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EDITOR'S BRIEF

In this issue of *The Colonial Lawyer: A Journal of Virginia Law and Public Policy*, five authors present insightful commentary on a number of diverse and changing areas of the law.

Ms. Naegele's article explores the relationship between medical malpractice law and the increasing frequency of court-ordered obstetrical interventions. She argues that a serious erosion of women's rights to reproductive autonomy occurs when a court compels a physician to perform medical procedures that are contrary to the intention of the pregnant woman. Ms. Naegele suggests that the court order is the result of conflicting messages sent by courts in abortion cases and medical malpractice cases in obstetrics.

Ms. I'Anson addresses the issue of surrogate motherhood in Virginia by analyzing various Virginia statutes which could be used as a basis for testing the validity of surrogate contracts. Additionally, she reviews case law from other jurisdictions and the public policy reasons for and against surrogate contracts. Ms. I'Anson concludes that the legislature of Virginia ought to outlaw surrogacy contracts or bar a surrogate mother from being compensated for her services.

On a separate front, Mr. Thomas presents a comprehensive analysis of the doctrine of constructive possession in Virginia. He provides both a discussion of the requisite elements of the doctrine and surveys the vast amount of case law on the issue. Additionally, Mr. Thomas provides the practitioner with a creative method for determining the application of the doctrine of constructive possession to relevant factual scenarios.

In our final article The Practitioner's Guide, Mr. Jordan and Mr. Nachman, the Research Editors for the publication, introduce a new and hopefully permanent section of the publication. The Practitioner's Guide is designed to touch upon current legal subjects confronting the practitioner in Virginia. Mr. Jordan and Mr. Nachman have focused on The Chesapeake Bay Preservation Act, DNA "Fingerprinting", and Reconstruction Evidence in this issue. Our goal is to present a general overview to the subject and a list of sources which we feel will aid the practitioner in mastering the subject.

The Editors and the Staff of *The Colonial Lawyer: A Journal of Virginia Law and Public Policy* hope that you, the practitioner and the scholar, find the articles of Volume 18, Number 2 insightful and stimulating, and we welcome any comments you might have for this or future issues.

Thomas Paul Sotelo
Editor-in-Chief

MALPRACTICE LIABILITY VERSUS PATIENT'S RIGHTS IN OBSTETRICAL CARE: THE PHYSICIAN'S DILEMMA

Amy K. Naegele

INTRODUCTION

Physicians practicing today need to be aware of their legal rights and obligations as well as those of their patients. As changes are made in both medical technology and legal thought, the legal system seems to be sending conflicting messages to physicians in the area of maternal and fetal care. Malpractice is a very real threat for practicing obstetricians. Results of malpractice cases indicate to physicians that they must take every available precaution to effectuate a favorable outcome for both the mother and fetus. Yet, at the same time, abortion cases indicate that they must respect the autonomy of the pregnant patient. This dichotomy has resulted in many doctors seeking court orders to perform procedures which they feel are medically necessary, but to which the patient refuses her consent. Apparently, many physicians feel that this is the best way to protect themselves and to comply with the conflicting demands of the law. Such orders, however, represent an apparent regression in the field of women's rights while taking advantage of medical advances in the area of fetal survival.

In 1987 the *New England Journal of Medicine* published a study undertaken by two physicians and an attorney of the prevailing attitudes within the medical profession (specifically obstetrics and gynecology) regarding court-ordered obstetrical care.[1] The authors sent a questionnaire to the heads of fellowship programs in maternal-fetal medicine and to the directors of residency programs in maternal-fetal medicine in the states which do not have a fellowship program. A total of 45 states was represented in the survey.[2]

Part of the questionnaire was designed to elicit opinions on various nonconsensual interventions into the life of a pregnant woman on behalf of the developing fetus. These questions were tabulated only for the heads of the fellowship programs.[3] The authors found that only 24% of those responding "consistently upheld a competent woman's right to refuse medical advice."[4]

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[1] Kolder, Gallagher & Parsons, *Court-Ordered Obstetrical Interventions*, 316 N. ENG. J. MED. 1192 (1987).

[2] *Id.*

[3] *Id.*

[4] *Id.* at 1194.

Specifically, 46% of the respondents indicated that they felt that pregnant women who refuse to follow medical advice should be confined to hospitals or similar facilities where compliance could be assured.[5] Forty-seven percent favored issuance of emergency court orders not only for cesarean sections, but also for other accepted procedures that could potentially save the life of the fetus.[6] Twenty-six percent advocated third-trimester surveillance of all pregnant women not already being monitored within the hospital system.[7]

These answers reflect a very paternalistic attitude and a willingness on the part of a large and respected segment of the medical community to subordinate the autonomy of pregnant women to the judgment of the attending physicians. They prompt one to wonder why such a group would hold such attitudes. Many possible answers exist.

Physicians are trained to save lives; a decision not to take advantage of every possible means of maintaining life may be contrary to their professional thinking. Often, doctors may believe that they understand better than a lay person the implications of the person's decision, and are thus more qualified to make such decisions. Additionally, many physicians fear legal liability if they do not utilize every means at their disposal to effectuate a favorable outcome.

This paper will explore the relationship between malpractice law and the emergent phenomenon of court-ordered obstetrical interventions. It will discuss the impact of the fear of malpractice on the practice of obstetrics and gynecology, as well as the demands apparently placed upon doctors by the abortion decisions. The conclusion is that the malpractice cases and the abortion cases communicate conflicting messages to physicians, thus backing them into a corner from which their only means of escape seems to be a court order sanctioning their course of action.

PHYSICIAN'S SOURCES OF INFORMATION: REPORTING ON MEDICAL MALPRACTICE

Medical malpractice is a topic which receives a great deal of attention now. The general public is aware of the problems faced by physicians in attempting to deal with malpractice suits and insurance premiums. Physicians themselves are even more acutely aware of the problem. An examination of the sources of their information provides some insight into how the attitudes toward the malpractice problem and its impact on delivery of care are fostered.

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[5] *Id.* at 1193.

[6] *Id.*

[7] *Id.* at 1194.

The *American Medical News* (AMN), a weekly publication for the members of the American Medical Association, periodically includes a feature entitled Medico-Legal Decisions. This feature summarizes recent cases which the editors feel are of interest to the readership of AMN. An examination of the 1988 issues of AMN[8] reveals that summaries of fifty-nine cases appeared in the Medico-Legal Decisions column during the year. Of these, twenty-seven reported outcomes which can be considered favorable to physicians. Twelve reported outcomes unfavorable to physicians. Twenty reported cases which were seemingly neutral in their effect upon the medical profession.[9] Of the fifty-nine total cases reported in Medico-Legal Decisions in 1988, twelve dealt directly with issues affecting obstetricians. Five of these were favorable to the doctor, five were favorable to the plaintiff, and two were neutral. These figures lead to the conclusion that AMN is not reporting these court decisions with the intent to cause alarm among members of the medical profession.

The cases which are reported in AMN represent twenty-four states and one federal circuit. They appear to be very ordinary cases; there is no apparent reason for selection of these cases over any others decided within the same time period. A reading of the reported obstetric cases reveals a great variety of types of cases and dispositions chosen. They address such topics as fetal abuse by a pregnant woman,[10] potential agency liability on the part of a hospital in a conspiracy to conceal a tubal ligation performed without consent,[11] Good Samaritan Laws,[12] and statutes of limitation.[13]

Several of the cases provide good explanations of the applicable law to those who seek out and read the entire text.[14] It is unlikely, however, that practicing physicians regularly read judicial

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[8] Figures include every issue in 1988 with the exception of December 16, which was unavailable.

[9] Several of the seemingly neutral reports do not represent final disposition of the case.

[10] *In re* Ruiz, 27 Ohio Misc. 2d 31, 500 N.E.2d 935 (Ohio C.P. 1986), *reported in* AM. MED. NEWS, Sept. 16, 1988, at 26.

[11] Barbour v. South Chicago Community Hosp., 156 Ill. App. 3d 324, 509 N.E.2d 558 (1987), *reported in* AM. MED. NEWS, Nov. 11, 1988, at 24.

[12] Burciaga v. Saint John's Hosp., 187 Cal. App. 3d 712, 232 Cal. Rptr. 75 (1986), *reported in* AM. MED. NEWS, Oct. 14, 1988, at 42.

[13] Mendez v. United States, 655 F. Supp. 701 (S.D.N.Y. 1987), *reported in* AM. MED. NEWS, Oct. 21, 1988, at 28; Gaines v. Preterm-Cleveland, Inc., 33 Ohio St. 3d 54, 514 N.E.2d 709 (Ohio 1987), *reported in* AM. MED. NEWS, Dec. 2, 1988, at 23.

[14] *See, e.g.,* Burciaga, 187 Cal. App. 3d. at ___, 232 Cal. Rptr. at 78 (explaining the existence of duty); Witherell v. Weimer, 148 Ill. App. 3d 32, 499 N.E.2d 46 (1986) (explaining qualification of expert and use of expert testimony to establish standard of care); Mariano v. Tanner, 497 So.2d 1066 (La. Ct. App. 1986) (explaining standard of care).

opinions to keep themselves informed of recent legal developments. They are therefore left to rely on the reporting of these decisions in periodicals which they read. The Medico-Legal Decisions feature of AMN seems to report the cases fairly, yet the summaries are often confusing because they are incomplete or made before the cases have reached final disposition.

Elsewhere within AMN, many articles have appeared which address the issue of malpractice. Many of these deal with the issue of tort reforms and alternatives to the current system of settling medical malpractice complaints. Some of these articles, as well as many editorial comments, are hostile to the legal system.[15] The tone of these articles may serve to foster a distrust of the law which may counteract the beneficial effects of the fair reporting within the Medico-Legal Decisions feature.

The general reporting in AMN on medical malpractice is not particularly encouraging to physicians. Those reading AMN on a regular basis are likely to be left with the impression (correct or incorrect) that the threat of medical malpractice is both real and severe and that it is in their best interest to seek the protection of the law and the sanction of the courts before undertaking treatment of pregnant women which may later be questioned.

LAW AND MEDICINE: IMPOSITION OF DUTIES UPON PHYSICIANS

Medical malpractice is a part of tort law, designed to compensate those who have been injured as a result of poor care on the part of a doctor.[16] Negligence is the most common theory used in malpractice suits.[17] Four elements are necessary for a successful malpractice suit:

1) Duty. The plaintiff must show that the physician owed a duty to the plaintiff. This duty, to act within the standards established by the profession, arises from the relationship which exists between the doctor and the patient. The physician is required to exercise the necessary knowledge

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[15] *See, e.g., Lawyers beam over lack of malpractice caps*, AM. MED. NEWS, Aug. 19, 1988, at 9; *'Go ahead and sue' seems to be prevailing attitude*, AM. MED. NEWS, Mar. 18, 1988, at 28.

[16] Virginia's law of medical malpractice is codified at VA. CODE ANN. §§ 8.01-581.1 to 8.01-581.20 (1989 Supp.). For a general discussion of the law of medical malpractice in Virginia, *See* 14B *Michie's Jurisprudence* §§ 12 et seq. (1988).

[17] K. FINEBERG, J. PETERS, J. WILSON & D. KROLL, OBSTETRICS/GYNECOLOGY AND THE LAW § 1.20 (1984).

and skill to provide appropriate treatment to the patient. The degree of knowledge and skill mandated may be ascertained from medical texts and literature.[18]

2) Breach of duty. The plaintiff must show that due to an omission or a commission, the physician did not act within the applicable standard of care.

3) Compensable injury. The plaintiff must show that she suffered actual injury for which compensation can be made.

4) Proximate cause. The plaintiff must show that the doctor's breach of the standard of care was the proximate cause of her injury. The physician's action need not be the sole cause of the injury; it can be one of the causes of the act which set in motion a chain of occurrences which ultimately led to the injury.

Widely accepted standards for obstetricians have been promulgated by the American College of Obstetricians and Gynecologists (ACOG).[19] The ACOG standards indicate that the primary responsibility of the obstetrician is to the woman, yet they provide for many procedures and policies which are justified on the basis of fetal well-being. In its Maternal Health Policy, the ACOG indicates that the scope of gynecological and obstetrical services should include "the maintenance in so far as possible of an optimal environment for fetal development."[20] Specific policies suggested on the basis of fetal well-being include preliminary questioning regarding possible pregnancy of all women prior to x-rays,[21] electronic fetal monitoring,[22] and arrangements for the presence of a second physician to take responsibility for the newborn if significant risk factors are present.[23]

The ACOG recognizes that the right to make decisions regarding treatment belongs to the patient, stating "[t]he ACOG supports the right of the pregnant woman to informed consent while recognizing that at the same time the woman assumes responsibility for decisions which she makes in the interest of her own health and the health and welfare of her infant."[24] In addition, the ACOG criticizes the mandatory second opinion which some states have attempted to institute

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[18] Virginia has codified the standard of care and methods for its determination at VA. CODE ANN. §§ 8.01-581.20 (1989 Supp.).

[19] AMERICAN COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS, STANDARDS FOR OBSTETRIC-GYNECOLOGIC SERVICES (5th ed. 1982).

[20] *Id.* at 87.

[21] *Id.* at 79.

[22] *Id.* at 28.

[23] *Id.* at 26.

[24] *Id.* at 75.

regarding abortion.[25] The problem, according to the authors, is that such requirements fail to recognize the primary importance of the patient's well-being; the second opinion is not necessarily the correct one, and may not be in the best interest of the patient.[26]

Courts have imposed certain duties to unborn children upon doctors. An early case to do so was *Smith v. Brennan.*[27] The court allowed a cause of action for a child later born alive who was injured in an auto accident while in utero, stating that "a child has a legal right to begin life with a sound mind and body."[28] This principle has been extended to allow suits against physicians on behalf of fetuses later born alive. An illustrative case is *Shack v. Holland.*[29] There, the court allowed recovery by a fetus later born alive for lack of informed consent. Although the duty of disclosure was to the mother, the court recognized that the failure of the physician to adequately inform the pregnant woman impacted upon the fetus, and allowed the claim.[30]

The duties owed by a physician and the parties to whom they are owed are thus not always clear. Both the courts and the medical profession indicate that the physician has a duty to the pregnant woman and her fetus. The ACOG standards recognize the right of the woman to make decisions regarding her treatment, with the expectation that she will take responsibility for her decisions. The recognition of the courts of a right of action for medical malpractice on the part of the fetus, however, undermines the confidence that physicians can place in that expectation.

THE ABORTION DECISIONS: PRIMACY OF MATERNAL WELL-BEING

Obstetricians caring for pregnant women often find themselves in the position of having two patients, mother and fetus. An apparent conflict can arise for the doctor in attempting to determine which patient should be primary. The judiciary has sent a clear message on this issue.

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[25] *Id.*

[26] *Id.* at 105.

[27] 31 N.J. 353, 157 A.2d 497 (1960).

[28] *Id.* at 503.

[29] 389 N.Y.S.2d 988 (Sup. Ct. 1976).

[30] *Id.* at 993.

Since its 1973 decision in *Roe v. Wade*,[31] the U.S. Supreme Court has consistently indicated that the life and health of the mother must be the primary consideration of the physician.[32]

In *Roe*, the Court held that a state has an interest in both the life and health of the mother and the life of a potentially viable fetus.[33] Each of these interests becomes compelling at a different point in the course of the woman's pregnancy.[34] However, even at the point at which the interest in fetal life becomes compelling, the Court indicated that the state cannot proscribe an abortion necessary to preserve the woman's life or health.[35]

The Court reaffirmed its commitment to women's health and life in 1976 in *Planned Parenthood v. Danforth*.[36] Missouri sought to prohibit the use of saline abortion after the twelfth week of pregnancy, citing maternal health as the motivating concern for the prohibition.[37] The Court noted that saline amniocentesis was, at the time, one of the most widely used and safest methods of abortion. It therefore rejected the state's proffered rationale and struck down the statute as dangerous to maternal health, noting that the regulation had the effect of forcing women desiring abortions after the twelfth week to submit to more dangerous methods.[38]

In *Colautti v. Franklin*,[39] the Court construed a Pennsylvania statute that required physicians performing abortions to exercise the same standard of care that would be necessary if a live birth rather than an abortion were intended. The doctor was further required to utilize the abortion method most likely to result in a live birth, unless a different method was necessary to preserve the health or life of the woman. The Justices declared these provisions unconstitutional because they were ambiguous as to which interest was predominant. They indicated that it might induce the physician to attempt to "make a 'trade-off' between the woman's health and additional

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[31] 410 U.S. 113 (1973).

[32] This paper was written prior to the Supreme Court decision of *Webster v. Reproductive Health Services*, 57 U.S.L.W. 5023 (July 3, 1989). Although the Court purported to leave *Roe v. Wade* intact, a plurality seemed to indicate that maternal health may not always be primary. *Webster*, 57 U.S.L.W. at 5029-5030. Thus, it is currently unclear what direction the Court will take regarding the relative weight to be afforded the rights and health of the mother versus the fetus.

[33] 410 U.S. at 162.

[34] *Id.* at 163.

[35] *Id.* at 165.

[36] 428 U.S. 52 (1976).

[37] *Id.* at 76.

[38] *Id.* at 78-79.

[39] 439 U.S. 379 (1979).

percentage points of fetal survival" and stressed the need for more specificity before the state could impose criminal liability on physicians.[40] Pennsylvania later attempted introduction of a similar provision in another statute which the court struck down, indicating that it failed to make explicit that the woman could not be forced to bear any additional medical risk for the sake of the fetus.[41]

States have also attempted to regulate post-viability abortions by requiring the presence of a second attending physician for the fetus. In 1983 the Court upheld such a provision in *Planned Parenthood Association v. Ashcroft.*[42] Three years later, however, it invalidated a similar provision in *Thornburgh v. American College of Obstetricians and Gynecologists.*[43] These seemingly irreconcilable decisions can be explained by the Court's insistence upon the superiority of the health of the woman. The Court recognized that the state's interest in protecting fetal life after viability could justify requiring the presence of a doctor to take care of the fetus, but the health of the mother would have to remain paramount. In both cases the Court was concerned with the existence of an emergency exception for cases where the health of the mother would be endangered by waiting for the arrival of the second doctor. In *Ashcroft*, apparently enough Justices were convinced that the exception was implied within the statute to uphold it.[44] The *Thornburgh* court, on the other hand, found no such exception. Writing for the court, Justice Blackmun stated that the statute "evinces no intent to protect a woman whose life may be at risk."[45]

Taken together, these cases clearly indicate that a doctor performing an abortion should consider the life and health of the pregnant woman to be paramount to any other concerns. The Court has recognized a state interest in both the life of the mother and the potential life of the fetus, but has always considered the interest in the woman to be superior to the interest in the fetus. By analogy, it would seem that the life and health of the woman should be paramount in any situation in which the interests of the pregnant woman and the fetus are in potential conflict. Yet, when faced with suits involving such circumstances, several courts have decided differently.

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[40] *Id.* at 400-401.

[41] Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 769 (1986).

[42] 462 U.S. 476 (1983).

[43] 476 U.S. 747 (1986).

[44] 462 U.S. at 485.

[45] 476 U.S. at 771.

Examination of these differing pronouncements from courts on medical malpractice and abortion rights reveals the dilemma faced by treating physicians in cases where a pregnant woman refuses to follow medical advice. If the doctor, desiring to protect himself from potential liability, treats the woman against her wishes, he violates her Constitutional rights and faces possible civil liability for battery. On the other hand, if the enlightened physician abides by her wishes and respects her right to autonomy, he faces potential liability for malpractice if the fetus suffers injury or death. It is easy to see why many frustrated physicians feel that the only way to protect themselves is to seek a court order.

Usually, such requests are made in emergency situations. Hearings are convened quickly and are often informal. Decisions are made very rapidly. A *New England Journal of Medicine* study reported that 88% of such orders were obtained in six hours or less.[46] Most of the cases, therefore, are not reported. The opinions in those that are reported are usually filed some time after the decision is actually made; thus, the decisions are made under pressure and opinions are filed after more time for reflection has passed.

