CHAPTER 3 - JUVENILE AND DOMESTIC RELATIONS PROCEDURES

I. INTRODUCTION

This chapter is designed to enable the Virginia magistrate to better understand the juvenile arrest process, bail procedures as they relate to juveniles, the salient issues involving the processing of domestic violence and other cases involving acts of violence, force or threats, and the issuance and processing of appropriate protective orders in these cases. The procedures which magistrates must follow when processing juvenile cases differ considerably from the approach magistrates take in hearings involving adults. The commentary will review the specific statutes in Title 16.1 that pertain to the magistrate's role in juvenile cases. The Juvenile Reform Act of 1996 significantly changed the role of magistrates in dealing with juvenile cases. With the changes to Title 16.1, the magistrate will conduct probable cause and bail hearings involving juvenile offenders more frequently than in the past. In these cases the magistrate must base his or her decision to issue such a criminal warrant both on criteria set forth in Title 16.1 and on probable cause as discussed elsewhere in this manual. This chapter also examines the options available to a complainant in domestic violence and stalking cases. The public usually is unaware of the civil remedies that the statutes give to domestic violence and stalking victims. Magistrates need to have a full understanding of these options to better assist complainants who may choose these remedies in lieu of a criminal action or in conjunction with one.

II. PHILOSOPHY OF THE JUVENILE JUSTICE SYSTEM

From the beginning of the juvenile court in 1899, the emphasis has been on a distinctive approach to the problems of juvenile offenders with the focus being on treatment and rehabilitation rather than punishment. The jurisdiction of the original juvenile court system gradually expanded to include the concerns of children who were in conflict with parents or schools, were orphaned, or had been abused or neglected. The emphasis of the evolving juvenile court system was still based upon attempting to obtain a result "in the best interest of the child."

The Virginia General Assembly has similarly been concerned with philosophy and purpose. The legislature made significant changes in the philosophy of the juvenile court system by enacting amendments to existing juvenile law. Virginia Code § 16.1-227 expresses the purpose and intent of Chapter 11 of Title 16.1 dealing with the juvenile and domestic relations district courts. This legislative intent is important as it assists the juvenile court system in determining the policy behind the statutes set forth in Chapter 11. While in the past, the welfare of the child and family was the primary concern of Virginia in matters involving juveniles, the more recent statutory changes now focus on the safety of the community and the rights of victims, as well. Virginia Code § 16.1-227 specifically provides that the juvenile and domestic relations district court law is to be construed liberally and as remedial in character. The powers conferred under the chapter are intended to be general so as to affect the beneficial purposes of the enactment. It is the intention of the enactments that in all proceedings

the welfare of the child and the family, the safety of the community, and the protection of the rights of victims are of paramount concern.

As stated, the juvenile and domestic relations district court law shall be interpreted and construed so as to effectuate the following purposes:

1. To divert from the juvenile justice system, to the extent possible, consistent with the protection of the public safety, those children who can be cared for or treated through alternative programs;

2. To provide judicial procedures through which the provisions of this law are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other rights are recognized and enforced;

3. To separate a child from such child's parents, guardian, legal custodian or other person standing in *loco parentis* only when the child's welfare is endangered or it is in the interest of public safety and then only after consideration of alternatives to out-of-home placement which afford effective protection to the child, his family, and the community; and

4. To protect the community against those acts of its citizens, both juveniles and adults, which are harmful to others and to reduce the incidence of delinquent behavior and to hold offenders accountable for their actions.

The magistrate should consider these basic policies to insure the welfare of the child and the family by:

- diverting non-criminal cases where possible;
- providing due process through a fair hearing;
- avoiding the separation of a child from his or her parents, and doing so only when required for the child's welfare or the public safety; and
- protecting the community from acts that are harmful to others.

III. JURISDICTION OF THE JUVENILE COURT

A. Age Jurisdiction

1. The juvenile court has jurisdiction over matters involving juveniles.

2. Virginia Code § 16.1-228 defines the terms "child," "juvenile," or "minor" as a person under the age of eighteen years.

3. The juvenile and domestic relations district court retains jurisdiction over a person 18 years of age but under 21 if such person committed the delinquent act when he was under the age of 18.

   a. In such cases, the case will be initiated through a petition and the magistrate is not involved in the process unless (1) the complainant appeals the decision of an intake officer, or (2) the judge or intake officer is unavailable and the court is closed as explained later in this chapter, or (3) the defendant has been previously convicted as an adult.

   b. For example, the accused commits an act designated as a crime when he or she was seventeen years and eleven months old. At the time the complainant seeks a criminal process against the accused, the accused is 20 years and three months old. Under this scenario, the juvenile and domestic relations district court would have jurisdiction over the case since the accused was a juvenile at the time he or she committed the criminal act. Consequently, the complainant would have to seek a petition to institute proceedings against the accused.

   c. Virginia Code § 16.1-242 states that a person who committed a delinquent act while under the age of 18 is treated as an adult if the prosecution for the crime is commenced after the person turns 21 years of age. *See* also dicta in Southerly v. Commonwealth, 33 Va. App. 650, 536 S.E.2d 452 (2000). Therefore, the magistrate would treat this situation like any other case involving an adult defendant.

   d. Pursuant to Va. Code § 16.1-271, the juvenile and domestic relations district court loses jurisdiction over crimes committed by a juvenile once the circuit court convicts the juvenile as an adult under the provisions of Chapter 11 of Title 16.1.

   e. The juvenile and domestic relations district court still retains criminal jurisdiction over a juvenile who has been convicted as an adult if such juvenile commits an offense against the person of a juvenile or commits an offense against a family or household member. *See* Subsection C of Va. Code § 16.1-269.6.

B. Venue (Territorial Jurisdiction)

Where delinquency is alleged, the case must commence in the city or county where the alleged acts occurred, or may, with the written consent of the child and the attorney for the Commonwealth for both jurisdictions, commence in the city or county where the juvenile resides. *See* Subsection A.1.a.of Va. Code § 16.1-243.

C. Subject Matter Jurisdiction

The General Assembly has given the juvenile and domestic relations district court extensive jurisdiction. The magistrate does not handle all cases that fall within the subject matter jurisdiction of the juvenile and domestic relations district court.

For example, Va. Code § 16.1-241 gives the court jurisdiction over child custody, child support, visitation, termination of parental rights, emancipation of minors, child abuse or neglect, juvenile work permits, emergency surgical or medical treatment matters involving children, and admission of minors for inpatient treatment in a mental health facility. With the exceptions of issuing emergency custody orders and temporary detention orders under the Inpatient Treatment of Minors Act and of issuing criminal process in certain situations involving custody, visitation and support, the magistrate has no role in the above issues.

Other subject matters over which the juvenile and domestic relations district court has jurisdiction are:

1. Delinquency

   Virginia Code § 16.1-241 A.1 gives the juvenile court original and exclusive jurisdiction over all delinquent acts committed by a juvenile.

   - Pursuant to Va. Code § 16.1-271, however, once the circuit court convicts the juvenile as an adult under the provisions of Chapter 11 of Title 16.1, the juvenile and domestic relations district court does not have jurisdiction over this juvenile in future criminal proceedings. *See* also Broadnax v. Commonwealth, 24 Va. App. 808 (1997).

   - Virginia Code § 16.1-228 defines "delinquent act" as: "(i) an act designated as a crime under the law of this Commonwealth, or an ordinance of any city, county, town or service district, or under federal law, (ii) a violation of § 18.2-308.7 or (iii) a violation of a court order as provided for in § 16.1-292, but is designated a crime only if committed by a child. For purposes of § 16.1-241 and § 16.1-278.9, the term shall include a refusal to take a blood or breath test in violation of § 18.2- 268.2 or a similar ordinance of a county, city or town."

   Under most circumstances, the complainant must file a DC-511, PETITION when a juvenile commits a delinquent act. The petitioner must file the petition either with the court or with an intake officer of the court services unit.

   Subsections H.1 and H.3 of Va. Code § 16.1-260 state that a petition is not necessary in the following cases:

   a. Violations of traffic laws including offenses involving bicycles, hitchhiking, and other pedestrian offenses;

b. Game and fish laws;

c. Local ordinances involving surfing, curfew, animal control, or littering;

d. At the scene of a motor vehicle accident or at any other location where a juvenile who is involved in such an accident may be located;

e. Driving under the influence (Va. Code § 18.2-266) or boating under the influence (Va. Code § 29.1-738) if the officer releases the juvenile to the custody of a parent or legal guardian;

f. Alcohol related offenses;

g. Offenses that would constitute a Class 3 or 4 misdemeanor if committed by an adult;

h. Refusing to take a breath or blood test.

- In the first three case types above, the arresting officer has the authority to issue a summons to the juvenile.
- In the case types listed in letters d. through g., the arresting officer has the authority to issue a summons if he can release the juvenile to the custody of a parent or legal guardian.
- In the case type listed in the letter h., the magistrate has the authority to issue a summons.

2. Traffic Infractions

Virginia Code § 16.1-241 A.6 gives the juvenile and domestic relations district court jurisdiction over juveniles charged with traffic infractions.

3. Child in Need of Services

Virginia Code § 16.1-228 defines "child in need of services" as a child

- whose behavior, conduct, or condition presents or results in a serious threat to the well-being and physical safety of the child; or
- a child under the age of 14 whose behavior, conduct or condition presents or results in a serious threat to the well-being and physical safety of another person, and

  - the conduct presents a clear and substantial danger to the child's life or health; **or**

- the child or his or her family is in need of treatment, rehabilitation or service not being received; **and**

- the intervention of the court must be essential to provide the treatment, rehabilitation, or services needed. This category does not apply to the child under spiritual care through prayer in accordance with the tenets and practices of a recognized church or religious denomination, or to the child solely because he or she runs away from home because of physical, emotional, or sexual abuse.

4. Child in Need of Supervision

   Virginia Code § 16.1-228 defines a "child in need of supervision" as:

   - "A child who, while subject to compulsory school attendance, is habitually and without justification absent from school, and (i) the child has been offered an adequate opportunity to receive the benefit of any and all educational services and programs that are required to be provided by law and which meet the child's particular educational needs, (ii) the school system from which the child is absent or other appropriate agency has made a reasonable effort to effect the child's regular attendance without success, and (iii) the school system has provided documentation that it has complied with the provisions of § 22.1-258; or

   - A child who, without reasonable cause and without the consent of his parent, lawful custodian or placement authority, remains away from or deserts or abandons his family or lawful custodian on more than one occasion or escapes or remains away without proper authority from a residential care facility in which he has been placed by the court, and (i) such conduct presents a clear and substantial danger to the child's life or health, (ii) the child or his family is in need of treatment, rehabilitation or services not presently being received, and (iii) the intervention of the court is essential to provide the treatment, rehabilitation or services needed by the child or his family."

   - "Incorrigibility" and the commission of an offense that would not be a crime if committed by an adult are not included in the definitions of child in need of services or child in need of supervision.

5. Status Offenses

   Status offenses are acts committed by juveniles that would not be crimes if committed by adults. Tobacco and curfew violations are examples of status offenses.

6. Adult Offense Committed Against a Child

   Pursuant to subsection I of Va. Code § 16.1-241, the juvenile and domestic relations district court has original and exclusive jurisdiction over adults charged

   - with the ill-treatment, abuse, abandonment, or neglect of a child; or
   - with any violation of law which causes or tends to cause a child to come within the purview of the law; or
   - with any other offense against the **person** of a child.
     - Offenses against the person of a child do not include offenses against the property of a juvenile. 1974-75 VA Op. Att'y Gen. p. 49, May 19, 1975; 1974-75 VA Op. Att'y Gen. p. 225, July 25, 1974.
     - The general district court has jurisdiction over offenses against the property of juveniles committed by a person who is not a family or household member as defined by Va. Code § 16.1-228.
     - For example, if John Hill, age 20, steals a bicycle belonging to Jimmy Smith, age 15, from the front yard of the Smith's residence, the general district court has jurisdiction of the case. If, however, John Hill takes the bicycle away from Jimmy Smith at knifepoint, the juvenile and domestic relations district court has jurisdiction, since the crime of robbery is one against the person of the victim.
   - When the charge is a felony, the juvenile and domestic relations district court's jurisdiction is limited to the holding of a preliminary hearing to determine the existence of probable cause.

7. Offenses Where One Family Or Household Member Is Charged With An Offense In Which Another Family Or Household Member Is The Victim.

   See the section in this chapter "Procedures For Domestic Violence Cases."

8. Violations of Protective Orders

   See the section in this chapter "Procedures For Domestic Violence Cases."

9. Desertion and Non-Support

   Pursuant to subsection E of Va. Code § 16.1-241, the juvenile and domestic relations district court has jurisdiction over cases involving persons charged with deserting, abandoning, or failing to provide support for any person, adult or juvenile, in violation of law.

10. Parents

Pursuant to subsection F of Va. Code § 16.1-241, the juvenile and domestic relations district court has jurisdiction over parents of a child who has been adjudicated in need of services, in need of supervision, or delinquent if the parents have caused, encouraged or contributed to the child's conduct.

IV. ARREST WARRANT AND BAIL PROCEDURES FOR JUVENILES

A. Arrest Warrant Procedures

Virginia Code § 16.1-255 states that only a judge of the juvenile and domestic relations district court, intake officer of such court, and a magistrate may issue a detention order for a juvenile. The statute further states that "In matters involving the issuance of detention orders, each state or local court service unit shall ensure the capability of a prompt response by an intake officer who is either on duty or on call."

1. Appeal From An Intake Officer

Subdivision 1 of Va. Code § 16.1-256 authorizes the magistrate to issue a warrant for a juvenile on appeal from a decision of an intake officer as provided in subsection E of Va. Code § 16.1-260.

Under subsection E of Va. Code 16.1-260, the intake officer must first refuse to authorize a petition for lack of probable cause for an offense that would be punishable, if committed by an adult, as a Class 1 misdemeanor, or Felony. If the intake officer refused to authorize the petition for some other reason other than lack of probable cause, such as diversion, that decision is not appealable to the magistrate.

a. The intake officer then must notify the complainant in writing at the time of refusal that the complainant may appeal the refusal directly to a magistrate.

b. The magistrate should ask the complainant for a copy of the written notice that the intake officer issued at the time of the denial of the petition. The complaint to the magistrate must be made within 10 days of the written denial.

c. If the magistrate finds probable cause that the juvenile committed the Class 1 misdemeanor or felony, the magistrate must issue a warrant returnable to the juvenile and domestic relations district court.

2. Unavailability Of Intake Officer Or Judge

Pursuant to subdivision 2 of Va. Code § 16.1-256 the magistrate also may issue a warrant for a juvenile under the following circumstances:

a. The magistrate finds probable cause that the child is in need of services or delinquent.

1) Virginia Code § 16.1-228 defines "delinquent act" as:

"(i) an act designated as a crime under the law of this Commonwealth, or an ordinance of any city, county, town or service district, or under federal law, (ii) a violation of § 18.2-308.7 or (iii) a violation of a court order as provided for in § 16.1-292, but is designated a crime only if committed by a child …"

2) Virginia Code § 16.1-228 defines a "child in need of services" as a

"(i) child whose behavior, conduct, or condition presents or results in a serious threat to the well-being and physical safety of the child or (ii) a child under the age of 14 whose behavior, conduct or condition presents or results in a serious threat to the well-being and physical safety of another person . . ."

However, to find that a child falls within these provisions, (i) the conduct complained of must present a clear and substantial danger to the child's life or health or to the life or health of another person, (ii) the child or his family is in need of treatment, rehabilitation or services not presently being received, and (iii) the intervention of the court is essential to provide the treatment, rehabilitation or services needed by the child or his family.

b. The juvenile and domestic relations district court **must be closed**, and

c. The judge and the intake officer of the juvenile and domestic relations district court are **not reasonably available**.

1) The phrase "not reasonably available" means that "neither the judge nor the intake officer of the juvenile and domestic relations district court could be reached after the appearance by the juvenile before a magistrate or that **neither could arrive within one hour** after he was contacted."

2) The questions posed in an Attorney General Opinion to Campbell, dated 4/8/82 (1981-82, page 21) are as follows: "*You have referred to § 16.1-256 of the Code of Virginia (1950), as amended, and asked whether telephone authority is sufficient to permit a magistrate to issue a warrant of arrest for a juvenile when the juvenile and domestic relations district court is not open, but the judge, intake officer, or clerk thereof has been reached. You specifically inquire if it is necessary for such officer to come to the*

magistrate's office and direct in person that a warrant be issued, or whether this can be accomplished by a telephone call to the magistrate wherein he is directed to issue the warrant." The Attorney General responded: *"I am of the opinion the statutory provision must be interpreted to require one of the officials to personally take action, unless they are not "reasonably available" (as defined by the Code section in question). This is a statute of limitation upon the issuance of a warrant by a magistrate. The section does not grant authority to the officer to authorize the magistrate, by telephone, to issue the warrant, but clearly contemplates that the officer, if reached and available, personally act in accordance with the authority given him in § 16.1-246, relating to the taking of a child into immediate custody. It is my opinion, therefore, in the circumstances you describe, that the magistrate is not authorized to issue the warrant on the basis of a telephone call from the judge, intake officer or clerk."*

3) Based on the opinion of the Attorney General, a magistrate should not issue a warrant for a juvenile under subdivision 2 of Va. Code § 16.1-256 unless law enforcement either could not contact the judge or intake officer of the local juvenile and domestic relations district court, or if contacted, neither could arrive within one hour to handle the case.

4) Virginia Code § 16.1-235.1 allows a chief judge to arrange for a replacement intake officer from another court service unit to ensure the capability of a prompt response in matters under Va. Code §§ 16.1-255 or 16.1-260 during hours the court is closed. The replacement intake officer has all the authority and power of an intake officer of that district when authorized in writing by the appointing authority and by the chief judge of that district.

