FINAL REPORT OF THE
DEPARTMENT FOR CHILDREN ON

Criminal Sanctions for Child Abuse Fatalities

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

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To: The General Assembly of Virginia

Please accept this document pursuant to the provisions of Item 363, Chapter 668, 1989 Acts of the Assembly, as the Department for Children's final report on criminal sanctions for child abuse fatalities.

Respectfully submitted,

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EXECUTIVE SUMMARY

During the 1989 General Assembly Session, members of the Junior Leagues of Virginia requested an amendment to the first degree murder statute to include the death of a child resulting from protracted patterns of abuse. The concern of the Junior Leagues was prompted, in part, by the case of a 21-month-old child who was brutally beaten and tortured to death in Tennessee. Although prosecutors involved with this case sought first degree murder convictions for the perpetrators of the abuse, convictions for lesser offenses were obtained. The situation in Tennessee ultimately led to the legislative request for this examination of the Commonwealth's cases of fatal abuse and neglect and review of prosecution outcomes. The study was legislatively mandated by an amendment, introduced by Senator Joseph Gartlan, to the 1989 budget bill. The mandate directs the Department for Children, in cooperation with other agencies, to review cases of child deaths and to recommend appropriate criminal sanctions for actions resulting in the death of a child after protracted patterns of abuse.

The Study Committee reviewed cases of child deaths from abuse or neglect for the years 1986 through the early part of 1989. The cases were obtained from: the Child Protective Services Unit, Department of Social Services; the Office of the Chief Medical Examiner, Department of Health; local law enforcement agencies; and

Commonwealth's attorneys. With the assistance of the Office of the Attorney General and the Commonwealth's Attorneys' Services and Training Council, the Committee examined Virginia's homicide and related felony statutes. Additionally, the study included a review of recent legislative initiatives, pertaining to the death of a child from abuse, taken in other states.

Findings

The review of cases revealed that there are no vast numbers of a certain type of case or cases which share very similar circumstances. The cases can be divided into broad categories, with many falling into more than one category. Few children whose cases were reviewed died as the result of the cumulative effects of abuse. For the most part, the victims died as a result of single, violent acts. The majority of victims were aged one year or younger. Their ages could have made them more vulnerable to single acts or to suffering from short periods of neglect and therefore less likely candidates for protracted patterns of abuse. The cases reviewed suggest that protracted patterns which do lead to the death of a child will involve neglect more often than physical abuse.

The charges filed against alleged perpetrators varied widely, as did the outcomes of prosecutions. The legal action taken ranged from no charges filed to charges of murder. The verdicts in prosecuted cases ranged from dismissal of all charges to conviction of capital murder. There appears to be little consistency in how

cases are handled, in the determination of charges to be filed, and in the convictions and sentencing of perpetrators.

The Committee determined that offenders who might have been charged with, or convicted of, more serious crimes were probably not because of lack or inadmissibility of evidence, insufficient investigations, inadequate prosecutions, and improper instructions to juries. None of these reasons would be addressed, much less rectified, by statutory amendments creating more severe penalties. The information reviewed leads to the conclusion that the existing statutes do provide for appropriate criminal sanctions for convicted perpetrators. The problems identified do not result from defects in the statutes, but rather from differing applications of the statutes and a lack of cooperative investigations and retrieval of evidence among local agencies.

The Committee recognized that cooperation and communication among local agencies can be crucial in the prosecution of alleged perpetrators in cases involving child abuse fatalities. Through this study, the Committee discovered that the degree to which child protective services workers, law-enforcement officers, medical examiners, and Commonwealth's attorneys work cooperatively and share pertinent case information varies throughout the Commonwealth.

Several responses to the survey conducted for this study by the Commonwealth's Attorneys' Services and Training Council

indicated a lack of communication among local agencies. Some Commonwealth's attorneys expressed frustration at the lack of timely notification of a suspicious death (notifications were received from one to six months after the child's death). The records from child protective services units in some localities also indicated limited cooperation, particularly among local law enforcement agencies and CPS. Further, the reports received from the Office of the Chief Medical Examiner revealed problems in communication in some localities among the medical examiner, CPS, and the Commonwealth's attorney.

While recognizing that the primary focus of the study was to recommend appropriate punishment for convicted perpetrators, the Study Committee agreed that the punishment of convicted abusers alone will do little to protect children from harm by deterring abuse or neglect. Further, the Committee agreed that improving Virginia's total response to child abuse and neglect can ultimately help prevent deaths from maltreatment.

Recommendations

I. **The Committee agreed that the Commonwealth should establish a formal process for reviewing cases of child deaths from suspected maltreatment on both the state and local levels.** The Committee recommends that the Commonwealth mandate the establishment of a State Child Fatality Review

Team and require the development of local, ad-hoc Child Fatality Review Teams.

The State Child Fatality Review Team should be comprised of the Commissioner of the Department of Social Services, the Chief Medical Examiner, the Attorney General, the Superintendent of State Police, or their designees, and representatives from the Commonwealth's Attorneys' Services and Training Council, the Virginia Association of Chiefs of Police, and the Virginia State Sheriffs' Association. The State Team should convene at least quarterly and should be staffed by an appropriate state agency. The State Child Fatality Review Team should:

- Develop a protocol for local review teams;
- Monitor and review the work of local fatality review teams and request local agencies to conduct further investigation of a case if such a need is determined;
- promote interdisciplinary education and training;
- Identify trends and policy needs;
- Make recommendations to the Governor and to the General Assembly annually; and
- Prepare a two-year follow-up report on the work of state and local fatality review teams and on the status of criminal sanctions in fatality from abuse cases.

Each locality should be required to establish an ad-hoc Child Fatality Review Team for each case of a child death from suspected abuse or neglect. The local teams should be comprised of representatives from the local child protective services unit, law enforcement agency, medical examiner, and Commonwealth's attorney. The local team would convene promptly upon identification of a suspicious child death, follow the protocol established by the State Team, and submit a report on each case to the State Team.

II. **After careful deliberation, the Study Committee agreed that amendments to the criminal statutes of the Code of Virginia not necessary at this time.** The problems related to the prosecution of alleged perpetrators of fatal abuse or neglect are not directly related to the homicide or felony statutes. The Committee believes that the child fatality review teams can promote the education necessary to understand the statutes and increase consistent application of the statutes, improve coordination among local agencies, and ultimately lead to appropriate criminal convictions and sentencing of perpetrators.

III. **The Study Committee recommends that staff to the House Committee on Appropriations and Senate Committee on Finance develop a follow-up report on the studies (1985-1989) conducted in Virginia related to child abuse and neglect.** The report should:

- identify recommendations that have been implemented;

- review recommendations for increased training of CPS workers and identify other recommendations that have gone without action;

- include a fiscal impact statement for implementation of the remaining recommendations; and

- contain a plan for implementing the recommendations and tasks for improvement of the child protective services system (to be developed cooperatively with the Commissioner of Social Services).

This recommendation is based on the Committee's acknowledgement that past studies conducted in the Commonwealth relating to abuse and neglect contain a wealth of sound information for the improvement of Virginia's system for protecting children. Follow-up of the recommendations contained in these studies is warranted.

PURPOSE OF THE STUDY/INTRODUCTION

This study was legislatively mandated by an amendment, introduced by Senator Joseph Gartlan, to the 1989 budget bill (Chapter 668). The mandate directs:

> "The Department for Children in cooperation with the Department of Social Services, the Department of Health, the Commonwealth's Attorneys' Services and Training Council, the office of the Attorney General, representatives of law-enforcement agencies and the courts, shall review cases of child death in Virginia and recommend appropriate criminal sanctions for actions resulting in the death of a child after protracted patterns or multiple incidents of abuse.
>
> This report shall be provided to the Governor and the General Assembly prior to the 1990 General Assembly."

Origin of the Study

During the 1989 General Assembly Session, members of the Junior Leagues of Virginia requested an amendment to the first degree murder statute to include the death of a child resulting from protracted patterns of abuse. The Junior Leagues' State Public Affairs Committee cited cases involving protracted, fatal abuse which had resulted in convictions of lesser crimes (e.g., manslaughter) when tried under current law. The Scotty Trexler case was of particular concern to the Leagues' members.

In May, 1987, Trexler, a 21-month-old child, was brutally beaten and tortured to death in Bristol, Tennessee. Prosecutors involved with the case sought first degree murder convictions for

Trexler's mother and her boyfriend; however, the convictions obtained were for lesser offenses. News accounts of the case indicated that the community's outrage with the verdicts was expressed through the media and in letters to legislators. In response to the concern generated by the Trexler case, the Tennessee legislature adopted an amendment to the state's first degree murder statute (see "Recent Legislative Changes in Other States" on p. 54). This situation in Tennessee prompted the request for this examination of the Commonwealth's cases of fatal abuse and neglect, along with a review of prosecution outcomes.

Framework of Study Committee Activities

While recognizing that the primary focus of the study, as directed by the Legislature, was to recommend appropriate punishment for convicted perpetrators of fatal abuse or neglect, the members of the Child Abuse Fatalities Study Committee, along with other professionals contacted for assistance, agreed that the punishment of convicted abusers alone will do little to protect children from harm by deterring abuse or neglect. Further, the Committee agreed that the Commonwealth's primary obligation in the area of child abuse and neglect should be prevention.

Early Committee discussions focused on the public's expectations regarding charges and penalties for child death cases resulting from abuse or neglect. The Committee acknowledged that the public's perception may be somewhat jaded by the fact that only a few cases, usually those involving the most brutal forms of abuse

and neglect, receive a high level of media attention. In these cases particularly, the public's expectations might be fulfilled through the meting out of severe punishment. However, the Committee determined that public expectation alone may not be sufficient reason to impose stricter penalties. In fact, the public may be equally well served through increased awareness on the dynamics of child abuse and neglect as well as through better understanding of the purpose of criminal sanctions in general.

To achieve the goal of the study, the Committee identified four broad areas for inquiry:

I) To review cases in Virginia involving the deaths of children from abuse or neglect.

Case documents were obtained from the state child protective services (CPS) unit, the Office of the Chief Medical Examiner, law enforcement agencies, and Commonwealth's attorneys. Through this case review, the Committee learned about the types of cases handled by Virginia agencies, the number of cases involving protracted patterns of abuse or neglect, the charges, if any, filed in each case, and the outcome of prosecution, if pursued.

II) To determine if Virginia's homicide statutes, as written, are a barrier to filing charges, and obtaining convictions, of first degree murder in child abuse fatality cases.

Homicide statutes were reviewed and interpreted with the assistance of Committee members with legal backgrounds. Additionally, the Committee sought the assistance of local

Commonwealth's attorneys and the staff of the National Center for the Prosecution of Child Abuse in identifying possible limitations of current statutes. Among the issues examined were: the requisite proof of willful, deliberate, and premeditated killing; the ability to obtain sufficient evidence to warrant a conviction of first degree murder; and the admissibility of certain types of evidence.

III) To determine whether factors other than homicide statutes have an impact on criminal proceedings.

"Factors" include: the level of communication among child protective services (CPS) workers, law enforcement officers, Commonwealth's attorneys, and medical examiners; attitudes among judges and juries in regard to imposing severe criminal sanctions on one family member for crimes committed against another; child abuse and neglect reporting laws; and interdisciplinary training.

IV) To gain a national perspective on child fatalities resulting from abuse and neglect and to collect information on other states' legislative initiatives.

The Committee reviewed information on child abuse fatalities from the National Center for the Prosecution of Child Abuse and the National Committee for the Prevention of Child Abuse and Neglect. The Committee also examined information from states which have amended first degree murder statutes to specifically address child abuse fatalities.