The only case of a compelled cesarean section to be ultimately and finally adjudicated by a state supreme court is *Jefferson v. Griffin Spalding County Hospital Authority*.[47] Mrs. Jefferson was receiving prenatal care at the Griffin Spalding County Hospital where doctors determined that she had a placenta previa, a condition which indicates a need for a cesarean section. Her doctors estimated that if a vaginal delivery were attempted the chances of fetal mortality were 99% and the chances of maternal mortality were 50%.[48] Mrs. Jefferson refused consent to a cesarean section on religious grounds. The hospital requested an order to perform the surgery, which was granted only upon the condition that Mrs. Jefferson voluntarily come to the hospital to deliver.[49] The day after the order was granted, the Department of Social Services petitioned the Juvenile Court seeking custody of the fetus, based upon its status as a deprived child.[50] The court granted

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[46] Kolder, Gallagher & Parsons, *Court-Ordered Obstetrical Interventions*, 316 N. ENG. J. MED. 1192, 1193 (1987).

[47] 247 Ga. 86, 274 S.E.2d 457 (1981).

[48] *Id.* at 458.

[49] *Id.*

[50] *Id.* at 459.

the motion and ordered Mrs. Jefferson to submit to the necessary surgery.[51] In its order the Juvenile Court declared: "The Court finds that the intrusion into the life of Jessie Mae Jefferson and her husband John W. Jefferson, is outweighed by the duty of the State to protect a living, unborn human being from meeting his or her death before being given the opportunity to live."[52] The Georgia Supreme Court refused to grant a stay, thus affirming the order.[53] Mrs. Jefferson refused to return to the hospital and later vaginally delivered a healthy child.[54]

A more recent case of a compelled cesarean delivery is *In re A.C.*[55] After indicating the impropriety and undesirability of court decisions in cases of this type,[56] the appeals court affirmed an order to perform a cesarean section without the consent of the pregnant woman, who was dying of cancer. The court recognized the compelling state interests in both maternal and fetal life, and conceded that considerations of maternal life should probably be primary. However, the court then indicated that those considerations were inapplicable to this case because A.C. was dying anyway;[57] the only foreseeable consequence of the order was to shorten her life by a matter of days or hours. The court also pointed out that A.C. was sedated and seemed to indicate that her life was not of a very high quality at that point.[58]

These two cases directly contradict the balance of interests specified by the Supreme Court in the line of cases discussed above. The *Jefferson* and *A.C.* courts blatantly stated that they were weighing the rights of the fetus against the health and life of the mother, and allowing the fetus to prevail. The Supreme Court, however, has indicated that courts should not weigh the rights of the fetus more heavily than those of the mother. It is not surprising that health care professionals look at these cases and simply become more confused over what their duties and responsibilities are.

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[51] *Id.*

[52] *Id.* at 460.

[53] *Id.*

[54] Jost, *Mother versus Child*, A.B.A.J., April 1989, at 84, 86.

[55] 533 A.2d 611 (D.C. App. 1987), *reh'g en banc granted*, 539 A.2d 203 (1988).

[56] *Id.* at 612.

[57] *Id.* at 617.

[58] *Id.* at 614.

PROBLEMS OF COMPELLING TREATMENT: THE SLIPPERY SLOPE

The sanction of compelled medical treatment of pregnant women by the courts may well be the first step in the serious erosion of women's rights to reproductive autonomy. One attorney has pointed out that "[i]t used to be that a woman lost her rights when she married. A current move now seeks to deprive women of their rights when they get pregnant."[59]

It is not difficult to imagine the implementation of the strictly paternalistic measures advocated by some of the respondents to the *New England Journal of Medicine* survey. The doctors participating in the survey reported two cases in which court orders were obtained for hospital detention of pregnant women who refused treatment, and two cases in which intrauterine blood transfusions were ordered against the wishes of the patient.[60] In at least one case the court not only ordered the compulsion of medical treatment, but also directed the local police to locate the woman and bring her to the hospital to undergo the treatment.[61]

"Slippery slope" problems are easy to envision with such strict surveillance of pregnant women. It could lead to imposition of civil liability on the part of pregnant women to their fetuses later born alive. One court that has considered the issue pointed out that this "would have serious ramifications for all women and their families, and for the way in which society views women and women's reproductive capabilities."[62] The court declined to allow such a cause of action which "would necessitate the recognition of a legal duty on the part of the mother; a legal duty as opposed to a moral duty, to effectuate the best prenatal environment possible."[63]

Compelling women to submit to certain procedures for the sake of their fetuses and increased surveillance of women during pregnancy may also lead to the imposition of sanctions upon pregnant women for failure to act in the best interests of the fetus at all times during the pregnancy. Increasingly, courts are using child abuse or criminal statutes to punish women for less than perfect behavior during pregnancy. Women have been prosecuted for drug offenses and child

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[59] Remarks by Martha A. Field before the American Society of Law and Medicine (Oct. 1988), *quoted in* AM. MED. NEWS, Nov. 11, 1988, at p.11.

[60] Kolder, Gallagher & Parsons, *Court-Ordered Obstetrical Interventions*, 316 N. ENG. J. MED. 1192, 1193 (1987).

[61] Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CALIF. L. REV. 1951, 2026 (1986), *reporting In re* Baby Jeffries, No. 14004 slip op. at 9 (Jackson County, Mich. P. Ct. May 24, 1982).

[62] Stallman v. Youngquist, 125 Ill.2d 267,___, 531 N.E. 2d 355, 359 (1988).

[63] *Id.*

abuse based upon their behavior while pregnant.[64] At least one judge has sentenced a pregnant woman who was found to be using drugs to jail for a crime that would normally bring probation, justifying his action as protecting the fetus.[65] Dr. Ira Chasnoff, President of the National Association for Perinatal Addiction, Research and Education, suggests that this approach is wrong; the goal is better served through education and treatment.[66]

Broad state intervention into the lives of pregnant women not only violates the Supreme Court's mandates of autonomy, but may serve to contravene the very goals it seeks to effectuate. Disregard of the patient's wishes places the physician and the patient in adversarial positions, which is antithetical to the concept of patient care. Court orders sanctioning treatment against the wishes of the patient interpose the state between the physician and the patient, the very situation which the court in *Roe* sought to avoid.

Physicians may anticipate that their disregard of the woman's wishes will serve the ultimate goal of fetal survival. This may well be true in the particular case presenting itself at the moment. However, beyond the scope of the particular case, the effect may be just the opposite. Women may be less likely to seek help for substance abuse if they fear that their children will be taken from them or that they will face criminal charges. Thus, the goal of increased care for fetuses may actually be undermined by these actions that may be taken in their interests.

CONCLUSION: WORKING WITHIN THE CURRENT SYSTEM

It seems impossible to solve the doctors' dilemma in any way satisfying to all. Unless changes are made in the liability compensation system which serve to alleviate fear on the part of the physicians, they will probably continue to seek some affirmation of the decisions they make in an effort to avoid liability.

It remains intolerable, however, that courts are assuming the power to deny pregnant women rights that all other citizens have, particularly the right to bodily integrity and autonomy in reproductive choice. Courts should not continue to issue orders empowering third parties to make intensely private decisions for competent women.

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[64] *Drug Abuse, Pregnancy Pose Issue*, Richmond Times-Dispatch, Jan. 9, 1989, at 1.

[65] *Id.*

[66] Jost, *Mother Versus Child*, A.B.A.J., April 1989, at 84, 88.

Ideally, physicians would be able to practice without fear of massive liability forcing them to lose their livelihood, and pregnant women would have the full rights of other citizens. Unfortunately, the two currently seem incompatible. Perhaps the best way to operate within the current system is for physicians to continue to seek court orders, but for courts to refuse to grant them. In this way, the courts will affirm the right of the woman to make her own decision, and eliminate excess liability for the physician who wants to respect his patient's wishes by providing him with a court decision on which to rely.

THE FUTURE OF SURROGACY IN VIRGINIA

Elizabeth Cheshire I'Anson

INTRODUCTION

Almost six hundred babies have been born under agreements known as surrogate parenting contracts by the end of 1987.[1] "Surrogate motherhood is a novel application of the technique of artificial insemination that also results in the birth of a child with a unilateral biological link to the infertile couple."[2] The debate over surrogacy is heated with the process being described by proponents as

> . . . the "wave of new technology, an alternative whose time has come, an alternative which is here to stay, an alternative for childless couples, the 'outer crest of reproductive technology,'" a "gift of life" to childless couples, one that alleviates the needs of childless couples, implementation of the principal's right to obtain a baby, and one that is sensitive to the needs of infertile couples.[3]

Opponents of the process, on the other hand, have said surrogacy is

> the illegal and unconstitutional purchase and sale of human beings, babies for profit, "rent a womb", industrialized reproduction, illegal black market babies, surrogate mother mills, commercial baby brokerage, and a threat to human dignity.[4]

The growing number of such arrangements has raised legal and ethical questions about the validity of such contractual arrangements. Several states have already chosen to legislate that the contracts are void and unenforceable.[5] Virginia has no specific statute addressing surrogate parenting agreements and no Virginia court has directly confronted the issue.

The Virginia General Assembly has recognized that the matter of surrogate parenting agreements must be addressed by the legislature in the near future. The 1988 General Assembly

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[1] Charo, *Legislative Approaches to Surrogate Motherhood*, 16 LAW, MEDICINE & HEALTH CARE 96 (Spring-Sum. 1988).

[2] Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions*, 50 TENN. L. REV. 71, 75 (1982).

[3] Flaherty, *Enforcement of Surrogate Mother Contracts: Case Law, The Uniform Acts, and State and Federal Legislation*, 36 CLEV. ST. L. REV. 223, 224 (1988).

[4] *Id.* at 225.

[5] KAN. STAT. ANN. § 199.590 (Supp. 1988); LA. REV. STAT. ANN. § 2713 (West 1965 & Supp. 1989); NEB. REV. STAT. § 25-21, 200 (Supp. 1988). The Nebraska statute outlaws surrogacy contracts in which a woman is "*compensated* for bearing a child of a man who is not her husband." NEB. REV. STAT. § 25-21, 200 (Supp. 1988)(emphasis added).

established a joint subcommittee to study surrogate motherhood.[6] The joint subcommittee was instructed to

> determine the number of surrogacy contracts made in the Commonwealth and the potential for an increase in such arrangements; determine whether surrogacy contracts and surrogate brokerage shall be legal in Virginia and, if so, how such practices shall be governed; examine the various new reproductive technologies and assess the potential effect of such technologies on health and social policy planning in the Commonwealth; analyze the constitutional issues of privacy, protection of children born of new reproductive technologies, the surrogate, [and] the health and social effects of such arrangements on the Commonwealth and any other related issues deemed appropriate . . . .[7]

Senate Joint Resolution No. 178 continued the joint subcommittee examining surrogate motherhood and asked that the committee submit its findings to the 1990 General Assembly.[8]

This article will not evaluate all the issues facing the joint subcommittee studying surrogate motherhood. The article will examine cases on the subject from other jurisdictions, the potential legality of the contracts under current Virginia law, and issues that the legislature must face in deciding whether to and how to regulate the surrogate parenting business.

CURRENT CASE LAW FROM OTHER JURISDICTIONS

Courts in Michigan, Kentucky, New York, and New Jersey have all addressed surrogate parenting contracts under the adoption laws of each state.[9] Some courts found the contracts violated state laws while others determined that surrogacy contracts were not in the purview of the legislature at the time the laws were passed and thus the contracts were enforceable.[10]

One of the first cases to address surrogate parenting contracts was *Doe v. Kelley*.[11] In *Doe*, the plaintiffs wanted to have the Michigan statutes prohibiting the exchange of money in connection with an adoption declared unconstitutional.[12] Under the surrogacy agreement which

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[6] VA. GEN. ASSEMBLY S.J. RES. 178 (1988).

[7] *Id.*

[8] *Id.*

[9] *In re* Baby M, 109 N.J. 396, 537 A.2d 1227 (1988); Surrogate Parenting Assoc., Inc. v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209 (Ky. 1986); *In re* Adoption of Baby Girl L.J., 132 Misc.2d 972, 505 N.Y.S.2d 813 (1986); Syrkowski v. Appleyard, 420 Mich. 367, 326 N.W.2d 211 (1985); Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (1981), *cert. denied*, 459 U.S. 1183 (1982).

[10] Armstrong, 704 S.W.2d at 214.

[11] 106 Mich. App. 169, 307 N.W.2d 438 (1981), *cert. denied*, 459 U.S. 1183 (1982).

[12] *Id.* at ___, 307 N.W.2d at 439.

the Does had entered into, they were to pay the surrogate mother five thousand dollars[13] plus medical expenses.[14] The Does claimed that the "baby-buying" statutes[15] prohibited them from exercising their right to procreate.[16] The Michigan Court of Appeals did not view the alleged right to procreate as a valid prohibition to state interference with surrogacy agreements.[17] The court found that the statutes were not preventing the Does from procreating, but merely preventing them from "paying consideration in conjunction with their use of the state's adoption procedures."[18]

Four years later in *Syrkowski v. Appleyard*,[19] the Michigan Supreme Court addressed the question of whether the trial court had jurisdiction to hear a case in which a father wanted to have an order of filiation entered by the court declaring his paternity after he and the biological mother had entered into a surrogate parenting contract. The court found jurisdiction because the Michigan Paternity Act was designed to determine the paternity of the father and the plaintiff in *Syrkowski* was merely seeking just that, a paternity determination.[20] Although the "Michigan Paternity Act was designed only for 'the purpose of providing support for children born out of wedlock,'" the Michigan court found that a child born as a result of a surrogate parenting contract was a child born "out of wedlock" for the purposes of the statute.[21]

In *Surrogate Parenting Assoc., Inc. v. Commonwealth ex rel. Armstrong*,[22] the Attorney General of Kentucky brought suit against Surrogate Parenting Associates, Inc. in an attempt to have the court revoke its charter for violations of public policy--namely, arranging for surrogate

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[13] The most common fee paid to surrogate mothers is ten thousand dollars plus expenses such as medical tests, maternity clothes, and actual delivery costs. Adding the fees paid to the commercial broker, the doctors, psychiatrists, and attorneys, the contract price can total between thirty thousand and fifty thousand dollars. Charo, *Legislative Approaches to Surrogate Motherhood*, 16 LAW, MEDICINE & HEALTH CARE 96, 97 (Spring-Sum. 1988).

[14] Kelley, 106 Mich. App. at ___, 307 N.W.2d at 440.

[15] Statutes that prohibit the exchange of valuable consideration during adoption procedures are commonly referred to as baby-buying statutes.

[16] Kelley, 106 Mich. App. at ___, 307 N.W.2d at 441.

[17] *Id.*

[18] *Id.*

[19] 420 Mich. 367, 326 N.W.2d 211 (1985).

[20] *Id.* at ___, 326 N.W.2d at 214.

[21] *Id.*

[22] 704 S.W.2d 209 (Ky. 1986).

contracts in violation of the state's baby-buying statutes.[23] Surrogate Parenting Associates (SPA) ran a clinic which helped couples seeking surrogate mothers arrange for surrogacy contracts.[24] The arrangement was a typical surrogate parenting agreement because the biological father contracted with the surrogate mother to have his genetically-related child. Upon the birth of the child, the mother would terminate her parental rights and receive a fee for her services.[25] The wife of the biological father would then be in a position to adopt the child.[26]

The Kentucky Supreme Court found that SPA did not violate the baby-buying statutes.[27] The court looked at the purpose behind the statutes and determined that there were fundamental differences between the surrogacy contracts and the buying and selling of babies as prohibited by the statutes.[28] The determining factor for the court was that in surrogate contracts the mother gives her consent to terminate her parental rights *before* she signs the contract, not *after*, as in the case of a pregnant woman or one who has recently delivered and is arranging for adoption of her child.[29]

Justices Vance and Wintersheimer, in separate opinions, strongly dissented. Justice Vance stated that

> the fact remains that [SPA's] primary purpose is to locate women who will readily, for a price, allow themselves to be used as human incubators and who are willing to sell, for a price, all of their parental rights in a child thus born. . . . [A] portion of the fee is paid in advance for the use of her body as an incubator, but a portion of the payment is withheld and is not paid until her living child is delivered unto the purchaser, along with the equivalent of a bill of sale, or quit-claim deed, to wit--the judgment terminating her parental rights.[30]

Vance viewed the delivery of the child along with the termination of parental rights in exchange for money as selling children.[31] Justice Wintersheimer also viewed the agreements as commercial contracts in which a surrogate mother accepts money in return for giving up her parental rights.[32]

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[23] Armstrong, 704 S.W.2d at 210.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 211.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 209, 214 (Vance, J., dissenting).

[31] *Id.*

[32] *Id.* at 209, 214-5 (Wintersheimer, J., dissenting).

He expressed concern that offers of money could persuade financially needy women to sell their reproductive organs to those who could afford them.[33]

A New York court, in the same year that *Armstrong* was decided, was faced with a private adoption of a child born to a surrogate mother.[34] The court refused to deny the adoption on public policy grounds and found that the best interests of the child lay in being adopted by the biological father and his wife.[35] The court then addressed whether the surrogate mother should be allowed to receive payment.[36] The New York court chose to follow the *Armstrong* decision and found that despite the court's "strong reservations about these arrangements both on moral and ethical grounds," it would not hold that payment to the surrogate mother was in violation of New York law.[37] The court then petitioned the legislature to review the problem of surrogate parenting agreements to determine if legislation was needed.[38]

The most recent and most famous decision involving surrogate parenting agreements is *In re Baby M.*[39] In *In re Baby M*, the biological father (Mr. Stern) and the surrogate mother (Mrs. Whitehead) had entered into a contract under which the surrogate would bear Mr. Stern's child and after the birth, would terminate her parental rights.[40] Mr. Stern agreed to pay Mrs. Whitehead the sum of $10,000 after the child's birth.[41] After the birth of the baby, Mrs. Whitehead realized that she wanted to keep the baby and therefore, found herself in court when Mr. Stern sought enforcement of the surrogacy agreement.[42]

The New Jersey Supreme Court found that surrogacy contracts violated the state's baby-buying statutes and conflicted with state public policy.[43] The court, however, awarded custody (but did not grant the adoption) to the biological father and his wife after determining that such

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[33] *Id.* at 216 (Wintersheimer, J., dissenting).

[34] *In re* Adoption of Baby Girl L.J., 132 Misc.2d 972, 505 N.Y.S.2d 813 (1986).

[35] *Id.* at 974, 505 N.Y.S.2d at ___.

[36] *Id.*

[37] *Id.* at 978, 505 N.Y.S.2d at ___.

[38] *Id.*

[39] 109 N.J. 396, 537 A.2d 1227 (1988).

[40] *Id.* at ___, 537 A.2d at 1235.

[41] *Id.*

[42] *Id.* at ___, 537 A.2d at 1236-37.

[43] *Id.* at ___, 537 A.2d at 1246-50.

a placement was in the best interests of the child.[44] The court also allowed the biological mother visitation rights.[45] The *In re Baby M* case is comprehensive because the New Jersey Supreme Court addressed most of the issues facing courts in determining the legality of surrogacy contracts. Those issues include the invalidity and unenforceability of surrogacy contracts based on conflicts with baby-buying statutes and public policy, the termination of parental rights, the constitutional issues facing the courts, and finally, custody and visitation.[46]

The court first addressed the question of whether the surrogacy contract violated the state's baby-buying statutes.[47] Finding that despite the fact that the surrogacy contract was carefully drafted so as to avoid the appearance of violating the statutes, the effect of the contract was to pay Mrs. Whitehead to allow Mrs. Stern (the wife of the biological father) to adopt the baby, thereby violating the statute.[48] The contract also violated the state statute which said that parental rights cannot be terminated unless the child is voluntarily surrendered to an approved agency or when "there has been a showing of parental abandonment or unfitness."[49] Neither one of the statutory criteria had been met in *In re Baby M*.[50]

The next issue that the court discussed was whether the contract violated New Jersey public policy.[51] The court found that the contract, by giving the father exclusive rights to the child and forcing the mother to terminate her parental rights, violated the policy of the state that a natural father's rights to custody of a child are no greater than the mother's rights.[52]

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[44] *Id.* at ___, 537 A.2d at 1255-61.

[45] *Id.* at ___, 537 A.2d at 1261-64.

[46] *Id.* at ___, 537 A.2d at 1234.

