alleged abuser. When a "founded" disposition is appealed, Va. Code § 63.2-1526(A) allows the alleged abuser or neglecter the opportunity to review the record providing the basis for the DSS determination of abuse or neglect when that person appeals. The identity of the reporter need not be disclosed, and the identity of collateral witnesses or any other person may be withheld if disclosure may endanger their safety. Also, any information that might endanger the well-being of the child can be kept confidential.

21-3.04 Discovery of CPS/DSS Records in Criminal Cases

It is not uncommon for alleged abusers who are also facing criminal prosecution for their actions to subpoena the CPS records in an effort to access copies of a victim/child's statements, medical records, counseling records, etc., in order to attack the competency or credibility of the victim/child. DSS should move to quash such subpoenas.

The Rules of the Supreme Court provide the only means for pretrial discovery by a defendant in a criminal case, and it is quite limited. *Hackman v. Commonwealth*, 220 Va. 710, 261 S.E.2d 555 (1980). There is no general constitutional right to discovery in a criminal case. *Spencer v. Commonwealth*, 238 Va. 295, 384 S.E.2d 785 (1989). See *Spencer v. Commonwealth*, No. 2207-01-2 (Va. Ct. App. Oct. 8, 2002) (unpubl.) (upholding a circuit court decision denying a criminal defendant access to Child Protective Service records).

The Rules of the Supreme Court provide that, upon motion, an accused shall be entitled only to certain of his own statements and criminal records which the Commonwealth's Attorney plans to introduce into evidence against the defendant in court. The Rules do not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective witnesses, such as the child/victim, to agents of the Commonwealth, or of reports, memoranda, or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case.

DSS investigatory records are not discoverable under the Rules if DSS was involved jointly with the police in the investigation of the criminal case. In such cases, DSS is an agent of the Commonwealth and a party to the prosecution for purposes of the Rules.

Ramirez v. Commonwealth, 20 Va. App. 292, 456 S.E.2d 531 (1995). See *Cox v. Commonwealth*, 227 Va. 324, 315 S.E.2d 228 (1984). The best practice in such cases is to either: (i) provide the records to the Commonwealth and let the prosecutor determine what, if any, DSS records must be released to the defendant under the rules of criminal procedure, or (ii) let the judge review the records in camera and determine what records should be disclosed to the defendant. See *Commonwealth v. Tuma*, 285 Va. 629, 740 S.E.2d 14 (2013) (reversing the Court of Appeals and finding no *Brady* violation when defense counsel knew of existence of recording of witness interview but did not ask to hear it before trial and did not seek a recess during trial to listen to it when prosecutor stated she was in possession of the recording).

21-3.05 Discovery of CPS/DSS Records in Civil Cases

Sometimes, parties to child abuse cases initiated by DSS attempt to gain access to DSS records through interrogatories, requests for documents, and depositions. Rule 8:15 of the Rules of the Supreme Court prohibits discovery in child custody matters, including DSS cases, except upon motion timely made and for good cause shown. Therefore, DSS is not subject to discovery in child abuse/neglect cases unless the court so orders.

Also, the Court of Appeals has recognized good cause to restrict a non-custodial parent's right to access a child's medical and therapy records held by DSS under § 20-124.6 of the Code when a child is in foster care because of abuse or neglect and the issues being addressed in therapy relate to that parent. *Green v. Richmond DSS*, 35 Va. App. 682, 547 S.E.2d 548 (2001). See *Clatterbuck v. Clatterbuck*, No. 1775-02-3 (Va. Ct. App. Dec. 10, 2002) (unpubl.) (father denied access to child's counseling records in divorce case); *L.C.S. v. S.A.S.*, 19 Va. App. 709, 453 S.E.2d 580 (1995) (welfare of the child is to be regarded more highly than the technical legal rights of a parent to access records).

When DSS records, and CPS records in particular, are sought in civil litigation unrelated to the child abuse complaint or the best interest of the child, DSS should file a motion to quash and cite the statutory mandates of confidentiality under §§ 63.2-104, 63.2-105. (See *Tyson v. Tyson* discussed in section [21-3.01](#)).

21-4 CHILD PROTECTIVE SERVICES

Chapter 15 of Title 63.2 (Va. Code §§ 63.2-1500 through 63.2-1530) requires that all local departments establish child protective services to respond to reports of child abuse or neglect, mandates certain individuals to make reports when they suspect cases of child abuse or neglect in their professional or official capacity, and provides an appeal process for persons who have been found by a child protective services worker during an administrative investigation to have abused or neglected a child. The chapter implements a differential response system in cases of reported child abuse and neglect, which allows DSS to respond to certain reports by conducting either an investigation or a family assessment. The impetus behind the differential response system is to make available a less threatening and more service-oriented response to families in crisis, with a goal of having better outcomes and less stigma for families who are involved.

Key provisions of the Code of Virginia regarding the child protective services system are discussed below.

21-4.01 Definition of Abuse and Neglect

The definition of "abused or neglected child" is found in Va. Code §§ 63.2-100 and 16.1-228. The definitions are identical. Both statutes exclude from the definition of medical neglect parents who refuse to provide certain medical treatment to a child fourteen years old or older who has a life-threatening condition and the child and the parents agree it is in the child's best interests to refuse the treatment. (Query: Does this mean that DSS may still petition the JDR court with an abuse/neglect petition under such circumstances?) The definition of "abused or neglected child" is broad and includes conduct that creates

risk of harm, in addition to actual harm. For example, a child who is with a parent while the parent is either manufacturing or selling drugs is abused or neglected under the legal definition of abuse or neglect. Also, a child who is left alone in a dwelling with an unrelated person who is a known violent sex offender meets the definition of an abused or neglected child. However, it must be determined that the alleged abuser is a parent, a person responsible for the child's care, or—as of July 1, 2022—an intimate partner of the parent or person responsible for the child's care. Va. Code § 16.1-228(4). See *Moore v. Brown*, 63 Va. App. 375, 758 S.E.2d 68 (2014) (CPS founded disposition overturned because abuser not deemed to be in caretaking role simply because he resided in same residence); 2014 Op. Va. Att'y Gen. 92 (leaving child alone in room with sex offender does not violate statute when caretaker remains in the residence).

Even though the General Assembly has specifically excluded from the definition of abuse or neglect an infant that is "delivered" safely to a hospital or emergency services agency by a parent within 30 days of the child's birth (safe delivery is also a defense to a criminal action), such conduct is considered abandonment for purposes of terminating parental rights. See Va. Code § 16.1-228; section 21-7.03(d).

The definition is general, but it has been upheld against challenges of unconstitutional vagueness. The Court of Appeals of Virginia has specifically noted and upheld the validity of that portion of the definition that includes conduct that "creates a substantial risk" of harm. See *Chabolla v. Va. DSS*, 55 Va. App. 531, 687 S.E.2d 85 (2010); *Jenkins v. Winchester DSS*, 12 Va. App. 1178, 409 S.E.2d 16 (1991) (statutory definitions of an abused or neglected child do not require proof of actual harm or impairment); *Jackson v. W.*, 14 Va. App. 391, 419 S.E.2d 385 (1992); and *Wilson v. Fairfax Cnty. Dep't of Family Services*, No. 2606-02-4 (Va. Ct. App. July 15, 2003) (unpubl.). The Virginia Department of Social Services policy manual regarding child protective services provides [more detailed definitions](#) and guidelines, which have also been upheld against constitutional challenge.

21-4.02 CPS Must Receive a Valid Complaint

Not every concern expressed to DSS obligates DSS to take action. DSS is only required to respond to a "valid" complaint, which is a term defined in Va. Code § 63.2-1508. A report or complaint is "valid" only when DSS has evaluated the information and determined that the following elements are present:

1. The alleged victim child or children are under the age of eighteen at the time of the complaint;
2. The alleged abuser is the alleged victim child's parent or other caretaker or an intimate partner of the parent or caretaker;
3. DSS is the local department of jurisdiction; and
4. The circumstances described meet the definition of child abuse or neglect.

If the local department that first receives the complaint does not have jurisdiction, and the local department with jurisdiction is within Virginia, the department that received the complaint must forward it to the appropriate local department. Va. Code § 63.2-1508(D). See 22 VAC 40-705-40(I)(2) (describing procedures).

21-4.02(a) Mandatory Reporting Requirement

Virginia Code § 63.2-1509 requires physicians, nurses, teachers, and a variety of other specifically named professionals and volunteers who work with children and families to make a report to DSS whenever such person has a "reason to suspect" that a child has

been abused or neglected. Specifically exempted from mandated reporting, however, are religious leaders of a church if the information related to the suspected abuse or neglect is required to be held confidential by church doctrine or information which is subject to the "minister-penitent" privilege. Va. Code §§ 8.01-400 and 19.2-271.3. Also, no person is required to make a report if the person has actual knowledge that the same matter has already been reported.

The report must be made to either: (1) DSS in the jurisdiction where the abuse or neglect is believed to have occurred or the child resides; (2) the Commonwealth's toll-free child abuse and neglect hotline; or (3) DSS where the abuse or neglect was discovered, if the place where the abuse occurred or the child resides is unknown.

If the information regarding suspected child abuse or neglect is received by a teacher, staff member, resident, intern, or nurse in the course of professional services in a hospital, school, or similar institution, then such person may, instead of making a direct report, immediately inform the person in charge of the institution or department, or his designee. Then, that person must make the report "forthwith." Va. Code § 63.2-1509.

Virginia Code § 63.2-1509(A) requires all mandated reporters to cooperate with CPS and make any related information, records, and reports available to CPS. This means that CPS workers can obtain information about a child from a mandated reporter even when that person was not the person who made the report being investigated. However, no such release of information may be required if it would violate the Family Educational Rights and Privacy Act. In addition, federal substance abuse law would prohibit disclosure of information beyond the mandated report of suspected abuse without a consent form. 42 C.F.R. § 2.12(c)(6). The Privacy Rule for health care providers under the Health Insurance Portability and Accountability Act (HIPAA) also permits mandated reporters to comply with state law on reporting child abuse. 45 C.F.R. § 164.512. The Code of Virginia also specifically requires law enforcement officers to disclose relevant information, and it specifically protects that information from re-disclosure.

The mandatory reporting requirement applies equally to church-run childcare facilities, and has been found by the Fourth Circuit Court of Appeals not to burden the free exercise of religion. *Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988).

21-4.02(b) Perinatal Substance Abuse

Virginia Code § 63.2-1509 states that a "reason to suspect that a child is abused or neglected," thereby mandating a report to CPS, shall include medical findings that: (i) within six weeks after birth, a child was born affected by substance abuse or experiencing withdrawal symptoms resulting from in utero drug exposure; (ii) within four years following birth, the child has an illness, disease, or condition that is attributable to maternal drug abuse during pregnancy; and (iii) within four years following birth, a child has fetal alcohol spectrum syndrome.

The CPS Policy Manual provides special rules for investigating such cases. The Code requires CPS to develop a plan of safe care for the child. In general, in utero exposure is not, per se, abuse or neglect; only the mother's failure to follow through with the plan of safe care or some other behavior of the mother that actually harmed or threatened the child can form the basis of a founded disposition and/or court action. However, a petition may be filed in court under § 16.1-241.3 for court assistance with the investigation. The court may take a number of actions, including removal of the child, but only for so long as is necessary to complete the CPS investigation. The fact that the court enters an order to assist in the CPS investigation is not admissible in a subsequent abuse or neglect proceeding that DSS would have to initiate by separate petition.

21-4.02(c) Immunity for Good-Faith Reporting

Virginia Code §§ 63.2-1509(C) and 63.2-1512 provide that any person making a report, or taking a child into custody under the authority of Va. Code § 63.2-1517, or who participates in a judicial proceeding resulting from a report, shall be immune from civil or criminal liability unless it is proven that the person acted in bad faith or with malicious intent.

21-4.02(d) Penalty for Failure to Report

Virginia Code § 63.2-1509(D) provides that any mandated reporter who fails to do so within twenty-four hours after having reason to suspect child abuse or neglect shall be fined not more than \$500 for the first failure and not less than \$1,000 for any subsequent failures. In cases evidencing acts of rape, sodomy, or object sexual penetration, a person who knowingly and intentionally fails to make a required report is guilty of a Class 1 misdemeanor.

21-4.02(e) Malicious Reports

Under Va. Code § 63.2-1514(D), a person who is the subject of an unfounded report and who believes that the report was made maliciously can petition the circuit court to release the records of the investigation. The petition must specify the reasons for the person's belief that the report was malicious. Upon receiving the petition, the court directs DSS to provide the record for in-camera review. After reviewing the record, the court must provide the petitioner with a copy of the records if it finds the following: (i) there is a reasonable question of fact as to whether the report was made in bad faith or with malicious intent and (ii) disclosure of the identity of the reporter would not be likely to endanger the life or safety of the reporter. This is a summary procedure and thus the petitioner has the right, but is not required, to present evidence. The Department of Social Services is not given the right to present evidence. *Gloucester Cnty. DSS v. Kennedy*, 256 Va. 400, 507 S.E.2d 81(1998).

The primary purpose of this procedure is to find out who made the report for purposes of a subsequent civil suit against the complainant for a malicious report. Virginia Code § 63.2-1513 provides that any person fourteen years of age or older who makes "or causes to be made" a report of child abuse or neglect that he/she knows to be false shall be guilty of a Class 1 misdemeanor. A second conviction results in a Class 6 felony. If a conviction is obtained in a case, DSS must immediately purge its records of the case if it receives a certified copy of the conviction.

21-4.03 Organizing a CPS Response**21-4.03(a) Notify the Police**

Virginia Code § 63.2-1503 sets out the responsibility of DSS to establish a child protective services unit and to be able to respond to reports twenty-four hours a day, seven days a week. The first step to be taken by DSS is to notify immediately (within two hours) the Commonwealth's Attorney and the local law enforcement agency of any complaint that involves a broad range of criminal conduct specifically enumerated in Va. Code. § 63.2-1503(D) and to make available to them the records of DSS. Within two business days, the department must complete a written report to be kept in the investigation file which contains details about the notification, the victim, and the alleged abuser. Va. Code § 63.2-1503(D). Not every possible crime requires a DSS report, but the Commonwealth and police are better trained at determining when alleged abuse is also a crime. Accordingly, the local department should develop a protocol for sharing all reports with the police and Commonwealth's Attorney. Va. Code § 63.2-1503(J); 22 VAC 40-705-50(E).

21-4.03(b) Investigation or Family Assessment?

For each valid complaint, DSS must decide whether to conduct an investigation or a family assessment. DSS has some discretion to determine what complaints it wants to

investigate, but DSS does not have the option to conduct a family assessment in lieu of an investigation if there is a valid report of sexual abuse, child fatality, serious injury, DSS removal of the child, or cases involving a child at a licensed or religiously exempt day-care facility, regulated family day home, a school, hospital, or any institution. If the complaint is based on a health care provider's finding that the abuse or neglect was caused by maternal substance abuse (drug or alcohol), see Va. Code § 63.2-1509(B), then a family assessment must be conducted unless an investigation is otherwise required or is necessary to protect the safety of the child. Va. Code § 63.2-1506(C). When the victim is younger than two years of age, the child protective services worker must conduct a face-to-face observation of the child within twenty-four hours of receiving the report. 22 VAC 40-705-80(A)(1).

21-4.03(c) Locate the Child

DSS must use "reasonable diligence" to locate a child once a valid complaint is accepted for investigation or family assessment. Va. Code § 63.2-1503(F). If the family has moved to another jurisdiction, DSS must notify that jurisdiction, whether in Virginia or not, and transfer the department's information to the department in the jurisdiction to which the family has moved. The new locality must then arrange appropriate services. Va. Code § 63.2-1503(G) and (H).

In cases in which the parent is not the subject of the report, DSS must notify the custodial parent and attempt to notify the non-custodial parent of a report of suspected abuse or neglect of a child who is the subject of an investigation or is receiving a family assessment. Va. Code § 63.2-1503(O).

At the initial time of contact with the person subject to a child abuse and neglect investigation, DSS must advise such person of the complaints or allegations made, "in a manner that is consistent with laws protecting the rights of the person making the report or complaint." Va. Code § 63.2-1516.01. This language appears to be an oblique way of saying that the complaint against the suspect should be revealed in a manner that maximizes the protection of the identity of the complainant. Virginia Code §§ 63.2-1526 and 63.2-1514 already specify that the identity of the complainant is to remain confidential unless the local circuit court specifically authorizes disclosure of the complainant's identity.

21-4.03(d) Conduct Investigation and Determination of "Founded" or "Unfounded"

Pursuant to Va. Code § 63.2-1505(B), if DSS responds by making an investigation, the department shall:

1. Make an "immediate" investigation. The term "immediate" is not defined in the Code, and case law indicates that this term is to be understood as directory rather than mandatory in nature. See *J.B. v. Brunty*, 21 Va. App. 300, 464 S.E.2d 166 (1995). When the victim is younger than two years old, the initial contact with the child by DSS must be within twenty-four hours of receiving the report. 22 VAC 40-705-80(B)(1).
2. Enter a report into the automation system maintained by the Virginia Department of Social Services.
3. Consult with the family to provide necessary services for the child and family.
4. Petition the court for the provision of necessary services, including the removal of the child.
5. Determine within forty-five days (or, with written justification, sixty days—or ninety days if the investigation is in conjunction with law enforcement, although extensions are provided for in certain

circumstances) whether the complaint is “founded” or “unfounded” and so report to the Virginia DSS. These time limits are “directory” and not jurisdictional in nature. The fact that the CPS worker takes longer than the allotted time to make a finding does not render that finding void, and does not divest DSS of jurisdiction to proceed with a finding and report to the central registry. *See Carter v. Ancel*, 28 Va. App. 76, 502 S.E.2d 149 (1998); *J.B. v. Brunty*, 21 Va. App. 300, 464 S.E.2d 166 (1995). Also, DSS may make separate determinations of founded mental abuse and founded physical abuse based on an investigation arising from a single valid complaint. *John S. v. Alexandria DSS*, No. 2285-03-4 (Va. Ct. App. Oct. 26, 2004) (unpubl.).

6. If the report is unfounded, so notify the complainant and the person suspected of abuse or neglect.
7. If the report is founded, and the subject of the report is or was at the time of the investigation or conduct an employee of a Virginia school division, notify the relevant school board of the founded complaint without delay.
8. Upon request and under certain enumerated conditions, disclose to the child’s parent or guardian the location of the child.

Va. Code § 63.2-1505(B). No individual may determine whether a case involving a complaint of alleged sexual abuse of a child is founded or unfounded unless he has completed a Board-approved training program for the investigation of complaints involving alleged sexual abuse of a child. Va. Code § 63.2-1505(D).

DSS may create a multidisciplinary team to provide consultation to DSS during the investigation of selected cases involving child abuse or neglect and to make recommendations regarding the prosecution of such cases. The team may be composed of members of the medical, mental health, legal, and law-enforcement professions, including the attorney for the Commonwealth, a local child protective services representative, and the guardian ad litem or other court-appointed advocate for the child. Va. Code § 63.2-1503(K).

21-4.03(e) Special Procedure for Public School Employees

If the complaint is against school personnel, then additional procedures must be followed. Virginia Code § 63.2-1516.1 provides that the initial interview with the alleged abuser or neglecter must be face-to-face. At the initial interview, the accused must be provided a written statement describing the general nature of the complaint, the right to representation, and the identity of the alleged victim. Written notification of the findings must also be provided, which must include a summary of the investigation and notice of the right of appeal.

When a complaint is also being criminally investigated by a law-enforcement agency, and DSS is conducting a joint investigation with law-enforcement, no information in the possession of DSS from such joint investigation shall be released by DSS except as authorized by the investigating law-enforcement officer or his supervisor or the local attorney for the Commonwealth. Va. Code § 63.2-1516.1(B). Therefore, the CPS investigator is not required to make any of the initial disclosures required by this section in the initial interview with the suspected abuser, except as authorized by the police or the commonwealth’s attorney. This language was added to ensure that joint investigations by child protective services and the police would not be compromised. In addition, Va. Code § 63.2-1516.1(C) amounts to a “savings” clause, so that a violation of any of the procedural requirements of Va. Code § 63.2-1516.1 will not jeopardize a finding. Failure

to comply with investigation procedures does not preclude a finding of abuse or neglect if such a finding is warranted by the facts.

Each DSS and local school division must adopt a written interagency agreement as a protocol for investigating child abuse and neglect reports. Va. Code § 63.2-1511(D).

School personnel are also subject to an entirely different standard of abuse or neglect. Section 63.2-1511 provides that if, after an investigation of a complaint, DSS determines that the actions or omissions of a teacher, principal, or other person employed by a local school board, or employed in a school operated by the Commonwealth, were within the employee's scope of employment and were taken in good faith in the course of supervision, care, or discipline of students, then the report of abuse or neglect can be founded only if such acts or omissions constituted gross negligence or willful misconduct.

21-4.03(f) Family Assessment

If DSS decides to conduct a family assessment pursuant to Va. Code § 63.2-1506(B), it shall:

1. Immediately conduct a family assessment and, if the report or complaint was based upon one of the factors specified in § 63.2-1509(B), DSS may file a petition pursuant to § 16.1-241.3.
2. Search the child abuse and neglect registry with regard to the subject of the assessment, including the registry of another state if the subject lived in another state within the preceding five years. The Central Criminal Records Exchange may also be searched.
3. Immediately contact the subject of the report and the family of the child and give a written and oral explanation of the assessment procedure. A Virginia circuit court has held that the failure to do so is not harmless error. *Fentress v. Va. Dep't of Soc. Servs.*, 83 Va. Cir. 148 (City of Norfolk 2011).
4. Complete the assessment within sixty days and transmit the report to the Virginia DSS and to the person who is the subject of the assessment. No disposition of founded or unfounded is made.
5. Consult with the family to provide necessary services for the child and family. However, if the family declines the offered services, the case shall be closed unless DSS determines "sufficient cause" exists to redetermine the case as one that needs to be investigated. Significantly, Va. Code § 63.2-1506(B)(4) provides that in no instance shall a case be redetermined as an investigation solely because the family declines services. This provision should be viewed with caution by local agencies, since it might be used as a defense by parents against an agency's decision to "redetermine" a case for investigation, or against a subsequent agency petition to the juvenile court alleging child abuse or neglect. DSS should be prepared to articulate and prove a change in circumstances that warrants redetermining a family assessment as an investigation.
6. Petition the court for services deemed necessary. Va. Code § 63.2-1506(B)(5). This provision is problematic for a couple of reasons. First, DSS would only need to petition the court if the family refused services. But, under Va. Code § 63.2-1506(B)(4), the case must be closed if the family refuses. Second, the Juvenile Code makes no provisions for petitions by local agencies that simply allege that a family needs services.

Since the juvenile court has only the powers granted by statute, there are serious questions regarding whether a local agency can petition the juvenile court and ask the court to order a family to participate in services unless the agency has redetermined the case as one that needs investigation and then determined facts to support an abuse or neglect petition.

