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HOUSE BILL NO. 1169

Offered January 11, 2006

Prefiled January 11, 2006

A BILL to amend and reenact § 16.1-228 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 16.1-274.2, relating to electronic recording of statements made by juvenile defendants.

Patrons—Eisenberg, Brink, Caputo, Ebbin, Englin, Melvin, Toscano and Ware, O.; Senators: Edwards, Hanger, Howell, Marsh, Ticer and Whipple

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 16.1-228 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 16.1-274.2 as follows:

§ 16.1-228. Definitions.

When used in this chapter, unless the context otherwise requires:

"Abused or neglected child" means any child:

1. Whose parents or other person responsible for his care creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon such child a physical or mental injury by other than accidental means, or creates a substantial risk of death, disfigurement or impairment of bodily or mental functions, including, but not limited to, a child who is with his parent or other person responsible for his care either (i) during the manufacture or attempted manufacture of a Schedule I or II controlled substance, or (ii) during the unlawful sale of such substance by that child's parents or other person responsible for his care, where such manufacture, or attempted manufacture or unlawful sale would constitute a felony violation of § 18.2-248;

2. Whose parents or other person responsible for his care neglects or refuses to provide care necessary for his health; however, no child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall for that reason alone be considered to be an abused or neglected child;

3. Whose parents or other person responsible for his care abandons such child;

4. Whose parents or other person responsible for his care commits or allows to be committed any sexual act upon a child in violation of the law; or

5. Who is without parental care or guardianship caused by the unreasonable absence or the mental or physical incapacity of the child's parent, guardian, legal custodian or other person standing in loco parentis.

If a civil proceeding under this chapter is based solely on the parent having left the child at a hospital or rescue squad, it shall be an affirmative defense that such parent safely delivered the child to a hospital that provides 24-hour emergency services or to an attended rescue squad that employs emergency medical technicians, within 14 days of the child's birth. For purposes of terminating parental rights pursuant to § 16.1-283 and placement for adoption, the court may find such a child is a neglected child upon the ground of abandonment.

"Adoptive home" means the place of residence of any natural person in which a child resides as a member of the household and in which he has been placed for the purposes of adoption or in which he has been legally adopted by another member of the household.

"Adult" means a person 18 years of age or older.

"Ancillary crime" or "ancillary charge" means any delinquent act committed by a juvenile as a part of the same act or transaction as, or which constitutes a part of a common scheme or plan with, a delinquent act which would be a felony if committed by an adult.

"Boot camp" means a short term secure or nonsecure juvenile residential facility with highly structured components including, but not limited to, military style drill and ceremony, physical labor, education and rigid discipline, and no less than six months of intensive aftercare.

"Child," "juvenile" or "minor" means a person less than 18 years of age.

"Child welfare agency" means a child-placing agency, child-caring institution or independent foster home as defined in § 63.2-100.

"Child in need of services" means (i) 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 (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, no child who in good faith is under treatment solely by

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58 spiritual means through prayer in accordance with the tenets and practices of a recognized church or
59 religious denomination shall for that reason alone be considered to be a child in need of services, nor
60 shall any child who habitually remains away from or habitually deserts or abandons his family as a
61 result of what the court or the local child protective services unit determines to be incidents of physical,
62 emotional or sexual abuse in the home be considered a child in need of services for that reason alone.

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

68 "Child in need of supervision" means:

69 1. A child who, while subject to compulsory school attendance, is habitually and without justification
70 absent from school, and (i) the child has been offered an adequate opportunity to receive the benefit of
71 any and all educational services and programs that are required to be provided by law and which meet
72 the child's particular educational needs, (ii) the school system from which the child is absent or other
73 appropriate agency has made a reasonable effort to effect the child's regular attendance without success,
74 and (iii) the school system has provided documentation that it has complied with the provisions of
75 § 22.1-258; or

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

83 "The court" or the "juvenile court" or the "juvenile and domestic relations court" means the juvenile
84 and domestic relations district court of each county or city.

