



COMMONWEALTH of VIRGINIA

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The Honorable Charniele L. Herring
Member, House of Delegates
Post Office Box 11779
Alexandria, Virginia 22312

Dear Delegate Herring:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask, based upon four hypothetical factual scenarios, (1) whether a mature or emancipated minor may seek a protective order pursuant to §§ 16.1-253.1, 16.1-253.4, 16.1-279.1, 19.2-152.8, 19.2-152.9, or 19.2-152.10; and (2) whether law enforcement officers may seek emergency protective orders pursuant to §§ 16.1-253.4 and 19.2-152.8 on behalf mature or emancipated minors who are victims of domestic violence (family abuse) or stalking, sexual assault, or other acts of violence.

Response

It is my opinion that an emancipated minor may file petitions for protective orders pursuant to the applicable statutes, and a minor may seek an emergency protective order in certain situations, but that a minor who has not been emancipated, however mature that individual may be, can seek a protective order only through a next friend. It further is my opinion that law enforcement officers may file petitions for emergency protective orders on behalf of minors who are victims of family abuse or stalking, sexual assault or other acts of criminal violence.

Background

For purposes of your request, you define "mature minor" as "a minor who is mature enough and well informed enough to have his or her choices respected independent of third parties." You further define "emancipated minor" as:

[A] minor emancipated by: (i) entry into a valid marriage, even though the marriage may have been terminated by dissolution; (ii) active duty with any of the Armed Forces of the United States; (iii) willingly living separate and apart from his or her parents or guardian, with the consent or acquiescence of the parents or guardian; or (iv) entry of an order of

emancipation pursuant to Article 15 of Title 16.1 of the Code of Virginia (§ 16.1-331 *et seq.*).¹

Two of your scenarios relate to protective orders issued pursuant to §§ 16.1-253.1, 16.1-253.4 and 16.1-279.1, and the other two refer to §§ 19.2-152.8 through 19.2-152-10. I will describe each in turn.

In the first scenario, a 16-year-old mother, who is living at home, has been punched in the face by the 18-year-old father of her child. The teen mother believes that there is danger of further violence and wants a protective order to prohibit further acts of abuse and to order the batterer to stay away from her home and school. The teen mother's parents believe that she is overreacting and that a protective order is not necessary. You indicate that the teen mother is a "mature minor" based upon your definition. You relate that she is not a "child in need of supervision" and the alleged acts of violence do not constitute child "abuse or neglect" as defined in § 16.1-228.

Next, you relate that a 16-year-old married her 16-year-old boyfriend without the consent of their parents. Although the marriage was void, the couple was allowed to live together as "man and wife" in the house of the boy's parents. Just after they both turned 17, the "husband" began engaging in a pattern of behavior that placed the "wife" in reasonable fear that he would cause her bodily harm.

Turning to §§ 19.2-152.8 through 19.2-152.10, you describe a 17-year-old college freshman, living in an on-campus dormitory, who is from another state and who returns home only on school holidays, but who is a dependent for tax purposes. You state the student is being stalked by a classmate who also lives on campus. A warrant for the arrest of the alleged perpetrator has been issued. The alleged stalker also lives on campus. The student who is being stalked wants the alleged perpetrator to be ordered to stay out of the dorm where the student lives and to stay at least 100 yards away from the student at all times.

In your final scenario, you relate that a 17 year-old high school senior is sexually assaulted by a 17-year-old classmate. A warrant for the arrest of the alleged perpetrator has been issued. The victim's parents are apprehensive about pursuing charges because of the impact it may have on their child's life. The victim, however, wants to pursue the criminal charge and obtain a civil protective order to bar further acts of violence and keep the alleged perpetrator away.

Applicable Law and Discussion²

Sections 16.1-253.1, 16.1-253.4 and 16.1-279.1 apply to the first two scenarios. These sections authorize the issuance of preliminary, emergency and permanent protective orders, respectively, in cases of family abuse. "Family abuse" is defined as:

[A]ny act involving violence, force, or threat including, but not limited to, any forceful detention, which results in bodily injury or places one in reasonable apprehension of

¹ I note that your definition tracks the language of § 16.1-241(V), which defines an "unemancipated minor" for purposes of judicial authorization for obtaining an abortion by a juvenile. What constitutes emancipation as a general matter, however, is governed by §§ 16.1-331 through 16.1-334, which additionally provide that the minor living separate and apart from his parents or guardian, with the consent or acquiescence of the parents or guardian must be "capable of supporting himself and competently managing his own financial affairs." VA. CODE ANN. § 16.1-333 (2010).