5) Virginia Code § 16.1-255 allows a child to appear before an intake officer either by personal appearance before the intake officer or by the use of two-way electronic video and audio communication.

d. Provided that the facts of the case meet the provisions of subdivision 2 of Va. Code § 16.1-256, the magistrate may issue a warrant for any criminal charge, whether it be a misdemeanor or felony. The magistrate also may issue a warrant for a traffic infraction in appropriate cases.

e. The Attorney General Opinion to Ward, dated 1/11/83 (1982-83, page 319) stated that "where an officer seeks to obtain a warrant prior to taking a child into custody, the child need not be present at the time the officer seeks the warrant from the magistrate."

Based on the same logic, a private citizen may appear before the magistrate to seek a warrant for a juvenile assuming the provisions of Va. Code § 16.1-256, subdivision 2, are met.

f. If the magistrate finds probable cause that the juvenile committed the offense, the magistrate must issue a warrant returnable to the juvenile and domestic relations district court.

3. Juvenile Previously Tried And Convicted As An Adult

The magistrate also may issue a warrant of arrest for a juvenile once a circuit court has convicted a juvenile as an adult pursuant to the provisions of Chapter 11 of the Code of Virginia Title 16.1. This is a distinct and different situation than emancipation of a minor. Emancipation of a minor does not render such minor an adult for criminal prosecution purposes. But, if a circuit court treats a juvenile as an adult, and the juvenile is tried as an adult and convicted, the juvenile is thereafter treated as adult in subsequent criminal prosecutions.

There are three situations where the circuit court will try a juvenile as an adult:

a. The juvenile and domestic relations district court transfers the juvenile's case to the circuit court in accordance with the provisions of subsection A of Va. Code § 16.1-269.1 and the circuit court enters an order advising the attorney for the Commonwealth that he or she may seek an indictment in accordance with subsection B of Va. Code § 16.1-269.6.

b. The juvenile has waived the jurisdiction of the juvenile and domestic relations district court pursuant to Va. Code §16.1-270.

c. The juvenile and domestic relations district court certifies a charge to the grand jury pursuant to subsection B or C of Va. Code § 16.1-269.1.

The juvenile and domestic relations district court does not have jurisdiction over a juvenile in future criminal proceedings once the juvenile has been convicted as an adult. *See* also Broadnax v. Commonwealth, 24 Va. App. 808 (1997).

Once the circuit court has convicted the juvenile as an adult pursuant to the provisions of Chapter 11 or Title 16.1, the magistrate must then treat the juvenile as an adult for all criminal procedure purposes.

- The juvenile and domestic relations district court still retains criminal jurisdiction over a juvenile convicted as an adult if such juvenile commits an offense against the person of a juvenile or commits an offense against a family or household member. *See* Subsection C of Va. Code § 16.1-269.6.

- This does not affect the juvenile's status as a minor for civil procedure purposes, nor does this action emancipate the juvenile.

B. Issuance of The Warrant

1. The magistrate lacks discretion to divert criminal cases if the magistrate determines that probable cause exists to believe that the juvenile committed the criminal offense.

   a. Pursuant to subsection E of Va. Code § 16.1-260, the magistrate "**shall**" issue a warrant upon a finding that probable cause exists in cases involving an appeal from an intake officer.

   b. Title 16.1 is silent as to whether a magistrate is required to issue a warrant upon a finding that probable cause exists in cases where the judge and intake officer cannot be reached or are unavailable. Virginia Code § 19.2-72, however, states that if the magistrate finds "that there is probable cause to believe that the accused has committed an offense, such officer shall issue a warrant for his arrest." [Emphasis added.]

2. Subdivision 2 of Va. Code § 16.1-256 authorizes a magistrate to issue a warrant for a child in need of services. Even though by definition, a child in need of services has not committed a crime, the magistrate still issues a warrant in such a case.

3. Subdivision 2 of Va. Code § 16.1-256 does not authorize a magistrate to issue a warrant for a child in need of supervision.

4. In all but one instance, Title 16.1 makes reference to magistrates issuing warrants for juveniles. Consequently, magistrates should not issue a DC-319, SUMMONS for any charges except a violation for refusing to take a breath or blood test in relation to an alcohol-related driving offense.

5. Magistrates may issue a DC-312, WARRANT OF ARREST - FELONY, DC-314, WARRANT OF ARREST –MISDEMEANOR (STATE), DC-315, WARRANT OF ARREST – MISDEMEANOR (LOCAL) in juvenile cases.

6. Subsection H3 of Va. Code § 16.1-260 requires the magistrate to authorize the execution of the warrant as a summons in cases involving the refusal to take a breath or blood test pursuant to Va. Code §§ 18.2-268.2 or 29.1-738.2.

7. In all other cases, however, the magistrate should mark all misdemeanor warrants **"Execution by summons not permitted."**

   a. The reason for this stems from the fact that the only time a magistrate will ask that the warrant be served will be in serious cases where the facts of the case

make it necessary that law enforcement arrest the juvenile. Also in most cases, law enforcement already will have the juvenile in custody pursuant to one of the provisions of Va. Code § 16.1-246.

b. In non-serious cases, the magistrate will deliver the misdemeanor warrants directly to the juvenile and domestic relations district court. The intake officer must then convert the warrant to a petition. Consequently, the juvenile will not be arrested pursuant to the warrant.

8. Directly underneath the offense wording on the warrant, the magistrate should type in the names and addresses of the child's parents. In addition, the magistrate should note the name and address of the child's legal guardian, custodian, or another person standing in *loco parentis*.

   a. If the magistrate does not have access to this information, note the following on the warrant: **"The names and addresses of the parents or guardian are unknown."**

   b. The clerk needs this information in order to summons these people pursuant to Va. Code § 16.1-263.

9. There are no special rules regarding search warrants for Juveniles. Juveniles may be the subject of search warrants and should be treated as adults when a juvenile is the person to be searched.

C. Procedures Once the Magistrate has Issued a Warrant for a Juvenile

1. The magistrate issues a warrant for the juvenile under subdivision 1 of Va. Code § 16.1-256.

   a. Virginia Code § 16.1-256 states that "Warrants issued pursuant to this section shall be delivered forthwith to the juvenile court."

   b. Subsection E of Va. Code § 16.1-260 also directs that the warrant "shall be delivered forthwith to the juvenile and domestic relations district court" if the magistrate issues it pursuant to an appeal from an intake office.

   Subsection E then states "If the court is closed and the magistrate finds that the criteria for detention or shelter care set forth in § 16.1-248.1 have been satisfied, the juvenile may be detained pursuant to the warrant issued in accordance with this subsection."

   1) Consequently, if the court is open at the time the magistrate issues the warrant, the magistrate must deliver the warrant to the juvenile and domestic relations district court.

2) If the court is closed, subsection E allows for the execution of the warrant. Consequently, the magistrate then must determine whether the charge and circumstances surrounding the case justify having law enforcement arrest the juvenile.

- If the arrest of the juvenile is not necessary, the magistrate will then deliver the warrant to the appropriate juvenile and domestic relations district court on the next day the clerk's office is open.

- If the charge and circumstances compel that law enforcement arrest the juvenile immediately, the magistrate then will deliver the warrant to the appropriate law enforcement agency for execution.

- If law enforcement serves the warrant on the juvenile and the court is closed, the magistrate would then conduct a bail hearing pursuant to Va. Code § 19.2-119 et seq.

3) Once the warrant is delivered to the juvenile and domestic relations district court, subsection E of Va. Code § 16.1-260 then states that "the intake officer shall accept and file a petition founded upon the warrant."

c. Although it is not specifically addressed in Title 16.1, it appears that intake must convert warrants to petitions even in those cases where law enforcement served the warrant on the juvenile.

2. The magistrate issues a warrant for the juvenile under subdivision 2 or Va. Code § 16.1-256.

a. Virginia Code § 16.1-256 states that "Warrants issued pursuant to this section shall be delivered forthwith to the juvenile court." This is the only direction that Title 16.1 gives on what the magistrate should do with the warrant issued pursuant to subdivision 2 of Va. Code § 16.1-256.

b. The court will always be closed when the magistrate issues a warrant pursuant to subdivision 2 since that is one of the criteria for issuance. Consequently, the magistrate will be unable to deliver the warrant to the juvenile and domestic relations district court immediately.

c. A practical approach to the problem is for the magistrate to determine whether the charge and circumstances surrounding the case justify having law enforcement arrest the juvenile.

1) If the arrest of the juvenile is not necessary, the magistrate will then deliver the warrant to the appropriate juvenile and domestic relations district court on the next day the clerk's office is open.

2) If the charge and circumstances compel that law enforcement arrest the juvenile immediately, the magistrate then will deliver the warrant to the appropriate law enforcement agency for execution. In most cases, the law enforcement agency will already have the juvenile in custody pursuant to one of the provisions of Va. Code § 16.1-246.

3) If law enforcement serves the warrant on the juvenile and the court is closed, the magistrate would then conduct a bail hearing pursuant to Va. Code § 19.2-119 et seq.

d. Once the warrant is delivered to the juvenile and domestic relations district court, subsection E of Va. Code § 16.1-260 then states that "Upon delivery to the juvenile and domestic relations district court of a warrant issued pursuant to subdivision 2 of § 16.1-256, the intake officer shall accept and file a petition founded upon the warrant."

Although it is not specifically addressed in Title 16.1, it appears that intake must convert warrants to petitions even in those cases where law enforcement served the warrant on the juvenile.

D. Procedures for Juvenile Custody Once Law Enforcement has Taken a Juvenile Into Custody Pursuant to a Warrant Issued by a Magistrate or a Detention Order Issued by a Judge, Intake Officer, or Clerk

1. Subsection A of Va. Code § 16.1-246 allows a law enforcement officer to take a juvenile into immediate custody "with a detention order issued by the judge, the intake officer or the clerk" or "with a warrant issued by a magistrate."

2. If the court is open when the officer takes the juvenile into custody pursuant to a warrant issued by a magistrate, subsection A of Va. Code § 16.1-247 requires the officer to take the person to the judge or intake officer of the juvenile and domestic relations district court. This subsection then requires the judge, intake officer, or the officer to give notice of and reasons for the action taken to the child's parent, custodian, or person standing in *loco parentis*. Virginia Code § 19.2-80 complements this subsection A in that Va. Code § 19.2-80 requires the officer to bring the accused without unnecessary delay before the "court of appropriate jurisdiction of the county or city in which the warrant . . . is issued."

3. If the court is closed when the officer takes a juvenile into custody pursuant to a warrant issued by a magistrate, subsection D of Va. Code § 16.1-247 states that the juvenile may be released on bail pursuant to Chapter 9 of Title 19.2, or may be placed in a detention home or in shelter care.

a. Virginia Code § 19.2-80 requires the officer "making an arrest under a warrant" to bring the accused without unnecessary delay before the court of appropriate jurisdiction "or before an official having authority to grant bail."
b. The statute further mandates that the judicial officer "immediately conduct a bail hearing."

c. A reading of Va. Code §§ 16.1-246 A, 16.1-247 D, and 19.2-80 authorizes a magistrate to conduct a bail hearing for a juvenile only when a law enforcement officer takes such person into custody pursuant to a warrant **and** when the court is closed.

4. If the court is open when an officer takes a juvenile into custody pursuant to a detention order issued by a judge, intake officer, or clerk, subsection A of Va. Code § 16.1-247 requires the officer to take the person to the judge or intake officer of the juvenile and domestic relations district court. This subsection then requires the judge, intake officer, or the officer to give notice of and reasons for the action taken to the child's parent, custodian, or person standing in *loco parentis*.

5. If the court is closed when an officer takes a juvenile into custody pursuant to a detention order issued by a judge, intake officer, or clerk, subdivisions D2 and D3 of Va. Code § 16.1-247 require the officer to either place the child in a detention home or in shelter care, or place the child in jail subject to the provisions of Va. Code § 16.1-249.

a. Subsection D of Va. Code § 16.1-249 does **NOT** authorize a magistrate to conduct a bail hearing if the child is taken into custody pursuant to a detention order.

b. Sometimes an officer will take an adult person into custody pursuant to a detention order issued by the court, intake officer, or clerk when the person was a juvenile. Subsection K of Va. Code § 16.1-247 states "when an adult is taken into custody pursuant to a warrant or detention order alleging a delinquent act committed when he was a juvenile, he may be released on bail or recognizance pursuant to Chapter 9 (§19.2-119 et seq.) of Title 19.2."

c. If the court is closed when the officer takes an adult who committed the offense while a juvenile into custody pursuant to a warrant issued by a magistrate or a detention order, subsection D of Va. Code § 16.1-247 states that magistrate may release such person on bail pursuant to Chapter 9 of Title 19.2. If the magistrate is unable to release the person on bail, subsection H of Va. Code § 16.1-249 requires the magistrate to place the person in an adult facility, i.e., a local jail. In such case the magistrate would prepare a DC-352, COMMITMENT ORDER.

E. Bail, Detention and Shelter Care Procedures

1. Bail

a. As noted above, the magistrate will conduct a bail hearing for a juvenile only when law enforcement arrests such person pursuant to a warrant when the court is closed. A magistrate will conduct a bail hearing on an adult who is arrested pursuant to a detention order for a crime committed while he was a juvenile.

b. Virginia Code § 16.1-269.6 (C) states that if circuit court issues an indictment against a juvenile the juvenile and domestic relations court is divested of jurisdiction. Therefore, it appears a magistrate should conduct a bail hearing on the rare circumstance of a juvenile who is detained pursuant to a circuit court indictment.

c. Virginia Code § 19.2-120 directs that a "person who is held in custody pending trial or hearing for an offense, civil or criminal contempt, or otherwise shall be admitted to bail by a judicial officer, unless there is probable cause to believe that:

1) will not appear for trial or hearing or at such other time and place as may be directed, or

2) his liberty will constitute an unreasonable danger to himself or the public.

- Consequently, the magistrate will conduct a bail hearing as if it were a hearing for an adult.
- The procedures for detaining or releasing a juvenile, however, differ significantly than the procedures for adults.
- Because of the different juvenile detention and release procedures, magistrates will place juveniles in detention or shelter care only in a very limited number of cases as discussed below.

d. Virginia Code § 16.1-248.1 requires the magistrate to immediately release the juvenile to his or her

– parent, or
– guardian, or
– custodian, or
– "other suitably person able and willing to provide supervision and care for such juvenile…"on bail or recognizance pursuant to the "Emergency Custody Orders and Temporary Custody Orders" chapter of the *MAGISTRATE MANUAL* in those cases where the magistrate does not issue a DC-529, DETENTION ORDER or a DC-530, SHELTER CARE ORDER.

The magistrate may detain a juvenile in a secured facility or shelter care only in limited circumstances. Consequently, the magistrate should not set a secured bond as a condition of bail for a juvenile unless that juvenile meets the criteria for detention or shelter care outlined below.

e. As in Va. Code § 19.2-123, the magistrate may impose conditions of release on the juvenile.

f. Pursuant to Subsection D of Va. Code § 16.1-249, the magistrate may commit a juvenile to jail if the court is treating the juvenile as an adult.

When a case is transferred to the circuit court in accordance with the provisions of subsection A of § 16.1-269.1 and an order is entered by the circuit court in accordance with § 16.1-269.6, or in accordance with the provisions of § 16.1-270 where the juvenile has waived the jurisdiction of the district court, or when the district court has certified a charge to the grand jury pursuant to subsection B or C of § 16.1-269.1, the juvenile, if in confinement, shall be placed in a juvenile secure facility, unless the court determines that the juvenile is a threat to the security or safety of the other juveniles detained or the staff of the facility, in which case the court may transfer the juvenile to a jail or other facility for the detention of adults, provided that the facility is approved by the State Board of Corrections for the detention of juveniles.

g. In the rare case where the magistrate issues a warrant for an adult person who committed an offense while a juvenile (the statutes require such cases to be instituted by petition except where the adult is now 21 years of age or older) and where the magistrate determines during the bail hearing that the criteria for detention is met, subsection H of Va. Code § 16.1-249 requires the magistrate to detain the arrestee in an adult facility (i.e. a jail) pursuant to a detention order.

h. If the magistrate releases the juvenile from detention or shelter care pursuant to bail set by a judge or another magistrate, the magistrate will prepare a DC-330, RECOGNIZANCE form and a DC-539, RELEASE ORDER.

i. If the magistrate releases the juvenile on bail, the attorney for the commonwealth cannot make a motion to revoke bail unless "(i) the juvenile has violated a term or condition of his release, or is convicted of or taken into custody for an additional offense, or (ii) the attorney for the commonwealth presents evidence that incorrect or incomplete information… was relied upon by the … magistrate." *See* Subsection H of Va. Code § 16.1-248.1

2. Detention Orders

a. Magistrates do not use the DC-352, COMMITMENT ORDER forms to place juveniles in detention in cases where the juvenile cannot meet the conditions

of release or where the magistrate is holding the juvenile without bail. Instead magistrates issue DC-529, DETENTION ORDER and DC-538, PLACEMENT ORDER.

To release juveniles from a secured facility, magistrates do not use the DC-353, RELEASE ORDER forms. Instead magistrates issue the DC- 539, RELEASE ORDER.

b. The magistrate may issue a DC-529, DETENTION ORDER to place the juvenile in a secured facility only if the magistrate finds that the juvenile's case meets one of the four criteria for detention.

c. Virginia Code § 16.1-228 defines "secured facility" or "detention home" as "a local, regional, or state public or private locked residential facility which has construction fixtures designed to prevent escape and to restrict the movement and activities of child held in lawful custody."

d. The criteria for detention as spelled out in subsection A of Va. Code § 16.1-248.1 are as follows:

1) The juvenile is alleged to have violated the terms of probation or parole when the charge for which he was placed on probation or parole was a felony or Class 1 misdemeanor, **or**

- the juvenile allegedly committed a Class 1 misdemeanor or a felony, **or**
- the juvenile has violated any of the provisions of Va. Code § 18.2-308.7.

