Through Advocacy, Education, Litigation the Virginia Poverty Law Center (VPLC) breaks down systemic barriers keeping low-income Virginians in the cycle of poverty

RECENT DEVELOPMENTS IN POVERTY LAW: DOMESTIC AND SEXUAL VIOLENCE

Presented by Susheela Varky
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Reality D.V.—Domestic Violence in Appalachian Culture
sponsored by Southwest Virginia Legal Aid Society (SVLAS)



Through Advocacy, Education, Litigation

The Virginia Poverty Law Center (VPLC) breaks down systemic barriers keeping low-income Virginians in the cycle of poverty



	Population	Percent of VA Pop	% Pop in Poverty	#Pop under 18	% Pop under 18
VIRGINIA	8,631,393	100%	9.2%	1,881,643	21.8%
SWVA					
30th JUDICIAL CIRCUIT					
Lee	22,173	0.25%	26%	4,102	18.5%
Scott	21,576	0.24%	17.6%	4,176	17.8%
Wise (inc. Norton)	39,817	0.46%	20.4%	7,605	19.1%
29th JUDICIAL CIRCUIT					
Buchanan	20,355	0.23%	23.7%	3,521	17.3%
Dickenson	14,124	0.16%	19.3%	2,768	
Russell	25,781		16.2%	4,821	18.7%
Tazewell	40,429	0.46%	16.4%	9,096	22.5%
28th JUDICIAL CIRCUIT					
Bristol	17,219	0.19%	22.6%	3,668	21.3%
Smyth	29,800	0.34%	15.2%	5,692	19.1%
Washington	53,935	0.62%	13.2%	9,708	18%
27th JUDICIAL CIRCUIT					
Bland	6,270	0.07%	12.1%	941	15.0%
Carroll	29,155	0.34%	13.2%	5,190	17.8%
Floyd	15,476		10.9%	2,987	19.3%
Galax	6,720		18.8%	1,586	
Giles	16,787		10.7%	3,425	
Grayson	15,333		16.2%	2,530	
Montgomery	99,721		19.3%	15,257	15.3%
Pulaski	33,800		12.5%	5,915	
Radford	16,070		24.6%	2,008	
Wythe	28,290	0.33%	12.0%	5,601	19.8%

This table shows poverty rates in southwest Virginia counties compared to the poverty rate of the entire state of Virginia, which is 9.2%. The yellow highlighted areas are at least double our state's poverty rate. The darker the yellow, the higher the poverty rate.

We know that poverty can make it even harder for a victim of domestic violence to get help.



Context that Makes it Harder for Survivors to Obtain Services and for You to Provide Services in SW VA:

- Spotty cell and Internet service;
- Limited health care for both physical and mental issues; *limited medical expertise on strangulation;
- *Transportation: if survivor cannot get to a physical office, it can be hard to gain access to services; slow response time from LE because of the great distance of terrain their area covers;
- Lack of low-income and affordable housing can prevent survivors from leaving abusive situations because they don't believe they will be able to live on their own;
- Substance Use Disorder is increasing in number, severity, and danger; and
- Small communities mean providers, LE, etc. "know" victims and abusers.







Of course, on the bright side, rural communities tend to be more close-knit than urban or suburban communities. Your common bond can lead to trust and developing innovative policies and protocols that really work for your survivors and service providers



OBJECTIVES FOR THIS TRAINING

Overview of changes in Virginia law/policies that affect domestic and sexual violence victims and will become effective on July 1, 2022, in the areas of:

- Protective Orders
- Stalking
- Victim Rights
- Vulnerable Adults
- Human Trafficking Trainings-required
- Language Access Funding
- Victim Services Funding
- VA Cases of Note
- ARPA Funding
- VAWA Reauthorization



2022 Virginia General Assembly

Hope Card created for Full Protective Orders

HB 671 (Delegate Patrick Hope): Requires the Office of the Executive Secretary of the Supreme Court of Virginia to develop and all district courts and circuit courts to implement the Hope Card Program (the Program) for the issuance of a Hope Card to any person who has been issued a full protective order by any district court or circuit court. This Hope Card will be a durable, plastic, wallet-sized card containing, to the extent possible, essential information about the protective order, such as the identifying information and characteristics of the person subject to the protective order, the issuance and expiration date of the protective order, the terms of the protective order, and the names of any other persons protected by the protective order.