DEFINITION OF PROTRACTED ABUSE

For the purpose of the study, the Committee agreed to the following definition of protracted abuse:

> "Protracted patterns or multiple incidents of abuse" are defined as actions taken by a person over a period of time which have the cumulative effect of rendering one or more children 'abused or neglected' as defined by § 63.1-248.2."

METHODOLOGY OF CASE REVIEW

In an effort to obtain and review cases of child fatalities involving possible abuse or neglect, the Committee sought the assistance of five agencies/organizations:

- Child Protective Services (CPS) Unit, Bureau of Child Welfare, Virginia Department of Social Services
- The Office of the Chief Medical Examiner
- The Commonwealth's Attorneys' Services and Training Council (The Council)
- Virginia Association of Chiefs of Police
- Virginia State Sheriffs' Association

An initial list of 90 cases was generated by CPS and the Office of the Chief Medical Examiner for the years 1986 through 1989. This master list was then sent to local law enforcement agencies and Commonwealth's attorneys, through the above mentioned organizations. Each agency was requested to forward the records maintained on the identified cases. Concurrently, the Council surveyed participating Commonwealth's attorneys to identify specific problems, and the recommended solutions, encountered when prosecuting cases involving the death of a minor from abuse or neglect. The Office of the Chief Medical Examiner developed and completed a review form which summarized case records and autopsies. The form sought evidence of chronic abuse (e.g., old fractures in various stages of healing), requested information related to the prosecution of the case, and asked for the cause and manner of death (as determined by the local medical examiner). CPS

requested documentation from local departments of social services on fatalities investigated by those agencies.

Staff to the Committee reviewed and summarized cases from each of the five sources. The cases were cross referenced by agency involvement and by type of abuse or neglect, and the review focused on the prosecution, if any, which occurred. Through this process, an additional 23 child fatality cases were identified and reviewed by staff. However, for the purpose of the study, the original 90 cases served as the primary data source.

Early in the study, the question of confidentiality of the records was raised. In the opinion of the Office of the Attorney General, confidentiality would not be breached because the records would only be reviewed by the Committee, at the request of the General Assembly, and would not be made public. Furthermore, all the cases reviewed related to deceased children whose identities no longer required protection. Finally, under the CPS policy allowing access to records for bona fide research, permission was obtained for review of case files for the purposes of this study.

CASE REVIEW

Types of Cases and Prosecutions

Although the cases reviewed for this study revealed no vast numbers of a certain type of case, the cases can be divided into broad categories, with many of the cases falling into more than one category. The charges filed against alleged perpetrators varied widely, as did the outcomes of prosecution. The legal action taken ranged from no charges filed to charges of murder. The most common reasons for failure to file charges were insufficient evidence or inability to rule out sudden infant death syndrome (SIDS). (SIDS is an unexpected death in the first few months of life for which no specific cause can be found.) The verdicts in prosecuted cases ranged from dismissal of all charges to conviction of capital murder.

Protracted Abuse

In reviewing the cases, it became evident that few met the Committee's definition of protracted abuse, i.e., the cumulative effects of such abuse led to the child's death. For the most part, the victims died as a result of single, violent acts. In considering whether protracted abuse occurred, it may be important to keep in mind the ages of the victims. The majority of all victims whose cases were studied were one year old or younger. The age distribution of the victims was:

AGE	NUMBER OF CASES
0-1 year	56
13 months - 3 years	13
3 years - 5 years	11
5 years - 8 years	6
Over 8 years	4

Because more than 60 percent of the victims were aged one year or younger, their ages could have made them more vulnerable to single, violent acts or to suffering from short periods of neglect and, therefore, less likely candidates for protracted abuse or neglect. Furthermore, the cases reviewed suggest that protracted patterns which lead to child deaths will involve neglect more often than physical abuse.

The following cases are presented as examples of protracted abuse:

Case Scenario

10-Month-Old Male

Cause of Death: Starvation and acute dehydration.

The victim's mother had not fed the child for at least 5 to 6 days. Child protective services had gained custody of the victim's three older siblings as a result of founded neglect (not being fed) prior to the victim's death. **The victim's mother was charged with first degree murder and found "not guilty by reason of insanity."**

Case Scenario

3-Week-Old Male

Cause of Death: Malnutrition and pneumonia

The victim's mother had fed the victim only a few ounces of formula each day since the child's birth. **The victim's mother was charged with, and convicted of, felony neglect. She was sentenced to two years in jail, all suspended, and placed on probation for five years. Probation is conditional upon her not becoming pregnant again outside the bonds of marriage. The mother was a minor, tried as an adult.**

Case Scenario

17-Month-Old Male

Cause of Death: Acute Dehydration

This case involved medical neglect. The victim was ill for several days prior to death. The victim's parents' religious beliefs precluded the use of medical doctors. The Commonwealth's attorney was not notified until 6 months after the child's death. **The Commonwealth's attorney anticipates that two warrants for arrest on charges of involuntary manslaughter will be issued against the victim's parents during the fall of 1989.**

Past Abuse or Neglect

In each of approximately 40 cases reviewed, there was some evidence of prior abuse or neglect (e.g., evidence of prior CPS involvement with the family and/or medical examiners' reports indicating past injuries consistent with abuse). While this

history may have placed the child at risk, the prior abuse did not directly contribute to the child's death.

Some examples of cases involving prior abuse or neglect follow:

Case Scenario

3-Month-Old Male

Cause of Death: Blunt Force Trauma

At the time of the victim's death, CPS was investigating a complaint involving the victim's sibling. The medical examiner's report on the victim indicates multiple fractures in various stages of healing. **The victim's father was charged with first degree murder, convicted of involuntary manslaughter, and sentenced to 12 months in jail. The circuit court would not permit the Commonwealth's attorney to introduce evidence of prior abuse and ordered the medical examiner to omit evidence of prior abuse obtained from the autopsy.**

Case Scenario

8-Month-Old Female

Cause of Death: Skull fracture

The medical examiner's report indicates that the victim had suffered two previous skull fractures. A third skull fracture was caused by the fatal blow. **The victim's father was charged with, and convicted of, first degree murder and sentenced to 36 years in the State Penitentiary. The assistant Commonwealth's attorney estimates that the perpetrator will be paroled after serving six**

years. In obtaining a conviction of first degree murder, the Commonwealth's Attorney was able to provide evidence of five elements of premeditated murder: repeated attacks; brutality; disparity in size and strength; concealment; and lack of remorse. (The legal definition of premeditated murder varies greatly from the common understanding of the concept "to premeditate." It is the prosecutor's responsibility to help the jury distinguish a legal definition of premeditation from its common use. In addition to elements of premeditated murder, premeditation does not require a long-standing plan to kill. In the case cited, the defense attorney tried to encourage the jury to interpret premeditation by common use--a thought-out plan.)

NOTE: This case is a good example of the pivotal role jury instruction plays in the outcome of a trial.

Case Scenario

4-Year-Old Female

Cause of Death: Hypernatremia

The victim died of a heart attack as a result of being force fed salt. The medical examiner's report indicates numerous old scars and contusions. During the CPS investigation, siblings reported extensive abuse of the victim by the parents. Prior to the victim's death, a sibling was referred by school officials to a psychologist because of behavioral problems. The psychologist's report, discovered by CPS after the death, indicates the family's use of "bizarre discipline" and possible abuse. The psychologist

made no report to CPS. **The victim's parents were charged with second degree murder. The mother was convicted of second degree murder and sentenced to 12 years in prison. The disposition of the charges against the father could not be determined.**

Case Scenario

2-Year-Old Male

4-Year-Old Female

Cause of Death: Smoke Inhalation

The victims died in a fire set by their step-father. The victims' older siblings had been placed in foster care prior to the death as a result of neglect founded by CPS. CPS also founded three complaints of neglect involving the victims prior to their deaths. CPS had referred the parents to a parenting education program. **The perpetrator was charged with, and convicted of, two counts of capital murder and one count of arson; he was sentenced to two life terms plus ten years.**

The role that evidence of prior abuse plays in the prosecution of cases varies greatly. Prosecutors cannot introduce evidence of prior abuse for the sole purpose of presenting the defendant as a person of bad character. (See "Evidentiary Issues" on p. 42.)

Willful Neglect

At least 35 of the cases involved child neglect. As with other categories, there exists no typical neglect case. Several of the children died in fires while left unattended by their

parents. Several children were left unattended in bathtubs and drowned. Some of the cases involving neglect also involved other forms of abuse and, therefore, overlap with other groupings of abuse referenced in this report.

The following examples of cases of willful neglect were reviewed:

Case Scenario

5-Year-Old Male

6-Year-Old Female

The victims, left unattended, died in a fire. **The victims' mother was charged with two counts of involuntary manslaughter and three counts of felony neglect. Case pending.**

Case Scenario

4-Month-Old Male

Cause of Death: Exposure to Cold

The victim died in his parents' trailer after being left in an unheated room. Other rooms in the trailer were heated. **The parents were charged with, and convicted of, felony neglect and sentenced to 12 months in jail plus fines. Charges of murder were dismissed because the possibility of SIDS was raised as a defense.**

Case Scenario

2-Month-Old Male

Cause of Death: Meningitis/Starvation

The victim's parents fed the child only a few ounces of formula each day from birth. The child's weight dropped from seven pounds to four pounds, and he died from a form of meningitis brought on by starvation. **The parents were initially charged with murder, but the prosecutor later reduced the charge to manslaughter. After all the evidence was introduced, the judge struck the evidence on charges of manslaughter against the victim's parents. The jury acquitted both parents of felony neglect during a single trial. The defense held that the defendants were "so intellectually deprived that they were unable to properly care for the infant." After the trial, CPS returned custody of the victim's sibling to the parents.**

NOTE: The Commonwealth's attorney's report cites this case as an example of the difficulties in satisfying the elements of willful neglect.

The evidence reviewed suggests that in at least 12 additional neglect cases charges were either not filed or later dropped because of insufficient evidence to satisfy the elements of willful neglect. In several of these cases, sudden infant death syndrome (SIDS) could not be ruled out. There may be some confusion regarding SIDS and how a determination of SIDS is made. In one fatality case, for example, CPS made a founded disposition of physical abuse and neglect; the medical examiner indicated the cause of death to be SIDS.

NOTE: The use of SIDS as a possible defense, and the labeling of a fatality as SIDS by different entities involved may warrant collaborative training on the subject.

The cases and other information reviewed for this study indicate that defense attorneys are able to introduce evidence not relevant to the charge of felony neglect. In particular, one defense attorney attempted to convince the jury that the defendant, charged with felony neglect, did not intend to kill the child. Elements of felony neglect do not require an intention to kill; such an intention would elevate the crime to voluntary manslaughter or murder. The willful behavior which must be proved is the act of neglect, regardless of the outcome of that act.

NOTE: Although an intention to kill is not an issue in a trial for felony neglect, it is often an artful technique that can be used to sway a jury.

Shaken Baby Syndrome

For six of the victims, the cause of death was determined to be shaken baby syndrome. Several others whose deaths involved cerebral edema (a swelling of brain tissue) may also have been victims of violent shaking. **Two of the perpetrators were charged with involuntary manslaughter; one was convicted and sentenced to 12 months in jail, and the other case is pending. Two of the perpetrators were charged with second degree murder. One was**

convicted and sentenced to 20 years, all suspended. The other case is pending.