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> a. No person, firm, partnership, corporation, association or agency shall make, offer to make or assist or participate in any placement for adoption and in connection therewith (1) pay, give or agree to give any money or any valuable consideration, or assume or discharge any financial obligation; or (2) take, receive, accept or agree to accept any money or any valuable consideration.

N.J. STAT. ANN. § 9:3-54 (West 1988) (in relevant part).

[48] *In re* Baby M, 109 N.J. at ___, 537 A.2d at 1241.

[49] N.J. STAT. ANN. §§ 9:2-16, -17, 9:3-41, 30:4C-23, 9:2-14 (West 1988).

[50] *In re* Baby M, 109 N.J. at ___, 537 A.2d at 1243.

[51] *Id.* at ___, 537 A.2d at 1246.

[52] *Id.* at ___, 537 A.2d at 1247.

The primary constitutional issue facing the New Jersey court was the right to procreate.[53] The Sterns claimed that if the court found surrogacy contracts illegal, it would violate the Sterns' right to have a biologically-related child.[54] The court found that Mr. Stern had not been deprived of the right to procreate.[55]

> The custody, care, companionship, and nurturing that follow birth are not parts of the right to procreation; they are rights that may also be constitutionally protected, but that involve many considerations other than the right of procreation. To assert that Mr. Stern's right of procreation gives him the right to custody of Baby M would be to assert that Mrs. Whitehead's right of procreation does *not* give her the right to the custody of Baby M; it would be to assert that the constitutional right of procreation includes within it a constitutionally protected contractual right to destroy someone else's right of procreation.[56]

The court summarily dealt with the Stern's equal protection claim.[57] The Stern's asserted that their constitutional right had been violated because the New Jersey statute provided "full parental rights to a husband in relation to the child produced, with his consent, by the union of his wife with a sperm donor."[58] The court did not accept this argument reasoning that because a sperm donor and a surrogate mother were not similarly situated, the state could properly distinguish between the sperm donor and surrogate mother.[59]

These five cases demonstrate the difficulties that courts face when dealing with surrogacy contracts. Courts are presented not only with contractual issues, but also with a live human being, a child. The judge must weigh the public policy issues against the best interests of the child and determine an equitable solution to a difficult dilemma.

LEGALITY OF SURROGACY CONTRACTS UNDER VIRGINIA LAW

Although Virginia has no statute directly addressing the legality of surrogate contracts, there are several statutes which a court could use in determining whether such a contract would be enforceable under Virginia law. Virginia Code section 63.1-220.1 defines who may place a child

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[53] *Id.* at ___, 537 A.2d at 1253.

[54] *Id.*

[55] *Id.*

[56] *Id.* at ___, 537 A.2d at 1253-54 (emphasis in original).

[57] *Id.* at ___, 537 A.2d at 1254.

[58] N.J. STAT. ANN. § 9:17-44 (West 1988).

[59] *In re* Baby M, 109 N.J. at ___, 537 A.2d at 1254. The court looked at the difference in time it takes to produce sperm or to bear a child for nine months.

for adoption.[60] The only entities that may place a child for adoption are a licensed child-placing agency, a local board of public welfare or social services, the child's parent or any agency outside the Commonwealth which is licensed to place children for adoption by the laws of the state in which it operates.[61] Therefore, if the child is being placed for adoption by its biological mother (with the consent of the biological father), this particular statute would not be violated.

The inquiry, however, does not end with that statute. Virginia Code section 63.1-220.3 outlines the procedures that must be followed when a child is being placed for adoption by his parent or guardian.[62] Before the adoption may be processed, the parent/guardian must execute a valid consent before a juvenile and domestic relations district court subject to the following findings: 1) that the birth parents are aware of alternatives to adoption and their consent is informed and uncoerced, 2) that a licensed child-placing agency has advised the adopting parents on alternatives to adoption, 3) that both sets of parents have exchanged identifying information, 4) that "any financial agreement or exchange of property among the parties and any fees charged or paid for services related to the placement or adoption of the child have been disclosed to the court," 4) that there has been no violation of the Virginia version of a baby-buying statute (to be discussed further below), and 6) that a licensed child-placing agency has conducted a study of the home of the adoptive parents.[63] Furthermore, consent cannot be given until the adoptive child is at least ten days old and that consent shall be revocable for up to fifteen days after execution.[64] Finally, the court must determine if the adoption is in the best interests of the child.[65]

A typical surrogacy contract would violate several provisions of § 63.1-220.3. First, there normally is no counseling of the birth parent and adoptive parent on the alternatives to adoption.[66] Second, as will be discussed below, the contract itself arguably violates the Virginia baby-buying statute. Third, there is no investigation into the home-life of the adopting parent. Under a surrogacy contract there is no inquiry into the suitability of the adoptive parents. If the prospective parents have enough money to pay the bills, the inquiry stops there. "The mere fact

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[60] VA. CODE ANN. § 63.1-220.1 (Supp. 1989).

[61] *Id.*

[62] VA. CODE ANN. § 63.1-220.3 (Supp. 1989).

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] If there were such counseling, this portion of the statute would not be violated.

that a couple is willing to pay a good deal of money to obtain a child does not vouchsafe that they will be suitable parents . . . ."[67] The General Assembly believed strongly enough in the best interests of the child to include a suitability criteria in its statutory scheme for adoption. Because most surrogacy contracts do not address the best interests of the child, they would violate that criteria.[68] Finally, consent in Virginia cannot be given before the infant is at least ten days old and is revocable for up to fifteen days thereafter.[69] Under surrogacy contracts, the surrogate mother gives her consent nine months before the baby is born and normally that consent is not revocable. This clearly violates § 63.1-220.3, which was probably designed, like laws in other states, to give a woman time to think about her decision and time to change her mind after she has made her decision.[70]

The final statutory provision that could be used to challenge a surrogacy contract in Virginia is § 63.1-220.4: "No person or child-placing agency shall charge, pay, give, or agree to give or accept any money, property, service or other thing of value in connection with a placement or adoption . . . ."[71] The exceptions to the statute include 1) reasonable services and fees provided by a licensed agency, 2) payment for medical expenses, 3) payment for transportation costs incurred in gaining consent, 4) customary legal fees, and 5) expenses for transportation for intercountry adoptions.[72] The statute also states that "[n]o person shall advertise or solicit to perform any activity prohibited by this section."[73]

Although care can be taken to fashion a contract that appears not to violate the statute, the underlying purpose of the contract remains the same--payment of money in return for the termination of parental rights. In *In re Baby M*, the contract was structured so that the adopting mother was not a party to the contract, the stated purpose of the contract was to give a child to Mr. Stern (the biological father), and the payment to Mrs. Whitehead (the surrogate mother) was

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[67] Capron, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, 16 LAW, MEDICINE & HEALTH CARE 34, 37 (Spring-Sum. 1988).

[68] *See In re* Baby M, 109 N.J. 396, ___, 537 A.2d 1227, 1242 (1988)(adoption statutes seek to further the goal of determining the best interests of the child).

[69] Because Virginia has no published legislative history, there is no indication that surrogacy contracts were considered when the General Assembly adopted this statute effective July 1989.

[70] Surrogate Parenting Assoc., Inc. v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209, 214-15 (Ky. 1986) (Wintersheimer, J., dissenting).

[71] VA. CODE ANN. § 63.1-220.4 (Supp. 1989).

[72] *Id.*

[73] *Id.*

for compensation of services.[74] The court still found that the contract violated New Jersey law because money was paid to Mrs. Whitehead in connection with the adoption of Baby M.[75] Under the Virginia statute, not only could a court find the parties to the contract to be in violation of the statute, but the agency as well for advertising for or soliciting such arrangements.[76]

A Virginia court could, however, take the approach of the court in *Surrogate Parenthood Assoc., Inc. v. Commonwealth ex rel Armstrong.*[77] That court concluded that because consent by a mother is given before entering into the surrogate agreement, there were fundamental differences between surrogacy contracts and baby-buying, and therefore the baby-buying statute was not violated.[78] The Kentucky Supreme Court focused on the fact that in surrogacy contracts the biological mother gives her consent to termination of her parental rights before she conceives, not after, as in the case of a woman who is already pregnant and is approached by a baby-broker.[79]

It is not clear under current Virginia law whether surrogacy contracts are legal. The General Assembly has recognized that surrogacy is an area that must be addressed by the legislature. The next section of this article will outline issues which the General Assembly should consider in drafting legislation concerning surrogate parenting agreements.

ISSUES TO BE ADDRESSED BY GENERAL ASSEMBLY

Exploitation of Women

Some critics of surrogacy agreements have argued that the agreements promote the exploitation of women. Although a surrogate parenting contract is signed before a woman conceives and the woman is not laboring under an unwanted pregnancy at the time she signs the contract, that woman may still be exploited. Financial inducements to enter into the contract are still present whether the woman is pregnant or not. A single mother who is unable to meet her

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[74] *In re* Baby M, 109 N.J. 396, ___, 537 A.2d 1227, 1241 (1988).

[75] *Id.* at ___, 537 A.2d at 1241.

[76] Violation of this statute is considered a class 5 felony. VA. CODE ANN. § 63.1-220.4 (Supp. 1989). A class 5 felony subjects a person to a prison term of between one and 10 years or confinement in jail for up to 12 months and a fine of not more than $1000, either or both.

[77] 704 S.W.2d 209 (Ky. 1986).

[78] *Id.* at 211.

[79] *Id.*

debts to support her other children, faced with the prospect of earning $10,000 for bearing a child, may be induced to enter into a surrogacy contract.

Couples who wish to employ the use of a surrogate mother are generally well educated and well off financially.[80] Almost sixty-four percent of the couples have an income of over fifty thousand dollars per year, while an another twenty-eight percent earn between thirty thousand and fifty thousand dollars per year.[81] At least thirty-seven percent of the couples are college-educated and fifty-four percent have attended graduate school.[82]

The surrogate mothers, on the other hand, are generally non-Hispanic Protestant whites between the ages of twenty-six and twenty-eight, sixty percent of whom are married.[83] Less than thirty-five percent of surrogate mothers have gone to college and only four percent ever attended graduate school.[84] Only thirty percent of surrogate mothers earn between thirty thousand and fifty thousand dollars per year and sixty-six percent earn less than thirty thousand dollars.[85]

These figures show that most of the couples seeking surrogate mothers are in a position to financially induce a surrogate mother to bear their child. "Although an offer of money almost always serves as an inducement to act in certain ways, it is difficult to determine when an incentive becomes an 'undue' inducement."[86] It is difficult to ascertain how much money will induce someone because people place different values on sums of money and have varied amounts of willingness to undergo the substantial discomforts of pregnancy.[87] One cannot separate, in a surrogacy context, what sum would be "undue" influence versus merely "due" influence.[88]

Because of the cost involved, up to fifty thousand dollars,[89] only the wealthy will be able to afford to enter into surrogacy contracts. A woman in a destitute situation with the prospect of

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[80] Charo, *Legislative Approaches to Surrogate Motherhood*, 16 LAW, MEDICINE & HEALTH CARE 96 (Spring-Sum. 1988).

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* at 97.

[85] *Id.*

[86] Macklin, *Is There Anything Wrong With Surrogate Motherhood? An Ethical Analysis*, 16 LAW, MEDICINE & HEALTH CARE 57, 62 (Spring-Sum. 1988).

[87] *Id.*

[88] *Id.*

[89] *See* note 13, *supra*.

earning up to ten thousand dollars may sign the contract merely to get the money.[90] "It is always going to be poor women who have babies and rich women who get them."[91]

One author has suggested that "[s]urrogate [p]arenting can be viewed as a new and possibly lucrative field for women. Rather than being demeaning to bear a child for another woman, it could be viewed as a noble and honorable profession, and pretty well-paying, too."[92] However, "[t]he role of paid breeder is incompatible with a society in which individuals are valued for themselves and are aided in achieving a full sense of human well-being and potentiality."[93] Indeed, as one author put it: "[w]hile commercialized surrogacy finally acknowledges the economic value of women's reproductive capabilities- i.e., that 'labor' is labor- it also makes biological mothers into workers on a baby assembly line, as they try to convert their one economic asset- fertility- into cash for their other children."[94]

Violations of the Policies Behind Baby-Buying Statutes

Many states, including Virginia, prohibit the exchange of money in connection with an adoption except for the payment of medical expenses and customary agency and legal fees.[95] "[P]rohibitions on paying for adoptable babies are based on a collective judgment that certain things simply should not be bought and sold."[96] At least one court has found that surrogacy contracts violated the baby-buying statutes of that state.[97]

Proponents of surrogacy contracts argue that the contracts do not violate baby-buying statutes. "Concerns that an unwed mother will part with her child because of societal pressure and the attendant emotional strain of the situation or that she will yield to unscrupulous baby brokers

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[90] *In re* Baby M, 109 N.J. at ___, 537 A.2d at 1249; Macklin, *supra*, note 86 at 61.

[91] Macklin, *Is There Anything Wrong with Surrogate Motherhood? An Ethical Analysis*, 16 LAW, MEDICINE & HEALTH CARE 57, 60 (Spring-Sum. 1988) (citation omitted).

[92] Keech, *Surrogate Parenting Agreements in Virginia*, 16 COLONIAL LAWYER 28, 31 (1987).

[93] Capron, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood*, 16 LAW, MEDICINE & HEALTH CARE 34, 36 (Spring-Sum. 1988).

[94] Charo, *Legislative Approaches to Surrogate Motherhood*, 16 LAW, MEDICINE & HEALTH CARE 96, 108 (Spring-Sum. 1988) (citation omitted).

[95] Capron, *supra*, note 94 at 109.

[96] Charo, *Legislative Approaches to Surrogate Motherhood*, 16 LAW, MEDICINE & HEALTH CARE 96, 109 (Spring-Sum. 1988).

[97] *In re* Baby M, 109 N.J. 396, ___, 537 A.2d 1227, 1240-41 (1988).

involved in the black market are not warranted in the surrogate context."[98] In the situation which most baby-buying statutes were designed to prevent, an unwed pregnant mother is accosted by a baby-broker and induced into selling her unborn child.[99] In a surrogacy situation, the potential mother makes an informed, rational decision before she is faced with an unwanted pregnancy and the financial burden that will follow.[100]

The fact remains, nevertheless, that under surrogate contracts, money is given to the surrogate mother in exchange for an adoption. "[T]he procedure . . . is nothing more than a commercial transaction in which a surrogate mother receives money in exchange for terminating her natural and biological rights in the child."[101] The child is conceived for the purpose of abandoning him to someone else in spite of what might be in the best interests of the child after he is born.[102]

There is certainly a valid argument that in special circumstances surrogate arrangements serve a legitimate and useful purpose--for example, the woman who wishes to produce a baby (without compensation) for her infertile daughter or sister. The Nebraska legislature recognized those special circumstances when it enacted legislation that only prohibited surrogacy contracts in which the woman received compensation.[103] A law such as Nebraska's would greatly reduce the number of surrogacy agreements because it would be hard to find women who would serve as surrogates for no compensation, but it would still allow for the truly dedicated women to produce a biologically-related child without violating a baby-buying statute.

The Right to Procreate and Equal Protection

Surrogacy litigants have argued that constitutional issues such as the right to procreate and equal protection under the law mandate a court to approve such contracts.[104]

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[98] Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions*, 50 TENN. L. REV. 71, 108 (1982).

[99] Surrogate Parenting Assoc., Inc. v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209, 211 (Ky. 1986).

[100] *Id.* But even if a woman makes an informed consent before conception, the woman cannot know (unless she has previously done so) what it is like to give up one's child after birth. Macklin, *Is There Anything Wrong with Surrogate Motherhood? An Ethical Analysis*, 16 LAW, MEDICINE & HEALTH CARE 57, 60 (Spring-Sum. 1988).

[101] Surrogate Parenting Assoc., Inc. v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209, 214-15 (Ky. 1986) (Wintersheimer, J., dissenting).

[102] Macklin, *supra*, note 100 at 59.

[103] NEB. REV. STAT. § 25-21, 200 (Supp. 1988).

[104] *In re* Baby M, 109 N.J. 396, ___, 537 A.2d 1227, 1253 (1988).

The right to procreate has only been the subject of one Supreme Court case.[105] Under surrogacy agreements, the biological father is not denied his right to procreate.[106] The biological father asking for the "custody, care, companionship, and nurturing that follow birth" is not asking for his right to procreate.[107]

Couples attempting to enforce surrogacy agreements have also argued that invalidating the contract would be a denial of equal protection under the law.[108] This argument arises in states which allow "granting full parental rights to a husband in relation to the child produced, with his consent, by the union of his wife with a sperm donor."[109] The infertile couples argue that if a sperm donor was allowed to help an infertile couple to conceive, it would be a denial of equal protection to couples with infertile wives if a surrogate mother were not also allowed to help infertile couples.[110]

There are, however, fundamental differences between sperm donors and surrogate mothers. The two parties are not similarly situated. A sperm donor is not the same as a surrogate mother. The difference between donating sperm and carrying a child to term is substantial enough for a state to distinguish between the two parties. The male sperm donor donates his sperm in a sterile doctor's office or sperm bank. The surrogate mother, on the other hand, meets with the future parents, and after deciding to go through the process, endures the physical and emotional changes associated with a nine-month pregnancy. On this basis, the state may distinguish between the two parties so as to justify automatically divesting a sperm donor's parental rights without doing the same for the surrogate mother.[111]

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[105] Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization of criminals violated the fourteenth amendment) *noted in In re* Baby M, 109 N.J. 396, ___, 537 A.2d 1227, 1253 (1988).

[106] *In re* Baby M, 109 N.J. 396, ___, 537 A.2d 1227, 1253 (1988).

[107] *Id.* at ___, 537 A.2d at 1253-4. *See, supra*, note 53 and accompanying text. In the majority opinion, Chief Justice Wilentz makes a convincing argument that the right to procreate does not include the right to custody of a child.

[108] Charo, *Legislative Approaches to Surrogate Motherhood*, 16 LAW, MEDICINE & HEALTH CARE 96, 109 (Spring-Sum. 1988).

[109] *In re* Baby M, 109 N.J. 396, ___, 537 A.2d 1227, 1254 (1988). Virginia has a statute which states that "[a]ny child born to a married woman, which was conceived by means of artificial insemination performed by a licensed physician at the request of and with the consent in writing of such woman and her husband, shall be presumed, for all purposes, the legitimate natural child of such woman and such husband the same as a natural child not conceived by means of artificial insemination." VA. CODE ANN. § 64.1-7.1 (1988). (This statute is found in the Virginia Code section dealing with wills and trusts).

[110] *Id.*

[111] *Id.* at ___, 537 A.2d at 1254.

The United States Supreme Court in *Reed v. Reed*,[112] stated that in order to avoid a violation of the Equal Protection Clause, distinctions between males and females had to be reasonable.[113] The distinction between male sperm donors and female surrogate mothers, for reasons outlined above, is reasonable. In addition, no court that has considered such claims has acknowledged the validity of a constitutional challenge on equal protection grounds.

CONCLUSION

There are many ways which the legislature can choose to deal with the question of surrogacy in Virginia. It can pass a law declaring the contracts void and unenforceable. This would satisfy those members of the "constituency" that believe such contracts to be morally wrong. If the General Assembly believes that the contracts serve a useful purpose, but is troubled by the fact that such contracts promote the buying and selling of babies, it could pass a law against commercialized contracts, similar to that of Nebraska. A final approach could be to put into place a regulatory system that would review the contracts before they are signed and monitor the outcome of the contracts. A statutory scheme similar to that outlined in the adoption statutes could be established for surrogacy contracts. In this manner, issues such as the best interests of the child and the prevention of the exploitation of women could be addressed.

My recommendation to the General Assembly is to either outlaw surrogacy contracts altogether or to outlaw only those involving compensation paid to the surrogate mothers. Either of these two solutions would promote the general public policy against the buying and selling of babies while not requiring the state to become over-involved in the regulation of surrogacy contracts.

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[112] 404 U.S. 71 (1976).

[113] *Id.* at 76.