7. Make no disposition of founded or unfounded. Reports in which a family assessment is completed shall not be entered into the DSS central registry.
8. Commence an immediate investigation if, at any time during the completion of the family assessment, the local department determines that an investigation is required.
9. Upon request and under certain enumerated circumstances, disclose to the child's parent or guardian the location of the child.

Va. Code § 63.2-1506(B).

21-4.03(g) Human Trafficking Assessments

If there is an allegation that the child is a victim of sex trafficking or severe forms of trafficking as defined by federal law, the local department shall conduct a human trafficking assessment, unless at any time during the assessment the local department determines that an investigation or family assessment is required. Va. Code § 63.2-1506.1. A valid complaint regarding a child who has been identified as a victim of trafficking may be established if the alleged abuser is the alleged victim child's parent, other caretaker, or any other person suspected to have caused such abuse or neglect. Va. Code § 63.2-1508(B). The standards for taking a child into emergency custody are specified in Va. Code § 63.2-1517(C) and (D).

21-4.04 The Central Registry

21-4.04(a) Reports of Founded Complaints/Risk Levels

If the investigation results in a founded determination, the information must be reported in a Central Registry maintained by the Virginia Department of Social Services. The registry identifies the abuser/neglector and the victim(s), with names remaining on the registry for a period of time that is specified under Virginia Board regulations, based upon the severity of the abuse/neglect. However, if the founded complaint of child sexual abuse involved injuries or conditions, real or threatened, that resulted in or were likely to have resulted in serious harm to a child, the records must be kept twenty-five years from the date of the complaint. If the parent or guardian of the child is not the abuser, the parent or guardian may request in writing that the child's name not be listed. Va. Code §§ 63.2-1514 and 63.2-1515. Va. Code § 63.2-1515 requires the worker to consult with and obtain the permission of the parent or guardian before including the name of the child if the abuse or neglect occurred in listed facilities. As there is no constitutional right to be free from child abuse investigations, *Hodge v. Jones*, 31 F.3d 157 (4th Cir. 1994), state publication of information regarding child abuse or neglect to entities authorized by law to receive such reports likewise does not violate substantive due process. *Wildauer v. Frederick Cnty.*, 993 F.2d 369 (4th Cir. 1993).

21-4.04(b) Access to Central Registry

The Central Registry is only accessible by the Virginia DSS and by local departments. The public cannot access the Central Registry. An individual's record can only be released to third parties with a signed consent form from the abuser.

21-4.04(c) Information Related to Unfounded Complaints

Unfounded investigations, family assessments, and reports determined to be invalid must be maintained in a record separate from the central registry and accessible only to the Virginia DSS and to local departments. Va. Code § 63.2-1514(B). The purpose of retaining these reports is to provide local DSS with information regarding prior complaints or reports. *Id.* The subject of the complaint or report may have access to his own record. *Id.* The record of complaints and reports determined to be invalid, however, must be purged one year after the date of the complaint or report if there are no subsequent complaints or reports regarding the same child or the person who is the subject of the complaint or report in that one year, and records of unfounded investigations must be kept for three years. *Id.* DSS must retain such records for an additional period of up to two years if requested in writing by the person who is the subject of such complaint or report. *Id.* The record of family assessments must be purged three years after the date of the complaint or report if there are no subsequent complaints or reports regarding the same child or the person who is the subject of the report in that three-year period. Va. Code §§ 63.2-1506(B)(6), 63.2-1514(B).

21-4.05 Child Sexual Abuse Response Team

The commonwealth's attorney in each jurisdiction in the Commonwealth must establish a child sexual abuse response team composed of law enforcement, social service workers, child advocacy representatives, and specified others who must meet to review new and ongoing reports of felony sex offenses involving a child, and, at the request of any member of the team, may conduct reviews of any other reports of child abuse and neglect. Va. Code § 15.2-1627.5. This must include a representative of the local child protective services unit. *Id.*; 2019 Op. Va. Att'y Gen. 37. The team must meet frequently enough that reports in the jurisdiction are reviewed within sixty days. Va. Code § 15.2-1627.5. The team may be an existing multidisciplinary team. *Id.*

21-4.06 The Burden of Proof and Procedural Requirements in CPS Investigations and Assessments**21-4.06(a) CPS Process Satisfies Due Process**

In *Carter v. Gordon*, 28 Va. App. 133, 502 S.E.2d 697 (1998), the Court of Appeals held that a "founded" determination does not constitute a judicial determination requiring full due process. DSS and CPS procedures satisfy any due process required for fact-finding investigations. *See also Wolf v. Fauquier Cnty. Bd. of Sup'rs*, 555 F.3d 311 (4th Cir. 2009); *Prescott v. Wade*, No. 4:12cv126 (E.D. Va. Apr. 2, 2013) (imperfections in an investigation do not violate procedural due process, if the flaws do not deprive an individual of the right to make his case). Also, the founded determination and placement of the finding on the Central Registry does not deprive an employee of a protected employment interest even if it has the collateral consequence of employment termination. The termination is caused by the affirmative act of the employer, not DSS. *See Ables v. Rivero*, No 0973-02-1 (Va. Ct. App. Feb. 19, 2003) (unpubl.) (prohibition on coaching act of athletic body, not DSS); *see also Larkin v. Smith*, No. 94-CV-53 (E.D. Va. 1994) (no constitutional violation for reporting founded complaint to Central Registry; no cause of action against DSS for loss of employment). The Attorney General has opined that placing the name of an individual on the registry after he has been acquitted of criminal charges related to child abuse and neglect does not violate the Double Jeopardy Clause of the Fifth Amendment to the Constitution. 2003 Op. Va. Att'y Gen. 181.

21-4.06(b) Burden of Proof

The Code of Virginia does not specify the burden of proof that applies in determining whether a report is "founded." That burden is specified by rules of the Virginia Board. For many years, the rules required a finding by "clear and convincing evidence," but the rules also allowed a lesser finding (with the case remaining on the central registry for only twelve months) of "reason to suspect" child abuse or neglect. In *Jackson v. Marshall*, 19 Va. App. 628, 454 S.E.2d 23 (1995), the Court of Appeals ruled that the Code of Virginia

authorized only two findings: “founded” or “unfounded,” and voided the “reason to suspect” finding as unauthorized by the law. The State Board subsequently changed the burden of proof for determining a report to be “founded” to a “preponderance of the evidence.” *See also Comm’r Dep’t of Soc. Serv. v. Fulton*, 55 Va. App. 69, 683 S.E.2d 837 (2009) (standard of review of founded determination is preponderance of the evidence); *Anonymous v. Va. DSS*, 64 Va. Cir. 381 (City of Salem 2004) (same).

21-4.06(c) Interviews Must Be Recorded

All interviews of a child victim, alleged perpetrator, and family members are to be audio recorded, unless the interviewee declines to have the interview recorded. Certain exceptions are allowed (see the CPS Policy Manual, 22 VAC 40-705-80, and Va. Code § 63.2-1516), but the Court of Appeals has made it clear that the exceptions must be strictly followed. In *Jones v. West*, 46 Va. App. 309, 616 S.E.2d 790 (2005), the Virginia Court of Appeals held that a state regulation (22 VAC 40-705-80(B)(1)(d)) requires that the decision not to record an interview be documented with reasons specifically relating to the alleged victim that support the determination that recording the interview is impractical or inappropriate. It was not sufficient for DSS simply to adopt the policy of the police, as lead investigatory agency, never to record a child interview. The court further found on the facts of that case that the failure to record the interview was not harmless error, and the court overturned a “founded” determination in that case.

21-4.06(d) Advising Parent/Custodian of Rights

Board regulations require that the CPS worker advise the parent/custodian that (among other things) he/she has the right to refuse to speak with the worker and has the right to refuse to let the worker into the home.

21-4.06(e) Pre-Dispositional Conferences

CPS investigators must give an alleged perpetrator the opportunity to have a “pre-dispositional conference,” in which the person can meet with the investigator, review the facts gathered by the investigator, and offer any additional information. The pre-dispositional conference becomes a substitute for the “informal local conference” that is part of the normal administrative appeal process that comes after, rather than before, a finding. If a person chooses to have a pre-dispositional conference, then the sole appeal step available upon a determination of “founded” is to request a state-level administrative appeal hearing before a hearing officer. [See section 21-4.08\(e\).](#)

21-4.06(f) Statements Inadmissible in Criminal Case

Virginia Code § 63.2-1503(M) provides that, if a person has been criminally charged for conduct that is also the subject of a CPS investigation, any statements made to a CPS worker by the accused person after that person has been arrested cannot be used over that person’s objection in the case in chief of any criminal proceeding unless the worker advised the person of his *Miranda* rights prior to interviewing the person, which is not customarily CPS practice.

21-4.06(g) Authority to Talk With Child or Sibling

Virginia Code § 63.2-1518 provides that any mandated reporter, including the CPS worker, may talk with any child suspected of being abused or neglected, or to any of that child’s siblings, without the consent of, and outside the presence of, the child’s parent, guardian, legal custodian, or other person standing in loco parentis, or school personnel. As a practical matter, a parent can make it difficult for CPS to investigate a complaint if the parent refuses access to the home or the child. It may be necessary to petition the court for a protective order in order to gain compliance with the law.

21-4.06(h) Physician-Patient and Spousal Privileges Inapplicable

Virginia Code § 63.2-1519 provides that neither of these privileges can be invoked in any legal proceeding resulting from the filing of a child abuse or neglect complaint.

21-4.06(i) Photographs and X-Rays of Child

Virginia Code § 63.2-1520 allows photos and x-rays of a child to be taken without the consent of the parent/custodian: (i) as part of a medical evaluation; or (ii) as part of the CPS investigation or family assessment (though in this case the photos shall not be used "in lieu of" medical evaluation). The photos and x-rays can be used as evidence in any subsequent proceeding.

21-4.06(j) Prima Facie Evidence for Removal

Under Va. Code § 63.2-1525, competent evidence by a physician that a child is abused or neglected shall be prima facie evidence to support a petition for removal of the child from the home. Accordingly, appropriately-authenticated medical reports that document abuse or neglect under Va. Code § 16.1-245.1 should be sufficient to sustain an abuse or neglect petition absent contrary persuasive evidence presented by the child's custodian.

21-4.07 Out-of-Family Investigations

Given repeated complaints over the years, primarily by the Virginia Education Association, over the way in which local CPS workers were handling child abuse investigations involving teachers and child-care professionals, Va. Code § 63.2-1527 was enacted, which directed the State Board to set standards for out-of-family investigations and to establish an advisory committee (consisting of representatives of the groups affected—public school employees, family day care homes, juvenile detention homes, etc.) to advise the Board on the effectiveness of those standards. In addition, Va. Code § 63.2-1503(A) requires that, where an out-of-family case of child abuse or neglect has been reported, DSS shall request the state DSS to assist in accordance with State Board rules.

Currently, that assistance seldom involves direct involvement by Virginia Department of Social Services staff in investigations. However, Virginia Board standards now require that a local investigator must complete training provided by the state before being able to conduct out-of-family investigations. In addition, there are specific regulations governing such investigations.

21-4.08 CPS Administrative Appeals

Virginia Code § 63.2-1526 sets out the procedure for appealing from a CPS administrative determination that a child abuse or neglect complaint is "founded."

21-4.08(a) Request Change in Determination

The person who is found to have committed the abuse or neglect has thirty days from the date of being notified of the founded determination to ask DSS to amend its record. An informal conference is then scheduled.

21-4.08(b) Request for Information Regarding the Determination

Once a person has made a request for an informal hearing, DSS shall, upon written request, provide that person with all information used in making the "founded" determination. The only exceptions are: (i) the name of the reporter shall not be disclosed; (ii) information which may endanger the well-being of a child shall not be disclosed; (iii) the identity of collateral witnesses or any other person shall not be disclosed if disclosure may endanger their safety.

21-4.08(c) Informal Conference

At the informal conference, which is held at DSS, the appellant, who may be represented by legal counsel, is entitled to present witnesses, documents, factual data, etc., as well as argument regarding the determination. The department representative presiding over the conference must either be the department head or a person who does not have substantial involvement with child abuse and neglect cases.

21-4.08(d) Appeal from Local Department

If DSS refuses to change its determination or if it fails to act within forty-five days of the person's request for a change in the determination, the person may, within thirty days, petition the Commissioner of the Virginia Department of Social Services for a hearing. While this language has not been litigated, it clearly states that, even if DSS fails to act on a person's request for a change in the determination, the sole recourse of the person is to appeal to the next level. Untimeliness on the part of DSS does not render the original determination void. Moreover, the Court of Appeals of Virginia has made it clear that the time frames set out in these procedures are directory and not jurisdictional in nature. See *J.P. v. Carter*, 24 Va. App. 707, 485 S.E.2d 162 (1997). The failure (because of mistake) to notify a subject of the right to a hearing on the founded determination does not constitute a deprivation of due process. *Perry v. City of Norfolk*, 194 F.3d 1305 (4th Cir. 1999).

21-4.08(e) Hearing Before State Hearing Officer**21-4.08(e)(1) Standard**

The hearing officer must determine whether it appears, by a preponderance of the evidence, that the record contains information which is irrelevant or inaccurate regarding the commission of abuse or neglect and, therefore, should be amended. This review can include not only the founded determination but also the level of severity of the determination which affects how long the case is maintained in the Central Registry.

21-4.08(e)(2) Subpoenas and Evidence

The hearing officer has the authority to issue subpoenas for witnesses and subpoenas duces tecum for documents. Those subpoenas can be enforced by the local juvenile and domestic relations district court if they are not honored. The hearing officer can also determine how many requested depositions to authorize (depositions may be submitted into evidence at the hearing) and has the authority to administer oaths or affirmations to all parties and witnesses at the hearing.

21-4.08(e)(3) Victims/Siblings Cannot Be Subpoenaed

Virginia Code § 63.2-1526(B) specifies that alleged child victims and their siblings may not be subpoenaed, deposed or required to testify.

21-4.08(e)(4) Rules of Evidence

Strict rules of evidence do not apply in these hearings. The hearing officer does have the authority to make rulings on what proffered evidence to admit or exclude.

21-4.08(e)(5) New Evidence

If the person at the hearing presents evidence that the hearing officer determines was not available to DSS when it made its determination and that may affect DSS's determination, the hearing officer may remand the case to DSS for reconsideration. If, after fourteen days, the department has not changed its determination, the case is returned to the hearing officer for determination. Also, the hearing officer may allow DSS to present new evidence at the hearing if it is relevant to the matter being appealed. 22 VAC 40-705-190(H)(11). This is an opportunity for DSS to strengthen its case over the course of the appellate process.

21-4.08(e)(6) Representation by Counsel

The person appealing a DSS determination has the right to be represented by legal counsel at the hearing.

21-4.08(e)(7) Further Appeal

If aggrieved by the hearing officer's decision, the person may seek review, on the record, before the local circuit court, in accordance with the Administrative Process Act. The proceedings are confidential and the record is sealed absent good cause shown. Va. Code

§ 17.1-513.1. The scope of court review under the APA is limited to determination of whether there was substantial evidence in the agency record to support the decision. Review is based solely on the record. Va. Code § 2.2-4025(B); *Turner v. Jackson*, 14 Va. App. 423, 417 S.E.2d 881 (1992); *Spurrier v. Conyers*, No. 0772-11-1 (Va. Ct. App. Sept. 27, 2011) (unpubl.). A trial court is not required to consider evidence rejected by the hearing officer. A trial court may reject the findings of fact only if, considering the record as a whole, a reasonable mind would necessarily come to a different conclusion. The burden of proof rests upon the party challenging the agency determination to show that there was not substantial evidence in the record to support a "founded" determination. See *Schultz v. Carter*, No. 0031-99-4 (Va. Ct. App. Dec. 7, 1999) (unpubl.); *Berryman v. Spotsylvania Cnty. DSS*, 62 Va. Cir. 443 (Spotsylvania Cnty. 2003). This is a very hard standard to overcome. See *Higgs v. Comm'r, Va. DSS*, No. CH01-18423 (Rockingham Cnty. Cir. Ct., May 29, 2003). But see *Zukor v. Commonwealth DSS*, 52 Va. Cir. 201 (Fairfax Cnty. 2000) (in which a circuit court held that the department did not have substantial evidence for a finding of mental abuse).

21-4.08(e)(8) Res Judicata Effect of Administrative Finding

A determination by a state hearing officer that a finding of neglect was "unfounded" is not entitled to res judicata effect in a trial court's determination of whether there was abuse or neglect. *Anonymous B v. Anonymous C & Albemarle DSS*, 51 Va. App. 657, 660 S.E.2d 307 (2008) (decision by DSS was not binding upon the court and it was not error for court to exclude administrative opinion as admission of party opponent); *Plotkin v. Fairfax Cnty. Dep't of Family Servs*, No. 0085-98-4 (Va. Ct. App. Oct. 13, 1998) (unpubl.). But see *Beaton v. Va. DSS*, No. 0917-99-1 (Va. Ct. App. Mar. 7, 2000) (unpubl.) (assumed without deciding that decision of district court regarding neglect may be res judicata in related administrative hearing). There are notable differences in the two proceedings that should preclude a court from considering the outcome of the administrative appeal on the adjudication of an abuse or neglect petition and vice versa. In addition to the rules of evidence and civil procedure, which do not apply in the administrative process, court proceedings concern the status and protection of the child and can be sustained even without a known perpetrator. The CPS administrative process, on the other hand, is based on identifying the alleged abuser, assessing the risk that individual poses to others, and placing his name on the Central Registry to protect the public.

21-4.08(e)(9) Criminal Proceedings Stayed

Under Va. Code § 63.2-1526(C), the appeal process is automatically stayed if a criminal charge has also been filed or investigation is begun against the person for the same conduct. During this time, the person's right of access to DSS's records on the matter is also stayed. Query: Does name stay in the central registry pending the stay?

21-4.09 Taking Children into Emergency Custody

Virginia Code § 63.2-1517 states that a physician or a CPS worker or a law enforcement officer involved in investigating a report that a child is abused or neglected may take the child into custody for up to seventy-two hours without the prior approval of the parents or guardian, provided that all of the following conditions exist:

1. Allowing the child to remain where the child is would either: (i) subject the child to an imminent danger to the child's life or health, to the extent that severe or irremediable injury would be likely to result, or (ii) cause evidence of abuse to perish or deteriorate before a hearing can be held (and, presumably, taking custody of the child will preserve it); and
2. A court order is not immediately obtainable; and
3. The court has set up procedures for placing such children; and

4. The parents or guardians are notified as soon as practicable after the removal, preferably in person; and
5. A report is made to DSS; and
6. A child abuse or neglect petition is filed and the person filing the petition obtains, as soon as possible, but in no event later than seventy-two hours (ninety-six hours if this time limit expires on a weekend or legal holiday) an emergency removal order, pursuant to Va. Code § 16.1-251. (Va. Code § 63.2-1517(A)(6) provides that if a preliminary removal order, which requires notice to the parents/custodians and opportunity for adversary hearing, is entered within that seventy-two hour period, then the emergency removal order, which can be entered on an ex parte basis, is not required).

See generally *Parker v. Austin*, 105 F. Supp. 3d 592 (W.D. Va. 2015) (complaint alleging Fourth and Fourteenth Amendment violations for emergency removal and detention of children dismissed; probable cause not necessary if officials have a “reasonable suspicion” that a child’s life or limb is in immediate jeopardy).

21-5 LITIGATING CHILD ABUSE AND NEGLECT CASES

The Juvenile Code (Va. Code §§ 16.1-226 through 16.1-348) contains the substantive and procedural law relating to court intervention in cases of child abuse and neglect.²

Counsel for local DSS should contact the Office of the Executive Secretary (OES) of the Supreme Court of Virginia for resource material on child welfare cases. The OES is responsible for administering Virginia’s Court Improvement Program, which federal law requires in order to improve and expedite permanent decisions in child dependency cases.

21-5.01 Definitions

The definition of “abused or neglected child” in Va. Code § 16.1-228 tracks the definitional language of Va. Code § 63.2-100. The child does not have to suffer actual harm or impairment to meet the definition. The definition includes conduct on the part of a parent that simply creates the risk of harm, such as manufacturing or selling drugs while your child is with you or leaving your child alone with a known violent sex offender. The Court of Appeals has upheld that creating “substantial risk” of harm to the child is a form of child abuse or neglect. *Jenkins v. Winchester Dep’t of Social Services*, 12 Va. App. 1178, 409 S.E.2d 16 (1991). The Court of Appeals has also held that proof of abuse and neglect of one child coupled with the parents’ history can create the “substantial risk” of harm for siblings. It is not necessary that the siblings themselves “suffer” abuse. *Farrell v. Warren*

² A 2005 opinion by the Virginia State Bar asserted that the practice of having social workers file motions and petitions constituted the unauthorized practice of law. A case in the Court of Appeals of Virginia challenged the jurisdiction of the circuit court to terminate parental rights when the petition for termination was signed by the social worker and not an attorney. The Court of Appeals avoided the issue, however, because the appellant had not raised the argument below. *Webb v. Tazewell Cnty. DSS*, No. 0828-15-3 (Va. Ct. App. Jan. 12, 2016) (unpubl.) (LGA filed an amicus brief). The General Assembly subsequently amended Va. Code §§ 16.1-260 and 63.2-332 to provide that local departments are to designate non-attorney employees who are authorized to sign and file petitions for foster care review, petitions for permanency planning hearings, petitions to establish paternity, motions to establish or modify support, motions to amend or review an order, and motions for a rule to show cause. The legislature also made it clear that such actions do not constitute the practice of law. See Va. Code § 54.1-3900; *Rudolph v. City of Newport News Dep’t of Human Servs.*, 67 Va. App. 140, 793 S.E.2d 831 (2016) (form petitions signed prior to the amendments’ enactment remain valid pleadings).

Cnty. DSS, 59 Va. App. 375, 719 S.E.2d 329 (2012); 59 Va. App. 342, 719 S.E.2d 313 (2012).

No child whose parent or other person responsible for his care allows the child to engage in independent activities without adult supervision shall for that reason alone be considered to be an abused or neglected child, provided that (a) such independent activities are appropriate based on the child's age, maturity, and physical and mental abilities and (b) such lack of supervision does not constitute conduct that is so grossly negligent as to endanger the health or safety of the child. Such independent activities include traveling to or from school or nearby locations by bicycle or on foot, playing outdoors, or remaining at home for a reasonable period of time. Va. Code § 16.1-228(2); Va. Code § 63.2-100(2).