Stalking: expands what "conduct" means

HB 451 (Delegate Elizabeth Bennett-Parker): Except for a lawenforcement officer, acting in the performance of his official duties, or a registered private investigator, acting in the course of his legitimate business, anyone who on more than one occasion engages in conduct, either in person or through any other means, including by mail, telephone, or an electronically transmitted communication, directed at another person with the intent to place, or when he knows or reasonably should know that the conduct places that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that other person or to that other person's family or household member is guilty of a Class 1 misdemeanor.



Stalking: may be convicted in other jurisdictions than where stalking occurred(cont'd)

C. A person may be convicted *in any* jurisdiction within VA where the stalking described in subsection A occurred, if the person engaged in that stalking conduct on at least one occasion in the jurisdiction where the person is tried *or in the jurisdiction where the person at whom the conduct is directed <u>resided</u> at the time of such conduct. Stalking conduct that occurred outside VA may be admissible, if relevant, in any prosecution under this section (no longer requires stalking conduct to have to have happened in VA in order to be prosecuted in VA).*





Victim shouldn't have to pay court reporting & recording costs for Perpetrator

HB 1327 (Delegate Paul Krizek):

Provides that the court shall not allow a defendant convicted of a crime from which a civil matter arose to recover costs for court reporting and recording of such trial from the victim of such crime.



Sexual Assault Procedures: storing PERKs for 10 years or until victim reaches age of maturity + victim notification

HB 719 (Delegate Eileen Filler-Corn)/SB 658 (Senator Jennifer McClellan):

Requires that for certain PERKs (Physical Evidence Recovery Kits) required to be held for 10 years or until 10 years after the victim reaches the age of majority if the victim was a minor at the time of collection, whichever is longer, after the mandatory retention period, the law-enforcement agency may destroy the physical evidence recovery kit or keep it for a longer period of time.

When a state or local law enforcement agency in VA has taken over responsibility for the investigation related to the PERK, unless one of the other exceptions for submitting such kit to the Department of Forensic Science applies, the PERK shall be transferred to such law-enforcement agency and then, that law-enforcement agency must send the PERK to the Department of Forensic Science within 60 days of receipt from the original receiving law-enforcement agency.



Sexual Assault Procedures: storing PERKs for 10 years or until victim reaches age of maturity + victim notification (cont'd)

Also requires the law enforcement agency to inform the victim, parent, guardian, or next of kin of the unique identification number assigned to the PERK used by the health care provider and the personal identification number required to view the status of the PERK and provide information regarding the PERK Tracking System, unless disclosing this information would interfere with the investigation or prosecution of the offense, in which case the victim, parent, guardian, or next of kin shall be informed of the estimated date on which the information may be disclosed, if known.



Changes "incapacitated adult" to "vulnerable adult" for A & N

SB 687 (Senator Montgomery Mason)/HB 496 (Delegate Michael Mullen):

Changes the term "incapacitated adult" to "vulnerable adult" for the purposes of the crime of abuse and neglect of such adults

Definition change: "Vulnerable adult" means any person 18 years of age or older who is impaired by reason of mental illness, intellectual or developmental disability, physical illness or disability, or other causes, including age, to the extent the adult lacks sufficient understanding or capacity to make, communicate, or carry out reasonable decisions concerning his well-being or has one or more limitations that substantially impair the adult's ability to independently provide for his daily needs or safeguard his person, property, or legal interests





Victims of Sex Trafficking do not have to pay fees to have certain Convictions Vacated

HB 711 (Delegate Mark L. Keam): Victims of sex trafficking may vacate certain convictions. They <u>shall not be required to pay any fees or costs</u> for filing a petition pursuant to this chapter if the petitioner is found to be unable to pay fees or costs pursuant to § 17.1-606.