PROVING CONSTRUCTIVE POSSESSION IN VIRGINIA: A CHANGE IN THE TRADEWINDS

David L. Thomas

INTRODUCTION

Dick and Jane are a pair of fun-loving teenage college students. Late one evening several months ago they met a suspicious character at a predesignated spot on campus where the two college party-goers bought some marijuana. Dick paid cash for the stash which he placed on the dash of Jane's brand new car. Then off the two went. On the way to their private getaway where they would smoke the marijuana, Jane's speed caught the attention of a lone policeman who took chase and pulled the young collegians over in his police cruiser. Upon asking Jane for her identification and registration, the officer noticed a greenish leafy substance on the dash in plain view and quickly seized it. Shortly thereafter both Jane and Dick were placed under arrest for possession. Later at trial, as Dick and Jane sat next to their respective attorneys, they each accused the other of being the true possessor. Dick proffered that the marijuana was Jane's because it was found in Jane's car, while Jane insisted that the marijuana was Dick's because he was the one who had actually purchased it and then placed it in the vehicle.

The glaring question for both the court and the prosecutor to consider is typical of all such drug-related cases: Whose marijuana is it, and to prove constructive possession, does it really matter?" The answer to this inquiry has demanded the attention of jurists since the turn of the century. Most recently, in light of the societal push toward a drug-free America, it has emerged as one of the more controversial topics in American politics. Specifically, the tactics and policies of law enforcement agencies, most notably the FBI's policy of Zero-Tolerance, have come under attack. What makes for the strongest echoes of controversy is that many of these same, self-serving individuals who criticize law enforcement for failures in the realm of due process are the ones who also criticize the police department for their perceived lack of initiative toward halting the drug problem in their own communities. As a result of this "Catch 22" situation, a number of perplexing issues and questions have arisen, namely: what is constructive possession? how is it proven? and does this proof pass the constitutional hurdles of due process?

My analysis is intended to discuss the elements of constructive possession and the problems of ambiguity that accompany those elements in the State of Virginia. For a discussion of the more concrete, actual, physical possession, I refer the reader to *Michie's Virginia Jurisprudence* or *Corpus Juris Secundum*. Of general interest here will be a discussion of all major Virginia cases which lay down what the Virginia Supreme Court and the Virginia Court of Appeals have accepted as constructive possession. Because the law of possession is ever evolving, like the rest of common law, it is never assumed that this discussion of possession is complete. It is merely meant to be a guide from which one may predict the outcome of a case involving the constructive possession of a controlled substance in the Virginia court system today.

WHAT CONSTITUTES CONSTRUCTIVE POSSESSION IN AMERICA: A BACKGROUND GUIDE

To begin an analysis of Virginia law, one may give the reader a general flavor for the diversity of this subject by a quick reference to how alternative jurisdictions prove constructive possession. For example, in Illinois, constructive possession has a narrow spectrum and hence drugs found in the trunk of the defendant's car while s/he is driving is not enough to prove possession.[1] Yet in California, constructive possession has been expanded. There, the state court system has determined that inferences and statutory presumptions can be drawn from varying situations. If drugs are found hidden in a car in California, a presumption is raised that the owner knew of their presence.[2] In most states, the key to proving constructive possession hinges on the accompanying circumstances and not on mere ownership of the premises or the defendant's proximity to the drugs. That's why in New York the owner of an apartment who sublets to another is not responsible for drugs that are found on his premises,[3] and in Oklahoma mere attendance at a party where drugs are used is not enough to prove possession.[4]

The conditions reflecting constructive possession, as determined by a general consensus of the states, can be categorized into three areas: dominion/control, knowledge of presence, and knowledge of nature.[5] A fourth area used to be "exclusivity of control,"[6] but with the advent of "joint possession," that element has lost much of its weight. Nevertheless, there still seems to be some fervor regarding the defense of "equal access", that is to say, the defense of saying, "the drugs are as much his as they are mine, because both of us had access to them."[7] Such a defense would lead to obvious injustice if it were allowed to succeed, as anyone who could prove nonexclusive control could wiggle out of the drug charge. (The perfect preventive measure for any defendant who planned to use a controlled substance would be to have the drugs in open view with many

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[1] People v. Mosley, 131 Ill. App. 2d 722, 265 N.E.2d 889 (1972).

[2] People v. Waller, 260 Cal. App. 2d 131, 67 Cal. Rptr. 8 (1968).

[3] People v. Schriber, 310 N.Y.S.2d 551, 34 A.D.2d 852, *aff'd* 327 N.Y.S.2d 68, 29 N.Y.2d 780, 277 N.E.2d 187 (1971).

[4] Brown v. State, ___ Okla. Crim. ___, 481 P.2d 475 (1971).

[5] *See generally*, 28 C.J.S. *Supp. Drugs and Narcotics* §§ 154-61 (1974 & Supp. 1989).

[6] People v. Diaz, 343 N.Y.S.2d 474, 41 A.D.2d 382, *aff'd* 356 N.Y.S.2d 295, 34 N.Y.2d 689, 312 N.E.2d 478 (1973).

[7] Shreve v. State, 172 Ga. App. 190, 322 S.E.2d 362 (1984).

people around. As long as the defendant was not caught actually touching the drugs, s/he would be safe. The ultimate consequence of all of this, if we are to believe the progenitors of the "equal access" defense, is the eventual quasi-legalization of drug parties).

All of this "give and take" leads to a diversity of definitions as to what constructive possession is or isn't -- depending in part upon the law and judicial philosophy that exists in the state where the offense occurred. What is agreed by all jurisdictions is that some quantity of drugs must be actually found and a link establishing some type of corroboration must be made in order for the prosecution to establish a *prima facie* case of constructive possession.[8]

ELEMENTS OF CONSTRUCTIVE POSSESSION IN VIRGINIA: A RESTATEMENT OF THE NATIONAL GUIDELINES

Virginia's black letter definition of possession reads that the defendant must be "aware of the presence and character of the particular substance and [must be] . . . intentionally and consciously in possession of it."[9] Generally, "physical possession giving the defendant 'immediate and exclusive control' is sufficient" to establish the above standard.[10] The scenario changes, however, when the drugs are not found on the defendant's physical person. This is where the already-mentioned, three-part rules governing constructive possession begin.

There is, under Virginia's view of constructive possession, a subset identified as "joint possession" where "exclusivity of control" is not a necessary element.[11] Hence, under Virginia's "joint possession" philosophy, control can be exercised simultaneously by plural subjects (defendants).

The overall view of constructive possession in Virginia, like that of the rest of the country, defines its elements in a three-part test, namely, "dominion and control" over the substance,[12] as well as knowledge of both "the presence and the nature/character" of the substance.[13] Another

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[8] Wong Sun v. United States, 371 U.S. 471 (1962).

[9] Robbs v. Commonwealth, 211 Va. 153, 176 S.E.2d 429 (1970) (*quoting* Ritter v. Commonwealth, 210 Va. 732, 741, 173 S.E.2d 799, 805-06 (1970)).

[10] *Id.*

[11] Clodfelter v. Commonwealth, 218 Va. 619, 238 S.E.2d 820, *rev'g and remanding* 218 Va. 98, 235 S.E.2d 340 (1977).

[12] *Id.*

[13] Burton v. Commonwealth, 215 Va. 711, 213 S.E.2d 757 (1975).

essential aspect of this traditional three-part test to prove possession is that the police must actually find drugs (a controlled substance). A defendant's mere confession to possessing drugs is insufficient in and of itself in Virginia to yield a conviction.[14] The police must recover a minuscule quantity or at least a residue of the drug.[15]

After the drug has been found and properly identified via a valid drug analysis and certification, the three aforementioned elements will come into play and must be satisfied to securely link the drugs with the defendant. Although it is suggested that these three elements act as corroborating evidence, the fact that one needs all three without exception seems to suggest a corroboration that is much more intense than in most other criminal proceedings.[16]

APPLICATION OF THE POSSESSORY SCHEME IN VIRGINIA

The application of the three components of possession, "dominion/control," "presence," and "character/nature," to any set of facts corresponding to a drug charge is often a vague task, for constructive possession outside of actual physical control has no true, steadfast definition by any means. It changes as the facts change -- what is commonly called constructive possession in one case may not be in another if one seemingly minor fact is different, like the defendant is not present when the drugs are found at his/her residence.[17] As a consequence to this diversity of facts scenario, in order to understand what it takes to prove possession and what the words "control" and "knowledge" truly mean, one must examine not statutory codes, but Virginia case law. What follows is a discussion of the most important factors affecting possession as deemed by the Virginia courts. Many of the topics under each element of possession are interchangeable as pertaining to each of the other elements. As a result, for purposes of simplification, an attempt will be made to discuss key topics with the corresponding possessory element that perhaps best illustrates its use in fulfilling the Commonwealth's burden of proof.

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[14] Manley v. Commonwealth, 211 Va. 146, 176 S.E.2d 309, *cert. denied* 403 U.S. 936 (1970).

[15] Robbs, 211 Va. at 153, 176 S.E.2d at 429.

[16] Adkins v. Commonwealth, 217 Va. 437, 229 S.E.2d 869 (1976).

[17] Drew v. Commonwealth, 230 Va. 471, 338 S.E.2d 844 (1986).

Dominion and Control

The first factor the court will ponder is ownership, but not ownership of the drugs *per se*, rather ownership or possessory interest in the place where the drugs are found, whether that be a house, apartment, or motor vehicle. Generally, drugs found in private are much more incriminating than if they are found in a public place.[18] The innate inference, which goes toward the weight of the evidence, will be present to suggest that whoever owns the premises probably owns the drugs. Certainly under those circumstances one has them at least within one's dominion.[19] More than this is needed, however, to show possession in Virginia; the Code steadfastly points out that there are no presumptions of possession in Virginia arising out of mere ownership of the premises on which the drugs are found.[20] Nevertheless, there is some relevance to the aforementioned inference surrounding the issue of ownership. As a by-product, the judicial inference arising from ownership coupled with other corroborating evidence will eventually prove constructive possession in the Virginia courts.[21] This same judicial inference arises again if the defendant is found in close proximity to the drugs.[22] A defendant who is charged with possession then takes the first step down the path to conviction if s/he owns the house/vehicle where the drugs are found or if s/he has a legal possessory right to occupy and control the premises, namely, a lease on the apartment, hotel room, or vehicle.

One of the defenses most used to combat the prosecution's assertion of "dominion and control" is referred to as "equal access" -- the showing that others could have controlled the drugs just as easily as the defendant. This is done by demonstrating that the premises was frequented by people other than the defendant and that as a result, the defendant did not have exclusive use of the area.[23] Today "equal access" is not as controlling in Virginia as elsewhere in the nation. This lack of precedential value is rooted in two alternative arguments. First, the development of

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[18] Drew v. Commonwealth, 230 Va. 471, 338 S.E.2d 844 (1986); Clodfelter v. Commonwealth, 218 Va. 619, 238 S.E.2d 820, *rev'g and remanding* 218 Va. 98, 235 S.E.2d 340 (1977).

[19] Drew, 230 Va. 471, 338 S.E.2d 844; Clodfelter, 218 Va. 619, 238 Va. S.E.2d 820.

[20] VA. CODE ANN. §§ 18.2-250 & 250.1 (1988 & Supp. 1989).

[21] Adkins v. Commonwealth, 217 Va. 437, 229 S.E.2d 869 (1976); Hodge v. Commonwealth, 7 Va. App. 351, 371 S.E.2d 156 (1988).

[22] Brown v. Commonwealth, 5 Va. App. 489, 364 S.E.2d 773 (1988).

[23] Drew, 230 Va. 471, 338 S.E.2d 844; Huvar v. Commonwealth, 212 Va. 667, 187 S.E.2d 177 (1972); Crisman v. Commonwealth, 197 Va. 17, 87 S.E.2d 796 (1955).

"joint possession" allows more than one person or defendant to exercise control over the drugs.[24] Thus, nonexclusive use is acceptable, as long as there are other elements showing control -- a large amount of drugs in open view coupled with ownership of the premises being one such example.[25] Second, the code as amended in 1973 specifies that mere ownership of the premises or proximity to the drugs is not good enough for a conviction, thereby ensuring that the policy behind the "equal access" defense is protected.[26] It is interesting to note that even though "equal access" has seemingly been done away with in Virginia, it still finds its way back into the courts and has been validated by the Virginia Supreme Court as late as 1986 in *Drew v. Commonwealth.*[27] The general approach by the Virginia Supreme Court seems to be that a defendant may use the defense in two differing scenarios: First, when the defendant is not the owner of the premises/vehicle where the drugs are found and there are a lot of other people around in the area; and second, where the defendant is the owner of the premises/vehicle, but, although numerous people are at the premises, the defendant is in fact not present at the scene when the drugs are found.[28]

An important endnote to "equal access" is that the Virginia Court of Appeals has never ruled on the issue. It is this writer's opinion that the use of "equal access" will be even more limited in the future due to the new court's tendency toward conservatism on matters concerning drug possession.

In the event that the defendant doesn't own the premises, the Commonwealth must show that the defendant had access to it and thereby access to the drugs.[29] Without this control link, there is no case for possession, as "equal access" can and will be more readily used. The search for showing access begins by assuming that the owner of record is not the true resident, but is in name only, and proceeds by asking whether the defendant makes the rent, mortgage, utilities, or phone payments. If so, s/he may be the constructive owner.[30] The inference may arise with

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[24] Robbs v. Commonwealth, 211 Va. 153, 176 S.E.2d 429 (1970).

[25] McGee v. Commonwealth, 4 Va. App. 317, 357 S.E.2d 738 (1987).

[26] VA. CODE ANN. §§ 18.2-250 & 250.1.

[27] 230 Va. 471, 338 S.E.2d 844.

[28] *See* Drew, 230 Va. 471, 338 S.E.2d 844; Lane v. Commonwealth, 223 Va. 713, 292 S.E.2d 358 (1982); Adkins, 217 Va. 437, 229 S.E.2d 869; Huvar, 212 Va. 667, 187 S.E.2d 177; Crisman, 197 Va. 17, 87 S.E.2d 796.

[29] Brown v. Commonwealth, 5 Va. App. 489, 364 S.E.2d 773 (1988); Albert v. Commonwealth, 2 Va. App. 734, 347 S.E.2d 534 (1986).

[30] Patty v. Commonwealth, 218 Va. 150, 235 S.E.2d 457 (1977).

constructive ownership to prove possession just as it does with actual ownership of the premises; however, this inference will naturally be weaker.

In the event that the defendant doesn't own the premises actually or constructively, the case for possession becomes harder to prove because one corroborating fact, like open view, will not be enough to demonstrate possession. Yet the Commonwealth's case is not sunk. Although the inference is weak,[31] the defendant can still be linked with the premises through accessibility, thus demonstrating "dominion and control" by showing that the defendant either frequents the premises (building) or uses the vehicle.[32] As a result, if a defendant uses the building as a mailing address[33] or rides in the car to work everyday, an inference of "dominion and control" will arise from the excessive use standing alone.

Probably the strongest inference going toward proving possession, which would need only a small amount of corroboration by the Commonwealth to demonstrate control, would be the combination of ownership of the premises with exclusive possession.[34] Although exclusivity is a hard case to prove, it may be inferred by sole occupancy of the house, apartment, or vehicle, together with the fact that the deed or lease is in the defendant's name only, and s/he has the only key.[35] However, just as the plural possession of keys can spell doom for the inference of exclusivity, it can also bring life to an otherwise dead case if the defendant is not a constructive or an actual owner, but does have a key which allows him/her to frequent the premises at will.[36] The defendant caught driving someone else's vehicle is a primary example of how the

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[31] Clodfelter, 218 Va. 619, 238 S.E.2d 820.

[32] Woodfin v. Commonwealth, 218 Va. 458, 237 S.E.2d 777 (1977); Wynn v. Commonwealth, 5 Va. App. 283, 362 S.E.2d 193 (1987). Keys to demonstrating accessibility include determining: 1) when the defendant last frequented the premises; 2) how often s/he visits; and/or 3) how long s/he stays when visiting. Brown, 5 Va. App. 489, 364 S.E.2d 773.

[33] Fierst v. Commonwealth, 210 Va. 757, 173 S.E.2d 807 (1970); Ritter v. Commonwealth, 210 Va. 732, 173 S.E.2d 799 (1970).

[34] Thorne v. Commonwealth, No. 1011-86-2 (Va. App. Sept. 30, 1987).

[35] Iglesias v. Commonwealth, 7 Va. App. 93, 372 S.E.2d 170 (1988); Thorne, No. 1011-86-2 (Va. App. Sept. 30, 1987).

[36] *See* Thorne, No. 1011-86-2 (Va. App. Sept. 30, 1987); *see also* Clodfelter, 218 Va. 619, 238 S.E.2d 820 (for discussions about the importance of having access through the use of a key). It should be noted that in these cases the defendant who possessed the key was also the owner of the premises.

Commonwealth can show control, as the defendant has not only a key, but has also demonstrated the ability to use it to control the vehicle.[37]

Another ingredient of "dominion and control" which can act to shore up an otherwise weak case is the finding of the defendant's personal effects at the scene where the drugs are found. These personal effects serve a dual purpose. First, they may be used to show that the defendant frequented and had access to the area.[38] Second, they may be used to draw a tighter link with the defendant's knowledge of the presence of the drugs, the inference being that the defendant must have seen the drugs when s/he put his/her gear in the area.[39] Thus, if the defendant is not the owner of the car where the drugs are found, but has personal mail or other personal papers in that car, a tighter link between the defendant and the drugs is drawn.[40] That link can even be tighter depending upon where the personal items are found in relation to the drugs.[41] As a general rule, personal items that touch the drugs create an unofficial, but nevertheless authoritative, rebuttable presumption of "knowledge" and "control," whereas those that are just close in proximity create a mere inference which needs further corroboration.[42] If the items are in the trunk or glove compartment, an additional burden is created for the Commonwealth to prove a more substantial use of the vehicle by the defendant. In that type of case, one may need more than mere possession of car keys to show use.[43] The more a defendant uses the premises or vehicle, the better the control argument for the Commonwealth.[44]

Another often overlooked area with which to demonstrate control, as it is usually only used to show knowledge of the nature of the substance, is paraphernalia that either is found in open view near the defendant or is found hidden on the defendant's physical person. The former

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[37] Patty, 218 Va. 150, 235 S.E.2d 457; Adkins, 217 Va. 437, 229 S.E.2d 869; Castaneda v. Commonwealth, 7 Va. App. 574, 376 S.E.2d 82 (1989).

[38] Woodfin, 218 Va. 458, 237 S.E.2d 777; Wynn, 5 Va. App. 283, 362 S.E.2d 193.

[39] Andrews v. Commonwealth, 216 Va. 179, 217 S.E.2d 812 (1975); Albert, 2 Va. App. 734, 347 S.E.2d 534.

[40] Patty, 218 Va. 150, 235 S.E.2d 457.

[41] Andrews, 216 Va. 179, 217 S.E.2d 812.

[42] *Compare* Garland v. Commonwealth, 225 Va. 182, 300 S.E.2d 783 (1983); Clodfelter, 218 Va. 619, 238 S.E.2d 820; Albert, 2 Va. App. 734, 347 S.E.2d 534.

[43] Adkins, 217 Va. 437, 229 S.E.2d 869.

[44] *See generally*, Woodfin, 218 Va. 458, 237 S.E.2d 777; Wynn, 5 Va. App. 283, 362 S.E.2d 193 (where the Commonwealth lost on the grounds that it failed to show a more substantial use by the defendant).

circumstance draws as tight of a possessory link as the latter only in a situation where the paraphernalia is found among (touching) the defendant's personal effects.[45] The inference, in that case, is that the paraphernalia was used by the defendant to administer or dispense the drug that was found.

Fingerprints are yet another piece of evidence which can be used to show control and knowledge of presence, if they are found on the drugs[46] or on items, such as guns or paraphernalia, that are either touching or in the same area as the drugs.[47]

Knowledge of Presence

The factors used to prove knowledge are seemingly subjective by their very nature. What one perceives as happening in the environment around him or her appears to be purely speculative and yet, although it screams of reasonable doubt, is not looked upon in speculative terms by the courts. Courts tend to take a recognized, but unspeakable reasonable man standard, which is the norm in civil tort matters. As a result, the court instinctively asks what a reasonable man would have known. The use of logical inferences is common to satisfy not only the knowledge of "presence" element, but also that of "character/nature".[48]

The strongest circumstance that gives rise to a fulfillment of the knowledge of "presence" requirement is when the defendant is apprehended with the drugs on his/her person. This physical possession carries with it a presumption that the defendant knew s/he was carrying the drugs.[49]

With constructive possession, this presumption is nonexistent. It used to be that a mere inference, not a presumption, toward knowledge of the presence of the drugs arose only in cases where the drugs were in open view and the defendant was present on the premises or in the vehicle where the drugs were found. The presence of the defendant at the scene to show knowledge was an almost essential factor in Virginia. Without it, the case for knowledge was a

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[45] Brown, 5 Va. App. 489, 364 S.E.2d 773.