21-5.02 Jurisdiction and Standing Issues

21-5.02(a) Persons With Legitimate Interest

Petitions alleging the abuse or neglect of a child are customarily filed by DSS. However, abuse or neglect petitions (as well as other petitions related to the custody of the child) can be filed by guardians ad litem, parents, or other parties with a "legitimate interest" in the child. Virginia Code § 16.1-241(A) describes the broad range of people who have standing to seek custody and/or visitation of a child. Persons having a "legitimate interest" in a child's custody and care include (but are not limited to) grandparents, step-grandparents, stepparents, former stepparents, blood relatives, and family members. The statute expressly states that the definition should be broadly construed, and the courts have done so in a number of cases. *Yokshas v. Bristol City DSS*, No. 0065-17-3 (Va. Ct. App. November 14, 2017) (unpubl.) (former foster parents have standing to file custody and adoption petitions); *Surles v. Mayer*, 48 Va. App. 146, 628 S.E.2d 563 (2006) (former boyfriend of a child's biological mother was a person with a legitimate interest); *Joseph v. Portsmouth DSS*, No. 1984-05-1 (Va. Ct. App. June 13, 2006) (unpubl.) (child's great-great step aunt is a "family member"). However, if parental rights have been terminated or an adoption order has been entered, there is a "clean break" from the previous family ties and persons whose interests derived from those ties no longer have a legitimate interest. *Harvey v. Flockhart*, 65 Va. App. 131, 775 S.E.2d 427 (2015).

21-5.02(b) The 18-Year-Old

21-5.02(b)(1) DSS's Legal Custody

Virginia Code § 63.2-900 states that DSS shall have custody and control of a child until the child is discharged, adopted, or reaches the age of majority. Therefore, by operation of law, DSS's legal custody of a child ends when the child turns eighteen. Prior to leaving foster care, DSS must ensure that the child turning eighteen has a birth certificate, social security card, health insurance information and health records, and either a state driver's license or identity card, unless the child has been in foster care less than six months. Va. Code § 63.2-905.3. DSS need not file a petition to be relieved of custody, but some localities do adhere to that practice. Best practice would be at least to notify the court of the teen's status. However, under the Fostering Futures program, services may still be provided to a young person age 18-21 through an agreement which acts in effect as an entrustment agreement. See section [21-2.01\(f\)](#).

21-5.02(b)(2) Court's Jurisdiction

Generally, the court no longer has jurisdiction over an eighteen-year-old and no further court review of services is necessary. Virginia Code §16.1-242, however, suggests that the Court may continue to review a case in its discretion until the person is twenty-one years old. See 1984 Op. Va. Att'y Gen. 210. Also, if the person is receiving IV-E-funded services and wishes to continue past the age of eighteen, further court review is necessary until the person is age nineteen.

21-5.02(b)(3) Appointing Guardians for Disabled 18-Year-Olds

Many older teens in foster care have serious physical, emotional, or mental disabilities that prevent them from functioning independently. Best practice is to anticipate the needs of these individuals before they age-out. DSS should consult with the local Community Services Board for potential services and consideration should also be given to petitioning the circuit court for a guardian and/or conservator of the person. See Va. Code § 64.2-2000 et seq.; section [21-9.07\(b\)](#).

21-5.02(c) Mental or Physical Incapacity of the Parent

While this situation is included within the definition of child abuse or neglect, it is also listed in Va. Code § 16.1-241(A)(2) as a separate basis for court jurisdiction over a child. In cases involving parents who are mentally disabled, using this jurisdictional basis for intervention may seem less punitive and threatening, and may allow a department to reach its goal of protecting a child without unnecessary conflict.

21-5.02(d) Sibling Child at Risk of Being Abused or Neglected

This category for jurisdiction (Va. Code § 16.1-241(A)(2)(a)) supports the importance of pursuing a child abuse adjudication whenever there is any concern about possible future involvement with a family, and risk to a child's siblings. Once child abuse or neglect has been established in one case, then this section allows the court to find that child's siblings to be "at risk" and, therefore, entitled to the protection of the court, even if the condition of the child or the home do not yet rise to the level of child abuse or neglect. However, to get the at-risk finding, the parent or caretaker must have first been adjudicated as abusing or neglecting another child in his care.

21-5.02(e) De Novo Appeals

Trial before the circuit court upon appeal is de novo. Therefore, the evidence is heard anew, and the parties are not restricted to the evidence that was presented before the juvenile court. The circuit court's jurisdiction is derivative—that is, its jurisdiction is the same as that of the juvenile court. *Fairfax County Dept. of Family Services v. D.N.*, 29 Va. App. 400, 512 S.E. 2d 830 (1999). The circuit court must consider all relevant evidence, even if such evidence had not been considered by the juvenile court. In addition, the circuit court is not limited by any determination made by the juvenile court. See *Fairfax Cnty. Dep't of Family Servs. v. Nordel*, 29 Va. App. 400, 512 S.E.2d 830 (1999). In that case, the court ruled that the fact that the juvenile court had found the child to be sexually abused did not preclude the presentation of evidence at the circuit court hearing about physical abuse of the child. See *Sabir v. Roanoke City DSS*, No. 1866-18-3 (Va. Ct. App. May 28, 2019) (unpubl.) (father cannot challenge service of process issues from juvenile court once he appealed to circuit court). Appeals should be limited, however, to the evidence relevant to the petition on appeal (e.g., an appeal de novo of a termination of parental rights petition sustained by the juvenile court does not require DSS to retry the adjudication and disposition of the underlying abuse or neglect petition). The circuit court, in such cases, should be familiar with the file, the evidence, and the prior rulings of the juvenile court leading up to the petition that is on appeal. See *Padilla v. Norfolk Division of Social Services*, No. 1388-98-1 (Va. Ct. App. Jan. 26, 1999) (unpubl.) (it was not improper for circuit court to consider a psychological evaluation admitted into the record in juvenile court). A parent cannot attack the validity of a termination of parental rights order by appealing only the prior order approving the plan of adoption. In *Najera v. Chesapeake DSS*, 48 Va. App. 237, 629 S.E.2d 721 (2006), a father appealed the JDR court decision accepting a foster plan recommending termination of parental rights and adoption, but failed to appeal the subsequent order terminating his parental rights. The Court of Appeals held that the termination order superseded the order recommending termination and, because the termination order was final, there was no action the court could take regarding the foster care plan recommendations. If a nonsuit is taken in circuit court, jurisdiction remains with the circuit court and the case may not be refiled in a lower court. *Davis v. Cnty. of Fairfax*, 282 Va. 23, 710 S.E.2d 466 (2011).

21-5.02(f) Circuit Court Concurrent Jurisdiction to Hear Matters Related to Child Abuse

The language of Va. Code § 16.1-244 gives a circuit court concurrent jurisdiction over child custody matters (including abuse and neglect, foster care, and termination of parental rights) when such matters are “incidental to the determination of causes pending” in such court. Virginia Code § 16.1-296(I) gives the circuit court all the powers that the juvenile court possesses when hearing such matters. Accordingly, a petition for termination of parental rights could be filed for the first time directly in circuit court when the child’s foster care case is pending in circuit court on appeal. See discussion at section [21-7.14\(c\)](#).

21-5.02(g) Runaways

Foster care children who run away from their placements present challenging problems. Not only are they hard for DSS to serve, but they are also difficult to detain under the law. Virginia Code § 16.1-246(F) authorizes the police to detain a child when there is probable cause to believe a child has run away from a placement arranged by DSS. However, under Va. Code § 16.1-247, the child must be returned by the police to the facility or home from which the child ran. This is not very helpful since the child can simply run again. There is no basis to detain the child except under Va. Code § 16.1-248.1(A)(2), when the child has run away from a “facility” where he has been ordered to remain by a judge or intake officer pursuant to a predispositional order. Therefore, if DSS anticipates that a child may run from a placement, an order granting custody to DSS or other preliminary order should also order the child to remain in any placement arranged by DSS. There may be some question about a court’s authority to order a child to remain in a placement under an abuse or neglect petition. Notwithstanding, the court clearly can issue such an order under the statutes addressing delinquency and children in need of services (CHINS).

21-5.02(h) Foreign Foster Care Kids Found in Virginia

Unfortunately, some children in foster care are prone to run away. Some Virginia kids run to other states. Some kids in the custody of other states’ child welfare agencies find their way to Virginia. The best practice for securing the custody of the child on behalf of an out-of-state locality is to file for an emergency removal order pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Virginia Code § 20-146.15 of the UCCJEA allows for temporary emergency custody of a child present in Virginia if necessary to protect an abused or neglected child. The petition should attach a custody order from the foreign locality and request that the emergency order remain in effect until the foreign locality comes to resume physical custody of the child. Although a local DSS may be able to assume temporary physical custody of a child on behalf of another locality without court order, practically speaking it may be difficult to convince the child, or the person harboring the child, that DSS has any authority to take the child without a court order.

21-5.03 Emergency Removal Order (Va. Code § 16.1-251)

This section authorizes the court to enter an order on an ex parte basis that removes a child from the custody of the parent/custodian if a petition alleging that the child is abused or neglected has been filed with the court, supported by an affidavit or sworn testimony in person before the judge or intake officer, and the petition establishes that:

1. The child would be subjected to an imminent threat to life or health to the extent that severe or irreparable injury would be likely to result if the child were left in the custody of (or returned to) the parent/custodian;
2. Reasonable efforts have been made to prevent the removal of the child (if there is no reasonable opportunity to provide preventive services, reasonable efforts are deemed to have been made and there are certain circumstances, described below, when reasonable efforts do not have to be made); and

3. There are no less drastic alternatives which could reasonably protect the child's life or health pending final hearing on the petition.

See *Rivera v. Roanoke City DSS*, No. 0727-00-3 (Va. Ct. App. July 5, 2000) (unpubl.) (sufficient evidence supported removal).

Reasonable efforts to prevent removal from the home are not required if:

1. Parental rights previously have been involuntarily terminated with regard to a sibling;
2. The parent has been convicted of murder or voluntary manslaughter of the parent's child, a child residing in the home, or the other parent of the child;
3. The parent has been convicted of felonious assault resulting in serious bodily injury, or felonious sexual assault, if the victim was the parent's child or a child residing in the home; or
4. Based on clear and convincing evidence, the parent has imposed or allowed to be imposed on the parent's child or a child residing in the home severe or chronic abuse or has abandoned the child under circumstances that would justify termination of parental rights.

If the emergency removal order is not obtained within four hours of taking the child into custody, the petitioner must explain why, either in the affidavit or through sworn testimony. Va. Code § 16.1-251(A)(2).

Virginia Code § 16.1-251(C) requires the court to consider placing the child with a person with a legitimate interest pending the next hearing and under the supervision of the department.

An emergency removal is not a final disposition and thus cannot be appealed. *Wilson v. Fairfax Cnty. Dep't of Family Services*, No. 2606-02-4 (Va. Ct. App. July 15, 2003) (unpubl.). See *Norfolk DSS v. Petermore*, 63 Va. Cir. 315 (City of Norfolk, 2003) (government is not required to wait until a child is abused before acting). In *Petermore*, the department sought to transfer custody of a recently-born child from the child's mother to the department because the department considered the mother, who had been convicted of child abuse of one of her other children, to have a high risk of future abuse.

Provided the JDR court has jurisdiction over the child, an ERO may be enforced in another state pursuant to the UCCJEA, Va. Code § 20-146.27, by registering the order in the foreign juvenile court where the child is located.

21-5.04 Authority of Department to Change Placements

After removal, DSS has the authority to place the child and to remove the child from a placement at the department's discretion, even when the child has been placed with a natural parent. Va. Code § 16.1-251. This language was added in response to the ruling by some juvenile courts that, if DSS received legal custody of a child and placed the child with a natural parent, the department could not remove the child from that placement unless the criteria of Va. Code § 16.1-251 were met. This language makes it clear that this is not the case. This language re-appears in all of the subsequent adjudicatory and dispositional sections of the Juvenile Code. DSS must, however, notify the court immediately whenever a child is returned to a parent or guardian after the court has ordered removal of the child. Va. Code § 16.1-281(D).

21-5.05 Preliminary Removal Order/Hearing (Va. Code § 16.1-252)

A preliminary removal hearing pursuant to Va. Code § 16.1-252 may be held upon the filing of a petition alleging abuse or neglect, even if not preceded by entry of an emergency removal order pursuant to Va. Code § 16.1-251. However, a preliminary removal hearing must be held within five business days after the ex parte removal of the child pursuant to Va. Code § 16.1-251. The preliminary removal hearing is also the first opportunity for an adjudicatory hearing to determine whether the child has been abused or neglected.

21-5.05(a) Notice

Notice of the hearing, as well as a copy of the petition, must be given at least twenty-four hours in advance to the parents/custodian, the guardian ad litem, and to the child if the child is twelve years of age or older. Even if notice cannot be given despite reasonable efforts to do so, the hearing should still be held. A parent or custodian is entitled to a later hearing regarding the removal of the child if he or she makes a motion for such hearing.

21-5.05(b) Right to Counsel

The parents/custodians of a child have a right to counsel under Va. Code § 16.1-266 before the adjudicatory hearing of an abuse or neglect petition and prior to a hearing on termination of parental rights. For all other hearings, if the child remains in foster care, the court has the discretion to appoint counsel. The best practice is for the court to appoint counsel, if the parent qualifies, for all phases of abuse or neglect cases. If the identity or location of a parent or guardian is not reasonably ascertainable or a parent or guardian fails to appear at a preliminary removal hearing, the court should appoint counsel to represent the interests of the absent parent or guardian, so the hearing may be held. If the court in its discretion determines that a child, parent or guardian, or other adult party requires additional representation than what Va. Code § 16.1-266 otherwise provides for, the court may appoint counsel or a guardian ad litem. This 2003 amendment was intended to overrule 2002 Op. Va. Att'y Gen. 117 and 2001 Op. Va. Att'y Gen. 81. The circuit court did not abuse its discretion in refusing to appoint counsel for a child who had expressed placement wishes at odds with the recommendation of the guardian ad litem when the GAL made those wishes known to the court and the child so testified. *Tackett v. Arlington Cnty. Dep't of Human Servs.*, 62 Va. App. 296, 746 S.E.2d 509 (2013).

21-5.05(c) Closed-Circuit Presentation of Evidence

At the preliminary removal hearing, the parties have the right to present evidence and confront and cross-examine witnesses. Virginia Code § 16.1-252(D) specifically allows DSS to apply for a court order allowing testimony by a child who is younger than fifteen at the time of the offense or younger than seventeen at the time of the hearing through the use of two-way closed-circuit television, as provided for in Va. Code § 63.2-1521. However, application for such an order must be made at least forty-eight hours before the hearing.

21-5.05(d) Findings Required to Support Continued Removal of the Child; Court Order

In order for the court to order the removal of a child from the home at the preliminary removal hearing or to maintain the child's removal from the home under a prior emergency removal, the petitioner must prove, by a preponderance of the evidence, the same elements that are required to obtain an emergency removal, namely: (i) an imminent threat of harm to the child if left in the home; (ii) reasonable efforts to prevent removal have been made (or there was no opportunity to prevent removal or the conditions described [above](#) were met); and (iii) there is no less drastic alternative than removal.

If the court upholds the removal of the child, it must decide who is to have temporary legal custody of the child, order reasonable visitation by the parents/custodian if such would not endanger the child's life or health, and order child support pursuant to Va. Code § 16.1-290. The court may not order child support when parental rights have

been terminated. *Commonwealth v. Fletcher*, 266 Va. 1, 581 S.E.2d 213 (2003) (per curiam).

At the preliminary removal hearing, the court may order that the child be placed in the custody of a relative or "other interested individual."

Under Va. Code § 16.1-252(F), the court is also authorized to order the parents/custodians and others to take specific actions for the protection of the child, as provided for under Va. Code § 16.1-253 (preliminary protective order). This is very helpful language, since the court can direct parents to begin specific identified services and to start taking action deemed necessary by the court for reunification before the presentation and approval of a foster care plan, which may not take place until over two months hence.

21-5.06 Adjudication of Abuse or Neglect

Virginia Code § 16.1-252(G) provides that at the preliminary removal hearing, the court shall adjudicate the petition, i.e., determine whether the allegations of abuse or neglect have been proven by a preponderance of the evidence. Either the parents/custodian, the guardian ad litem, or DSS may object for any or no reason. If there is an objection, the court is required to continue the matter and schedule an adjudicatory hearing within thirty days of the preliminary hearing.³ A hearing can be held more than thirty days after for good cause shown or upon the agreement of all parties. 1998 Op. Va. Att'y Gen. 38.

The court may still hear the case and enter temporary orders including continued removal of the child. The court should also schedule a dispositional hearing at the time of the preliminary hearing, for a date within sixty days of the preliminary hearing in the likely event that the petition is sustained at the adjudicatory hearing. If, subsequently, the petition is not sustained, the case is dismissed. All parties attending the preliminary hearing should be put on notice of the new dates, and those who did not receive service for the preliminary hearing should be served with summonses. The clear objective here is to keep cases from being bogged down, first by bringing cases to disposition in a short time frame and second by preventing delays due to problems in serving parties with notice of subsequent hearings.

21-5.06(a) Written Medical Evidence

Virginia Code § 16.1-245.1 allows the submission of a report by the treating or examining health care provider (as defined in Va. Code § 8.01-581.1) and/or the records of a hospital or medical facility at which the child was examined or treated, as to the extent, nature and treatment of any physical condition or injury suffered by a person and the examination of the person. Such report and/or record may be admitted as evidence if: (i) it has attached to it an affidavit of authentication meeting certain requirements set out in the section, and (ii) a copy of the evidence is given to the opposing party at least twenty-four hours before the preliminary hearing (or ten days prior to any subsequent hearing).

21-5.06(b) Testimony by Two-Way Closed-Circuit Television

Virginia Code § 63.2-1521 provides a mechanism under which the testimony of a child victim who is younger than fifteen at the time of the offense or younger than seventeen at the time of the hearing can be proffered through two-way closed-circuit television if it is established that the child is unable to testify in the courtroom. Under Va. Code § 16.1-252(D), the party seeking a court order to authorize either procedure must do so at least forty-eight hours prior to the hearing (though the court is authorized to allow a later

³ There is no right of appeal from an adjudicatory order, as it is interlocutory. See *Byrd v. Petersburg DSS*, No. 0782-15-2 (Va. App. July 19, 2016) (unpubl.). The appeal challenging the adjudication cannot occur until a final dispositional order is entered. *Blevins v. Prince William Cnty. DSS*, 61 Va. App. 94, 722 S.E.2d 674 (2012).

application). As a practical matter, testimony in this manner is difficult to arrange in time for a preliminary hearing.

21-5.06(c) Statutory Hearsay Exception for Child's Statements of Sexual Abuse

Virginia Code § 63.2-1522 allows the out-of-court statements of a child fourteen or younger to be introduced as evidence of sexual abuse if the child is found by the court to be unable to testify either in court or through the two-way closed-circuit television method. There are several circumstances that meet the standard for allowing the child's hearsay statements, but the most common are: (i) an expert opines that the child will be traumatized by testifying and (ii) the child's statement is shown to be trustworthy and reliable. §§ 63.2-1522(B)(1)(g) and (B)(2). See *Ferrell v. Alexandria Dep't of Cmty. & Human Servs.*, No. 1705-11-4 (Va. Ct. App. Feb. 14, 2012) (unpubl.).

Although the children's statements may be admitted pursuant to Va. Code § 63.2-1522 without objection, the court can find the statements to be not credible. *Fairfax Cnty. Dep't of Family Servs. v. Neidig*, No. 1304-97-4 (Va. Ct. App. Mar. 31, 1998) (unpubl.) (statute is rule of evidence regarding admission and does not establish presumption statements are true).

Similarly, Va. Code § 63.2-1523 allows a recording of an abused child's statement (e.g. from a Child Advocacy Center) to be admitted as evidence in any civil proceeding involving alleged abuse or neglect if: (i) the child is fourteen years of age or younger at the time the statement is offered into evidence and other conditions of the recording are met as provided in the Code; (ii) the child testifies in person or by two-way closed-circuit television or is found to be "unavailable" to testify on grounds enumerated in the Code, including the substantial likelihood based upon expert testimony that the child would suffer severe emotional trauma from testifying at the proceeding; and (iii) the child's statement is shown to be trustworthy and reliable.

21-5.06(d) Other Hearsay Exceptions and Admissibility Arguments for Child's Statements

There are other arguments for admitting a child's out-of-court statement in an abuse or neglect case over a hearsay objection, but there is little guidance from the courts in Virginia on these arguments:

1. Child's statement that sex is "dirty, nasty and it hurt" admissible not to prove truth of statement, but as circumstantial evidence to show changes in child's behavior, likely to have resulted from a traumatic experience. *Myers v. Comm.*, Rec. No. 0651-00-1 (Va. Ct. App. June 15, 2001) (unpubl.).
2. Expert opinion testimony of psychologist that a child is abused can be based on hearsay statements of child under Va. Code § 8.01-401.1, provided proper foundation is laid. *M.E.D. v. J.P.M.*, 3 Va. App. 391, 350 S.E. 2d 215 (1986) (also referred to as "diagnosis or treatment" exception).
3. Statements may be admissible, as circumstantial evidence of abuse, to show child possesses knowledge that is either unusual or far advanced for child's age or stage of development (e.g., a four-year-old's statements describing details of sexual intercourse could be offered not for the truth of the statement, but to show that the child possessed knowledge that no normal four-year-old would know).
4. Statements may be offered to show timing and circumstances of the statements (e.g., nightmares reported after visits with parent).

5. Statements may show child had unique knowledge that is circumstantial evidence of abuse (e.g., a child's description of a bedroom where alleged abuse took place is admissible as direct evidence of child's knowledge of scene).
6. Present sense impression of child describing or explaining an event or condition made while the child was perceiving the event, condition or immediately thereafter (e.g., three-year-old's statement during a bath that her vaginal area hurts is admissible).
7. Excited utterance of child related to an event (e.g., 911 tapes of child's call for help while under stress of event or condition).
8. Prior consistent statement of child to rebut claim of fabrication or faulty memory.

21-5.07 Preliminary Protective Order (Va. Code § 16.1-253)

21-5.07(a) Protective Order Can Be Issued in Any Matter

The court may issue a preliminary protective order upon motion of any person or the court's own motion, in any matter before the court, or upon petition. The order is intended to provide protection to a child pending a final determination of whatever matter is before the court. Although commonly sought by DSS upon the filing of an abuse or neglect petition, the protective order can be issued at any time, in any matter pending before the court, and does not require an underlying child abuse or neglect petition.

21-5.07(b) Protective Order Cannot Transfer Custody

This section does not give the court authority to remove a child from the custody of his parent. If, however, a petition alleging abuse or neglect has been filed and is sustained along with a preliminary protective order, the court still has all the dispositional alternatives available to it under Va. Code § 16.1-278.2, which include (in addition to a final protective order) granting legal custody to DSS at the dispositional hearing. See Va. Code § 16.1-253(H).

There is an interesting 1999 Attorney General's opinion, 1999 Op. Va. Att'y Gen. 80), regarding the court's entry of preliminary protective orders to protect children following hearings in civil or criminal adult proceedings. That opinion states that, while such protective orders are part of the adult case over which the court has jurisdiction and are not independent cases, the disposition of such protective orders does not depend upon the disposition of the adult case, and instead must follow the provisions of Va. Code § 16.1-278.2. This opinion appears contrary to the explicit language of the Code, which allows the court to proceed under Va. Code § 16.1-278.2 only if an abuse or neglect petition is sustained.