Newborns

Seven of the victims died just after birth. (Three additional newborns who were not included in the original list of 90 cases died in a similar manner.) Three of these infants drowned in toilets upon birth. Two others were abandoned at birth, and two suffered physical abuse at birth. All of the perpetrators were mothers, six of whom were teenagers. **The information received on convictions of these perpetrators reveals that one mother was convicted of first degree murder; one mother was convicted of second degree murder; two were convicted of involuntary manslaughter; one mother was convicted of felony neglect; and one mother was found not guilty of murder.**

Summary

The cases reviewed here appear to present certain inconsistencies: the details of the first two cases involving prior abuse and neglect, for example, seem quite similar, but one father was convicted of involuntary manslaughter and sentenced to 12 months in jail, while the other was convicted of first degree murder and sentenced to 36 years in the State Penitentiary. However, it is important to note that the review of cases conducted for this study could not reveal all of the factors influencing each decision made. Nevertheless, the known facts in the Trexler case, which was a primary impetus for this study, indicate that first

degree murder charges probably could have been filed if the killing had occurred in Virginia.

In some cases, convictions for felony child abuse or neglect were obtained. Since these cases involved killings which occurred in the commission of felonies, it would appear that they could have been tried as second degree murder (see "Second Degree Murder" on p. 36). Again, the limitations of the study methodology prevented the staff from determining why such charges were not filed.

Based on the Committee's discussions and comments from local agency staff members, it seems safe to assume that offenders who might have been charged with, or convicted of, more serious crimes were not because of lack or inadmissibility of evidence, insufficient investigations, inadequate prosecutions, improper instructions to juries, or other similar reasons. None of these problems would be addressed, much less rectified, by statutory amendments creating more severe penalties.

Agency Involvement and Communication

The Committee recognized that cooperation and communication among local agencies can be crucial in the prosecution of alleged perpetrators in cases involving child abuse fatalities. Through this study, the Committee discovered that the degree to which child protective services workers, law-enforcement officers, medical examiners, and Commonwealth's attorneys work cooperatively and share pertinent case information varies throughout the Commonwealth.

Of the original 90 cases, the local child protective services unit, law enforcement agency, medical examiner's office, and Commonwealth's attorney's office were all known to be aware of, or involved with, 55 cases. In 19 of these 55 cases, the Committee staff received documentation from each of the four sources. Reports on the remaining cases from one source contained information citing the involvement of another agency (for example, police records may have made reference to screening a case with the Commonwealth's attorney, or the CPS documentation may have made reference to a joint investigation with law enforcement).

Since reports from all four sources were not received for review in each of the 55 cases, it is difficult to determine the exact extent of each agency's involvement. Follow-up telephone conversations with several local agencies indicated the involvement ranged from a phone conversation (e.g., CPS spoke with the Commonwealth's attorney) to a more extensive sharing of information. A breakdown of known agency involvement with the 90 cases is included as Appendix A.

Several responses to the survey conducted for this study by the Commonwealth's Attorneys' Services and Training Council indicated a lack of communication among local agencies. Some Commonwealth's attorneys expressed frustration at the lack of timely notification of a suspicious death (notifications were received from one to six months after the child's death). The records from child protective services units in some localities

also indicated limited cooperation, particularly among local law enforcement agencies and CPS. Further, the reports received from the Office of the Chief Medical Examiner revealed problems in communication in some localities among the medical examiner, CPS, and the Commonwealth's attorney. In other communities, positive working relationships among the agencies were noted in the reports or case records.

Inconsistent or non-existent working relationships among agencies involved in child abuse fatalities are not problems unique to the Commonwealth. In 1987, the National Committee for the Prevention of Child Abuse conducted a nationwide study of this issue which uncovered many problems experienced by prosecutors, coroners, and social workers in the identification and prosecution of fatality abuse cases. These problems include:

- Limited knowledge of child abuse on the part of medical and law enforcement personnel;
- Failure to report suspected abuse by professionals and the public;
- Limited training and understanding of child abuse among professionals required to report abuse;
- Difficulty distinguishing sudden infant death syndrome (SIDS) and death caused by accidents from death by abuse; and
- Lack of adequate resources and training among child protective services workers.

In response to these concerns, 32 states report having established formal or informal child fatality review committees.

These committees ensure that each pertinent child death case is reviewed by all appropriate agencies. They also serve the vital function of enabling all agencies to share pertinent information used to determine or label a case abuse or neglect, sudden infant death, or an accident. These review teams can help each agency understand what is needed for successful prosecution and may lead to more joint investigations.

Formalizing the Case Review Process

The Committee agreed that the Commonwealth should establish a formal statewide process for reviewing cases of child deaths from suspected maltreatment. A planned, interagency response to these cases could be achieved through the use of fatality review teams. A fatality review team would:

- Increase the opportunity to identify cases of fatal abuse
- Ensure that each case is reviewed by all of the agencies/systems
- Promote sharing of timely information among agencies
- Reduce gaps in communication and promote consistency in case handling
- Improve investigations and increase the potential for identifying evidence that now, because of fragmented or separate investigations of each agency, may be overlooked
- Increase the possibility of charges and convictions
- Ensure compliance with existing policy, such as required reporting to CPS

The Committee also agreed that such teams should be comprised of, but not limited to, representatives from: the Department of Social Services; The Office of the Chief Medical Examiner; law enforcement agencies; and the Commonwealth's attorneys.

The Study Committee reviewed four options for the structure of review teams.

Options

1) **Appoint One State-Level Review Team Comprised of Representatives of the Above Agencies.**

   Advantages

   Appointed members would ensure consistency in the case review process. State level cooperation and communication would also be promoted.

   Disadvantages

   Appointees may not be the most informed persons concerning the dynamics of fatal abuse or neglect. The team would have to rely on written reports from the localities. Such reports may not reflect the details of what actually occurred.

2) **Appoint Four Regional Review Teams.**

   Advantages

   Regional review teams would provide regional consistency in case review. Regional representatives may have a better understanding of the dynamics within localities, and such teams would foster regional cooperation.

   Disadvantages

   Same as Option 1.

3) **Require Localities to Form Ad-hoc Teams for Each Case.**

   Advantages

   Ad-hoc teams would ensure communication among agencies for every case. The representatives, the actual case workers,

would be most knowledgeable of the dynamics of a case and of the locality. Such teams would encourage cooperative investigations of cases.

Disadvantages

Case reviews would lack consistency from locality to locality. There is no provision for oversight of teams to ensure compliance.

4) **Establish One State-Level Review Team and Require Localities to Form Ad-hoc Teams for Each Case.**

Advantages

This option, in which ad-hoc teams would report to a state review team, has several additional advantages to the option of local ad-hoc teams. The state team would have the authority to request local agencies to investigate further, if needed, and fixed membership would promote consistency in case review. The state team would identify gaps in communication among different localities and intervene by requiring or ensuring more complete review of the work of the ad-hoc teams. The state team would also be able to forward recommendations to the Governor or legislature for improving any of the systems, based on their review. This approach creates a system of checks and balances.

Recommendation

After reviewing the four options, the Committee agreed to recommend that the Commonwealth provide for a review of child fatalities from suspected maltreatment on both the state and local levels (option 4).

The State Fatality Review Team should be comprised of the Commissioner of the Department of Social Services, the Chief Medical Examiner, The Attorney General, the Superintendent of State Police, or their designees, and representatives from the Commonwealth's Attorney's Services and Training Council, the

Virginia Association of Chiefs of Police, and the Virginia State Sheriffs' Association. The State Team should convene at least quarterly and should be staffed by an appropriate state agency. The State Fatality Review Team should:

- Develop a protocol for local fatality review teams;
- Monitor and review the work of local fatality review teams and request local agencies to conduct further investigation of a case if such a need is determined;
- Promote interdisciplinary education and training;
- Identify trends and policy needs;
- Make recommendations to the Governor and to the General Assembly annually; and
- Prepare a two-year follow-up report on the work of state and local fatality review teams and on the status of criminal sanctions in fatality from abuse cases.

Each locality should be required to establish an ad-hoc Fatality Review Team for each case of a child death from suspected abuse or neglect. The local teams should be comprised of representatives from the local child protective services unit, law enforcement agency, medical examiner, and Commonwealth's attorney. The local team would convene promptly upon identification of a suspicious child death, follow the protocol established by the State Team, and submit a report on each case to the State Team.

LEGAL ISSUE ANALYSIS

Child Abuse and Homicide Laws in Virginia

When a child dies as a result of abuse or neglect in the Commonwealth, the defendant may be convicted of charges ranging from involuntary manslaughter to capital murder, depending upon the circumstances of the case. It is also possible that the defendant may be acquitted or the initial charges dropped or reduced. If the defendant is found guilty of homicide, the most likely convictions are manslaughter or second degree murder. See e.g. Evans v. Commonwealth, 215 Va. 609, 212 S.E.2d 268 (1975) (second degree murder for beating death of a child); Pugh v. Commonwealth, 223 Va. 663, 292 S.E.2d 339 (1982) (second degree murder for force-feeding pepper to a child); Biddle v. Commonwealth, 206 Va. 14, 141 S.E.2d 710 (1965) (manslaughter, not murder, for negligently failing to feed an infant).

This range of results is partially due to the way homicide is defined by Virginia law. Killings in the commission of certain felonies enumerated in the capital, first degree, and second degree murder statutes are the only forms of homicide that are statutory offenses. Code of Virginia, §§ 18.2-31 through 18.2-33 (Repl. Vol. 1988). All other forms of homicide in Virginia are common law offenses. (Common law is defined by custom, usage, and the way court cases have been decided over the years.) In Virginia's

statutes, murder is not defined; the statutes only distinguish between the degrees of murder.

The forms of common law homicide are involuntary manslaughter, voluntary manslaughter, and murder. Involuntary manslaughter is an accidental killing, contrary to the intention of the defendant. The killing must occur either during the commission of an illegal (but not felonious) act or during the improper performance of a legal act. Reid v. Commonwealth, 206 Va. 464, 469, 144 S.E.2d 310, 314 (1965).

Voluntary manslaughter is an unlawful killing done without malice. Essex v. Commonwealth, 228 Va. 273, 322 S.E. 2d 216, (1984). Voluntary manslaughter is usually committed during the "heat of passion" brought on by great provocation. Davidson v. Commonwealth, 167 Va. 451, 456, 187 S.E. 437, 439 (1936).

If the killing is done with malice, either expressed or implied, it is murder. Id. Malice is present when a person intentionally commits a wrongful act without just cause or excuse. Wooden v. Commonwealth, 222 Va. 758, 762, 284 S.E.2d 811, 814 (1981).

Statutory Classification of Murder

The purpose of Virginia's murder statutes is to classify murder by degree and type. The degree determines the class of punishment. (See "Penalties" for designated offenses on p. 41.) The degrees are: capital murder; first degree murder; and second

degree murder. The types of murder are ordinary common law murder and felony-murder.

Felony-murder is a killing that occurs during the commission of, or attempt to commit, a felony. Wooden at 761, 284 S.E.2d at 813. In felony-murder, malice need not be proved separately because it is considered to be inherent in the commission of a felony. Wooden, at 762, 284 S.E.2d at 814. Therefore, once the underlying felony is proved, malice is proved.

The purpose behind felony-murder statutes is to deter dangerous felonies by making the felon criminally responsible for whatever unintended death may occur in the course of a felony. W. LaFave & A. Scott, Criminal Law § 7.5 (1986). Normally, an unintended death would result in an involuntary manslaughter conviction, if it resulted in any conviction at all. The felony murder statute elevates the crime to murder. See e.g. Spain v. Commonwealth, 7 Va. App. 385, 373 S.E.2d 728 (1988) (robber convicted of felony-murder when elderly robbery victim suffered heart-attack due to trauma of robbery).