² Although you describe four distinct scenarios, general principles apply to each of them equally.

bodily injury and which is committed by a person against such person's family or household member.^[3]

Because the definition of "family and household member" includes "any individual who has a child in common with the person, whether or not the person and that individual have been married or have resided together at any time," the teen mother falls within the scope of the protection afforded by such orders. Also, the underage "wife" will meet the definition as an "individual who cohabits or who, within the previous 12 months, cohabited with the person,"⁴ provided she can show that the totality of the circumstances demonstrate the required elements of cohabitation.⁵ Therefore, because the young women in the first two scenarios qualify as victims of family abuse, they could be afforded the security of a protective order.

With regard to the final two victims you describe, §§ 19.2-152.8, 19.2-152.9 and 19.2-152.10 authorize the issuance of emergency, preliminary and final protective orders, respectively, in cases of stalking, sexual battery, and criminal offenses resulting in serious bodily injury to the alleged victim. Unlike protective orders issued for family abuse, to obtain a protective order for stalking, sexual battery or serious bodily injury, a warrant first must be issued for the arrest of the alleged offender.⁶ You note in both scenarios that the required warrant has been issued.

Whether an individual is entitled to obtain a protective order, however, is a question distinct from whether the person may request the issuance of such an order. Protective order proceedings are civil in nature. In civil matters, minors who have not been legally emancipated are considered to be under a disability.⁷ At common law, minors were unable to sue or to be sued in their own capacities.⁸ The common law, unless repealed by statute, remains part of the law of Virginia.⁹ Section 8.01-8 permits a

³ Section 16.1-228 (2010).

⁴ *Id.* (emphasis added).

⁵ *Rickman v. Commonwealth*, 33 Va. App. 550, 557, 535 S.E.2d 187, 191 (2000) (analyzing whether there was sufficient evidence of cohabitation to uphold the defendant's conviction under § 18.2-57.2 for assault and battery against a family or household member). In applying § 16.1-228, the court identified the essential elements of "cohabitation" as "(1) sharing of familial or financial responsibilities and (2) consortium[;]" and in applying a "totality-of-the-circumstances analysis" further guided:

Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets. Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations. Other factors appropriate for consideration include the length and continuity of the relationship.

Id. (citations omitted). These factors, however, are not the only factors for consideration; "they merely provide guidance in assessing the relationship between the abuser and the victim." *Cowell v. Commonwealth*, 2005 Va. App. Lexis 42, *10, No. 3198-09-1 (Va. Ct. App. 2005) (unpublished).

⁶ *See id.*

⁷ VA. CODE ANN. § 8.01-2 (2007); *See* § 16.1-334 (2010). *See also* WILLIAM H. BRYSON, BRYSON ON VIRGINIA CIVIL PROCEDURE, § 5.02[5] (4th ed. LexisNexis Matthew Bender 2010) ("A person below the age of eighteen years is an infant. Infants are not sui juris and thus lack the capacity to sue and defend in court without the aid of an adult.").

⁸ *See Lineberry v. Town of Mebane*, 13 S.E.2d 429, 430 (N.C. 1941) ("At common law an infant was under disability and without legal capacity to contract or to act in his own name in asserting a right in any legal proceeding. He could neither sue nor defend a suit in his own name.").

⁹ VA. CODE ANN. § 1-200 (2008).

minor to sue, provided the child does so by his “next friend,” who may be one or both of his parents.¹⁰ A minor also may initiate suit if he or she is emancipated.¹¹ To be deemed emancipated, a minor of at least 16 years of age must demonstrate to the appropriate court that he either has entered into a valid marriage, is on active duty with the U.S. military, or willingly lives separate and apart from his parents or guardian, with their consent or acquiescence, and is self-supporting and can manage his own financial affairs.¹² There is no provision authorizing “mature minors” to initiate a legal action.