21-5.07(c) Broad Range of Protective Conditions

The court may issue a preliminary protective order if it finds, by a preponderance of the evidence, that such is necessary to protect the child's life, health, safety, or normal development, pending final determination of any matter before the court. The court can order the parents/custodian or other household or family member of the child to observe reasonable conditions of behavior for a specified length of time, which may include: cooperating in certain services and programs, refraining from acts of commission or omission which tend to endanger the child, refraining from contact with the child or family or household members of the child, and removal of such person from the residence of the child if it's proven that the person's presence in the home would endanger the child and that there are no less drastic alternatives that would reasonably protect the child.

21-5.07(d) Ex Parte Preliminary Protective Order (Va. Code § 16.1-253(B))

A preliminary protective order may be entered ex parte like an emergency removal order. The motion or petition must be supported by an affidavit or sworn testimony in person before the judge or intake officer establishing that a delay in providing an adversary hearing would be likely to result in serious or irreparable injury to the child's life or health.

21-5.07(e) Adjudication at the Preliminary Hearing

Virginia Code § 16.1-253(F) provides that, if a child abuse or neglect petition has been filed, the court should adjudicate the petition (i.e., determine whether the allegations of abuse or neglect have been proven by a preponderance of the evidence at the preliminary protective order hearing). Either the parents/custodian, the guardian ad litem, or DSS may object, for any or no reason, in which case the court is required to schedule an adjudicatory hearing within thirty days of the preliminary hearing. A hearing can be held more than thirty days after for good cause shown or upon the agreement of all parties. 1998 Op. Va. Att'y Gen. 38. The preliminary protective order remains in effect pending the adjudicatory hearing. A dispositional hearing for an abuse or neglect petition should also be scheduled at the time of the preliminary hearing, to take place within sixty days of the preliminary hearing. All parties attending the preliminary hearing should be put on notice of the new dates, and those who did not receive service for the preliminary hearing should be served with summonses.

21-5.07(f) Disclosures of Information Related to Protective Orders

Law enforcement and court personnel may not disclose, except among themselves, the address, telephone number, and place of employment of the person protected by the protective order or the family of such person unless such information is: (i) required by law to be disclosed; (ii) necessary for law enforcement purposes; or (iii) permitted by the court for good cause. Va. Code § 16.1-253(I).

21-5.07(g) Criminal Registry

Upon receipt of the protective order, the local law enforcement agency must submit the name of the person subject to the protective order to the state criminal registry. After the proof of service is received, the agency must submit the date when the order was served on the person subject to the order and any other information required by the State Police. If the order is later dissolved or modified, such information must also be sent to the registry. Va. Code § 16.1-253(K). If the court does not explicitly modify or dissolve a protective order and a second protective order is issued involving the same parties, the law enforcement agency should not remove the first order from the registry, as it remains in effect; the individual subject to the order may be charged with violating either order. 2019 Op. Va. Att'y Gen. 141.

21-5.07(h) Enforcement of Protective Order

Virginia Code § 16.1-253.2 provides penalties for violating a protective order entered under Va. Code § 16.1-253. Violations related to trespass, criminal offenses, acts of abuse, or prohibited contacts are Class 1 misdemeanors. Furtively entering the home, or using a deadly weapon, while violating a protective order are Class 6 felonies, as are committing assault and battery upon, or stalking someone protected by, a protective order. Conviction carries a required jail sentence.

In addition, violation of any court order is punishable by contempt, which carries possible jail time of ten days. Va. Code §§ 18.2-456, 18.2-457.

21-5.08 Dispositional hearing

A dispositional hearing must be held within sixty days of the preliminary hearing in cases where emergency or preliminary removal orders or preliminary protective orders are entered pursuant to sustained abuse or neglect petitions. It is also possible, albeit rare,

for the court to sustain a petition (adjudicate a child as abused or neglected), take no preliminary protective action, and simply set a dispositional hearing, at which time the court takes final dispositive action on the petition.

Virginia Code § 16.1-278.2 sets out the options available to the court in final disposition of an abuse or neglect petition. They include the following: (i) allowing the child to remain with the parent(s), subject to conditions the court may set; (ii) prohibiting contact among certain family members, including requiring a family member to be out of the home (which may be imposed for 180 days at a time); (iii) authorizing a public agency, under authorization from the community policy and management team (CPMT—see Children’s Services Act in section 21-8), to place the child in a group home, residential program, institution, etc., under an agreement with the parents in which the parents retain legal custody of the child; (iv) award legal custody of the child to a relative or other individual who, after study, is found by the court to be qualified to receive and care for the child; (v) award to or continue legal custody of the child with DSS within the court’s jurisdiction or to DSS where the parents reside; and (vi) terminate the residual parental rights of the parents (an action which also requires a separate petition and a finding by clear and convincing evidence that the abuse and neglect presents a substantial threat to the child’s wellbeing. *Farrell v. Warren Cnty. DSS*, 59 Va. App. 375, 719 S.E.2d 329 (2012). The court can also modify or keep in place any protective orders that it had entered previously. *Altice v. Roanoke Cnty. DSS*, 45 Va. App. 400, 611 S.E.2d 628 (2005) (protective order can require father’s visitation to be supervised for five years).

21-5.08(a) Disposition Does Not Include Permanent Foster Care

The dispositional alternatives provided to the court in Va. Code § 16.1-278.2 do not include permanent foster care. That placement is addressed only in Va. Code § 63.2-908. Therefore, if a department is seeking permanent foster care for a child, it cannot obtain such placement through the disposition of any case brought before the court under the Juvenile Code. Instead, it must file a separate petition under Va. Code §§ 63.2-903 and 63.2-908, or use the procedure under Va. Code § 16.1-282.1, see section 21-6.10.

21-5.08(b) Reopening Cases after Final Disposition

In *Fairfax County Department of Family Services v. Doe*, 54 Va. Cir. 18 (Fairfax Cnty. 2000), the trial court held it had authority under Va. Code § 16.1-289 to reopen any case disposed of under Va. Code § 16.1-278.2 if it was determined to be in the best interest of the child. See *Blevins v. Prince William Cnty. DSS*, 61 Va. App. 94, 733 S.E.2d 674 (2012) (a child custody determination can be reopened if that would be in the child’s best interests) (dicta). It is important to note, however, that an appeal of a dispositional order by a JDR court must be made within ten days of the order even if the order indicates that an interim review of the matter will be undertaken a month later. *Id.*

21-5.09 Custody to Persons with a “Legitimate Interest”; Kinship Care

As an alternative to foster care, the court may, as a dispositional alternative, grant custody of a child to a person with a “legitimate interest.” Before a court can order the temporary or permanent transfer of custody to a person with a legitimate interest, the court must find, based upon a preponderance of the evidence, that the person, after an investigation as directed by the court is: (i) found by the court to be willing and qualified to receive and care for the child; (ii) willing to have a positive, continuous relationship with the child; (iii) committed to providing a permanent, suitable home for the child; and (iv) is willing and has the ability to protect the child from abuse and neglect. Va. Code §§ 16.1-277.01, 16.1-277.02, 16.1-278.2, 16.1-278.3. A court may order the parents or guardians of a child who is removed from the home to provide names and contact information for all persons with a legitimate interest. Va. Code § 16.1-229.1.

The focus of this investigation should be on the prospect for permanency for the child, not temporary placement until the parents stabilize themselves. In *Lynchburg*

Division of Social Services v. Cook, the Supreme Court of Virginia held that the specific statutory criteria for awarding custody of a foster child to a relative is not subordinate to or subsumed in Title 20. *Lynchburg DSS v. Cook*, 276 Va. 465, 666 S.E.2d 361 (2008). The Court held that a trial court must make the specific factual findings required by the foster care statutes in every custody case involving a child subject to a foster care plan, whether the custody order is entered upon a petition for custody, a petition for a foster care review, or a petition for a permanency planning hearing. An award of custody without such findings is error as a matter of law.

Virginia Code § 63.2-900.1 affirms that relatives can qualify as foster parents and receive all the benefits of a foster parent. Indeed, the statutory scheme is increasingly emphasizing placement with relatives (also called “kinship care,” as defined in Va. Code § 63.2-100), and kinship foster care receives some preference over regular foster care. Virginia Code § 63.2-900 provides that the “local board shall first seek out kinship care options to keep children out of foster care and as a placement option for those children in foster care, if it is in the child’s best interest.” The board must search for relatives who may be eligible for kinship every year the child is in foster care and before there is a change in placement. Va. Code § 63.2-900.1. Some foster care requirements not related to child safety can be waived on a case-by-case basis. Va. Code § 63.2-900.1. If the child has been in kinship foster care for over six months, removal from the home is limited to specified circumstances, *id.*, and certain criminal offenses will not disqualify a kinship foster care applicant if more than ten years have passed since conviction, Va. Code § 63.2-901.1(F). If the adult relative establishes a kinship guardianship, then additional assistance may be provided. Va. Code §§ 63.2-100 (definitions), 63.2-1305. If a relative’s request to become the child’s kinship foster parent is denied, the local board must provide the relative with a clear and specific explanation of the reasons for the denial, notice that the denial is appealable pursuant to § 63.2-915, and information regarding the procedure for filing such an appeal. Va. Code § 63.2-900.1(A).

If the father is unknown, then the Virginia Birth Father Registry (see section [21-6.07\(f\)](#)) must be searched.

21-6 FOSTER CARE

21-6.01 Title IV-E and Required Findings

There are several avenues by which children come into foster care aside from abuse or neglect petitions. Before a court can commit a child to the legal custody of DSS in any matter, including abuse or neglect, it must make specific findings in order for the placement to be eligible for IV-E funding. Title IV-E of the Social Security Act is one of the primary sources of federal funding for state child welfare services, foster care, and adoption assistance. The [website](#) maintained by the U.S. Department of Health and Human Services, Administration for Children and Families, Children’s Bureau, provides an abundance of information on IV-E and other pertinent child welfare federal laws and regulations.

The eligibility regulations for foster care maintenance payments are set forth in 45 C.F.R. § 1356.21. The regulations set forth two key eligibility criteria, as discussed below.

21-6.01(a) Contrary to the Child’s Welfare

The first eligibility requirement pertains to the child’s removal from the home. Such removal must be based on a voluntary placement agreement or a judicial determination that it was contrary to the child’s welfare to remain at home. This determination was the first of the existing protections afforded to children and their families by the federal foster care program and has been in effect since 1961. Furthermore, this determination must be made in the very first court order sanctioning removal of the child, even if it is a temporary emergency order. If such a determination is not made, the placement will not be IV-E eligible. The exact language “contrary to the welfare” does not have to be used. The Code’s

language in § 16.1-251(A)(1) and elsewhere that the child would be subject to “imminent threat” if the child remains in the home, satisfies this federal requirement.

21-6.01(b) Reasonable Efforts to Prevent Removal

The second eligibility requirement relates to “reasonable efforts” findings. The “reasonable efforts” requirements are twofold. First, the court must find that reasonable efforts were made to prevent removal (or were not required) within sixty days from the date the child is removed from the home. The Va. Code incorporates this standard into §§ 16.1-251 and 16.1-252 and all other sections that authorize removal of a child from the home. The forms designed by the Supreme Court to be used in such cases all have boxes that can be checked for the appropriate finding. If the determination concerning reasonable efforts to prevent removal is not made within sixty days, the child is not eligible for IV-E funding for the entire duration of that stay in foster care.

The court must also then make a finding every twelve months after the child’s placement in foster care that DSS has made reasonable efforts to reunify the child and family or to make and finalize an alternate permanent placement when the child and family cannot be reunited. If the court fails to make these findings, funding will be lost, but can be reestablished once the finding is made.

21-6.01(c) Documentation of Judicial Determinations

The judicial determinations regarding contrary to the welfare and reasonable efforts findings must be explicitly documented and made on a case-by-case basis and so stated in the court order. This requirement can be satisfied by the order stating the specific facts which supported the finding or referencing other documents in the record, such as a court report, psychological evaluation, or sustained petition. The judicial determinations do not have to use the exact terminology “contrary to the welfare” and “reasonable efforts” but must convey that the court has made the required determination. Orders that merely reference the state statute are not acceptable.

21-6.01(d) Nunc Pro Tunc Orders Prohibited

If the reasonable efforts and contrary to the welfare findings are not included on the orders, a transcript of the court proceeding is the only documentation that will be accepted to verify that the findings were in fact made. Nunc pro tunc orders and affidavits are not acceptable. Obviously, juvenile court is not a court of record, and it is rare that a court reporter is hired for any proceeding in juvenile court. It is not clear whether a “record of proceedings” with the judge’s specific findings would satisfy the requirement, but it should.

21-6.02 Emergency Placement Without Notice to DSS

In abuse or neglect cases, CHINS-services, petitions for relief, and delinquency matters, the court has the authority to give DSS temporary emergency custody of the child for up to fourteen days, even if DSS was not given reasonable notice and an opportunity to be heard. However, in the order the court must describe the emergency and the need for the temporary placement and then give DSS an opportunity to be heard (Va. Code §§ 16.1-278.2, 16.1-278.3, 16.1-278.4, 16.1-278.8).

21-6.03 Court Commitment

The court can commit a child to the legal custody of DSS as a disposition of a number of different kinds of cases brought before the court besides abuse or neglect petitions:

1. Children in need of services (“CHINS-services”) (Va. Code § 16.1-278.4)
2. Children in need of supervision (“CHINS-supervision”) (Va. Code § 16.1-278.5)
3. Status offenders (Va. Code § 16.1-278.6)

4. Delinquent juveniles (Va. Code § 16.1-278.8). Va. Code § 16.1-278.7 specifies that a delinquent child cannot be committed jointly to the Department of Juvenile Justice and to DSS. Accordingly, when a child who is already in the legal custody of DSS is committed to the Department of Juvenile Justice, DSS's custody of the child is automatically abated during the course of that commitment. Under Va. Code § 16.1-293, the court can order DSS to maintain contact with the child during the course of the child's commitment, and to be responsible for placing the child on rules of probation/parole upon the child's return to the community. The Department of Juvenile Justice is required to give two weeks' notice before sending a child home from commitment. Beyond that notice requirement, the Department of Juvenile Justice has the authority to decide when and how to release children from commitment, see Va. Code § 16.1-285, unless a child is committed to a specific sentence as a serious offender under Va. Code § 16.1-285.1.

While DSS must be notified and given an opportunity to be heard prior to a non-emergency commitment to DSS, the court is not required to have subpoenaed DSS to attend proceedings in which such a disposition is made as long as timely notice of some type was given. 2012 Op. Va. Att'y Gen. 82.

21-6.04 Petitions for Relief of Care and Custody

A parent may petition the juvenile court to be relieved of the care and custody of a child. Va. Code § 16.1-241(A)(4). The court is supposed to refer such petitions initially to DSS for investigation, provision of services, and hopefully placement diversion. The court should also appoint a guardian ad litem and schedule a hearing for partial or final disposition. Va. Code §§ 16.1-277.02 and 16.1-278.3.

When so requested, the Code permits the court to also grant one or both parents' request to be relieved of custody permanently and have their residual parental rights terminated.

21-6.05 Entrustment

A parent or guardian may enter into an entrustment agreement with DSS. Va. Code § 63.2-903. In *Fredericksburg DSS v. Brown*, 33 Va. App. 313, 533 S.E.2d 12 (2000), the Court of Appeals held that Va. Code § 63.2-900 authorizes a parent or guardian, but not a legal custodian, to enter into an entrustment agreement. The opinion did not reference Va. Code § 63.2-1817, which provides that a department "shall have the right to accept . . . such children as may be entrusted or committed to it by the parents, guardians, relatives or other persons having legal custody thereof"

If the agreement is for less than ninety days, the agency must file a petition for approval of the agreement within eighty-nine days of its execution, if the child is not returned to the caretaker within that period. If the agreement is for more than ninety days or an unspecified amount of time and does not provide for the termination of parental rights, the petition for approval must be filed within thirty days. Va. Code § 16.1-277.01.

A petition for approval for a permanent entrustment agreement that provides termination of parental rights may be filed, but is not required. Va. Code § 16.1-277.01(A)(3). A petition is optional in the case of permanent entrustments because, under Va. Code § 63.2-903, the execution of a permanent entrustment agreement, if not rescinded by the parent within the time frames provided, affects the termination of residual parental rights and does not require court approval. However, the consequences of a permanent entrustment are so significant that court approval normally should be sought. In *Butler v. Culpeper County DSS*, 48 Va. App. 537, 633 S.E.2d 196 (2006), the

court upheld a termination pursuant to an entrustment over an attempt by the parent to rescind.

If the court makes appropriate findings to approve the entrustment agreement, the court can make any of the orders of disposition permitted in a case involving an abused or neglected child pursuant to Va. Code § 16.1-278.2. Those orders may include awarding legal custody of the child to a person with a legitimate interest. This raises the prospect that the relatives of either parent, who do not want to see the child placed outside the extended family, could become involved in the court proceedings and could obtain custody of the child, even over the objections of the parents. Given this, some caution is advised in deciding how to proceed in these cases. The permanent entrustment agreement developed by the Commonwealth of Virginia has a provision for a parent to void the agreement within a specific time frame or prior to the child's placement in an adoptive home. If court approval of the agreement is sought by the department, that provision should be modified, and specific language added in which the parent acknowledges that court approval of the agreement will be sought and that the court will terminate the parent's residual parental rights upon approving the agreement.

The court may approve an entrustment agreement if a preponderance of the evidence indicates it is in the best interest of the child. Parental rights may be terminated based on a clear and convincing evidence standard. Va. Code § 16.1-277.01. Parents are not entitled to counsel pursuant to Va. Code § 16.1-266(D) when the entrustment agreement anticipates return to home, not termination of parental rights. *Fredericksburg DSS v. Brown*, 33 Va. App. 313, 533 S.E.2d 12 (2000). However, the court in its discretion may appoint counsel. Va. Code § 16.1-266(E).

A foster care plan shall be filed with any petition for approval. Va. Code § 16.1-281. In the case of permanent entrustments, an Adoption Progress Report must be filed with the court every six months. Va. Code § 16.1-277.01(E). Regular foster care reviews must also be held as required under Va. Code §§ 16.1-281, 16.1-282, and 16.1-282.1.

21-6.06 Authority of Social Services Department to Determine Appropriate Placement for the Child

Virginia Code § 16.1-278.2(A)(5)(c) provides that, when legal custody of a child is awarded to DSS, that department "shall have the final authority to determine the appropriate placement for the child." However, the Court of Appeals of Virginia ruled in *Fauquier County DSS v. Robinson*, 20 Va. App. 142, 455 S.E.2d 734 (1995), that the local court, through its authority under § 16.1-278 (in which the court has authority to order any agency to render services "as may be provided for by state or federal law . . ."), and under Va. Code § 2.2-5211 of the Children's Services Act, can order and direct the placement of a child into specific programs or institutions. In *S.G. v. Prince William County DSS*, 25 Va. App. 356, 488 S.E.2d 653 (1997), the appeals court ruled that this authority overrides the authority of the department of social services to determine the child's placement. However, when the juvenile court considers ordering services for a child to be funded by the Children's Services Act, the court is required to refer the case, prior to final disposition, to the family assessment and planning team (FAPT) to determine the recommended level of treatment and services needed by the child and family. Upon receiving a request for a level of service not identified or recommended in the initial report submitted by the FAPT, the court must request a second FAPT report characterizing comparable levels of service to the requested level of service. Va. Code § 2.2-5211(E). Notwithstanding the provisions of this law, the court may make any disposition as is authorized or required by law and such services shall qualify for funding.

Before making or changing a school-age child's foster care placement, Va. Code § 63.2-900.3 requires that the Department determine jointly with the local school

division, in writing, whether it is in the child's best interests to remain enrolled at the school in which he was enrolled prior to the most recent foster care placement.

The Attorney General opined that a juvenile and domestic relations court may order a department of social services to accept noncustodial entrustment of a child in need of services. 2004 Op. Va. Att'y Gen. 86. However, this opinion does not seem to distinguish between an agreement for services and the services themselves. Though a juvenile court may order services under Va. Code § 16.1-278(A), it is not clear how a court can order DSS to enter into what is supposed to be a voluntary agreement.

21-6.06(a) Background Checks on Foster Parents

DSS must obtain and consider national criminal background (with fingerprints through FBI) and Central Registry results for all adult individuals, including parents, residing in a home where DSS is considering placing a child, whether on an emergency, temporary, or permanent basis. No foster or adoptive home may be approved if an individual residing in that home has a record for any barrier crime as defined in Va. Code § 19.2-392.02 or has a founded complaint of child abuse or neglect. Va. Code § 63.2-901.1.

21-6.07 The Foster Care Plan

21-6.07(a) Requirement

Virginia Code § 16.1-281 requires that, if a child comes into the custody of DSS under any petition filed with the court, DSS must file an initial foster care plan with the juvenile court within forty-five days of the child coming into care (except for foster care plans filed with entrustment petitions, which are governed by the entrustment provisions). An additional sixty days to develop the plan may be allowed by the court for good cause. Va. Code § 16.1-281(A). In addition, if the community policy and management team (CPMT) works out an agreement with a child's parents, in which the child is placed in a foster home, residential program, etc., while the parents maintain legal custody of the child, a foster care plan is also required. The written plan developed by the family assessment and planning team (FAPT) under Va. Code § 2.2-5208 can be accepted as the foster care plan. If a child is returned home or placed with an adoptive family within forty-five days of the child's initial placement, no plan is required.

21-6.07(b) Involvement of Parents and Child

Va. Code § 16.1-281(A) requires that DSS involve the parents (if they can be located) in developing the plan. Involving the parent means more than simply telling the parent what the plan is. Relatives and fictive kin who are interested in the child's welfare must also be involved. Va. Code §§ 16.1-281(A) and 63.2-906. Children twelve years old and older must also be involved in plan development; younger children may be involved in the development of the plan if it is in the best interest of the child. *Id. See Redditt v. Fairfax County DFS*, No. 0770-04-4 (Va. Ct. App. Jan. 11, 2005) (discussion of the requirement to involve the child and its limits). Sometimes social workers tend to impose a plan on parents. DSS should take care to show that the parents' views and concerns were considered. In fact, if the parents or child are not involved, DSS must explain in the plan why not. When a child has a program goal of permanent foster care or is in a long-term foster care placement, the foster parents must also participate in the assessment and planning. Va. Code § 2.2-5208. See Va. Code § 63.2-906.

21-6.07(c) Elements of the Plan

Virginia Code § 16.1-281(B) sets out what must be in the foster care plan. The Virginia Department of Social Services has developed a standard form for such plans that is used statewide. The most effective plans are ones that clearly identify what skills, abilities, or changes in parental behavior a parent must demonstrate before it will be safe and appropriate to return the child. Simply listing services that will be offered and in which a parent must participate can be problematic. For example, a father can easily satisfy a plan if the plan requires him only to "attend parenting classes." Attending class is not enough.