In addition to any of these criterions, the magistrate also must find **by clear and convincing evidence that**:

– upon consideration of:
  - the seriousness of the current offense or offenses, and
  - the seriousness of other pending charges, and
  - the seriousness of prior adjudicated offenses, and
  - the legal status of the juvenile, and
  - the aggravating and mitigating circumstances

– the release of the juvenile constitutes a clear and substantial threat to the person or property of others; **or**

– the release of the juvenile presents a clear and substantial threat of serious harm to the juvenile's life or health; **or**

– the juvenile has threatened to abscond from the court's jurisdiction during the pendency of the instant proceedings or has a willful failure to appear at a court hearing within the immediately preceding twelve months, **OR**

2) The juvenile has absconded from a detention home; **OR**

3) The juvenile is a fugitive from a jurisdiction outside Virginia and subject to a verified petition or warrant from another state; **OR**

4) The juvenile has failed to appear in court after receiving a summons in a case in which it is alleged that the juvenile

- has committed a delinquent act; **or**
- is a child in need of services or is in need of supervision

e. If the juvenile meets the criteria for detention, the magistrate should note the bail determination on the DC-529, DETENTION ORDER and the DC-538, PLACEMENT ORDER forms.

f. Pursuant to Subsection A of Va. Code § 16.1-248.1, when the magistrate places the juvenile in secured detention, the magistrate must note on the DC-529, DETENTION ORDER the offense for which the juvenile is being detained, and, to the extent practicable, other pending and previous charges.

g. Subsection A of Va. Code § 16.1-249 states that a magistrate may place a juvenile in detention pending a court hearing, in a detention home approved by the Department of Juvenile Justice or in a separate juvenile detention facility located upon the site of an adult regional jail facility constructed after 1994 and approved by the Department of Juvenile Justice and certified by the Board of Corrections for holding and detaining juveniles.

h. Subsection H of Va. Code § 16.1-249 requires the magistrate to detain an adult arrested pursuant to a warrant or detention order for a crime committed while the arrestee was a juvenile in an adult facility.

i. Placement in a secured juvenile facility often is a difficult process. Therefore, magistrates should be careful to order detention only in those cases where it is absolutely necessary to do so. Bed space is limited statewide and the magistrate may have to call several different detention facilities before he or she finds one willing to accept the juvenile. Many localities contract bed space with various facilities. In the localities that have contracted for bed space, magistrates will not encounter much difficulty in making the placement. In those rural localities that have not contracted for bed space, the magistrates should expect problems in making the placement. Magistrates need to contact their local intake officer directors to obtain information about the facilities

willing to accept juveniles from their areas prior to having to make placements. Bed space in shelter care facilities is widely available, and magistrates should not encounter difficulties in making placements in these facilities. Magistrates need to know, however, that shelter care facilities do not provide the level of security found at secured facilities such as detention homes.

j. Pursuant to subsection A of Va. Code § 16.1-250 a child whom the magistrate places in detention must appear before the judge of the juvenile and domestic relations district court that will hear the juvenile's case on the next day on which that court sits for a detention hearing.

1) The statute further states that if that court does not sit on the next day after placement in detention, the juvenile must appear within a reasonable time not to exceed seventy-two hours after the juvenile was taken into custody.

2) If the seventy-two hour period expires on a Saturday, Sunday, legal holiday or day on which the court is lawfully closed, the seventy-two hours is extended to the next day that is not a Saturday, Sunday, or legal holiday.

3) In rural areas where the juvenile and domestic relations district court meets infrequently, the provisions of this statute often will require a judge to hold the detention hearing in a juvenile and domestic relations district court in a locality other than where the juvenile's case will be heard.

- The magistrate must meet with the court to determine the times and places of detention hearings.
- The magistrate needs to note the time and place of the detention hearing on the DC-529, DETENTION ORDER form.

k. Pursuant to subdivision A.4 of Va. Code § 16.1-248.1, a child whom the magistrate places in detention for being in need of services must appear before the judge of juvenile and domestic relations district court that will hear the juvenile's case on the next day that court sits for a detention hearing. If the court does not sit on the next day, the time period may be extended to 72 hours after law enforcement took the juvenile into custody. If the 72 hour period expires on a Saturday, Sunday, legal holiday, or a day on which the court is lawfully closed, the detention period is extended to the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is closed.

– Only under the rarest of circumstances would a magistrate place a child in need of services in detention.

l. Subsection B of Va. Code § 16.1-250 requires that notice of the detention hearing be given to a parent, guardian, legal custodian, or other person standing in *loco parentis*, if such person can be located.

1) The notice provision applies to juveniles twelve years of age or older.

2) The notice may be given orally or in writing.

3) Notice must include the time, place, and purpose of the hearing.

4) The attorney for the Commonwealth must also be notified.

m. If the parent, guardian, etc., of the juvenile is not present, the magistrate should attempt to call such person to give the notice required by subdivision B of Va. Code § 16.1-250.

n. The magistrate needs to document whether he or she notified the parent, guardian, etc., in the special instructions section of the detention order. The magistrate also should document the parent's, guardian's, etc., response. If the magistrate was unable to reach such person, the magistrate also should document this fact.

o. The magistrate also needs to contact the clerk of the juvenile and domestic relations district court that will hold the detention hearing. Every magistrate's office should meet with the respective juvenile and domestic relations district court clerk's offices to work out the details of this notification.

3. Shelter Care Orders

a. Magistrates do not use the DC-352, COMMITMENT ORDER forms to place juveniles in shelter care. Instead magistrates issue DC-530, SHELTER CARE ORDER and DC-538, PLACEMENT ORDER forms.

To release juveniles from a shelter care facility, magistrates do not use the DC-353, RELEASE ORDER forms. Instead magistrates issue DC-539, RELEASE ORDER.

b. The magistrate may issue a DC-530, SHELTER CARE ORDER to place the juvenile in a shelter care facility only if the magistrate finds that the juvenile's case meets one of the six criteria for detention by clear and convincing evidence.

c. Virginia Code § 16.1-228 defines "shelter care" as "the temporary care of children in physically unrestricting facilities."

d. The criteria for shelter care as spelled out in subsection A of Va. Code § 16.1-248.1 are as follows:

1) The juvenile is eligible for placement in a secure facility.

2) The juvenile has failed to adhere to the directions of the court, intake officer, or magistrate while on conditional release.

3) The juvenile's parent, guardian, or other person able to provide supervision cannot be reached within a reasonable time.

4) The juvenile does not consent to return home.

5) Neither the juvenile's parent or guardian nor any other person able to provide proper supervision can arrive to assume custody within a reasonable time.

6) The juvenile's parent or guardian refuses to permit the juvenile to return home and no relative or other person willing and able to provide proper supervision and care can be located within a reasonable time.

e. If the juvenile meets the criteria for shelter care, the magistrate should note the bail determination on the DC-530, SHELTER CARE ORDER and on the DC-538, PLACEMENT ORDER form.

f. Virginia Code § 16.1-249 states that a magistrate may place a juvenile in shelter care pending a court hearing in

1) an approved foster home authorized by law to provide such care;

2) a facility operated by a licensed child welfare agency;

3) a group home approved by the Department of Juvenile Justice;

4) any other suitable place designated by the court and approved by the Department of Juvenile Justice.

g. When encountering problems in making a shelter care placement, the magistrate should contact an intake office for assistance. The magistrate should have on hand, a list of shelter care facilities that serve the magistrate's locality.

h. Pursuant to subsection A of Va. Code § 16.1-250 a child whom the magistrate places in shelter care must appear before the judge of the juvenile and domestic relations district court that will hear the juvenile's case on the next day on which that court sits for a detention hearing.

1) The statute further states that if that court does not sit on the next day after placement in detention, the juvenile must appear within a reasonable time not to exceed seventy-two hours after the juvenile was taken into custody.

2) If the seventy-two hours period expires on a Saturday, Sunday, or a legal holiday, the time period is extended until the next day that is not a Saturday, Sunday, or legal holiday.

3) In rural areas where the juvenile and domestic relations district court meets infrequently, the provisions of this statute often will require a judge to hold the detention hearing in a juvenile and domestic relations district court in a locality other than where the juvenile's case will be heard.

- The magistrate must meet with the court to determine the times and places of detention hearings.
- The magistrate needs to **note the time and place** of the detention hearing on the DC-530, SHELTER CARE ORDER form.

i. Subsection B of Va. Code § 16.1-250 requires that notice of the detention hearing be given to parent, guardian, legal custodian, or other person standing in *loco parentis*, if such person can be located.

1) The notice provision applies to juveniles twelve years of age or older.

2) The notice may be given orally or in writing.

3) Notice must include the time, place and purpose of the hearing.

4) The attorney for the Commonwealth must also be notified.

j. If the parent, guardian, etc., of the juvenile is not present, the magistrate should attempt to call such person to give the notice required by Va. Code § 16.1-250.

k. The magistrate needs to document whether he or she notified the parent, guardian, etc., in the special instructions section of the detention order. The magistrate should also document the parent's, guardian's, etc., response. If the magistrate was unable to reach such person, the magistrate also should document this fact.

l. The magistrate also needs to contact the clerk of the juvenile and domestic relations district court that will hold the detention hearing. Every magistrate's office should meet with the respective juvenile and domestic relations district court clerk's offices to work out the details of this notification.

4. Bail Hearings Involving A Juvenile Who Has Been Tried And Convicted As An Adult

   Pursuant to Va. Code § 16.1-271, once a circuit court has tried and convicted a juvenile of a criminal offense as an adult, the juvenile must be treated as an adult in any subsequent criminal cases.

   a. Consequently, the magistrate must conduct a bail hearing as if the juvenile were an adult.

   b. If the juvenile defendant is unable to meet the conditions of bail, the magistrate must commit the juvenile to jail as if he were an adult. *See* Va. Code § 16.1-249 D.

V. IMPLIED CONSENT AND MOTOR VEHICLE IMPOUNDMENT PROCEDURES IN JUVENILE CASES

A. Implied Consent

1. Provided that the child is released to the custody of a parent or legal guardian, subsection H.3. of Va. Code § 16.1-260 requires the arresting officer to issue a VIRGINIA UNIFORM SUMMONS to the juvenile charging him or her with a violation of Va. Code §§ 18.2-266, 29.1-738, or "any alcohol-related offense" which would include violations of Va. Code §§ 18.2-51.4, 18.2-266.1, 18.2-272, and 29.1-738.02. The arresting officer also issues a summons requiring the parent or guardian to appear in court with the child.

2. The magistrate does not conduct a probable cause hearing for a juvenile arrested for driving under the influence unless (1) the juvenile refuses to take a blood or breath test; or (2) the arresting officer appeals the decision of an intake officer after seeking a petition; or (3) the arresting officer seeks a warrant from the magistrate because a judge or intake officer is not reasonably available; or (4) the juvenile has previously been tried and convicted as an adult.

3. If the magistrate is involved with a juvenile who allegedly is refusing to take a breath or blood test, the magistrate follows the implied consent procedures set forth in the "Adult Arrest" chapter of the *MAGISTRATE MANUAL*. The procedures are the same for adult and juvenile offenders.

4. Once the magistrate issues the criminal process, the officer is required to serve a copy of the process on a parent or legal guardian and the child.

5. When the arresting officer administratively suspends a juvenile's license pursuant to Va. Code § 46.2-391.2, subsection A requires that "A copy of the notice of suspension shall be forwarded forthwith to both (i) the general district court or, as

appropriate, the court with jurisdiction over juveniles of the jurisdiction in which the arrest was made and (ii) the Commissioner."

Juvenile and domestic relations district courts handle motions to review the administrative suspension of a juvenile's license. For further guidance on the administrative suspension of driver's licenses, refer to the "Adult Arrest Procedures" chapter.

B. Impoundment of a Motor Vehicle

1. Virginia Code § 46.2-301.1 allows for the administrative impounding of a motor vehicle upon the driver's arrest for driving while such person's permit or privilege to drive a motor vehicle had been suspended or revoked for:

   a. driving while intoxicated in violation of Va. Code §§ 18.2-266 or 46.2-341.24 or similar local ordinance, or

   b. driving after adjudication as an habitual offender, where such adjudication was based in whole or in part on an alcohol-related offense.

2. Pursuant to subsection H.1 of Va. Code § 16.1-260, the arresting officer will either issue a Virginia Uniform Summons or will file a petition for a violation of Va. Code §§ 46.2-301 or 46.2-357.

   The magistrate would not be involved in a probable cause hearing unless the case meets the criteria set forth in Va. Code § 16.1-256.

3. Virginia Code § 46.2-301.1 requires the arresting officer to serve a notice of impoundment on the driver.

4. The statute further requires the officer to deliver a copy of the notice to the magistrate who then must forward it to "the clerk of the general district court of the jurisdiction where the arrest was made . . ."

5. Even though the juvenile and domestic relations district court has trial jurisdiction over the violation of either Va. Code § 46.2-301 or 46.2-357, **the general district court has authority over the civil impoundment**. Consequently, the magistrate must always forward the notice of impoundment to the appropriate general district court.

VI. PROCEDURES FOR DOMESTIC VIOLENCE CASES

A. Definitions

1. "Family abuse" is defined in Va. Code § 16.1-228 as:

   "Family abuse means any act involving violence, force, or threat that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury and that is committed by a person against such person's family or household member. Such act includes, but is not limited to, any forceful detention, stalking, criminal sexual assault in violation of Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2, or any criminal offense that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury."

2. "Family or household member" is defined in Va. Code § 16.1-228.

   For a quick reference to determine which parties meet the statutory definition of a family or household member, refer to Subpart I at the end of this Section.

   Virginia Code § 16.1-228 defines **"Family or household member"** as:

   a. the person's spouse, whether or not he or she resides in the same home with the person;

   b. the person's former spouse, whether or not he or she resides in the same home with the person;

   c. the person's parents, stepparents, children, stepchildren, brothers, sisters, half-brothers, half-sisters, grandparents and grandchildren regardless of whether such persons reside in the same home with the person;

      1) There is one exception to the parent definition that is not obvious. When a court has terminated the residual parental rights of the accused pursuant to Va. Code § 16.1-283, then the person is no longer legally the parent of the child (even though they may be the biological parent). Consequently, if a court has terminated the residual parental rights and the person afterwards batters his biological 18-year-old or older child, the magistrate would issue the warrant under Va. Code § 18.2-57 and return the case to the general district court.

      2) Also important to note for purposes of Va. Code § 16.1-228, a person having custody over a child when the parents are deceased is not a family or household member as defined by the statute. Consequently, if such person batters the child, the magistrate would issue a warrant for assault and battery under Va. Code § 18.2-57 and return the case to the

juvenile and domestic relations district court (since the victim is under the age of 18). Even the existence of legal guardianship would not change this result.

d. the person's mother-in-law, father-in-law, brother-in-law, and sister-in-law who reside in the same home with the person;

e. any individual who has a child in common with the person, whether or not the person and that individual have been married or have resided together at any time; or

f. any individual who cohabits or who, within the previous twelve months, cohabited with the person, and any children of either of them residing in the same home with the person. The attorney general has opined that an adult child living with cohabitants is not a family or household member to the cohabitant of the adult child's parent. "or (vi) an individual who is a legal custodian of the juvenile.

1) The Court of Appeals in Rickman v. Commonwealth, 33 Va. App. 550, 535 S.E.2d 187 (2000) adopted a three-pronged totality of the circumstance test for determining what constitutes cohabitation.

The issue in Rickman v. Commonwealth was whether the appellant, who was married to another woman, and the victim were cohabiting at the time of the offense. The victim testified that the defendant had been residing with her for a couple months. He worked out of town and stayed with the victim "off and on, when [he] would come into town." The victim also testified that she and appellant were "boyfriend and girlfriend," slept in the same bed and had sexual relations. She stated that she would not take money that the appellant offered her for living expenses, although he did buy food and "tried to just help out." He stored clothes and personal property at the victim's home. The defendant testified that he considered the trailer he and his wife owned as his residence during that time but admitted he was not actually living there. In deciding this case, the Court of Appeals applied a totality-of-the-circumstances analysis to determine whether the defendant and the victim were cohabiting. In applying this analysis, the court adopted a three-pronged test to establish cohabitation. One factor to be looked at is whether there is a sharing of familial or financial responsibilities.

The Court determined that in this case there was a sharing. The testimony revealed that the appellant tried to give the victim money toward the household expenses and bought groceries on occasion. The testimony revealed that the mother of victim, who lived next door to her daughter, washed the defendant's clothes and allowed the defendant to use her telephone. Another factor that the Court examined was consortium. The Court held that the facts presented by the victim

established that the parties slept in the same bed and had sexual relations. The third factor that Court reviewed in the totality-of-the-circumstances analysis was the "*duration, continuity and permanency of the relationship*." In this case, the facts supported that the appellant had resided with the defendant continuously for three months and had stayed with her sporadically before that time. The Court further held that "*the fact that appellant sometimes worked out of town and may periodically have stayed elsewhere when in town did not preclude a finding that he cohabited with [the victim]*." The appellant and the victim had maintained a substantial ongoing relationship. For these reasons, the Court upheld the appellant's conviction for assault and battery on a family or household member.