Capital Murder

Capital murder is a willful, deliberate, and premeditated killing that occurs during the commission of certain enumerated felonies or under certain specified circumstances (Code of Virginia, § 18.2-3). Most of the felonies and circumstances listed in Virginia's capital murder statute would probably not occur in

conjunction with child abuse. However, murder in the commission of rape (§ 18.2-31 (e)) or murder when a child under the age of twelve years is abducted with intent to extort money or defile (§ 18.2-31 (h)) are two capital murder offenses that might be related to child abuse.

First Degree Murder

There are two basic types of first degree murder. They are first degree felony-murder and ordinary first degree murder. First degree felony-murder is a killing which occurred during the commission of, or attempt to commit, certain enumerated felonies (Code of Virginia, § 18.2-32). Of those felonies, the ones most likely to occur in conjunction with child abuse are rape, sodomy, and inanimate object sexual penetration. Id.

Ordinary first degree murder is murder by poisoning, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing that is not classified as capital murder. Id. Poisoning and starving are the two methods which would be most likely to occur in conjunction with child abuse. However, it should be noted that in order to qualify as first degree murder, such starving or poisoning must be intentional and malicious; it cannot be accidental or merely negligent. See eg. Biddle v. Commonwealth, 206 Va. 14, 141 S.E.2d 710 (1965).

For any other method to qualify as first degree murder, the act must be willful, deliberate, and premeditated (Code of

Virginia, § 18.2-32). To premeditate means to adopt a specific intent to kill, and that is what distinguishes first and second degree murder. Smith v. Commonwealth, 220 Va. 696, 700, 261 S.E.2d 550, 553980). The specific intent requirement is difficult to prove in child abuse or neglect cases. The question of whether the killing was willful, deliberate, and premeditated is for the jury to decide. (To premeditate in a legal sense has different meaning than what is commonly understood.) Clozza v. Commonwealth, 228 Va. 123, 134, 321 S.E.2d 273, 279 (1984), cert. denied 469 U.S. 1230, 105 S.Ct. 1233 (1985). In deciding this question, the jury may consider such factors as the brutality of the killing and the disparity in size and strength between the accused and the victim. Id. In the beating death of a child, these factors appear to be relevant and would seem to indicate a first degree murder conviction. Nevertheless, in many child abuse homicides, juries decide that the killing was not willful, deliberate, and premeditated. See eg. Evans v. Commonwealth, 215 Va. 609, 212 S.E.2d 268 (1975) (second degree murder for beating death of child).

Second Degree Murder

Second degree murders are those which are not willful, deliberate, and premeditated, and which did not occur during the commission of an enumerated felony. A second degree murder can either be a common law murder, which requires independent proof of malice, or it can be second degree felony-homicide, as defined by

§ 18.2-33. A felony-homicide is an unintended killing which occurs during the commission of any felony other than those listed in the capital and first degree statutes. Id.

Child abuse or neglect can be a felony if the abuser "by willful act or omission or by refusal to provide any necessary care...causes or permits the life or health of such child to be seriously injured." Code of Virginia, § 18.2-371.1 (Repl. Vol. 1988). ("Refusal to provide necessary care" and "serious injury" are the two factors that distinguish felony child abuse from misdemeanor child abuse. § 18.2-371.) If an accidental death resulted from the commission of felony child abuse or neglect, the abuser can be charged with second degree felony-homicide. § 18.2-33. The Commonwealth would then be required to prove the underlying felony plus the fact of death.

Homicide by Neglect

The success of a second degree felony-homicide prosecution depends upon how easily the underlying felony can be proved. Since felony child abuse or neglect is a statutory offense, the language of the statute determines what must be proved. The statutory language that elevates child abuse or neglect from a misdemeanor to a felony includes the phrases, "refusal to provide any necessary care" and "seriously injured." Cf. §§ 18.2-371 and 18.2-371.1. Both offenses also include the element of willfulness. Obviously, serious injury is not difficult to prove in a homicide case. However, when the child died because of neglect, a "willful

omission" or "refusal to provide any necessary care" is much more difficult to prove. The defendant can claim that he or she didn't know what care was necessary. Unless there is some documentation that the defendant has refused services (for example, family counseling or parent education), the jury may decide to convict the defendant of only a misdemeanor simply because the offender claims ignorance.[1] If there is no felony, there can be no felony-homicide.

If there is insufficient evidence to establish all the elements of felony child neglect, the prosecution has the recourse of pursuing a common law homicide conviction. Unfortunately, the common law does not provide many avenues for the prosecution of crimes of omission. (Felony child neglect is a statutory offense, not a common law offense.) Under a common law homicide theory, the perpetrator of a neglect death can rarely be convicted of murder. For example, in Biddle v. Commonwealth the mother neglected to feed her infant whenever she was distracted by marital difficulties. 206 Va. at 21, 141 S.E.2d at 715. She was convicted of first degree murder in the trial court, based on the theory of murder by "starving." Id at 19-21, 141 S.E.2d at 714-15. See Va. Code Ann. § 18.2-32. But the Virginia Supreme Court reversed the first degree conviction, holding that unless the mother willfully and maliciously withheld food, she could not be convicted of murder

[1] Cathy Krinick, Esq. Presentation to Child Fatality Study Committee on 6/14/89.

but only involuntary manslaughter. Biddle at 21, 141 S.E.2d at 715.

Furthermore, in order to rise to the level of negligence necessary for a manslaughter conviction, the omission which led to the child's death must constitute the breach of a legal duty. This breach must be "of such reckless, wanton and flagrant nature as to indicate a callous disregard for human life." Davis v. Commonwealth, 230 Va. 201, 205-6, 335 S.E.2d 375, 378 (1985). This requirement creates a very high standard. Although many cases of neglect could be considered careless, few would qualify as a "reckless, wanton and flagrant...disregard for human life." Id. Because the standard of recklessness is so high, many cases of death due to neglect would not result in a manslaughter conviction.

In some neglect cases, although the defendant's behavior might indicate a flagrant disregard for human life, the defendant cannot be convicted of manslaughter because a legal duty of care cannot be established. This issue arises in the typical case of concealed pregnancy. In these cases, the mother (often a teenager) disposes of the infant's body after an unattended birth. Her legal duty to care for the infant does not arise until the evidence establishes that the child was born alive, had a separate and independent existence apart from its mother, and that the mother was the agent of its death. Lane v. Commonwealth, 219 Va. 509, 514, 248 S.E.2d 781, 783 (1978).

Even if it can be shown that the infant was born alive and that the mother was the agent of its death, malice must be proved before the mother can be convicted of any greater crime than manslaughter. Vaughan v. Commonwealth, 7 Va. App. 665, 674, 376 S.E.2d 801, 806 (1989). (Reversal of first degree murder conviction when teenage mother unexpectedly gave birth in bathroom and left baby to die on bathroom floor.) In addition to malice, intent to kill must also be proved for a conviction of first degree murder.

Summary

If there is a homicide conviction resulting from a child's death due to abuse or neglect, the conviction is usually manslaughter or second degree murder. If it is manslaughter, the defendant's breach of a legal duty must demonstrate a flagrant disregard for human life. Davis at 206, 335 S.E.2d at 378. If the conviction is for second degree murder, it can either be felony-homicide (§ 18.2-33) or ordinary murder. If it is felony-homicide, the underlying felony of child abuse or neglect (§ 18.2-371.1) must be proved.

First degree murder convictions are rare because, unless the killing occurred during the commission of certain felonies, the murder must be "willful, deliberate, and premeditated." § 18.2-32. If the child's death was unintended, it is difficult to prove premeditation. Although first degree and even capital murder convictions are possible, these determinations are restricted to

a narrow set of particular fact situations. For example, in the ongoing Diehl case, a first degree murder conviction was affirmed, based on the underlying felony of abduction. Michael Joseph Diehl v. Commonwealth, 6 VLR 681, ___ S.E.2d ___, (1989). (In Virginia, abduction includes detaining a person with the intent to deprive him of his personal liberty. Va. Code Ann. § 18.2-47. The Diehl child was "abducted" by being shackled to the floor of a converted school bus for days at a time.)

NOTE: In an obvious case of severe abuse and neglect, the abduction charge was the only means of obtaining a first degree murder conviction.

Penalties

Punishments for murder and manslaughter are prescribed by statute. See Code of Virginia, §§ 18.2-30 to 18.2-36. These punishments range from execution to a fine of not more than $1000.00.

Both voluntary and involuntary manslaughter are punishable as Class 5 felonies. §§ 18.2-35 and 18.2-36. The punishments for a Class 5 felony are one to ten years imprisonment or, at the jury's or court's discretion, a fine of up to $1000.00, with or without imprisonment of up to twelve months. § 18.2-10 (e).

Second degree murder and second degree felony-homicide are punishable as Class 3 felonies. The punishment for a Class 3 felony is five to twenty years imprisonment. § 18.2-10 (c).

First degree murder is punishable as a Class 2 felony. The punishment for a Class 2 felony is twenty years to life imprisonment. § 18.2-10 (b).

Capital murder is punishable as a Class 1 felony. The punishment for a Class 1 felony is death or life imprisonment. § 18.2-10 (a).

Evidentiary Issues

Evidentiary issues which may arise in the prosecution of child homicides due to abuse or neglect include the weight and sufficiency of evidence, the admissibility of evidence of prior abuse, and hearsay.

Weight and Sufficiency

An issue of weight and sufficiency is likely to arise simply because of the difficulty in obtaining evidence in child abuse cases. Child abuse is usually a private crime, often with no witnesses other than the victim and the abuser. Or if there are other witnesses, they are frequently young children, such as siblings, who might not be competent to testify or who might not be credible on the witness stand. Without eye witnesses, the Commonwealth must rely on circumstantial evidence to prove the crime.

Sometimes relevant circumstantial evidence is lost due to confusion and poor communication during the investigation of a child's death. Homicides that allegedly result from child abuse

are unique since both the local law enforcement and social services agencies may conduct investigations. As previously noted, some investigations show a high degree of cooperation and communication, while others do not. This poor coordination may result in the loss of valuable evidence necessary for obtaining a conviction.

In order to initiate a homicide charge, the prosecutor must have probable cause. Without sufficient evidence, probable cause cannot even be established. Once the case reaches trial, there must be evidence "beyond a reasonable doubt" to support a conviction. Holland v. Commonwealth, 190 Va. 32, 40, 55 S.E.2d 437, 441, (1949). Often, there is evidence of abuse or neglect, but it is not sufficient to support a homicide conviction. Lack of sufficient evidence might also lead to a plea-bargaining agreement for a lesser charge.

Prior Abuse and Collateral Estoppel

After a case reaches trial, issues of admissibility of evidence arise. An issue particularly relevant to child homicides involving a protracted pattern of abuse is the admissibility of evidence of previous abuse. Two potential obstacles may hinder proving a past pattern of abuse. One is the doctrine of collateral estoppel, defined as:

> When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, (1970). Therefore, the Commonwealth may be barred from introducing evidence of an offense for which the defendant was previously tried and acquitted. Simon v. Commonwealth, 220 Va. 412, 415, 258 S.E.2d 567, 571 (1979). In a child abuse homicide, evidence of previous non-fatal abuse might be used to show a pattern of abuse or to show the cumulative effects of abuse. But if the defendant had already been tried and acquitted for the past incident, the prosecutor might not be able to introduce this evidence again in the homicide trial.

