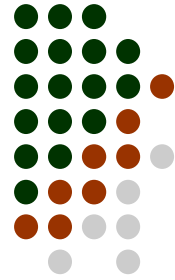




# Virginia Poverty Law Review



## Protective Orders for Same-Sex Couples: A Tangled History and Uncertain Present

By Rachel H. MacKnight,  
Legal Aid Society of  
Roanoke Valley

In the 23 years since the introduction of the Family Abuse protective order statute (VA Code 16.1-279.1), domestic violence victims and their attorneys have worked to obtain the law's protections and clarify its ambiguities. One area that remains shrouded in mystery, however, is the application of the statute to same-sex couples. The only part of VA Code 16.1-228's complicated definition of "family or household member" likely to be relevant to same-sex couples is the status of having "cohabited" together within the past 12 months, but the definition of "cohabiting" and the question of whether it encompasses same-sex individuals has led to a great deal of confusion.

The story begins in 1994, when the attorney general's office released an opinion responding to the question of whether a same-sex partner could be charged with Assault and Battery Against a Family or Household Member, commonly known as "domestic assault and battery."

Since one of the elements of that crime is that the victim qualify as a "family or household member" of the defendant, again as defined in VA Code 16.1-228, the opinion focused on the question of whether a same-sex couple could be said to be "cohabiting." In a very brief opinion, then-attorney general James Gilmore cited Black's Law Dictionary to define the term as "liv[ing] together as husband and wife." 1994 Op. Va. Att'y Gen. 60 (1994). Because same-sex marriage is not legal in Virginia, he concluded that it was impossible for a same-sex couple to meet that definition, and thus that no defendant could be charged with domestic assault and battery against a same-sex partner. Although the opinion did not specifically address the topic of protective orders, it did state that same-sex couples could not "cohabit" for purposes of 16.1-228, thus essentially eliminating the possibility of such victims' eligibility for family abuse protective orders. *Id.*

There has been no study or other repository of data showing how courts in Virginia reacted to this

opinion, or indeed what their policies had been towards issuing protective orders to victims of same-sex domestic violence before the opinion appeared. However, anecdotal evidence suggests that practice has varied widely from jurisdiction to jurisdiction. Some victims report being told that protective orders simply did not apply to same-sex couples, while others have had no trouble obtaining them. Of course, the A.G.'s opinion is not binding law, so it is certainly possible that some courts disregarded its interpretation entirely.

In 2000, the Court of Appeals took up the issue in *Rickman v. Commonwealth*, 33 Va. App. 550 (Va. Ct. App. 2000). The court took a nuanced approach, stating that the "essential elements" of cohabitation for purposes of 16.1-228 are "(1) sharing of familial or financial responsibilities and (2) consortium," and detailing a lengthy list of factors that could be used to determine those elements. *Id.* The court stated that a "totality-of-the-circumstances

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## Protective Orders for Same-Sex Couples

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analysis” was required on a case-by-case basis to determine cohabitation. Subsequent cases both in and outside of the 16.1-228 context cited this opinion and engaged in such analyses. See, e.g., *Pearson v. VanLowe*, 2005 Va. App. LEXIS 91 (Va. Ct. App. 2005); *Cowell v. Commonwealth*, 2005 Va. App. LEXIS 42 (Va. Ct. App. 2005); *Harris v. Commonwealth*, 2002 Va. App. LEXIS 622 (Va. Ct. App. 2002). Still, however, none of these cases addressed protective orders, and none involved the application of this new definition to a same-sex couple.

The landscape for these issues changed again in 2006. In response to a question about whether the proposed “marriage amendment” would affect other laws, including domestic violence laws, the attorney general’s office issued a new opinion which overruled the 1994 one. The 2006 opinion reviewed the changes in case law since the older opinion, concluding, “It is my opinion that ‘cohabitation’ is determined by a variety of factors, and that the institution of marriage may be used as an illustrative and objective standard to determine whether unmarried parties are cohabitating.” 2006 Va. AG LEXIS 34 (Va. AG 2006). Further, the opinion argued, passage of the amendment “would not prevent prosecution of an individual cohabitating in a same-sex or other unmarried relationship for [domestic assault and battery.]” *Id.* By referring to the prosecution of a hypothetical individual “cohabiting” in a same-sex relationship, the opinion implicitly acknowledged that it

was possible for such cohabiting to occur.

Two weeks after Robert McDonnell issued the new opinion, the office of the Executive Secretary of the Supreme Court of Virginia sent a memorandum to every judge in Virginia advising them of the new opinion and stating that “Those courts which may have denied petitions for family abuse protective orders because of the 1994 opinion of the attorney general concluding that members of a same-sex couple could not cohabit may view the issue differently, in light of the 2006 opinion of the attorney general.” Memorandum from Steven L. Dalle Mura, Office of the Executive Secretary, Supreme Court of Virginia, to Circuit Court Judges and District Court Judges (September 29, 2006), available at <http://www.vsdvalliance.org/secAbout/Sup%20Ct%20memo.doc>.

Again, of course, neither the AG opinion nor the Supreme Court memorandum are binding law. Case law has continued to develop on this issue, including the recent *Stroud v. Stroud*, 641 S.E.2d 142 (Va. Ct. App. 2007), which found a same-sex couple to be cohabiting in a different context. In that case, a divorce decree had ordered Mr. Stroud to pay spousal support to his wife until “the remarriage of Wife and/or her cohabitation with any person to whom she is not related by blood or marriage in a situation analogous to marriage.” *Id.* The court engaged in a lengthy review of the facts of Ms. Stroud’s subsequent relationship with another woman, describing their household arrangements and quoting from family

letters, before concluding that she was cohabiting with her partner and that the cohabitation terminated Mr. Stroud’s support obligation. In doing so, the court overturned the Circuit Court determination, which had relied heavily on the 1994 AG opinion: “the trial court erred in concluding that, for the purposes of interpreting the contract between husband and wife, same sex individuals may not cohabit in Virginia as a matter of law.” *Id.* at 151.

The other development that has occurred since the 2006 opinion is the actual passage of the Marshall-Newman “marriage amendment,” which states *inter alia* that Virginia may not “create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage.” Va. Const. Art. I, § 15-A. Some domestic violence advocates expressed concern about the broad language of this amendment, fearing that a court might decide that allowing protective orders for unmarried couples who live together but not for roommates or other individuals who share housing creates the legal status of “cohabitants” which intends to approximate marriage. Under such an interpretation, the court would be forced to stop granting protective orders to all unmarried couples who cohabit. However, there have been no reported cases so far of an unmarried domestic violence victim being denied a protective order for this reason.

At this point, the plain

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## Protective Orders for Same-Sex Couples

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language of the statute, in combination with the interpretation of the most current A.G. opinion and available case law, strongly suggests that family abuse protective orders should be available to victims of same-sex domestic violence who have lived together within the preceding 12 months. However, the lack of available information noted above

continues to be a problem. The real answer is that no one really knows how judges (or intake officers) are handling these cases. What is needed is a higher court opinion specifically on point, one that defines the "cohabit" term in the context of VA Code 16.1-228 and makes clear that the term's application is not limited to opposite-sex couples. A training effort for court employees, magistrates

and police officers, many of whom may be unaware of the newer opinions, would also be welcome. Until then, legal aid lawyers may be called upon to fight these battles on a case-by-case basis, from making sure that intake officers are taking these petitions to representing these clients in court to ensure that they obtain all of the protection that the law allows.

## National Legal Aid Leaders Testify on Need for Funding Increase

By Legal Services Corporation

Washington, DC—Leaders from the Legal Services Corporation (LSC), the single largest source of funding for civil legal aid programs nationwide, testified before a House panel recently on the critical need for increased funding to provide crucial legal assistance to the millions of low-income Americans forced to confront serious civil legal problems without the help of an attorney.

LSC Board Chairman Frank B. Strickland and President Helaine M. Barnett appeared before the House Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies to present the case for LSC's FY 2009 budget request for \$471 million, an increase of \$121 million over current funding levels. The subcommittee is led by Chairman Alan B. Mollohan, D-W. Va., and Ranking Member Rodney P. Frelinghuysen, R-N.J. Strickland and Barnett told the subcommittee that an increase is necessary in light of LSC's groundbreaking report, *Documenting the*

*Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans*, which found that funding shortages force LSC's civil legal aid programs to turn away 50 percent of eligible low-income Americans seeking their assistance. In addition, the nationwide foreclosure crisis has flooded programs with requests for assistance, resulting in a doubling of foreclosure-related caseloads in some instances. Natural disasters like Hurricane Katrina, last year's wildfires in southern California, and the recent tornadoes in Tennessee, Arkansas, and Georgia continue to create new clients for LSC-funded programs. Without a funding increase, LSC's programs will not be able to meet the increased demand for their services. "The LSC Board and I urge you to restore adequate funding for the provision of civil legal aid to the most vulnerable among us," said Barnett. "In this effort, the federal government must lead the way consistent with its role in fulfilling the promise of our Constitution, the promise inscribed on the Supreme Court Building: equal justice under law."

"Clearly there is much work to be done to improve access to justice," said Chairman Mollohan to Strickland and Barnett, "and this committee appreciates your efforts to do so."

Rep. Frelinghuysen commended LSC for its work, and commented on the valuable services provided by legal aid programs in New Jersey.

Strickland also updated the subcommittee on LSC's progress implementing the recommendations of the Government Accountability Office (GAO) in recent reports on the Corporation's governance and accountability practices, and grants management and oversight. In response to the GAO's suggestions, the Board approved a Code of Ethics and Conduct, established a separate Audit Committee, and approved the continued use of the Government Accounting Standards Board guidelines for LSC's financial reports. LSC management has completed the first phase of a Continuity of Operations Plan for the Corporation and is working towards establishing

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## National Legal Aid Leaders Testify on Need for Funding Increase

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a more formal and rigorous risk management program. LSC's Board has also established an *ad hoc* committee, consisting of three Board members, responsible for working with the Corporation's management and Office of Inspector General to establish better coordination and

information sharing, and to define a clear delineation of oversight responsibilities.

LSC is an independent, non-profit Corporation created by Congress in 1974 to promote equal access to justice and to provide high-quality civil legal assistance to low-income Americans. The Corporation gives grants to independent,

local programs—in 2008, 137 programs with more than 900 offices nationwide. Clients of LSC-funded programs include families facing homelessness due to eviction or foreclosure, women imprisoned by domestic abuse, and senior citizens victimized by predatory lenders.

## 2008 General Assembly Consumer Legislation Summary

By Jay Speer, Virginia Poverty Law Center

**The following Bills were signed by the governor and will take effect July 1st:**

### Credit report Freeze and Breach Notification

The governor put together a group of consumer advocates and trade groups representatives last fall in an effort to agree on possible legislation concerning credit report freezes and mandated duties for companies that lose your personal financial information. The trade groups adamantly opposed any legislation and refused to seriously discuss it. The governor decided to ask some legislators to put in bills anyway and several legislators had constituents asking for legislation. Several industry trade groups then put in their own bills that passed and were signed by the governor.

Credit Report Freeze—Del Byron (HB 1311) and Sen. Saslaw (SB 576) Identical Bills. Authorizes any consumer to freeze access to his/her credit report. If a consumer has placed a freeze on his credit report, a consumer reporting agency is prohibited from releasing the

credit report, or any information in it, without the consumer's express authorization. The measure provides a means by which a consumer can release his report, permanently, temporarily, or to a specific third party. Certain disclosures are exempt from the freeze. A fee of up to \$10 may be charged for establishing a freeze, although identity theft victims are not required to pay a fee. A person who willfully fails to comply with the requirements is liable to a consumer for actual damages of between \$100 and \$1,000, punitive damages, and reasonable attorney fees. A person who negligently fails to comply with the requirements is liable to a consumer for actual damages and reasonable attorney fees. The attorney general is authorized to take enforcement actions.