Human Trafficking Trainings: Hotel Owners & Employees

HB 258 (Delegate Shelly Simonds): The Virginia Department of Criminal Justice Services (DCJS) must develop an online course to train hotel owners and their employees, as defined in the bill, to recognize and report instances of suspected human trafficking. This online course shall be free to hotel owners and their employees. Every hotel owner must require its employees to complete this human trafficking training course or an alternative online or in-person training course approved by DCJS within six months of being employed by a hotel and thereafter at least once every two years, for as long as the employee is employed by the hotel.



Human Trafficking Trainings: Law Enforcement

HB 283 (Delegate Emily Brewer)/SB 467 (Senator Jill Vogel):

 Requires DCJS to establish training standards for lawenforcement personnel regarding the recognition, prevention, and reporting of human trafficking.



Language Access Services at State Agencies

• The Biennial Budget has \$6.1M for language access funding (according to TCI's analysis, this could go to one FTE at each of the 18 state agencies with the "greatest public-facing need").





Sexual and Domestic Violence Prevention Funds

• \$2.7M for sexual and domestic violence prevention fund



Earmarks for Specific Victim Services Agencies

- The budget allots \$400,000 for the first year and \$400,000 for the second year from the GF to Virginia Victim Advocacy Network (VVAN)
- Plus, earmarks in the budget for two local programs:
 - The Laurel Center (Winchester) gets an additional \$500,000 each year from the federal Temporary Assistance to Needy Families (TANF) block grant to the Laurel Center for education, outreach, program services, and new career and education support for survivors of domestic abuse and sexual violence in Winchester, Frederick County, Clarke County, and Warren County at the Center's residential facility for survivors
 - Eastern Shore Coalition Against Domestic Violence gets \$114,000 from DSS GF funds the first year for operational support and infrastructure for the organization's s programs and administrative operations



Virginia Sexual and Domestic Violence Victim Fund

• The budget allots \$1.4M for the first year and \$1.4M for the second year from the GF to support the Virginia Sexual and Domestic Violence Victim Fund. This expanded purposes includes costs associated with FNEs and SANEs, with at least \$500,000 each year for sexual assault service providers and hospitals for these purposes.



2022 Virginia General Assembly: Bills that Died, and for that, we are GLAD



DEAD: Affirmative Defense for Respondents who Violate GDC PPOs and POs

SB 174 (Senator Mark J. Peake) would have allowed an "affirmative defense to prosecution of a violation of a protective order issued under §§ 19.2-152.9 and 19.2-152.10 when the petitioner invited or solicited the respondent to contact the petitioner and the respondent subsequently violated a condition imposed on him solely as a result of such invitation or solicitation."

This would have allowed Respondents to <u>violate the no-contact provision of a</u> <u>protective order with impunity</u>. Among the 50 states and territories, only Arkansas codifies affirmative defense language in their Code. The trend among states, in fact, is to articulate the opposite:

- i. Alaska: "[...] an invitation by the petitioner to communicate, enter the residence or vehicle, or have other prohibited contact with the petitioner does not waive or nullify any provision of the protective order."
- ii. Indiana: "[...] even if invited to do so by the petitioner."





DEAD: Bill to Diminish the BIC Factors in Favor of One Parent's Arbitrary Request "to maximize the amount of time the minor child spends with each parent"

HB 69 (Delegate Glenn R. Davis) would have diminished the BIC factors by

- a. removing the word, "consider," in Line 14. Without the word, "consider," in Line 14, one parent's request for the judge's assurance of "frequent and continuing contact..." trumps longstanding precedent requiring judges to consider all ten (10) of the "Best Interests of the Child" (BIC) factors.
- b. The added language in Lines 14-16, "[...] the court shall, upon the request of either party, assure a minor child of frequent and continuing contact with both parents so as to maximize the amount of time the minor child spends with each parent," immediately BEFORE the 10 BIC factors, especially after no longer requiring the court to consider said factors, unduly amplifies the importance of the amount of time each parent spends with the minor children in making a custody or visitation determination. The BIC factors take into consideration many other items besides the amount of time each parent has with their minor children.