The doctrine of collateral estoppel is applied very narrowly in Virginia. Whether evidence used at the previous trial could be re-introduced depends upon whether a particular issue of fact was resolved in the earlier trial. For example, in Rogers v. Commonwealth a previous acquittal on abduction and attempted murder charges did not preclude the introduction of the same evidence in a rape trial, because it was unknown upon which facts the jury had based their earlier acquittals. 5 Va. App. 337, 343-44, 362 S.E.2d 752, 755-56 (1987). Therefore, it was not known which issues of fact had actually been resolved. Collateral estoppel does not apply unless that particular issue of fact was resolved by a prior judgment. Simon at 415, 258 S.E.2d at 571.

Prior Abuse and the Character Evidence Rule

A second obstacle to introducing evidence of prior abuse is the rule excluding evidence of the defendant's bad character. The

general rule is that evidence of other crimes and misconduct is inadmissible if offered merely to show that the defendant is the type of person who would be likely to commit the crime charged. Kirkpatrick v. Commonwealth, 211 Va. 269, 272, 176 S.E.2d 802, 805 (1970). This rule is based on the common law assumption that the defendant's bad character is not legally relevant to show that he or she committed the particular crime charged.

Exceptions to this rule are allowed on the grounds that evidence which might appear to be character evidence can be legally relevant to show something else (other than character). This is known as "independent basis of relevance." For example, evidence of prior misconduct might be relevant to show the feelings of the defendant toward his victim and the relationship between them, to show the defendant's motive or intent, to show a "modus operandi," or to show a chain of events that led up to the crime charged.

This exception to the general rule has been used to admit evidence of prior abuse in a child homicide case in Virginia. The court held that evidence of prior beatings of the child by the defendant was "relevant to establish the intent to do serious bodily harm to the child, to show defendant's feelings toward him and to indicate a pattern of conduct which led to [the child's] death." Evans v. Commonwealth, 215 Va. 609, 614, 212 S.E.2d 268, 272 (1975).

Another "independent basis of relevance" is "modus operandi." A "modus operandi" is a "signature" behavior which marks the crime as the handiwork of a particular criminal. It is relevant to show the defendant's identity. For example, in United States v. Woods an infant allegedly died from smothering. Examination of the body revealed cyanosis, a bluish discoloration of the skin resulting from inadequate oxygenation of the blood. Evidence of nine other children in the defendant's custody who had also exhibited cyanosis, seven of whom had died, was admissible to show the defendant's "modus operandi." 484 F.2d 127 (4th Cir. 1973).

Although the smothering of nine children might be admitted to show the defendant's "modus operandi," conduct which is generally violent or abusive would not be admitted. This is because such behavior is not distinctive enough to demonstrate a defendant's identity. For example, in Hagy v. Commonwealth the injuries leading to the victim's death were unrelated to the injuries received by two other children, so a distinctive "modus operandi" could not be shown. 222 Va. 599, 602-604, 283 S.E.2d 187, 190 (1981). The court held that this evidence of prior abuse was inadmissible because it was offered merely to show that the defendant was the type of person who abused children. Id. at 604, 283 S.E.2d at 190. Since the evidence concerned two other children, it was not relevant to show the relationship between the defendant and the victim, nor to show the defendant's conduct and

feelings toward the victim, nor to show motive or intent or any chain of events leading to the child's death. Id.

Syndrome Testimony

Another issue related to the character evidence rule which is currently being debated is the admissibility of expert testimony on the "Battering Parent Syndrome." This issue may emerge at some point in the future as a relevant consideration in child abuse prosecutions.

Medical testimony of the "Battered Child Syndrome" is fairly well accepted by courts in many states. (The admissibility of "Battered Child Syndrome" testimony in Virginia is still an unresolved issue.) However, most courts will not admit expert testimony regarding the corresponding "Battering Parent Syndrome." Comment, Syndrome Testimony in Child Abuse Prosecutions: The Wave of the Future? St. Louis E. Pub. L.R. 207 (1989). Courts primarily object to testimony on the "Battering Parent Syndrome" because it is an obvious violation of the character evidence rule. (The sole purpose of such testimony is to show that the parent is "an abusive person.")

Courts also object to expert testimony on the "Battering Parent Syndrome" because the syndrome lacks general acceptance in the scientific community. Id. at 224. However, some courts have hinted that if the Battering Parent Syndrome were considered scientifically accurate, it might be admissible in spite of the

character evidence rule. Id. citing State v. Loebach, 310 N.W.2d 58, 64, (Minn. 1981). If, for example, the Battering Parent Syndrome were elevated to the level of a diagnostic category in the DSM-III, it may be admitted as psychiatric testimony. Id. Currently, however, there is not enough conclusive research to give the syndrome scientific credibility.

Hearsay

The inadmissibility of hearsay testimony constitutes another barrier to the prosecution of child abuse homicides. Hearsay is defined as an out-of-court statement offered to prove the truth of the matter. Michie's Jurisprudence, Vol 7-B § 195 (1985). Hearsay is generally inadmissible on the grounds that it is unreliable. A number of exceptions exist, however. These exceptions are based on either the principle of necessity (i.e., there is no other means of obtaining the evidence) or on the principle that the exception offers a special guarantee of reliability. Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, (1980).

The hearsay issue is especially relevant to child abuse because the witnesses are frequently children. Depending upon their age and maturity, children may be considered incompetent to testify in a proceeding. Whitcomb, D., Shapiro, E. and Stellwagen, L., When the Victim is a Child: Issues for Judges and Prosecutors, National Institute of Justice, Department of Justice, August 1985 at 31-33. If children are incompetent to testify themselves, the only way their statements can be heard in court is if someone else

repeats them. In the course of an investigation, children may make relevant statements to relatives, friends, neighbors, and teachers, as well as to child protective services personnel and police. However, such persons may be prevented from presenting this testimony by the hearsay rule.

In some cases, a child's out-of-court statement may be covered by a hearsay exception. However, if a child's out-of-court statement did not happen to fall under one of the hearsay exceptions, and the child was considered incompetent to testify, that testimony would not be allowed into evidence.

Even when a child is considered competent to testify, he or she may not be considered credible as a witness. Comment, A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 Column L. Rev. 1745, 1750-52 (1983). Furthermore, young children's memories of events may fade quickly, and the child may have forgotten important details of the event by the time of trial. Id. If the child witness is also the victim (in cases of non-fatal abuse) or is a member of the same family as the victim, he or she may be pressured by parents to recant earlier statements. Id.

Children may be intimidated, not only by parents and relatives, but also by the courtroom setting and procedure. Id. Children are frequently confused by cross-examination and may respond inconsistently to leading questions out of a desire to placate the cross-examining attorney. Id. For all of these

reasons, prosecutions are made more difficult when key witnesses are children.

Special Child Hearsay Statutes

In order to address these problems, many states have adopted special child hearsay exceptions. Most states have confined the child hearsay exception to sexual abuse cases. Nevertheless, the problems encountered by using child witnesses in sexual abuse cases also apply in cases of physical abuse and neglect. Child fatalities are more likely to result from physical abuse and neglect than from sexual abuse. Therefore, if the special child hearsay exception were extended to cases of child homicide, the exception might make convictions easier to obtain when, for example, the victims had made previous statements describing abuse or the offenses were witnessed by other children.

Virginia has enacted several laws regarding child hearsay and the protection of child witnesses. In criminal proceedings, the Virginia Code allows for the use of two-way closed-circuit television under certain specified circumstances when the child victim is a witness. Code of Virginia, § 18.2-67.9 (Repl. Vol. 1989). This innovation allows a child to testify under somewhat less intimidating circumstances than the usual courtroom procedure. At the same time, the defendant's right to confront his accuser is maintained, since each party can see the other on television. This provision for two-way closed-circuit television is also applied in civil proceedings over issues such as abuse or neglect, as well as

in child custody and support cases (Code of Virginia, § 63.1-248.13.1).

Virginia's other child hearsay exceptions apply only in civil proceedings (Code of Virginia, §§ 63.1-248.13.2 and 63.1-248.13.3). Like most child hearsay statutes, they require that the child also testify, or that the child is unavailable to testify, as well as requiring sufficient indicia of reliability. Id. Section 63.1-248.13.2 of the Code of Virginia deals with the victim's out-of-court statements in a civil proceeding involving sexual abuse. The Code of Virginia, §63.1-248.13.3, allows for the use of video taped recordings of a child/victim's out-of-court statement in civil proceedings involving abuse, neglect, or custody when the victim is under the age of twelve. Since neither of Virginia's child hearsay statutes applies to criminal proceedings, they could not apply to homicide prosecutions.

The argument against extending a special child hearsay statute to include criminal proceedings is that the defendant is in greater jeopardy in a criminal proceeding than in a civil one. Therefore, hearsay should not be admitted as readily in a criminal proceeding as in a civil proceeding. Other states allow child hearsay statutes to apply in criminal proceedings. For example, Indiana's child hearsay statute applies to the crimes of child molesting, battery upon a child, rape, kidnapping, and confinement. Ind. Code Ann. § 35-37-4-6 (1985). Kansas's child hearsay statute applies

to any criminal proceeding where the child is alleged to be the victim of a crime. Kan. Civ. Proc. Code 60-460 (dd) (1982).

Given the difficulty of obtaining evidence in child abuse cases, child hearsay statutes can play an important role in obtaining convictions where the only witnesses of the abuse were children. When abuse results in a child's death, a child hearsay statute might be used to bring in evidence of prior abuse of the same child, of similar abuse to another child, or of the homicide itself when another child was a witness.

Summary

There are several potential evidentiary obstacles to the successful prosecution of homicides resulting from child abuse or neglect. First, in a crime which is usually private, it is difficult to obtain sufficient evidence to support a conviction or even to bring the initial charge. Second, the doctrine of collateral estoppel and the character evidence rule make it less likely that evidence of prior abuse will be admitted. If the prosecution wishes to show a pattern of abuse or the cumulative effects of abuse, evidence of prior abuse is essential. Third, when important witnesses are children, the prosecution faces special problems. Children might not be credible witnesses, might be intimidated and confused by the trial process, and might be pressured into not testifying by the defendant or other parties. Out-of-court statements by children might help prove that abuse occurred when in-court testimony is not feasible. But unless a

child's statement fits certain hearsay exceptions, it cannot be admitted into evidence. Special child hearsay exceptions have been codified in many states, including Virginia. However, Virginia's current statutory exceptions would not be applicable to homicide prosecutions. Taken together, these evidentiary obstacles create a barrier to the successful prosecution of homicides resulting from child abuse.

RECENT LEGISLATIVE CHANGES IN OTHER STATES

A number of states have recently amended their murder laws to address the issue of child homicide by abuse. During the course of the study, Committee staff contacted legislators and other state officials in southern states that had recently amended their murder statutes (Arkansas, Florida, Louisiana, Mississippi, and Tennessee). (See "References" on p. 81 for list of contacts.) The reason cited for the introduction of an amendment in each southern state was that a particularly heinous case of fatal child abuse captured media and legislative attention. In each of the cases, a capital or first degree murder conviction could not be obtained, despite the heinous nature of the crime. In Florida, for example, the McDougall case was a particularly grisly example of child torture and murder. (See Krupinski & Weikel, Death From Child Abuse and No One Heard (1986).) McDougall was convicted of second degree murder and aggravated child abuse. The defendant could not be convicted of first degree murder because a premeditated design to kill the child could not be proved. Likewise, in the Trexler case in Tennessee, the defendant could not be convicted of first degree murder because premeditation could not be proved. (See Singleton, Reporting Child Abuse- One Way to Help Stop It, Bristol Herald Courier, Sept. 11, 1988, at 1B.) In Arkansas, a first degree murder conviction was reversed because there was no evidence of premeditation in the defendant's beating death of his son, despite a long history of abuse. Midgett v.