Several other legislators also introduced bills that were either defeated or incorporated into Delegate Byron and Sen Saslaw's bills: Del. Tata, Del. O. Ware, Del. Oder, Del. L. Ware, Del. Plum, Del. Morgan, Del. Barlow, Del. Eisenberg, Del. OBannon, Sen Wagner, Sen Whipple

Database Breach Notification (or I gave away your personal

information, oops!)—Del. Byron (HB 1467) and Sen. Reynolds (SB 307). Requires an individual or entity that owns or licenses computerized data that includes personal information to disclose any breach of the security of the system following discovery or notification of the breach to the Office of the Attorney General and any affected resident of the Commonwealth whose unencrypted and unredacted personal information was, or is reasonably believed to have been accessed and acquired by an unauthorized person. A breach is defined as the unauthorized access and acquisition of unencrypted and unredacted computerized data that compromises the security or confidentiality of personal information maintained by an individual or entity as part of a database of personal information regarding multiple individuals and that causes, or the individual or entity reasonably believes has caused, or will cause, identity theft or other fraud to any resident of the Commonwealth. Violations by a state-chartered or licensed financial institution shall be enforceable exclusively by the financial institution's primary state regulator. Violations by

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## 2008 General Assembly Consumer Legislation Summary

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an entity regulated by the State Corporation Commission shall be enforceable exclusively by the commission. All other violations shall be enforced by the Office of the Attorney General, which may impose a civil penalty not to exceed \$150,000 per breach or series of breaches of a similar nature that are discovered in a single investigation. The bill specifies that its provisions do not limit an individual from recovering direct economic damages. This bill incorporates [HB 390](#) (Delegate Bulova), [HB 971](#) (Delegate Shannon), [HB 1052](#) (Delegate Plum), and [HB 1504](#) (Delegate Nixon). This bill is identical to [SB 307](#).

### Foreclosure Rescue Scams

This bill started as a helpful tool to protect homeowners from foreclosure rescue scams but unfortunately was watered down to the point that it might not be very helpful. We should keep in mind that it is a good start and something to build upon in the next General Assembly session.

Del. Oder (HB 408)—Makes persons participating in or servicing foreclosure rescues for profit with the intent to defraud a consumer a violation of the Virginia Consumer Protection Act. HB 947 (Del. Iaquinto) is incorporated into this bill.

§ [59.1-200.1](#). *Prohibited practices; foreclosure rescue.* A. In addition to the provisions of § [59.1-200](#), the following fraudulent acts or practices committed by a supplier, as defined in § [59.1-198](#), in a consumer transaction involving residential real property

owned and occupied as the primary dwelling unit of the owner, are prohibited:

1. The supplier of service to avoid or prevent foreclosure is to be paid a fee prior to the settlement on a sale of such residential real property, regardless of whether the fee is charged or collected as part of the transaction involving a sale of such residential real property;
2. The supplier of such services (i) fails to make payments under the mortgage or deed of trust that is a lien on such residential real property as the payments become due, where the supplier has agreed to do so, regardless of whether the purchaser is obligated on the loan, and (ii) applies rents received from such dwellings for his own use;
3. The supplier of such services represents to the seller of such residential real property that the seller has an option to repurchase such residential real property, after the supplier of such services takes legal or equitable title to such residential real property, unless there is a written contract providing such option to repurchase on terms and at a price stated in such contract; or
4. The supplier advertises or offers such services as are prohibited by this section.
  - B. This section shall not apply to any mortgage lender or servicer regularly engaged in making or servicing mortgage loans that is subject to the supervisory authority of the State Corporation Commission, a comparable regulatory authority of another state, or a federal banking agency.
  - C. Any provision in an agreement with the owner of such residential real property that requires the owner to

submit to mandatory arbitration shall be null and void, and notwithstanding any such provisions, the owner of such residential real property shall have the rights and remedies under this chapter.

Wet Settlement Act—Sen McEachin (SB 158). Requires any lender providing a loan secured by a first mortgage on real estate containing not more than four residential dwelling units to disclose on the settlement statement any fee charged to the borrower for an appraisal and any fee charged to the borrower for a valuation or opinion of value prepared using an automated or other mechanism prepared by a person who is not licensed as an appraiser.

Higher educational institutions: policies addressing student loan vendors—Sen. McEachin (SB 510). Requires the State Council of Higher Education to develop policies and procedures for disclosing certain information to students on student lending practices. This information shall include (i) the criteria used to determine which lenders, if any, are recommended or endorsed by the school, and (ii) explicit notification that students are free to borrow from any lender of their choosing and are not limited to a list offered by the school. Also, the bill prohibits public institutions of higher education from entering into exclusive agreements with vendors regarding student loans, and prohibits employees from accepting gifts to induce endorsement of certain vendors

Homestead deeds; previous filings—Del. Griffith (HB

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1042). Adds to the homestead deed form the following questions: (i) how many homestead deeds has the householder filed previously, (ii) what was the amount of the exemption, and (iii) what jurisdiction were they in?

“In order to secure the benefit of the exemptions of *real estate...*” (my emphasis added)  
It doesn't apply to a Homestead Deed for setting apart personal property.

Deed of trust or mortgage: reduces time in which one may enforce—Del. Fralin (HB 1133). No deed of trust or mortgage heretofore or hereafter given to secure the payment of money, and no lien heretofore or hereafter reserved to secure the payment of unpaid purchase money, shall be enforced after 10 years from the time when the original obligation last maturing thereby secured shall have become due and payable according to its terms and without regard to any provision for the acceleration of such date; provided that the period of one year from the death of any party in interest shall be excluded from the computation of time.

Computation of time: when statute of limitations ends on Saturday, Sunday, legal holiday, etc.—Sen. Peterson (SB 699). Clarifies that when the last day for bringing an action falls on a Saturday, Sunday, legal holiday, or day or part of a day on which the clerk's office is closed as authorized by an act of the General Assembly, then the action may be filed on the next day that is not a Saturday, Sunday, legal

holiday, or day or part of a day on which the clerk's office is closed as authorized by an act of the General Assembly.

Mortgage Lender & Broker Act; SCC to enforce certain laws for home ownership protection—Del. Suit (HB 1487). Authorizes the State Corporation Commission to impose a fine not exceeding \$2,500 upon a mortgage lender or mortgage broker that is required to be licensed under the Mortgage Lender and Broker Act for violating any other law or regulation applicable to the conduct of the lender's or broker's business. The Housing Commission is directed to study all new federal legislation pertaining to mortgage lending and brokering, and to determine if the legislation requires changes to Virginia law. The measure authorizes the commission to suspend or revoke a mortgage lender's or broker's license upon its failure promptly to pay when due reasonable fees to a licensed appraiser for appraisal services performed in connection with the origination or closing of a mortgage loan for a customer of the mortgage broker or lender. Other amendments to the Mortgage Lender and Broker Act (i) remove the element of the definition of a mortgage loan that has required the property securing the loan to be owner-occupied; (ii) require the Commission to conduct criminal background checks through the Central Criminal Records Exchange on every member, senior officer, director, and principal of a licensee; (iii) require licensees to conduct background checks on employees who may have access to or process personal identifying

or financial information from a member of the public; (iv) require licensees to ensure that employees are properly trained in applicable state and federal mortgage lending laws and regulations; and (v) authorize the attorney general to bring actions to enjoin violations of the federal Real Estate Settlement Procedures Act to the extent authorized by provisions of that Act.

Mortgage lenders or servicers; notice and additional time before foreclosure on high-risk loans—Sen. Puckett (SB 797). Requires high-risk mortgage lenders or servicers to provide written notice of the intention to send a notice to accelerate the repayment of the loan 10 business days prior to sending the notice of acceleration. If an obligor indicates the desire to avoid foreclosure, the high-risk mortgage lender or servicer shall give the obligor 30 calendar days' forbearance.

### Payday Lending

**This legislation will not take effect until January 1, 2009.**

Del. Oder (HB 12) and Sen. Puckett (SB 588).

### The Good

- One loan at a time
- Payday lenders must give you two pay periods to repay the loan
  - More time to pay it back
  - Social Security recipients get two months and can only get 6 loans per year

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## 2008 General Assembly Consumer Legislation Summary

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### The Bad (or at least, not so good)

- If you want a fifth loan within 180 days....
  - can't get another for 45 days, or
  - extended payment plan
- Net effect: bi-weekly borrowers limited to 9 payday loans per year and weekly borrowers limited to 15

### The Ugly

- Payday lenders can charge 36% APR
- PLUS
  - 20% "fee" PLUS
  - \$5 verification fee
- Net effect
  - Just as expensive as it is now and maybe more expensive for weekly wage earners
  - APR for worker paid biweekly: 310 - 362%

Other provisions in the law of interest:

- A payday lender may not *make a loan to a borrower on the same day that a borrower paid or otherwise satisfied in full a previous payday loan;*
- A licensee shall not threaten, or cause to be instigated, criminal proceedings against a borrower if a check given as security for a loan is dishonored. *In addition to any other remedies available at*

*law, a licensee that knowingly violates this prohibition shall pay the affected borrower a civil monetary penalty equal to three times the amount of the dishonored check.*

- *In collecting or attempting to collect a payday loan, a licensee shall comply with the restrictions and prohibitions applicable to debt collectors contained in the Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq.) regarding harassment or abuse, false or misleading misrepresentations, and unfair practices in collections.*
- *A licensee may not file or initiate a legal proceeding of any kind against a borrower until 60 days after the date of default on a payday loan, during which period the licensee and borrower may voluntarily enter into a repayment arrangement.*

Many other payday bills were introduced and either defeated or incorporated into HB 12 and SB 588:

- 36% Cap or repeal the payday lending act bills: Del. Morissey, Del. Jones, Del. O'Bannon, Del. McClellan, Sen. Reynolds, Sen. McEachin, Sen. Locke
- Debtor harassment bill: Sen. McEachin
- Let localities decide bill: Del. Marshall
- Impersonating law

enforcement bill: Del. Cosgrove

- All we need is a magical database bill: Del. Nixon
- Pro-payday lending bills: Del. O Ware, Del. L. Ware, Del. Sickles

### **Other Bills that were defeated or withdrawn**

Motor vehicle equity loans: caps interest thereon—Sen. Obenshain (SB 565). Regulates motor vehicle equity loans, which are closed-end loans secured by an interest in a motor vehicle. The measure caps the interest on such loans at 20 percent per month for the first two months and three percent per month for the balance of the term. If such a loan is repaid in full within 48 hours, the loan shall not bear interest. The maximum term of such a loan is 12 months. The maximum amount of a motor vehicle equity loan is 50 percent of the value of the motor vehicle. Lenders are required to be licensed with the State Corporation Commission. A violation of the measure is a prohibited practice under the Consumer Protection Act. Violators are subject to civil and criminal penalties. Making unlicensed motor vehicle equity loans, or arranging or brokering motor vehicle equity loans, is punishable as a Class 1 misdemeanor.

### **Mortgage Lending Bills (Most of these bills will be examined by the Housing Commission in the coming year.)**

Mortgage loans—Del. Sickles (HB 1091). Requires certain lenders that make a subprime

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## 2008 General Assembly Consumer Legislation Summary

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adjustable rate mortgage loan to a borrower to collect and hold in escrow periodic payments for real estate taxes and insurance premiums.

Mortgages—Del. Sickles (HB 1093). Prohibits certain lenders from making a low-document, no-document, or stated-document mortgage loan unless the lender has obtained detailed documentation of all sources of income claimed by the borrower in the loan application, or corroborated the claimed income by independent verification, and determined, that a reasonable creditor would believe at the time the loan is closed that the borrower will be able to make the scheduled payments associated with the loan.

Mortgage lenders and brokers—Del. Sickles (HB 1097). Requires mortgage lenders and brokers required to be licensed under the Mortgage Lender and Broker Act to make a reasonable and good faith determination based on verified and documented information that a borrower has a reasonable ability to repay a nonqualified mortgage loan. The measure prohibits a mortgage lender from compensating a mortgage broker based on the terms of a nonqualified mortgage loan. The fine or penalty that may be imposed by the State Corporation Commission for a violation of either of these provisions is \$5,000; for other violations of the act, the maximum fine remains \$2,500. Finally, the measure requires the employees of a mortgage lender or broker who originates mortgage loans to

be registered with the commissioner of the Bureau of Financial Institutions. Applicants for registration will be required to submit to a criminal background check and to satisfy training standards and education requirements.

Real estate lending practices—Del. Jones (HB 1495). Prohibits the assessment of a prepayment penalty on a loan secured by a mortgage or deed of trust on an owner-occupied home more than two years after the origination date of the loan. A prepayment penalty provision that contravenes requirements applicable to such loans shall be unenforceable. The measure also amends the Mortgage Lender and Broker Act to prohibit mortgage brokers from receiving compensation that is based on or varies with the terms of a mortgage loan, and to prohibit mortgage lenders and brokers from paying compensation to any person for placing a borrower in a mortgage loan, if the compensation is based on, or varies with, the terms of the mortgage loan.