2) In a 2009 case, Tolley v. Tolley, 09 Va. UNP 2376081 (2009), the Court defined cohabitation not in the family abuse context, but in the context of a civil divorce proceeding. The test is essentially the same. The Court applied a four factor test: (1) sharing a common residence; (2) intimate or romantic involvement; (3) provision of financial support; and (4) duration and continuity of the relationship and other indicia of permanency. In Tolley, the issue was whether the ex-wife was cohabiting with another man in violation of the terms of the divorce decree. The fact that the ex-wife paid rent to a landlord to share living space in a trailer and used cash given to her by landlord to pay some of his bills from her checking account was not enough to qualify them as family or household members as the evidence did not establish they were living in a relationship analogous to marriage. They did not hold themselves out as husband and wife, nor did the evidence prove that they were involved in an intimate or romantic relationship.

3) The Supreme Court of Virginia has held that same-sex couples can "cohabit" in a "relationship analogous to marriage" for purposes of Va. Code § 20-109. *See* Luttrell v. Cucco (No. 150770, April 28, 2016). The analysis the Court utilized strongly suggests that same-sex couples can "cohabit" for purposes of determining who is a "family or household member" as defined in Va. Code § 16.1-228. If a magistrate determines that a couple cohabits after examining the factors from Rickman or Tolley, the case should be placed in the juvenile and domestic relations district court whether the couple is a same-sex couple or an opposite-sex couple. If a local Court disagrees with this analysis, the Court may transfer the case to the general district court.

B. Jurisdiction

Virginia Code § 16.1-241 J grants the juvenile and domestic relations district court exclusive jurisdiction over **all offenses** in which one family or household member, as defined in Va. Code § 16.1-228, is charged with an offense against another family or

household member and all offenses under Va. Code § 18.2-49.1 (violation of a visitation or custody order.

Where the court determines that it lacks subject matter jurisdiction, it may transfer the case to the proper court pursuant to Va. Code § 16.1-245.

C. Venue

1. Criminal Cases

   The first sentence of Va. Code § 19.2-244 states, "Except as otherwise provided by law, the prosecution of a criminal case shall be had in the county or city in which the offense was committed."

   a. 16.1-53.2 states: A violation of this section may be prosecuted in the jurisdiction where the protective order was issued or, in any county or city or town where any act constituting the violation of the protective order occurred, or in the jurisdiction where the party protected by the protective order resided at the time of such violation.

   b. The same principle is applicable to Va. Code § 18.2-60.4 that prohibits violations of protective orders issued pursuant to Va. Code §§ 19.2-152.8, 19.2-152.9, and 19.2-152.10.

2. Family Abuse Emergency Protective Orders (Va. Code § 16.1-253.4)

   Venue for a Family Abuse Emergency Protective Order is addressed in subsection A.3 of Va. Code § 16.1-243, which states that venue is proper for the commencement of protective orders where:

   a. either party has his or her principal residence, or
   b. the abuse occurred, or
   c. a protective order was issued if at the time the proceeding is commenced the order is in effect to protect the petitioner or a family or household member of the petitioner.

3. Emergency Protective Order (Va. Code § 19.2-152.8)

   Virginia Code § 19.2-152.11 states that venue is proper for the commencement of protective orders issued pursuant to Va. Code § 19.2-152.8 where:

   a. either party has his principal residence;

b. the act of violence, force, or threat by the respondent against the petitioner occurred; **or**

c. a protective order was issued if, at the time the proceeding is commenced, the order is in effect to protect the petitioner or a family or household member of the petitioner.

D. Procedural Options for Family or Household Member Abuse Cases

1. In dealing with cases involving an act of family abuse, the magistrate should take care to explain the alternative approaches available to the victim. The magistrate, however, is not in an advocate role. In order for the victim to choose the most appropriate remedy in his or her circumstance, the magistrate must provide accurate information on the available legal options.

2. There are at least five different approaches that are available to a victim of "family abuse" as defined in Va. Code § 16.1-228. These approaches are not mutually exclusive of one another. Victims may pursue one or more of these approaches. The options are:

   a. The Family Abuse Emergency Protective Order (Va. Code § 16.1-253.4)

      1) When the respondent and the person(s) whom an order is intended to protect are family or household members, if an emergency protective order is to be issued, it should be issued pursuant to Va. Code § 16.1-253.4. It appears, based upon the comprehensive nature of the 2011 legislation, that the General Assembly intended Family Abuse Emergency Protective Orders (Va. Code § 16.1-253.4) to be issued in cases involving family or household members and that in all other situations, Emergency Protective Orders should be issued pursuant to Va. Code § 19.2-152.8.

      2) A Family Abuse Emergency Protective Order is a civil process that a magistrate or judge issues after an *ex parte* hearing. In such an order the judicial officer may:

         - prohibit the respondent (abuser) from committing further acts of family abuse or criminal offenses that result in injury to persons or property;

         - Prohibit such contacts by the respondent with the allegedly abused person or family or household members of the allegedly abused person, including prohibiting the respondent from being in the physical presence of the allegedly abused person or family or household members of the allegedly abused person, as the judge or magistrate deems necessary to protect the safety of such persons; "Physical presence" includes (i) intentionally maintaining direct

visual contact with the petitioner or (ii) unreasonably being within 100 feet from the petitioner's residence or place of employment.

- grant possession of the residence to the victim to the exclusion of the respondent;

- prohibit contact of any type between the victim and the respondent;

- grant the petitioner possession of a companion animal as defined in Va. Code § 3.2-6500 if the petitioner is the companion animal's owner as defined in Va. Code § 3.2-6500.

3) A violation of a Family Abuse Emergency Protective Order may constitute a crime as set forth in Va. Code § 16.1-253.2 if the respondent violates one or more of the following three provisions:

- a prohibition from going or remaining on specified land, building, or premises; **or**
- a prohibition from further acts of family abuse; **or**
- a prohibition from being in the physical presence of the petitioner or family or household members; **or**
- a prohibition from contacting the petitioner or other family or household members. *See* Attorney General Opinion to Howell dated 11/30/98 (1998, page 42); *Person found guilty of criminal violation of protective order is not also subject to contempt of court sanction*. The violation of any other provision of an emergency protective order does not constitute a criminal violation of Va. Code § 16.1- 253.2, but does constitute contempt of court.

b. The Preliminary Protective Order – Family Abuse (Va. Code § 16.1-253.1)

1) This is a civil process that a judge issues after an *ex parte* hearing. In the preliminary protective order the court may:

- prohibit the respondent from committing further acts of family abuse or criminal offenses that result in injury to person or property;
- prohibit the petitioner and the respondent from having contact with each other;
- prohibit such contacts by the respondent with petitioner or family or household members of the petitioner as the court deems necessary for the health and safety of such persons;
- grant the petitioner possession of the residence occupied by the parties to the exclusion of the allegedly abusing person;
- prohibit the respondent from terminating any necessary utility service to a premises that the petitioner has been granted

possession;
- order the respondent to restore utility services to the premises that the petitioner has been granted possession;
- grant the petitioner temporary possession or use of a motor vehicle jointly owned by the parties;
- require that the respondent provide suitable alternative housing for the petitioner and other family or household members; and where appropriate, require the respondent to pay deposits to connect or restore necessary utility services in the alternative housing provided;
- grant the petitioner possession of a companion animal as defined in Va. Code § 3.2-6500 if the petitioner is the companion animal's owner as defined in Va. Code § 3.2-6500;
- grant any relief necessary for the protection of the petitioner and family or household members of the petitioner.

2) The victim begins the preliminary protective order process by filing a petition with the intake officer. The victim may not file the petition directly with the clerk of the court. An attorney representing the petitioner, however, may file the petition directly with the clerk's office. *See* subsection A of Va. Code § 16.1-260.

3) The judge may issue a DC-627, PRELIMINARY PROTECTIVE ORDER – FAMILY ABUSE upon good cause shown that the petitioner is, or has been, the subject of family abuse.

4) The preliminary protective order hearing is usually *ex parte*.

5) The judge must specify in the preliminary protective order a date for a full hearing.

The preliminary protective order expires fifteen days from the date of issuance or at the conclusion of the full hearing whichever occurs first.

6) The DC-627, PRELIMINARY PROTECTIVE ORDER -FAMILY ABUSE does not become effective until an officer serves a copy on the accused.

7) If the respondent fails to appear at the hearing specified in the preliminary protective order because he was not properly served, the court may extend the preliminary protective order for a period up to six additional months.

8) A violation of the preliminary protective order may

- constitute contempt of court, **or**

- constitute a crime as set forth in Va. Code § 16.1-253.2 if the respondent violates one or more of the following three provisions:

  - a prohibition from going or remaining on specified land, building, or premises; or

  - a prohibition from further acts of family abuse; or

  - a prohibition from contacting the petitioner or other family or household members. See Attorney General Opinion to Howell dated 11/30/98 (1998, page 42); Person found guilty of criminal violation of protective order is not also subject to contempt of court sanction. The violation of any other provision of an emergency protective order does not constitute a criminal violation of Va. Code § 16.1-253.2, but does constitute contempt of court.

c. The Protective Order – Family Abuse (Va. Code § 16.1-279.1)

1) This is a civil process that a judge issues after a full due process hearing. In the order of protection the court may:

- prohibit the respondent from committing further acts of family abuse or criminal offenses that result in injury to person or property;

- prohibit contact by the respondent with the petitioner or family or household members for the health or safety of such persons;

- grant the petitioner possession of the residence occupied by the parties to the exclusion of the respondent;

- prohibit the respondent from terminating any necessary utility service to a premises that the petitioner has been granted possession or order the respondent to restore previously terminated utility services;

- grant the petitioner temporary possession or use of a motor vehicle jointly owned by the parties;

- require that the respondent provide suitable alternative housing for the petitioner and other family or household members and require the respondent to pay deposits to connect or restore necessary utility services in the alternative housing provided;

- require the respondent to participate in treatment, counseling, or

other programs designed for the rehabilitation and reconciliation of the parties;

- grant the petitioner possession of a companion animal as defined in Va. Code § 3.2-6500 if the petitioner is the companion animal's owner as defined in Va. Code § 3.2-6500;

- provide any other relief necessary for the protection of the petitioner and any minor children including a provision for temporary custody or visitation or a minor child.

  A violation of a custody or visitation order issued pursuant to the statute constitutes a crime under Va. Code § 18.2-49.1.

2) The victim begins the order of protection process by filing a petition with the intake officer. The victim may not file the petition directly with the clerk of the court. The attorney representing the petitioner, however, may file the petition directly with the clerk's office. *See* subsection A of Va. Code § 16.1-260.

3) The judge may enter a DC-650, PROTECTIVE ORDER -FAMILY ABUSE after a hearing with notice to the respondent to protect the health and safety of the petitioner.

4) The judge must specify the period, not to exceed two years, for which the order is valid. The judge may extend the order for another two years upon a written motion filed by a petitioner prior to expiration of the original order. There is no limitation to the number of extensions that may be requested or issued. Va. Code § 16.1-279.1.

5) The judge may assess attorney's fees and costs against either party regardless of whether the judge issues a protective order.

6) A violation of the protective order issued pursuant to Va. Code § 16.1-279.1 may:

   - constitute contempt of court,

   - constitute a violation of Va. Code § 18.2-49.1 if it involves an issue of custody or visitation; **or**

   - constitute a crime as set forth in Va. Code § 16.1-253.2 if the respondent violates one or more of the following three provision:

     - a prohibition from going or remaining on specified land, building, or premises; **or**

- a prohibition from further acts of family abuse; **or**

- a prohibition from contacting the petitioner or other family or household members. *See* Attorney General Opinion to Howell dated 11/30/98 (1998, page 42); *Person found guilty of criminal violation of protective order is not also subject to contempt of court sanction*. The violation of any other provision of an order of protection does not constitute a criminal violation of Va. Code § 16.1-253.2, but does constitute contempt of court.

d. Criminal Charges Of Assault And Battery Against A Family Or Household Member (Va. Code § 18.2-57.2)

1) This is the criminal procedure option in cases involving an assault **and battery** by one family or household member against another.

- In an opinion to the Honorable Neil Vener, the Attorney General stated that a person who commits an assault against a family or household member does **NOT** violate Va. Code § 18.2-57.2. *See* Attorney General Opinion to Vener, dated 11/13/97 (1997, page 99); *Offense of assault without battery against family or household member*.

- To violate Va. Code § 18.2-57.2, a person must commit an assault **AND BATTERY** upon a family or household member. A person who commits a simple assault against a family or household member violates Va. Code § 18.2-57.

2) The definition of "family or household member" found in Va. Code § 18.2-57.2 is the same as found in Va. Code § 16.1-228.

3) A violation of Va. Code § 18.2-57.2 constitutes a Class 1 misdemeanor unless the case meets the following criteria for enhanced punishment to a Class 6 felony:

- any combination of violations of Va. Code §§ 18.2-57.2, 18.2-51 (malicious wounding or unlawful wounding), 18.2-51.2 (aggravated malicious wounding), 18.2-52 (malicious bodily injury by caustic substances/fire/explosion), 18.2-51.6 (strangulation), or of a similar offense under the law of any other jurisdiction, and
- each offense involved a family or household member
- each offense occurred on different dates.

4) If the defendant has not had a previous conviction for an offense found in Article 4 of Chapter 4 of Title 18.2 (Va. Code §§ 18.2-51 through 18.2-57.3), and if the court finds the evidence sufficient for guilt for a violation of Va. Code § 18.2-57.2, the court may defer further proceedings and place the defendant on probation without entering a judgment of guilt.

- The court must require the defendant to be evaluated and enter and successfully complete a treatment and/or education program.
- The court also must require the defendant to be of good behavior for a period of not less than two years.
- If the defendant violates any of the terms and conditions of probation, the court must enter an adjudication of guilt and proceed with sentencing.
- If the defendant fulfills the terms and conditions, the court must then dismiss the proceedings against him or her.

5) Virginia Code § 19.2-81.3 requires a law enforcement officer to arrest a person who commits a violation of Va. Code §§ 18.2-57.2 or 16.1-253.2 upon a probable cause finding that the accused was the "predominant physical aggressor." The officer uses the following considerations in determining the predominant physical aggressor:

- who was the first aggressor;
- the protection of the health and safety of family and household members;
- prior complaints of family abuse by the allegedly abusing person involving the family or household members;
- the relative severity of the injuries inflicted on persons involved in the incident;
- whether any injuries were inflicted in self-defense;
- witness statements; and other observations.

6) Virginia Code § 19.2-81.3 requires a law enforcement officer to arrest a person who commits a violation of Va. Code § 18.2-60.4 that involves physical aggression upon a probable cause finding that the accused was the "predominant physical aggressor." The officer uses the following considerations in determining the predominant physical aggressor:

- who was the first aggressor;
- the protection of the health and safety of family and household members;
- prior acts of violence, force, or threat, as defined in Va. Code § 19.2-152.7:1, by the person against whom the protective order was issued against the person protected by the order or the protected person's family or household members;

- the relative severity of the injuries inflicted on persons involved in the incident;
- whether any injuries were inflicted in self-defense;
- witness statements; and
- other observations.

7) Virginia Code § 19.2-81.3 also requires the investigating officer to file a report with his or her law enforcement agency documenting the number or arrests, or if there were no arrests, why an arrest was not appropriate under the circumstances of the case. A summary of this report must be made available to the allegedly abused person or the person protected by an order issued pursuant to Va. Code §§ 19.2-152.8, 19.2-152.9, or 19.2-152.10 upon request.

8) *See* also Subpart H of this section for policy and procedural requirements for law enforcement agencies.

9) If a person is an active member of the United States Armed Forces, Va. Code § 18.2-57.4 requires the court to notify a family advocacy representative of the defendant's branch of service. The eMagistrate System requires the magistrate to note the branch of service, if known, on the entry screen prior to printing the warrant or summons.

10) Domestic Violence cases often involve highly emotional and traumatizing effects for the parties involved. To minimize potential increased trauma for victims, magistrates should follow the policy for processing cross-warrant complaints outlined in the Adult Arrest chapter of the manual.

e. A fifth and often overlooked option for victims of domestic violence is a referral to the local Domestic Violence Program for assistance and information regarding application to the Address Confidentiality Program (if appropriate) as described below, or for such other available services that the local program might administer.

3. Address Confidentiality Program

The legislature has enacted contingent legislation that required the Office of the Attorney General to establish an address confidentiality program for victims of domestic violence in accordance with Va. Code §§ 2.2-515.1 and 2.2-515.2.

Under the program, a victim of domestic violence who fears further violent acts from the assailant may designate the Attorney General to receive mail for the victim and to forward that mail to an address designated by the victim.

Confidentiality of the designated forwarding address is protected. The program's main features under the current statutory scheme are:

a. The Office of the Attorney General is tasked with establishing a Statewide Facilitator for Victims of Domestic Violence, whose job is to:

   1) Establish the address confidentiality program

   2) Assist agencies in implementing the domestic violence program

   3) Report on the status of such programs to the House Committee on Courts of Justice, to the Senate Committee on Courts of Justice, and to the Virginia State Crime Commission by January 1st of each year.

b. The Address Confidentiality Program under Va. Code § 2.2-515.2 is established to protect victims of domestic violence by authorizing the use of designated addresses for such victims by making application at a domestic violence program office and becoming certified as a program participant. Under the statute the following definitions apply:

   1) "Address" means a residential street address, school address, or work address of a person as specified on the person's application to be a program participant.

   2) "Applicant" means a person who is a victim of domestic violence or is a parent or guardian of a minor child or incapacitated person who is the victim of domestic violence.

   3) "Domestic violence" means an act as defined in Va. Code § 38.2-508 and includes threat of such acts committed against an individual in a domestic situation, regardless of whether these acts or threats have been reported to law-enforcement officers. Such threat must be a threat of force that would place any person in reasonable apprehension of death or bodily injury.

      Notice that the victim of domestic violence does **NOT** have to report the acts or threats against them to law enforcement before making application to the program

   4) "Domestic violence programs" means public and not-for-profit agencies, the primary mission of which is to provide services to victims of sexual or domestic violence.