The father must be able to demonstrate that he has made meaningful improvements in his ability to parent, and that the problems that brought the child into care have been remedied.

For children fourteen years old and older, regardless of what permanent goal DSS is proposing, the plan must also include what can be described as an independent living transition plan that includes the child's needs and goals in the areas of counseling, education, housing, employment, and money management skills and specify the services that will be provided to the child to help him reach these goals. Children of this age must also be provided with, and acknowledge receipt of, an [explanation](#) of their rights with respect to education, health, visitation, court participation, and safety.

21-6.07(d) The Paramount Concern: The Child's Health and Safety

Virginia Code § 16.1-281 emphasizes that "the child's health and safety shall be the paramount concern of the court and the agency throughout the placement, case planning, service provision and review process." This, along with other provisions of Va. Code § 16.1-281, make clear that the child's needs supersede the needs and interests of the parents in determining the child's ultimate placement.

21-6.07(e) When Reasonable Efforts With Parents Not Required

DSS may propose in the initial plan that the goal be something other than return home if it concludes and can prove to the court that it is not reasonably likely that the child can be returned to this prior family within a practicable time consistent with the best interests of the child.

DSS cannot be required by the court to make reasonable efforts to reunite the child with a parent if the court finds any of the following:

1. The residual parental rights of the parent regarding a sibling of the child have previously been involuntarily terminated;
2. The parent has been convicted of murder, or voluntary manslaughter, or a felony attempt, conspiracy or solicitation to commit any such offense, against a child of the parent, a child with whom the parent resided at the time of the offense, or the other parent of the child;
3. The parent has been convicted of felony assault or felony sexual assault of a child of the parent, or a child with whom the parent resided at the time of the offense. *See Brown v. Spotsylvania DSS*, 43 Va. App. 205, 597 S.E.2d 214 (2004) (holding "felony assault" means any crime that results in serious bodily injury to the child); or
4. Based on clear and convincing evidence, the parent has subjected any child to "aggravated circumstances" (as defined in the statute), or abandoned a child under circumstances that would justify the termination of residual parental rights. In *Tellez v. DSS*, [no number in original] (City of Roanoke Cir. Ct., Oct. 17, 2003), the court held the statute requires reasonable efforts to reunite the child with the parent even if the parent is incarcerated for abusing a child who was not his and who did not live with him; however, the efforts under the circumstances could be "minimal."

Normally, the court will be able to make these findings at the first hearing on the foster care plan. Virginia Code § 16.1-281(B) requires that, after making this finding, the court must hold a permanency planning hearing (discussed in section [21-6.10](#)).

If DSS concludes that it is not reasonably likely that the child can be returned to his prior family within a practicable time, then DSS must document in the plan the reasons for that conclusion and propose an alternative goal of either relative placement or adoption and, if neither is feasible, a plan of permanent foster care. Va. Code § 16.1-281.

21-6.07(f) Determining Paternity/Virginia Birth Father Registry

Determining paternity of children in foster care is often a challenge. A Virginia Birth Father Registry is funded by a fee paid with all petitions for adoptions. Any man who has engaged in sexual intercourse with a woman is deemed to be on legal notice that a child may have been conceived. In order to receive notice if a child is born and subsequently placed for adoption or accepted into foster care, the man must have registered with the Virginia Birth Father Registry. Failure to timely register waives all parental rights of the father unless he was otherwise acknowledged or presumed to be the father or he was led to believe by the birth mother that the pregnancy had been terminated or the child was not alive, in which case he has ten days from the discovery of the misrepresentation to register. Va. Code § 63.2-1250(C). However, registration is untimely if 180 days have elapsed since the final order of adoption was entered. *Id.* If the identity and whereabouts of the birth father are reasonably ascertainable, written notice of the existence of an adoption plan and the availability of the registry must be given to the birth father. Va. Code § 63.2-1250(F). The putative father then has ten days after personal service, or thirteen days after the certified or express mailing of the notice, to register with the Birth Father Registry. *Id.*

21-6.08 Court Approval of the Initial Foster Care Plan

At the dispositional hearing in which the court orders continued placement of a child in foster care, whether by agreement, preliminary removal order, granting of a petition for relief of custody, or other court commitment, the court should review and approve an initial foster care plan. Va. Code § 16.1-281(C).

The court may appoint counsel for the parents or guardian but must appoint a guardian ad litem for the child. Va. Code §§ 16.1-281(F) and 16.1-266(D).

The court has the authority to modify the foster care plan, Va. Code § 16.1-281(C), and the court can even change the child's placement while keeping the child in foster care. *See S.G. v. Prince William Cnty. DSS*, 25 Va. App. 356, 488 S.E.2d 653 (1997). The court cannot, however, modify the plan to set a goal of adoption and termination of parental rights if DSS has not first filed a plan recommending termination as in the best interests of the child. *Strong v. Hampton DSS*, 45 Va. App. 317, 610 S.E.2d 873 (2005). At the conclusion of the hearing at which the initial foster care plan is reviewed, the court shall schedule a foster care review hearing to be held within four months.

21-6.09 Foster Care Review

Virginia Code § 16.1-282 requires that a foster care review hearing be held within four months of the dispositional hearing approving the initial foster care plan. If the hearing is not pre-set, DSS must file a petition for such hearing within three months of the dispositional hearing. The court must set and hold a foster care review hearing within thirty days of the filing of the petition. The section sets out what must be in the petition, and specifically requires that the petition (or, more realistically, the plan) set out the disposition sought by DSS and the grounds for the recommended action.

The court shall consider appointing counsel for the parents or guardian. Va. Code § 16.1-266(D). If, following the hearing, the court approves keeping the child in foster care, the court must at that time schedule the next hearing, a permanency planning hearing, for a date five months hence (unless a goal is approved for adoption, permanent foster care, or independent living, in which case, the hearing shall be held within twelve months pursuant to Va. Code § 16.1-282.2).

DSS may petition for a change of goal of a previously approved plan. The Virginia Court of Appeals has held DSS's standard of proof for a change in the foster care plan under Va. Code § 16.1-282 is by a preponderance of the evidence, not clear and convincing evidence. *Richmond DSS. V. Carter*, 28 Va. App. 494, 507 S.E.2d 87 (1998).

21-6.10 Permanency Planning Hearing

Pursuant to Va. Code § 16.1-282(E), at the conclusion of the foster care review hearing, the court shall schedule a permanency planning hearing to be held within five months. Virginia Code § 16.1-282.1, which governs permanency planning hearings, however, provides that the permanency planning hearing shall be held within ten months of the dispositional hearing. There is no clear way to reconcile this conflict, but the Supreme Court of Virginia's Court Improvement Program advises that the hearing should be held within five months of the foster care review hearing.

DSS must file a petition for a permanency planning hearing thirty days prior to the date the permanency planning hearing is, or should be, scheduled by the court, and file with the court a permanent plan for the child which seeks to achieve either: (i) returning the child to his prior placement; (ii) placing the child in the custody of a relative; (iii) terminating the parents' residual parental rights so that adoption placement can be sought for the child; (iv) placing the child in an independent living arrangement if the child is a refugee sixteen years old or older; (v) placing a child sixteen years old or older in permanent foster care pursuant to subsection A3 and Va. Code § 63.2-908; or (vi) placing a severely mentally or physically disabled child sixteen years old or older in a permanent living arrangement in accordance with subsection A2 of the provision. The agency must file a petition for termination of parental rights if the child has been in the custody of DSS for fifteen of the most recent twenty-two months unless the agency documents in the service plan a compelling reason why termination is not in the child's best interests, including when a relative has shown the will and ability to care for the child. Va. Code §§ 16.1-282.1 and 63.2-910.2.

The court may approve an interim plan for up to six more months if the court finds either: (i) if the goal is still return home, that the parents are making marked progress toward reunification, but it is still premature to send the child home; or (ii) if another goal has been selected, that marked progress is being made to achieve that goal, but it is premature to set an exact date for the goal to be accomplished. The department must justify an out-of-state placement over in-state placement. A second permanency planning hearing must then be set six months hence, at which time permanency must be achieved. Va. Code § 16.2-282.1(B).

The court must consult with the child regarding a proposed permanency or transition to independent living plan, unless the court finds that such consultation is not in the best interests of the child. Va. Code § 16.1-282.1(C).

DSS must provide independent living services to persons between eighteen and twenty-one years of age who are in the process of transitioning to self-sufficiency. Va. Code § 63.2-905.1. The provision of such services has been added to the definition of "foster care services." Va. Code § 63.2-905. See section [21-2.01\(f\)](#).

If the court orders a permanent goal that results in termination of parental rights, permanent foster care, or independent living, the order shall state whether reasonable efforts have been made to place the child in a timely manner in accordance with the foster care plan and to complete the steps necessary to finalize the permanent placement of the child. Va. Code § 16.1-281(C)(2).

21-6.11 Continued Foster Care Review

When adoption or permanent foster care⁴ is the approved goal, the court reviews the foster care plan annually as long as the child remains in DSS custody. Va. Code § 16.1-281(E). Some judges have been known to require more frequent review hearings (e.g., every six months in the first year or two of foster care, depending on the circumstances). DSS must file the petition and plan review, and, if applicable, a written adoption progress report. The court order entered at the conclusion of the hearing held on the petition shall state whether reasonable efforts have been made to place the child in a timely manner in accordance with the approved permanent goal for the child and to complete the steps necessary to finalize the permanent placement of the child. Va. Code § 16.1-282.2(A).

If the child is placed in permanent foster care, the court shall give consideration to the appropriateness of the services being provided to the child and permanent foster parents, to any change in circumstances since the entry of the order placing the child in permanent foster care, and to such other factors as the court deems proper. Va. Code § 16.1-282.2(B).

If the goal is another planned permanent living arrangement, the plan must be reviewed every six months to monitor the condition of the child and to consider a more permanent plan when the child's health warrants it. Va. Code § 16.1-282.1(A)(2).

21-6.12 The Family First Prevention Services Act

The Family First Prevention Services Act (Family First) was enacted by Congress on February 9, 2018, and represents the most significant rewrite of title IV of the Social Security Act since 1981. See H.R. 1892-169, 115th Cong. (2017-18). Family First enables states to use federal funds under parts B and E of title IV of the Social Security Act to provide enhanced support to children and families and prevent foster care placements by providing the following: (i) mental health services, (ii) substance abuse prevention and treatment services, (iii) in-home parent skill-based programs, and (iv) kinship navigator services. Additionally, Family First provides the tools and resources necessary to allow Virginia's social services system to focus on prevention in order to keep children safely with their families and not enter foster care so that they have a better chance of growing up in the least restrictive setting.

While Family First focused mostly on prevention efforts, there were several key impacts to foster care programs specifically regarding payment for congregate care placements for children in foster care. Family First emphasizes that children in foster care should be placed in the least restrictive, most family-like setting, such as a foster home. In Virginia, when a child in foster care needs to be placed in a setting that is not a foster family home, the child's placement must be in a placement setting outlined in Family First in order to be eligible for title IV-E funding. These settings include: qualified residential treatment programs (QRTP); placements for youth who are victims or at risk of sex trafficking; placements specializing in providing prenatal, post-partum, or parenting supports for youth; residential family-based treatment facilities for substance use disorders; and supervised independent living settings for youth ages eighteen and up. See DSS, [Child and Family Services Manual, Placements Specific to Family First Requirements](#). Virginia Code § 63.2-906.1 requires all QRTP placements to be approved by the court within sixty days of the child's placement. If the placement is not approved by the court within sixty days, IV-E funding can only be used for the first sixty days of placement.

21-6.13 Interstate Compact on Placement of Children (ICPC)

The purpose of the ICPC is to ensure that children placed out of state are in approved settings and receive continuing services and supervision. Va. Code § 63.2-1000 et seq.

⁴ Except in cases in which a child is sixteen years of age or older and is a refugee or asylum seeker, independent living was removed as an approved goal in 2011. 2011 Va. Acts c. 730.

Accordingly, DSS cannot place children with persons in another state without following ICPC procedure. The process is contained in the Code of Virginia and in Uniform ICPC Regulations, which have been adopted by all states; however, the regulations have not been incorporated into the Virginia Administrative Code. Virginia DSS has an ICPC Administrator whose office coordinates and processes all ICPC requests.

One of the most litigated questions is whether the ICPC applies to placements by DSS or the court with a non-custodial parent in another state. Courts across the country have interpreted the ICPC differently on this question. There are no reported cases in Virginia on this issue. The prevailing view appears to be that if the local court wishes the receiving state to provide any type of services such as a home study or monitoring of the placement, then the ICPC process must be followed, which means legal custody cannot be transferred until the receiving state agrees. If, however, the local court grants custody to the parent without receiving any information or assistance from the receiving state, the ICPC does not apply and the placement may occur without complying with the ICPC. See *Construction and Application of Interstate Compact on the Placement of Children*, 5 A.L.R. 6th 193. Under the new ICPC, it appears that this prevailing view will be codified.

Receiving timely home studies from other states is another common problem under the ICPC process. The problem is so pervasive that Congress passed the Safe and Timely Interstate Placement of Foster Children Act of 2006. The most significant impact of the law is that it requires that all states complete home studies within sixty days. Contact the state's ICPC office to determine how this requirement is being implemented.

21-6.14 Special Immigrant Juvenile Status (SIJS)

SIJS provides lawful residency to non-citizen children who are under the jurisdiction of the juvenile court and who will not be reunified with their parents due to abuse or neglect or abandonment. The application can be filed after reunification efforts have ended. The application is processed through the Department of Homeland Security's Bureau of Citizen and Immigration Service (CIS). CIS is responsible for immigration-related services previously performed by the INS. A SIJS determination makes the child eligible for employment and eventually lawful resident status. Also, it generally provides an easier way for a non-citizen child to immigrate than through adoption. The requirements for SIJS are set out in federal statute and regulation. 8 C.F.R. § 204.11.

21-6.15 Indian Child Welfare Act (ICWA)

The ICWA, 25 U.S.C. § 1901 et seq., applies to a child dependency proceeding if the child is an "Indian child." An "Indian child" is defined as an unmarried person under the age of 18 who is a member of an Indian tribe⁵ or who is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. 25 U.S.C. § 1903. The statute requires DSS and the juvenile court to inquire about a child's possible Indian heritage at the beginning of each case proceeding to ensure that certain provisions of the law, such as notice to a tribe and active efforts to maintain or reunite an Indian child with the child's family, are properly and timely implemented. See 2022 Op. Va. Att'y Gen. 5 (ICWA applies to Virginia cases involving, or that could culminate in, foster care placement, termination of parental rights, or pre-adoptive or adoptive placements for Indian children).

If the child is an Indian child, the tribe may intervene in the proceedings and identify a "placement preference" for the child with a tribe member as provided in 25

⁵ For the list of tribes currently recognized by the federal government, see [Indian Entities Recognized by and Eligible for Services From the United States Bureau of Indian Affairs](#), 89 Fed. Reg. 944 (Jan. 8, 2024).

U.S.C. § 1915. In foster care placements, the placement preference shall apply in the absence of “good cause” to the contrary. *Id.*

A court must make a determination of good cause to depart from the tribe’s placement preferences based on “one or more” of the following considerations: (1) the request of one or both of the Indian child’s parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference; (2) the request of the child, if the child is able to understand the decision being made; (3) sibling attachment that can only be maintained through a particular placement; (4) the extraordinary physical, mental, or emotional needs of the Indian child; (5) the unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placement meeting the preference criteria, but none has been located. 25 C.F.R. § 23.132. The Bureau of Indian Affairs [guidelines](#) specify that the list of factors in 25 C.F.R. § 23.132 is not exhaustive, and a court can find good cause based on extraordinary circumstances outside of the listed factors.

21-7 TERMINATION OF RESIDUAL PARENTAL RIGHTS

Virginia Code § 16.1-283 provides the framework and standards for seeking termination of residual parental rights in an adversarial process. The Court Improvement Program, located in the Office of the Executive Secretary of the Supreme Court of Virginia, maintains a [table of appellate decisions](#), both published and unpublished, in termination of parental rights cases. It is a very useful resource with hyperlinks to the referenced cases and is indexed by the various substantive areas which form the basis for termination under Va. Code § 16.1-283. The Court of Appeals confirmed that Virginia’s termination statutes provide parents with “fundamentally fair” procedures under the Due Process Clause. *Farrell v. Warren Cnty. DSS*, 59 Va. App. 375, 719 S.E.2d 329 (2012). The Court of Appeals also held in a child custody case that a court has no jurisdiction to terminate parental rights if the procedural and substantive requirements of Va. Code § 16.1-283 are not met and that an agreement between parents to terminate one parent’s parental rights is void as against public policy and unenforceable as a matter of law. *Layne v. Layne*, 61 Va. App. 32, 733 S.E.2d 139 (2012).

21-7.01 Foster Care Plan Required as Prerequisite

Virginia Code § 16.1-283(A) requires that, before the court can accept a petition for termination of residual parental rights, the department must first file a foster care plan documenting that termination of residual parental rights is in the child’s best interests. The court can consider the termination petition and the foster care plan on which it was based at the same hearing. Any petition for termination that is filed before such a plan is filed is void. *Stanley v. Fairfax Cnty. DSS*, 10 Va. App. 596, 395 S.E.2d 199 (1990), *aff’d*, 242 Va. 60, 405 S.E.2d 621 (1991). DSS’s duty to file a foster care plan that recommends termination of parental rights is not obviated by a court’s ordering the goal of adoption through its “approval” and “revision” of a filed foster care plan that did not recommend termination. *Strong v. Hampton DSS*, 45 Va. App. 317, 610 S.E.2d 873 (2005). A parent cannot attack the validity of a termination of parental rights order by appealing only the prior order approving the plan of adoption. In *Najera v. Chesapeake DSS*, 48 Va. App. 237, 629 S.E.2d 721 (2006), a father appealed the JDR court decision accepting a foster plan recommending termination of parental rights and adoption, but failed to appeal the subsequent order terminating his parental rights. The Court of Appeals held that the termination order superseded the order recommending termination, and because the termination order was final, there was no action the court could take regarding the foster care plan recommendations. Conversely, a denial of parental rights termination renders the foster plan moot. The trial court has the authority to determine who should take custody of the child. *Fauquier Cnty. v. Ridgeway*, 59 Va. App. 185, 717 S.E.2d 811 (2011).

A guardian ad litem has the authority to file a petition on behalf of the child for the termination of the parents’ residual parental rights, but, before the termination petition,

a foster care service plan documenting that termination of residual parental rights is in the child's best interests must still be filed with the court. *Stanley v. Fairfax Cnty. DSS*, 10 Va. App. 596, 395 S.E.2d 199 (1990), *aff'd* 242 Va. 60, 405 S.E.2d 621 (1991). A grandparent has no standing to contest the termination of parental rights. *Tackett v. Arlington Cnty. Dep't of Human Servs.*, 62 Va. App. 296, 746 S.E.2d 509 (2013).

The termination of parental rights includes the termination of parental responsibilities. Thus, an agency may not seek child support from a parent whose rights have been terminated. *Commonwealth v. Fletcher*, 266 Va. 1, 581 S.E.2d 213 (2003).

In *Eckley v. City of Virginia Beach*, No. 1863-99-3 (Va. Ct. App. Ct. July 20, 1999) (unpubl.), the court held that Va. Code § 16.1-283(B) does not require that a parent have physical or legal custody prior to the department placing the child in foster care and seeking to terminate parental rights.

21-7.02 Best Interests of the Child

The "best interests" standard is a separate determination that the court must make. The Supreme Court of Virginia and the Virginia Court of Appeals have stated that the "best interests of the child" is the paramount consideration in termination cases, "the first prong," and "the threshold test." See *Richmond DSS v. Crawley*, 47 Va. App. 572, 625 S.E.2d 670 (2006); *Barkey v. Commonwealth*, 2 Va. App. 662, 347 S.E.2d 188 (1986). Virginia courts have reiterated that the law presumes that the child's best interests will be served when in the custody of his parent. *Bristol DSS v. Welch*, 64 Va. App. 34, 764 S.E.2d 284 (2014).

The constitutional analysis of the Supreme Court of the United States in *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388 (1982), emphasized that, given the protection of the familial relationship provided under the 14th Amendment to the U.S. Constitution, that a state can justify the permanent involuntary severing of the parent-child relationship only if it can first show conduct (or misconduct) on the part of the parent that justifies severing the relationship. Only then can the court look at what constitutes the "best interests" of the child. The Court in *Santosky* also ruled that, given the fundamental nature of the familial right being severed through termination, the burden on the state in termination cases was "clear and convincing evidence." That of course is now reflected in statute. See *Wright v. Alexandria Div. of Social Servs.*, 16 Va. App. 821, 433 S.E.2d 500 (1993); *Knox v. Lynchburg Div. of Social Servs.*, 223 Va. 213, 288 S.E.2d 399 (1982); *Helen W. v. Fairfax Cnty. Dep't of Human Servs.*, 12 Va. App. 877, 407 S.E.2d 25 (1991).

The following factors should be considered in assessing what constitutes the "best interests of the child": (i) the age and physical and mental condition of the child; (ii) the age and physical and mental condition of the parents; (iii) the relationship existing between each parent and each child; (iv) the role which each parent has played and will play in the upbringing and care of the child; and (v) such other factors as are necessary in determining the best interests of the child. *Barkey v. Commonwealth*, 2 Va. App. 662, 347 S.E.2d 188 (1986) It is important for the court to address specifically each of the elements required for termination in the record. For example, it is error for the trial court to cite only the opportunity that would be afforded the children if parental rights were terminated. *Harmon v. Richmond Cnty. DSS*, No. 0895-00-2 (Va. Ct. App., Feb. 20, 2001) (unpubl.). See *Roanoke City DSS v. Heide*, 35 Va. App. 328, 544 S.E.2d 890 (2001); *L.G. v. Amherst Cnty. DSS*, 41 Va. App. 51, 581 S.E.2d 886 (2003). A circuit court's decision concerning the best interest of a child is entitled to deference and should be overturned only if it is plainly wrong or without evidence to support it. *Bristol DSS v. Welch*, 64 Va. App. 34, 764 S.E.2d 284 (2014).

So, even though a father had not substantially remedied the conditions that led to foster care placement within twelve months, the evidence that he had made substantial

progress after that time period (when the goal was changed to adoption), was sufficient for the trial court to determine that it was not in the best interests of the child to terminate parental rights. *Roanoke City DSS. v. Heide*, 35 Va. App. 328, 544 S.E.2d 890 (2001); *L.G. v. Amherst Cnty. DSS*, 41 Va. App. 51, 581 S.E.2d 886 (2003). Likewise, in *Richmond DSS v. Crawley*, 47 Va. App. 572, 625 S.E.2d 670 (2006), the court found that even though the mother had not remedied the substantial problems that led to the children's continued placement in foster care, it was still not in the children's best interests to terminate because of the continued positive contact the mother had with the children and the fact that the children were removed from their mother solely because she was hospitalized for medical reasons and no other family was available.