Mortgage lenders and brokers—Sen. McEachin (SB 157). Establishes a fiduciary duty of mortgage brokers to borrowers. Mortgage brokers are required to act in the borrower's best interest and with the utmost good faith. Mortgage brokers have the duties (i) to disclose all material information that might reasonably affect the borrower's rights, interests, or ability to receive the intended benefit from the loan, including the total compensation that the mortgage broker would receive from any of the loan

options presented to the borrower, and (ii) to make reasonable efforts to secure or obtain a mortgage loan that is in the best interest of the borrower. Mortgage lenders are required to act in good faith and deal fairly in any transaction, practice or course of business in connection with a mortgage loan, and to make reasonable efforts to make a mortgage loan that is reasonably advantageous to the borrower. In addition, mortgage brokers and lenders are required to safeguard and account for any money handled for a borrower, follow reasonable and lawful instructions from the borrower, and use reasonable skill, care, and diligence.

Mortgage lending—Sen. Deeds (SB 258). Prohibits any (i) mortgage lender or broker, (ii) person required to be licensed under the Mortgage Lender and Broker Act, and (iii) person exempt from the licensing requirements of the Mortgage Lender and Broker Act, other than a state or federally chartered bank, savings institution, or chartered credit union, or person making, providing, or arranging a mortgage loan originated or purchased by an agency of the Commonwealth or a locality, from arranging special mortgages unless the borrower has obtained a written certification from an authorized independent loan counselor on the advisability of the loan transaction. A special mortgage is a residential mortgage loan originated, subsidized, or guaranteed by or through an agency of the Commonwealth, a locality, or a nonprofit organization that has one or more nonstandard payment

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## 2008 General Assembly Consumer Legislation Summary

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terms which substantially benefit the borrower. Such persons are also prohibited from (a) entering into subprime loans containing a provision requiring or permitting the imposition of a prepayment penalty or charge in the event the loan is prepaid and (b) making, providing, or arranging for a residential mortgage loan, other than a reverse mortgage, if the borrower's compliance with any repayment option will result in negative amortization during any six-month period. The measure expressly gives borrowers a private cause of action, in which they may seek recovery of damages, statutory damages equal to the amount of all lender fees included in the amount of the principal of the mortgage loan, punitive damages, costs, and reasonable attorney fees. Finally, the measure makes it unlawful to knowingly make or cause to be made any deliberate and material misstatement, misrepresentation, or omission during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process; to knowingly use or facilitate the use of any deliberate and material misstatement, misrepresentation, or omission, knowing the same to contain a material misstatement, misrepresentation, or omission, during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process. Violations are to be punishable as a Class 1 misdemeanor or, if a financial

loss of greater than \$200 results, a Class 6 felony. Second or subsequent convictions are punishable as a Class 6 felony. Violators shall also be required to pay restitution.

Mortgage lenders—Sen. Martin (SB 709). Prohibits any mortgage lender or broker that is required to be licensed under the Mortgage Lender and Broker Act from making a mortgage loan to, or negotiating, placing or finding a mortgage loan for, a borrower if it is more expensive than another mortgage loan with identical terms that the lender or broker markets or offers and for which the borrower qualifies.

Department of Consumer Affairs—Del. Marshall (HB 206). Removes the Office of Consumer Affairs from the Department of Agriculture and Consumer Services and establishes it as the Department of Consumer Affairs (DCA). The DCA will be headed by a director appointed by the governor to serve at his pleasure.

Doctrine of necessities; repealed—Del. Cox (HB 476). Repeals § 55-37, relating to the doctrine of necessities, which obliges each spouse to provide basic necessities of the other spouse such as housing, medical care, and nourishment.

Individual retirement accounts (IRAs); exemption from civil judgments—Del. Marsden (HB 1256). Provides that an individual's interest in an IRA, up to \$750,000, is exempt from creditor process including civil judgments

Individual retirement accounts (IRAs); exemption from civil judgments—Del. Lingamfelter (HB 1559). Exempts individual retirement accounts from all creditor process including civil judgments.

Consumer Protection Act: advertising at price after rebate—Del. Alexander (HB 1545). Makes it a prohibited practice under the Virginia Consumer Protection Act to advertise goods for sale in manner that would lead a reasonable person to conclude that the price of the goods is the ultimate price paid by the purchaser after the purchaser redeems the manufacturer's rebate offered for the advertised goods. The practice would not be prohibited if the supplier provides the amount of the manufacturer's rebate to the purchaser at the time of purchase.

Judgment; assignment shall be noted upon judgment docket—Sen. Reynolds (SB 23). Requires that an assignment of a judgment shall be noted upon the judgment docket. Such a notation is currently discretionary. If no notation is made, the judgment shall be considered satisfied.

Bad checks; attorneys for state to establish programs that allow persons to avoid prosecution (SB 364). Authorizes attorneys for the Commonwealth to establish programs that allow persons who write bad checks to avoid prosecution if they pay full restitution to the victim, attend an educational program, and pay all fines and costs.

## 2008 General Assembly Elder Law Legislation Summary

By Kathy Pryor, Virginia Poverty Law Center

**The following Bills were signed by the Governor and will take effect July 1st:**

### Long Term Care

Medical Malpractice: Definition of Professional Services—Hamilton (HB 501) and Norment (SB 602). The bills, introduced in response to the Virginia Supreme Court decision of Alcoy v. Valley Nursing Homes, Inc., 272 Va. 37, 630 S.E.2d 301 (2006), define the term “professional services in nursing homes” in the medical malpractice context, §8.01-581.1. As introduced, the term “professional services” was defined as “services provided to a patient by a health care provider pursuant to federal or state statutes or regulations.” Since medical malpractice includes any tort action or breach of contract action for personal injuries or wrongful death based on professional services rendered by a health care provider to a patient, this would have made injuries or deaths caused by strictly business decisions—e.g., facility security, building maintenance, etc.—by nursing home operators subject to the medical malpractice act. The final version of the bill, which passed both houses and has been signed by the governor, defines “professional services in nursing homes” as “services provided in a nursing home, as that term is defined in subdivision (iv) of the definition of health care provider in this section, by a health care provider related to health care, staffing to provide patient care, psycho-social services, personal hygiene, hydration, nutrition,

fall assessments or interventions, patient monitoring, prevention and treatment of medical conditions, diagnosis or therapy.”

Infectious Diseases: Residential or Day Program Licensed by State to Report Cases—Englin (HB 806) and Whipple (SB 463). The bill amends §32.1-37 to add persons in charge of any residential or day program, service or facility licensed or operated by any agency of the state to the list of non-physicians who are required to report an outbreak of disease to the local health director or to the Commissioner of Health. It also authorizes the director of any such facility to voluntarily report additional information, including individual cases of communicable diseases, at the request of the Department of Health for special surveillance or other epidemiological studies.

Health Care Providers: Those Responding to Disaster Immune from Liability—Hamilton (HB 403) and Newman (SB 657). The bill amends Virginia Code §§ 8.01-225.01, 8.01-581.1, 38.2-324, 44-146.16 et seq., and 59.1-526 and adds § 8.01-225.02 relating to health care provider liability protections. The bill provides that, in the absence of gross negligence or willful misconduct, health care providers who respond to a disaster are immune from civil liability for any injury or wrongful death arising from the delivery or withholding of health care if (1) a state or local emergency has been or is subsequently declared in response to the emergency, and (2) the emergency and subsequent conditions

“caused a lack of resources, attributable to the disaster, rendering the health care provider unable to provide the level or manner of care that otherwise would have been required... and which resulted in the injury or wrongful death at issue.” The bill combines the definitions of the terms “man-made disaster” and “natural disaster” and adds the term “communicable disease or public health threat” to the definition. The bill expands when immunity attaches for health care providers who abandon patients in order to respond to a disaster to include “disaster,” “emergency” or “major disaster.” The bill allows persons who hold licenses or certificates evidencing their professional or mechanical skills who render aid involving that skill during a disaster to receive reimbursement for their actual and necessary expenses.

Adult Fatality Review Team Created. Report—O’Bannon (HB 251). The bill adds §32.1-283.5 to create an Adult Fatality Review Team to review suspicious deaths of any incapacitated adult aged 18 or older and any adult aged 60 or older (i) who was the subject of an adult protective services investigation, (ii) whose death was due to abuse or neglect or acts that suggest abuse or neglect, or (iii) whose death came under the jurisdiction of the Office of the Chief Medical Examiner pursuant to § 32.1-283. The bill sets out the duties, membership, confidentiality, reporting and other requirements of the team. The bill also amends § 2.2-3705.5 to create a Freedom of Information Act

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## 2008 General Assembly Elder Law Legislation Summary

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exemption for information and records acquired during a review of any death conducted by a family violence fatality review team or during a review of any adult death conducted by the adult fatality review team to the extent made confidential by state law. Although not funded in the budget, the bill did not contain "the clause" which would have made the law effective only if funded, so that other funding sources could be explored or so that the Medical Examiners Office could create the team within its existing budget.

Nursing Facilities; Those in Continuing Care Retirement Communities to Participate in Program—Albo (HB 819). The bill amends § 32.1-102.3:1 and adds § 32.1-102.3:1.1 to allow nursing facilities in continuing care retirement communities in Planning District 8 to participate in the Medicaid program so long as (i) the nursing facility is no longer operating under an open admissions period, (ii) any patients who qualify and receive Medicaid have been residents of the community for at least 3 years, (iii) not more than 10% of the facility receives benefits at any given time, and (iv) residents who qualify for and receive Medicaid have exhausted any refundable entrance fee paid on the resident's behalf as a result of expenditures for that resident's care. The bill allows these facilities to be exempt from certificate of public need requirements as long as no resident receives federal or state public assistance funds during an open admissions period. In order to have no fiscal impact in the 2008-2010 biennium, the change does not take effect until

7/1/10.

Caregivers Grant Program; Physician Assistant or Nurse Practitioner to Certify—Ebbin (HB 861). The bill amends §63.2-2203 to allow a licensed physician assistant or nurse practitioner to provide the necessary certification for eligibility for the Virginia Caregiver's Grant Program application.

Nursing Workforce Information; Publication on Website—Bell (HB 1003). The bill amends § 54.1-3012.1 to require that data related to the Commonwealth's nursing workforce, which is currently collected by the Board of Nursing, be published in aggregate form and in a format that is accessible to the public on the Department of Health Profession's website.

Nurses, Licensed; Presumption of Knowledge of Statewide Standard of Care—Marsden (HB 584). The bill amends § 8.01-581.20 to add nurses licensed by a state participating in the Nurse Licensure Compact to those persons presumed to know the statewide standard of care in the field in which they are qualified or certified for purposes of medical malpractice actions or proceedings before a medical malpractice review panel.

Long-Term Care Services; Adds Representatives of Housing and Transportation to Membership—Ingram (HB 1447) and Lucas (SB 701). The bill amends §2.2-708 to add representatives of housing, transportation, and other appropriate local organizations that provide long-term care services to the membership of local long-term care coordination

committees.

Department for Aging; Four-Year Plan, Report—Alexander (HB 674). The bill amends § 2.2-703 and adds § 2.2-703.1 to require the Department for the Aging to develop and maintain a four-year plan for aging services. The bill requires the department to consult with various state and local agencies and details a list of factors to be included in the plan for consideration in determining when additional funds may be needed for various programs and services.

Certificate of Public Need; Introduced Institutional Competition into Health Planning Region—Hamilton (HB 502). The bill amends §32.1-102.3 of the code to provide that, when determining whether a public need for a project involving proposed health services or facilities has been demonstrated, the State Health Commissioner shall consider the extent to which the proposed service or facility will increase citizen accessibility, demonstrate documented community support, and introduce institutional competition into a health planning region.

Certificate of Public Need; Relocation of Nursing Home Beds—Hamilton (HB 398). The bill amends § 32.1-102.1 to exempt from the definition of "project" any relocation of up to 10 beds or 10% of beds, whichever is less, (i) from one existing facility to another existing facility at the same site in any 2-year period; or (ii) in any 3-year period, from one existing nursing home facility to any other existing nursing

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## 2008 General Assembly Elder Law Legislation Summary

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home facility owned or controlled by the same person that is located either within the same planning district, or within another planning district out of which, during or prior to that 3-year period, at least 10 times that number of beds have been authorized by statute to be relocated from one or more facilities located in that other planning district and at least half of those beds have not been replaced.