   5) "Program participant" means a person certified by The Office of the Attorney General as eligible to participate in the Address Confidentiality Program.

c. When an individual who is at least 18 years of age, a parent or guardian acting on behalf of a minor, a guardian acting on behalf of an incapacitated person, or an emancipated minor applies in person at the domestic violence program, the role of the service provider is to:

1) assist the eligible person in determining whether the address confidentiality program should be part of their overall safety plan

2) explain the address confidentiality program services and limitations

3) explain to the person their responsibilities as program participant

4) assist the person, if eligible for participation, with the completion of the program application materials.

d. Upon approval of the application and certification of the applicant as a program participant, the individual will be able to participate for one year. The participant can apply for recertification every year. While a participant in the program, the individual's address will remain confidential and the participant may receive first class mail addressed in their name through the Attorney General or his designee. The participant's actual address may be entered into the Virginia Criminal Information Network (VCIN) for law enforcement purpose.

E. Family Abuse Emergency Protective Orders (Va. Code §§ 18.2-57.2 And 16.1-253.4)

1. Virginia Code § 18.2-57.2

a. Subsection C requires the magistrate to issue an emergency protective order as authorized by Va. Code § 16.1-253.4 when the magistrate issues a warrant for assault and battery on a family or household member.

1) Subsection B of Va. Code § 16.1-253.4 provides that, except in cases where the respondent is a minor, an EPO shall be issued " When a law-enforcement officer or an allegedly abused person asserts under oath to a judge or magistrate, and on that assertion or other evidence the judge or magistrate …issues a warrant for violation of § 18.2-57.2 and finds that there is probable danger of further acts of family abuse against a family or household member by the respondent…." If the respondent is a minor, an emergency protective order shall not be required.

2) The last paragraph of subsection B Va. Code § 16.1-253.4 requires the magistrate to presume that there is a probable danger of further acts of family abuse based solely on the issuance of a warrant for a violation of

Va. Code § 18.2-57.2 unless the testimony of the allegedly abused person rebuts this presumption.

b. Consequently, the fact that a magistrate issues a warrant for a violation of Va. Code § 18.2-57.2 requires the magistrate also to issue an emergency protective order *unless* the testimony of the allegedly abused person rebuts the presumption that there is probable danger of further acts of family abuse against a family or household member by the respondent.

2. Virginia Code § 16.1-253.4

a. Subsection A

1) A magistrate or a judge of the circuit, general district, or juvenile and domestic relations district court has the authority to issue an emergency protective order to protect the health or safety of any person.

The correct district court form is the DC-626, EMERGENCY PROTECTIVE ORDER - FAMILY ABUSE.

2) Depending upon the circumstances, the magistrate may issue either a written or oral emergency protective order.

3) The emergency protective order hearing is *ex parte*.

b. Subsection B

1) A law enforcement officer, an allegedly abused person, or a person acting as next friend for an allegedly abused juvenile may petition for the emergency protective order. Those who may act as next friend for a juvenile include a parent, a legal guardian, or a person standing in *loco parentis* to the juvenile. For purposes of this section, law enforcement officer is defined as (i) any full-time or part-time employee of a police department or sheriff's office which is part or administered by the Commonwealth or any political subdivision thereof and who is responsible for the protection and detention of crime and the enforcement of the penal, traffic, or highway laws of this Commonwealth (ii) any member of an auxiliary police force established pursuant to §15.2-1731; and (iii) any special conservator of the peace who meets the certification requirements for a law-enforcement officer as set forth in §15.2-1706. Part time employees are compensated officers who are not full-time employees as defined by the employing police departments or sheriff's office.

If the allegedly abused person, the person acting as next friend for the allegedly abused juvenile, or the officer seeks a warrant for assault and

battery on a family or household member in violation of Va. Code § 18.2-57.2 or malicious wounding/bodily injury under Va. Code § 18.2-51 and the magistrate requires the complainant to complete a DC-311, CRIMINAL COMPLAINT form to document the facts for the criminal charge, the magistrate may use this form as the petition for the emergency protective order.

- In such case, the magistrate would type, "See attached criminal complaint" in the "Request For Emergency Protective Order" section of the DC-626, EMERGENCY PROTECTIVE ORDER - FAMILY ABUSE.

- If this is done, the magistrate must make two copies of the DC-311, CRIMINAL COMPLAINT form and attach one photocopy to the front page of the order, and attach the other photocopy to the respondent's copy of the order.

- The petitioner may also write the facts supporting the abuse allegation in the space provided on the DC-626, EMERGENCY PROTECTIVE ORDER - FAMILY ABUSE, or write the facts on a separate sheet of paper. If a separate page is used for the facts, the magistrate must make a copy of the fact sheet. The magistrate attaches the original of the fact sheet to the front page of the order, and the photocopy to the respondent's copy of the order.

2) The magistrate must obtain the testimony of the petitioner under oath.

3) There are two instances in which the magistrate may issue a Family Abuse Emergency Protective Order. The magistrate must either:

- issue a warrant for a violation of Va. Code § 18.2-57.2 (or determine that another judicial officer has issued a warrant for a violation of Va. Code § 18.2-57.2) and find that there is probable danger that the respondent will commit further acts of family abuse against a family or household member;

  - The issuance of a warrant for a violation of Va. Code § 18.2-57.2 creates a presumption that there is probable danger that the respondent will commit further acts of family abuse.

  - This presumption may be rebutted by the allegedly abused person. If such person presents information upon which the magistrate can conclude that there is no danger that the respondent will commit further acts of family abuse, the magistrate would not issue the emergency protective order.

- If the magistrate determines that the allegedly abused person has rebutted the presumption, the magistrate should mark the "order denied" box on the emergency protective order and document that the allegedly abused person rebutted the presumption. The magistrate then files the order with the juvenile and domestic relations district court.

- If the magistrate issues a warrant for assault under Va. Code § 18.2-57, the presumption noted in subsection B is **not** created. (Virginia Code § 18.2-57.2 requires a family or household member to commit an assault **and** battery against another family or household member.)

- **OR**, find that reasonable grounds exist to believe that the respondent has committed family abuse, **and** there is probable danger that the respondent will commit further acts of family abuse against a family or household member.

  - The magistrate may issue a Family Abuse Emergency Protective Order even though he or she has not issued a warrant for a violation of Va. Code § 18.2-57.2. In this case, the magistrate must find that the respondent has committed an act of family abuse. The magistrate must also find that there is probable danger of the respondent committing further acts of family abuse.

  - Virginia Code § 16.1-228 defines the term "family abuse" as meaning any act involving violence, force, or threat that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury and that is committed by a person against such other person's family or household member. Such act includes, but is not limited to, any forceful detention, stalking, criminal sexual assault in violation of Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2, or any criminal offense that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury." The magistrate can infer probable danger of further abuse from:

    - the respondent's past history of abuse or violence, or
    - the circumstances providing the basis for the criminal warrant, or
    - the statements that the respondent made to the victim or other people.

4) If the magistrate makes the prerequisite findings, the magistrate **must** issue the Family Abuse Emergency Protective Order.

If, however, the respondent is a minor, subdivision B of Va. Code§ 16.1-253.4 does not require the magistrate to issue the Family Abuse Emergency Protective Order.

The statute, however, does not prohibit the magistrate from issuing a Family Abuse Emergency Protective Order when the alleged abuser is a minor.

5) The magistrate may order any or all of the following conditions as part of the emergency protective order:

- Prohibit further acts of family abuse or criminal offenses that result in injury to person or property.
- Prohibit contacts by the respondent with family or household members.
- Prohibit such contacts by the respondent with the allegedly abused person or family or household members of the allegedly abused person, including prohibiting the respondent from being in the physical presence of the allegedly abused person or family or household members of the allegedly abused person, as the judge or magistrate deems necessary to protect the safety of such persons.
- Physical presence" includes (i) intentionally maintaining direct visual contact with the petitioner or (ii) unreasonably being within 100 feet from the petitioner's residence or place of employment.
- Exclude the respondent from his or her residence and grant possession to the family or household member.
- Grant the petitioner possession of any companion animal as defined in Va. Code § 3.2-6500 if the petitioner is the companion animal's owner as defined in Va. Code § 3.2-6500.

6) These restrictions are independent of any conditions of release that the magistrate imposed or may impose after a bail hearing.

c. Subsection C

1) The Family Abuse Emergency Protective Order expires at 11:59 p.m. on the third day following issuance. If the expiration occurs on a day that the court is not in session, the emergency protective order shall be

extended until 11:59 p.m. on the next day that the juvenile and domestic relations district court is in session.

- The legislative history indicates that the term "*in session*" means when the juvenile and domestic relations district court normally is scheduled to convene. In other words, if the judge of the juvenile and domestic relations district court is having any scheduled court hearings of any type then the court is "in session" for purposes of the statute.

- If the court convenes for an emergency hearing on a day other than it is normally scheduled to convene, then the court is not in session for purposes of the statute.

- Pursuant to subsection A of Va. Code § 1-210 the day upon which the magistrate issues the EPO is **NOT** counted as the first day in calculating the day on which the order expires.

- Following the statutory analysis, the expiration of the order will always occur "at 11:59 p.m."

2) The expiration date is to be calculated as outlined above from the date when the magistrate issues the Family Abuse Emergency Protective Order, and the magistrate must note the expiration date on the order. If law enforcement fails to personally serve the respondent before the expiration time and date listed in the order, the order is not valid. Effective July 1, 2011, Va. Code § 16.1-264 was amended to state:

"Any person who is subject to an emergency protective order issued pursuant to § 16.1-253.4 or 19.2-152.8 shall have been personally served with the protective order if a law-enforcement officer, as defined in § 9.1-101, personally provides to such person a notification of the issuance of the order, which shall be on a form approved by the Executive Secretary of the Supreme Court of Virginia, provided that all of the information and individual requirements of the order are included on the form. The officer making service shall enter or cause to be entered the date and time of service and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network and make due return to the court."

The Committee on District Courts has approved the DC-633, NOTICE OF ISSUANCE OF EMERGENCY PROTECTIVE ORDER – FAMILY ABUSE to comply with the requirements of § 16.1-264 in family abuse cases. This form is designed for use by law enforcement officers in the field. The various law enforcement agencies may obtain the form through their local clerk's offices. A magistrate does not complete the DC-633,

NOTICE OF ISSUANCE OF EMERGENCY PROTECTIVE ORDER – FAMILY ABUSE form.

3) Urban area courts may result in a fairly uniform manner of calculating the expiration dates for emergency protective orders, but in rural localities where the court is in session only once a week or once a month, the order may be valid for a much longer period.

   - Example for urban courts meeting every day:

     The Hampton Juvenile and Domestic Relations District Court meets every weekday. The magistrate issues the order at 9:52 p.m. on a Monday. The order expires at 11:59 p.m. on Thursday.

   - Example for the more rural courts:

     The Sussex Juvenile and Domestic Relations District Court meets every Wednesday. The magistrate issues the order at 9:52 p.m. on Monday. Since the third day following issuance is a Thursday, and since the Sussex J&DR court is not in session on Thursdays the order is then extended to 11:59 p.m. of the following Wednesday.

4) Step-by-step summary of how to calculate the expiration date and time of the emergency protective order:

   - Look at the date on which the magistrate issued the emergency protective order.

   - Discount the day on which the order was issued

   - Find the third day after that date of issuance; if the J&DR court was in session that day, the order expires on that date at 11:59 p.m.

   - If the J&DR court was not in session on the third day following issuance, the order expires on the next day the J&DR court is in session at 11:59 p.m.

   - Examples of how to calculate the expiration of the emergency protective order:

     - Use this scenario as the premise for the examples: The Northampton Juvenile and Domestic Relations District Court Judge holds court every Monday and every Wednesday.

- The magistrate issues an emergency protective order on a Wednesday at 9:30 p.m. The order expires on the following Monday at 11:59 p.m.

- The magistrate issues an emergency protective order on a Sunday at 8:28 a.m. The order expires on Wednesday at 11:59 p.m. (Explanation: In this example, the third day after issuance is Wednesday. Since the court was in session that day, the magistrate selects that day as the date on which the order expires.)

- The magistrate issues an emergency protective order on a Saturday at 10:04 a.m. The order expires on the following Wednesday at 11:59 p.m.

- The magistrate issues an emergency protective order on a Friday at 9:00 a.m. The order expires Monday at 11:59 p.m.

▪ When a magistrate issues a Family Abuse Emergency Protective Order, subsection C of Va. Code § 16.1-253.4 requires the magistrate to give a DC-611, PETITION FOR PROTECTIVE ORDER – FAMILY ABUSE, and a Protective Order Information Sheet to the person who actually petitioned for the order. If the petitioner was a law enforcement officer, the officer provides the petition and information sheet to the person protected by the emergency custody order. The eMagistrate System automatically prints these documents with the printing of the order.

- Law enforcement officers should keep a supply of these two forms with them in the event of an electronic request for the issuance of an order pursuant to subsection D of Va. Code § 16.1-253.4.

- Subsection C allows the respondent to file a motion with the court to dissolve or modify the order. Once filed, the court must give precedence on the docket to such a motion.

d. Subsection D

1) A law enforcement officer may request orally a family abuse emergency protective order either:

- in person, or
- by electronic means

2) A law enforcement officer also may request orally an extension of an

existing emergency protective order for an additional period of time not to exceed three days after expiration of the original order if the victim is physically or mentally incapable of filing a petition pursuant to Va. Code § 16.1-253.1 (preliminary protective order) or Va. Code § 16.1-279.1 (protective order).

- The officer may request the extension either in person or by electronic means.
-
- If the magistrate grants such an extension, the magistrate prepares an amended order showing the new expiration date.
-
- The expiration date will be at the end of the third day following the expiration of the order. All extensions of Family Abuse Emergency Protective Orders will end at 11:59 p.m. of the third day after the expiration of the original order.

3) A magistrate may issue an oral Family Abuse Emergency Protective Order based on a request made electronically by a law enforcement officer.

- The law enforcement officer who requested the order from the magistrate must then reduce the oral order to writing on a form provided by the Supreme Court.

- When reducing the order to writing, the law enforcement officer or the magistrate must include the facts supplied by the abused person that supports the issuance of the order.

4) Under normal circumstances the magistrate will issue an oral Family Abuse Emergency Protective Order only in cases where the officer petitions for an order over the telephone or radio from the scene of the incident.

- In this case the officer, not the magistrate, will reduce the oral order to written form.

- The magistrate must later verify the oral order.

  - If the magistrate discovers that the officer did not transcribe the order correctly, the magistrate should correct the order and have law enforcement serve the amended copy on the respondent.

  - The amended order is valid for the time period established by

the original oral order.

e. Subsection E

1) The court or magistrate issuing the order shall forthwith, but in all cases no later than the end of the business day on which the order was issued, enter and transfer the identifying information of the respondent and the name, date of birth, sex, and race of each protected person provided to the magistrate electronically to the Virginia Criminal Information Network (VCIN).

- The eMagistrate System will automatically send this information to VCIN electronically as required unless the order was issued orally as described above, or unless the order was issued from the Local Backup eMagistrate System when the eMagistrate System was down or performing routine maintenance.

- When issuing a Family Abuse Emergency Protective Order on the Local Backup eMagistrate System while the eMagistrate System is down or performing routine maintenance, the magistrate should ensure compliance with the requirement to enter the information from the order into the VCIN. To ensure the entry requirement has been made, the magistrate should enter all of the information from an order produced by means of the backup system into the eMagistrate System when it again becomes operational. If necessary, the next magistrate on duty should enter it as soon as eMag is available. To perform this the magistrate should:

  - keep on hand a copy of the Family Abuse Emergency Protective Order issued from the Local Backup eMagistrate System for reference;

  - enter all of the information from the copy of the order into the eMagistrate system when it is again operation;

  - denote the original date, time & issuing magistrate in the "**Except**" field and is simply being issued now as a means to send the data electronically to VSP;

  - not print the order from the eMagistrate System. There is no reason to print the EPO as you now have the option to simply "save" the EPO data.

- When authorizing a law enforcement officer to complete an order telephonically, the magistrate should take care to ensure its entry into VCIN as required. One method of ensuring this would be to

use the following steps upon verification.

- When the officer brings the order back to be verified, the magistrate should:
- verify the paper order completed by the officer in the field as correct;
- enter all of the information from the paper order into the eMagistrate System;
- denote the original date, time & issuing magistrate in the "**Except**" field and is simply being issued now as a means to send the data electronically to VSP;
- not print the order from the eMagistrate System. There is no reason to print the EPO as you now have the option to simply "save" the EPO data;
- transcribe the OTN from eMag to the officer's paper order;
- verify/sign the written order. When a magistrate issues an **oral** emergency protective order in response to a telephonic request by law enforcement, the magistrate must verify the written order to determine whether the officer who reduced it to writing accurately transcribed the contents;
- the verification acknowledgment is located at the bottom of the DC-626, EMERGENCY PROTECTIVE ORDER - FAMILY ABUSE form;
- return the original order (officer's paper order) to the appropriate court.

▪ Using this process will ensure that the original order completed by the officer in the field has been verified as accurate, entered into the VCIN by the magistrate as required by statute, entered into the eMagistrate system database, and has the proper identifying tracking number.

2) The Family Abuse Emergency Protective Order issued pursuant to this code section is to be forwarded forthwith to the primary law-enforcement agency responsible for service and entry of protective orders.

3) Upon receipt of the order by the primary law-enforcement agency, the agency is to verify and enter any modification as necessary to the identifying information and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network (VCIN). A law enforcement officer must serve the order as soon as possible.

4) Once the officer has executed the order by serving a copy on the respondent, the agency must enter the date and time of service into the VCIN and make due return to the court.

5) The magistrate or officer must give the abused person a copy of the Family Abuse Emergency Protective Order.