21-7.03 Six Scenarios for Termination

If the circuit court finds that termination is in the best interest of the child, the circuit court may only terminate parental rights if it *also* finds clear and convincing evidence that one of the scenarios for termination is met. *Dung Thi Thach v. Human Servs. Dep't*, 63 Va. App. 157, 754 S.E.2d 922 (2014). Six different independent scenarios for termination of rights are provided for in Va. Code § 16.1-283. DSS may proceed under more than one applicable subsection. *Sawyers v. Tazewell Cnty. DSS*, No. 1605-99-3 (Va. Ct. App. May 9, 2000) (unpubl.). Since a hearing in the circuit court is de novo, DSS is not bound by the evidence it presented in the juvenile court proceeding either, and can proceed in termination cases under different sections in circuit court than it did in juvenile court. *Nguyen v. Fairfax Cnty. Dep't of Family Servs.*, No. 0938-04-4 (Va. Ct. App. Sept. 28, 2004) (unpubl.). A court may terminate the rights of one parent without terminating the rights of the other. *Campbell Cnty. v. Roberts*, No. 2349-07-03 (Va. Ct. App. May 6, 2008) (unpubl.). In fact, the decision to terminate parental rights *must* be evaluated independently for each parent. *Dung Thi Thach v. Human Serv. Dep't*, 63 Va. App. 157, 754 S.E.2d 922 (2014). In this case of first impression, the Virginia Court of Appeals analyzed how a non-offending parent can remedy the conditions which led to or required continuation of the foster care placement if he was not the cause of those conditions or living in the home when the conditions occurred.

One of the enumerated standards must be met to terminate a parent's rights. The court cannot use another basis to terminate rights. For example, the court held that the trial court abused its discretion when its sanction for the parents' failure to adequately meet pre-trial requirements to participate in a home study and custody evaluation was the termination of parental rights. *Ange v. York/Poquoson DSS*, 37 Va. App. 615, 560 S.E.2d 474 (2002). Furthermore, a trial court cannot base its decision to terminate parental rights on a previous preliminary finding (by the preponderance of the evidence), that a child is abused or neglected as the standard for termination is clear and convincing evidence. *Farrell v. Warren Cnty. DSS*, 59 Va. App. 375, 719 S.E.2d 329 (2012).

21-7.03(a) No Reasonable Likelihood of Rehabilitation in Case of Serious Child Abuse or Neglect

The first scenario is under Va. Code § 16.1-283(B), which speaks prospectively regarding a parent's future ability to remedy conditions within a reasonable period of time. It is designed to cover the case where services have already been provided to the parents, but that, in spite of those efforts, the child had to be removed. The court can terminate parental rights without DSS having to attempt reunification services after the child's placement in foster care. This section allows the court to find that, given the parents' condition and history, it is unlikely that they will change, and therefore, it is unnecessary for DSS to keep trying to work with the family. The efforts of service agencies to rehabilitate the parents prior to the child's initial placement in foster care is the key consideration by the court under this section. See *City of Newport News DSS v. Winslow*, 40 Va. App. 556, 580 S.E.2d 463 (2003); *Farrell v. Warren Cnty. DSS*, 59 Va. App. 375, 719 S.E.2d 329 (2012). *Toms v. Hanover DSS*, 46 Va. App. 257, 616 S.E.2d 765 (2005), holding that rehabilitative services are not constitutionally required, provides the best

statement to date by the Court of Appeals on when Va. Code § 16.1-283(B) can be used and how it differs from subsection (C). See *Richmond DSS v. Enriquez*, No. 1650-03-02 (Va. Ct. App. 2004) (unpubl); *Edwards v. Cnty. of Arlington*, 5 Va. App. 294, 361 S.E.2d 644 (1987).

21-7.03(a)(1) *Prima Facie* Cases

Virginia Code § 16.1-283(B) provides for three common scenarios, which if proved by clear and convincing evidence, establish a prima facie case of conditions in which there is no reasonable likelihood that conditions can be remedied. Those scenarios are discussed below.

21-7.03(a)(1)(i) Mental/Emotional/Intellectual Disability

The parents have such a severe mental or emotional illness or intellectual disability that there is no reasonable expectation of their being able to properly care for the child. The court is to consider in particular under this category the child's needs given his age and stage of development. *Elkins v. DSS of Campbell Cnty.*, No. 1878-98-3 (Va. Ct. App. Jan. 26, 1999) (unpubl.).

21-7.03(a)(1)(ii) Substance Abuse

The parents are addicted to drugs or alcohol and have not followed through with offered treatment.

21-7.03(a)(1)(iii) No Response to Services

The parents, without good cause, have not responded to services offered to reduce, eliminate, or prevent the neglect or abuse of the child. Failure to respond to services could include a mother's refusal to believe the abuse occurred. Therefore, termination of the mother's parental rights was justified under Va. Code § 16.1-283(B) even though she maintained twice weekly contact and completed all requested courses, because she failed to believe the father was guilty of abuse. *Gallupe v. Roanoke City DSS*, No. 0515-98-3 (Va. Ct. App. Dec. 15, 1998) (unpubl.).

21-7.03(b) Failure by Parents to Communicate With Child

Virginia Code § 16.1-283(C) covers all situations in which a child comes into foster care, regardless of whether abuse or neglect has been found by the court. This section authorizes termination of residual parental rights under two scenarios. First, under (C)(1), whenever the parents have failed to maintain continuing contact and to plan for the future of the child for a period of six months following the child's foster care placement, in spite of efforts by serving agencies to help them do this. Parents' failure without good cause to communicate on a continuing and planned basis with the child for a period of six months shall constitute prima facie evidence of this condition. Therefore, a phone call every two or three months does not defeat an effort to pursue termination of parental rights under this section.

21-7.03(c) Failure to Remedy Conditions Resulting in Removal

Under Va. Code § 16.1-283(C)(2), the court can grant termination if the parents have not, without good cause, and within a reasonable period of time not to exceed twelve months from the date the child was placed in care, been able to remedy substantially the conditions that led to, or required continuation of, the child's foster care placement, despite the efforts of service agencies to help them. This section clearly recognizes that even if the original problems which brought a child into foster care have been remedied, if new problems have required the child's continued placement, then termination is still appropriate. *Green v. City of Hampton DSS*, No. 0396-06-1 (Va. Ct. App. Nov. 7, 2006) (unpubl.) (although mother no longer lives in abandoned boat from which children were removed, she still was struggling with drug addiction and other problems that required children to remain in care); *Sullivan v. Fredericksburg DSS*, No. 0809-13-2 (Va. Ct. App. Apr. 1, 2014) (unpubl.) (mother obtained appropriate housing in accordance with

approved plan but delayed so long it left insufficient time to allow for therapeutic visitation assessment). DSS cannot base termination on a parent's failure to comply with a service it does not offer or delays in offering. *C. S. v. Va. Beach DSS*, 41 Va. App. 557, 586 S.E.2d 884 (2003).

Virginia Code § 16.1-283(C)(2)'s twelve-month time limit "was designed to prevent an indeterminate state of foster care 'drift' and to encourage timeliness by the courts and social services in addressing the circumstances that resulted in the foster care placement." *L.G. v. Amherst Cnty. DSS*, 41 Va. App. 51, 581 S.E.2d 886 (2003). However, the factfinder may consider evidence before or after the twelve-month time period in order to evaluate the present best interests of the child. *Id.* (citing *Roanoke City DSS v. Heide*, 35 Va. App. 328, 544 S.E.2d 890 (2001)). The court may discount the parent's current progress if the best interests of the child would be served by termination, or it may determine that a parent's delayed, but nonetheless substantial, progress may overcome the time delay. *Id.* See *Dung Thi Thach v. Human Servs. Dep't*, 63 Va. App. 157, 754 S.E.2d 922 (2014) (not in best interests of child to terminate father's parental rights for failure to remedy within twelve months when father was not present when conditions that caused foster care placement arose and father had made significant progress outside of twelve-month period).

Under Va. Code § 16.1-283(C)(2), proof that the parent or parents have failed to comply with the foster care plan filed with the court, or with any other plan agreed to by the parents and a public or private agency, is prima facie evidence of this condition.

Mental illness and alcoholism do not constitute "good cause" for inability to change the conditions in the home within a period of years. *Barkey v. Alexandria Dep't of Human Servs.*, 2 Va. App. 662, 347 S.E.2d 188 (1986). See *Richmond DSS v. L.P.*, 35 Va. App. 573, 546 S.E.2d 749 (2001) (parent's mental deficiency that prevents care of child does not constitute "good cause" under Va. Code § 16.1-283(C)(2)). But see *In re Neblett*, 50 Va. Cir. 457 (City of Richmond, 1999) (mental illness constitutes good cause). See also *Fields v. Dinwiddie Cnty. DSS*, 46 Va. App. 1, 614 S.E.2d 656 (2005) (termination upheld when schizophrenic mother unwilling to regularly take needed medication). Cf. *In re Pendleton*, No. CJ01-CH1718 (City of Richmond Cir. Ct., Apr. 11, 2002) (when abuse or neglect did not cause child to come into care, mental illness did not justify termination when there was evidence of a willingness to remedy conditions).

21-7.03(c)(1) The Young Parent

A teenage mother's extreme youth does not constitute "good cause" for her failure to comply with the foster care service plan. *Lecky v. Reed*, 20 Va. App. 306, 456 S.E.2d 538 (1995).

21-7.03(c)(2) Poverty

Poverty, per se, does not militate against the termination of parental rights. *DSS for Campbell Cnty. v. Woodruff*, No. 0416-04-3 (Va. Ct. App. Oct. 12, 2004) (unpubl.).

21-7.03(c)(3) Parenting of Other Children

Where two parents had children in foster care but also had two younger children who had not been removed from their care, the court rejected the parents' argument that the fact that they were successfully raising two other children was proof that they were not unfit and therefore should not have their rights to the older children terminated. *Kessler v. DSS*, No. 0452-94-3 (Va. Ct. App. Feb. 14, 1995) (unpubl.). The court ruled that their success with the younger children was a factor to be considered but that the provisions of Va. Code § 16.1-283 provided the framework for evaluating their conduct regarding the children in foster care. The court upheld the termination of the parents' residual parental rights.

Conversely, the Court of Appeals held that termination of parental rights to younger children was not required merely because termination of parental rights to older children with special needs was proper. *Fauquier Cnty. v. Ridgeway*, 59 Va. App. 185, 717 S.E.2d 811 (2011).

21-7.03(c)(4) Imprisoned Parent

The case of the imprisoned parent is one that has caused a lot of difficulty. Incarceration per se does not constitute grounds for terminating that parent's parental rights. *Harris v. Lynchburg Division of Social Services*, 223 Va. 235, 288 S.E.2d 410 (1982). The Court generally has required DSS to show that it has actively considered the potential of the parent to become a caretaker for the child after release from prison, have actively considered the risks and benefits of visitation between the child and the imprisoned parent, and have attempted to provide services to the parent (in accordance with the requirements of *Weaver*). Failure to do these things early in the foster care process may result in delays in getting to termination of residual parental rights. In *Harrison v. Tazewell County DSS*, 42 Va. App. 149, 590 S.E.2d 575 (2004), however, the court held that there was no obligation for the department to provide services to an incarcerated parent.

The Virginia Court of Appeals has also recognized that "it is clearly not in the best interests of a child to spend a lengthy period of time waiting to find out when, or even if, a parent will be capable of resuming [parenting] responsibilities." *Kaywood v. Halifax Cnty. DSS*, 10 Va. App. 535, 394 S.E.2d 492 (1990). *Ferguson v. Stafford Cnty. DSS*, 14 Va. App. 333, 417 S.E.2d 1 (1992). The *Ferguson* court also ruled that "while long-term incarceration does not, per se, authorize termination of parental rights or negate [DSS's] obligation to provide services, it is a valid and proper circumstance which, when combined with other evidence concerning the parent/child relationship, can support a court's finding by clear and convincing evidence that the best interests of the child will be served by termination." *Id.* The courts now appear to accept termination petitions in cases of long-term incarceration, even when the crime involved is unrelated to childcare, due to this time factor. See *Harrison v. Tazewell Cnty.*, 42 Va. App. 149, 590 S.E.2d 575 (2004). See also *Marlowe v. Chesterfield DSS*, No. 1913-99-2 (Va. Ct. App. Feb. 15, 2000) (unpubl.) (although incarcerated mother had made improvements in her life, her expressed plans were insufficient to meet the best interests of the child).

It was an abuse of discretion that resulted in prejudice to the parent for a district court to not grant a continuance when an incarcerated parent, who was participating in a termination hearing by telephone, was made to end her participation by prison authorities. *Haugen v. Shenandoah Valley DSS*, 274 Va. 27, 645 S.E.2d 261 (2007).

21-7.03(d) Abandonment

The fourth scenario for termination of parental rights is found under Va. Code § 16.1-283(D) which authorizes the court to terminate residual parental rights in cases where the child has been abandoned and: (i) either the identity or the whereabouts of the parents cannot be determined; (ii) neither the parent or anyone has come forward to claim a relationship to the child within three months of the child's placement in foster care; and (iii) diligent efforts have been made to locate the parents.

A parent may safely deliver an infant within fourteen days of birth to a hospital or emergency services agency and avoid a civil finding of abuse or neglect. Regardless, for purposes of termination of parental rights and adoption placement, a court may find such conduct constitutes abandonment under this section. Va. Code §§ 16.1-228 and 63.2-100; see section [21-4.01](#).

21-7.03(e) Prior Termination of Parental Rights

The fifth scenario is governed by Va. Code § 16.1-283(E), which authorizes the court to terminate residual parental rights where the court finds that the residual parental rights of the parent regarding a sibling of the child have previously been involuntarily terminated.

21-7.03(f) Criminal Conduct by Parent

The sixth scenario is described in Va. Code § 16.1-283(E), which authorizes termination where the court finds one of the following conditions:

1. The parent has been convicted of murder, or voluntary manslaughter, or a felony attempt, conspiracy, or solicitation to commit any such offense against a child of the parent, a child with whom the parent resided at the time of the offense, or the other parent of the child;
2. The parent has been convicted of felony assault, felony bodily wounding, or felony sexual assault of a child of the parent, or a child with whom the parent resided at the time of the offense. See *M. G. v. Albemarle Cnty. DSS*, 41 Va. App. 170, 583 S.E.2d 761 (2003) (felony sexual assault refers to all felony sexual assault offenses contained in Chapter 4, Article 7, of Title 18.2; termination proceeding need not be continued pending appeal of felony conviction); or
3. The parent has subjected any child to “aggravated circumstances,” defined as torture, chronic or severe abuse, or chronic or severe sexual abuse, if the victim was a child of the parent or a child with whom the parent resided at the time such conduct occurred, including the failure to protect such a child from such conduct, if it: (i) evinces a wanton or depraved indifference to human life, or (ii) resulted in the death of such a child or serious bodily injury to such a child.

21-7.04 Veto of Termination by Child

Virginia Code § 16.1-283(G) states that if the child is fourteen years of age or older, or “otherwise of an age of discretion,” and objects to the termination, then no termination of residual parental rights shall occur. The residual parental rights may be terminated over the objection of the child, however, if the court finds that any disability of the child reduces the child’s developmental age and that the child is not otherwise of an age of discretion.

In *Hawks v. Dinwiddie DSS*, 25 Va. App. 247, 487 S.E.2d 285 (1997), the Court of Appeals reversed a termination decision of the lower court on the grounds that the lower court did not adequately consider whether the eleven-year-old child who was before the court was of sufficient intelligence, judgment, and capacity to have reached an age of discretion and, therefore, be able to object to the termination of her parents’ residual parental rights. *But see Tackett v. Arlington Cnty. Dep’t of Human Servs.*, 62 Va. App. 296, 746 S.E.2d 509 (2013) (no abuse of discretion to find twelve-year-old was not of age of discretion when sufficient evidence of manipulation by biological family); *Harmon v. Richmond Cnty. DSS*, No. 0895-00-2 (Va. Ct. App. Feb. 20, 2001) (unpubl.) (no abuse of discretion to determine eleven-year-old not age of discretion; court not required to interview child); *Akers v. Fauquier Cnty. DSS*, 44 Va. App. 247, 604 S.E.2d 737 (2004) (fact that the trial court made no finding that the child had reached the age of discretion is of no moment). The Court of Appeals held it harmless error that eleven-year-old testified to preference for adoption even though the court did not make finding of age of discretion. *Kenny v. Richmond DSS*, No. 1483-97-2 (Va. Ct. App. June 30, 1998) (unpubl.). Some unpublished cases suggest that the parents must raise this issue before the trial court and preserve it for appeal in order for the Court of Appeals to take it seriously. See *Houston v. City of Newport News Dep’t of Human Servs.*, No. 1456-16-1 (Va. Ct. App. July 11, 2017) (unpubl.). Therefore, for any child who is approaching adolescence, this section

must be seriously considered and addressed by counsel before a termination petition is filed.

When a fourteen-year-old vetoes termination, thereby thwarting adoption, permanency planning can be difficult. The child's objection can effectively leave DSS in limbo without another viable plan if no relatives have been identified and permanent foster care is not an option. One approach to the problem is to have the court approve the goal of adoption but allow DSS some time to provide additional counseling to the child on the concept of adoption and the detrimental effects of the child's objection.

21-7.05 Foster Parent Custody Petition

A circuit court has held that foster parents have no right of intervention in a termination proceeding. *Department of Family Servs. v. Oxley*, No. CH-2005-2256 (Fairfax Cnty. Cir. Ct., Sept. 2, 2005). *But see Welch v. Wise Co. Dep't of Soc. Servs.*, 84 Va. Cir. 245 (Wise Cnty. 2012) (foster parents qualify as persons with a "legitimate interest" in the child and, therefore, have standing to petition for custody).

21-7.06 Availability of an Adoptive Home Irrelevant

The court should not deny a petition to terminate parental rights because DSS cannot guarantee that the child has an adoptive home. Generally, a child cannot be placed on adoption lists until the child is actually freed for adoption. Accordingly, the requirement of the court that DSS have an adoptive placement for the child becomes an impossible task, unless the current foster parents are identified as the adoptive parents. DSS need not have identified an adoptive family prior to filing a termination petition. Va. Code § 16.1-283.

21-7.07 No Special Exception for Children with Special Needs

There is no special exception for the termination of parental rights for children with disabilities who may need care when they are adults. *Harrison v. Tazewell Cnty. DSS*, 42 Va. App. 149, 590 S.E.2d 575 (2004) (child's Down Syndrome not a basis for special consideration of parental rights).

21-7.08 Reasonable Efforts by the DSS

DSS must offer services to the parents that are reasonably calculated to help the parents overcome the specific conditions that led to the child's placement in foster care. DSS fails to comply with a fundamental requirement of Va. Code § 16.1-283 if the plan does not show any effort by the department to offer meaningful services aimed at helping the parents overcome the identified problems. *Weaver v. Roanoke Dep't of Human Res.*, 220 Va. 921, 265 S.E.2d 692 (1980).

In *Fairfax Cnty. Dep't of Family Servs. v. Ibrahim*, No. 0821-00-4 (Va. Ct. App. Dec. 19, 2000) (unpubl.), the department failed to provide the parent with reasonable and appropriate services when it had no contact with the father after he was deported. Services had been offered and rejected prior to incarceration. See *Richmond DSS v. Enriquez*, No. 1650-03-2 (Va. Ct. App. Jul. 13, 2004) (unpubl.) (DSS "gave up too fast" in offering services to mother). In *Tackett v. Arlington Cnty. Dep't of Human Servs.*, 62 Va. App. 296, 746 S.E.2d 509 (2013), however, the court held that the department did not have to provide services to the mother based on her indication to DHS that she was not a placement option and her inconsistent involvement in the child's life.

These cases do not mean, however, that DSS is required to provide services to the parent beyond the twelve-month period through the date of a termination appeal hearing. *Akers v. Fauquier Cnty. DSS*, 44 Va. App. 247, 604 S.E.2d 737 (2004). However, the court must consider the efforts the parent has made to remedy the problems pending the appeal.

21-7.09 The Availability of Relatives as Alternative Placements

DSS has a duty to investigate possible relative placements, and it is insufficient for DSS to argue that no relatives have come forward to offer to take the child. The court may deny termination even though it is clearly proven at trial that the parents have failed to remedy the conditions that had led to the removal of the children from the home if DSS has not explored obvious possible relative placements. *Sauer v. Franklin Cnty. DSS*, 18 Va. App. 769, 446 S.E.2d 640 (1994) (DSS failed to consider grandmother as potential placement even though she was an obvious possible option because father lived with her). A "relative" is not someone with a tenuous connection; it is someone associated with the child by consanguinity (common ancestor), affinity (relationship to a spouse's kindred), or adoption. *Bagley v. City of Richmond DSS*, 59 Va. App. 522, 721 S.E.2d 21 (2012). DSS need not investigate every relative as a potential placement, only those who have been identified by the parents or who have otherwise come forward. Even if a relative is located, the consideration of the relative must include how the relative compares with other placement options. *Logan v. Fairfax Cnty. Dep't of Human Development*, 13 Va. App. 123, 409 S.E.2d 460 (1991). This is an important consideration especially for a very young child who has become bonded with foster parents who are willing to adopt the child. Placement outside the home of those foster parents, even with a fit relative, might be devastating for the child. See *Hawthorne v. Smyth County DSS*, 33 Va. App. 130, 531 S.E.2d 639 (2000), which cites the analysis in *Logan* with approval, and attempts to reconcile the apparent difference in approach and tone between *Sauer* and *Logan*. See also *Rouse v. Russell County DSS*, No. 0944-04-3 (Va. Ct. App. Feb. 15, 2005) (unpubl.) (approved the trial court's one-year postponement of the entry of a custody decree to provide time for an investigation of the appropriateness of placement with relatives by allowing relatives increasing visitation while minimizing the disruption to the child by keeping physical custody with the foster parents).

In 2008, Congress enacted the Fostering Connections to Success and Increasing Adoptions Act, which has a number of provisions to expand local funding under Title IV-E for services that will promote permanency and well-being for children in foster care. Several programs, however, require the state to opt-in and commit matching funds in order to access the federal funding. The law also imposes some requirements that will require legislative and/or policy changes, including a requirement for DSS to notify relatives of children placed in foster care within thirty days of the child's placement. The notice is intended to go out to all adult relatives known to the agency inviting them to contact the agency to be considered a placement for the child or to become involved in the child's life. The notice is also required to seek assistance locating other family members.