Your scenarios do not indicate that any of the victims have been declared emancipated by court order. Although the out-of-state college student lives separate and apart from his parents with their consent, the student is still dependent on them for his support, so the student cannot be deemed emancipated. Also, although the 16-year-old girl “married” her boyfriend, the marriage is void under Virginia law because their parents did not consent to it.¹³ Because emancipation requires a valid marriage, the teen “wife” remains a minor. As such, the persons in the fact patterns you present may be describable as “mature minors,” but each remains subject to the established legal disability with respect to minors instituting litigation.

With respect to *emergency* protective orders, the General Assembly expressly has authorized persons who are victims of sexual battery, aggravated sexual battery, stalking or a criminal offense resulting in a serious injury to come before a magistrate and obtain an emergency protective order, provided of course, that the requirements set forth in the statute are met.¹⁴ A person, including a juvenile, who is subjected to family abuse may similarly be able to obtain an emergency protective order from a magistrate.¹⁵

Other, nonemergency protective orders contemplate the filing of a pleading in court.¹⁶ To file a petition, one must have legal standing to do so. Given the common law rule, absent a statute to the contrary,¹⁷ a minor may not initiate suit on his own behalf without the aid of his next friend. Thus, absent statutory authority allowing a minor to bring a legal action, a mature minor must file the required petition by a next friend. Such petitions can be handled through the Court Service Unit, which is a division of the Department of Juvenile Justice. In sum, aside from an emergency protective order obtained from a

¹⁰ Section 8.01-8 (2007). Cf. *Cook v. Radford Cmty. Hosp.*, 260 Va. 443, 450, 536 S.E.2d 906, 910 (2010) (rejecting proposition that precedent held that a minor’s suit without a next friend was valid).

¹¹ Section 16.1-334(3).

¹² Section 16.1-333 (2010).

¹³ VA. CODE ANN. §§ 20-45.1; 20-48; 20-49 (2008).

¹⁴ VA. CODE ANN. § 19.2-152.8 (Supp. 2010). Specifically, the victim of stalking or sexual battery must state under oath that he or she has been subjected to stalking, sexual battery, aggravated sexual battery or a criminal offense resulting in sexual battery, and the judge or magistrate must find based on the evidence that “(i) there is probable danger of a further offense being committed by the respondent against the alleged victim and (ii) a warrant for the arrest of the respondent has been issued.” *Id.*

¹⁵ Section 16.1-253.4(B).

¹⁶ Cases in the juvenile and domestic relations courts are initiated by the filing of a petition. See § 16.1-260 (2010). Similarly in general district courts, cases are initiated by the filing of a pleading. Sections 16.1-79, 81 (2010).

¹⁷ See, e.g., §§ 16.1-241(G) (2010) (petition by a child to obtain required treatment, rehabilitation or other services); 16.1-241(V) (2010) (petition by juvenile seeking judicial authorization for an abortion); 16.1-331 (2010) (petition by minor for order of emancipation).

magistrate, the juveniles in the scenarios where the parents oppose the issuance of a protective order would be able to obtain a protective order, but they would require a next friend to proceed.

Finally, §§ 16.1-253.4(D) and 19.2-152.8(D) explicitly provide that a “law-enforcement officer may request an emergency protective order pursuant to th[e] section.”¹⁸ I therefore conclude that a law-enforcement officer may file a petition for an emergency protective order on behalf of the minor in each of your scenarios.

Conclusion

Accordingly, it is my opinion that an emancipated minor may file petitions for protective orders pursuant to the applicable statutes, and a minor may seek an emergency protective order in certain situations, but that a minor who has not been emancipated, however mature that individual may be, can seek a protective order only through a next friend. It further is my opinion that law enforcement officers may file petitions for emergency protective orders on behalf of minors who are victims of family abuse or stalking, sexual assault or other acts of criminal violence.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink, appearing to read "Ken C II", with a stylized flourish at the end.

Kenneth T. Cuccinelli, II
Attorney General

¹⁸ Sections 16.1-253.4(D) and 19.2-152.8(D).