   - If the magistrate issues the order electronically, the officer transcribing the electronic order will give a copy of it to the abused person.

   - If the abused person appears before the magistrate to petition for the Family Abuse Emergency Protective Order, the magistrate should issue the order while the petitioner is present in order to give him or her a copy.

   - Once the magistrate gives the petitioner/abused person a copy, the magistrate must complete the "**Copy delivered to**" section of the order located on the back of the court's copy of the order.

6) An officer must file a copy of the order with the written report required by Va. Code § 19.2-81.3 subparagraph (D).

7) Subsection E of Va. Code § 16.1-253.4 requires the order to be filed with the clerk of the appropriate juvenile and domestic relations district court within five business days of issuance.

   The statute is unclear as to whether law enforcement or the magistrate is responsible for forwarding the emergency protective order to the clerk of the juvenile and domestic relations district court.

   This may not be much of a problem since in most cases the defendant will be before the magistrate for a bail hearing anyway, and the magistrate can forward the Family Abuse Emergency Protective Order along with the warrant and the bail or commitment documents.

8) If the court dissolves or modifies the order, the clerk or judge must forward an attested copy of that order to the law enforcement agency.

The agency must then enter the dissolution or modification of the order into the VCIN.

9) The clerk of court must provide the abused person with the date and time of service if such person requests it.

f. Subsection F

The fact that the abused person left to avoid the danger of further abuse from the respondent does not affect whether the magistrate should issue the Family Abuse Emergency Protective Order.

g. Subsection G

No person can use the issuance of the Family Abuse Emergency Protective Order as evidence of wrongdoing by the respondent.

h. Subsection H

This subsection defines a "law-enforcement officer" as "(i) any full-time or part-time employee of a police department or sheriff's office which is part of or administered by the Commonwealth or any political subdivision thereof and who is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of the Commonwealth; (ii) any member of an auxiliary police force established pursuant to subsection B of Va. Code § 15.2-1731; and any special conservator of the peace who meets the certification requirements for a law-enforcement as set forth in § 15.2-1706. Part-time employees are compensated officers who are not full-time employees as defined by the employing police department or sheriff's office."

Uncompensated part-time officers do not qualify as law enforcement officers and cannot act as a petitioner for an emergency protective order.

i. Subsection I

1) This subsection prevents law enforcement agencies, attorneys for the Commonwealth, courts, clerk's offices, and employees of these entities from disclosing the following information concerning the person protected by the Family Abuse Emergency Protective Order or the family of such protected person:

- residential address;
- telephone number;
- place of employment.

2) Under this subsection, the magistrate also is prohibited from disclosing this information.

3) Magistrates must follow procedures regarding confidentiality of crime victim information set forth in the Confidentiality of Crime Victim Information section of the "Adult Arrest Procedures" chapter of the *MAGISTRATE MANUAL*.

4) This non-disclosure provision is automatic, and the protected person does NOT have to file a DC-301, REQUEST FOR CONFIDENTIALITY BY CRIME VICTIM form to prevent disclosure.

The information of the protected parties is further protected with the filing of a DC-621, NON-DISCLOSURE ADDENDUM. This form is printed by the eMagistrate System along with the EPO. The magistrate issuing an EPO shall staple the DC-621, NON-DISCLOSURE ADDENDUM, to the back of the COURT copy of the EPO. The information provided for this form may be either submitted writing or orally by the petitioner. If a magistrate does receive a completed DC-621, NON-DISCLOSURE ADDENDUM, from the complainant, the magistrate should attach to the EPO both the DC-621, NON-DISCLOSURE ADDENDUM, submitted by the complainant and the DC-621, NON-DISCLOSURE ADDENDUM, printed with the EPO by the eMagistrate System.

5) This provision also covers persons protected by preliminary protective orders, and orders of protection in family abuse cases.

j. Subsection J - This subsection includes a facsimile copy within the meaning of "copy" as used in the statute.

k. Subsection K - No entity can charge for the filing or serving of a petition for the Family Abuse Emergency Protective Order, or for serving the Family Abuse Emergency Protective Order.

l. Subsection C of Va. Code § 16.1-260 requires an intake officer to accept a petition when it is alleged that family abuse has occurred and a protective order is being sought pursuant to Va. Code §§ 16.1-253.1 (preliminary protective order), 16.1-253.4 (emergency protective order), or 16.1-279.1 (order of protection). If the complainant does not file the petition, the intake officer may file it.

m. Virginia Code § 19.2-387.1

Pursuant to this statute, the Department of State Police maintains a computerized Protective Order Registry. The magistrate has access to this registry through the Virginia Criminal Information Network (VCIN).

3. Virginia Code § 18.2-308.1:4

a. This statute prohibits a person (respondent) who is the subject of a Family Abuse Emergency Protective Order issued "…pursuant to Va. Code § 16.1-253.4 from purchasing or transporting a firearm while the order is in effect. Furthermore, respondents subject to orders entered pursuant to § 16.1-253.1, 16.1-278.2, 16.1-279.1, 19.2-152.8, 19.2-152.9, or 19.2-152.10; (ii) an order issued pursuant to subsection B of § 20-103; (iii) an order entered pursuant to subsection D of § 18.2-60.3; (iv) a preliminary protective order entered pursuant to subsection F of § 16.1-253 where a petition alleging abuse or neglect has been filed; or (v) an order issued by a tribunal of another state, the United States or any of its territories, possessions or commonwealths, or the District of Columbia pursuant to a statute that is substantially similar to those cited in clauses (i), (ii), (iii), or (iv) of Va. Code § 18.2-308.1:4 are also prohibited from purchasing or transporting a firearm while the order is in effect." This statute also requires the respondent to surrender his or her concealed handgun permit upon service of the emergency protective order.

Further, pursuant to Subsection B of Va. Code § 18.2-308.1:4 which states in part, "…it is unlawful for any person who is subject to a protective order entered pursuant to § 16.1-279.1 or an order issued by a tribunal of another state, the United States or any of its territories, possessions, or commonwealths, or the District of Columbia pursuant to a statute that is substantially similar to § 16.1-279.1 to knowingly possess any firearm while the order is in effect, provided that for a period of 24 hours after being served with a protective order in accordance with subsection C of § 16.1- 279.1 such person may continue to possess and, notwithstanding the provisions of subsection A, transport any firearm possessed by such person at the time of service for the purposes of selling or transferring any such firearm to any person who is not otherwise prohibited by law from possessing such firearm. A violation of this subsection is a Class 6 felony.

b. If the law enforcement officer serves the respondent with the emergency protective order while he or she is before the magistrate, the magistrate should inquire whether the respondent is in possession of a concealed handgun permit.

1) If the respondent has the concealed handgun permit, the magistrate should take the order and attach it to the original of the emergency protective order and forward it to the clerk's office.

2) If the respondent does not have the permit with him or her, then the magistrate should instruct the respondent to deliver it to the juvenile and domestic relations district court to which the emergency protective order is returnable.

c. Failure to surrender the concealed handgun permit constitutes a Class 1 misdemeanor.

d. Purchasing or transporting a firearm while the order is in effect also constitutes a Class 1 misdemeanor.

VII. EMERGENCY PROTECTIVE ORDERS – ACTS OF VIOLENCE, FORCE OR THREAT (§ 19.2-152.8)

A. Subsection A

A magistrate or a judge of the circuit, general district, or juvenile and domestic relations district court has the authority to issue an Emergency Protective Order when any person has been subjected to an act of violence, force, or threat or a warrant has been issued for any criminal offense resulting from the commission of an act of violence, force, or threat.

1. The correct district court form is the DC-382, EMERGENCY PROTECTIVE ORDER.

2. Depending upon the circumstances, the magistrate may issue either a written or oral emergency protective order.

3. The emergency protective order hearing is *ex parte*.

B. Subsection B

1. It appears based upon the comprehensive nature of the 2011 legislation that the General Assembly intended for Family Abuse Emergency Protective Orders (Va. Code § 16.1-253.4) to be issued in cases involving family or household members and that in all other situations, Emergency Protective Orders should be issued pursuant to Va. Code § 19.2-152.8. When the respondent and the person(s) whom an order is intended to protect are family or household members, if an emergency protective order is to be issued, it should be issued pursuant to Va. Code § 16.1-253.4.

2. A law enforcement officer; a person who has been subjected to an act of violence, force, or threat; or a person acting as next friend of a juvenile who has been subjected to an act of violence, force, or threat, may request an emergency protective order. Those who may act as next friend for a juvenile include a parent, a legal guardian, or a person standing in *loco parentis* to the juvenile.

   a. If a law enforcement officer; an alleged victim of an act of violence, force, or threat; or a person acting as next friend of a juvenile who has been subjected to an act of violence, force, or threat, completes a DC-311, CRIMINAL COMPLAINT form to document the facts for a criminal charge, the

magistrate may use this form as the petition for the Emergency Protective Order.

1) In such a case, the magistrate would type, "**See attached criminal complaint**" in the "Request for Emergency Protective Order" section of the DC-382, EMERGENCY PROTECTIVE ORDER form.

2) If this is done, the magistrate must make two copies of the DC-311, CRIMINAL COMPLAINT form and attach one photocopy to the front page of the order, and attach the other photocopy to the respondent's copy of the order.

3) The requester may also write the facts supporting the allegation in the space provided on the DC-382, EMERGENCY PROTECTIVE ORDER form, or the magistrate may subscribe the facts alleged by the petitioner by typing them in the appropriate field of the form on the eMagistrate System. The magistrate must be careful to only list the facts alleged by the petitioner or the law enforcement officer requesting the order.

4) The requester may also write the facts supporting the allegation on a separate sheet of paper. If a separate page is used for the facts, the magistrate must make a copy of the fact sheet. The magistrate attaches the original of the fact sheet to the front page of the order, and the photocopy to the defendant's copy of the order.

b. The magistrate must obtain the testimony of the requester under oath.

3. In order to issue the Emergency Protective Order, a law enforcement officer, an alleged victim, or a person acting as next friend for an alleged juvenile victim, must assert under oath to a judge or magistrate that such alleged victim is being or has been subjected to an act of violence, force, or threat, and the magistrate must find:

a. that there is a probable danger of further such act being committed by the respondent against the alleged victim,

OR

b. that a petition or warrant for the arrest of the respondent has been issued for any criminal offense resulting from the commission of an act of violence, force, or threat.

1) **NOTE:** Unlike Family Abuse Protective Orders issued pursuant to Va. Code § 16.1-253.4, issuance against a juvenile respondent is mandatory under Va. Code § 19.2-152.8 when a magistrate makes all of the necessary findings.

2) If either one or both of the parties is a juvenile then the EPO would be a juvenile and domestic relations court matter and this should be indicated in the appropriate box on the EPO form.

3) Those who may act as next friend for a juvenile include a parent, a legal guardian, or a person standing in *loco parentis* to the juvenile.

4. The magistrate can infer probable danger of further acts from the respondent's past history of violence, force or threats.

5. The magistrate can infer probable danger of further acts from the circumstances providing the basis for the act of violence, force or threat.

6. The magistrate can infer probable danger of further acts from statements that the respondent made to the victim or other people.

7. If the magistrate makes the prerequisite findings, the magistrate must issue the emergency protective order.

8. The magistrate may order any or all of the following conditions as part of the emergency protective order:

a. Prohibit acts of violence, force, or threat or criminal offenses resulting in injury to person or property.

b. Prohibit such contacts by the respondent with the alleged victim or such person's family or household members as the judge or magistrate deems necessary to protect the safety of such persons.

c. Prohibit such contacts by the respondent with the alleged victim or the alleged victim's family or household members, including prohibiting the respondent from being in the physical presence of the alleged victim or the alleged victim's family or household members, as the judge or magistrate deems necessary to protect the safety of such persons.

d. Such other conditions as the judge or magistrate deems necessary to prevent (i) acts of violence, force, or threat, (ii) criminal offenses resulting in injury to person or property, or (iii) communication or other contact of any kind by the respondent.

e. Grant the petitioner possession of a companion animal as defined in Va. Code § 3.2-6500 if the petitioner is the companion animal's owner as defined in Va. Code § 3.2-6500.

9. These restrictions are independent of any conditions of release that the magistrate imposed in a bail hearing.

C. Subsection C

1. The Emergency Protective Order issued pursuant to Va. Code § 19.2-152.8 expires at 11:59 p.m. of the third day following issuance. If the expiration occurs on a day that the court is not in session, the emergency protective order shall be extended until 11:59 p.m. of the next day that the court is in session.

   a. The legislative history indicates that the term "*in session*" means when the court normally is scheduled to convene. In other words, if the judge of the court the order is returnable to is having any scheduled court hearings of any type on a particular day, then the court is "in session" for purposes of the statute on that day.

   b. If the court to which the Emergency Protective Order is returnable convenes for an emergency hearing on a day other than its normally scheduled date, the court is not in session for purposes of this statute.

   c. Pursuant to subsection A of Va. Code § 1-210 the day upon which the

   d. magistrate issues the EPO is **NOT** counted as the first day in calculating the day on which the order expires.

2. Following the statutory analysis, the expiration of the Emergency Protective Order always occurs at 11:59 p.m.

   a. The expiration period is to be calculated as outlined above according to the date the magistrate issues the order, and the magistrate must note the expiration date on the order (this is automated in eMagistrate).

   b. If law enforcement fails to personally serve the respondent before the expiration time and date listed in the order, the order is not valid. Effective July 1, 2011, Va. Code § 16.1-264 was amended to state:

      "Any person who is subject to an emergency protective order issued pursuant to § 16.1-253.4 or 19.2-152.8 shall have been personally served with the protective order if a law-enforcement officer, as defined in § 9.1- 101, personally provides to such person a notification of the issuance of the order, which shall be on a form approved by the Executive Secretary of the Supreme Court of Virginia, provided that all of the information and individual requirements of the order are included on the form. The officer making service shall enter or cause to be entered the date and time of service and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network and make due return to the court."

The Committee on District Courts has approved the DC-373, NOTICE OF ISSUANCE OF EMERGENCY PROTECTIVE ORDER to comply with the requirements of Va. Code § 16.1-264 in cases involving Emergency Protective Orders issued pursuant to Va. Code § 19.2-152.8. This form is designed for use by law enforcement officers in the field. The various law enforcement agencies may obtain the form through their local clerk's offices. A magistrate does not complete the DC-373, NOTICE OF ISSUANCE OF EMERGENCY PROTECTIVE ORDER form.

3. Urban area courts may result in a fairly uniform manner of calculating the expiration dates for emergency protective orders, but in rural localities where the court is in session only once a week or once a month, the order may be valid for a much longer period.

   a. Example for urban courts meeting every day:

      The Hampton General District Court meets every weekday. The magistrate issues the order at 9:52 p.m. on a Monday. The order expires at 11:59 p.m. on Thursday.

   b. Example for the more rural courts:

      The Nelson General District Court meets every Wednesday. The magistrate issues the order at 9:52 p.m. on Monday. Since the order would expire at 11:59 p.m. on Thursday, and since the court was not in session on that day, the order is extended to 11:59 p.m. on the following Wednesday.

4. Step-by-step summary of how to calculate the expiration of the Emergency Protective Order:

   a. Look at the date on which the magistrate issued the emergency protective order.

   b. Discount the day on which the order was issued.

   c. Find the third day after that date of issuance; if the court was in session that day, the order expires on that date at 11:59 p.m.

   d. If the court was not in session on the third day following issuance, the order expires on the next day the court is in session at 11:59 p.m.

   e. A law-enforcement officer may request an extension of an existing emergency protective order for an additional period of time not to exceed three days after expiration of the original order if the victim is physically or mentally incapable of filing a petition pursuant to Va. Code §§ 19.2-152.9 or 19.2-

152.10. The request for such extension may be made orally, in person or by electronic means.

5. The respondent may file a motion with the court to dissolve or modify the order. The court must give precedence on the docket to such a motion.

D. Subsection D

1. A law enforcement officer may petition for an Emergency Protective Order pursuant to Va. Code § 19.2-152.8 orally either:

    - in person, or
    - by electronic means

2. A magistrate may issue an oral emergency protective order upon the request of a law enforcement officer.

    a. The law enforcement officer who requests the order or the magistrate must then reduce the order to writing on a form provided by the Supreme Court.

    b. When reducing the order to writing, the law enforcement officer or the magistrate must include the facts supplied by the alleged victim that supports the issuance of the order.

3. Under normal circumstances the magistrate will issue an oral Emergency Protective Order only in cases where the officer petitions for an order over the telephone or radio from the scene of the incident.

    a. In this case the officer, not the magistrate, will reduce the oral order to written form.

    b. The magistrate must later verify the oral order.

        – If the magistrate discovers that the officer did not transcribe the order correctly, the magistrate should correct the order and have law enforcement serve the amended copy on the respondent.
        – The amended order is valid for the time period established by the original oral order.

E. Subsection E

1. The court or magistrate issuing the order shall forthwith, but in all cases **no later than the end of the business day**, on which the order was issued, enter and transfer the identifying information of the respondent and the name, date of birth,

sex, and race of each protected person provided to the court or magistrate electronically to the Virginia Criminal Information Network (VCIN).

a. The eMagistrate System will automatically pass this information to the VCIN electronically as required unless the order was issued orally as described above, or unless the order was issued from the Local Backup eMagistrate System when the eMagistrate System was down or performing routine maintenance.

b. When issuing an Emergency Protective Order on the Local Backup eMagistrate System while the eMagistrate System is down or performing routine maintenance, the magistrate should ensure the compliance with the requirement to enter the EPO information into the VCIN. To ensure the entry requirement has been made, the magistrate should enter all of the information from the EPO produced by means of the backup system into the eMagistrate System when it again becomes operational. To perform this, the magistrate should:

   - keep on hand a copy of the EPO issued from the Local Backup eMagistrate System for reference;
   - enter all of the information from the copy into the eMagistrate system when it is again operational;
   - issue and print the order from the eMagistrate System;
   - dispose of the eMagistrate System printed order and all copies and the extra copy of the EPO printed from the Local Backup eMagistrate System.

c. If issuing an oral EPO the magistrate should enter into the eMagistrate System the same information from the oral order that was obtained by law enforcement through electronic communication to ensure compliance with the necessary VCIN entry. When authorizing a law enforcement officer to complete an Emergency Protective Order telephonically, the magistrate should take care to ensure its entry into the VCIN as required. One method of ensuring this would be to use the following steps upon verification.