Nursing Home or Facility Beds; Health Commissioner May Accept and Issue Applications Therefore—Kilgore (HB 1498). The bill permits the Commissioner to issue a Request for Applications and to accept applications for 120 new nursing home or nursing facility beds in Planning District 3. The bill also directs the Commissioner to consider, in issuing any certificate of public need for 120 beds, that an applicant proposes to establish a new nursing facility located within 3 miles of the boundary of the county seat or within the county seat of the county adjacent to the city or county in which is sited any facility in Planning District 3 determined by the Division of Certificate of Public Need to be licensed for 120 beds but that operated no Medicaid-certified beds in 2006.

Hospice Facilities; Continued Operation of Certain—O'Bannon (HB 604). The bill allows certain hospice facilities operating as of January 1, 2008 in independent cities within Planning Districts 7, 10 and 11 to continue to operate pending promulgation of final licensure regulations by the Board of Health. The law

becomes effective upon passage.

Family Caregivers; Joint Commission on Health Care to Study Support Services Therefore—Stosch (SJ 102). The bill directs the Joint Commission on Health Care to study support services for family caregivers of the frail elderly and disabled and community-based caregiver support organizations.

### Budget Items

Portability of Auxiliary Grants. Language (Item 282 #2c) to require the Secretary of Health and Human Resources to develop a plan by November 1, 2008, to implement a housing program, on a pilot basis, which allows disabled consumers who receive case management services from a community services board or behavioral health authority to use Auxiliary Grant payments for housing arrangements other than assisted living facilities. Eligible recipients would include recipients of an auxiliary grant who reside in a facility that closes or for whom the services and housing supports would lead to reductions in higher-cost institutional care and i) whose needs are not being met by their current living arrangement, or ii) who are living in localities without ALFs, or iii) who are ready for discharge from a state hospital and are without access to an ALF placement. The plan shall include information on eligibility, the number of consumers to be served, financing, program monitoring and quality assurance, the roles of the various agencies in determining eligibility, administering the program, providing case management

and other support services, and the continued provision of financial support through local matching funds. The plan is to be submitted to the governor, the chairmen of the House Appropriations and Senate Finance committees, and the Joint Commission on Health Care by November 1, 2008.

Elimination of the Life Estate Exemption—Item 306 NN of the governor's budget included language to eliminate the life estate exemption in Medicaid—that is, to make all life estates countable as a resource (except for the six month exemption for a life estate in the home property after someone is admitted to a long-term care facility or if a reasonable effort to sell is made). The General Assembly added language, with DMAS's agreement, that the provision will apply only to life estates created after the effective date of agency regulations implementing the provision.

### Guardians/ Advance Medical Directives/Powers of Attorney

Advance Health Care Directive Registry Created—Englin (HB 805) and Barker (SB 290). The bill amends §§ 54.1-2983 and 54.1-2985 and adds §§ 54.1-2994, 54.1-2995, and 54.1-2996 to require the Department of Health to make available and maintain a secure online central registry for advance health care directives which would be accessible to health care providers licensed by the board. The Board of Health shall promulgate regulations specifying who may access the registry, annual reminders to registry users of which

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documents have been registered, and appropriate filing fees, etc. Provisions of this bill will become effective upon promulgation of final regulations by the board. The bill authorizes the Department of Health to obtain funding from other sources to make the registry available and to make the registry available through a contract with an appropriate vendor, an existing registry maintained by another entity, or by entering into a public-private partnership.

Revised Uniform Anatomical Gift Act; Resolve Situations When Conflict between Health Care Directive—Frederick (HB 1299). The bill amends §§32.1-291.21, 32.1-292.2 and 46.2-343 and repeals §32.1-290.1 to specify a procedure for resolving situations when, with regard to the measures necessary to ensure the medical suitability of an organ, there is a conflict between an advanced health care directive or similar declaration and the express or implied terms of an anatomical gift. The bill also repeals a section that was inadvertently not repealed when the prior Uniform Anatomical Gift Act was repealed in 2007 (when the Revised Uniform Anatomical Gift Act was enacted).

### Trusts and Estates

Decedents' Estates: Priority of Debt—Smith (SB 735) and Griffith (HB 412). The bill amends § 64.1-157 to increase from \$2,000 to \$3,500 the amount available from the estate to pay funeral expenses when there are insufficient assets for satisfaction of all demands

against the estate.

### Income and Real Property Taxes

Real Estate Tax; Inclusion of Income of Certain Non-Relatives of Owner—Lewis (HB 1479). The bill amends § 58.1-3211 to include the income of non-relatives living in the dwelling of the owner seeking tax relief, except for bona fide tenants and bona fide paid caregivers, in computing the maximum income limits to be eligible for the tax relief. Under current law, only the income of relatives living in the dwelling are included with that of the owner's in determining eligibility.

Real Estate Tax; Exemptions for Elderly and Handicapped Persons in Certain Cities and Counties—Loupassi (HB 1503) and Quayle (SB 203). The bills amend § 58.1-3211 to raise the maximum income eligibility restriction from \$62,000 to \$67,000 in the cities of Charlottesville, Chesapeake, Norfolk, Portsmouth, Richmond, Suffolk and Virginia Beach, and the counties of Chesterfield, Goochland, and Henrico.

Real Estate Tax; Exemption for Elderly and Handicapped Persons in Certain Counties and Cities—BaCote (HB 698) and J.Miller (SB283). The bill amends §§ 58.1-3211 and 58.1-3211.1 to add Newport News, Hampton, Hanover and Powhatan to the localities that may provide real estate tax exemptions to elderly and handicapped persons whose incomes and resources do not exceed \$67,000 and \$350,000 respectively.

Real Estate Tax; Exemption or

Deferral for Certain Elderly and Handicapped Persons—Sherwood (HB 163). The bill amends § 58.1-3215 to permit localities to grant a real estate tax exemption or deferral to elderly and handicapped persons based upon projected income and financial worth for the current year under certain circumstances. Under current law, the previous year's income and financial worth are used. Any exemption or deferral must be conditioned upon the individual filing another affidavit after the end of the year showing that the actual income and financial worth levels were within the limitations set by ordinance. If the actual income and financial worth levels exceeded the limitations, any exemption or deferral shall be nullified for the current taxable year and the taxable year immediately following.

### **FAILED/TABLED/STRUCK:**

#### Long-Term Care

Nursing Homes; Board of Health to Establish Staffing Levels—Watts (HB 1046). The bill would have required the Board of Health to establish staffing standards in nursing homes to require minimum hours of direct care services to each resident per 24-hour period—by July 1, 2008 a minimum of 3.5 hours of direct care services by CNAs, licensed vocational nurses or registered nurses per 24-hour period; by July 1, 2012, a minimum of 3.9 hours; and by July 1, 2014, or upon adoption by Congress, whichever is sooner, a minimum of 4.1 hours of direct care services. A facility which failed to maintain at least 3.0 hours of direct care

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services per resident by July 1, 2008 or 3.3 hours by July 1, 2014 would not be eligible to accept new residents. Total staffing hours would be determined based on payroll information reported to the IRS for the relevant positions. The bill reported out of Health, Welfare & Institutions committee without discussion or opposition, but was referred to Appropriations where it was left (there was a financial impact statement indicating this would cost nearly \$20 million in general funds for the first year and increase thereafter).

Assisted Living Facilities; Exempting Certain from Requirement to Have License—Spruill (HB 1461). This bill would have exempted from licensing requirements any assisted living facility that had not been found in violation of licensing requirements during the most recent 5-year period. It would also have exempted any medication aide employed by any assisted living facility from registration requirements. The bill was stricken from the docket by the Health, Welfare and Institutions committee by voice vote.

Emergency Plans; Fee for Review—McClellan (HB 338). The bill would have allowed a locality to charge an administrative fee for the review of the emergency plans of nursing homes, assisted living facilities, adult day care center, and child care centers within the locality. Localities that have an emergency management agency are currently authorized to require such a review. The bill was continued to 2009 in the House Militia, Policy and

Public Safety committee.

Uniform Statewide Building Code: Use of Noncombustible Materials in Certain Structures Construction—Blevins (SB 167). The bill would have required the Board of Housing and Community Development to promulgate regulations establishing standards for requiring the use of noncombustible materials in the construction of assisted living facilities, residential dwelling units designed or developed and marketed to senior citizens, nursing homes, and nursing facilities. The bill was passed by in Senate General Laws and Technology with a letter referring the subject matter to the Housing Commission.

Long-Term Care Needs; Joint Commission on Health Care to Study Alternative Solutions—Plum (HJ 69). The bill would have directed the Joint Commission on Health Care to study alternative solutions to long-term care needs, including intentional communities of clustered homes. The bill was left in House Rules.

Health Care Professionals; Licensed; Joint Commission on Health Care to Study Competence—Houck (SJ 128). The bill would have directed the Joint Commission on Health Care to study the feasibility, advisability, and necessity of considering the competence of licensed health care professionals who are not granted deemed status as a condition of license renewal. The bill passed the Senate but was left in House Rules.

Aging; Joint Subcommittee to Study Reducing Cost of Caring for Population in State—R.

Marshall (HJ 165). The bill would have established a joint subcommittee to study reducing the cost of caring for the aging population of the Commonwealth. In conducting the study, the subcommittee was to examine alternatives to nursing home care, including adult day care; evaluate cost containment efforts in other states; and seek the input of other interested parties, including both private and nonprofit entities who work with the aging population, in seeking cost containment strategies. Left in House Rules.

Nursing Home Beds; Health Commissioner May Accept Applications & Issue Certificates of Public Need—Hogan (HB 1532). The bill would have authorized the Commissioner of Health to accept applications and to issue certificates of public need for nursing home beds in Planning District 13, which would result in an increase of 30 percent in the number of licensed nursing home beds for each nursing home that has reported to Virginia Health Information an average annual occupancy rate of 99% or higher for fiscal year 2006 and fiscal year 2007, provided that the application is filed on or before December 1, 2008, and approved additional nursing home beds are not put into service prior to July 1, 2009. The bill was continued to 2009 in Senate Finance. However, budget language (Item 294 #1c) essentially did this, allowing the Commissioner of Health to issue additional Certificates of Public Need approving an increase of 30 licensed nursing home beds in

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## 2008 General Assembly Elder Law Legislation Summary

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Planning District 12 for nursing homes that has had an annual occupancy rate of 99% or higher for fiscal years 2006 and 2007, if the application is filed before December 1, 2008 and the additional nursing home beds are not put into service before July 1, 2009.

Certificates of Public Need; Certain Request for Applications—Houck (SB 672). The bill would have required the Commissioner of Health to issue a Request for Applications for 90 new nursing facility beds in Planning District 9 no later than October 1, 2008. The bill was continued to 2009 in Senate Finance.

### Public Benefits

Medical Assistance Services; Increases Amount Disregarded from Countable Resources.—Griffith (HB 413). The bill would have increased the amount disregarded from countable resources to an amount not in excess of \$5,000 for an individual and for a spouse when such resources have been set aside to meet burial expenses. The bill was left in House Appropriations.

Medical Assistance Services; Coverage of Treatment for Breast and Cervical Cancer—Vanderhye (HB 1227). The bill would have eliminated the requirement that women be screened in under the Centers for Disease Control and Prevention Breast and Cervical Cancer Early Detection Program to qualify for coverage. The bill was left in House Appropriations.

Medical Services; State's Lien

for Payment—Edwards (SB 17). The bill would have provided that, in the event the Commonwealth's lien against any recovery from a third party obtained by an injured person whose medical costs were paid in whole or in part by the Commonwealth is compromised under § 2.2-514, this lien shall be reduced by an amount proportionate to the costs, expenses, and attorney fees incurred by the injured person. The bill was continued to 2009 in Senate Finance.

### Guardian/ Advance Medical Directives/Power of Attorney/ APS

Guardian Ad Litem; Dissemination of Criminal Records—Saxman (HB 325). The bill would have allowed the dissemination of criminal records to guardians ad litem appointed to represent and protect the interests of children or incapacitated adults in any court. The bill was left in House Courts of Justice.