21-7.10 Relatives as an Adoptive Placement

Virginia Code § 16.1-283(A) requires the court to consider granting custody of a child to a "person with a legitimate interest," even when it terminates the residual parental rights. As noted above, the case law clearly requires that placement with relatives must first be considered by the court as an alternative to terminating the parents' residual parental rights. Given that, the language in Va. Code § 16.1-283(A) appears to be aimed at those cases where relatives are not willing to become legal custodians of a child if the parents retain their residual parental rights, but are willing to adopt the child. This happens from time to time, where the interested relatives feel that the parents would unduly interfere with the relatives' care of the child if the parents retained residual parental rights. Subsection (A)(1) requires the court to make certain specific findings regarding the ability and willingness of the person with a legitimate interest to properly care for the child to adulthood before awarding custody of the child to that person. These are the same findings required for an award of legal custody of a child to a person with a legitimate interest under Va. Code §§ 16.1-278.2 and 16.1-278.3.

21-7.11 Visitation During Pendency of Termination Proceedings

DSS has the discretion to decide, based upon the best interest of the child and the facts of the case, to suspend visitation between the child and the parent while termination proceedings are pending. See *Toombs v. Lynchburg DSS*, 223 Va. 225, 288 S.E.2d 405 (1982); *Helen W. v. Fairfax Cnty. Department of Human Development*, 12 Va. App. 877, 407 S.E.2d 25 (1991).

21-7.12 Permanent Foster Care Not a Lesser Included Alternative

If the court rejects DSS's request for termination of residual parental rights, it does not have the authority to then authorize the child's placement in permanent foster care as a lesser included alternative. *Martin v. Pittsylvania Cnty. DSS*, 3 Va. App. 15, 348 S.E.2d 13 (1986). Placement in permanent foster care requires a separate petition and hearing.

In *Norfolk DSS v. Hardy*, 42 Va. App. 546, 593 S.E.2d 528 (2004), the court held that it was in the best interests of the child not to terminate the mother's rights when the permanent goal was adoption because the children had bonded so greatly with their foster mother and older brother who also lived with the foster mother. DSS had argued that such a decision results in a de facto permanent foster care placement and that, under the law, a court cannot consider permanent foster care before it terminates parental rights and determines that adoption is not feasible. Va. Code § 63.2-908(B). The court stated that it was not considering a placement of permanent foster care, but was instead considering the best interests of a child under the termination statute and, thus, it was not violating the statute.

21-7.13 Petition to Terminate Parental Rights Required

A petition to terminate parental rights must be filed if a child has been in foster care under the responsibility of the local board for fifteen of the most recent twenty-two months or if: (i) the parent has been convicted of murder or voluntary manslaughter of the parent's child, a child residing in the home, or the other parent of the child; or (ii) the parent has been convicted of felonious assault resulting in serious bodily injury, or felony sexual assault, if the victim was the parent's child or a child residing in the home. Va. Code § 63.2-910.2. Exceptions are made when:

1. the board has placed the child with a relative;
2. the board has documented in the foster care plan a compelling reason why termination is not in the best interests of the child; or
3. the board has not provided the family services or made the reasonable efforts to return the child home to the extent required under Title IV-E of the Social Security Act (see section [21-6.01](#)).

21-7.14 Appeals

Foster care plan approvals by the juvenile court are appealable to the circuit court and the evidentiary standard for foster care cases, including those in which the goal is changed to adoption, is "preponderance of the evidence." *Padilla v. Norfolk DSS*, 22 Va. App. 643, 472 S.E.2d 648 (1996). The statutory right of appeal pursuant to Va. Code § 16.1-296(A) is forfeited if the appellant misses the ten-day deadline, even if entirely by mistake. *Congdon v. Commonwealth*, 57 Va. App. 692, 705 S.E.2d 526 (2011); *Burch v. Alexandria Dep't of Cmty. & Human Servs.*, No. 1269-12-4 (Va. Ct. App. Jan. 29, 2013) (unpubl.).

Termination of parental rights upheld under one subsection of Va. Code § 16.1-283 forecloses the need to consider termination under alternative subsections. *Fields v. Dinwiddie Cnty. DSS*, 46 Va. App. 1, 614 S.E.2d 656 (2005); *Ganthier v. Frederick Cnty. DSS*, No. 0338-13-4 (Va. Ct. App. July 23, 2013) (unpubl.). However, if the court finds that parental rights should be terminated under alternative subsections, the sufficiency of both findings must be challenged on appeal. In *Brown v.*

Petersburg Department of Social Services, No. 0722-16-2 (Va. Ct. App. Feb. 21, 2017) (unpubl.), the Court of Appeals held that it need not consider the appeal of termination of parental rights pursuant to Va. Code § 16.2-283(B), when the court also held rights should be terminated under Va. Code § 16.2-283(C) and the parent failed to challenge the sufficiency of the evidence for those grounds.

The failure of a parent to receive actual notice of the appeal hearing date in circuit court is a violation of due process. *Robinson v. Madison Cnty. DSS*, No. 0778-14-2 (Va. Ct. App. Dec. 23, 2014) (unpubl.).

21-7.14(a) Ninety-Day Hearing Requirement for Termination Cases Appealed to Circuit Court

The requirement in Va. Code § 16.1-296 that appeals from the juvenile court in termination cases be heard by the circuit court within ninety days of the appeal is directory in nature, and is not a jurisdictional requirement. *Boatright v. Wise Cnty. DSS*, 64 Va. App. 71, 764 S.E.2d 724 (2014).

21-7.14(b) The Lack of a Valid Petition Giving the Court Its Original Jurisdiction Over a Child Makes All Subsequent Proceedings and Orders Regarding the Child Void

In *Rader v. Montgomery County DSS*, 5 Va. App. 523, 365 S.E.2d 234 (1988), the Court of Appeals reversed a termination order on the grounds that the court did not have jurisdiction over the children in the matter. The department had originally received custody of these children after it had filed petitions with the local juvenile court seeking custody of the children's half-siblings. The court sua sponte also awarded custody of these other children to the department, even though the department had not filed a petition regarding them. The parents did surrender these children, and the department submitted foster care plans and had court reviews regarding the children before filing the termination petitions. The appeals court ruled that, because there was no underlying petition regarding these children, the court had no jurisdiction to enter its original order giving custody of the children to the department. Therefore, the court subsequently had no jurisdiction over the children in any later proceedings, including the termination proceedings. See *Fredericksburg DSS v. Brown*, 33 Va. App. 313, 533 S.E.2d 12 (2000) (because entrustment agreement was invalid, court had no jurisdiction to terminate parental rights).

21-7.14(c) Concurrent Jurisdiction of the Circuit Court

Under Va. Code § 16.1-244, the circuit court has concurrent jurisdiction to hear a termination of residual parental rights case regarding a child if a matter regarding the care and custody of the child is already pending before the court. *Martin v. Pittsylvania Cnty. DSS*, 3 Va. App. 15, 348 S.E.2d 13 (1986); *Etzold v. Loudoun Cnty. DSS*, No. 2050-90-4 (Va. Ct. App. Sept. 28, 1993). In such a situation, DSS can file its termination petition directly with the circuit court, and is not required to file first in the juvenile court. In *Martin*, the child was in the Department's custody and the mother had appealed the juvenile court's denial of her petition seeking the return of the children to her. She also had appealed the juvenile court's approval of a foster care plan that had a goal of "adoption." While those matters were pending before the circuit court, the department filed its petition for termination of residual parental rights in the circuit court. If a nonsuit is taken in circuit court, jurisdiction remains with the circuit court and the case may not be refilled in a lower court. *Davis v. Cnty. of Fairfax*, 282 Va. 23, 710 S.E.2d 466 (2011).

21-7.14(d) Authority of the Trial Court to Delay Decision

In a number of cases, including *Helen W. v. Fairfax County Department of Human Development*, 12 Va. App. 877, 407 S.E.2d 25 (1991), the Court of Appeals has affirmed the authority of the trial court to defer a decision on a termination petition and provide the parents with additional time to demonstrate whether they can remedy the conditions that led to the child's foster care placement.

21-7.14(e) Preserving Objection for Appeal

In *Dolak v. Virginia Beach Department of Human Services*, No. 0064-12-1 (Va. Ct. App. July 31, 2012) (unpubl.), the Court of Appeals held that parental rights could be terminated despite the parents' absence from the hearing and any due process concerns regarding termination in absentia were not preserved for appeal when parents' counsel merely noted that the order was "seen and objected to."

21-7.14(f) Restoration of Parental Rights

Virginia Code § 16.1-283.2 provides a process for the restoration of a biological parent's previously-terminated parental rights provided a number of conditions can be satisfied. The petition can only be filed if no adoptive family has been identified and can only be filed by DSS or the child's guardian ad litem. If a child over the age of thirteen has expressed an interest in the possibility of parental rights being restored, DSS or the guardian ad litem shall inform the court of such at the foster care review hearing and then must conduct an investigation of the parents and file a petition for restoration if DSS or the guardian deems it appropriate. Va. Code § 16.1-282.2.

21-7.15 Post-Adoption Contact and Communication

Virginia Code §§ 16.1-277.01, 16.1-277.02, 16.1-278.3, 16.1-283.1, 63.2-1228.1, and 63.2-1228.2 authorize and establish procedures governing post-adoption contact and communication agreements (PACCA) between the birth parent or parents of a child and the adoptive parent or parents. PACCA's are intended to support "open" adoption and are targeted for older youth in foster care who have significant emotional attachments to their birth parents and who would object to termination of parental rights thereby preventing adoption. While PACCA's are not to be required as a condition of approving any adoption, DSS may inform the parties of the option to enter into one, even if the parental rights have been involuntarily terminated. Va. Code §§ 16.1-283.1(A), 63.2-1220.2. Failure to comply with the terms of a PACCA shall not affect: (i) the consent to the adoption, (ii) the voluntary relinquishment of parental rights, (iii) the voluntary or involuntary termination of parental rights, or (iv) the finality of the adoption. A PACCA may include, but is not limited to, the sharing of information about the child, including the child's education, health and welfare, and photographs of the child. Such agreements must be approved by DSS and the guardian ad litem and are approved by the circuit court in which a petition for adoption is filed and must be incorporated into the final order of adoption by the circuit court to be enforceable. If the child is fourteen years of age or older, the child must consent to the agreement.

21-7.16 Adoption Progress Reviews

DSS must file a written Adoption Progress Report with the juvenile court on the progress being made to place the child in an adoptive home. The report must be filed with the court every six months from the date of the final order terminating parental rights until a final order of adoption is entered. Va. Code § 16.1-283(F). The court must hold a hearing to review the progress annually and make a determination that DSS is making reasonable efforts to finalize adoption.

21-7.17 Retention of Jurisdiction

Under Va. Code § 16.1-242.1, the juvenile court retains jurisdiction to continue to hear foster care review petitions filed pursuant to Va. Code §§ 16.1-282 and 16.1-282.1 while the case has been appealed to the circuit court, the Court of Appeals, or the Supreme Court.

21-7.18 Guardian Ad Litem as Indispensable Party to Appeal

A guardian ad litem is an indispensable party to an appeal and must receive notice of an appeal pursuant to Rule 5A of the Rules of the Supreme Court of Virginia, or the appeal will be dismissed. *Hughes v. York Cnty. DSS.*, 36 Va. App. 22, 548 S.E.2d 237 (2001). However, all the formalities of the certificate accompanying the notice of appeal do not

have to be met for there to be jurisdiction if in fact a notice was mailed to the guardian ad litem. *M.G. v. Albemarle Cnty. DSS*, 41 Va. App. 170, 583 S.E.2d 761 (2003). The guardian ad litem, however, must be explicitly named in the notice of appeal to perfect the appeal. *Watkins v. Fairfax Cnty. Dep't of Fam. Servs.*, 42 Va. App. 760, 595 S.E.2d 19 (2004).

21-7.19 Admissibility of CASA Reports

The Virginia Court of Appeals, in unpublished decisions, has held that the trial court not only can, but must, consider the CASA reports filed in a TPR case on appeal in the circuit court. The Court of Appeals has noted that Va. Code § 9.1-153 requires the child's advocate to investigate the case, make recommendations, and submit a report to the court. It is proper for the Court to consider those reports even if they contain hearsay evidence. *Holley v. Amherst Cnty. DSS*, No. 3397-02-03 (Va. Ct. App. June 10, 2003) (unpubl.). Furthermore, Va. Code § 9.1-153 requires the advocate to remain on the case until relieved by the Court. Therefore, no reappointment by the circuit court should be necessary. *Nelson v. Petersburg DSS*, Va. Ct. of Appeals Record No. 1343-04-02 (Va. Ct. App. Feb. 22, 2005) (unpubl.).

21-8 CHILDREN'S SERVICES ACT

21-8.01 Background and Importance

The Children's Services Act (CSA), Va. Code §§ 2.2-5200 et seq., is intended to reduce the fragmentation of funding and services provided for children with serious behavior problems who were in, or at risk of, institutional placement. It did this by putting a variety of federal, state, and local funds—special education money, foster care funds, and money that had been used for special programs for delinquent youth—into a "State Fund Pool" and local fund pools throughout the state, to be administered through interagency collaboration for eligible children and families. In addition to providing services to eligible children, local agencies are expected to increase preventive services that will eventually reduce the numbers of children needing more expensive services. Unfortunately, the funds for preventive services are supposed to come from the savings produced by having interagency service delivery. The reality is that service programs for these children are still very expensive and burst a lot of local budgets.

21-8.02 Structure

21-8.02(a) State Level

At the state level are the State Executive Council and the Office of Children's Services (see Va. Code §§ 2.2-2648 and 2.2-2649), which set policies and procedures for localities to follow and distribute and monitor the local use of the State Pool of Funds. Five local government representatives must be members of the Council. The State Executive Council's oversight responsibilities include the development of: (i) a uniform process to be used at the local level to identify levels of risk; (ii) uniform case management standards; (iii) guidelines regarding documentation of services provided; (iv) a dispute resolution and appeals process; and (v) other quality assurance measures. The State Executive Council also has the authority to deny funding to a locality whose Community Policy and Management Team (CPMT) fails to provide services in accordance with the Act or any other state law or policy, or any federal law pertaining to the provision of any funded services. Va. Code §§ 2.2-2648(D) and 2.2-2649.

21-8.02(b) Local Level; Dual Representation by Local Government Attorney

At the local level are two levels of interagency collaboration. The CPMT and one or more Family Assessment and Planning Teams (FAPT or FAP Team) or collaborative, multidisciplinary teams approved by the State Council. Each local government can create this structure, or two or more localities may form teams that serve multiple jurisdictions. Va. Code §§ 2.2-5204, 2.2-5206, 2.2-5209. The LGA Ethics Committee has issued an opinion dated November 29, 2005, on the potential conflicts of interests that local

government attorneys may encounter attempting to represent the interests of both DSS and the CPMT. Such conflicts may arise when disputes occur between DSS and other members of the CPMT about the nature of placements and the cost of treatment for children's infrastructure. In the opinion of the Ethics Committee, the local government attorney is allowed to represent both simultaneously as long as the attorney reasonably believes she can adequately represent both and both clients concur after full and adequate disclosure. The opinion should be read in its entirety by every local government attorney who represents both DSS and CPMTs.

21-8.02(c) Community Policy and Management Team

21-8.02(c)(1) *Composition*

Under Va. Code § 2.2-5205, the CPMT, at a minimum, must be made up of the agency heads, or their designees, of the community services board, juvenile court services unit, department of health, department of social services, and local school division. In addition, there must be a parent representative, a local governing body representative, and a representative of private service providers. See 2020 Op. Va. Att'y Gen. 70 (confirming that CPMT must include a parent representative).

21-8.02(c)(2) *Powers and Duties*

Under Va. Code § 2.2-5206, the CPMT is responsible for developing local interagency policies and procedures on service provision, fiscal management, resource development, procurement, quality assurance, etc. It establishes policies regarding referrals to FAPTs or collaborative, multidisciplinary teams and authorizes the funding of each. It must also report to the state. In addition, the CPMT appoints the members of each FAPT, and must authorize and monitor the expenditure of funds by each FAPT. It must establish a procedure for appeals from a FAPT's family services plan. With the approval of the governing body, a CPMT may contract with another CPMT to purchase coordination services provided that the state pool of funds is not used.

21-8.02(c)(3) *Immunity Protections*

Virginia Code § 2.2-5205 provides all members of a CPMT with immunity from any civil liability for decisions made about the appropriate services for a family or the placement or treatment of a child, unless it is proven that such person acted with malicious intent.

21-8.02(c)(4) *Additional Requirements for Non-Public Agency Members*

Those members who are not representing a public agency must file a "statement of economic interests" as set out in Va. Code § 2.2-3117 of the State and Local Government Conflict of Interests Act and must abstain from any decision in which they have a personal interest, as defined in Va. Code § 2.2-3101.

21-8.02(d) Family Assessment and Planning Team

21-8.02(d)(1) *Composition*

Under Va. Code § 2.2-5207, each FAPT must include a representative from each of the public agencies represented on the CPMT. It must also include a parent representative. See 2020 Op. Va. Att'y Gen. 70 (confirming that CPMT must include a parent representative). It may include a representative of a private provider, but this is not required. At the request of the CPMT, it may include a representative of the department of health.

21-8.02(d)(2) *Powers and Duties*

The FAPT is responsible for reviewing applications for services for children, as well as: (i) determining whether the children are eligible for services under the Act, and (ii) recommending certain services, programs and placements for eligible children. FAPTs must provide for family participation, including foster parents if permanent or long-term foster care is the program goal, in all aspects of assessment, planning and implementation of services. Va. Code § 2.2-5208.

There is no authority under the Act for the use of funds to pay a locality's administrative costs in providing services to children. 1999 Op. Va. Att'y Gen. 3 (deferring to decision of state executive counsel and state management team). A FAPT may not refer a juvenile for services funded under Juvenile Community Crime Control Act (JCA) when CSA funding is available for such purposes. Therefore, when a juvenile is eligible under both JCA and CSA for services that have not yet been funded by either act, the local FAPT may not refer the juvenile for services funded under JCA rather than CSA. 2000 Op. Va. Att'y Gen. 3.

21-8.02(d)(3) Immunity Protections

Virginia Code § 2.2-5207 provides all members of a FAPT with immunity from any civil liability for decisions made about the appropriate services for a family or the placement or treatment of a child unless it is proven that such person acted with "malicious intent."

21-8.02(d)(4) Additional Requirements for Non-Public Agency Members

Those members who are not representing a public agency must file a "statement of economic interests" as set out in Va. Code § 2.2-3117 of the State and Local Government Conflict of Interests Act, and must abstain from any decision in which they have a personal interest, as defined in Va. Code § 2.2-3101.

21-8.03 Eligibility for Services

21-8.03(a) "Eligible" Population—Non-Guaranteed Funding

Virginia Code § 2.2-5212 describes those children and youth who are eligible for services under the Act. This description is very broad and is intended to cover the child or youth who has severe or chronic emotional or behavior problems which requires a unique level of services.

21-8.03(b) Target Population

Virginia Code § 2.2-5211(B) states, however, that of the eligible population, only the following children are the "target population" for funding under the Act:

1. Children and youth placed for purposes of special education in approved private educational programs;
2. Children and youth with disabilities placed by DSS or the Department of Juvenile Justice in private residential facilities or across jurisdictional lines in private education day schools;
3. Children and youth who are receiving foster care services, as defined by Va. Code § 63.2-905;
4. Children and youth placed by a juvenile court in a private or locally operated public facility or nonresidential program, pursuant to Va. Code § 16.1-286, or in a community or facility-based treatment program in accordance with the provisions of subsections (B) or (C) of Va. Code § 16.1-284.1; and
5. Children and youth committed to the Department of Juvenile Justice and placed in a private home or public or private facility under § 66-14.

Not every child or youth in the target population is guaranteed funding. Only "mandated" children or youth must be served.

21-8.03(c) "Mandated" Service Population—Guaranteed Funding

Only children and youth within the "target" population who are in special education and those who are in foster care are entitled to receive whatever funding is necessary from

the local government to provide the services they need. Va. Code § 2.2-5211(C). These children and youth are referred to as the “mandated service population.” Due to the fact that there is no statutory requirement that funding be authorized for any but the “mandated” children, many localities decline to consider providing services except those who are “mandated” for services. The Virginia Attorney General has opined that statutory and constitutional provisions require mandated services pursuant to CSA to be provided to eligible children who are in need of such mental health services without their parents having to relinquish custody to local social services agencies. 2006 Op. Va. Att’y Gen. 206.

21-8.04 Court-Ordered Services

21-8.04(a) Authority to Order Services Contrary to FAPT/CPMT Recommendation/Authorization

Virginia Code § 2.2-5211(E) provides that in any matter before a court for which state pool funds are to be accessed, the court must refer the matter to the CPMT for assessment by a FAPT to determine the recommended level of treatment and services needed by the child and family. However, when the juvenile court considers ordering services for a child to be funded by the Children’s Services Act, the court is required to refer the case, prior to final disposition, to the family assessment and planning team to determine the recommended level of treatment and services needed by the child and family. Upon receiving a request for a level of service not identified or recommended in the initial report submitted by the FAPT, the court must request a second FAPT report characterizing comparable levels of service to the requested level of service. Notwithstanding the provisions of this law, the court may make any disposition as is authorized or required by law and such services shall qualify for funding. See *Fauquier Cnty. DSS v. Robinson*, 20 Va. App. 142, 455 S.E.2d 734 (1995); *S.G. v. Prince William Cnty. DSS*, 25 Va. App. 356, 488 S.E.2d 653 (1997).

21-8.04(b) Appeal of Court-Ordered Services

The agency is entitled to an appeal de novo and an evidentiary hearing before the circuit court pursuant to Va. Code §§ 16.1-278 and 16.1-296 if it contests the order of the JDR court. *Comprehensive Services Act Office of the City of Richmond v. J.M.*, No. 1620-98-2 (Va. Ct. App. Aug. 3, 1999) (unpubl.).

21-9 ADULT PROTECTIVE SERVICES

Virginia Code §§ 63.2-1603 through 63.2-1615 establish the adult protective services system in Virginia. Virginia Code § 63.2-1605 requires localities to provide such services but only “to the extent that federal or state matching funds are made available” to the locality. Key components include those discussed below.

21-9.01 Covered Population

The system is intended to protect adults sixty years old or older and “incapacitated persons,” defined as persons over eighteen “impaired by reason of mental illness, intellectual disability, physical illness or disability, advanced age or other causes to the extent that the adult lacks sufficient understanding or capacity to make, communicate or carry out responsible decisions concerning his or her well-being.” Va. Code §§ 63.2-1603 and 63.2-1605. Creation of multidisciplinary teams, consisting of members of the medical, mental health, social work, nursing, education, legal, and law-enforcement professions, may be created to assist the local department. Va. Code § 63.2-1605(K).

The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, Va. Code §§ 64.2-2100 et seq., establishes a mechanism for resolving multistate jurisdictional disputes regarding adult guardianships and conservatorships. Procedures are provided for determining which jurisdiction is the “home state” having primary jurisdiction, transferring a guardianship or conservatorship to another state, registering orders, and addressing emergency situations. This act is the exclusive jurisdictional basis for a court of the

Commonwealth to appoint a guardian or issue a protective order for an adult. Va. Code § 64.2-2106.