2022 Virginia General Assembly: Bill carried over to 2023

HB 713 (Delegate Mark L. Keam), if passed, would have made it a Class 1 misdemeanor for a person to engage in "coercive control" of a family or household member <u>and</u> would have added "coercive control" to the definition of family abuse as a basis to issue a PO.



HB 713 language: "Coercive control" means a pattern of behavior that unreasonably interferes with a person's free will and personal liberty. Acts of coercive control include unreasonably engaging in any of the following:

- 1. Isolating the other party from friends, relatives, or other sources of support;
- 2. Depriving the other party of basic necessities;
- 3. Controlling, regulating, or monitoring the other party's movements, communications, daily behavior, finances, economic resources, or access to services;
- 4. Compelling the other party by force, threat of force, or intimidation, including threats based on actual or suspected immigration status, to engage in conduct from which the other party has a right to abstain or to abstain from conduct in which the other party has a right to engage; or
- 5. Committing or threatening to commit cruelty to animals that intimidates the other party.



Concerns of VPLC, Action Alliance, you all: this language could have unintended consequences of savvy abusers or abusers with crafty attorneys using "coercive control" against the true victims (because such behavior is not easily provable...ends up being one person's word against the other's; could end up being a race to the courthouse, etc.)





Language we are revising for future iterations of HB 713: NO coercive control in criminal code AND "Coercive control" means a pattern of three or more of the following behaviors that unreasonably interferes with a person's free will and personal liberty. Acts of coercive control include unreasonably engaging in any of the following:

- 1. Isolating the other party from friends, relatives, or other sources of support by use of force, threat, or intimidation;
- 2. Depriving the other party of basic necessities, including access to medical care;
- 3. Controlling, regulating, or monitoring the other party's movements, communications, daily behavior, finances, economic resources, or access to services;
- 4. Compelling the other party by force, threat of force, or intimidation, including threats based on actual or suspected immigration status, to engage in conduct from which the other party has a right to abstain from conduct in which the other party has a right to engage; or
- 5. Committing or threatening to commit cruelty to any minor, adult, or animal that intimidates the other party.



- This definition of "coercive control" would be a stand-alone definition in §16.1-228 along with family abuse, not part of family abuse definition
- Only use it in Family Abuse POs (§16.1-253.1 (PPO), §16.1-253.4 (EPO), §16.1-279.1 (PO)), "Upon the filing of a petition alleging that the petitioner is or has been, within a reasonable period of time, subjected to family abuse or coercive control [...]"





On 2/9/2022, the House Courts of Justice Subcommittee #1 (Criminal) took testimony, including that of Elyse Osterweil, a constituent of Delegate Keam, who is a scientist and a mom of a 7-year-old child. Ms. Osterweil and her child have been subject to coercive control by her exhusband.



VA Case Law that affects DV/SV Survivors

Recent Developments in Poverty Law - Domestic and Sexual Violence





PO MAY BE EXTENDED WITHOUT NEW EVIDENCE:

Zimmerman v. Happe, Case No. CJ22-02, March 21, 2022, Floyd County Circuit Court (Fleenor)

<u>Facts:</u> At extension hearing for two-year, §19.2-152.10 (GDC) PO issued in January 2020, Petitioner resubmitted the same evidence she provided to obtain that original PO. During closing and oral argument, Respondent's counsel said there was no case law articulating whether new or additional evidence was necessary for the extension.

WELL...THERE IS NOW, COUNSEL!!!

<u>Ruling:</u> Court concluded that new or additional evidence is <u>not</u> necessary to support extending a PO.



