

## COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

**Adjudicatory hearing to determine allegations of child abuse and neglect to be held within 30 days of preliminary removal and protective order hearings is procedural requirement that may be extended by juvenile court for good cause shown or on agreement of all parties involved. Juvenile court has discretionary authority, but is not required, to order service of process by publication. Service of process may be waived without completion of service by publication when court determines that, after reasonable effort, person cannot be located. When court-appointed guardian ad litem presents appropriate court order, child-protective services must allow guardian access to records relating to child guardian represents for purposes of inspection and copying.**

Ms. Sharon E. Pandak

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You inquire regarding various provisions of Title 16.1 of the *Code of Virginia* governing the disposition of allegations of child abuse or neglect by the juvenile and domestic relations district court ("juvenile court").

You first inquire regarding §§ 16.1-252(G) and 16.1-253(F), which provide that "the court shall schedule an adjudicatory hearing to be held within thirty days of the date of the initial preliminary removal<sup>[1]</sup> hearing ... to determine whether the allegations of abuse and neglect have been proven by a preponderance of the evidence." You specifically ask whether the requirement that an adjudicatory hearing be held within thirty days of the date of the initial removal hearing, and now also the initial preliminary protective order hearing,<sup>2</sup> is mandatory, or whether such period may be either extended for good cause shown or waived by the agreement of all parties involved.

In your written opinion,<sup>3</sup> you conclude that the thirty-day requirement is designed to protect the rights of the parents in abuse and neglect cases by ensuring them access to speedy adjudications. You note that some parents desire more than thirty days to prepare a defense, especially where experts are involved. In addition, you relate that child-protective services<sup>4</sup> administrative investigations may not be complete within such thirty-day period. It is your view that the adjudicatory hearing required by §§ 16.1-252(G) and 16.1-253(F) may be either extended for good cause shown or waived by the agreement of all parties involved beyond thirty days from the initial preliminary protective order hearing date.

"An important consideration in interpreting the meaning of a statute is whether it is mandatory and jurisdictional or directory and procedural."<sup>5</sup> The 1994 decision of the Supreme Court of Virginia in *Jamborsky v. Baskins*<sup>6</sup> directs the outcome to this inquiry. In *Jamborsky*, the juvenile court entered an order certifying the juvenile defendant to the circuit court for trial as an adult.<sup>7</sup> At the time of this decision, § 16.1-269(E) provided that "[t]he circuit court *shall*, within twenty-one days after receipt of the case from the juvenile court, ... enter an order" either remanding the case or advising the Commonwealth that it may seek an indictment.<sup>8</sup> The trial court entered its order twenty-four days later, authorizing the Commonwealth to seek an indictment.<sup>9</sup> The defendant moved to quash the indictment, arguing that the circuit court lacked jurisdiction to hear the case because it had not entered its order within the statutorily specified period.<sup>10</sup> The Court in *Jamborsky* held that the trial court retained jurisdiction over the case because the use of the word "shall" imposed only a procedural requirement, and "[a] statute directing the mode of proceeding

by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute."<sup>11</sup>

The use of "shall" in §§ 16.1-252(G) and 16.1-253(F) is "directory and not mandatory." Such provisions are procedural in nature and "precise compliance is not to be deemed essential to the validity of the proceedings," absent infringement of a substantive right.<sup>12</sup> The procedural nature of this requirement is underscored by the Supreme Court's repeated holding that the use of "shall" in a statute requiring action by a public official is directory, and not mandatory, unless the statute manifests a contrary intent.<sup>13</sup> Therefore, I am of the opinion that the adjudicatory hearing specified by the General Assembly to be held within thirty days of the date of the preliminary removal hearing in § 16.1-252(G) and the preliminary protective order hearing in § 16.1-253(F) is a procedural requirement that may be extended by the juvenile court for good cause shown or upon the agreement of all parties involved in the matter.

You next inquire regarding §§ 16.1-252(H) and 16.1-253(G), requiring a dispositional hearing to be held pursuant to § 16.1-278.2.<sup>14</sup> Section 16.1-278.2(A) provides, in part:

The hearing shall be held and a dispositional order may be entered, although a [party to the preliminary protective order hearing] fails to appear and is not represented by counsel, provided personal or substituted service was made on the person, or the court determines that such person cannot be found, after reasonable effort, or in the case of a person who is without the Commonwealth, the person cannot be found or his post office address cannot be ascertained after reasonable effort.

You specifically ask whether service of process may be waived without the completion of service by publication when the juvenile court makes a finding that a party cannot be located.