21-9.02 Covered Conditions

The system is intended to provide services to covered adults who are “abused,” “neglected,” or “exploited.” Va. Code § 63.2-1605. These terms are defined in Va. Code § 63.2-100. Importantly, the definition of neglect encompasses self-neglect, and exploitation includes financial exploitation. “Financial exploitation” is defined as “the illegal, unauthorized, improper, or fraudulent use of the funds, property, benefits, resources, or other assets of an adult for another’s profit, benefit, or advantage, including a caregiver or person serving in a fiduciary capacity, or that deprives the adult of his rightful use of or access to such funds, property, benefits, resources, or other assets.” Va. Code § 63.2-1603.

21-9.03 Mandated Reporting

Virginia Code § 63.2-1606 requires medical professionals, mental health workers, social workers, police officers, emergency services personnel, and other identified persons who work in an agency or facility providing care to adults, to make a report to DSS if they have reason to suspect that an adult is an abused, neglected, or exploited adult. Such reporters are also required to make available any information that supports the suspicion of abuse or neglect. Guardians, conservators, and emergency medical services providers are also mandated reporters. Reports may be made to the adult protective services hotline. Failure to report as required can result in civil penalties. Va. Code § 63.2-1606(H). A financial institution may refuse to execute a transaction if its staff believes in good faith that it may contribute to the financial exploitation of an adult or if the staff makes a report or has knowledge that someone else made a report to the adult protective services hotline regarding the proposed transaction. Va. Code § 63.2-1606(L). The institution must report the incident to DSS or the adult protective services hotline within five business days. *Id.* The institution may refuse to execute the transaction for up to thirty business days, and, absent gross negligence or willful misconduct, is immune from civil or criminal liability for refusing to execute the transaction. *Id.*

Any person who is subject to mandatory reporting and who maintains records on a person subject to the report shall provide all “relevant” information and records to investigators as allowed by law. All persons who report, or who subsequently participate in court proceedings arising from such report, are immune from civil or criminal liability unless the report was made in bad faith or with malicious intent.

21-9.04 Investigation; Right of Access; Right to Receive and Refuse Services

Virginia Code § 63.2-1605(B) requires that DSS investigate a valid report within twenty-four hours of when the report is received. If the report alleges sexual abuse, death or serious bodily harm, financial exploitation, or criminal activity involving abuse or neglect that places the adult in imminent danger of death or serious bodily harm, then DSS must notify local law enforcement. Va. Code § 63.2-1605(C). DSS, with the informed consent of the adult or his legal representative, may take or have taken photographs, video recordings, or appropriate medical imaging of the adult and his environment as long as such measures are relevant to the investigation and do not conflict with Va. Code § 18.2-386.1, which establishes limitations on such imaging. Va. Code § 63.2-1605(F). In any case of suspected abuse of an incapacitated person, photographs, X-rays and appropriate medical imaging of such incapacitated person may be taken as a part of the medical evaluation without the consent of the person responsible for the incapacitated person. Va. Code § 63.2-1606.1. Financial institutions must cooperate with the DSS investigation and produce any relevant financial records. Va. Code § 6.2-103.1.

If the worker is denied access to the person or to the home, DSS may petition the circuit court for an order allowing access, entry, or both. The language in this section

indicates that the court can enter such an order through ex parte proceedings. However, it is likely that most judges will insist upon notice, unless it is demonstrated that a true emergency situation exists which requires immediate access.

The adult clearly has the right to reject offered services, even if the investigating worker finds that the adult needs those services. If the worker determines that the adult lacks the capacity to make an informed decision about services, and an emergency exists, DSS can seek a court order for "involuntary" protective services. Va. Code § 63.2-1608. If the adult agrees to services, Va. Code § 63.2-1610(B) specifies that no one can interfere with such services. DSS can petition the court to enjoin such interference.

21-9.05 Confidentiality of Information

Virginia Code §§ 63.2-104 and 63.2-1605(I) provide that adult protective services investigation records are confidential and are not subject to the Virginia Freedom of Information Act. They are still subject to release to "data subjects" under the Government Data Collection and Dissemination Act, however, and may be released to those with a "legitimate interest" in accordance with §§ 63.2-102 and 63.2-104.

21-9.06 Appeals of APS Substantiated Cases

Written findings and actions resulting from adult protective services investigations are not appealable to the Commissioner for Aging and Rehabilitative Services or considered final agency action for purposes of judicial review under the Administrative Process Act. Va. Code § 63.2-1605. Substantiated APS cases are subject to an administrative appeal process provided in [Chapter 8 of the VDSS Adult Protective Services Manual](#). An individual identified as an alleged perpetrator in a substantiated APS case shall be afforded the opportunity to request a review by the local agency director who shall have the authority to sustain, amend, or reverse the findings.

21-9.07 Involuntary Protective Services

If an adult is found to be abused, neglected, or exploited and lacks the capacity to make an informed decision about receiving protective services, there are four statutory mechanisms for attempting to obtain services for that person: (i) emergency protective services order; (ii) appointment of a guardian and/or conservator; (iii) order authorizing medical treatment; and (iv) involuntary commitment for mental health treatment.

21-9.07(a) Emergency Protective Services Order

Virginia Code § 63.2-1609 authorizes the local circuit court to order protective services for an individual if the court makes the following findings, by a preponderance of the evidence: the adult is incapacitated, an emergency exists, the adult lacks the capacity to consent to receive protective services, and the proposed order is supported by the findings of DSS's investigation (or that there are other compelling reasons for ordering services).

21-9.07(a)(1) Appointment of Counsel

The adult has the right to counsel. If the court determines that the adult is indigent or lacks the capacity to waive counsel (a position the department would have to urge on the court, given the nature of the petition), the court shall appoint a guardian ad litem. Va. Code § 63.2-1609(E)

21-9.07(a)(2) Notice and Timing

Virginia Code § 63.2-1609(C) sets out what must be in the petition, which must describe the services being requested. Subsection (D) provides that the petition and notice of hearing must be served on the person and the spouse (or, if no spouse, the nearest next of kin) as well as the alleged perpetrator if the petition alleges the adult has been subjected to an act of violence, force, or threat of financial exploitation. The notice is to be served at least twenty-four hours before the hearing. This twenty-four-hour requirement can be waived by the court in extreme emergencies.

21-9.07(a)(3) The Order**21-9.07(a)(3)(i) Protective Services Specified**

The order must specify the protective services being ordered and must specifically include a finding regarding whether hospitalization or a change of residence is necessary. Va. Code §§ 63.2-1609(B)(1) and (B)(2). The court must find that those services are the least restrictive of the adult's liberty while consistent with the adult's welfare and safety. Va. Code § 63.2-1608(B). Virginia Code § 63.2-1609(B)(2) specifies that it cannot be used as a means to commit someone to a mental health facility.

21-9.07(a)(3)(ii) Temporary Guardian or Conservator Appointed

The order shall appoint the petitioner or another interested person as temporary guardian or conservator, as applicable, with the authority to give consent for the approved protective services. Va. Code § 63.2-1609(B)(4).

21-9.07(a)(3)(iii) Duration of the Order

The order is good for only fifteen calendar days and may be renewed once, for five days, upon a showing that such is necessary to remove the emergency. Va. Code § 63.2-1609(B)(3).

21-9.07(a)(3)(iv) Other Conditions Imposed in the Order

Upon a finding that the adult has been subjected to an act of violence, force, or threat, or been subjected to financial exploitation, the court may include in its order one of several enumerated conditions, including prohibiting contact between the perpetrator and the adult, or other conditions as the court deems necessary to prevent: acts of violence, force, or threat; criminal offenses that may result in injury to persons or property; communication or other contact of any kind by the perpetrator; or financial exploitation by the perpetrator. Va. Code § 63.2-1609(B)(8).

21-9.07(a)(4) Costs of Services

Virginia Code § 63.2-1608(C) states that the adult shall not be required to pay for protective services unless such payment is authorized by the court upon a showing that the person is financially able to pay.

21-9.07(b) Appointment of a Guardian and/or Conservator

Under Va. Code § 64.2-2000 et seq., any person, including DSS, may file a petition in the local circuit court (in the jurisdiction where the person who is the subject of the petition is present or where such person resided before going into the hospital, nursing home, etc.) seeking appointment of a guardian and/or conservator to manage the care of the person and/or estate of a person who is "incapacitated." The guardianship legislation is quite detailed and specific, regarding both procedural and substantive matters, and should be read carefully.

21-9.07(b)(1) Determining Whether a Person Is "Incapacitated"; Evaluation Report of Incapacity

The definitions section (Va. Code § 64.2-2000) provides a functional definition of "incapacitated person." Instead of referring to physical or mental illness or intellectual disability, the definition focuses on the person's functional inability to receive and evaluate information effectively or respond to people and events to such an extent that the person is unable to meet the essential requirements for that person's health, care, safety, or therapeutic needs without a guardian or is unable to manage his or her own financial affairs without a guardian. Virginia Code § 64.2-2005 requires that a report evaluating the condition of the person be submitted to the court prior to the hearing on the petition. This section requires that the report contain certain specific information. The court may waive submission of such a report only upon good cause shown and absent any objection by the guardian ad litem.

21-9.07(b)(2) Notice and Hearing

Under Va. Code § 64.2-2004, the person for whom a guardian or conservator is sought must be personally served with the petition and with notice of the hearing on the petition. A certification that the guardian ad litem personally served the respondent is valid personal service. Notice is jurisdictional; therefore, failure to serve cannot be remedied by the person's appearance at the hearing.

21-9.07(b)(3) Expanded Role of the Guardian Ad Litem

Under Va. Code § 64.2-2003, the guardian ad litem is required to conduct an independent investigation and to make a written report and recommendations to the court. Health care providers are required to provide needed information to the guardian ad litem. Va. Code § 64.2-2003.

21-9.07(b)(4) Paying the Guardian Ad Litem

Under Va. Code § 64.2-2008, if the adult who is the subject of the petition is determined by the court to be indigent, the fees and costs of the proceeding—including the fee of the guardian ad litem—are paid by the Commonwealth.

21-9.07(b)(5) Shaping the Powers of the Guardian/Conservator to Meet the Needs of the Incapacitated Person

The guardianship legislation emphasizes the importance of limiting the powers of the guardian/conservator to match the needs of the incapacitated person. The definitions section includes a definition of "limited conservator" and "limited guardian," and Va. Code § 64.2-2009 emphasizes that a conservator need not be appointed for a person who has appointed an agent under a durable power of attorney or whose only major source of income is from a government benefit program and the person has a representative payee. In cases where the person has very little income, it is best to try to arrange for a representative payee, since the costs of a bond, court fees and commissioner's fees for annual accountings will eat into what little estate is there.

21-9.07(b)(6) Burden of Proof

The court's findings in a guardianship petition must be supported by clear and convincing evidence.

21-9.07(b)(7) Periodic Review Hearings

Beginning July 1, 2023, the court shall set a schedule in the order of appointment for periodic review hearings, to be held no later than one year after the initial appointment and no later than every three years thereafter, unless the court orders that such hearings are to be waived because they are unnecessary or impracticable or that such hearings shall be held on such other schedule as the court shall determine. Va. Code § 64.2-2009(A1). A periodic review hearing shall include the following assessments by the court: (i) whether the guardian or conservator is fulfilling his duties and (ii) whether continuation of the guardianship or conservatorship is necessary and, if so, whether the scope of such guardianship or conservatorship warrants modification. Va. Code § 64.2-2009.1.

21-9.07(c) Judicial Authorization of Treatment

Virginia Code § 37.2-1101 authorizes either the circuit court or the general district court to order treatment for a mental or physical disorder for an adult person, even if that person objects to the treatment. Additionally, a court may order the temporary detention (for up to twenty-four hours) of a person who is incapable of making informed consent because of a physical or mental condition, to undergo testing, observation, or treatment necessary to avoid harm. Va. Code § 37.2-1104.

21-9.07(c)(1) Petition and Procedure

Any person, including DSS, can seek court authorization for needed treatment for a person. Jurisdiction lies where the person resides or is located, or where the proposed

place of treatment is located. The petition and notice of hearing must be served on the person and next of kin (though notice to next of kin can be waived if the person is a patient in a hospital at the time the petition is filed). If treatment is necessary to prevent imminent or irreversible harm, the court in its discretion may dispense with the requirement of providing notice. Counsel must be appointed for the person following the filing of the petition (unless counsel is retained).

21-9.07(c)(2) Findings Required

Under Va. Code § 37.2-1101(G), the court must make the following findings by clear and convincing evidence:

1. There is no person with legal authority under the Health Care Decisions Act, Va. Code § 54.1-2981 et seq., human rights regulations adopted pursuant to Va. Code § 37.2-400, or other applicable law, who is available to consent;
2. The person for whom treatment is sought is “incapable of making an informed decision” (which is defined in the definitions section of the statute) regarding treatment (also defined) or is physically or mentally incapable of communicating such a decision;
3. The person is unlikely to become capable of making an informed decision or communicating an informed decision within the time required for decision; and
4. The proposed treatment is in the best interest of the patient, is medically and ethically appropriate, and is not contrary to an advance medical directive or the person’s religious beliefs or preferences expressed before becoming incapacitated.

21-9.07(c)(3) Limitations on What the Court Can Authorize

The court cannot use this section to authorize nontherapeutic sterilization, abortion, psychosurgery, or admission to a mental retardation facility or psychiatric hospital. Also, it cannot be used to authorize the administration of psychotropic (antipsychotic) medications over the person’s objection, unless the person’s admission to a mental retardation facility or psychiatric hospital has been or is being authorized, or the person is being involuntarily committed to a psychiatric hospital. Such orders for psychotropic medications are good for a maximum of 180 days, and only for so long as the person remains institutionalized. Va. Code § 37.2-1102.

In those cases in which the person needs services but has been found by the person’s attending physician to be incapable of giving informed consent to them, but is not objecting to services, Va. Code § 54.1-2986 specifically allows relatives, in a specified order of priority, to provide valid substitute consent for the provision, withholding and withdrawal of medical treatment, including surgery and “life-prolonging procedures.” In addition, some of these persons may have provided “advance medical directives” specifically setting out what treatment they want in certain situations or appointing an agent to make those decisions for the person. See Va. Code § 54.1-2981 et seq.

21-9.07(d) Involuntary Admission to a Psychiatric Hospital

Both dementia and depression are increasingly common experiences among the long-living elderly. A rapid deterioration in a person’s condition, especially when that person is refusing medication and other treatment or services, may necessitate involuntary hospitalization, which is covered under Va. Code § 37.2-808 et seq. For a case addressing several substantive and procedural challenges to this process, see *Raub v. Bowen*, 960 F. Supp. 2d 602 (E.D. Va. 2013) (motion to dismiss and qualified immunity denied); sub

nom *Raub v. Campbell*, No. 3:13CV328-HEH (E.D. Va. Jan. 14, 2014) (no false imprisonment or negligence claims stated); 3 F. Supp. 3d 526 (E.D. Va. 2014) (holding no First or Fourth Amendment violations); 785 F.3d 876 (4th Cir. 2015) (qualified immunity for Fourth Amendment claim; no violation of First Amendment).

21-9.07(d)(1) Petition and Procedure

Pursuant to Va. Code § 37.2-808, a magistrate who finds, based upon such a petition filed by “any responsible person,” treating physician, or on the magistrate’s own motion, that there is probable cause to believe that a person: (i) is mentally ill; (ii) is in need of hospitalization; and (iii) either presents an imminent danger to self or others or is so seriously mentally ill as to be substantially unable to care for self, the magistrate may issue an emergency custody order authorizing that, if such person is incapable of volunteering or unwilling to volunteer to go for treatment, such person be taken into custody and transported to a “convenient location” for evaluation by a person designated by the local community services board. A police officer has independent authority to take such a person directly into custody if the officer has probable cause to make the same findings. A person can be kept in custody for no more than eight hours under this procedure (with a possible four-hour extension) and cannot be kept beyond that period unless a temporary detention order is issued pursuant to Va. Code § 37.2-809 or § 37.2-1104.

Under Va. Code § 37.2-809, a magistrate may issue a temporary detention order (TDO) without an emergency custody proceeding. However, no TDO can be issued until there has been an in-person evaluation of the person by a designee of the local community services board. An exception is allowed in cases where there is significant physical, psychological, or medical risk to the person or others from doing this. The magistrate is authorized to issue a temporary detention order (TDO) if it “appears” to the magistrate, “from all evidence readily available,” that the person: (i) is mentally ill; (ii) is in need of hospitalization; (iii) either presents an imminent danger to self or others or is so seriously mentally ill as to be substantially unable to care for self; and (iv) is incapable of volunteering or unwilling to volunteer for treatment. Va. Code § 37.2-809(B).

If the community services board designee recommends that that the person not be subject to a TDO, the designee must so notify the TDO petitioner, the person who initiated the emergency custody order (if present), and an onsite physician. If the person who initiated the custody order disagrees with that recommendation, that person has the right to communicate with the magistrate prior to the expiration of the emergency custody order and the magistrate must consider any information provided by that person as well as the recommendation of the community services board designee and the onsite physician in determining whether to grant the TDO. Va. Code § 37.2-809(L).

The detention order can direct the person’s transportation to and treatment in a medical facility if such is needed prior to placement. In jurisdictions served by police departments, the police department rather than the sheriff is to execute both emergency custody and temporary detention orders and to provide transportation pursuant to such orders. Va. Code § 37.2-810. If a town does not have its own police department, then the responsibility for the orders and accompanying transportation falls to the county police department if there is one, and to the sheriff’s office if there is not. 2011 Op. Va. Att’y Gen. S-2.

If there is no availability for custody in a local temporary detention facility, the person is transported to the state facility for the area in which the community services board is located. That state facility may search for an alternate facility if it does not have capacity, but in no event can a state facility fail to admit a person subject to a TDO unless an appropriate alternative facility agrees to accept custody. Va. Code § 37.2-809.1. The Attorney General has opined that there is no legal authority for law enforcement to

continue custody of an individual pursuant to a TDO beyond the length of time specified in § 37.2-809(H). 2022 Op. Va. Att’y Gen. 61.

The crucial role of the community services board pre-screener makes it vital for DSS to develop a good working relationship with the local community services board staff (including contractors), and to make sure that there is a good mutual understanding of geriatric mental health issues. In many jurisdictions, the emphasis of pre-screeners is on the “dangerousness” criterion for detention and commitment, with insufficient emphasis on the criterion of “substantially unable to care for self,” which will most often apply to elderly persons. It is very important to educate staff on the mental health problems experienced by the elderly.

21-9.07(d)(2) Court Hearing

At the beginning of the hearing, the district court judge or special justice must inform the person of that person’s right to apply for voluntary admission and treatment (per Va. Code § 37.2-805) and shall afford the person the opportunity for voluntary admission. The judge must then determine if the person is both willing and capable of seeking voluntary admission. If the person is willing and capable, the judge “shall require him to accept voluntary admission” for a minimum period of up to seventy-two hours. After that period, if the person wants to leave the hospital, the person must give the hospital forty-eight hours’ advance notice (during which time the hospital can seek involuntary commitment, if the person still meets commitment criteria).

If the judge finds that the person is either unwilling or incapable of accepting voluntary admission, the judge moves to the involuntary commitment phase of the hearing. Va. Code §§ 37.2-814 to 37.2-816 require that the person be represented by counsel, and that the person receive an independent examination and report by a certified psychiatrist, psychologist or other mental health expert meeting the requirements of the section. A “prescreening” report from the local community services board is also required. Normally, arrangements for all of these things have already been made before the first phase of the hearing. The involuntary commitment petitioner may be the community service board pre-screener. 2005 Op. Va. Att’y Gen. 127.

In order to commit a person to a mental health facility, the judge must find by clear and convincing evidence that: (i) the person presents an imminent danger to himself or others as a result of mental illness or has been proven to be so seriously mentally ill as to be substantially unable to care for himself, and (ii) the alternatives to involuntary confinement and treatment have been investigated and deemed unsuitable and there is no less restrictive alternative to institutional confinement and treatment. The order is effective for a maximum of 180 days. Va. Code § 37.2-817. This section does allow the option of “outpatient commitment” if the court finds that the person is capable of understanding and complying with an outpatient treatment plan and the person at the hearing agrees to comply. The court may order outpatient treatment, night treatment at a hospital, day treatment in a hospital, or other alternatives. However, if the person does not comply with the outpatient commitment order, the person cannot automatically be hospitalized. New notice and an additional hearing must be held to determine whether the person continues to meet commitment criteria.

If a person has at least twice within thirty-six months been voluntarily or involuntarily committed or temporarily detained and is now voluntarily or involuntarily admitted or temporarily detained, a physician, community services board, or family member may file a motion seeking mandatory outpatient treatment pursuant to Va. Code § 37.2-817(D). A hearing must be held on the motion within seventy-two hours. Va. Code §§ 37.2-805 and 37.2-817(C).

A commitment order does not by itself authorize the administration of psychotropic medications to a person—even an involuntarily committed person—who objects to the medications. In order to receive court authorization for such treatment, a separate petition must be filed (simultaneously with, or after, the filing of the commitment petition) seeking judicial authorization for such treatment, under Va. Code § 37.2-1101. Note as well that if the person is committed and is incapable of giving informed consent to treatment, but is not objecting to treatment, family members can provide substitute consent as provided for in Va. Code § 54.1-2986. In addition, all public psychiatric and mental retardation facilities have a process for appointment of an “authorized representative” to make treatment decisions for an incapacitated person.

Absent a further petition, a court’s jurisdiction over involuntary commitment ends 180 days after the commitment order is entered. *Inova Health System v. Grandis*, 268 Va. 437, 603 S.E.2d 876 (2004).

If the order is appealed to the circuit court pursuant to Va. Code § 37.2-821, the circuit court makes a de novo evaluation of the evidence as of the date of the circuit court hearing, not the date of admission or the date of the lower court’s hearing. *Paugh v. Henrico Area Mental Health Servs.*, 286 Va. 85, 743 S.E.2d 277 (2013).

21-9.07(d)(3) Transportation

Once a person has been ordered to be admitted to a facility under Va. Code § 37.2-817, the judge or special justice must determine whether transportation shall be provided by the sheriff or by an alternative transportation provider. Va. Code § 37.2-829. The statute requires that transport shall commence within six hours after notification of the order to the sheriff or alternative transportation provider. *Id.* If a facility of commitment is not identified in the commitment order, the Commissioner of the Department of Behavioral Health and Developmental Services must designate a facility in sufficient time to permit transport to commence within six hours of notification of the order; the sheriff may not delay transportation. 2023 Op. Va. Att’y Gen. S-3.

If the officer believes that custody and transportation of the person can be accomplished safely by an alternative transportation, the officer may contact the magistrate and request that the transportation provider specified in the TDO be changed. The magistrate should change the transportation provider to the identified alternative transportation provider upon finding that the alternative provider is available, willing, and able to provide transportation in a safe manner. 2022 Op. Va. Att’y Gen. 78.