PO MAY BE EXTENDED WITHOUT NEW EVIDENCE: Zimmerman (cont'd)

Analysis:

- Court retraces history of §19.2-152.10 from 1997 to present; statute doesn't require new or additional evidence;
- If GA had intended a requirement of new or additional evidence, they
 would have explicitly stated that in the statute itself or it would have
 appeared in the statute's extensive legislative history;

PO MAY BE EXTENDED WITHOUT NEW EVIDENCE: Zimmerman (cont'd)

Analysis (cont'd):

- Court notes evolution of 2010 GA amendments. PO may be extended:
 - 1st draft: "if the respondent continues to pose a <u>threat</u> to the health and safety of the petitioner and family or household members of the petitioner at the time the request for an extension is made"
 - 2nd draft: "to protect the <u>health and safety</u> of the petitioner or persons who are family or household members at the time the extension request is made"



PO MAY BE EXTENDED WITHOUT NEW EVIDENCE: Zimmerman (cont'd)

Analysis (cont'd):

- Court notes that GA shifted from a focus on the acts of the respondent to the health and safety of the petitioner...AND that this gives the Court broad discretion in granting the extension.
- PO is a shield to protect Petitioner and F/H members from Respondent who, at least, initially, was proven to have the "ability or desire to harm, harass, or otherwise jeopardize the safety of the petitioner and/or their family." If PO is working, no new or additional evidence is necessary to extend. The Court further states that if new or additional evidence were required, that would essentially require a. evidence of a violation or b. that the prior PO lapsed requiring new or additional evidence to obtain a new PO.



Fowler v. Commonwealth, Record No. 201255, January 13, 2022, unpublished opinion of Supreme Court of Virginia

Facts:

Fowler had EPO, PPOs, and a final Child PO entered against him for object sexual penetration of GF's child. Jury acquitted Fowler of criminal charges. CC of Roanoke County dissolved PO on 7/10/2019, finding "there [had] been a material change of circumstances, and that the [PO] [wa]s no longer necessary to protect the child's life, health, safety or normal development." Fowler filed w/CC to expunge the police, jail, and Court records relating to the aforesaid charges and the [POs]." CC granted motion and entered order on 3/17/2020.



Fowler v. Commonwealth, unpublished

Facts (cont'd):

• But then clerk told CC Judge she did not have authority to expunge PO, only criminal charges. CC then entered corrected order on 4/28/2020, saying it lacked jurisdiction to expunge POs. Fowler filed a motion to reconsider on 5/18/2020, arguing that the CC "would not have entered the [3/17 order] had it read the [3/17 order] more carefully," and that the CC's "failure to read the document does not permit modification of a final [o]rder." Fowler further argued that the 3/17 order became final on 4/7, pursuant to Rule 1:1 (>21 days); so, 4/28 corrected order was void *ab initio*.



Fowler v. Commonwealth, unpublished

Facts (cont'd):

- Fowler also argued that VA's Expungement Statute, §19.2-392.2(A) allows CC to expunge "police and court records" and that POs were court records relating to his criminal charges, and therefore, CC had authority to expunge them.
- Fowler never included a transcript or statement of facts of the CC's relevant expungement proceedings.
- CC never ruled on Fowler's motion to reconsider.
- Fowler appealed corrected 4/28 order.



Fowler v. Commonwealth, unpublished

Ruling: CC did not err in finding it lacked jurisdiction to expunge POs

Analysis:

- Because of Declaration of Judicial Emergency at the time, CC retained its authority to enter 4/28 order.
- Onus on appellant to provide reviewing court with sufficient record to determine whether trial court erred. Fowler didn't provide a transcript or written statement of facts from the 3/17 hearing precipitating the corrected 4/28 order. So, no transcript or written statement makes it impossible to reliably determine if Fowler adequately preserved this issue for appeal.