Advance Directives; Mental Health Directives Follow Same Procedures as for Medical—Bell (HB 1004) and Whipple (SB 47). These bills would have allowed for mental health advance directives by following the same procedures as for medical advance directives. A mental health advance directive could set forth procedures or instructions with regard to mental health treatment, including consent to or refusal of mental health treatment. A suggested form of written advance directive, including mental health treatment was offered. Del. Bell's bill was continued to 2009 in Health, Welfare & Institutions; Sen.

Whipple's bill was left in Senate Education and Health.

Uniform Power of Attorney Act (UPOAA) Established—Iaquinto (HB 950). The bill would have established in the Code of Virginia the Uniform Act that was adopted by the National Conference of Commissioners on Uniform State Laws in 2006. The act consists of default rules that can be modified if the principal desires. Powers of attorney will be durable unless drafted to expire upon a specified date or event. The UPOAA addresses creation and use, good faith reliance, limitations of agent's powers, refusal to recognize, judicial review, notification of resignation, and other matters. The act contains an optional statutory form. The bill was left in Commerce and Labor.

Adult Protective Services; Reports by Financial Institution Employees of Financial Abuse of Elders—Edwards (SB 738). The bill would have required employees of banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations, and credit unions to report the suspected financial abuse of elder or dependent adults, based on information obtained in their professional or official capacity. The bill was carried over to 2009 in Senate Commerce and Labor.

### Trusts and Estates

Small Estate Act; Updates Certain Banking and Fiduciary Statutes to Make them Consistent with Act—Watts (HB 279). The bill would have

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## 2008 General Assembly Elder Law Legislation Summary

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updated certain banking and fiduciary statutes to make them consistent with the changes made to the code under the Small Estate Act (promulgated in 2006), namely raising the qualifying amount from \$15,000 to \$50,000. The bill was continued to 2009 in House Courts of Justice.

Decedent's Will; Unsupervised Probate—Watts (HB 280). The bill would have allowed a will to be probated without supervision or intervention of the court if the will requests such probate or all beneficiaries of the will agree to such probate. The bill was continued to 2009 in House Courts of Justice.

Funerals and Burials; Designation of Persons Authorized to Make Decisions—Armstrong (HB 1484). The bill would have designated the persons, in order of priority, who have the ability to make all necessary arrangements for a decedent's funeral and the disposition of his remains. The bill was in response to recent Virginia cases about who has the right to make such decisions. Current law allows any next of kin to make arrangements, without specifying an order of priority. The bill grants funeral service providers civil immunity for decisions made if there is a dispute among members of the same class, in the absence of bad faith. The bill was continued to 2009 in Health, Welfare and Institutions.

### Income and Real Property Taxes

#### Constitutional Amendment;

Exempts Certain Homeowners from Taxation (Second Reference)—Albo (HJ 4). The Constitutional amendment would amend §6 of Article X of the Virginia Constitution to authorize the General Assembly to enact legislation that allows localities by ordinance to exempt from real property taxes, or defer real property taxes on, up to 20% of the value of residential or farm property that is owner-occupant's primary dwelling and lived in continuously. The bill was continued to 2009 in Senate Privileges and Elections.

Real Property Tax; Exemptions and Deferrals Persons Having Legal Right to Be Present in U.S.—Marshall (HB 183) and Barker (SB 425). Marshall's bill would have amended § 58.1-3211 to require that elderly and disabled persons seeking real estate tax exemptions or deferrals would have to demonstrate legal presence in the United States in order to be eligible for tax relief. Barker's bill would have amended § 58.1-3210 to authorize counties, cities and towns to require elderly and disabled persons to provide proof of legal presence in order to obtain real estate tax exemption or deferrals. HB 183 was left in House Rules; SB 425 was passed by indefinitely in Senate Courts of Justice.

Real Estate Tax; Exemptions for Certain Elderly and Disabled Persons with Income Limits—Watts (HB 465). The bill would have amended § 58.1-3211 to provide a local option formula for determining net combined financial worth that allows individuals who depend on investment income rather than pension income to qualify for real estate tax

relief. The bill was continued to 2009 in House Finance.

Real Estate Tax; Localities to Grant Higher Percentages of Tax Relief to Elderly—Spruill (HB 1275). The bill would have amended § 58.1-3210 to allow localities to grant higher percentages of tax relief to the elderly based on increasing age, especially for those who are 75 years of age and older. The bill was continued to 2009 in House Finance.

Income Tax, State; In-Home Health Care Tax Credit—Watts (HB 1050). The bill would have provided an income tax credit for every individual taxpayer who pays medical and in-home care expenses for family members living with the taxpayer for taxable years beginning on or after January 1, 2008. The amount of the credit would have been equal to the amount paid and not reimbursed for such expenses. The credit would be reduced \$1 for every \$2 that the taxpayer's federal adjusted gross income exceeds \$50,000 for single taxpayers and \$75,000 for married taxpayers. The bill was left in Finance.

Income Tax, State; Deduction for Licensed Medical Caregivers—Watts (HB 1049). The bill would have granted an income tax deduction for taxable years beginning on or after January 1, 2008, in the amount of \$10,000 for licensed medical caregivers who provide medical-related services to individuals in their homes. The deduction would have been reduced \$1 for every \$2 the taxpayer's federal adjusted gross income exceeds \$40,000. The bill was continued to 2009 in House Finance.

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## 2008 General Assembly Elder Law Legislation Summary

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Income Tax: Tax Credit for Long-Term Care Insurance Premiums Paid by Small Business Employers—Moran (HB 1191). The bill would have provided a tax credit for taxable years beginning on or

after January 1, 2008, to employers who pay the annual long-term care insurance premium for each employee. The credit would be 20% of the amount paid per employee. The credits would be available to

employers with 50 or fewer full-time employees and are refundable. The bill was left in House Finance.

## 2008 General Assembly Foster Care Legislation Summary

By Christie Marra, Virginia Poverty Law Center

**VPLC lobbied for the following bills in the foster care and family law areas, all of which passed.**

Del. Fralin (HB 1141). This bill gives youth who leave foster care and discontinue Independent Living Services between the ages of 18 and 21 a limited right to return and have their Independent Living Services restored. In order to have Independent Living services restored, the youth must enter into a written agreement with the local social services or child placing agency within 60 days of when he/she initially discontinued services.

Del. Fralin (HB 1143). This bill gives siblings of youth in

foster care the right to petition for visitation. It also requires the court to address sibling visitation in the order that places a youth in foster care.

Del. Fralin/Sen. Howell (HB 149/SB 249). This bill does two things. First, it lowers from 16 to 14 the age at which youth in foster care become eligible for Independent Living Services (defined in the bill to include counseling, education, housing, employment, money management skills development and access to essential documents). Second, it requires that a foster care plan describe in writing, for children age 14 and older, the child's needs and goals in five areas (defined in the bill to be counseling, education,

housing, employment and money management). It also requires that the foster care plan describe the specific Independent Living Services that will be provided to the child to help him or her reach individual goals.

Senator Quayle (SB 328).

This bill eliminates the requirement of an order of publication for indigent **divorce** plaintiffs. If a plaintiff is found indigent by the court and the defendant's whereabouts are not ascertainable, notice of the suit must be posted on the courthouse door and mailed to the defendant's last known address.

## 2008 General Assembly Domestic Violence Legislation Summary

By Susheela Varky, Virginia Poverty Law Center

### PROTECTIVE ORDERS/ FIREARMS

Protective orders: expiration: Virginia Criminal Information Network—Del. Peace/AG's Office (HB 753)/Sen. Obenshain/AG's Office (SB 540). Requires clerks of JDR & CC to enter and transfer essential protective order data to Virginia Criminal Information Network by the end of the court business day. Status: These identical

versions of a bill await the governor's signature. \*\*Hey, Everyone. Passage of this bill accomplishes the goal we established in the Creative Advocacy session of last fall's Statewide Legal Aid Conference! \*\*

Prohibits a person subject to a protective order from possessing a firearm—Del. Toscano (HB 281). Currently VA law only prohibits Respondents from purchasing or transporting a firearm while federal law, in addition to prohibiting

Respondents from purchasing or transporting firearms AND ammunition, prohibits possessing either of these. Status: Failed to report out of House Subcommittee on Militia, Police and Public Safety.

Encourages court to enter complete and accurate information as required by the Virginia State Police—Del. Cosgrove (HB 493). Status: Failed to report out of House

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## 2008 General Assembly Domestic Violence Legislation Summary

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Subcommittee on Militia, Police and Public Safety.

(INCORPORATED INTO HB 745/FAILED) HB 592 (Del. Marsden)

(INCORPORATED INTO HB 281/FAILED) HB 608 (Del. Eisenberg)

Closing the gun show loophole—Del. Caputo (HB 745). This bill would have required gun show promoters, who are currently unlicensed, to contract with vendors to conduct criminal records checks before transferring (exchanging, selling or trading) 25 or more firearms. Status: Failed to report out of House Committee on Militia, Police and Public Safety (Passed By Indefinitely).

Protective orders to include information on whether Respondent possesses firearms—Del. Ward (HB 814). Status: Failed to report out of House Subcommittee on Militia, Police and Public Safety.

Provides that courts may, whenever a preliminary protective order is issued, place the subject of the protective order on active probation making the violation of the protective order a probation violation—Del. Shannon (HB 970). Status: Failed to report out of House Committee on Courts of Justice.

(INCORPORATED INTO HB 753/PASSED) HB 974 (Del. Shannon)

Adds 5-day mandatory minimum for a 2<sup>nd</sup> (Class 1 misdemeanor) offense of assault & battery of a family or household member within

10 years—Rep. Lingamfelter (HB 1180). Status: Failed to report out of House Committee on Courts of Justice.

Created an exception for law enforcement officers who are respondents in protective orders to be able to transport their firearms while on duty at the discretion of their sheriffs or chief law enforcement officers—Rep. Sherwood (HB 1285). Status: Failed to report out of House Subcommittee on Militia, Police and Public Safety.

Pilot program to allow magistrates in Accomack County to issue preliminary protective orders (for 15 days) instead of emergency protective orders (3 days)—Rep. Marsden (HB 1518). Del. Marsden is trying to streamline the process for victims. In some areas, this might be helpful. In other areas, not so much. Status: Carried over to House Committee on Courts of Justice until 2009 under Rule 19.

Sen. Cuccinelli (SB 100). Originally, this bill was bad because it required the Court, BEFORE issuing an emergency protective order, preliminary protective order or protective order, to “independently determine” that prohibiting contact between Respondent and child is “necessary for the health and safety of the child and there are no less drastic alternatives that could reasonably and adequately protect the child.” This bill was later amended POSITIVELY in the following manner for the preliminary protective order and protective order settings ONLY: “If a court determines that contacts between the

child and the respondent should not be prohibited, the court shall include in the protective order a provision establishing how the respondent will maintain such contacts with the child without violating the terms and conditions of the protective order.” Status: Amended bill failed to report out of Senate Committee on Courts of Justice (PBled—Passed By Indefinitely).

Attempt to close gunshow loophole—Sen. Marsh (SB 109). Same as HB745/HB592; Status: Failed by re-referring to Crime Commission for further study.

Adds box cutters to the list of weapons that are prohibited from being carried as a concealed weapon; allows the court to exclude certain weapons from being prohibited if such item was carried for a legitimate occupational, recreational, or personal reason—Sen. Martin (SB 379). Status: Failed to report out of Senate Committee on Courts of Justice (PBled—Passed By Indefinitely).

Requires persons in protective order to obtain notice that the order was served by the agency that served it—Sen. Ticer (SB 638). Status: Continued to 2009 in Senate Courts of Justice.

### STALKING:

Mandatory minimum for stalking a minor—Del. Peace (HB 13). If, at the time of the offense, the victim is a minor and the offender is 10 or more years older than the victim, the mandatory

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## 2008 General Assembly Domestic Violence Legislation Summary

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minimum confinement is 30 days; 2<sup>nd</sup> such conviction within 5 years: 60 days; 3<sup>rd</sup> such conviction w/in 5 years: 12 months. Status: Continued to 2009 in House Appropriations because of fiscal impact (a.k.a., it's a tight budget year; so they say they like it, but it's dead for this year).

(INCORPORATED INTO HB 1328/FAILED) HB335 (Del. McClellan)

Extend permanent protective order in stalking context (§19.2-152.9) up to 6 months (PASSED)—Del. Janis (HB 713). If Respondent fails to appear at hearing because he wasn't served (mirrors similar language that was passed for §16.1-253.1 last year). Status: Awaits Governor's signature.