In your written opinion, you conclude that waiver of service of process without the completion of service by publication is in conflict with § 16.1-264, which provides:

If after reasonable effort a party other than the person who is the subject of the petition cannot be found or his post-office address cannot be ascertained, whether he is within or without the Commonwealth, the court may order service of the summons upon him by publication in accordance with the provisions of §§ 8.01-316 and 8.01-317.<sup>[15]</sup>

You advise that, pursuant to the policy of the Prince William County Juvenile and Domestic Relations District Court clerk's office, completion of an order of publication generally takes a minimum of seventy days. Therefore, allowing for the time required to effect a diligent search for a party, it is not reasonable to assume that such publication will be complete within seventy-five days of the scheduled dispositional hearing to be held pursuant to § 16.1-252(H) or § 16.1-253(G). You also note that § 16.1-278.2(D) provides that "[a] dispositional order entered pursuant to this section is a final order from which an appeal may be taken in accordance with § 16.1-296."<sup>16</sup> You, therefore, conclude that an order may not be finalized until service is perfected on all parties, and, consequently, pending the perfection of service, no order would be final.

It must be presumed that the General Assembly did not intend to enact inconsistent legislation.<sup>17</sup> The principles of statutory construction also require that statutes be harmonized with other

existing statutes, if possible, to produce a consistently logical result that gives effect to the legislative intent.<sup>18</sup>

Section 16.1-264(A) provides that a court "may order" service of a summons on a party by publication. (Emphasis added.) The use of the word "may" by the General Assembly clearly indicates the grant of permissive, not mandatory, authority.<sup>19</sup> Consequently, the juvenile court has the discretionary authority to order service of process by publication; however, it is not required to do so.<sup>20</sup> Since the use of an order of publication by the juvenile court is entirely discretionary, I am of the opinion that service of process may be waived without completion of service by publication when the court makes the statutorily required finding. I am also of the opinion that waiver of service without the completion of service by publication does not conflict with § 16.1-264.

Your final inquiry concerns the first sentence of § 16.1-266(E), which provides:

Any state or local agency, department, authority or institution and any school, hospital, physician or other health or mental health care provider shall permit a guardian ad litem appointed pursuant to this section to inspect and copy, without the consent of the child or his parents, any records relating to the child whom the guardian represents upon presentation by him of a copy of the court order appointing him or a court order specifically allowing him such access.

You specifically inquire whether this provision allows the guardian ad litem access to child-protective services ("CPS") investigation records, notwithstanding the requirements of what you refer to as the confidentiality statutes.<sup>21</sup>

In your written opinion, you also conclude that the confidentiality statutes require that the CPS documents, especially documents containing the names of the complainant and collateral contacts, remain confidential, and consequently, may not be disseminated to anyone, including the guardian ad litem. You specifically refer to the case of *Nelson v. County of Henrico*, wherein the Court of Appeals of Virginia notes that "[s]tatutes must be construed consistently with each other and so as to reasonably and logically effectuate their intended purpose."<sup>22</sup> You, therefore, conclude that § 16.1-266(E) may not contradict the confidentiality statutes.

A rule of statutory construction requires the presumption that, in enacting § 16.1-266(E), the General Assembly had full knowledge of the existing law and the construction placed upon it by the courts, and intended to change the then-existing law.<sup>23</sup> Furthermore, when new provisions are added to existing legislation by an amendatory act, a presumption normally arises that a change in the law was intended.<sup>24</sup> Section 16.1-266(E) became effective July 1, 1997.<sup>25</sup> Several other principles of statutory construction are also applicable to this matter: "If the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it."<sup>26</sup> It is unnecessary to resort to any rules of statutory construction when the language of a statute is unambiguous.<sup>27</sup> In such situations, the statute's plain meaning and intent govern. In addition, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.<sup>28</sup>

Section 16.1-266(E) plainly, clearly and unambiguously requires that the guardian ad litem appointed under § 16.1-266(A) to represent the child in a case alleging abuse or neglect of such child be permitted to inspect and copy "any records relating to the child whom the guardian represents." (Emphasis added.) Furthermore, "[a]ny state or local agency, department, authority or institution" that has possession of such records "shall permit a guardian ad litem appointed pursuant to this section to inspect and copy" such records.<sup>29</sup> This is clear and unambiguous language. Therefore, when any record maintained by CPS relates to the child whom a guardian

ad litem represents, such record must be made available to the guardian ad litem for inspection and copying. It is my opinion that when a guardian ad litem presents either a copy of the court order appointing him as guardian, or a court order specifically allowing him access to such files, CPS must allow him access to any record in its files "relating to the child whom the guardian represents"<sup>30</sup> for the purposes of inspection and copying.

<sup>1</sup>The 1998 Session of the General Assembly substituted "protective order" for "removal" in § 16.1-253(F). 1998 Va. Acts ch. 550, at 1306, 1307.