   - When the officer brings the order back to be verified, the magistrate should:

      - verify the paper order completed by the officer in the field as correct,
      - enter all of the information from the paper order into the eMagistrate system,
      - issue and print the order from the eMagistrate system,
      - transcribe the process number from the printed order to the paper order,
      - dispose of the eMagistrate system printed order and all copies, and
      - return the original paper order to the appropriate court.

– Using this process will ensure that the original paper order completed by the officer in the field has been verified as accurate, entered into the VCIN by the magistrate as required by statute, entered into the eMagistrate system database, and has the proper identifying tracking number.

2. A copy of an Emergency Protective Order issued pursuant to Va. Code § 19.2-152.8 containing any such identifying information shall be forwarded forthwith to the primary law-enforcement agency responsible for service and entry of protective orders.

3. Upon receipt of the order by the primary law-enforcement agency, the agency shall forthwith verify and enter any modification as necessary to the identifying information and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network (VCIN). A law enforcement officer must serve the emergency protective order as soon as possible.

4. Once the officer has executed the order by serving a copy thereof or the OES form authorized by Va. Code § 16.1-264 on the respondent, the agency must enter the date and time of service into the VCIN and make due return to the court.

5. The magistrate or officer must give the victim a copy of the Emergency Protective Order.

   a. If the magistrate issues the order electronically, the officer transcribing the electronic order will give a copy of it to the victim of the act of violence, force, or threat.

   b. If the victim appears before the magistrate to petition for the Emergency Protective Order, the magistrate should issue the order while the petitioner is present in order to give him or her a copy.

      Once the magistrate gives the victim a copy, the magistrate must complete the "**Copy delivered to**" section of the emergency protective order located on the back of the court's copy of the order.

6. The original copy shall be verified by the judge or magistrate who issued the order and then filed with the clerk of the appropriate district court within five business days of the issuance of the order.

7. If the court dissolves or modifies the order, the clerk or judge must forward an attested copy of that order to the law enforcement agency.

   The agency must then enter the dissolution or modification order into the Virginia Criminal Information Network (VCIN). The clerk of court must provide the victim with the date and time of service if such person requests it.

F. Subsection F

No person can use the issuance of the Emergency Protective Order as evidence of wrongdoing by the respondent.

G. Subsection G

This subsection defines a "law-enforcement officer" as a "(i) person who is a full-time or part-time employee of a police department or sheriff's office which is part of or administered by the Commonwealth or any political subdivision thereof and who is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of the Commonwealth and (ii) member of an auxiliary police force established pursuant to subsection B of § 15.2-1731. Part-time employees are compensated officers who are not full-time employees as defined by the employing police department or sheriff's office."

Uncompensated part-time officers do not qualify as law enforcement officers and cannot act as a petitioner for a stalking emergency protective order.

H. Subsection H

1. This subsection prevents law enforcement agencies, attorneys for the Commonwealth, courts, clerk's offices, and employees of these entities from disclosing the following information concerning the person protected by the emergency protective order or the family of such protected person:

    - residential address;
    - telephone number;
    - place of employment.

2. Under this subsection, the magistrate also is prohibited from disclosing this information. Magistrates must follow procedures regarding confidentiality of crime victim information set forth in the Confidentiality of Crime Victims Information section in the "Adult Arrest Procedures" chapter of the *MAGISTRATE MANUAL*.

3. This non-disclosure provision is automatic, and the protected person does **NOT** have to file a DC-301, REQUEST FOR CONFIDENTIALITY BY CRIME VICTIM form to prevent disclosure.

4. This provision also covers persons protected by preliminary protective orders, and orders of protection in cases involving acts of violence, force, or threat.

I. Subsection I

This subsection includes a facsimile copy within the meaning of "copy" as used in the statute.

J. Subsection J

No entity can charge for the filing or serving of a petition for the Emergency Protective Order, or for serving the Emergency Protective Order.

1. A victim of an act of violence, force or threat may also apply for a preliminary protective order pursuant to Va. Code § 19.2-152.9, and an order of protection pursuant to Va. Code § 19.2-152.10.

2. Virginia Code § 18.2-60.4 provides that a violation of an emergency protective order issued pursuant to Va. Code § 19.2-152.8, or a preliminary protective order issued pursuant to Va. Code § 19.2-152.9, or a protective order issued pursuant to Va. Code § 19.2-152.10 is punishable as a Class 1 misdemeanor. Conviction hereunder shall bar a finding of contempt for the same act.

    a. The punishment for any person convicted of a second offense of violating a protective order, when the offense is committed within five years of the prior conviction and when either the instant or prior offense was based on an act or threat of violence, shall include a mandatory minimum term of confinement of 60 days. Any person convicted of a third or subsequent offense of violating a protective order, when the offense is committed within 20 years of the first conviction and when either the instant or one of the prior offenses was based on an act or threat of violence, is guilty of a Class 6 felony and the punishment shall include a mandatory minimum term of confinement of six months. The mandatory minimum terms of confinement prescribed for violations of this section shall be served consecutively with any other sentence.

    b. If the respondent commits an assault and battery upon any party protected by the protective order resulting in serious bodily injury to the party, he is guilty of a Class 6 felony. Any person who violates such a protective order by furtively entering the home of any protected party while the party is present, or by entering and remaining in the home of the protected party until the party arrives, is guilty of a Class 6 felony, in addition to any other penalty provided by law.

    c. In addition to any other penalty provided by law, any person who, while knowingly armed with a firearm or other deadly weapon, violates any provision of a protective order with which he has been served issued pursuant to Va. Code §§ 19.2-152.8, 19.2-152.9, or 19.2-152.10 is guilty of a Class 6 felony.

d. Upon conviction of any offense hereunder for which a mandatory minimum term of confinement is specified, the person shall be sentenced to a term of confinement and in no case shall the entire term imposed be suspended.

VIII. EMERGENCY SUBSTANTIAL RISK ORDER § 19.2-152.13

A magistrate has authority to issue an emergency substantial risk order (ESRO) pursuant to VA Code 19.2-152.13.

The finding the magistrate must make is whether there is probable cause to believe that a person poses a substantial risk of personal injury to himself or others in the near future by such person's possession or acquisition of a firearm. If this finding is made, the Magistrate shall issue the ESRO. The order shall prohibit the person who is subject to the order from purchasing, possessing, or transporting a firearm while subject to the order. In determining whether probable cause for the issuance of an order exists, the magistrate shall consider any relevant evidence, including any recent act of violence, force, or threat directed toward another person or toward himself.

Only a law enforcement officer or an attorney for the Commonwealth may petition for the ESRO. A citizen may not petition for an emergency substantial risk order. No petition shall be filed unless an independent investigation has been conducted by law enforcement that determines that grounds for the petition exist. When law enforcement or an attorney for the commonwealth petitions, then the magistrate assumes the investigation has been done and does not inquire as to the extent of the investigation. The petitioner must provide a sworn petition and an affidavit. These two items may be provided together on the DC-4060, PETITION FOR EMERGENCY SUBSTANTIAL RISK ORDER. The order is issued on the DC-4061 EMERGENCY SUBSTANTIAL RISK ORDER form.

The order may be commenced where the respondent has his principal residence or has engaged in any conduct upon which the petition is based. The petitioner will state on the petition which court the ESRO should be returnable and why. Because the ESRO will always be returnable to circuit court, the eMagistrate system will automatically designate the circuit court. The order is valid for 14 days and expires at 11:59 p.m. on the fourteenth day following issuance of the order, unless the 14th day is a holiday or weekend. In that case, the order will expire at 11:59 p.m. on the next non holiday or weekend day.

The Magistrate must provide a copy of the ESRO to the Circuit Court Clerk's Office by fax. The exact protocol for this notification should have been established by the Chief Magistrate.

Some of the criminal offenses related to ESROs are:

1. VA Code 18.2-308.1:6 makes it a Class 1 misdemeanor to purchase, possess or transport any firearm while an ESRO is in effect.

2. VA Code 19.2-152.16 makes it a Class 1 misdemeanor to knowingly and willfully make a materially false statement or representation to a law enforcement officer or an attorney for the Commonwealth who is in the course of conducting the investigation required to obtain an ESRO.
3. A new category of information has been added to the disclosures required to transfer firearms (VA Code 18.2-308.2:2). If a person willfully and intentionally makes a materially false statement on the consent form required by 18.2-308.2:2(B) or (C) about being subject to an ESRO, a substantial risk order or an substantially similar law from any other jurisdiction and being prohibited from purchasing, possessing or transporting a firearm, this will now be punishable as a Class 5 Felony under Virginia Code Section 18.2-308.2:2 (K).

IX. VIRGINIA CODE § 19.2-387.1

Pursuant to this statute, the Department of State Police maintains a computerized Protective Order Registry. The magistrate has access to this registry through the Virginia Criminal Information Network (VCIN).

X. VIRGINIA CODE § 18.2-308.1:4

This statute prohibits a person (respondent) who is the subject of an Emergency Protective Order issued pursuant to Va. Code § 19.2-152.8 from purchasing or transporting a firearm while the order is in effect. Furthermore, respondents subject to orders entered "pursuant to § 16.1-253.1, 16.1-253.4, 16.1-278.2, 16.1-279.1, 19.2-152.9, or 19.2-152.10; (ii) an order issued pursuant to subsection B of § 20-103; (iii) an order entered pursuant to subsection D of § 18.2-60.3; (iv) a preliminary protective order entered pursuant to subsection F of § 16.1-253 where a petition alleging abuse or neglect has been filed; or (v) an order issued by a tribunal of another state, the United States or any of its territories, possessions or commonwealths, or the District of Columbia pursuant to a statute that is substantially similar to those cited in clauses (i), (ii), (iii), or (iv) of Va. Code § 18.2-308.1:4 are also prohibited from purchasing or transporting a firearm while the order is in effect." This statute also requires the respondent to surrender his or her concealed handgun permit upon service of the emergency protective order.

If the law enforcement officer serves the respondent with the Emergency Protective Order while he or she is before the magistrate, the magistrate should inquire whether the respondent is in possession of the concealed handgun permit.

- If the respondent has the concealed handgun permit, the magistrate should take the permit and attach it to the original of the Emergency Protective Order and forward it to the clerk's office.

- If the respondent does not have the permit with him or her, then the magistrate should instruct the respondent to deliver it to the district court to which the order

is returnable.

- Failure to surrender the concealed handgun permit constitutes a Class 1 misdemeanor.

- Purchasing or transporting a firearm while the order is in effect also constitutes a Class 1 misdemeanor.

XI. ENFORCEMENT OF ORDERS ISSUED BY THE DISTRICT COURTS, CIRCUIT COURTS, OR MAGISTRATES

A. Contempt Proceedings

Any person who violates an order of the juvenile and domestic relations district court or circuit court that does not involve a protective order is subject to punishment through contempt proceedings.

- To initiate contempt proceedings, the aggrieved party must petition the court by filing a DC-635, Motion For Show Cause Summons Or Capias.

- If the court finds evidence that the respondent may have violated an order, the court will issue a show cause summons or a capias.

- The respondent then must appear for the show cause hearing to determine whether there was a violation of the court's order.

- The magistrate's only role in this process is to conduct a bail hearing if law enforcement arrests the respondent pursuant to the court's capias.

B. Violation of Protective Orders

An aggrieved party may appear before the magistrate to seek a warrant or summons pursuant to Va. Code §§ 16.1-253.2, 18.2-60.4, or 18.2-119.

1. Violations of Va. Code § 16.1-253.2

   a. A person who violates an order issued by a court pursuant to Va. Code § 16.1-253 (preliminary protective order in cases of child abuse), Va. Code § 16.1-253.1 (preliminary protective order in cases of family abuse), Va. Code § 16.1-253.4 (emergency protective order in cases of family abuse), Va. Code § 16.1-278.14 (a protective or rehabilitative order incident to a criminal conviction), Va. Code § 16.1-279.1 (protective order in cases of family abuse) or subsection B of Va. Code § 20-103 (protective orders ancillary to suits for divorce, annulment and separate maintenance), or issued by a magistrate pursuant to Va. Code § 16.1-253.4 (emergency protective order in cases of family abuse) has committed a crime under Va. Code § 16.1-253.2.

b. Subsection F of Va. Code § 16.1-279.1 requires that any judgment, order, or decree issued:

- to prevent violent or threatening acts or harassment against, or contact or communication with, or physical proximity to another person; and
- by a court of appropriate jurisdiction in the United States and its territories, possessions, and Commonwealths, and in the District of Columbia or by a tribal court of appropriate jurisdiction; and
- the orders "provided reasonable notice and opportunity to be heard were given by the issuing jurisdiction to the person against whom the order is sought" must be given full faith and credit by Virginia and must be enforced as if it were an order of the Commonwealth. Consequently, a magistrate may issue a criminal process pursuant to Va. Code §16.2-253.2 based on a violation of an out-of-state order only if the defendant had the opportunity to appear and be heard in the other state. Another state's ex parte order cannot be enforced by Va. Code §16.1-253.2. The magistrate should look at all the evidence available to try and make a determination whether the defendant was given an opportunity to be heard in the other state. Orders titled "emergency" and orders with subsequent court dates on the order may be evidence that this order is an *ex-parte* order and not subject to punishment under Va. Code §16.1-253.2.

c. Section 19.2-152.10 has identical language to 16.1-279.1 in affording full faith and credit to out of state general protective orders. Consequently, a magistrate may issue a criminal process pursuant to Va. Code Section 18.2-60.4 based on a violation of an out-of-state order only if the defendant had the opportunity to appear and be heard in the other state.

d. For a magistrate or other judicial officer to issue a warrant or summons for a violation of Va. Code § 16.1-253.2, the order must prohibit

- a person from going or remaining on specified land, building, or premises; **or**
- further acts of family abuse; **or**
- contacts between the respondent and his or her family or household member. *See* the Attorney General Opinion to Howell, dated 11/30/98 (1998, page 44); *The clear intent of this language is to remove those violations specified in § 16.1-253.2 from the contempt of court sanction … and to establish such violations as criminal offenses*.

e. A first offense violation constitutes a Class 1 misdemeanor.

1) The punishment for any person convicted of a second offense of violating a protective order, when the offense is committed within five years of the prior conviction and when either the instant or prior

offense was based on an act or threat of violence, shall include a mandatory minimum term of confinement of 60 days.

2) Any person convicted of a third or subsequent offense of violating a protective order, when the offense is committed within 20 years of the first conviction and when either the instant or one of the prior offenses was based on an act or threat of violence is guilty of a Class 6 felony and the punishment shall include a mandatory minimum term of confinement of six months. The mandatory minimum terms of confinement prescribed for violations of this section shall be served consecutively with any other sentence.

3) If the respondent commits an assault and battery upon any party protected by the protective order, resulting in bodily injury to the party or stalks any party protected by the protective order in violation of Va. Code § 18.2-60.3, she is guilty of a Class 6 felony.

4) Any person who violates such a protective order by furtively entering the home of any protected party while the party is present, or by entering and remaining in the home of the protected party until the party arrives, is guilty of a Class 6 felony, in addition to any other penalty provided by law.

   - Furtively means in a manner done by stealth, surreptitiously, sneakily

   - In addition to the violation of Va. Code § 16.1-253.2, the magistrate may also charge the respondent with burglary if the order grants the protected person possession of the premises occupied by the parties to the exclusion of the respondent.

   Example: The respondent enters in the home of the protected while such person is gone and remains there until the protected person arrives.

   In this situation, the felony is not complete until the protected person arrives at the home.

   If the respondent is caught in the home before the protected party arrives, the respondent has committed the misdemeanor violation of Va. Code § 16.1-253.2 if the court or magistrate had granted the protected person possession of the premises occupied by the parties to the exclusion of the respondent. (If the order merely forbade contact with the protected party, the respondent has committed the misdemeanor violation of attempting to violate the protective order in violation of Va. Code §§ 18.2-27, 16.1-253.2.)

5) In addition to any other penalty provided by law, any person who, while knowingly armed with a firearm or other deadly weapon, violates any provision of a protective order with which he has been served issued pursuant to Va. Code §§ 16.1-253, 16.1-253.1, 16.1-253.4, 16.1-278.14, or Va. Code § 16.1-279.1 or subsection B of Va. Code § 20-103 is guilty of a Class 6 felony.