Includes stalking victims in definition of victim for purposes of applying to the Victim's Compensation Fund (PASSED)—Del. Shannon (HB 965). Status: Passed by House and Senate; awaits signatures of Speaker of the House, President of the Senate and then, Governor.

Enhanced penalties for stalking—Del. Peace (HB 1328). This bill would: 1—make a 2<sup>nd</sup> or subsequent offense within 5 years a Class 6 felony and 2—make it a Class 6 felony if the stalking occurred while “there is in effect any court order prohibiting contact between the defendant and the victim or the victim's family or household member.” Status: Left in House Appropriations because of fiscal impact.

### IMMIGRATION:

Originally required anyone who wished to change their name in Virginia to prove he/she was a “citizen of the United States.”—Del. Lewis (HB 151). Status: One opponent argued that there was no rational basis for this bill, and that it was therefore, unconstitutional. Undeterred, the bill passed the House. The Senate amended the bill to strike language regarding proof that the applicant is a “citizen of the United States” and instead required the applicant to prove “domicile and place of residence.” The House rejected these amendments, but agreed to a conference committee of Dels. Lewis, Griffith, Miller (J.H.) and Senators Petersen, Barker and Locke to work out a compromise. As of 3/13/08, the House still rejected the Senate amendments; so with differing versions passing the House and Senate, the bill fails to become law.

Enforcement of immigration laws; agreement with United States Immigrations and Customs Enforcement—Vogel (SB 433). Requires Governor to enter into a memorandum of agreement with Immigration and Customs Enforcement that would allow designated state and local law-enforcement officers to perform certain federal immigration law functions in the Commonwealth. Status: Failed to report out of Senate Committee on Courts of Justice (PBled).

Crime victims; immigration status—Sen. Howell (SB 441). Prevents local or state law enforcement from inquiring into the immigration status of any person who is the victim of a crime, the parent/guardian of a minor victim or

a cooperating witness in the investigation of a criminal violation UNLESS victim/witness was arrested or charged with a criminal violation of state or local law or when such inquiry is required by federal law or is essential to the investigation or prosecution of the crime to which the person is a witness/victim. Status: Senate passed it. House defeated it on the floor.

(INCORPORATED INTO SB 441) SB 639 (Sen. Ticer)

### MISCELLANEOUS

No complaining witness of a sex offense shall be requested to submit to a polygraph exam as a condition of proceeding with the investigation (PASSED)—Del. Watts (HB 1043).

Increases penalties for subsequent offenses of assault and battery against a family member—Del. Lingamfelter (HB 1180). 2<sup>nd</sup> offense of assault & battery against a family or household member within 20 years requires 5-day minimum mandatory confinement and is a Class 1 misdemeanor and 3<sup>rd</sup> offense within 20 years is a Class 6 felony. Status: Failed to report out of House Committee for Courts of Justice.

(INCORPORATED INTO HB 1043/PASSED) HB 1488 (Del. Sherwood)

Requires retaining records for misdemeanor convictions of 18.2-57.2 or violating a PO for 20 years; 3<sup>rd</sup> conviction w/in 20 years is a felony (i.e., if you don't force the clerks to keep the records, the C.A.'s office

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## 2008 General Assembly Domestic Violence Legislation Summary

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HAS to reduce these felony charges to misdemeanors. (PASSED)—Sen. Blevins (SB 173).

Expands the address confidentiality or victims of domestic violence program (PASSED)—Sen. Ticer (SB 764). Currently, the program is in Arlington County.

Expansion will be to the counties of Albemarle, Augusta, Dickenson, Fairfax, Henry, Lee, Rockbridge, Russell, Scott, Washington and Wise as well as the cities of Buena Vista, Charlottesville, Lexington, Martinsville, Norfolk and Roanoke. Also provides that an applicant may apply in person at DV programs

(defined as “public or not-for-profit agencies the primary mission of which is to provide services to victims of sexual or domestic violence”). Applicant used to have to apply through the Office of the Attorney General.

## 2008 General Assembly Protective Orders Legislation Summary

By Susheela Varky, Virginia Poverty Law Center

### Virginia Criminal Information Network (VCIN) Protective Order Entry Procedures

BACKGROUND: After a protective order is issued, clerks are supposed to transfer essential data from it electronically to VCIN so that local law enforcement can: 1—recognize that a protective order has been entered which needs to be verified and served, 2—verify the accuracy of the data against a hard copy of the order and 3—serve and enforce the order. Until recent legislative changes, the statutory language regarding clerks' entry procedures had been discretionary. So protective order entry into VCIN was not a priority in many jurisdictions, and subsequently, clerks were not entering protective

order data into VCIN on a timely basis, if at all.

### **Effective July 1, 2008, the following sections of the Code of Virginia have been changed:**

- § 16.1-253 (Preliminary Protective Order to protect a child's life, health, safety or normal development),
- § 16.1-253.1 (Preliminary Protective Order—Family Abuse),
- § 16.1-253.4 (Emergency Protective Order—Family Abuse),
- § 16.1-279.1 (Protective Order—Family Abuse),
- § 19.2-152.8 (Emergency Protective Order—Stalking/Acts of Violence),
- § 19.2-152.9 (Preliminary

Protective Order—Stalking/Acts of Violence),

- § 19.2-152.10 (Protective Order—Stalking/Acts of Violence) and
- § 19.2-390 (Reports to be made by local law enforcement officers...)

The changes are as follows:

1. Clerks “shall forthwith, but in all cases no later than the end of the business day on which the order was issued, enter and transfer identifying information provided to the court electronically to the Virginia Criminal Information Network.” Formerly discretionary language is made mandatory. Additionally, entry

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## 2008 General Assembly Protective Orders Legislation Summary

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- must be done, at the latest, by the end of the day the order was issued.
2. A copy of the order and an addendum "shall be forwarded forthwith" to the primary law enforcement agency responsible for service and entry of such orders. Clerks are required to forward "forthwith" a hard copy of the protective order as well as entering VCIN data electronically. This facilitates verification of VCIN data, service and enforcement.
  3. "Upon receipt of the order and addendum," the local law enforcement agency responsible for VCIN shall verify and modify the VCIN entry and serve it on the Respondent. This addendum is key: until now, if there was a mistake on the protective order (i.e., typing Joe Smith as Respondent's name instead of John Smith) or the clerk's data entry into VCIN, and the local law enforcement agency responsible for VCIN entry identified this mistake, there was often no way of correcting the court's information and communicating that correction without having the court schedule another hearing. With the addendum traveling with the protective order, the local law enforcement agency responsible for VCIN entry must correct information on the *addendum*, enter corrected information into VCIN and send the corrected addendum back to the court.
  4. Upon service, the agency serving the order "shall enter the date and time of service [...]" and make due return to the court." Now the court, too, has up-to-date information about date and time of service of the respondent.
  5. Circuit courts that issue protective orders "shall forthwith forward an attested copy of the order and an addendum containing identifying information" to the primary law enforcement agency responsible for service and entry of such orders. Circuit Courts do not have the same access to the VCIN computer system as juvenile and domestic relations and general district court clerks. This change requires them to fax or otherwise deliver a hard copy of the protective order to the local law enforcement agency responsible for service and entry of such orders.
  6. Time expirations: EPOs now expire "at the end of the third day following issuance," not 72 hours after issuance. "End" of the day means 11:59 PM. VCIN feeds the National Criminal Information Center (NCIC). That is how an out-of-state law enforcement officer may verify the validity of a VA protective order. NCIC expiration times are 11:59 PM; so this legislative change removes discrepancies between the VA and national systems. Now, the order expires at the same time in VCIN and NCIC.
  7. If the EPO expires on a day the court is not in session, the EPO is extended until the end of the next business day" the court is in session.
  8. The new changes also require clerks of the circuit court to make "an electronic" report to the Central Criminal Records Exchange of any dismissal, indefinite postponement or continuance, charge still pending due to mental incompetency or incapacity, nolle prosequi, acquittal, or conviction of, including any sentence imposed, or failure of a grand jury to return a true bill as to, any person charged with an offense of treason, any offense punishable as a misdemeanor under Title 54.1 or any misdemeanor punishable by confinement in jail (i) under Title 18.2 or

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## 2008 General Assembly Protective Orders Legislation Summary

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19.2, except an arrest for a violation of § 18.2-119, Article 2 (§ 18.2-415 et seq.) of Chapter 9 of Title 18.2, or any similar ordinance of any county, city or town, or (ii) under § 20-61. The point of this change is that:

- a. An electronic report must contain:
  - i. The name of the person convicted and all aliases,
  - ii. The date and locality of the conviction,
  - iii. His date of birth,
  - iv. Social security number,
  - v. Last known address and
  - vi. Specific reference to the offense including the Virginia Code section and any subsection, the Virginia crime code for the offense and the offense tracking number for which he was convicted.
- b. This provision is not effective until July 1, 2009, for circuit courts that do not have computer access to the Supreme Court of Virginia computer system (Case Management System). Those circuit courts shall fax or otherwise deliver such reports to the Central Criminal Records Exchange until July 1, 2009.

### Retention of Domestic Violence Records: 20 years instead of 10 years

**Effective July 1, 2008, §§ 16.1-69.55 and 17.1-213 of the Code of Virginia have been changed as follows:**

1. In misdemeanor cases under § 16.1-253.2, which are violations of protective orders under:
  - § [16.1-253](#) (Preliminary Protective Order to protect a child's life, health, safety or normal development),
  - § [16.1-253.1](#) (Preliminary Protective Order—Family Abuse),
  - § [16.1-253.4](#) (Emergency Protective Order—Family Abuse),
  - § [16.1-278.14](#) (Violation of any law, regulation or ordinance for the education, protection or care of children or involving offenses committed by one family or household member against another)
  - § [16.1-279.1](#) (Protective Order—Family Abuse) or
  - subsection B of § [20-103](#) orders (Pendente lite protective orders through divorce matters)

and § 18.2-57.2 (Assault and Battery of a Family or Household Member), all documents shall be retained for 20 years. The point of this extension in the abovementioned matters from 10 to 20 years is to support other parts of the Code of Virginia that increase the penalties for subsequent

convictions of certain types of offenses from misdemeanors to felonies. If records are only retained for 10 years, yet the Code allows for higher penalties for convictions within 20 years, prosecutors routinely have to drop what could be felony charges to misdemeanor charges.

- a. Under § 16.1-253.2, upon conviction 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, punishment 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.
- b. Under § 18.2-57.2, upon a conviction for assault and battery against a family or household member, where it is alleged in the warrant, information, or indictment on which a person is convicted,

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## 2008 General Assembly Protective Orders Legislation Summary

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that such person has been previously convicted of two offenses against a family or household member of (i) assault and battery against a family or household member in violation of this section, (ii) malicious wounding in violation of § [18.2-51](#), (iii) aggravated malicious wounding in

violation of § [18.2-51.2](#), (iv) malicious bodily injury by means of a substance in violation of § [18.2-52](#), or (v) an offense under the law of any other jurisdiction which has the same elements of any of the above offenses, in any combination, **all of which occurred within a period of 20 years**, and each of which

occurred on a different date, such person is guilty of a Class 6 felony.

## 2008 General Assembly Health Law Legislation Summary

By Jill Hanken, Virginia Poverty Law Center

### **BUDGET ACTIONS**

(GF indicates general/state funding, NGF refers to non-general funds. Figures are for both years of the biennium.)

Despite a projected deficit of \$2 billion for FY 08, 09 and 10, the legislature funded several important health initiatives, including the following:

#### **Medicaid Mental Retardation Waiver Slots** -

The budget funds 600 additional slots for the Mental Retardation Waiver Program (to be phased in through FY 2009) and a 3.6% rate

increase for MR Waiver providers. \$34.4 million GF, \$34.4 million NGF.

**Mental Health** - \$41.6 million (total state/federal) for outpatient services, emergency psychiatric services, case managers, children's mental health services, jail diversion and legislative reforms.

**FAMIS Moms** - Eligibility will increase from 185% FPL to 200% FPL on July 1, 2009. This expansion will serve 400 additional pregnant women each year. \$1.6 million GF, \$3 million NGF

**FAMIS Newborns** - By

using state funding, newborns of FAMIS enrollees will have coverage for the month of their birth plus 2 months, even if FAMIS eligibility for the baby is not established. \$90,000 GF

**Support for Safety Net Programs** - Community Health Centers will receive \$2.7 million GF additional support; Free Clinics will receive \$2.6 million.