<sup>2</sup>See *supra* note 1.

<sup>3</sup>Section 2.1-118 requires that any request by a county attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."

<sup>4</sup>See § 63.1-248.6 (providing for local departments of social services to establish child-protective services; duties).

<sup>5</sup>*Cheeks v. Com.*, 20 Va. App. 578, 582, 459 S.E.2d 107, 109 (1995).

<sup>6</sup>247 Va. 506, 442 S.E.2d 636 (1994).

<sup>7</sup>*Id.* at 508, 442 S.E.2d at 636.

<sup>8</sup>See 1993 Va. Acts: ch. 908, at 1374, 1479; ch. 6, at 4, 5 (emphasis added); see also *Jamborsky v. Baskins*, 247 Va. at 508, 442 S.E.2d at 637. Section 16.2-269 was repealed by the 1994 Session of the General Assembly. See 1994 Va. Acts: ch. 859, cl. 3, at 1386, 1409; ch. 949, cl. 3, at 1581, 1604.

<sup>9</sup>*Jamborsky*, 247 Va. at 508, 442 S.E.2d at 637.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* at 511, 442 S.E.2d at 638 (quoting *Commonwealth v. Rafferty*, 241 Va. 319, 324, 402 S.E.2d 17, 20 (1991) (quoting *Nelms v. Vaughan*, 84 Va. 696, 699, 5 S.E. 704, 706 (1888))).

<sup>12</sup>*Id.*

<sup>13</sup>See *Commonwealth v. Rafferty*, 241 Va. At 324-25, 402 S.E.2d at 20; *Fox v. Custis*, 236 Va. 69, 372 S.E.2d 373 (1988); *Moore v. Commonwealth*, 218 Va. 388, 237 S.E.2d 187 (1977); *Huffman v. Kite* 198 Va. 196, 93 S.E.2d 328 (1956); *Nelms v. Vaughan*, 84 Va. at 696, 5 S.E. at 704.

<sup>14</sup>Section 16.1-252(H) provides for the scheduling of a dispositional hearing 75 days after a preliminary removal order hearing; § 16.1-253(G) provides for the scheduling of a dispositional hearing 75 days after a preliminary protective order hearing.

<sup>15</sup>Section 16.1-264(A).

<sup>16</sup>Section 16.1-296 governs the jurisdiction and procedure for appeals.

<sup>17</sup>Williams v. Commonwealth, 190 Va. 280, 293, 56 S.E.2d 537, 543 (1949) (assuming that "the legislature did not intend to do a vain and useless thing" in enacting or amending statute).

<sup>18</sup>See 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (5<sup>th</sup> ed. 1992 & Supp. 1998); 1995 Op. Va. Att'y Gen. 118, 120.

<sup>19</sup>See Op. Va. Att'y Gen.: 1997 at 10, 12; 1994 at 64, 68; 1992 at 133, 135.

<sup>20</sup>An order of publication issued pursuant to § 8.01-317 is a form of substituted service of process. Its purpose is to "apprise the defendant of the nature and object of the proceeding against him and to notify him that his rights may be affected in the litigation." Robertson v. Stone, 199 Va. 41, 43, 97 S.E.2d 739, 741 (1957); see also 1990 Op. Va. Att'y Gen. 29, 30.

<sup>21</sup>I express no opinion whether your conclusion is correct regarding the confidentiality requirements of the various statutes, agency regulations and prior opinions of the Attorney General cited in your request.

<sup>22</sup>10 Va. App. 558, 561, 393 S.E.2d 644, 646 (1990).

<sup>23</sup>See Richmond v. Sutherland, 114 Va. 688, 77 S.E. 470 (1913).

<sup>24</sup>Wisniewski v. Johnson, 223 Va. 141, 144, 286 S.E.2d 223, 224-25 (1982); see also Op. Va. Att'y Gen.: 1996 at 61, 61; 1990 at 156, 157; 1986-1987 at 272, 273.

<sup>25</sup>See 1997 Va. Acts ch. 790, at 1922 (adding § 16.1-266(E)).

<sup>26</sup>Temple v. City of Petersburg, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944); see also 1993 Op. Va. Att'y Gen. 256, 257.

<sup>27</sup>See Ambrogi v. Koontz, 224 Va. 381, 297 S.E.2d 660 (1982); 1993 Op. Va. Att'y Gen. 99, 100.

<sup>28</sup>See 2A SINGER, *supra* note 18; § 47.23; 1992 Op. Va. Att'y Gen. 145, 146, and opinions cited therein.

<sup>29</sup>Section 16.1-266(E).

<sup>30</sup>*Id.*