[46] Wright v. Commonwealth, 2 Va. App. 743, 348 S.E.2d 9 (1986).

[47] Andrews v. Commonwealth, 216 Va. 179, 217 S.E.2d 812 (1975).

[48] Andrews v. Commonwealth, 216 Va. 179, 217 S.E.2d 812 (1975).

[49] Clodfelter v. Commonwealth, 218 Va. 619, 238 S.E.2d 820, *rev'g and remanding* 218 Va. 98, 235 S.E.2d 340 (1977).

difficult, if not impossible one, to prove.[50] Recently, however, the court of appeals has reversed this philosophy concerning the necessity of the presence of the accused. Now the court holds that although presence is important, it is not essential. A defendant can now be convicted without being present when the drugs are discovered, as long as there is enough corroborating evidence to show that the defendant had knowledge of their presence.[51]

For all of these factors relating to the presence of the accused, the police are cautioned to wait in a stake-out for the defendant to arrive. Arriving at the premises moments before a raid is not a substantial enough presence for most courts to find possession. The defendant must be on the premises or in the vehicle for a reasonable period of time so as to not only know of the drugs' presence, but also to exercise the requisite control over them.[52] Usually, one is safe if the defendant has been there for at least an hour.[53]

The issue over the defendant's presence is yet another important cross-over into the "dominion and control" area. The defendant's presence requirement may have to do more with control than it has to do with knowledge, and yet if the drugs are hidden, then knowledge is harder to prove unless the defendant is in the area for a substantially significant amount of time. This by itself still gives rise only to an inference of knowledge which goes toward the weight of the evidence.[54] Nevertheless, it is an inference that the Commonwealth cannot live without. Another reason for demonstrating knowledge through use of the premises or vehicle may be the fact that one who has frequent access most likely knows the hiding places for the drugs better than one with just a passing interest. As a result, the longer one resides on the premises, the better the link.[55]

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[50] *See* Drew v. Commonwealth, 230 Va. 471, 338 S.E.2d 844 (1986); Powers v. Commonwealth, 227 Va. 474, 316 S.E.2d 739 (1984); Garland v. Commonwealth, 225 Va. 182, 300 S.E.2d 783 (1983); Woodfin v. Commonwealth, 218 Va. 458, 237 S.E.2d 777 (1977); Wynn v. Commonwealth, 5 Va. App. 283, 362 S.E.2d 193 (1987).

[51] *See* Hodge v. Commonwealth, 7 Va. App. 351, 371 S.E.2d 156 (1988); *see also* Behrens v. Commonwealth, 3 Va. App. 131, 348 S.E.2d 430 (1986).

[52] Gillis v. Commonwealth, 215 Va. 298, 208 S.E.2d 768 (1974); Brown v. Commonwealth, 5 Va. App. 489, 364 S.E.2d 773 (1988).

[53] Gillis, 215 Va. 298, 208 S.E.2d 768; Brown, 5 Va. App. 489, 364 S.E.2d 773.

[54] Andrews, 216 Va. 179, 217 S.E.2d 812.

[55] Brown, 5 Va. App. 489, 364 S.E.2d 773.

Perhaps the lack of long term residency is why the Commonwealth lost in *Powers v. Commonwealth*.[56]

Another circumstance that affects knowledge of presence is the drugs in "open view" scenario, which is the natural opposite to the hidden drug scenario just discussed.[57] If the drugs are out in the open and the defendant is present, there is a quasi-presumption that the defendant has knowledge.[58] This presumption, although not admitted by the court, becomes stronger when the defendant has been in the house for over an hour and/or the defendant is found in the same room with a large quantity of drugs in open view.[59]

The issue of personal effects, as mentioned earlier in the discussion of "dominion and control," becomes important to proving knowledge when the defendant is not in the area or is out of eyeshot (i.e., not in the same room) where the drugs are found.[60] The key to demonstrating knowledge lies in how close the defendant's personal items are to the drugs. If they are touching the drugs, then there is a presumption of knowledge, as it is presumed that the defendant had to have seen the drugs when s/he was going through his/her personal items.[61] An interesting case develops if drugs are found in the defendant's gear when the defendant is not present. As mentioned, possession is a hard case to prove when the defendant is not around. In this kind of an example, presence would not go, as it usually would, toward knowledge, but instead to defend the defendant's contention that s/he was not in control of the substance. With a variety of slightly differing fact scenarios, this case type opens up a gambit of possibilities to a resourceful defense attorney.[62]

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[56] 227 Va. 474, 316 S.E.2d 739. Although the defendant was the sole occupant of the premises, the court held that the drugs could have been left in his attic by someone else. The inference was that someone who possessed the house prior to the defendant's occupancy could have hidden the drugs. Although the opinion does not state the amount of time the defendant had resided in the house prior to his impending move at the time of the raid, the inference was that for the Commonwealth to meet its burden, the defendant would have had to have resided in the house longer.

[57] McGee v. Commonwealth, 4 Va. App. 317, 357 S.E.2d 738 (1987).

[58] Brown, 5 Va. App. 489, 364 S.E.2d 773.

[59] Gillis, 215 Va. 298, 208 S.E.2d 768; McGee, 4 Va. App. 317, 357 S.E.2d 738.

[60] Clodfelter, 218 Va. 619, 238 S.E.2d 820.

[61] Iglesias v. Commonwealth, 7 Va. App. 93, 372 S.E.2d 170 (1988).

[62] *See* Hodge, 7 Va. App. 351, 371 S.E.2d 156 (for an example where the defendant was convicted); *see also* Powers, 227 Va. 474, 316 S.E.2d 739 and Clodfelter, 218 Va. 619, 238 S.E.2d 820 (for examples where the defendant was found not guilty).

A more substantial link that would solve the problem of "knowledge" and "control" and would precipitate a conviction, even in the absence of the defendant, is the uncontroverted fingerprint. If the print is on the drug package, then, just as with actual physical possession, knowledge of "presence" and "control" are presumed.[63] Most cases are not so clear cut, however, and only items around the drugs end up having readable fingerprints. In the more common case where the prints are taken from the defendant's personal effects, only an inference toward knowledge arises.[64]

The amount or quantity of drugs also plays a role, although a small one, in deciphering whether the defendant had the prerequisite knowledge of presence. This only comes to bear when the defendant is present on the premises and, although s/he is there for under an hour and not apprehended in the same room with the drugs, the drugs are found strung out all over the premises or vehicle. The mere quantity of drugs alone invokes a strong inference of knowledge.[65] Under this condition, presence is still important; however, it may not be essential to the Commonwealth's case if the defendant frequented the premises recently, owned it and had semi-exclusive use over it. In that case, a strong inference going toward the weight of the evidence, even in the absence of the defendant's presence, will be allowed.[66]

Knowledge of Character/Nature

Intent or *mens rea* is an essential element of all criminal offenses that demand punishment by incarceration.[67] Even in light of Virginia's First Time Offender Statute,[68] the crime of possession is no different than any other crime. The *mens rea* in possession cases equates to knowingly controlling an illegal substance. The process for demonstrating this knowledge is a two-part equation, the second part naturally flowing from the fulfillment of the first. This means that

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[63] Wright v. Commonwealth, 2 Va. App. 743, 348 S.E.2d 9 (1986).

[64] Andrews, 216 Va. 179, 217 S.E.2d 812.

[65] McGee, 4 Va. App. 317, 357 S.E.2d 738; *contra* Huvar v. Commonwealth, 212 Va. 667, 187 S.E.2d 177 (1972).

[66] Hodge, 7 Va. App. 351, 371 S.E.2d 156.

[67] *See* J. G. COOK and P. MARCUS, CRIMINAL LAW, at 157-61 (2d ed. 1988) (*quoting* HOOK, DETERMINISM AND FREEDOM, at 143-45 (1958)); *see also* People v. Hood, 1 Cal. 3d 444, 82 Cal. Rptr. 618, 462 P.2d 370 (1969).

[68] VA. CODE ANN. § 18.2-251 (1988 & Supp. 1989). This statute suspends all jail time/incarceration and thus would seemingly contradict the mandatory requirement of "intent" in narcotics cases in terms of the philosophical reasoning behind criminal law and punishment.

first, the defendant must have knowledge of the nature of the substance (be able to identify the substance on sight by name) and second, from that knowledge a natural presumption will arise that the defendant knew that the drug was illegal.[69] Although the defendant's attorney may challenge this presumption through the constitutional argument of due process or notice, it is a rare occurrence for him/her to succeed. Even relatively unknown drugs carry with them a strong presumption of illegality if they can only be received by virtue of a valid doctor's prescription. This is not to say that notice is never a valid defense. The defendant can assert due process to rebut a presumption of knowledge if s/he had no knowledge of the need for a prescription, as in a case where the defendant finds the drugs or buys them from another under innocent conditions. It should be noted that over-the-counter drugs are never part of the Schedule II or misdemeanor class of illegal drugs.[70] The fulfillment of the traditionally required intent or *mens rea* for possession will therefore depend heavily upon the satisfaction of the knowledge of the nature of the drug element as defined by modern case law.[71]

Probably the easiest way to infer knowledge is to find the defendant with drug paraphernalia on his person that is applicable to the drug found. The paraphernalia will trigger a stronger inference that the defendant knew the nature/purpose of the drug.[72] The harder case is when the paraphernalia is not on the defendant's person, but is instead just in the area. The connection between the drugs and the defendant and the paraphernalia will then depend upon any other circumstantial evidence that relates to control and presence.[73] Fingerprints on the paraphernalia would be one such example of this additional evidence.

Another key to proving knowledge is the defendant's past history of drug use or his/her prior drug conviction record.[74] The prior uses must be with the same drug that the defendant is now accused of possessing; otherwise, the defendant need only distinguish his/her past record by pointing to the differences in the prior and present instances of drug use.

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[69] McGee v. Commonwealth, 4 Va. App. 317, 325, 357 S.E.2d 738, 740-41 (1987).

[70] *See* VA. CODE ANN. §§ 54.1-3443 - 56. *et seq.* (1988 & Supp. 1989).

[71] McGee, 4 Va. App. at 325, 357 S.E.2d at 740-41.

[72] Servis v. Commonwealth, 6 Va. App. 507, 371 S.E.2d 156 (1988).

[73] Clodfelter v. Commonwealth, 218 Va. 619, 238 S.E.2d 820, *rev'g and remanding* 218 Va. 98, 235 S.E.2d 340 (1977); Brown v. Commonwealth, 5 Va. App. 489, 364 S.E.2d 773 (1988); McGee, 4 Va. App. 317, 357 S.E.2d 738.

[74] Stoval v. Commonwealth, 213 Va. 67, 189 S.E.2d 353 (1972); Brown, 5 Va. App. 489, 364 S.E.2d 773.

An important method of overcoming the debacle surrounding the demonstration of knowledge of nature element is to elicit statements from the defendant about the drugs. Any pre-Miranda or valid post-Miranda statements which show that the defendant had a knowledge of what the substance was will satisfy the requirements. Thus, when the police do not mention what the substance that was found is and the defendant says something to the effect that, "I've never seen that dope before in my life," the nature element will be satisfied.[75]

Additionally, knowledge can be inferred through the defendant's educational status or the kinds of books that the defendant owns,[76] the inferences being either that the well-educated man or woman would know that a drug (e.g., cocaine) is illegal, or that one who has a book on cocaine knows what it looks like and its character as an illegal drug.

A few other noticeable signs of knowledge that merely go toward the weight of the evidence are: 1) absence of surprise on the defendant's face when the drugs are found;[77] 2) nervousness of the defendant when the police want to search for the drugs in an area near the defendant;[78] 3) the defendant's associations with known drug dealers;[79] 4) needle marks in the defendant's arm;[80] 5) the defendant being noticeably stoned or high at the time of the arrest;[81] and/or 6) the defendant giving the police a false identification.[82]

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[75] McGee, 4 Va. App. 317, 357 S.E.2d 738.

[76] Eckhart v. Commonwealth, 222 Va. 447, 281 S.E.2d 853 (1981).

[77] Behrens v. Commonwealth, 3 Va. App. 131, 348 S.E.2d 430 (1986) (lack of surprise was not enough, by itself, to show knowledge).

[78] Lane v. Commonwealth, 223 Va. 713, 292 S.E.2d 358 (1982) (nervousness was enough to show knowledge when taken together with elements that also demonstrate dominion and control).

[79] Behrens, 3 Va. App. 131, 348 S.E.2d 430 (although guilt by association is forbidden under the law, demonstrations by the prosecutor that the defendant associates with known drug dealers can be used as one of many corroborating pieces of evidence that together prove knowledge. In this case, however, a demonstration of the defendant's association with drug dealers, along with the defendant's lack of surprise, was not enough to meet the Commonwealth's burden).

[80] Robbs v. Commonwealth, 211 Va. 153, 176 S.E.2d 429 (1970).

[81] *Id.*

[82] Clodfelter, 218 Va. 619, 238 S.E.2d 820 (the giving of a false identification was suspicious, but did not rise to the level of a presumption of knowledge by itself).

THE 1973 AMENDMENT

The 1973 amendment[83] didn't change Virginia law all that much, as the court had always inherently believed that mere presence and ownership were never enough to convict.[84] However, the supreme court in the 1970's and the court of appeals today have also consistently viewed any extra evidence at all to be enough to corroborate the ownership/presence/proximity inference, which is accepted as a factor going to the weight of the evidence, in order to raise the presumption of possession and thus make out a *prima facie* case of possession against the defendant.

This was demonstrated by the Virginia Supreme Court in *Adkins v. Commonwealth*,[85] when the defendant was stopped by the police in his own vehicle while he was driving and drugs were found in open view on the floor, as well as hidden in the glove compartment and the trunk. Although there were other people in the car, the court did not accept the defendant's use of the "equal access" defense, distinguishing *Crisman* and finding the defendant guilty of possession.[86] The defendant suggested that all the prosecution could prove was ownership and proximity, which in accordance with the 1973 amendment to the statute would be insufficient to show possession. The court held that the defendant's ownership and close proximity, together with the corroboration of exclusive use of the front seat and the trunk, as well as the defendant's act of driving would be sufficient to convict on the issue of possession.[87]

Two points of this decision are worth emphasizing. First, the court's unstated, but inferred, view that the "equal access" defense only applies to cases where the defendant doesn't own the premises. Second, the court's use of minor corroborating evidence to get around the statute's

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[83] 1973 Va. Acts 64, § 54.524.101:2.

[84] Gillis v. Commonwealth, 215 Va. 298, 208 S.E.2d 768 (1974); Huvar v. Commonwealth, 212 Va. 667, 187 S.E.2d 177 (1972). "While no presumption arises from ownership or occupancy of premises, . . . such circumstances may be considered along with other circumstances . . . ." Gillis, 215 Va. at 301, 208 S.E.2d at 770-71.

[85] 217 Va. 437, 229 S.E.2d 869 (1976).

[86] *Id.* at 438-39, 229 S.E.2d at 870.

[87] *Id.*

nullification of the proximity/ownership presumption.[88] This jurisprudential thought adhered to by the court was confirmed in both *Womack v. Commonwealth*[89] and *Dutton v. Commonwealth*.[90]

The court of appeals strongly reiterated this same jurisprudential philosophy concerning the 1973 amendment to the Virginia Code in both *Brown v. Commonwealth*[91] and *Castaneda v. Commonwealth*[92]. In *Brown* the defendant was found in another's home, sitting on a bed within an arm's length of the drugs which were in open view. The court, acknowledging the statute, stated that the defendant's proximity went toward the weight of the evidence, and that the corroboration needed to draw the presumption and hence meet the Commonwealth's burden came from the fact that the defendant was present for over an hour on the premises and the drugs were in open view.[93] *Castaneda* went on to reaffirm *Brown* by stating that although standing alone the defendant's leasing and presence in the rental vehicle didn't make out a *prima facie* case of possession, the combined fact that the defendant was also driving and acted nervously when the police approached the vehicle did.[94]

Judicial Trends of the Virginia Court of Appeals

There are a number of judicial trends that can be observed from recent case law. These trends are especially relevant in light of the relatively new Virginia Court of Appeals, as the older opinions of the Virginia Supreme Court will not be regarded as absolutely binding on the new intermediate court's judicial philosophy.[95] What follows is a compilation of new trends presently being adhered to by this relatively new court.

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[88] *Id.*

[89] 220 Va. 5, 255 S.E.2d 351 (1979) (where lots of drugs were found in open view near the defendant. Open view corroborated the inference of possession raised by the proximity of the drugs to the defendant).

[90] 220 Va. 762, 263 S.E.2d 52 (1980) (where the defendant was driving a car that he had in his exclusive possession and drugs were found under his seat).

[91] 5 Va. App. 489, 364 S.E.2d 773 (1988).

[92] 7 Va. App. 574, 376 S.E.2d 82 (1989).

[93] Brown, 5 Va. App. 489, 364 S.E.2d 773.

[94] Castaneda, 7 Va. App. 574, 376 S.E.2d 82.

[95] The two courts' statistical trends in regard to constructive possession are surprising in light of the general notions that the Virginia Supreme Court tends to be more conservative and the Virginia Court of Appeals lends itself toward a more liberal view of criminal justice. Since 1970, the Virginia Supreme Court has overturned about 50% of all drug related petitions heard, while the Virginia Court of Appeals has overturned a mere 33%.

First, the supreme court's usual insistence that the defendant be present when the police find the drugs was broken recently in *Hodge v. Commonwealth*,[96] where the court of appeals held for the first time that the defendant need not be present when there is enough corroboration to link him/her to the drugs. The notion of this had been first mentioned two years earlier by this same court in *Behrens v. Commonwealth*.[97] Although *Wynn v. Commonwealth*[98] seems to contradict this nonpresence school of thought, that case was decided in 1987, prior to the ruling in *Hodge*.

Second, the old mailbox rule is no longer the norm.

Third, although showing the defendant as the owner of the premises is important to inferring ownership of the drugs found therein, it is no longer critical to the case, as *Albert v. Commonwealth*,[99] *Hamburg v. Commonwealth*,[100] and *Wright v. Commonwealth*[101] demonstrate.

Fourth, a key ingredient to most successful defenses to possession has been the use of "equal access" when the defendant is found with multiple parties present on the premises. This defense was successfully used in *Drew v. Commonwealth*,[102] *Bentley v. Cox*,[103] *Huvar v. Commonwealth*,[104] and *Crisman v. Commonwealth*.[105]

Fifth, *Powers v. Commonwealth*[106] suggested that exclusivity and ownership were not enough to convict one for possession if the defendant was not present and there was no other corroborating evidence. This hard line stance on the interpretation of the 1973 amendment by the Virginia Supreme Court has been slowly whittled away by the Virginia Court of Appeals over the last three years. *Behrens v. Commonwealth*[107] broke the ice. In that case, although the court reversed the circuit court's decision, it did state unequivocally that the presence of the defendant

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[96] 7 Va. App. 351, 371 S.E.2d 156 (1988).

[97] 3 Va. App. 131, 348 S.E.2d 430 (1986).

[98] 5 Va. App. 283, 362 S.E.2d 193 (1987).

[99] 2 Va. App. 734, 347 S.E.2d 534 (1986).

[100] 3 Va. App. 435, 350 S.E.2d 524 (1986).

[101] 2 Va. App. 743, 348 S.E.2d 9 (1986).

[102] 230 Va. 471, 338 S.E.2d 844 (1986).

[103] 508 F. Supp. 870 (E.D. Va. 1981).

[104] 212 Va. 667, 187 S.E.2d 177 (1972).

[105] 197 Va. 17, 87 S.E.2d 796 (1955).

[106] 227 Va. 474, 316 S.E.2d 739 (1984).