State, 292 Ark. 278, 729 S.W.2d 410 (1987). Outrage at the law's inability to provide stricter criminal sanctions for such heinous crimes stimulated the introduction of amendments in all five southern states.

Florida was the only southern state in which a study was done prior to passage of their amendment. 1988 Fla. Laws § 782.04(2)(h). (See Florida House of Representatives, Bill Analysis of HB 135 (March 12, 1984).) The Florida study was composed of a fiscal impact analysis and a legal impact analysis. The fiscal analysis predicted that the bill would result in prison inmates serving increased time, which would then increase the state's cost of housing them. The predicted annual per diem cost from 1988 to 1998 was $128,480.00. Id.

The legal impact analysis cautioned that the addition of more felonies to the felony-murder rule would weaken the rule. Id. (Florida's amendment consisted of adding the felony of "aggravated child abuse" (§ 827.03) to the list of enumerated felonies in its first degree/capital murder statute. § 782.04(2)(h).) The legal impact analysis also criticized the proposed amendment because the change "would not constitute a visible improvement over existing language." Florida House of Representatives, Bill Analysis of HB 135. Despite this criticism, Florida's amendment was passed in 1984, one year after its introduction, with no changes.

When each of the southern states amended its law, it was done as a way of circumventing the "premeditation" requirement which had prevented the defendant in each of the cases from receiving a stricter penalty. Since many fatalities that result from child abuse appear to be unintentional, prosecutors frequently have difficulty proving "premeditation." In those cases, defendants are convicted of a lesser degree of murder than the degree which carries the "premeditation" requirement. By eliminating the premeditation requirement for first degree or capital murder in certain types of homicide resulting from abuse, these amendments effectively increase the punishment for such crimes. See 1988 Fla. Laws § 782.04(2)(h); Ark. Stat. Ann. § 5-10-102(a)(3)(1988); La. Rev. Stat. Ann. § 14:30 (1985); Miss. Code Ann. § 97-3-19(2)(f) (1983); Tenn. Code Ann. § 39-2-202 (1988).

Legislative Amendments in Other States: Three Basic Approaches

The states' amendments reviewed for this study incorporated essentially three basic approaches to circumventing the "premeditation" requirement:

- To define a special form of murder by abuse, see, e.g. Wash. Rev. Code § 9A.32.055 (1988);

- To include child abuse, or some special form of child abuse, as an enumerated felony in the state's first degree or capital felony-murder statute, see, e.g. 1988 Fla. Laws §782.04(2)(h); and

- To change the entire definition of first degree murder so that it no longer includes the elements of premeditation or specific intent to kill, see, e.g. La. Rev. Stat. Ann. § 14:30 (1985).

Defining a Special Form of Murder by Abuse

The first approach to circumventing the premeditation requirement (and thereby raising the penalty) is to define a special child abuse form of first degree murder. Tennessee defines this special form of first degree murder by (1) age of the child, (2) the number of incidents of abuse, (3) evidence of a pattern of abuse, and (4) in some cases, evidence of the cumulative effects of such abuse:

> It shall also be murder in the first degree to kill a child less than thirteen (13) years of age, if the child's death results from one (1) or more incidents of a protracted pattern or multiple incidents of child abuse committed by the defendant against such child, or if such death results from the cumulative effects of such pattern or incidents (Tenn. Code Ann. § 39-2-202 (1988)).

In comparison, other states include more general definitions of first degree murder by abuse. For example, Oklahoma's statute applies whenever,

> the death of a child results from the injury, torturing, maiming, or using of unreasonable force by said person upon the child... (Okla. Stat. tit. 21 § 701.7.C (1982).

Whenever states employ special definitions of first degree murder, they do so in a way that restricts the new statutes' applicability to some degree. Several statutes require a past pattern of abuse. See Minn. Stat. Ann. § 609.185(5) (1988) (past pattern of child abuse); Wash. Rev. Code § 9A.32.055 (1988) and Alaska Stat. §11.41.100(a)(2)(1988) (pattern or practice of assault or torture). Alaska goes on to define a pattern or practice of

assault or torture as the infliction of "serious injury to a child by at least two separate acts." § 1141.100(a)(2).

Other limiting language includes the requirement that there be evidence of "extreme indifference to the value of human life." Id. See also Minn. Stat. Ann. § 609.185(5) (1988); Wash. Rev. Code § 9A.32.055 (1988); Ark. Stat. Ann. § 5-10-102(a)(3) (1988) ("cruel and malicious indifference..."). This element is also present in the murder law of many states as the distinctive feature of "depraved heart murder." Eg. Miss. Code Ann. § 97-3-19(1)(b) (1988). (See discussion on p. 61.)

Another narrowing element that appears in statutes is the child's age. For example, although Tennessee's child abuse law applies to acts committed against any child under the age of eighteen (§ 39-4-401), the special homicide statute applies only to children under the age of thirteen. Tenn. Code Ann. § 39-2-202(a)(2). Elsewhere, the applicable age varies from twelve years to eighteen years. Cf. La. Rev. Stat. Ann § 14:30(a)(5) (under age twelve); Ark. Stat. Ann. § 5-10-102(a)(3) (under age fourteen); Utah Code Ann. §76-5-202(1)(d) (under age fourteen); Wash. Rev. Code §9A.32.055 (under age sixteen); Okla. Stat. tit. 21 § 701.7.C (under age eighteen).

Statutes also limit applicability by requiring that the pattern of abuse was inflicted on the particular homicide victim, as opposed to requiring a pattern of abuse generally or within a

family. See eg. Wash. Rev. Code § 9A.32.055 ("previously engaged in a pattern or practice of assault or torture of said child"). This limitation would affect cases where, for example, a parent who was accustomed to abusing an older child or a spouse decided to abuse a younger child for the first time and struck a fatal blow.

Other limiting language in special homicide statutes includes references to the method of homicide. For example, Oklahoma refers to "torturing, maiming, or us(e) of unreasonable force." Okla. Stat. tit. 22 § 701.7.C.

The Felony-Murder Approach

Those states which employ the felony-murder approach also limit the applicability of their amendment. Rather than drafting a special definition, however, these states rely upon the language that defines the underlying felony. For example, Florida added "aggravated child abuse" (§ 827.03) to the list of enumerated felonies in its first degree felony-murder statute. 1988 Fla. Laws § 782.04(2)(h). "Aggravated child abuse" is defined as:

> (1)...one or more acts committed by a person who:
> (a) Commits aggravated battery on a child
> (b) Willfully tortures a child
> (c) Maliciously punishes a child
> (d) Willfully and unlawfully cages a child.

The Florida felony-murder statute does not apply to the broad set of all child fatalities caused by abuse or neglect as defined in the state's felony child abuse statute.

Similarly, Utah's felony-murder statute incorporates only the subsection of its felony child abuse statute which refers to the conduct being done "intentionally and knowingly." Utah Code Ann. § 76-5-109(2)(a) (1983). Arizona and Mississippi take a comparable approach. Ariz. Rev. Stat. Ann. § 13-1105(A)(2) and § 13-3623 (1987); Miss. Code Ann. §§ 97-3-19(2)(f) and 97-5-39. Under these statutes, while the child's death may not be intended or inflicted knowingly, the abuse must be. In this way, states that take the felony-murder approach limit the applicability of their amendments. Knowledge, purpose, or intent to harm seem to be common characteristics of the underlying felonies.

Redefining First Degree Murder

The third approach to circumventing the "premeditation" requirement in child abuse homicides is to change the definition of first degree murder. This approach would relieve prosecutors of the need to prove premeditation, not only in certain types of child abuse homicides, but in all homicides of a certain type.

Some legal scholars have suggested that the "premeditated" criterion does not provide a sound basis for determining the severity of punishment to be imposed on a murder defendant. Model Penal Code and Commentaries § 210.2 (Revised Comments 1980). There are cases where extreme depravity may actually be revealed by the lack of premeditation. LaFave & Scott, Criminal Law § 7.7 (1986). For example, if the defendant has no motive or plan to kill anyone in particular, but manages to kill several people by firing into

a crowd, his or her conduct would be just as culpable as if he or she had formulated a specific plan.

In response to this type of unpremeditated homicide, some states have defined a form of first degree or capital murder known as "depraved heart murder." The distinguishing feature of depraved heart murder is that it is committed with an extreme and reckless disregard for human life. LaFave and Scott, Criminal Law § 7.4 (1986). For example, Mississippi's murder statute defines depraved heart murder as an illegal killing

> when done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual (§ 97-3-19(1)(b)).

As noted previously, several of the special child abuse homicide statutes include the criterion that the killing be committed "under circumstances manifesting cruel and malicious indifference to the value of human life." Ark. Stat. Ann. § 5-10-102(a)(3). By including this criterion, these statutes create a form of depraved heart murder which is only applicable to the killing of children. If depraved heart murder were incorporated into the basic definition of first degree murder, it would apply to the murder of adults as well as children.

As an alternative definition of first degree murder, some states use the language "intent to inflict great bodily harm."

Eg. La. Rev. Stat. Ann. § 14:30 (A). The language of "intent to inflict great bodily harm" is seen as a more practical alternative to the traditional "deliberate and premeditated" language that defines first degree murder. See annotation to La. Rev. Stat. Ann. § 14:30(A), quoting B. Cardozo, Law and Literature and Other Essays, 99-100(1931). It is more practical because it is easier for juries to understand than the traditional legal terminology. The legal meaning of "deliberate and premeditated" is not quite the same as the common literal meaning. For instance, juries may be instructed that if they find there was a great disparity of size and strength between the defendant and the victim, they may consider the murder to be premeditated. Clozza at 134, 321 S.E.2d at 279. "Disparity of size and strength" is not part of the average person's definition of "premeditated," which simply means "planned" to most people. Juries are better able to apply a legal concept when the language describing that concept is compatible with their own understanding. "Intent to inflict great bodily harm" is a straightforward phrase which juries can easily apply. Furthermore, if the words "deliberate and premeditated" were replaced by "intent to inflict great bodily harm," many more deaths that resulted from abuse would fit the definition of first degree murder.

Some scholars argue that it is unnecessary to include language of "intent to inflict great body harm" in the definition of first degree murder because such harmful conduct would be an example of

"extreme indifference to the value of human life." Model Penal Code and Commentaries § 210.2 (Revised Commentaries 1980). Thus, such a killing would qualify as "depraved heart murder." Id. On the other hand, if the defendant's intent were to inflict "minor" bodily harm, but the resulting harm were greater than he or she imagined possible (as, for example, in the shaking death of an infant), the defendant might not be found guilty of first degree murder when the definition required intent to do great harm.

In Louisiana, the old language of premeditation was replaced with "specific intent to kill or to inflict great bodily harm." La. Rev. Stat. Ann. §14:30. Children under the age of twelve years were then included as one of the four possible categories of victims. §14:30(A)(5). See Annotation to § 14:30. As with the other two approaches, this approach would not apply to all fatalities that resulted from abuse or neglect. The limitations of "extreme indifference to the value of human life" or "intent to inflict serious bodily harm" would restrict the law's applicability to the more heinous cases of death resulting from child abuse.

Judicial Response to Recent Amendments

Since all of the statutory amendments mentioned above have been passed in the 1980's, there has not been much opportunity for case law to develop. Case law would be most likely to develop when the language of a new statute is so controversial or ambiguous that courts of record would be obliged to interpret it.