2. Virginia Code § 18.2-60.4 provides that a violation of an emergency protective order issued pursuant Va. Code § 19.2-152.8, or a preliminary protective order issued pursuant to Va. Code § 19.2-152.9, or a protective order issued pursuant to Va. Code § 19.2-152.10 is punishable as a Class 1 misdemeanor. Conviction hereunder shall bar a finding of contempt for the same act.

   a. The punishment for any person convicted of a second offense of violating a protective order, when the offense is committed within five years of the prior conviction and when either the instant or prior offense was based on an act or threat of violence, shall include a mandatory minimum term of confinement of 60 days.

   b. Any person convicted of a third or subsequent offense of violating a protective order, when the offense is committed within 20 years of the first conviction and when either the instant or one of the prior offenses was based on an act or threat of violence, is guilty of a Class 6 felony and the punishment shall include a mandatory minimum term of confinement of six months. The mandatory minimum terms of confinement prescribed for violations of this section shall be served consecutively with any other sentence.

   c. If the respondent commits an assault and battery upon any party protected by the protective order resulting in bodily injury to the party or stalks any party protected by the protective order in violation of Va. Code § 18.2-60.3, she is guilty of a Class 6 felony.

   d. Any person who violates such a protective order by furtively entering the home of any protected party while the party is present, or by entering and remaining in the home of the protected party until the party arrives, is guilty of a Class 6 felony, in addition to any other penalty provided by law.

   e. In addition to any other penalty provided by law, any person who, while knowingly armed with a firearm or other deadly weapon, violates any provision of a protective order with which he has been served issued pursuant to Va. Code §§ 19.2-152.8, 19.2-152.9, or 19.2-152.10 is guilty of a Class 6 felony.

   f. Venue

See the Attorney General Opinion to Howell dated 11/30/98 (1998, page 44); While §16.1-243(A)(3) establishes venue for purposes of seeking a protective order, it does not establish venue for purposes of prosecution under § 16.1-253.2. *Accordingly, pursuant to Va. Code § 19.2-244, prosecution for an alleged violation of the provisions in a preliminary, emergency or final protective order specified in Va. Code § 16.1-253.2 is to be held in the jurisdiction in which the alleged violation occurred*.

The same reasoning would seem to apply to venue for violations of protective orders issued in cases involving acts of violence, force or threat issued under Title 19.2

In 2020, the legislature expanded the venue for a violation of any protective order to include a violation of a protective order may be prosecuted in the jurisdiction where the protective order was issued in addition to the usual where any act constituting the violation of the protective order occurred.

3. Trespass in violation of various orders.

Pursuant to Va. Code § 18.2-119, a person is guilty of criminal trespass if he or she goes upon, or remains upon specified land, building, or premises after having been prohibited to do so by:

- an order of protection for a child issued pursuant to Va. Code § 16.1-253;
- a preliminary protective order issued pursuant to Va. Code § 16.1-253.1;
- an emergency protective order issued pursuant to Va. Code § 16.1-253.4;
- an order involving an abuse, neglected, or abandoned child issued pursuant to Va. Code § 16.1-278.2;
- an order involving a child alleged to be a status offender issued pursuant to Va. Code § 16.1-278.6;
- an order involving a delinquent child issued pursuant to Va. Code § 16.1-278.8;
- a protective or rehabilitative order incident to a criminal conviction issued pursuant to Va. Code § 16.1-278.14;
- an order involving custody, visitation, child support, or spousal support issued pursuant to Va. Code § 16.1-278.15;
- an order of protection issued pursuant to Va. Code § 16.1-279.1;

- an emergency protective order in cases involving acts of violence, force, or threat issued pursuant to Va. Code § 19.2-152.8;

- a preliminary protective order in cases involving acts of violence, force, or threat issued pursuant to Va. Code § 19.2-152.9;

- a protective order in cases involving acts of violence, force, or threat issued pursuant to Va. Code § 19.2-152.10; or

- an ex parte order pending a suit for annulment or divorce issued pursuant to Va. Code § 20-103.

4. Full Faith and Credit of Out-of-State Orders

   Subsection E of Va. Code § 16.1-279.1 requires that orders issued by a court of appropriate jurisdiction in the United States or its territories, possessions, commonwealths, the District of Columbia, or a tribal court of appropriate jurisdiction must be given full faith and credit by Virginia and must be enforced as if it were an order of the Commonwealth.

5. Contempt of Court for Violating a Protective Order

   Should the respondent violate a companion animal provision of an emergency protective order issued pursuant to Va. Code § 16.1-253.4, subsection L of that statute states that such a violation constitutes contempt of court (other violations of an emergency protective order issued by a magistrate constitute a criminal offense under Va. Code § 16.1-253.2). Violations of the provisions of child protective orders, preliminary protective orders, and orders of protection issued pursuant to Va. Code §§ 16.1-253, 16.1-253.1, and 16.1-279.1 **NOT** involving prohibitions against further acts of family abuse, prohibitions against contact, or the granting of premises also constitute contempt of court (violations involving prohibitions against further acts of family abuse, prohibitions against contact, or the granting of premises are contempt of court or are criminal violations pursuant to Va. Code § 16.1-253.2).

   The Attorney General has delivered an opinion regarding the authority of the Court to enforce, through contempt proceedings, the granting of a companion animal to the petitioner either in an EPO or PO. The Attorney General has confirmed that a court may enforce this provision in contempt. However, in doing so, the Attorney General opined:

   > *In declaring the failure to obey a companion animal provision of an EPO contempt of court, § 16.1-253.4 makes no distinction between EPOs that are issued by magistrates and those that are issued by judges. By providing the same sanction irrespective of who issues the EPO, the General Assembly has shown its intent to treat a companion animal provision in a magistrate-issued*

EPO as equivalent to a court order or process for purposes of enforcement.

"The power of a court to punish for contempt is inherent in the nature and constitution of the court," but a magistrate has no such inherent power, and no statute confers such enforcement power upon magistrates.

Attorney General Opinion to the Honorable Anita D. Filson, dated 11/21/2014 (page 2) (citation omitted).

"Although deemed a judicial officer for certain purposes... a magistrate's powers are limited by statute ....I find no statutory provision authorizing a magistrate to conduct contempt proceedings, nor to impose fines or jail sentences." Id. at 2-3 n.10.

This statement addresses how the provision may be enforced, but not how contempt proceedings may be commenced. It does not address the possibility that since this is plenary, or indirect contempt, and is initiated by summons or warrant, and Va. Code § 19.2-45 gives the magistrates the same authority to issue warrants as those granted to district courts, magistrates may initiate contempt proceedings.

However, the Attorney General further opined:

Accordingly, an aggrieved party first must file a petition with the court, and then, "the offender must be brought before the court by a rule or some other sufficient process." Here, the proper procedure is for the court to issue a show cause summons to provide the alleged violator with notice and the opportunity to be heard... [I]t is my opinion that a JDR court may enforce, through indirect contempt proceedings, a provision of an EPO granting the petitioner the possession of a companion animal when a magistrate has issued the EPO. Further, it is my opinion that the contempt proceedings may be initiated by the JDR court through the issuance of a show cause summons.

Id. at 3-4 (citation omitted). Again, this does not specifically address a magistrate's ability to initiate such process, nor does it specifically preclude a magistrate from doing so. However, given the language that suggests how such proceedings should be initiated, it is advisable for magistrates to follow such language and refer those violations of a family abuse protective order that are not listed as chargeable under Va. Code § 16.1-253.2 to the court for a possible contempt violation. Magistrates should issue process only in those limited circumstances where a respondent has violated § 16.1-253.2.

C. Violations of Va. Code § 18.2-49.1

1. Elements of Va. Code § 18.2-49.1 Subsection A.

a. This subsection requires that a court has issued an **order** specifically regarding custody or visitation.

   – The order may come from a juvenile and domestic relations district court or a circuit court.

   – The court will issue copies of its order to the parties involved. The magistrate should examine a copy of the order to verify its contents during the probable cause hearing.

   – The order must be the most recent regarding custody or visitation.

   – Courts often modify existing orders. The magistrate must require the complainant to verify whether the order in question is the last that a court has issued.

b. A person must "knowingly, wrongfully and intentionally" withhold a child from either of a child's parents or other legal guardian.

   The Code of Virginia does not define the term "legal guardian." From the context of the statute, however, the magistrate must find that a court has granted the "legal guardian" custody of or visitation to, the child or children in question. If the withholding is from a parent, a court must have granted custody or visitation rights to the parent from whom the child or children are being withheld.

   – "Knowingly" - As the court issues copies of its order to the parties involved, the magistrate may assume that they know the terms of the order.

   – "Wrongfully" - The magistrate may assume that the accused does the withholding wrongfully unless the facts suggest otherwise. Example of where the withholding might not be wrongful:
     - The child is on a three-week visitation with his mother in South Carolina as mandated in the court order. Just before the visitation period is up, the child is hospitalized because of an accident. Because of this, the mother is unable to return her son to his father in Virginia on time.
     - The magistrate should note that the parties to the court order may not change the provisions of the order by agreement. Only the court may modify its own order.

   – "Intentionally" - The magistrate may assume that the accused does the withholding intentionally unless the facts suggest otherwise. Examples of where the withholding might not be intentional:
     - The child is on a three-week visitation with her father in Alaska as

mandated in the court order. The father takes his daughter on a wilderness tour. Flooding prevents the tour from returning on time, and the father is unable to return his daughter to her mother in Virginia pursuant to the order.

- The child is on a two-week visitation with his mother in Texas as mandated in the court order. On the trip back to Virginia the mother develops car trouble and is unable to return her son to his father on time.

c. The violation of the order must be "**clear and significant**."

There is no case law or opinion of the Attorney General that defines what constitutes a clear and significant violation.

– "Clear" - In determining if a violation is a "clear" one, the magistrate must read the exact wording of the order. Often the court orders are very broad and general. If after reading the order, the magistrate is unable to pinpoint how the withholding of the child from the custodial parent violates the order, then the action is probably not a clear violation.

– "Significant" - A minor violation of the order apparently does not qualify.

For example, a child is on a two-week visitation with her father in West Virginia. The order requires the father to return the child to her mother by 6:00 p.m. on February 29, 1996. The father has not arrived with the child by 7:00 p.m. and the mother requests that the magistrate issue a warrant for the violation. At this point, the violation is probably not significant. The magistrate should use common sense in deciding whether the withholding is a significant violation.

d. Subsection A deals only with a violation of a custody or visitation order where a person withholds the child out of state from either of a child's parents or other legal guardian.

If the action involves withholding a child in state in violation of an order, or involves other types of violations other than withholding either in or outside of Virginia, subsection B of Va. Code § 18.2-49.1 applies (*see* below).

1) A violation of subsection A of Va. Code § 18.2-49.1 constitutes a Class 6 felony.

2) Venue for a violation of Va. Code § 18.2-49.1 subsection A is proper where the child is withheld from because that is where the offense actually occurred, not where the withholding took place. Foster-Zahid v. Commonwealth, 23 Va. App. 430, 477 S.E.2d 759 (1996) aff'd, 254

Va. 168, 489 S.E.2d 687 (1997). In Foster-Zahid the Court of Appeals reasoned that venue existed where the crime of custodial interference occurred i.e., where the harm resulted as a direct and immediate consequence of the violation of the court order.

2. Elements of Va. Code § 18.2-49.1 Subsection B

   a. This subsection requires that a court has issued an **order** specifically regarding custody or visitation.

      – The order may come from a juvenile and domestic relations district court or a circuit court.

      – The court will issue copies of its order to the parties involved. The magistrate should ask the complainant to see a copy of the order to verify its contents during the probable cause hearing.

      – The order must be the most recent regarding custody or visitation.

      – Courts often modify existing orders. The magistrate must ask the complainant whether the order in question is the last that a court has issued.

   b. A person must "**knowingly, wrongfully and intentionally**" engage in conduct that violates the order. There is no case law or opinion of the Attorney General that defines the phrase as it pertains to this statute.

      – "Knowingly" - As the court issues copies of its order to the parties involved, the magistrate may assume that they know the terms of the order.

      – "Wrongfully" – The magistrate may assume that the accused does the withholding wrongfully unless the facts suggest otherwise. An example of where the withholding might not be wrongful:

         - The child is on his weekend visitation with his mother as mandated in the court order. The mother is supposed to have the child back to his father by 6:00 p.m. on Sunday. On Sunday afternoon the child becomes sick and the mother takes the child to the hospital where he is admitted. Because of this the mother is unable to return her son to his father on time.

         - The magistrate should note that the parties to the court order may not change the provisions of the order by agreement. Only the court may modify its own order.

– "Intentionally" - The magistrate may assume that the accused does the withholding intentionally unless the facts suggest otherwise. An example of where the withholding might not be intentional would be where the mother is unable to return her son to his father on time because of unsafe weather conditions.

– Any action specifically prohibited or required in the order constitutes a violation.

Unlike subsection A, the action does not have to be the withholding of the child out of state from a parent or legal guardian. Any act that is a violation of a custody or visitation order may violate the statute.

Examples:

- The court orders that the father is to have custody of his two children every other weekend. The mother refuses to allow the father to see his children on his scheduled weekend.
- The court order specifies that the mother is to have visitation every other Monday night with her child only at her grandmother's home while the grandmother is there to supervise. Instead of seeing her son at her grandmother's house, the mother takes him to her boyfriend's house.

c. The violation of the order must be "**clear and significant**."

There is no case law or opinion of the Attorney General that defines what constitutes a clear and significant violation.

– "Clear" - In determining if a violation is a "clear" one, the magistrate must read the exact wording of the order. Often the court orders are very broad and general. If after reading the order the magistrate is unable to pinpoint how the specific conduct violates the order, the action is probably not a clear violation.

– "Significant" – A minor violation of the order apparently does not qualify. For example, the father was late thirty minutes in returning the child to her mother.

– The complaining party may enforce minor violations by petitioning the appropriate court.

d. Classification of the offense under subsection B:

– The first violation of this subsection is a Class 3 misdemeanor, and consequently the magistrate would issue a DC-319, SUMMONS.

- A second violation **within twelve months** of the first conviction enhances the penalty to a Class 2 misdemeanor.

- A third violation **within twenty-four months** of the first conviction enhances the penalty to a Class 1 misdemeanor.

3. Venue

   a. Venue for a violation of Va. Code § 18.2-49.1 subsection A has been found to be proper where the child is withheld **from** because that is where the offense actually occurred, not where the withholding took place. Foster- Zahid v. Commonwealth, 23 Va. App. 430, 477 S.E.2d 759 (1996) aff'd, 254 Va. 168, 489 S.E.2d 687 (1997). In Foster-Zahid the Court of Appeals reasoned that venue existed where the crime of custodial interference occurred i.e., where the harm resulted as a direct and immediate consequence of the violation of the court order.

   b. The same reasoning is applicable to violations of Va. Code § 18.2-49.1 subsection B where the "clear and significant violation of a court order respecting the custody or visitation" is a withholding of the child or a failure to return the child to the proper place at the proper time.

   c. In all other cases of a "clear and significant violation of a court order respecting the custody or visitation," Va. Code § 19.2-244 states that "the prosecution of a criminal case shall be had in the county or city in which the offense was committed." The Attorney General addressed the issue of venue in regards to a violation of a protective order under Va. Code § 16.1-253.2 in an Attorney General opinion, to Howell, dated 11/30/98 (1998, page 42 on venue at pg. 44). In that opinion, the Attorney General reasoned that since that statute was silent as to venue, Va. Code § 19.2-244 controlled, and that a violation of the statute must be prosecuted in the jurisdiction in which the alleged violation occurred. (*See* Attorney General Opinion to Howell, dated 11/30/98 (1998, page 42 on venue at pg. 44).

XII. PROCEDURES AND POLICY REQUIREMENTS FOR LAW ENFORCEMENT

Chapter 13 of Title 9.1 requires the State Police, sheriff's departments, and police departments to establish arrest policies and procedures for domestic violence and family abuse cases, and sets forth minimum guidelines that must be met in such policies. Virginia Code § 9.1-1300 requires that all domestic violence policies and procedures of a law- enforcement agency in the Commonwealth must, at a minimum, provide guidance to law- enforcement officers on the following:

- The department's arrest policy;

- The standards for determining who is the predominant physical aggressor pursuant to Va. Code § 19.2-81.3;
- The standards for completion of a required incident report to be filed with the department including the existence of any special circumstances which would dictate a course of action other than arrest;
- The department's policy on providing transportation to an allegedly abused person;
- The legal and community resources available to allegedly abused persons in the department's jurisdiction;
- The department's policy on domestic violence incidents involving law-enforcement officers; and
- The department's policy on the handling of cases involving repeat offenders of family abuse or domestic violence.

XIII. REFERENCE GUIDE FOR PROCESSES IN FAMILY VIOLENCE CASES

This chart provides an easy reference to determine whether parties are "family or household members" for purposes of jurisdiction, family abuse emergency protective orders and violations of Va. Code § 18.2-57.2. The entries are in alphabetical order.

Virginia Code § 16.1-228 definition of "family and household member"

- Brother (parties do not have to reside together)
- Half-brother (parties do not have to reside together)
- Brother-in-law (parties must reside together)
- Child in common (parties do not have to reside together)
- Child (parties do not have to reside together)
- Child of cohabitant who resides with cohabitant (parties must reside)
- Cohabitant (parties must reside together)
- Cohabitant within past 12 months (parties do not currently have to reside together)
- Daughter-in-law (parties must reside together)
- Father-in-law (parties must reside together)
- Former spouse (parties do not have to reside together)
- Grandchild (parties do not have to reside together)
- Grandparent (parties do not have to reside together)
- Mother-in-law (parties must reside together)
- Parent (parties do not have to reside together)
- Sister (parties do not have to reside together)
- Half-sister (parties do not have to reside together)
- Sister-in-law (parties must reside together)
- Son-in-law (parties must reside together)

- Spouse (parties do not have to reside together)
- Stepchild (parties do not have to reside together)
- Stepparent (parties do not have to reside together)

In preparing the warrant or summons, the magistrate must describe how the defendant and victim fall within the definition of "family and household member" in the body of the criminal process. The court needs this information to determine jurisdiction.
If a juvenile and domestic relations district court has terminated the residual parental rights of a person pursuant to Va. Code § 16.1-283, there is no longer a parent/child relationship. In such a case, the parties no longer fall within the definition of "family and household member," and the juvenile and domestic relations district court would not have jurisdiction over an offense committed by a former parent against his or her former child. Court orders involving custody issues do not affect the parent/child relationship. For example, if a court grants the mother sole custody of her son, the child and his father still fall within the definition of "family and household member.