[107] 3 Va. App. 131, 348 S.E.2d 430 (1986).

was not necessary in order to prove possession. The next year in *Thorne v. Commonwealth*,[108] the court applied its newfound philosophy and affirmed a conviction based upon exclusivity and ownership alone without the presence of the defendant or any other corroborating evidence. This newfound importance of exclusivity as corroboration when ownership is involved was reiterated as late as 1988, in *Hodge v. Commonwealth*,[109] where in the absence of the defendant and only minor corroborating evidence, the defendant's conviction was affirmed. The trend allows for a more flexible position in dealing with the issue of ownership, exclusivity, and presence.

Sixth, the trend of both courts in cases involving automobiles is to hold the driver of the vehicle out as the inferred, not presumed, owner of the drugs. This was seen in *Adkins v. Commonwealth*[110] and most recently in *Castaneda v. Commonwealth*,[111] where the driver of a rental car was convicted of possession.

Seventh, the Virginia Supreme Court has the tendency to give some leeway to a defendant when the drugs and paraphernalia are found in open view on the defendant's property -- as in *Garland v. Commonwealth*, where open view was not able to defeat the quasi-inference of possession established by the defendant's ownership of the premises.[112] The new trend instituted by the court of appeals, however, has been to make it easier to link the defendant to the drugs by allowing open view as corroboration of the defendant's proximity to the drugs/paraphernalia, even if the defendant is not an owner of the premises.[113]

This use of open view evidence to shore up the inferences of "knowledge of presence" and "control" established by proximity runs parallel to the defendant's use of the statute to nullify all presumptions. The natural extension of the court of appeals' ruling would be to counter *Garland* and enable open view to be used with ownership to convict one of possession. Yet, the court will still require more than mere open view as corroboration in regard to the knowledge of the nature element. Additionally, this does not preclude the defendant, as in *Garland*, from using "equal access" as a defense under the correct conditions although as mentioned earlier, the court of

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[108] No. 1011-86-2 (Va. App. Sept. 30, 1987).

[109] 7 Va. App. 351, 371 S.E.2d 156.

[110] 217 Va. 437, 229 S.E.2d 869 (1976).

[111] 7 Va. App. 574, 376 S.E.2d 82 (1989).

[112] 225 Va. 182, 300 S.E.2d 783 (1983).

[113] *See* Brown v. Commonwealth, 5 Va. App. 489, 364 S.E.2d 773 (1988); *see also* McGee v. Commonwealth, 4 Va. App. 317, 357 S.E.2d 738 (1987).

appeals has not ruled on the acceptability of this defense. In fact, it may be that *Garland* would have been resolved by the supreme court the same way that the court of appeals decided *Brown*, had it not been for Garland's successful use of "equal access." Yet the supreme court probably would still have reached the same conclusion as it did originally in *Garland* even without "equal access," because of the court's seeming insistence on the defendant being present when the drugs are found.[114]

Eighth, the continuing trend of both courts concerning personal effects is to draw a strong inference of "knowledge" and "control" from the dispersing of the defendant's personal items near to or touching the drugs.[115]

ELEMENTAL INTERPLAY TODAY

As a result of the interplay between these three elements previously discussed, possession in the Commonwealth has become a contest of distinguishing facts rather than of real truth saying. Only the right combination will justify the vague repose called "constructive possession."

For this reason, it is necessary to evaluate each fact scenario of every new drug case in terms of 1) a fact's checklist; and 2) a precedent table which reflects Virginia's case law development over the past twenty-five years. Through the use of the matching principle with these two tables, one should be able to have a tenable predictor of the outcome of possession cases in the Commonwealth.

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[114] The court of appeals did away with this absolute to possession in *Behrens* and *Hodge*.

[115] Eckhart v. Commonwealth, 222 Va. 447, 281 S.E.2d 853 (1981); Andrews v. Commonwealth, 216 Va. 179, 217 S.E.2d 812 (1975): Iglesias v. Commonwealth, 7 Va. App. 93, 372 S.E.2d 170 (1988); Albert v. Commonwealth, 2 Va. App. 734, 347 S.E.2d 534 (1986).

The Narcotics Scenario Checklist of Facts

1. The defendant either owns or has the right of legal possession, by virtue of a lease, to the place where the drugs were found. Examples of drug sites include vehicles, houses, boats, apartments or hotel rooms. Ownership goes toward "dominion and control" of the premises.
2. The defendant pays the rent, mortgage, phone, or utility bills of the place where the drugs were found. The finding of bill receipts addressed to the defendant will satisfy this to establish the ability of the defendant to control the area and will demonstrate constructive ownership.
3. The defendant uses the place where the drugs were found as a mailing address or as a place of residence, although his/her name does not appear on the deed or lease. This applies to houses, including the home of a parent, and to apartments.
4. The defendant is the sole occupant/exclusive user of the place where the drugs were found. If a house or vehicle, then proving exclusivity may demand that the Commonwealth prove the following: 1) others do not have access to keys; 2) the defendant has the only set of keys; and 3) the defendant is the sole lessor/owner on the lease/deed.
5. The defendant's personal effects are not only in the same area where the drugs were found, but are actually touching the drugs. These personal items can include the following: suitcase, clothing, gun, baby stuff, mattress, birth certificate, personal papers, invoice to defendant, briefcase, medicine, wallet, tote bag, glasses, and credit cards.
6. There is something in the place/premises where the drugs were found to show that the defendant was in the area; the defendant's personal effects are not touching the drugs, but are in the same room as the drugs. Examples of this scenario are: clothes in the closet, personal effects in the defendant's vehicle where the drugs are found, or personal items in the defendant's chest of drawers or on the defendant's bed in the room where the drugs are found.
7. The drugs were in plain/open view to the defendant.
8. There was drug paraphernalia in plain/open view to the defendant.
9. The defendant owns books on drugs.
10. The defendant has gone to high school or college. The higher the education (e.g., two years of college), the more likely the defendant knows about the character of the drugs.

11. The defendant has prior convictions on drug related charges and/or the defendant admitted to prior use. The drugs used in the past must be the same kind as those charged in the instant offense.

12. The defendant made statements like "I've never seen that dope before." It may be inferred from such statements that the defendant knew not only the name of the drug, but also its illegal character.

13. The defendant's fingerprints are found on the drugs or on personal items found with the drugs (e.g., on the gun or on the plastic baggie that held the drugs).

14. The defendant was using a middleman who will testify against him/her to show that the defendant had "dominion/control" over and "knowledge" of the drugs.

15. The defendant was in close proximity to the drugs, e.g., within an arm's length, at the defendant's feet, or in the same room. If the drugs are in the same vehicle, they must be in either the front seat or the back seat. It cannot be that the defendant was in the front seat and the drugs were in the back seat or trunk.

16. The defendant has or has not been on the premises in the last two weeks prior to the incident. The nearer the defendant's last visit to the premises the better the link and vice versa.

17. The defendant was present on the premises (house or vehicle) when the drugs were found.

18. The defendant is not the owner of the premises, but does frequent the premises. This is different than scenario 2, and is not constructive ownership. It can be shown by virtue of the items found on the premises -- check stubs, defendant's clothes, defendant's wallet -- or by other evidence such as proof that it is the defendant's girlfriend/boyfriend's place, that the defendant uses the car to run errands/go to work, or that the premises is a place of employment of the defendant.

19. A large amount/quantity of drugs was found on the premises.

20. The defendant confessed that the drugs were his/hers.

21. The drugs were found in the defendant's clothing when the defendant was not wearing them. The clothes must have been in the defendant's bedroom, house, or vehicle.

22. The drugs were mailed to the defendant and the address label reflects the defendant's present address. The drugs must have been sent by U.S. Mail or another service that delivers directly to the defendant's house. These are the "mailbox cases."

23. The drugs were delivered in a box with the defendant's name on them to the bus station where the defendant had to pick them up, but the defendant never arrived to claim the drugs. This distinguishes the mailbox cases.

24. The drugs were in the vehicle that the defendant was driving. This goes toward control.

25. The drugs were hidden in a place where the defendant has exclusive use. All of the following elements are necessary: 1) the defendant has the only keys to the place; 2) the defendant is the sole owner or the sole lessor; and 3) the drugs found were in the defendant's briefcase/suitcase, in a hiding place in the defendant's house (not in open view), in the defendant's car trunk, or in a hotel room where the defendant had been staying and a maid testifies that the drugs were not there before the defendant took possession of the room.

26. The defendant was visibly nervous when the police were searching the area around him/her. The defendant was visibly sweating, staring in what turns out to be the exact location where the drugs are later found, trying to direct the police away from the drugs (e.g., the defendant opens the trunk and tells the police to search it, thus directing attention away from the back seat of the vehicle where the drugs are actually hidden), or the defendant's actions suggest that s/he knows drugs are present (e.g., s/he is trying to get away from the area where the drugs are found or dispose of the drugs when the police arrive).

27. The defendant did not show surprise when the police found the drugs.

28. The defendant associates with known drug dealers.

29. The defendant has needle marks and/or was noticeably stoned/high when s/he was arrested.

30. The drugs suddenly appeared in a place previously checked by the police where no one but the defendant had been (e.g., a police cruiser).

31. There were other people present when the drugs were found. "Equal access" is an acceptable defense if in addition to the above fact: 1) the defendant is the owner of the house or the vehicle, is not present when the drugs are found, and the drugs are not hidden but are in open view; or 2) the defendant is not the owner of the house or vehicle where the drugs are found.

32. The defendant gave the police a false identification.

33. The defendant threw away a bag or other container which contained drugs, but the police/witness did not see him/her actually throw it (e.g., the police saw the defendant with a bag beforehand and then saw it on the ground later; drugs are found inside of the bag).

34. Another person confessed to owning the drugs (e.g., the defendant's wife).

35. The defendant was an unsuspecting middleman who only delivered the drugs, but did not know what s/he was delivering (e.g., laundry bag to an inmate).

36. Drugs were found on something that the defendant was touching; however, the drugs were hidden and others had touched the item where the drugs were hidden within the last two hours (e.g., drugs in an infant child's clothing).

37. The defendant has owned the premises for a long period of time or is the original and only owner that the premises has had. The longer the ownership, the stronger the inference of knowledge of the presence of any drugs that are hidden on the premises.

38. Drugs were hidden in the defendant's car trunk or in his/her personal gear in his/her car.

39. Other witnesses/defendants are pointing the finger at the defendant.

40. The defendant was not present during the search/raid/finding of the contraband.

41. The drugs were hidden on the premises or vehicle, but the defendant did not have exclusive use (i.e., others were present in the house or vehicle).

42. The defendant did not own the vehicle or the premises.

43. The defendant rented a vehicle and was stopped and searched when it was not returned after thirty days.

44. The defendant had been on the premises for at least an hour before the police arrived.

45. The defendant used language typical of one familiar with the sale and use of narcotics.

46. "Joint possession" is sustained as acceptable by the court (multiple parties charged).

47. The defendant was lying on his own bed in a room occupied by only the defendant, and drugs were found in the room.

48. Multiple people were present in the area; however, "equal access" was ruled a nonacceptable defense and "joint possession" was not used by the Commonwealth as a theory of possession (only one individual was arrested and charged).

What May Demonstrate Possession:

Virginia Supreme Court

Fierst v. Commonwealth, 210 Va. 757, 173 S.E.2d 807 (1970) (drugs mailed to defendant, addressed to him, put in his mail box, defendant opened the package in front of police).[116] This case addresses item 22 on the preceding checklist.

Ritter v. Commonwealth, 210 Va. 732, 173 S.E.2d 799 (1970) (drugs mailed to defendant, defendant had receipt for money order which equaled the value of the drugs found, defendant held claim check for drug package).[117] This case addresses item 22 on the preceding checklist.

Manley v. Commonwealth, 211 Va. 146, 176 S.E.2d 309, cert. denied, 403 U.S. 936 (1970) (defendant admits drugs are his, drugs found in another's residence).[118] This case addresses item 20 on the preceding checklist.

Robbs v. Commonwealth, 211 Va. 153, 176 S.E.2d 429 (1970) (drugs in defendant's housecoat in defendant's room, where three other people were also present who point the finger at the defendant, paraphernalia found, needle marks in the defendant's arm, confession that defendant is a user). This case addresses items 1, 3, 21, 8, 11, 29, 39 and 48 on the preceding checklist.

Fox v. Commonwealth, 213 Va. 97, 189 S.E.2d 367 (1972) (defendant is in the driver's seat of the car, defendant's wallet is on the ground outside of the car, the drugs are on the floor of the car, there are numerous other people present in the car). This case addresses items 5, 15, 18, 24, 41 on the preceding checklist.

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[116] There has been some debate as to whether these two cases, *Fierst* and *Ritter*, are merely aberrations from the norm or binding Virginia law. Since 1970, there have been no mailbox cases before the court. The problem with the mailbox cases is that the defendant was not present when the mail was delivered, and in the *Fierst* case, there really was no other corroborating evidence outside of the package itself. It seems that the court inferred control, presence, and nature from the mere mailing label on the mail parcel. This seems to be a stretching of the normal guidelines. It is a dangerously scary dilemma indeed when anyone can incriminate another merely by sending them drugs through the mail. Perhaps that is why the Virginia Court of Appeals today has not affirmed the 1970 Virginia Supreme Court's mailbox philosophy.

It has been suggested that perhaps the supreme court had a change of heart in 1973, and although not wanting to overrule its prior mailbox rule, in fact distanced itself from the ruling by holding in *Buono v. Commonwealth*, 213 Va. 475, 193 S.E.2d 798 (1973), that a package delivered to a bus station with an address label to the defendant was not enough to convict. This seems to be the reverse of what was inferred in 1970, when the court stated in *Ritter* that knowledge of nature or presence vis a vis the defendant picking up his mail was not necessary, and that all that was needed in order to convict was evidence that the package had been mailed, such as a valid post mark. Yet the court, in distinguishing these two cases, infers that the key to the distinguishment lies in the fact that the package at the bus station had not been delivered to the defendant's home -- the defendant had to pick it up and never did. The suggestion by some jurists that in *Ritter* the corroborating evidence (besides the label) was the physical delivery to the defendant's residence is shallow at best. The court's use of the mailbox rules, as referenced in the University of Richmond Law Review's "Comment on *Ritter*," 5 U. Rich. L. Rev. 454, 55 (1971), to the legislative intent, *Id.* at 457 n. 12 (quoting Ch. 451 Secs. 1 (14), (19), [1952] Virginia Acts of Assembly 737 (repealed 1970); ch. 86, sec. 2 [1934] Va. Acts of Assembly 82 (repealed 1970); and Virginia Code Ann. Sec. 54-524.101 (c) (Cum. Supp. 1970)), which reads possession broadly, may be outdated in light of the constitutional concerns emphasized in the last decade.

[117] *See* n. 116.

[118] As emphasized in *Manley*, more than a confession is needed to establish possession. *Wong Sun* emphasized the need for corroborating evidence. That evidence may be the fact that drugs were found. *Manley* held this to be acceptable corroborating evidence.

Gillis v. Commonwealth, 215 Va. 298, 208 S.E.2d 768 (1974) (defendant rented apartment, drugs in open view in living room, defendant in different room, defendant in apartment for over an hour, prior to arrest had not been in apartment for two weeks). This case addresses items 1, 7, 16, 17, 44 and 46 on the preceding checklist.

Cook v. Commonwealth, 216 Va. 71, 216 S.E.2d 48 (1975) (defendant is driving his own car, drugs are hidden in a bag next to defendant, defendant is the sole occupant of the car). This case addresses items 1, 24, 25 and 15 on the preceding checklist.

Andrews v. Commonwealth, 216 Va. 179, 217 S.E.2d 812 (1975) (defendant picked up package at airport, drugs found in defendant's suitcase, which contained clothes that were the defendant's size and a gun with defendant's fingerprints on it). This case addresses items 5, 13, 15 and 25 on the preceding checklist.

Adkins v. Commonwealth, 217 Va. 437, 229 S.E.2d 869 (1976) (defendant was driving car that he owned, defendant was the only person in the front, three other people were in the back, drugs found at defendant's feet, in glove box, and in trunk). This case addresses items 1, 7, 15, 24, 38 and 48 on the preceding checklist.

Patty v. Commonwealth, 218 Va. 150, 235 S.E.2d 457 (1977) (defendant was driving car, defendant's birth certificate and an invoice found in car, paper with drug computations on it in car, drugs were in the trunk). This case addresses items 1, 7, 15, 24, 38 and 48 on the preceding checklist.

Womack v. Commonwealth, 220 Va. 5, 255 S.E.2d 351 (1979) (defendant ran from an apartment in which a large amount of drugs were found out in open view). This case addresses items 7, 8, 15, 17, 19 and 42 on the preceding checklist.

Dutton v. Commonwealth, 220 Va. 762, 263 S.E.2d 52 (1980) (defendant was driving his own car, drugs were found underneath the defendant's seat, three others were present in the car). This case addresses items 1, 15, 17, 24 and 41 on the preceding checklist.

Eckhart v. Commonwealth, 222 Va. 447, 281 S.E.2d 853 (1981) (defendant was holding baby outside of room that contained a crib and drugs in open view, defendant could see into the room, defendant was co-owner of the house, phone bills and check stubs found in the house, defendant had two years of college education). This case addresses items 1, 2, 5, 7, 10, 18 and 48 on the preceding checklist.

Lane v. Commonwealth, 223 Va. 713, 292 S.E.2d 358 (1982) (defendant owned house, defendant had not been in house for two weeks prior to arrest, defendant was noticeably nervous while the police were searching, drugs found behind chair where defendant was sitting). This case addresses items 1, 15, 16, 17, 26 and 48 on the preceding checklist.

Archer v. Commonwealth, 225 Va. 416, 303 S.E.2d 863 (1983) (another person acted as a middleman for the defendant). This case addresses item 14 on the preceding checklist.

Dukes v. Commonwealth, 227 Va. 119, 313 S.E.2d 382 (1984) (defendant's desk at work was searched under a warrant, drugs were found in a thirty-five millimeter film canister and a wallet in the defendant's desk). This case addresses items 5, 17, 18 and 42 on the preceding checklist.

Virginia Court of Appeals

Wright v. Commonwealth, 2 Va. App. 743, 348 S.E.2d 9 (1986) (defendant in his own bed at parents' house, drugs under bed with defendant's fingerprints on them). This case addresses items 1, 3, 6, 13, 15 and 47 on the preceding checklist.

Albert v. Commonwealth, 2 Va. App. 734, 347 S.E.2d 534 (1986) (defendant sleeping on bed in another's apartment, drugs in semi-open briefcase next to bed, defendant's wallet, personal papers and labeled medicine were also in briefcase). This case addresses items 5, 6, 15, 17, 25, 26 and 47 on the preceding checklist.

Glover v. Commonwealth, 3 Va. App. 152, 348 S.E.2d 434 (1986) (defendant searched incident to arrest, put in police cruiser, drugs appear on the seat next to defendant). This case addresses items 26 and 30 on the preceding checklist.

Hambury v. Commonwealth, 3 Va. App. 435, 350 S.E.2d 524 (1986) (drugs in defendant's jacket, but defendant was not wearing it at the time, confession). This case addresses items 20 and 21 on the preceding checklist.

McGee v. Commonwealth, 4 Va. App. 317, 357 S.E.2d 738 (1987) (drugs, paraphernalia, and manufacturing equipment found ten feet from defendant, defendant rented cabin, defendant noticeably stoned, defendant stated, "I didn't know it was PCP"). This case addresses items 1, 7, 8, 12, 15, 19 and 46 on the preceding checklist.

Thorne v. Commonwealth, No. 1011-86-2 (Va. App. Sept. 30, 1987)[119] (drugs in hotel room, defendant rented room and had the only key, defendant was not present when drugs found). This case addresses items 1, 4 and 40 on the preceding checklist.

Servis v. Commonwealth, 6 Va. App. 507 (1988) (drugs in the defendant's car, paraphernalia in hotel room, defendant rented hotel room, defendant confessed). This case addresses items 1, 8 and 20 on the preceding checklist.

Iglesias v. Commonwealth, 7 Va. App. 93, 372 S.E.2d 170 (1988) (defendant rented car, defendant sole user, drugs in tote bag, defendant admitted bag was his, bag on back seat of car). This case addresses items 1, 4, 5, 17, 24 and 38 on the preceding checklist.

