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HOUSE BILL NO. 1980

Offered January 12, 2011

Prefiled January 11, 2011

A BILL to amend and reenact §§ 16.1-228 and 16.1-269.1 of the Code of Virginia, relating to transfer of juveniles to circuit court for trial of violent juvenile felonies.

Patron—Greason

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

- 1. That §§ 16.1-228 and 16.1-269.1 of the Code of Virginia are amended and reenacted 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;

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; or

6. Whose parents or other person responsible for his care creates a substantial risk of physical or mental injury by knowingly leaving the child alone in the same dwelling, including an apartment as defined in § 55-79.2, with a person to whom the child is not related by blood or marriage and who the parent or other person responsible for his care knows has been convicted of an offense against a minor for which registration is required as a violent sexual offender pursuant to § 9.1-902.

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

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

69 "Child in need of supervision" means:

70 1. A child who, while subject to compulsory school attendance, is habitually and without justification
71 absent from school, and (i) the child has been offered an adequate opportunity to receive the benefit of
72 any and all educational services and programs that are required to be provided by law and which meet
73 the child's particular educational needs, (ii) the school system from which the child is absent or other
74 appropriate agency has made a reasonable effort to effect the child's regular attendance without success,
75 and (iii) the school system has provided documentation that it has complied with the provisions of
76 § 22.1-258; or

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

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

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

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

95 "Delinquent child" means a child who has committed a delinquent act or an adult who has committed
96 a delinquent act prior to his 18th birthday, except where the jurisdiction of the juvenile court has been
97 terminated under the provisions of § 16.1-269.6.

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

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

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

114 "Foster care services" means the provision of a full range of casework, treatment and community
115 services for a planned period of time to a child who is abused or neglected as defined in § 63.2-100 or
116 in need of services as defined in this section and his family when the child (i) has been identified as
117 needing services to prevent or eliminate the need for foster care placement, (ii) has been placed through
118 an agreement between the local board of social services or a public agency designated by the
119 community policy and management team and the parents or guardians where legal custody remains with
120 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.

"Independent living arrangement" means placement of a child at least 16 years of age who is in the custody of a local board or licensed child-placing agency and has been placed by the local board or licensed child-placing agency in a living arrangement in which he does not have daily substitute parental supervision.

"Independent living services" means services and activities provided to a child in foster care 14 years of age or older and who has been committed or entrusted to a local board of social services, child welfare agency, or private child-placing agency. "Independent living services" may also mean services and activities provided to a person who was in foster care on his 18th birthday and has not yet reached the age of 21 years. Such services shall include counseling, education, housing, employment, and money management skills development and access to essential documents and other appropriate services to help children or persons prepare for self-sufficiency.

"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.

"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 *or any conspiracy to commit or attempt to commit any such delinquent act by a juvenile 14 years of age or older.*

§ 16.1-269.1. Trial in circuit court; preliminary hearing; direct indictment; remand.

A. Except as provided in subsections B and C, if a juvenile ~~fourteen~~ 14 years of age or older at the time of an alleged offense is charged with an offense which would be a felony if committed by an adult, the court shall, on motion of the attorney for the Commonwealth and prior to a hearing on the merits, hold a transfer hearing and may retain jurisdiction or transfer such juvenile for proper criminal proceedings to the appropriate circuit court having criminal jurisdiction of such offenses if committed by an adult. Any transfer to the appropriate circuit court shall be subject to the following conditions:

1. Notice as prescribed in §§ 16.1-263 and 16.1-264 shall be given to the juvenile and his parent, guardian, legal custodian or other person standing in loco parentis; or attorney;

2. The juvenile court finds that probable cause exists to believe that the juvenile committed the

delinquent act as alleged or a lesser included delinquent act which would be a felony if committed by an adult;

3. The juvenile is competent to stand trial. The juvenile is presumed to be competent and the burden is on the party alleging the juvenile is not competent to rebut the presumption by a preponderance of the evidence; and

4. The court finds by a preponderance of the evidence that the juvenile is not a proper person to remain within the jurisdiction of the juvenile court. In determining whether a juvenile is a proper person to remain within the jurisdiction of the juvenile court, the court shall consider, but not be limited to, the following factors:

a. The juvenile's age;

b. The seriousness and number of alleged offenses, including (i) whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; (ii) whether the alleged offense was against persons or property, with greater weight being given to offenses against persons, especially if death or bodily injury resulted; (iii) whether the maximum punishment for such an offense is greater than ~~twenty~~ 20 years confinement if committed by an adult; (iv) whether the alleged offense involved the use of a firearm or other dangerous weapon by brandishing, threatening, displaying or otherwise employing such weapon; and (v) the nature of the juvenile's participation in the alleged offense;