Constitutionality is frequently an issue when a new criminal law is enacted. In Oklahoma, Florida, and Mississippi, amendments were challenged and upheld as constitutional. Drew v. State, 771 p.2d 224, 228 (Okla. Crim. App. 1989); Haag v. State, 513 So.2d 244 (Fla. App. 2 Dist. 1987); Faraga v. State, 514 So.2d 295, 301-03 (Miss. 1987).

In the same three states, felony-murder amendments were challenged as void because of the merger doctrine. In all three states, the amendments were upheld as not being subject to the merger doctrine. In Oklahoma, the court held that the merger doctrine did not apply because the legislature had clearly intended the use of unreasonable force against children to be punished as first degree murder. Schultz v. State, 749 P.2d 559, 561-62 (Okla. Crim. App. 1988) (citing Okla. Stat. tit. 21 §701.7(c)). Once the legislature had made its intentions clear, there was no need for the court to decide on the merger issue. Id. Likewise, the Florida court held that the clear legislative intent to punish aggravated child abuse resulting in death as first degree murder precluded the application of the merger doctrine. Mapps v. State, 520 So.2d 92, 93 (Fla. App. 4 Dist. 1988). In Mississippi, the court held that the merger doctrine did not apply because societal interests were different regarding the capital murder statute and the felonious child abuse statute; the child abuse statute was intended to protect, while the murder statute was intended to punish and act as a deterrent. Faraga at 302-03.

The related issue of double jeopardy has also arisen in Oklahoma. According to the double jeopardy doctrine of collateral estoppel, the state is barred from re-introducing evidence of an offense for which the accused has already been tried. Ashe at 443, 90 S.Ct. at 1194. In a child abuse murder prosecution under Oklahoma's § 701.7(c), the state was barred from introducing evidence of prior abuse because that abuse had resulted in a prior conviction. Hinton v. District Court of Oklahoma County 693 P.2d at 1278. In another case, the state was prohibited from prosecuting for first degree murder because the defendant had already been convicted of felony child abuse for the same abusive incident. Todd v. Lansdown, 747 P. 2d 312, 315 (Okla. Crim. App. 1987) (The child died in November of a beating inflicted in January of the same year.) Id. at 313. The court held that for double-jeopardy purposes, child abuse and first degree murder-child abuse constitute the "same offense." Todd at 314.

Under Mississippi's amendment (§ 97-3-19(2)(f)), the evidentiary issues of hearsay and the admissibility of past abuse have arisen. In Houston v. State, the court held that evidence of prior abuse was inadmissible to prove the child's murder because the prior abuse was too remote in time to have any bearing on whether the defendant committed murder several months or years later. Id. at 605-08. The evidence in question concerned abusive incidents occurring between fifteen months and eight years before the child's death. Id. The court did note that if the abuse had

occurred as part of a continuous pattern, it would have been admissible to show the cumulative effects of abuse. Id. at 607, citing Cardwell v. State, 461 So. 2d 754, 759-60 (Miss. 1984); and Johnson v. State, 475 So. 2d 1136, 1143 (Miss. 1985).

The second evidentiary issue concerns hearsay testimony regarding the victim's statements about prior abuse. Houston at 608-09. Mississippi's special child hearsay exception applies to spontaneous statements made in sex abuse cases. Id. Although the court conceded that there was no reason why the exception should not apply equally to physical abuse cases, it nevertheless held that the child's out-of-court statements were inadmissible because they were not "spontaneous." Id. According to the court, the statements lacked spontaneity because they were made in response to questioning by teachers or counselors. Id.

PROPOSED AMENDMENTS TO VIRGINIA'S HOMICIDE STATUTES: THREE OPTIONS FOR DISCUSSION

In addition to reviewing amendments adopted by other states, the Committee discussed Virginia's homicide statutes. The key points made in the Committee's deliberations are summarized below.

Generally, criminal sanctions are imposed for three reasons: to deter criminal behavior; to protect society from criminal behavior; and to punish convicted criminals. When considering amendments to Virginia's homicide statutes, consideration should be given to the degree to which the current statute, and subsequent penalties, achieve these goals and to what degree proposed changes would serve to deter, protect and punish.

The extent to which Virginia's current felony or homicide statutes deter abuse or neglect is unclear. The use of physical punishment in the home is an accepted form of disciplining a child; in some communities physical discipline may even be encouraged or expected. Some parents may be unable or unwilling to make a distinction between discipline and abuse or neglect. Additionally, some perpetrators may not recognize their behavior as abusive, illegal, or as having potentially fatal consequences. If actions ar not viewed as being extremely harmful and illegal, the possibility of criminal punishment may have little impact on deterring that behavior.

The goal of deterring abuse or neglect may be better served by increased awareness on the dynamics of abuse, on the danger of abuse and neglect, and on alternative behaviors than by imposing stricter penalties.

In cases of fatal abuse or neglect, incarceration of the convicted perpetrator may not, to any great extent, protect other children from harm. If the case has gone through the child protective services system, it is likely that the siblings of the victim (if there are any) will be removed from the custody of the perpetrator, regardless of the imposition of any criminal sanction. Unless the penalty is a life sentence without parole, it will be impossible to keep the perpetrator from ever having contact with other children. Further, because the overwhelming majority of fatal abuse occurs without the intent to kill, treatment for abusers may serve to protect children better than severe criminal penalties for convicted perpetrators.

Punishment of convicted abusers could be the most salient reason to consider amending Virginia's homicide statutes. The apparent lack of what the public perceives as justice was the impetus for this study. Punishment may have emerged as an issue prior to the study because there is little consistency in how the judicial system responds to cases involving the death of a child as a result of abuse or neglect.

Some of the cases reviewed for this study gained considerable attention from the media. Many of these media accounts implied that the punishment for convicted perpetrators was not severe enough for having caused the death of a child. While there may be some demand for more severe penalties, many people hold the converse attitude that the death of a child is punishment "enough" for a parent; the tremendous loss of a child is such that further or more severe punishment of a parent is not considered appropriate. Although difficult to document precisely, it appears that this "enough-punishment" attitude may influence some of the more lenient decisions handed down by judges and juries.

The study's emphasis, as determined by the legislative mandate, was on punishment via appropriate criminal sanctions. In keeping with this mandate, and in light of the previously identified barriers to prosecution, the Committee spent a considerable amount of time discussing three possible approaches to amending Virginia's first degree homicide statute, § 18.2-32.

Amending the First Degree Murder Statute to Include Death Resulting from Felony Child Abuse or Neglect

The first approach would use the current language of the felony child abuse and neglect statute (§ 18.2-371.1) to define the death of a child resulting from such felony as first degree murder. Following this approach, the statute might read as follows:

> **§ 18.2-32. First and second degree murder defined; punishment.**--Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the Commission of,

> or attempt to commit, arson, rape, forcible sodomy, inanimate object sexual penetration, robbery, burglary or abduction, except as provided in § 18.2-31, is murder of the first degree, punishable as a Class 2 felony. Any parent or other person responsible for the care of a child under the age of eighteen who by willful act or omission or by refusal to provide any necessary care for the child's health causes or permits the death of such child shall be guilty of murder in the first degree.
>
> All murder other than capital murder and murder in the first degree in murder of the second degree and is punishable as a Class 3 felony.

There are several advantages to the approach of amending the first degree murder statute to include death by felony child abuse or neglect. The amendment would eliminate the need for prosecutors to prove the willful, deliberate, and premeditated intent to kill. The amendment adopts an approach sanctioned by the General Assembly: to define murder committed in the course of certain felonies as first degree murder. The amendment also relies on existing language in the Code: the felony child abuse statute, § 18.2-371.1. The use of existing language increases the likelihood that the new statute will be understood and interpreted consistently while reducing the likelihood that the amendment will be challenged in the courts.

The amendment, however, may be too broad. This amendment goes beyond protracted patterns to include all willful acts of abuse or neglect. While the Committee recognizes the public's demand for "justice," this approach would subject all perpetrators of fatal,

sudden acts to charges of first degree murder (for example, the teen mother who panics and abandons the infant upon birth).

The felony murder approach is only as sound as the felony it is based upon. Obtaining a conviction for felony child abuse is not easy in Virginia. Several cases have been lost or charges dismissed because there was insufficient evidence to prove the parents willfully abused or neglected their children. In other words, the defense attorney was able to convince the jury that the parent did not intend to abuse or neglect the child. All obstacles encountered when prosecuting for a felony become obstacles to the conviction of first degree murder when that act can be tried as felony-murder.

Amending the First Degree Murder Statute to Include Death Resulting from Abuse with Intent to Inflict Great Bodily Harm

This approach would use modified language from the current felony child abuse and neglect statute (§ 18.2-371.1) to define death from such abuse or neglect with intent to inflict great bodily harm as first degree murder. Such an amendment might result in the statute reading as follows:

> **§ 18.2-32. First and second degree murder defined; punishment.**--Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate object sexual penetration, robbery, burglary or abduction, except as provided in § 18.2-31, is murder of the first degree, punishable as a Class 2 felony. Any parent or other person responsible for the care of a child under the age of eighteen who by willful act or omission with intent to inflict great bodily harm or by repeated refusal

to provide any necessary care for the child's health causes or permits the death of such child shall be guilty of murder in the first degree.

All murder other than capital murder and murder in the first degree is murder of the second degree and in punishable as a Class 3 felony.

This approach would also relieve prosecutors from the burden of proving an intent to kill. Juries may have a better understanding of the phrase "intent to inflict great bodily harm" than the legal implication of "premeditated intent to kill." This amendment also specifically addresses situations involving neglect over a period of time.

This approach also has broad implications. If it can be proven that the motives were to do great harm (but not kill), perpetrators whose actions lead to the death of a child can be found guilty of first degree murder. (Defense attorneys may be successful in proving that the intent was to do minor bodily harm).

Amending the First Degree Murder Statute to Include Death Resulting From Multiple Incidents of Felony Child Abuse or Neglect

The third approach would use modified language from the current statute (§ 18.2-371.1) to define death after multiple incidents of felony child abuse or neglect as first degree murder. The statute might read as follows if amended along these lines:

§ 18.2-32. First and second degree murder defined; punishment.--Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate object sexual penetration, robbery, burglary or abduction, except as provided in §18.2-31, is

> murder of the first degree, punishable as a Class 2 felony. Any parent or other person responsible for the care of a child under the age of eighteen who by willful act or omission or by refusal to provide any necessary care for the child's health causes or permits the death of such child, and who by willful act or omission or by refusal to provide any necessary care for the child's health has previously caused or permitted the life or health of such child to be seriously injured, shall be guilty of murder in the first degree.
>
> All murder other than capital murder and murder in the first degree is murder of the second degree and is punishable as a Class 3 felony.

This proposal contains some of the same advantages as the other options in that it incorporates existing language and eliminates the need to prove willful, deliberate, and premeditated intent to kill. This amendment is narrower in scope than the other options. Prosecuting attorneys must prove the death was the result of a willful act of abuse or neglect and that the perpetrator had previously willfully abused or neglect the child/victim.

One way a prior incident of abuse may be determined is to introduce as evidence a prior CPS founded disposition. Because a conviction of first degree murder would be contingent on proving a prior act of abuse or neglect, it is likely that this amendment would increase the number of appeals of CPS dispositions. The increase in appeals may overly burden the CPS system and reduce time spent on investigations by involving more workers in the appeal process.