Hodge v. Commonwealth, 7 Va. App. 351, 371 S.E.2d 156 (1988) (defendant rented apartment, drugs under rug, defendant's glasses and credit cards in room where drugs were found, defendant had the only keys, defendant not present when the drugs were found). This case addresses items 1, 4, 6, 25, 40, 45 and 46 on the preceding checklist.

Brown v. Commonwealth, 5 Va. App. 489, 364 S.E.2d 773 (1988) (drugs found within arm's length of defendant, drug paraphernalia was all over the room, defendant had been there over an hour, drugs in open view, defendant admitted to prior use, other people present but not charged, defendant did not own house but was just visiting). This case addresses items 7, 8, 11, 15, 17, 19, 42, 44 and 48 on the preceding checklist.

Castaneda v. Commonwealth, 7 Va. App. 574, 376 S.E.2d 82 (1989) (drugs found hidden in back seat of rental car, defendant rented the car, defendant had failed to return the car). This case addresses items 1, 17, 24, 26 and 43 on the preceding checklist.

What Will Not Demonstrate Possession:

Virginia Supreme Court

Henderson v. Commonwealth, 130 Va. 761, 107 S.E. 700 (1921) (drugs in defendant's house, wife confesses). This case addresses items 1 and 34 in the preceding checklist.

Crisman v. Commonwealth, 197 Va. 17, 87 S.E.2d 796 (1955) (drugs in the back seat of car, multiple people present, drugs were hidden, defendant was not the owner of the car). This case addresses items 31, 41 and 42 on the preceding checklist.

Gordon v. Commonwealth, 212 Va. 298, 183 S.E.2d 735 (1971) (police saw defendant with envelope, chase ensued, defendant did not have the envelope after caught by the police, envelope recovered on chase route, drugs in envelope). This case addresses item 33 on the preceding checklist.

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[119] This case cannot be cited as precedent, but does tend to show the court's state of mind on the issues contained therein.

Huvar v. Commonwealth, 212 Va. 667, 187 S.E.2d 177 (1972) (defendant at a drug party in room filled with drugs, defendant was not the owner of the house but was just visiting). This case addresses items 7, 15, 17, 31 and 42 on the preceding checklist.

Stovall v. Commonwealth, 213 Va. 67, 189 S.E.2d 353 (1972) (defendant had a prior drug-related conviction). This case addresses item 11 on the preceding checklist.

Buono v. Commonwealth, 213 Va. 475, 193 S.E.2d 798 (1973) (package delivered to bus station addressed to the defendant, drugs in package, defendant did not pick up the package but did go to the bus station). This case addresses item 23 on the preceding checklist.

Craig v. Commonwealth, 215 Va. 260, 208 S.E.2d 744 (1974) (police checkpoint, defendant tossed out the bag of drugs but was unseen by the police, ten cars passed the site before the police spotted the bag). This case addresses item 33 on the preceding checklist.

Burton v. Commonwealth, 215 Va. 711, 213 S.E.2d 757 (1975) (defendant was holding another's laundry bag, bag had drugs in it). This case addresses item 35 on the preceding checklist.

Fogg v. Commonwealth, 216 Va. 394, 219 S.E.2d 672 (1975) (defendant on bed ten feet from drugs, drugs hidden in paper bag on chair, defendant was not the renter of the room). This case addresses items 15, 17, 41 and 42 on the preceding checklist.

Wright v. Commonwealth, 217 Va. 669, 232 S.E.2d 733 (1977) (defendant was visiting a friend's apartment, drugs found three feet from the defendant in open view, defendant witnessed the apartment owners shooting up drugs when the police arrived). This case addresses items 7, 8, 11, 15 and 42 on the preceding checklist.

Woodfin v. Commonwealth, 218 Va. 458, 237 S.E.2d 777 (1977) (defendant sometimes stayed at girlfriend's apartment, personal items of defendant at apartment, drugs underneath mattress in bedroom). This case addresses items 5, 18 and 40 on the preceding checklist.

Clodfelter v. Commonwealth, 218 Va. 619, 238 S.E.2d 820, *rev'g and remanding* 218 Va. 98, 235 S.E.2d 340 (1977) (defendant rented room and had the only key, maid testified that there were no drugs in room before the defendant rented it, drugs found behind mirror, paraphernalia on bed in open view, defendant's personal gear spread throughout room, defendant not present when drugs found, defendant later gave police false identification). This case addresses items 1, 4, 6, 8, 25, 32 and 40 on the preceding checklist.

Garland v. Commonwealth, 225 Va. 182, 300 S.E.2d 783 (1983) (defendant co-rented apartment, drugs and paraphernalia found in defendant's bedroom, defendant's personal effects in room, defendant not in apartment when drugs were found). This case addresses items 1, 6, 7, 8, 31 and 40 on the preceding checklist.

Powers v. Commonwealth, 227 Va. 474, 316 S.E.2d 739 (1984) (defendant owned house, defendant was in the process of moving, drugs found under floor board in attic with defendant's ceramics and workbench on top of floor board, defendant was not in house when the drugs were found). This case addresses items 1, 4, 6, 25 and 40 on the preceding checklist.

Drew v. Commonwealth, 230 Va. 471, 338 S.E.2d 844 (1986) (defendant owned the house, personal items throughout the house, twenty-two people were at the house (party), drugs were semi-hidden, defendant was not present when the drugs were found). This case addresses items 1, 6, 31 and 40 on the preceding checklist.

Virginia Court of Appeals

Behrens v. Commonwealth, 3 Va. App. 131, 348 S.E.2d 430 (1986) (defendant rented hotel room, maid testified that no drugs had been in the room before the defendant rented it, maid found the drugs behind the dresser, defendant not surprised by the finding of the drugs, defendant associated with drug dealers). This case addresses items 1, 4, 25, 27, 28 and 40 on the preceding checklist.

Hairston v. Commonwealth, 5 Va. App. 183, 360 S.E.2d 893 (1987)[120] (drugs hidden in an infant's clothing, defendant was caught holding the infant, three other people had held the infant within the last two hour). This case addresses item 36 on the preceding checklist.

Wynn v. Commonwealth, 5 Va. App. 283, 362 S.E.2d 193 (1987) (defendant's clothing found at his girlfriend's apartment, bills and a letter made out to the defendant also found at the apartment, defendant admitted to staying overnight on occasions, large amount of drugs found hidden all over the apartment). This case addresses items 6, 18 and 40 on the preceding checklist.

Federal District Court

Bentley v. Cox, 508 F. Supp. 870 (E.D. Va. 1981) (defendant co-owned house, drugs found behind the garbage in the kitchen, party was going on at the house, defendant in a different room than the kitchen when the drugs were found). This case addresses items 1, 6, 17, 31 and 41 on the preceding checklist.

How to Use the Checklist and Precedent Tables

The use of the checklist and the precedent tables in a logical fashion will facilitate a best guess predictor of the outcome of criminal cases involving drug possession. To use the tables correctly in order to gain the appropriate case precedent, first list all of the known facts and evidence about the case at bar. Second, compare the facts list to the checklist and match the facts to the corresponding numbers on that list. Third, take the new list of matching numbers and compare them to the precedent tables to find all cases that are similar. Last, look up the most similar cases and compare their fact scenarios to the case at bar. Remember that the more numbers one has in common with a case in the precedent tables, the more on point it will be. Thus, every distinguishing fact will be essential to the finding of the appropriate precedent. Additionally, note which of the checklist facts are most critical to the case. List these in their order of importance. This is the best procedure to use in order to prioritize the numerical listings in such a way that the best precedent can be found.

What follows are three examples of using the checklist and tables:

Scenario #1

The defendant is driving a car that s/he borrowed from a friend. Drugs are located in the trunk and there are no personal items of the defendant found in the car.

The matching up of the case facts to the checklist will show that the following checklist numbers correspond: 17, 24, 41, and 42.

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[120] The key in this case was the "equal access" rule as applied to the other individuals who could have put the drugs in the infant's clothing. The two hour time factor played the critical role in the eyes of the court.

In comparing these numbers to the tables, one will find that *Fogg* is the best case. A closer look at that case will show that when drugs are hidden in a car and the defendant is not the owner of the vehicle or in exclusive possession of it (e.g., the defendant has the only key), the courts will not find him/her guilty of possession.

Scenario #2

The police raided the defendant's home and found drugs in open view, but the defendant was not at home. The defendant lives alone and has the only keys to the residence.

The corresponding numbers on the checklist to these facts are: 1, 4, 7, and 40.

Although *Powers* is nearly on target, *Hodge* is the court's new trend and identifies well with the checklist numbers. If two or more cases are on point or nearly on point, take the latest case as controlling precedent. *Hodge* will render this defendant guilty of possession.

Scenario #3

The police raid X's home and the defendant is present. The drugs are found in open view, but the defendant had just arrived and says that s/he was just visiting X.

The corresponding numbers on the checklist to these facts are: 7, 15, and 42.

Although *Brown* is a close case, the time of the defendant's arrival at the house is critical, and *Wright* should control. Thus the defendant would be found not guilty of possession.

THE DICK AND JANE DILEMMA RESOLVED

To answer the Commonwealth Attorney's question as to whether ownership of the marijuana matters, either of two approaches may be taken. The first is the ideal judicial approach, which has as its objective the punishment of the true wrongdoer. The second is the less than ideal approach. Under the guise of this second approach, fairness is no real concern -- only conformity to predesignated standards is of true worth. For purposes of true life pragmatism, the Dick and Jane Dilemma will be answered using the latter, nonidealistic approach.

In compliance with that approach, the end result for the fun-loving couple is that Jane will, in all probability, be convicted. This is because applying the tables to this scenario would yield *Adkins* as precedent. Although it is a Virginia Supreme Court case that is over a decade old, it is the only case that addresses all of the issues present in Jane's predicament. An argument could be made for "equal access," but the fact that Jane owns the car and is present when the drugs are found makes it an unlikely winner. *Crisman* can be easily distinguished.

On the other hand, Dick will more than likely be found not guilty. The key for Dick is that "equal access" works for him because he is not the owner of the vehicle and his case more closely parallels *Huvar*. The only hang-up for Dick is that the Virginia Court of Appeals has never officially ruled on the "equal access" defense and with its present, more conservative, trend in

finding possession, may not accept the doctrine in favor of a more liberal "joint theory." Dick's chances are nevertheless very good compared to Jane's. Although one may ask whether this is really very fair considering our knowledge of what truly happened, the reality is that fairness is of no real concern to the court that practices academia over equity.

CONCLUSION

It's an easy case to prove constructive possession in instances where there is a lot of evidence or the defendant confesses; however, it is quite another story where the facts and evidence are skimpy at best or at worst still in dispute. Those are the situations where knowing case precedents and judicial trends will make the difference. Unfortunately for the Commonwealth, these troublesome close calls are in fact the majority, not the minority, of the drug-related cases pending before the Virginia courts today. Prosecutorial discretion becomes a key part of this process, as the Commonwealth Attorney determines whether to proceed with or to withdraw the charge (*nolle prosequi*). It is only through an insightful and studious analysis of the precedential trends that a competent prosecutor can come to any meaningful conclusions as to what is or is not the crime of constructive possession in Virginia.

CHESAPEAKE BAY PRESERVATION ACT

Peter S. Jordan

INTRODUCTION

When the Virginia General Assembly enacted the Chesapeake Bay Preservation Act during the 1988 session,[1] environmentalists praised the state's first comprehensive attempt to reduce pollution in the Chesapeake Bay watershed resulting from the general activities of agriculture, development, and urban life. The purpose of the legislation is to protect and improve the water quality of the Chesapeake Bay and its tributaries and to ensure balanced economic development in fragile waterfront areas.[2] The Act created the Chesapeake Bay Local Assistance Board to establish land-use guidelines in light of these objectives.[3] However, striking the proper balance between growth and environmental protection has not been an easy task. In September 1989, following over a year of deliberation, public comment, and revision, the Board approved the final regulations establishing criteria that provide for both the protection of water quality and the accommodation of economic development.[4]

The following material will provide a brief background of the Chesapeake Bay Preservation Act and the initial regulations approved by the Board in June 1989. The article will then outline the final regulations that the Board adopted on September 20, 1989.

THE CHESAPEAKE BAY PRESERVATION ACT

The Chesapeake Bay Preservation Act[5] provides for local planning and implementation of state standards for the use and development of designated lands in "Tidewater Virginia."[6] The Act

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[1] Act of Apr. 9, 1988, ch. 608, 1988 Va. Acts 738, (codified as amended at VA. CODE ANN. §§ 10.1-2100 to -2115 (1989)).

[2] VA. CODE ANN. § 10.1-2100 (1989).

[3] *Id.* §§ 10.1-2102, -2103.

[4] Chesapeake Bay Preservation Designation and Management Regulations, 6 Va. Regs. Reg. §§ 1.1-6.5 (Sept. 20, 1989).

[5] Hereinafter referred to as "the Act."

[6] "Tidewater Virginia" includes the "Counties of Accomack, Arlington, Caroline, Charles City, Chesterfield, Essex, Fairfax, Gloucester, Hanover, Henrico, Isle of Wright, James City, King George, King and Queen, King William, Lancaster, Mathews, Middlesex, New Kent, Northampton,

creates a new administrative agency, the Chesapeake Bay Local Assistance Department.[7] The Department is to provide technical and administrative assistance to the Chesapeake Bay Local Assistance Board ("the Board"), the state policy board responsible for promulgating regulations and overseeing local program administration.[8]

The Board's regulations are to serve two purposes. The first is to develop procedures and establish criteria to aid local governments in determining the ecological and geographic extent of the "Chesapeake Bay Preservation Areas" within their jurisdictions.[9] The second is to establish criteria for use by local governments in granting, denying, or modifying requests to rezone, subdivide, or use and develop land in these areas.[10] The guiding principle behind the regulations is the protection of water quality from significant degradation as a result of the use and development of land.[11]

Local governments must employ the Board's criteria to ensure that the use and development of land within Chesapeake Bay Preservation Areas is done in a manner that protects the quality of state waters consistent with the provisions of the Act.[12] Specifically, local governments must incorporate water quality protection measures into their comprehensive plans, zoning ordinances, and subdivision ordinances.[13] Localities are responsible for enforcing these criteria in all land use decisions through the exercise of their police and zoning powers.[14] The Board is authorized to provide financial and technical assistance and advice to local governments concerning land use and development and water quality protection.[15] In addition, the Board is authorized to consult

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Northumberland, Prince George, Prince William, Richmond, Spotsylvania, Stafford, Surry, Westmoreland, and York, and the Cities of Alexandria, Chesapeake, Colonial Heights, Fairfax, Falls Church, Fredericksburg, Hampton, Hopewell, Newport News, Norfolk, Petersburg, Poquoson, Portsmouth, Richmond, Suffolk, Virginia Beach, and Williamsburg." VA. CODE ANN. § 10.1-2101.

[7] *Id.* § 10.1-2105.

[8] *Id.* §§ 10.1-2102, -2103, -2104, -2107 (promulgation of all regulations and determination of compliance must be in accordance with the Virginia Administrative Process Act (VA. CODE ANN. § 9-6.14:1 *et seq.*); *see id.* § 10.1-2103(4),(8)).

[9] *Id.* §§ 10.1-2103(5), (7), -2107(A).

[10] *Id.* §§ 10.1-2103(5), -2107(A).

[11] *Id.* § 10.1-2107(B).

[12] *Id.* § 10.1-2111.

[13] *Id.* § 10.1-2109(B)-(D).

[14] *Id.* § 10.1-2108.

[15] *Id.* § 10.1-2103(3).

with local governments regarding all phases of developing and implementing local comprehensive plans, zoning ordinances, and subdivision ordinances to ensure compliance with the objectives of the Act.[16] Localities may submit any application for the use or development of land within their jurisdiction to the Board for review.[17] In the exercise of its oversight and enforcement authority, the Board may institute legal actions to ensure that counties, cities, and towns comply with the provisions of the Act.[18]

JULY 1, 1989 REGULATIONS

On July 1, 1989, the Board adopted and promulgated regulations as mandated in the Act.[19] Criticism of the regulations, mostly from environmentalists and farmers, prompted Governor Baliles to order the Board to suspend its enactment of the rules and re-open public comment on the two most contentious issues: septic tank requirements and agricultural buffer zones.

Environmental advocates complained that the regulations as adopted were significantly weaker and less effective than the draft criteria originally proposed. Their main concern was the Board's failure to include tough new septic tank requirements in the final regulations, leaving responsibility for developing these criteria with the State Health Department. Wastewater discharge from septic tanks is considered to be a significant contributor to pollution of the Bay's waters.

Farmers and other agricultural groups objected to the reduction of acreage resulting from the Board's adoption of a 100-foot buffer zone for all agricultural lands bordering on the Bay or its tributaries. This buffer area of vegetation along the shoreline is meant to retard erosion and filter chemical runoff, another major pollutant of the Bay.

SEPTEMBER 20, 1989 REGULATIONS

On September 20, 1989, the Board adopted and promulgated the final regulations.[20] The

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[16] *Id.* § 10.1-2103(2),(8).

[17] *Id.* § 10.1-2112.

[18] *Id.* § 10.1-2104.

[19] VA. CODE ANN. § 10.1-2107(E).

[20] Chesapeake Bay Preservation Designation and Management Regulations, 6 Va. Regs. Reg. §§ 1.1-6.5 (Sept. 20, 1989) [hereinafter "Final Regulations"].

following is a summary of selected provisions and not a comprehensive coverage of the regulations.

Introduction

The purpose of the regulations is to minimize the polluting effects of human activity upon the Chesapeake Bay, its tributaries, and other state waters.[21] The regulations establish the criteria by which local governments must determine the Chesapeake Bay Preservation Areas and set land use and development guidelines within their jurisdictions.[22]

Local Government Programs

Localities must develop measures, called local programs, necessary to comply with the Act and regulations.[23] Local governments have twelve months from the adoption of the regulations in which to map the Chesapeake Bay Preservation Areas within their jurisdictions and adopt the relevant performance criteria in these areas.[24] They have two years to incorporate measures that comply with these criteria into their comprehensive plans, zoning ordinances, subdivision ordinances, and other water quality protection plans.[25]

Chesapeake Bay Preservation Area Designation Criteria

Chesapeake Bay Preservation Areas are to be divided into Resource Protection Areas and Resource Management Areas.[26] Resource Protection Areas are lands near the shoreline that either have an intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts which may cause significant degradation to the quality of state waters.[27] They include tidal wetlands, some contiguous nontidal wetlands, tidal shores, and a 100-foot buffer area subject to certain exemptions.[28] Resource Management Areas are lands which, if improperly used or developed, may substantially damage water quality or diminish the functional value of the

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[21] *Id.* § 1.3.

[22] *Id.* § 1.1, 1.3.

[23] Final Regulations, § 2.1.

[24] *Id.* § 2.2(A)-(B).

[25] *Id.* § 2.2(C)-(G).

[26] Final Regulations, § 3.1.

[27] *Id.* § 3.2(A).

[28] *Id.* § 3.2(B).

Resource Protection Area.[29] These areas must be contiguous to the entire inland boundary of the Resource Protection Areas and may include floodplains, highly erodible or permeable soils, and other nontidal wetlands.[30]

Localities within Chesapeake Bay Preservation Areas where existing development is concentrated may be designated as Intensely Developed Areas at the option of local governments and are subject to separate redevelopment criteria.[31]

Land Use and Development Performance Criteria

The criteria in this section establish performance standards for incorporation into local programs and are meant to achieve the goals and objectives of the Act.[32] The criteria may be employed in conjunction with other planning and zoning concepts to protect the quality of state waters.[33]

General Performance Criteria

Any use, development, or redevelopment of land in designated Preservation Areas must meet the general performance criteria. These criteria include provisions on best management practices, development exceeding 2500 square feet, septic systems, stormwater management, and agricultural and silvicultural activities.[34] The criteria incorporate tougher septic tank requirements in response to complaints by environmentalists. The regulations require septic systems to be pumped out once every five years and new systems to be built with a reserve sewage disposal site to reduce the threat of overflow.[35]

Performance Criteria for Resource Protection Areas

This criteria is supplemental to the general performance criteria and applies specifically

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[29] *Id.* § 3.3(A).