c. Whether the juvenile can be retained in the juvenile justice system long enough for effective treatment and rehabilitation;

d. The appropriateness and availability of the services and dispositional alternatives in both the criminal justice and juvenile justice systems for dealing with the juvenile's problems;

e. The record and previous history of the juvenile in this or other jurisdictions, including (i) the number and nature of previous contacts with juvenile or circuit courts, (ii) the number and nature of prior periods of probation, (iii) the number and nature of prior commitments to juvenile correctional centers, (iv) the number and nature of previous residential and community-based treatments, (v) whether previous adjudications and commitments were for delinquent acts that involved the infliction of serious bodily injury, and (vi) whether the alleged offense is part of a repetitive pattern of similar adjudicated offenses;

f. Whether the juvenile has previously absconded from the legal custody of a juvenile correctional entity in this or any other jurisdiction;

g. The extent, if any, of the juvenile's degree of mental retardation or mental illness;

h. The juvenile's school record and education;

i. The juvenile's mental and emotional maturity; and

j. The juvenile's physical condition and physical maturity.

No transfer decision shall be precluded or reversed on the grounds that the court failed to consider any of the factors specified in subdivision A 4 of this section.

B. The juvenile court shall conduct a preliminary hearing whenever a juvenile ~~fourteen~~ 14 years of age or older is charged with murder in violation of §§ 18.2-31, 18.2-32, or § 18.2-40, ~~or~~ aggravated malicious wounding in violation of § 18.2-51.2, *or any conspiracy to commit or attempt to commit any such offense.*

C. The juvenile court shall conduct a preliminary hearing whenever a juvenile ~~fourteen~~ 14 years of age or older is charged with murder in violation of § 18.2-33, felonious injury by mob in violation of § 18.2-41, abduction in violation of § 18.2-48, malicious wounding in violation of § 18.2-51, malicious wounding of a law-enforcement officer in violation of § 18.2-51.1, felonious poisoning in violation of § 18.2-54.1, adulteration of products in violation of § 18.2-54.2, robbery in violation of § 18.2-58 or carjacking in violation of § 18.2-58.1, rape in violation of § 18.2-61, forcible sodomy in violation of § 18.2-67.1 ~~or~~, object sexual penetration in violation of § 18.2-67.2, *or any conspiracy to commit or attempt to commit any such offense*, provided the attorney for the Commonwealth gives written notice of his intent to proceed pursuant to this subsection. The notice shall be filed with the court and mailed or delivered to counsel for the juvenile or, if the juvenile is not then represented by counsel, to the juvenile and a parent, guardian or other person standing in loco parentis with respect to the juvenile at least seven days prior to the preliminary hearing. If the attorney for the Commonwealth elects not to give such notice, or if he elects to withdraw the notice prior to certification of the charge to the grand jury, he may proceed as provided in subsection A.

D. Upon a finding of probable cause pursuant to a preliminary hearing under subsection B or C, the juvenile court shall certify the charge, and all ancillary charges, to the grand jury. Such certification shall divest the juvenile court of jurisdiction as to the charge and any ancillary charges. Nothing in this subsection shall divest the juvenile court of jurisdiction over any matters unrelated to such charge and ancillary charges which may otherwise be properly within the jurisdiction of the juvenile court.

If the court does not find probable cause to believe that the juvenile has committed the violent juvenile felony as charged in the petition or warrant or if the petition or warrant is terminated by dismissal in the juvenile court, the attorney for the Commonwealth may seek a direct indictment in the

244 circuit court. If the petition or warrant is terminated by nolle prosequi in the juvenile court, the attorney
245 for the Commonwealth may seek an indictment only after a preliminary hearing in juvenile court.

246 If the court finds that the juvenile was not ~~fourteen~~ 14 years of age or older at the time of the
247 alleged commission of the offense or that the conditions specified in subdivision 1, 2, or 3 of subsection
248 A have not been met, the case shall proceed as otherwise provided for by law.

249 E. An indictment in the circuit court cures any error or defect in any proceeding held in the juvenile
250 court except with respect to the juvenile's age. If an indictment is terminated by nolle prosequi, the
251 Commonwealth may reinstate the proceeding by seeking a subsequent indictment.

252 **2. That the provisions of this act may result in a net increase in periods of imprisonment or**
253 **commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot**
254 **be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter**
255 **874 of the Acts of Assembly of 2010 requires the Virginia Criminal Sentencing Commission to**
256 **assign a minimum fiscal impact of \$50,000. Pursuant to § 30-19.1:4, the estimated amount of the**
257 **necessary appropriation cannot be determined for periods of commitment to the custody of the**
258 **Department of Juvenile Justice.**