Fowler v. Commonwealth, unpublished

Analysis (cont'd):

- Instead of transcript or written statement of facts, Factor relies on his own motion to reconsider and objections, which were never ruled on, to demonstrate that he properly preserved his argument. "A motion to reconsider is insufficient to preserve an argument not previously presented unless the record establishes that the court had an opportunity to rule on the motion." Westlake Legal Grp. v. Flynn, 293 Va. 344, 352 (2017)(citing Brandon v. Cox, 284 Va. 251, 256 (2012)).
- "No ruling of the trial court...will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling." Rule 5:25



Fowler v. Commonwealth, unpublished

Analysis (cont'd):

 Fowler's motion to reconsider was never ruled on by CC. So, unable to conclude whether this issue was ever presented to or considered by the CC and therefore, barred by Rule 5:25. CC judgment affirmed.

MORAL OF THE STORY?

Just stall and don't rule on motions.



Federal Laws and Policies that affect DV/SV Survivors





AMERICAN RESCUE PLAN ACT (ARPA)

- Last year, ARPA money was used in VA to restore VOCA grantee awards (via DCJS)
- This year, the budget allots \$6M the first year and \$3M the second year to DCJS to support services to "victims of crime including, but not limited to, services for victims of sexual assault and domestic violence." This is through the Victims Services Grant Program (VOCA). Look out for the email from DCJS!
- Plus, those of you who received FY22 ARPA money to restore VOCA-VSGP required reductions have through FY23 to amend your ARPA restoration fund budgets and spend that money.





VAWA REAUTHORIZATION 2022

 The Violence Against Women Act (VAWA) was signed by President Biden on March 15, 2022, and reauthorized for FY23-FY27 (starts 10/1/2022). There are excellent resources by the ABA Civil Rights and Social Justice Section here,

https://www.americanbar.org/groups/crsj/events_cle/recent/vawa-2022/



Highlights:

- 1. A new definition of domestic violence that:
 - a. acknowledges economic and technological abuse
 - b. recognizes that victim services include services for trafficking, adult victims of child sexual assault, FGM, or forced marriage



2. MONEY!!

- ► Legal Assistance \$57M → \$60M
- ▶ Underserved \$2M → \$6M
- ► Culturally Specific \$2M → \$25M
- ▶ Sexual Assault \$40M → \$100M
- ► Rape Prevention \$50M → \$100M
- Youth \$15M → \$30M

- Disabilities \$9M → \$15M
- Campus \$12M → \$15M
- ▶ Prevention \$15M → \$20M
- ► Health \$10M → \$49M
- Econ \$1M → \$5M
- ► Tribal \$5 → \$31M

- 3. Wins for tribal jurisdiction (including restoring tribal jurisdiction over SOME, but not all, crimes committed by non-Indians):
- a. History: The 1978 *Oliphant v. Suquamish* Supreme Court decision ruled that tribal nations do NOT have jurisdiction to prosecute non-Indians in tribal jurisdictions.
- b. VAWA 2013 restored jurisdiction over non-Indians for domestic violence, dating violence, violations of protective orders.
- c. VAWA 2022 restored jurisdiction over non-Indians for assaults of tribal justice personnel, child violence, sex trafficking, obstruction of justice, sexual violence, and stalking.





4. Restorative Justice: there has been on ongoing discussion about VAWA's place in the 1994 crime bill and it being a "carceral" law. More conversations in 2013 about alternatives. So, now, a new definition of "restorative practice" which applies to campus grant programs and pilot programs. These are grants for prevention, training, and evaluations





- 5. Expanded federal jurisdiction over sexual assault committed by law enforcement over anyone in their custody.
- 6. Hard compromises on Firearms:
- a. LE notification when there are prohibited purchases and failed background checks
- b. cross-deputizes local LE and prosecutors to enforce law with ATF and US Attorneys



- 7. Housing:
 - a. Establishes VAWA director at HUD
 - b. Training, TA, and compliance work
- 8. LGBTQ:
 - a. \$8M in new grant programs to enhance services for LGBTQ victims

WHAT'S MISSING? Immigration changes. Check out ASISTA training on 6/20/2022



Thank You! Any questions?

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