[30] *Id.* § 3.3(B).

[31] *Id.* § 3.4.

[32] Final Regulations, § 4.1.

[33] *Id.* § 4.4.

[34] Final Regulations, § 4.2.

[35] *Id.* § 4.2(7).

within Resource Protection Areas.[36] It allows land development in the Resource Protection Areas only if it is "water dependent" or constitutes "redevelopment."[37] The regulations require a 100-foot buffer of vegetation to be preserved or established to act as a pollutant filter to halt chemical runoff.[38] In certain instances the buffer can be reduced to fifty feet if a combination of the reduced buffer and suitable best management practices would collectively achieve water quality protection equivalent to the 100-foot buffer.[39]

In response to complaints by farmers and agricultural groups, the criteria adopt more lenient agricultural buffer restrictions. The agricultural buffer area may be reduced to a minimum of twenty-five feet when an approved soil and water conservation plan has been implemented on adjacent land.[40] The regional Soil and Water Conservation District must approve the plan and ensure that it achieves water quality protection at least the equivalent of the 100-foot buffer.[41]

Administrative Waivers and Exemptions

Local governments may permit the continued nonconforming use or reconstruction, but not necessarily the expansion, of any pre-existing structure within Chesapeake Bay Preservation Areas.[42] Public utilities, railroads, and facilities are generally excepted from the criteria subject to certain requirements.[43] Any exceptions granted under this section must be the minimum necessary to afford relief and must preserve the purpose and intent of the Act.[44]

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[36] Final Regulations, § 4.3.

[37] *Id.* § 4.3(A); *see id.* § 3.4(A)-(C).
A "water-dependent facility" is "a development of land that cannot exist outside of the Resource Protection Area and must be located on the shoreline by reason of the intrinsic nature of its operation. These facilities include, but are not limited to (i) ports; (ii) the intake and outfall structures of power plants, (iii) marinas and other boat docking structures; (iv) beaches and other public water-oriented recreation areas, and (v) fisheries or other marine resources facilities." *Id.* § 1.4. "Redevelopment" means "the process of developing land that is or has been previously developed." *Id.* § 1.4.

[38] *Id.* § 4.3(B).

[39] *Id.*

[40] *Id.* § 4.3(B)(4).

[41] *Id.*

[42] Final Regulations, §4.5(A).

[43] *Id.* § 4.5(B).

[44] *Id.* § 4.6.

Implementation, Assistance, and Determination of Consistency

One of the Board's functions is to assist in the preparation and implementation of local programs.[45] For this purpose, the Board must provide a local assistance manual, establish a liaison with each local government, and review proposed programs.[46] The regulations establish guidelines both for local government use in preparing local programs and for the Board's use in determining local program consistency.[47]

Enforcement

The Board has the right to take administrative and legal action to ensure that local governments comply with the provisions of the Act and the regulations.[48]

CONCLUSION

The Chesapeake Bay Preservation Act will have wide ranging effects on real estate use and development in Tidewater Virginia. Tougher standards for the use and development of land in designated Protection Areas will make the activities of builders, land owners, and farmers more costly. Local governments are also concerned with the costs of implementing the regulations. Most localities do not have the technical and financial resources necessary to implement the regulations without state assistance. Finally, environmental groups will still need to pressure local authorities to adopt a firm stance on the incorporation of the Board's criteria into their local programs. In the end, the Act's final impact will depend to a large extent upon the strength of local governments' implementation of the Board's regulations.

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[45] Final Regulations, § 5.1.

[46] *Id.* §§ 5.2, 5.3, 5.5(B).

[47] *Id.* § 5.6.

[48] Final Regulations, §§ 6.1, 6.2, 6.3.

DNA "FINGERPRINTING"

Steven N. Nachman

INTRODUCTION

It has been hailed as a revolutionary tool in law enforcement. One federal official has called it "the most dramatic breakthrough for forensics this century."[1] It is DNA "fingerprinting," and the State of Virginia has become one of its leading proponents.

On September 22, 1989, the Virginia Supreme Court upheld the admissibility of DNA evidence in two trials resulting in rape and murder convictions of former Richmond resident Timothy Spencer.[2] Scientists performed tests on semen found at the scenes of both crimes and determined that the DNA pattern matched the pattern found in Spencer's blood. The court held that DNA testing was "a reliable scientific technique" and that in both cases the tests were properly conducted. Accordingly, the court held that the trial court did not err in admitting the DNA test results into evidence.[3] The *Spencer* rulings marked the first time that a court heard an appeal from a murder trial based on DNA evidence.

STATEWIDE DNA DATABANK

Earlier this year, the Virginia General Assembly passed a bill authorizing the establishment of a statewide databank to store DNA fingerprints of convicted felony sex offenders.[4] The legislation, which took effect on July 1, 1989, authorized testing of felony sex offenders who are currently incarcerated. State officials hope to use the DNA databank as an investigatory tool to aid law enforcement authorities. Samples of blood, semen, or hair recovered from crime scenes can be tested and matched against DNA fingerprints in the statewide databank. If a match or "hit" is produced, authorities can use the information to establish probable cause and obtain a search warrant for a criminal suspect.

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[1] John Hicks, Assistant Director of the Federal Bureau of Investigation Laboratory Division in Washington, *quoted in* Richmond Times-Dispatch, Oct. 27, 1989, § D, at 2, col. 6.

[2] Spencer v. Commonwealth , Nos. 881268, 881288 (Va. Sept. 22, 1989).

[3] Richmond Times-Dispatch, Sept. 23, 1989, § B, at 1, col. 5.

[4] VA. CODE ANN. § 53.1-23.1.

A special subcommittee of the Virginia General Assembly is rewriting the 1989 statute in response to problems and concerns over the databank which have surfaced since July.[5] According to Professor Walter J. Felton, Professor of Law, Marshall-Wythe School of Law, College of William and Mary, who is working with the special subcommittee, the 1989 statute did not specify which agency of the state government would pay for the DNA testing. The new statute is expected to correct this omission. In addition, the proposed legislation will improve procedures for testing convicts who are incarcerated in county jails and in rural areas.

The new statue is also expected to specify that the DNA databank is to be used solely for identification of suspects in criminal proceedings. The statute may include sanctions for wrongful use of DNA test results. These proposed changes were spurred by concerns that the databank might be used for purposes other than criminal law enforcement. According to Professor Felton, however, the subcommittee may revise the current statute to allow DNA testing of prisoners convicted of burglary. Professor Felton stressed that none of the proposed revisions have been finalized. The subcommittee will present the General Assembly with recommended legislation in the 1990 session.

Virginia is not alone in its efforts to incorporate DNA testing into its criminal justice system. Over half the states are exploring proposals to create DNA databases, and the FBI is attempting to create a national DNA information network.[6]

Despite its growing acceptance in the criminal justice system -- DNA evidence is admissible as evidence in eighteen states[7] -- some critics charge that DNA testing procedures are far from foolproof and that extensive independent studies to determine their reliability should be undertaken before courts routinely admit the results of DNA tests into evidence.[8] Moreover, the courts have not been unanimous in their determinations of admissibility. On August 14, 1989, New York State Supreme Court Judge Gerald Sheindlin refused to allow the results of a DNA test into evidence following a twelve-week pre-trial hearing in a Bronx murder case. Sheindlin held that although DNA testing was an accepted scientific procedure, the testing laboratory failed to use the proper tests. Sheindlin urged lawyers involved in previous DNA testing cases to examine trial records to

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[5] The formal title of the committee is the Joint Legislative Subcommittee Studying the Creation of a DNA Test Data Exchange Pursuant to Senate Joint Resolution 127.

[6] Los Angeles Times, Sept. 15, 1989, Metro Section, Part 2, at 7, col. 4.

[7] *Id.*, Sept. 14, 1989, § 1, at 3, col. 2.

[8] *See* Thompson and Ford, *DNA Typing: Acceptance and Weight of The New Genetic Identification Tests*, 75 VA. L. REV. 45 (1989).

determine whether appeals, based on his decision, would be appropriate.[9]

There is widespread disagreement over the potential impact of Judge Sheindlin's ruling. Critics of DNA testing hailed the decision and said previous DNA testing cases should be reopened. Some proponents of DNA testing, however, interpreted the ruling as a victory. The Bronx District Attorney, Robert T. Johnson, said the court had upheld the validity of DNA testing.[10] Judge Sheindlin, in an appearance on ABC's Nightline, commented that his ruling had stressed that DNA testing was "a powerful, accepted scientific procedure."[11]

Critics of DNA testing have expressed concerns over proposals to create DNA databanks as an aid to law enforcement. Professor Donald Shapiro of New York Law School has argued that DNA fingerprints will be used for non-law enforcement purposes to discriminate against individuals. Shapiro's concerns are premised on the fact that DNA fingerprints can be used to establish whether an individual has certain genetic defects. Specifically, Shapiro warns that employers will refuse to hire individuals with certain defects, and insurance companies will similarly refuse to insure individuals based on their genetic profiles. One commentator has warned that establishment and use of genetic databases could lead to creation of a "permanently stigmatized genetic underclass."[12] Supporters of a national and state DNA databanks argue that safeguards can be instituted to ensure that DNA fingerprints will be used for law enforcement purposes only and will otherwise be kept confidential.[13]

THE DNA TESTS

Despite these concerns, it appears that DNA testing will be used increasingly in Virginia criminal cases. Note that the new technology can be utilized by criminal defense attorneys as well as prosecutors. Defense attorneys can introduce DNA test results in an effort to exculpate their

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[9] The New York Times, Aug. 15, 1989, § B, at 1 , col. 4; *see* People v. Castro, 545 N.Y.S.2d 985 (1989).

[10] The New York Times, Aug. 15, 1989, § B, at 1, col. 4.

[11] *Nightline*: Interview with Judge William Sessions, FBI Director; Justice Gerald Sheindlin, New York Supreme Court; and Donald Shapiro, New York Law School (ABC television broadcast, Aug. 15, 1989).

[12] Marx, *Now the Techno-Snoopers Want To Get Into Our Genes*, L. A. Times, Sept. 15, 1989, Metro Section, at 7. Gary T. Marx is a sociology professor at the Massachusetts Institute of Technology.

[13] *Nightline*, *supra* note 11.

clients. Attorneys working in the criminal justice field should be familiar with the scientific procedures involved in DNA fingerprinting.

Commercial laboratories currently offer three different tests for typing or fingerprinting DNA. The best known test is offered by Lifecodes Corporation of Valhalla, New York, and is called the "DNA-Print" test. A second test is known as "DNA fingerprinting" and is performed by Cellmark Diagnostics Corporation of Germantown, Maryland. The third DNA typing test was developed by the Cetus Corporation and is offered by Forensic Science Associates of Richmond, California.

In an article entitled *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*,[14] William C. Thompson and Simon Ford provide a detailed and critical description of these testing techniques. Thompson and Ford note that all three tests are significant improvements over previous genetic identification techniques.[15] Thompson and Ford stress that the theory behind DNA testing is widely accepted throughout the scientific community. DNA is a complex chain of molecules which contain heritable information passed from parents to offspring. No two individuals, except for identical twins, have identical DNA.[16] DNA is structured like a ladder, with the "rungs" of the ladder consisting of pairs of molecules known as "bases." Four different kinds of bases exist, their order on the ladder constituting a "DNA sequence." DNA typing developed when scientists discovered how to identify variable or "polymorphic" sections of the DNA ladder, which identify differences among individuals.[17]

The Cellmark and Lifecodes tests analyze polymorphic DNA segments using a seven-step scientific procedure known as "RFLP" analysis.[18] Thompson and Ford note that the reliability of RFLP analysis can be undermined where DNA samples have become contaminated with chemical or biological agents.[19] Accordingly, they call for additional research to test the reliability of RFLP analysis where samples have been contaminated.[20] The authors also point out that most of the procedures involved in the seven-step analysis are well accepted by scientists. Because the

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[14] Thompson and Ford, *supra* note 8.

[15] *Id.* at 51.

[16] *Id.* at 41.

[17] *Id.* at 62-63.

[18] "RFLP" stands for "restriction fragment length polymorphism."

[19] Thompson and Ford, *supra* note 8 at 66.

[20] *Id.* at 68-69.

procedures are complicated, however, there is significant room for laboratory error. The authors state that most of the validation studies of DNA testing have been conducted by experts who are employed by the companies marketing the tests. They call for additional validation studies by independent experts.[21]

The Cetus test is a newer technique which determines whether polymorphic DNA segments are present in a given sample. This differs from the RFLP analysis, which measures the length of the segments.[22] Unlike the Cellmark and Lifecodes tests, the Cetus test can type the DNA of a single human hair.[23] According to Thompson and Ford, however, under a Cetus test procedure known as "polymerase chain reaction," or "PCR," DNA samples are susceptible to contamination.[24]

Once samples have been typed for DNA, a laboratory analyst must determine whether a "match" has occurred. Although no two individuals have identical DNA, they can have the same DNA type.[25] Scientists must determine, based on the pattern of DNA prints, the probability that two unrelated individuals would have matching DNA patterns. Some scientists have conducted population studies to estimate the frequency of certain DNA patterns within a given population. These figures are then used to determine the probability of a coincidental match between DNA prints.[26] In the *Spencer* cases cited above, experts testified that the odds were one in 705 million and one in 135 million that an individual other than Spencer had the same DNA type as that found in the recovered samples.[27]

CONCLUSION

Prosecutors and criminal defense attorneys in Virginia should be familiar with the technical aspects of DNA testing and its potential weaknesses. An attorney who has a basic understanding of DNA fingerprinting will be better prepared to conduct an effective examination of expert witnesses, and to argue for or against the admissibility of DNA test results, in a given trial.

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[21] *Id.* at 73.

[22] *Id.* at 76.

[23] *Id.* at 50.

[24] *Id.* at 77.

[25] *Id.* at 80.

[26] *Id.* at 81-86.

[27] Richmond Times-Dispatch, Sept. 23, 1989, § B, at 1, col. 6.

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ACCIDENT RECONSTRUCTION

Steven N. Nachman

On America's streets and highways, traffic accidents are commonplace, everyday events. In 1986, according to the National Safety Council, there were 17.7 million traffic accidents, resulting in 48,300 fatalities, 1.8 million injuries, and $21.2 billion in property damage.[1] Though commonplace, many traffic accidents occur when there are no eyewitnesses. In such cases, particularly where the parties to an automobile accident are killed, determining which party was at fault can be an extremely difficult task. Over the the past several years, attorneys representing plaintiffs and defendants in lawsuits stemming from traffic accidents have turned in increasing numbers to accident reconstruction (AR) specialists to help determine liability.

Accident reconstructionists, drawing upon a wide range of scientific disciplines and utilizing state-of-the art computer technology, can recreate the events and conditions immediately preceding, during, and after an automobile accident. AR specialists often serve as expert witnesses at trial, offering their opinions on what happened in a given accident, why it happened, and which party was at fault. Under certain circumstances, particularly where complicated automobile accidents prove difficult to explain through verbal descriptions or diagrams, judges will allow juries to view films, videotapes, or computerized simulations of reconstructed accidents. Judges will admit an accident reconstruction video only if it has been prepared under conditions substantially similar to those existing at the time of the accident.[2] When such evidence is admitted at trial, it can have a dramatic and often decisive impact on a jury.

Accident reconstruction, however, does have its limitations. Attorneys should not expect miracles, particularly where the conditions surrounding an automobile accident render reconstruction impractical or impossible. But it is important to keep in mind that an AR specialist can help an attorney formulate both offensive and defensive strategies for trial. If an AR specialist determines that the opposing party caused an accident, an attorney can offer the AR's opinion at trial following proper foundation testimony. If an accident reconstructionist determines that the opposing party has a better case, the attorney can learn about the weaknesses in his client's claim or defense and anticipate attacks by the opposing party.

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[1] Bates, *Accident Reconstruction*, DEF. COUNS. J., Oct. 1988, at 437.

[2] J. BUCHANAN, YES, BUT CAN YOU GET IT IN? (1987).

Accident reconstruction is a complex science requiring expertise in a variety of fields, including math, physics, engineering, and computer science. Many AR specialists have advanced degrees in these fields, but others have developed their expertise through police work. In the past several years, computers have played an increasingly prominent role in accident reconstruction. Yau Wu, a physicist and founder of Dynamic Analysis Corp. in Concord, Massachusetts, has developed a computer program called IMPACT (Improved Mathematical Predictions of Automobile Collision and Trajectory) for use in accident reconstruction. Using data on vehicle weights, passenger weights, weather conditions and other factors, IMPACT determines the speed of the vehicles and the angle of impact in a given accident.[3] The program, according to Wu, has an error rate of 5%.[4]

ACCIDENT RECONSTRUCTION SCENARIOS

Evidence generated by AR specialists has helped to turn the tide in a wide range of traffic accident cases. The following is a summary of some key cases in which accident reconstruction has played a decisive role:

* In 1982, former U.S. Olympic hockey team goalie Jim Craig was charged with vehicular homicide following an auto collision. Prosecutors alleged that Craig was driving on the wrong side of the road while going over seventy miles per hour prior to the collision. Utilizing IMPACT, noted above, AR specialist Yau Wu determined that Craig was traveling at forty miles per hour and took precautions to prevent the accident. The charge was defeated.[5]

* A 17-year-old was charged with manslaughter after his car hit a concrete wall. An AR specialist determined that the vehicle spun out of control when a wheel made contact with an exposed electric utility box on the road. The accident reconstructionist also determined, based on passenger weights and personal injuries caused by the accident, that the defendant was not driving the vehicle. The 17-year-old was acquitted of manslaughter, but convicted on a lesser charge.[6]

* A truck driver was cited for reckless driving following a five truck accident on an interstate highway. The right lane of the highway had been closed due to construction. The

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[3] Ballard, *The computer as expert witness*, CAL. LAW., Aug. 1985, at 26.

[4] *Id.*

[5] Ballard, *supra*.

[6] *Id.*

accident occurred near the approach to the lane closure. An AR specialist determined that a contractor had failed to provide appropriate warning signs indicating the closed lane ahead. The truck driver was thus unable to stop in time to prevent a collision with vehicles which had slowed down near the approach to the closed lane. The accident reconstructionist succeeded in establishing that the truck driver had not proximately caused the accident.[7]

* A defendant was charged with driving on the wrong side of the road based on a determination by an accident investigator that a gouge mark represented the point of impact of the vehicles. An AR expert, using scientific theories of motion and velocity, established that the gouge mark was located on the opposite side of the road from the point of impact. This established that the defendant was in fact driving on the correct side of the road at the time of the accident.[8]

* A truck driver attempted to make a left turn off a two lane road onto a connecting side road. The plaintiff-driver, proceeding in the opposite direction in a passenger car, struck the truck while it was making the left turn. The plaintiff was seriously injured and brought suit alleging that the truck driver had five or six seconds in which to see the plaintiff's vehicle as it was approaching from the opposite direction and could have avoided the accident. The operator of the truck claimed that a crest in the road prevented him from seeing the plaintiff's vehicle until it was less than a second away from the point at which he began to make the left turn.

An accident reconstruction expert was brought in by plaintiff's counsel in an effort to counter defendant's claim that the crest in the road obstructed his view of plaintiff's vehicle. The AR expert examined the police accident report, accident photographs, and highway construction plans. The AR specialist then prepared a videotape in which the camera was placed at the vantage point of the truck driver looking ahead at the start of his turn. The photographs were used to estimate the positioning of the truck immediately preceding the point of impact. The accident reconstructionist then filmed a vehicle -- of the same height as plaintiff's car -- proceeding in the opposite direction over the crest of the hill. A digital clock, superimposed on the film, showed that about five seconds elapsed between the time when the vehicle first became visible and then passed out of view.

At trial, the judge allowed the videotape to be shown to the jury. Over defense counsel's objections, the accident reconstructionist then offered his opinion that the defendant began his turn when the plaintiff's vehicle was 150 feet away, or two seconds' travel time from the point of impact.

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[7] Bates, *supra* note 1 at 438.

[8] *Id.*

The plaintiff had about a second and a half to react and was unable to brake in time to avoid hitting the truck. The jury subsequently determined that the defendant was the negligent party.[9]

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