The Committee sought the input of the Commonwealth's Attorney Services and Training Council in regard to the possible amendments to the first degree homicide statute. In the opinion of the Council, an amendment is not warranted. The Council's position is that the current statutes provide sufficient tools for prosecution. The Council did provide the Committee a fourth proposal. The proposal follows:

> **§ 18.2-271.1. Abuse and neglect of children; penalty.** - Any parent or other person responsible for the care of a child under the age of eighteen who by willful act or omission or by refusal to provide any necessary care for the child's health causes or permits the life or health of such child to be seriously injured shall be guilty of a Class 5 felony. Any parent or other person having care, custody, or control of a minor child who is in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall not, for that reason alone, be considered in violation of this section. <u>If any person causes the death of a child while committing an offense in violation of this section, he shall be guilty of a Class 2 felony</u>.

(A Class 2 felony carries the same penalty as first degree murder.)

<u>Recommendation</u>

After careful deliberation, the Study Committee agreed <u>not</u> to recommend any amendments to the criminal section of the <u>Code of Virginia</u>. This was not an easy decision for the Committee to reach. However, in response to the legislative request to the Committee, all information reviewed leads to the conclusion that

the existing statutes do provide for appropriate criminal sanctions for convicted perpetrators. The problems identified do not result from defects in the statutes but rather from differing understandings and interpretations of the statutes and lack of cooperative investigations and retrieval of evidence among local agencies. The Committee believes that the fatality review teams can promote the education necessary to understand the statutes, improve coordination among local agencies, and ultimately lead to appropriate criminal convictions and sentencing of perpetrators.

OTHER ISSUES

If the dynamics of child abuse and neglect were placed on a continuum, the death of a child would represent the negative end of the continuum. Because these deaths are part of such a complex continuum, several issues not directly related to the Committee's primary charge surfaced during the study. The Committee's discussions of these issues are briefly summarized below.

Reporting Laws

Certain persons in the Commonwealth are required by §63.1-248.3 of the Code of Virginia to report suspected child abuse or neglect to the local department of social services. The reporting requirement includes any professional who works with children. In at least one case reviewed for this study, a professional working with a victim's sibling did suspect that abuse was occurring in the family but made no report to child protective services (documentation of the suspicion was discovered after the death). The obvious question is: if the professional had reported his suspicion, would the child's death have been prevented?

Members of the Committee expressed concern that some professionals working with children may be unaware of their legal obligation to report suspected child abuse or neglect. The language of the law may also be misunderstood; some professionals may think that a report is required only when child abuse or

neglect is known to be a fact, while the law actually requires reports of suspected abuse. Finally, members of the Committee suggested that some professionals may lack sufficient expertise to identify evidence of maltreatment, and others may simply be unwilling to comply with the requirement.

Greater public awareness of the requirement for professionals to report suspected maltreatment may be necessary. Such education should emphasize the important role professionals can play in protecting children from harm. Additionally, the penalty for failure to report suspicions to CPS is a fine of up to $500.00. No one on the Committee was aware of any prosecutions for failure to report. Enforcement of this law and imposition of penalties for those found guilty of not reporting may increase the number of professionals complying with the law.

Statement From the Virginia Chapter - American Academy of Pediatrics

The Committee received a combined statement from the Virginia Chapter of the American Academy of Pediatrics and the Virginia Department of Health. In regard to child deaths from abuse or neglect, the statement recommends that:

1. emphasis be placed on prevention of child fatalities;

2. complaints from hospitals and physicians be given closer attention in investigations;

3. guidelines should be developed and implemented for identification of the subset of children at risk for fatal incidents of abuse or neglect, including

medical neglect (such risk identification factors should consider the most vulnerable age group, type of injury, characteristics of the abuser, source of referral, etc.);

4. children identified by such risk factors as being vulnerable should be removed from the abusing family for a specified duration or permanently.

Statement From VOCAL - Virginia, Inc.

The Committee, via the Department for Children, received communication from Victims of Child Abuse Law (VOCAL) - Virginia, Inc. The recommendations of this organization were to improve the investigation of all reports of child abuse and neglect and to expand prevention services.

REVIEW OF RELATED VIRGINIA STUDIES

During the past five years, the Virginia General Assembly, the Department of Social Services, and the Governor's Advisory Board on Child Abuse and Neglect have conducted a variety of studies on child abuse and neglect. These studies pose recommendations for improving Virginia's response to suspected and founded cases of child maltreatment. Unfortunately, fiscal and other constraints have prevented implementation of some of these recommendations. Among the past studies are:

- Protecting Children From Abuse: Future Directions, Report of the Governor's Advisory Committee on Child Abuse and Neglect, February 1985.

- CPS Training Programs in Virginia 1981-1986: Evaluation and Future Directions, Department of Social Services, February 1987;

- Caseload Standards Study, Bureau of Child Welfare Services, Department of Social Services, May 1987;

- House Document No. 18, 1988, Report of the Study on the Feasibility of the Development of a Behavioral Profile to Screen Prospective Workers in Child Caring Positions;

- Study of Child Abuse/Neglect Fatalities in Virginia, 1986-87, Department of Social Services, March 1988;

- House Document No. 47, 1989, Report of the Joint Subcommittee Studying Child Abuse Reporting and Investigation Procedures;

- Case Review of Unfounded Complaints from September-November, 1988, Bureau of Child Welfare Services, Department of Social Services, May 1989;

Implementation of the recommendations from these studies could have a significant impact on the prevention and treatment of child

abuse and neglect and ultimately help to prevent child deaths from maltreatment. Some of these studies address the issues raised in Committee discussions which were not related to the study mandate. Several draw similar conclusions: **improved training of CPS workers is needed; inter-disciplinary training should be expanded; and staffing levels for local CPS units should be increased.**

Recommendation

The Committee agreed that these past studies contain a wealth of sound information for the improvement of Virginia's system for protecting children. Follow-up of the past studies is warranted. Therefore, the Study Committee recommends that staff to the House Committee on Appropriations and Senate Committee on Finance develop a follow-up report on the studies conducted in Virginia related to child abuse and neglect. The report should:

- identify recommendations that have been implemented;
- review recommendations for increased training of CPS workers and identify other recommendations that have gone without action;
- include a fiscal impact statement for implementation of the remaining recommendations; and
- contain a plan for implementing the recommendations and tasks for improvement of the child protective services system (to be developed cooperatively with the Commissioner of Social Services).

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APPENDICES

Agencies	Number of Cases
Child Protective Services	2
Medical Examiner	1
Commonwealth's Attorney	1
Law Enforcement	5
CPS/Medical Examiner	3
CPS/Commonwealth's Attorney	2
Medical Examiner/ Law Enforcement	1
Commonwealth's Attorney/ Law Enforcement	2
CPS/Medical Examiner/ Commonwealth's Attorney	1
CPS/Medical Examiner/ Law Enforcement	6
CPS/Commonwealth's Attorney/Law Enforcement	7
Medical Examiner/ Commonwealth's Attorney/ Law Enforcement	4
CPS/Medical Examiner/ Commonwealth's Attorney/ Law Enforcement	55
	90

APPENDIX B

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend the Code of Virginia by adding in Chapter 8 of Title 32.1 an article numbered 1.1., consisting of sections numbered 32.1-288.1 through 32.1-288.3, relating to review of suspected child abuse and neglect fatalities.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 8 of Title 32.1 an article numbered 1.1., consisting of sections numbered 32.1-288.1 through 32.1-288.3 as follows:

Article 1.1.

Review of Suspected Child Abuse or Neglect Fatalities.

§ 32.1-288.1. Local fatality review teams; duties; membership.--A. Upon the death of any child which is suspected to result from child abuse or neglect, a local fatality review team shal convene promptly to investigate such death in accordance with the protocol for such investigations developed by the State Fatality Review Team and shall report on such investigation to the State Fatality Review Team.

B. The local fatality review team shall be composed of a representative of the department of social services' child protective services program established pursuant to § 63.1-248.6, a representative of the local law-enforcement agency, the local medical examiner, and the attorney for the Commonwealth.

§ 32.1-288.2. State Fatality Review Team; membership; powers ar

duties.--A. A State Fatality Review Team is hereby created which shall be composed of the Commissioner of the Department of Social Services, the Chief Medical Examiner, the Attorney General, and the Superintendent of State Police, or their designees, and representatives of the Commonwealth's Attorneys Services and Training Council, the Virginia Association of Chiefs of Police, and the Virginia State Sheriffs Association.

B. The State Fatality Review Team shall meet at least quarterl . Its powers and duties shall be as follows:

1. Develop a protocol for operation of local fatality review teams;

2. Monitor and review the work of the local fatality review teams and request local agencies to conduct further investigation of any case if such a need is identified;

3. Promote interdisciplinary education and training with respec to fatal child abuse and neglect;

4. Identify trends and policy needs with respect to fatal child abuse and neglect;

5. Make recommendations to the Governor and the General Assembl annually regarding fatal child abuse and neglect; and

6. Prepare a biennial report for the Governor and the General Assembly on the work of state and local fatality review teams and on the status of criminal penalties in child abuse cases which result in fatalities.

§ 32.1-288.3. Same; administrative support.--The Department for Children shall provide administrative support to the State Fatality Review Team and perform such other services as the Team may require i executing its powers and duties.

SENATE JOINT RESOLUTION NO.....

Requesting the staffs of the House Appropriations Committee and of the Senate Committee on Finance to develop a follow-up report on the studies conducted in the Commonwealth related to child abuse and neglect.

WHEREAS, the 1989 General Assembly directed the Department for Children, in cooperation with other agencies, to review cases of child deaths and to recommend appropriate criminal sanctions for protracted abuse resulting in the death of a child; and

WHEREAS, the committee organized to undertake such study found that during the past five years, the General Assembly, the Department of Social Services, and the Governor's Advisory Board on Child Abuse and Neglect have conducted studies of child abuse and neglect; and

WHEREAS, these studies recommended improvements in procedures in the Commonwealth to respond to suspected and founded cases of child abuse and neglect, but fiscal and other constraints have prevented implementation of some of these recommendations; and

WHEREAS, implementation of the recommendations from these studies could have a significant impact on the prevention of child abuse and neglect and help to prevent child deaths from maltreatment; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the staffs of the House Appropriations Committee and of the Senate Committee on Finance review and report on the studies conducted in the

Commonwealth related to child abuse and neglect. The report shall include but not be limited to review of the following studies:

1. Protecting Children From Abuse: Future Directions, Report of the Governor's Advisory Committee on Child Abuse and Neglect, February 1985;

2. CPS Training Programs in Virginia 1981-1986: Evaluation and Future Directions, Department of Social Services, February 1987;

3. Caseload Standards Study, Bureau of Child Welfare Services, Department of Social Services, May 1987;

4. Report of the Study on the Feasibility of the Development of a Behavioral Profile to Screen Prospective Workers in Child Caring Positions, House Document No. 18, 1988;

5. Study of Child Abuse/Neglect Fatalities in Virginia, 1986-87, Department of Social Services, March 1988;

6. Report of the Joint Subcommittee Studying Child Abuse Reporting and Investigation Procedures, House Document No. 47, 1989;

7. Case Review of Unfounded Complaints from September-November, 1988, Bureau of Child Welfare Services, Department of Social Services, May 1989.

The report shall, at a minimum:

1. Identify recommendations that have been implemented;

2. Review recommendations for increased training of child protective service workers and identify other recommendations that have not been implemented;

3. Include a fiscal impact statement for implementation of the remaining recommendations; and

4. Contain a plan, to be developed cooperatively with the Commissioner of Social Services, for implementing the recommendations

for improvement of the child protective services system.

The committee staffs shall report their findings and recommendations to the 1991 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for processing legislative documents.

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