85 "*Custodial interrogation*" means any interview conducted by a law-enforcement officer in such
86 circumstances that would lead a reasonable person in the subject's position to consider himself to be in
87 custody and during which the law-enforcement officer takes actions or asks questions that are calculated
88 to elicit responses from the subject that could incriminate him.

89 "Delinquent act" means (i) an act designated a crime under the law of this Commonwealth, or an
90 ordinance of any city, county, town or service district, or under federal law, (ii) a violation of
91 § 18.2-308.7, or (iii) a violation of a court order as provided for in § 16.1-292, but shall not include an
92 act other than a violation of § 18.2-308.7, which is otherwise lawful, but is designated a crime only if
93 committed by a child. For purposes of §§ 16.1-241 and 16.1-278.9, the term shall include a refusal to
94 take a blood or breath test in violation of § 18.2-268.2 or a similar ordinance of any county, city or
95 town.

96 "Delinquent child" means a child who has committed a delinquent act or an adult who has committed
97 a delinquent act prior to his eighteenth birthday, except where the jurisdiction of the juvenile court has
98 been terminated under the provisions of § 16.1-269.6.

99 "Department" means the Department of Juvenile Justice and "Director" means the administrative head
100 in charge thereof or such of his assistants and subordinates as are designated by him to discharge the
101 duties imposed upon him under this law.

102 "*Electronic recording*" means motion picture, videotape, audiotape, digital, or any other recording
103 medium as may become practical.

104 "Family abuse" means any act involving violence, force, or threat including, but not limited to, any
105 forceful detention, which results in bodily injury or places one in reasonable apprehension of bodily
106 injury and which is committed by a person against such person's family or household member.

107 "Family or household member" means (i) the person's spouse, whether or not he or she resides in the
108 same home with the person, (ii) the person's former spouse, whether or not he or she resides in the same
109 home with the person, (iii) the person's parents, stepparents, children, stepchildren, brothers, sisters,
110 half-brothers, half-sisters, grandparents and grandchildren, regardless of whether such persons reside in
111 the same home with the person, (iv) the person's mother-in-law, father-in-law, sons-in-law,
112 daughters-in-law, brothers-in-law and sisters-in-law who reside in the same home with the person, (v)
113 any individual who has a child in common with the person, whether or not the person and that
114 individual have been married or have resided together at any time, or (vi) any individual who cohabits
115 or who, within the previous 12 months, cohabited with the person, and any children of either of them
116 then residing in the same home with the person.

117 "Foster care services" means the provision of a full range of casework, treatment and community
118 services for a planned period of time to a child who is abused or neglected as defined in § 63.2-100 or
119 in need of services as defined in this section and his family when the child (i) has been identified as

needing services to prevent or eliminate the need for foster care placement, (ii) has been placed through an agreement between the local board of social services or a public agency designated by the community policy and management team and the parents or guardians where legal custody remains with the parents or guardians, (iii) has been committed or entrusted to a local board of social services or child welfare agency, or (iv) has been placed under the supervisory responsibility of the local board pursuant to § 16.1-293.

"Intake officer" means a juvenile probation officer appointed as such pursuant to the authority of this chapter.

"Jail" or "other facility designed for the detention of adults" means a local or regional correctional facility as defined in § 53.1-1, except those facilities utilized on a temporary basis as a court holding cell for a child incident to a court hearing or as a temporary lock-up room or ward incident to the transfer of a child to a juvenile facility.

"The judge" means the judge or the substitute judge of the juvenile and domestic relations district court of each county or city.

"This law" or "the law" means the Juvenile and Domestic Relations District Court Law embraced in this chapter.

"Legal custody" means (i) a legal status created by court order which vests in a custodian the right to have physical custody of the child, to determine and redetermine where and with whom he shall live, the right and duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, all subject to any residual parental rights and responsibilities or (ii) the legal status created by court order of joint custody as defined in § 20-107.2.

"Permanent foster care placement" means the place of residence in which a child resides and in which he has been placed pursuant to the provisions of §§ 63.2-900 and 63.2-908 with the expectation and agreement between the placing agency and the place of permanent foster care that the child shall remain in the placement until he reaches the age of majority unless modified by court order or unless removed pursuant to § 16.1-251 or § 63.2-1517. A permanent foster care placement may be a place of residence of any natural person or persons deemed appropriate to meet a child's needs on a long-term basis.