**Screenings for Breast and Cervical Cancer** - Program funding is increased by \$300,000 GF in FY 2010 to provide screenings and

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## 2008 General Assembly Health Law Legislation Summary

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tests to over 1,000 uninsured women ages 18 through 44.

**Virginia Dental Association's Missions of Mercy (MOMS) Projects** - \$50,000 GF is provided for dental equipment and supplies for the MOMS projects that offer free dental care to the uninsured.

On the negative side:

**Medicaid Reimbursement** - The budget eliminated the expected inflation increase for hospitals and nursing homes, "saving" \$41.2 million GF.

**Medicaid Eligibility Change for Aged, Blind and Disabled** - Budget language eliminates the resource exemption for new life estates created after the effective date of implementing regulations. (probably July 1, 2008). Any life estate existing before that time will continue to be an exempt resource. This change was requested by the Governor and DMAS to respond to instances where the life estate exemption was used in creative/abusive ways to shelter large amounts of assets. Life estates created after the effective date will be evaluated like other property and may be exempted if, for example, the life estate is the "home", the exempt "former home" of a nursing home patient, or it is "unsaleable after a reasonable effort to sell has been made."

### **LEGISLATION**

(Online access to legislative information - <http://leg1.state.va.us/>)

#### **Medicaid**

**Continuing care retirement communities: medical assistance**—Albo (HB 819). Beginning July 1, 2010, the bill permits certain continuing care retirement communities (CCRC) in Planning District 8, to use up to 10% of their nursing home beds for Medicaid recipients after the end of an open admissions period. The patients must have resided in the CCRC for at least three years and exhausted any refundable entrance fees.

#### **Indigent Care**

**Certificate of public need; fostering competition**—Hamilton (HB 502). When determining whether a public need exists for proposed health services or facilities, the Health Commissioner shall consider the extent to which the project will increase citizen accessibility and introduce competition into a health planning region and has documented community support.

**Health care costs; estimates and average costs**—O'Bannon (HB 603) and Edwards (SB 396). Requires the Health Commissioner to contract with a nonprofit organization for an annual survey of private group health insurance companies, to determine the reimbursement that is paid for a minimum of 25 most frequently reported health care services. The survey reports will be public. Also requires carriers to report the average reimbursement paid for a specific service from all providers and

provider types.

**Sale or conversion of nonprofit hospitals: public hearing**—Marshall (HB 1037). Requires certain nonprofit health providers, no later than 40 days prior to any disposition of assets, to convene a public meeting to set forth its expectations about how the health care needs of the community will be served following the proposed disposition of assets and to receive comments and respond to questions on the potential impact of the proposed disposition of assets on the community served by the nonprofit entity.

**Charitable medical events; lack of notice**—Bowling (HB 1222). Amends the criteria allowing a medical provider who is licensed out-of-state to provide volunteer, free health care to underserved patients in Virginia.

**Department of Health; payment for medical care services**—Plum (HB 1265) and Saslaw/Norment (SB 579). Allows the Department of Health to charge an amount equal to the allowable charge of a private insurer for the services provided by the Department to an insured individual. If an insurance company denies a claim for medical care services provided by the Department, the patient portion of the bill shall not be greater than if the person did not have private health insurance.

#### **Health Insurance**

**Health maintenance organizations; deductibles**—Hamilton (HB 397). Allows

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## 2008 General Assembly Health Law Legislation Summary

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HMOs to request approval of new insurance products with higher deductibles than currently permitted for high deductible health plans used with health or medical savings accounts.

Health insurance; exclusive provider policies or contracts—Hamilton (HB 504). Permits insurers to offer individuals or groups "exclusive provider policies" (EPPs) under certain conditions. EPPs condition the payment of benefits on the use of preferred providers.

Local choice health insurance program; centers for independent living—Wampler (SB 288). Allows state-funded Centers for Independent Living to participate in the state employee's "local choice" health insurance program.

### **Elderly**

Advance Health Care Directive Registry; creation—Englin (HB 805) and Barker (SB 290). Requires the Department of Health to make available a secure online central registry for advance health care directives. The registry shall be accessible to certain licensed health care providers.

Virginia Caregivers Grant Program application; allow physician assistant or nurse practitioner to certify—Ebbin (HB 861). Allows licensed physician assistants or nurse practitioners to provide the certification necessary for the Virginia Caregiver's Grant Program application.

Medical malpractice; professional services—

Hamilton (HB 501) and Norment (SB 602). Defines the term "professional services in nursing homes" for use in medical malpractice actions.

Study; support services for family caregivers of the frail elderly and disabled and community-based caregiver support organizations; report—Stosch (SJ 102). Directs the Joint Commission on Health Care to study support services for family caregivers of the frail elderly/disabled and community-based caregiver support organizations.

### **Child Health & Safety**

Child restraints; penalties—Lewis (HB 131). Provides higher fines for violation of laws regarding child restraints in automobiles.

Reporting of infectious diseases; residential facilities—Englin (HB 806) and Whipple (SB 463). Requires medical care facilities, schools and summer camps to report cases of certain infectious diseases.

Study; autism services; report—Valentine (HJ 105). Directs JLARC to study the scope and availability of autism services in the Commonwealth.

Study; continuing the study of the mental health needs and treatment of minority young adults in the Commonwealth; report—Marsh (SJ 46). Directs the JCHC to study the mental health needs and treatment of minority young adults.

### **Mental Health**

Parental admission of minors for inpatient treatment;

minors incapable of making an informed decision—Hamilton (HB 400) and Howell (SB 67). Parental admission of minors for inpatient treatment - Provides that minors 14 years of age or older who are incapable of making an informed decision may be admitted to inpatient treatment upon the application of a parent. The bill also defines the term "incapable of making an informed decision."

Involuntary commitment; outpatient treatment; etc.—Hamilton (HB 499) and Howell (SB246). These Omnibus Bills contain numerous reforms in the mental health system, including procedures for outpatient psychiatric treatment, CSB training and oversight, emergency custody, involuntary commitment, and disclosure of records. Provisions require an independent evaluator to complete a mental status exam and history, substance abuse screening, risk assessment, assessment of capacity to give informed consent and a review of TDO records (§37.2-815). It also clarifies information magistrates are to consider in making decisions (§37.2-808 and §37.2-809) as well as what special justices must consider in making decisions (§37.2-817).

Additional provisions require the preadmission screener and the independent evaluator to be present at the hearing (§37.2-817.B, 37.2-815). Less restrictive alternatives to outpatient treatment are not appropriate unless they are available and providers agree to deliver (§37.2-817.D).

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## 2008 General Assembly Health Law Legislation Summary

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Finally, the bill covers disclosures of mental health information between parties (various code sections), an extension of the ECO period by 2 hours for good cause (§37.2-808), procedures for transfer of cases between courts when jurisdiction changes (§37.2-817) and a myriad of changes to Mandatory Outpatient Treatment.

ECO, TDO, involuntary commitment; criteria—Bell (HB 559). Changes the criteria for emergency custody orders, temporary detention orders, involuntary commitment, and outpatient treatment, including how that criteria is applied to prisoners and juveniles. A person may be taken into custody, temporarily detained, involuntarily committed, or ordered to outpatient treatment if the person has a mental illness and there exists a substantial likelihood that, as a result of mental illness, the person will, in the near future (i) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or (ii) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs.

Commitment hearing; independent examiner or community services board member attending—Bell (HB 560). Requires the independent examiner and community services board employee or designee who prepared the prescreening report to attend the commitment hearing in person or by two-way

communication system. The bill also provides that the initial period of involuntary commitment shall be 30 days and allows for a subsequent order authorizing an additional period of 180 days. The bill also sets forth conditions for ordering a person to mandatory outpatient treatment.

Medical records; disclosure; safe harbor—Watts (HB 576). Disclosure of health records—Provides that, upon request, any provider rendering services to persons subject to emergency custody orders, temporary detention orders, or involuntary commitment proceedings shall disclose to certain entities and individuals all information necessary and appropriate for the entities or individuals to perform their duties in relation to such orders or proceedings. The health care provider shall be immune for any harm resulting from the disclosure of health records unless he intended the harm or acted in bad faith.

Psychiatric inpatient treatment of minors; timing of petition and hearing—Marsden (HB 582) and Cuccinelli (SB 276). Involuntary commitment of minors—Increases from 72 hours to 96 hours the length of time to hold a hearing for the involuntary commitment of a minor or the emergency admission of a minor for inpatient treatment.

Commitment of minors; appointment of counsel and guardians ad litem—Howell (SB 247). Requires courts to appoint a guardian ad litem and counsel for a minor for involuntary commitment hearings and proceedings for the judicial approval of

inpatient treatment of a minor 14 years of age or older over his objections.

### Virginia Birth-Related Neurological Injury Compensation Program

Virginia Birth-Related Neurological Injury Compensation Program—Edwards (SB 211) and Morgan (HB 1305). Revises procedures, services covered, and composition of the governing board.

### Comprehensive Services Act

Office of Comprehensive Services and the Comprehensive Services Act; best practices—Hanger (SB 479). Requires annual workshops on best practices and evidence based practices

Comprehensive Services Act; data collection performance standards—Hanger (SB 483). Requires the Executive Council to oversee the development of performance measures for CSA providers.

Comprehensive Services Act; intensive care coordination and service planning—Hanger (SB 487) and Hamilton (HB 503). Requires the Executive Council to oversee the development and implementation of mandatory uniform guidelines for intensive care coordination services for children who are at risk of entering, or are placed in, residential care through the Comprehensive Services Act program. The bill also requires family assessment and planning teams, whenever appropriate, to serve children in their homes, relatives' homes, family-like settings, and communities.

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## 2008 General Assembly Health Law Legislation Summary

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Study; continuing the Joint Subcommittee to Study the Comprehensive Services Program for At-Risk Youth and Families; report—Hanger (SJ 75). Continues Joint Subcommittee studying the CSA program.

### Other

Malpractice actions; limitation—Amundson (HB 616). Extends the two-year limitations period for personal injury actions in malpractice cases arising out of the negligent failure to diagnose a malignant tumor or cancer or to communicate such diagnosis to the patient for a period of one year from the date the existence of a malignant tumor or cancer is communicated to the patient.

Informed consent for testing for human immunodeficiency virus—Sickles (HB 1100). Removes the requirement for separate oral or written informed consent for testing for HIV and adds the requirement that a medical provider inform a patient that the test is planned, provide information about the test, and advise the patient that he has the right to decline the test. In addition, as a routine component of prenatal care, every pregnant woman shall be given information about HIV and HIV testing and informed that HIV screening is recommended. The test shall be provided unless she opts out.

Administrative Process Act (APA); public participation guidelines—Saxman (HB 1167) and Smith (SB 734). Requires the development of model public participation guidelines for all agencies

that promulgate regulations through the APA.

Practice of dental assistants—Bowling (HB 1431) and Lucas (SB 151). Establishes credentialing requirements for dental assistants and directs the Board of Dentistry to regulate the practice of dental assistants.

### Carried over to 2009

Hospital emergency departments; ability to access electronic health records—O'Bannon (HB 247). Hospital capability to use electronic health records.

Hospital-Emergency Treatment Reimbursement Fund—Purkey (HB 364). Requires wage withholding from uninsured employees to fund uncompensated emergency room services.

State medical assistance plan; DMAS to contract with DMHMRSAS for mental health services—Hamilton (HB 510). Requires DMAS to contract with the DMHMRSAS to provide mental health services to eligible individuals in underserved areas.

Health reimbursement arrangements—Hogan (HB 648). Prohibits health insurers from canceling or refusing to issue an individual health insurance policy on grounds that the policy owner's employer funds the premium for the policy.

Coordination of health insurance benefits—Nutter (HB 1419). Coordination of health insurance benefits.

Public schools; abortion services prohibited—Pogge (HB 1538). Prohibits school divisions from using any provider of abortion services

for any educational programs related to human sexuality or STDs.

Crisis intervention pilot programs for persons with mental illness—Edwards (SB 16). Creates crisis intervention team pilot programs to assist police officers responding to crisis situations involving persons with mental illness, substance abuse problems, or both.