"Place of detention" means a police station or sheriff's office, detention center, or other building at which persons are or may be held in detention in connection with criminal charges against those persons or allegations that those persons are delinquent minors.

"Residual parental rights and responsibilities" means all rights and responsibilities remaining with the parent after the transfer of legal custody or guardianship of the person, including but not limited to the right of visitation, consent to adoption, the right to determine religious affiliation and the responsibility for support.

"Secure facility" or "detention home" means a local, regional or state public or private locked residential facility that has construction fixtures designed to prevent escape and to restrict the movement and activities of children held in lawful custody.

"Shelter care" means the temporary care of children in physically unrestricting facilities.

"State Board" means the State Board of Juvenile Justice.

"Status offender" means a child who commits an act prohibited by law which would not be criminal if committed by an adult.

"Status offense" means an act prohibited by law which would not be an offense if committed by an adult.

"Violent juvenile felony" means any of the delinquent acts enumerated in subsection B or C of § 16.1-269.1 when committed by a juvenile 14 years of age or older.

§ 16.1-274.2. Admissibility of statements of a juvenile.

A. An oral, written, or sign language statement of a juvenile made during a custodial interrogation shall be presumed inadmissible as evidence against the juvenile in any juvenile court proceeding or criminal proceeding when either such proceeding involves an act alleged to have been committed by the juvenile that would be a felony if committed by an adult unless the following procedures are followed:

1. Any custodial interrogation regarding the incident for which the accused is detained is electronically recorded in its entirety from the moment the interrogation begins;

2. Prior to the statement, but during the recording, the accused is given the requisite Miranda warnings and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning;

3. The recording device was capable of making an accurate recording, the operator was competent, and the recording has not been altered, erased, or edited in any way;

4. If the recording is aural, all voices on the recording that are material to the custodial interrogation are identified and able to be heard, and if the recording is audio-visual, the main interrogator and the juvenile are visible on the recording; and

181 5. Not later than 20 days prior to the date of the court or criminal proceeding, the attorney
182 representing the juvenile is provided with a true, complete, and accurate copy of all recordings of the
183 accused made under this section.

184 B. The Commonwealth may rebut a presumption of inadmissibility through clear and convincing
185 evidence that:

186 1. The statement was both voluntary and reliable; and

187 2. Law-enforcement officers had good cause not to tape the entire interrogation.

188 Examples of good cause include that:

189 a. The statement was obtained in a location set forth in subdivision C 1 or C 2 and where the
190 requisite recording equipment was not readily available;

191 b. The accused refused to have his or her interrogation electronically recorded, and the refusal itself
192 was electronically recorded;

193 c. Failure to record electronically an entire interrogation was the result of equipment failure and
194 obtaining replacement equipment was not feasible; or

195 d. The accused made a spontaneous statement, not in response to a question.

196 C. Notwithstanding any other provision of this section, a written, oral, or sign language statement
197 of the accused made as a result of a custodial interrogation is admissible against the accused in a
198 juvenile delinquency or criminal proceeding if:

199 1. The statement was obtained in another state and was obtained in compliance with the laws of that
200 state or this state; or

201 2. The statement was obtained by a federal law-enforcement officer in this state or another state and
202 was obtained in compliance with the laws of the United States.

203 D. If the court finds, by a preponderance of the evidence, that the juvenile was subjected to a
204 custodial interrogation in violation of this section, then any statements made by the juvenile during or
205 following that nonrecorded custodial interrogation, even if otherwise in compliance with this section, are
206 presumed to be inadmissible in any juvenile court proceeding or criminal proceeding against the
207 juvenile except for the purposes of impeachment.

208 E. Every electronic recording made of a custodial interrogation must be preserved until such time as
209 the juvenile's conviction or juvenile delinquency disposition for any offense relating to the interrogation
210 is final and all direct and habeas corpus appeals are exhausted, or the prosecution of such offenses is
211 barred by law.