Commonwealth's lien for payment of medical services; reduction—Edwards (SB 17). Creates a formula for compromising the state lien for medical costs in recovery actions from a third party.

Mental health courts; pilot program—Edwards (SB 18). Establishes up to five "mental health courts."

Mental health; assisted outpatient treatment—Marsh (SB 177). Establishes a program of assisted outpatient treatment for the severely mentally ill who were previously hospitalized due to noncompliance with prescribed psychiatric treatment.

Mentally ill defendants; treatment and hospitalization—Cuccinelli (SB 275) and McEachin (SB 440). Establishes a program to provide mental health services for certain criminal defendants.

## 2008 General Assembly Unemployment Law Legislation Summary

By Ty Jones, Virginia Poverty Law Center

**The following bills were signed by the Governor and will take effect on July 1<sup>st</sup>.**

Unemployment compensation: Indian tribes—Purkey (HB 96). This bill provides that unemployment compensation benefits based on service in the employ of an Indian tribe are payable to the same extent as benefits payable to other employees covered by the Virginia Unemployment Compensation Act.

Unemployment compensation: testing for controlled substances—Carrico (HB 366). Disqualifies an individual from receiving unemployment compensation benefits if he is discharged from employment as a result of a confirmed positive test for a nonprescribed controlled substance conducted in a United States Department of Transportation-qualified drug screen, conducted in accordance with an employer's bona fide drug policy. Currently, an individual is ineligible for unemployment benefits if he fails a drug test conducted in accordance with scientifically recognized standards by a laboratory accredited by the United States Department of Health and Human Services, or the College of American Pathology, or the American Association for Clinical Chemistry, or the equivalent.

Virginia Employment Commission orders—Loupassi (HB 881). Authorizes final orders of the Virginia Employment Commission (VEC) with respect to overpayments of unemployment benefits to be recorded, enforced and

satisfied as orders or decrees of a circuit court upon certification of such orders by the Commissioner of the VEC.

**The following bill was signed by the Governor and first provision will take effect on July 5, 2009, and the second provision will take effect July 6, 2008.**

Unemployment compensation: minimum earnings: maximum weekly benefit—Nixon (HB 547). Increases the wages an employee must have earned in the two highest earnings quarters of his base period in order to be eligible for unemployment benefits from \$2,700 to \$3,000. The measure also increases the maximum weekly unemployment compensation benefit from \$363 to \$378 for claims effective on or after July 6, 2008.

**The following bills died in the Commerce and Labor committee:**

Virginia Employment Commission: employment office closures—Marshall (HB 24). Required the Virginia Employment Commission to close Commonwealth-operated employment offices, by its ranking of such offices based on the unemployment rate in the political subdivision or subdivisions served by the office.

Virginia Employment Commission: regional offices—Bowling (HB 1223). Required the Virginia Employment Commission to maintain at least one regional office in each planning district in Virginia.

Unemployment compensation: services not

constituting employment—McClellan (HB 599). Provided that services performed by an individual on a temporary basis in several circumstances does not constitute "employment" for purposes of the Unemployment Compensation Act.

Unemployment compensation: not speaking English is misconduct—Cuccinelli (SB 339). Provided that an employee's inability or refusal to speak English at the workplace, in violation of a known policy of the employer, constitutes misconduct and therefore the individual would be disqualified from receiving benefits.

## 2008 General Assembly TANF Law Legislation Summary

By Ty Jones, Virginia Poverty Law Center

**The following bills were signed by the Governor and will take effect on July 1<sup>st</sup>.**

TANF: waiver of ineligibility period—Ward (HB 811) and Miller (SB 251). Provides that the 24-month period of ineligibility shall not apply to a child who is removed from his parents' home as the result of a child protective services report or complaint as defined in regulations promulgated by the Board and placed with a relative. This bill provides that in such cases, the child shall be eligible for TANF financial assistance immediately and without waiting for the 24-month period to run.

**The following bills died in committee.**

Substance Abuse Screening:

Person Becomes Ineligible for Public Assistance if Using Illegal Drugs—Carrico (HB 365) and Puckett (SB 404). As introduced, these bills would have required local departments of social services to screen all applicants of recipients of public assistance (defined elsewhere to include Medicaid, auxiliary grants, TANF, energy assistance, child care, employment services, food stamps and general relief) for use of illegal drugs and if there was “reason to believe” an applicant or recipient was using illegal drugs to require a formal substance assessment which could include drug testing. If a person failed or refused to participate in a screening or assessment without good cause, or tested positive for use of illegal drugs, they would have been ineligible for benefits for 12 months. The

bills were subsequently narrowed to affect only TANF View participants and there were various changes regarding opportunities to get back in the program and treatment, but both bills were ultimately killed—HB 365 was left in House Appropriations and SB 404 was tabled in House Health, Welfare & Institutions.

Eligibility for TANF and food stamps: drug-related felonies—Puller (SB 296).

Provides exemption to receive TANF benefits for persons who have been convicted of a felony drug offense pursuant to § 18.2-250 and comply with criminal court orders and treatment programs, as permitted by federal law.

## 2008 General Assembly Housing Law Legislation Summary

By Jim Naggles, Virginia Poverty Law Center

**The following bills are those that have passed and were signed by the Governor. Any bill that has passed will go into effect on July 1<sup>st</sup> unless its language says otherwise.** Most of the bills have been signed by the Governor. Some bills are pending because the General Assembly adjourned with the Governor's not having received them at least 7 days before adjournment. In that case a bill is presumed to have passed if the Governor has not taken any action by 30 days (around April 8<sup>th</sup>) after adjournment, and the bill will become law at the usual time. All of this is in the language Article V, Section 6 of the Virginia constitution, at

the end of this report, if you choose to read it.

Homestead deeds: previous filings—Griffith (HB 1042). Adds to the homestead deed form the following questions: (i) how many homestead deeds has the householder filed previously, (ii) what was the amount of the exemption, and (iii) what jurisdiction was it in Homestead deeds; previous filings?

03/03/08 Signed by the Governor

Deed of trust or mortgage: reduces time in which one may enforce—Fralin (HB 1133). Reduces time frame beyond which deed of trust past its due date may be enforced. Right now, a lender who has not enforced the DOT

within 20 years of the date it lapses may still come back and enforce it. This reduces the time frame to 10 years.

03/03/08 Signed by the Governor

Manufactured Home Lot Rental Act—Saxman (HB 1240). Access of tenant to cable, satellite and other television facilities. Authorizes a landlord of a manufactured housing community to enter into a service agreement with a television service provider to provide marketing and other service to the television service provider and to receive compensation for the services. Compensation under such service agreement may also include the

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## 2008 General Assembly Housing Law Legislation Summary

(cont'd from pg. 29)

reasonable value of the landlord's property that is used by the television service provider. This is similar to § 55-248.13:2 of the Virginia Residential Landlord and Tenant Act.

Home ownership protection—Suit (HB 1487). Authorizes the State Corporation Commission (SCC) to impose a fine not exceeding \$2,500 upon a mortgage lender or mortgage broker that is required to be licensed under the Mortgage Lender and Broker Act for violating any other law or regulation applicable to the conduct of the lender's or broker's business. The SCC is directed to study all new federal legislation pertaining to mortgage lending and brokering, and to determine if they require changes to Virginia law. The measure authorizes the Commission to suspend or revoke a mortgage lender's or broker's license upon its failure promptly to pay when due reasonable fees to a licensed appraiser for appraisal services performed in connection with the origination or closing of a mortgage loan for a customer of the mortgage broker or lender. Other amendments to the Mortgage Lender and Broker Act (i) remove the element of the definition of a mortgage loan that has required the property securing the loan to be owner-occupied; (ii) require the Commission to conduct background checks on every member, senior officer, director, and principal of a licensee; (iii) require licensees to conduct background checks on employees who may have access to or process personal identifying

or financial information from a member of the public; (iv) require licensees to ensure that employees are properly trained in applicable state and federal mortgage lending laws and regulations; (v) authorize the Insurance Commissioner to bring actions to enforce specific provisions of the federal RESPA that, pursuant to the federal law, may be enforced by the federal Department of Housing and Urban Development, a state Attorney General, or a state insurance commissioner; and (vi) prohibit the making or brokering of certain types of mortgage loans unless the borrower has completed an approved homeownership education course.

Real property tax exemptions for the elderly and handicapped—Loupassi (HB 1503). Raises the maximum income eligibility restriction from \$62,000 to \$65,000 in the Cities of Charlottesville, Chesapeake, Norfolk, Portsmouth, Richmond, Suffolk, and Virginia Beach and the Counties of Chesterfield, Goochland, and Henrico.

Landlord and managing agent immunity for mold claims—Kilgore (HB 221). Provides immunity for landlords and managing agents if they are in compliance with the Virginia Residential Landlord and Tenant Act. Managing agents can be held liable for affirmative acts of negligence. Any party who pleads a defense pursuant to this immunity shall be entitled to a hearing on the merits after limited discovery and before adjudication of the underlying claim. If the landlord complies with the requirements he is immune from damages to the tenant

caused solely by the tenant.

Landlord and tenant law; appointment of resident agent by nonresident property owner—Ware (HB 264).

Provides that for nonresident property owners, in addition to the requirement for a rental agent to reside and maintain a business office within Virginia, the City of Roanoke may, by ordinance, require such agents to reside in such locality or in an adjoining locality.

This bill will allow service on a nonresident landlord by posting on the door of the property at issue in an LT matter AND by service at the address in the local tax records. This takes service through the Secretary of the Commonwealth out of the picture.

Single-family dwellings; no action taken against owner if has taken legal action against tenant, including action basically aimed at immigrants—Rust (HB 445).

This bill was the subject of much attention as the opposing side offered amendments that affect the severity of the action that must be taken against the tenant for the landlord to avoid liability.

The local government may proceed to enforce the zoning ordinance to eliminate any overcrowding condition in the single family residential dwelling unit; however, the local government may not seek a conviction for violations of the zoning ordinance against such owner or managing agent if such owner or managing agent is diligently pursuing legal remedies against the tenant, in accordance with Chapter

(cont'd on pg. 31)

## 2008 General Assembly Housing Law Legislation Summary

(cont'd from pg.30)

13 or Chapter 13.2 of Title 55, as applicable, to eliminate any overcrowding condition including, but not limited to, filing an unlawful detainer in accordance with § 8.01-126, and seeking eviction of the tenant for such lease violations.

Mold conditions involving landlords and tenants—Cosgrove (HB 580). Provides for mold remediation and the process for notice from tenant to landlord regarding mold. A notable part of the bill is that which requires a landlord temporarily to relocate a tenant at the landlord's expense while remediating the condition in certain cases.

Landlord and tenant law; definitions; payment of rent; landlord remedies—Oder (HB 720). Adds, among other things, a definition of "application fee," caps the fee at \$50, and provides that such fee is nonrefundable. The bill also defines "written notice" as notice, including any representation of words, letters, symbols, numbers, or figures, whether (i) printed in or inscribed on a tangible medium or (ii) stored in an electronic form or other medium, retrievable in a perceivable form, and regardless of whether an electronic signature is affixed. In cases where a tenant pays rent with a bad check, the bill also allows a landlord to seek an award of costs or attorney fees or the lesser of \$250 or three times the amount of the bad check, draft or order as part of the damages requested on an unlawful detainer action,

provided the landlord has given notice. The bill allows such notice to be included in the five-day termination notice at the option of the landlord. The bill contains specific provisions if the dwelling unit is a public housing unit or other housing unit subject to regulation by the Department of Housing and Urban Development. The bill contains technical amendments.

The new definition section clarifies that the LL can get only out of pocket fees from a potential tenant in addition to a \$50 non-refundable fee. For housing regulated by HUD, or public housing, the nonrefundable fee is still \$32.00.

03/07/2008 House concurred in Governor's recommendation

03/08/2008 Senate concurred in Governor's recommendation

03/08/2008 G Governor's recommendation adopted

03/08/2008: enacted

Landlord and managing agent immunity for mold claims—McDougle (SB 232). Amends old Landlord and Tenant Act. Provides immunity for landlords and managing agents if they are in compliance with the Virginia Residential Landlord and Tenant Act. Managing agents can be held liable for affirmative acts of negligence. Any party who pleads a defense pursuant to this immunity shall be entitled to a hearing on the merits after limited discovery

and before adjudication of the underlying claim.



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