COMMENTS AND QUESTIONS IN RESPONSE TO PROPOSED LEGISLATIVE CHANGES SUBMITTED BY STANTON PHILLIPS, ESQ.

COMMENTS BY COMMITTEE MEMBER, BARBARA C. JONES, ESQ.:

Favor reducing the birth parent revocation period from 25 days to 7 days

Favor reducing length of time to finalize adoptions. (The adoption process in VA typically takes just under 1 year, and in other jurisdictions, 1 mo. – 6 mo.). Where there is a Home Study by a licensed child-placing agency, or otherwise a relative adoption, it would be in the best interests of all parties to move to finalization more quickly.

Favor putative birth father registry, with the expectation that it will preserve birth father's right, and eliminate costly searches and significant time delays for (often disinterested) birth fathers, frequently resulting in blocked adoptions.

Favor elimination of §63.2-1200 [4] and § 63.2-1222 (last sentence) wherein out of state agencies accepting relinquishments of Virginia birth parents, must have the birth parent execute an Entrustment Agreement. This statute raises significant conflict of laws concerns and usurps the right of a birth parent's choice of law. It has added tremendous confusion to the agency placement process (for birth parents, courts, agencies and attorneys) and produces a situation awaiting messy litigation.

RESPONSE COMMENTS TO MR. PHILLIPS PROPOSALS
(identified by a "*" and in italics at the bottom of each Code § or division thereto)

Prepared for the Joint Subcommittee Studying Virginia's Adoption Laws and Policies (SJR 331) by Stanton Philips, Esq., and presented on June 22, 2005

#1 §§ 63.2-1201. Filing of petition for adoption; venue; jurisdiction; and proceedings.

Proceedings for the adoption of a minor child and for a change of name of such child shall be instituted only by petition to a circuit court in the county or city in which the petitioner resides, ~~or~~ in the county or city in which is located the child-placing agency that placed the child, *or in the county or city where a birth parent executed a consent pursuant to §63.2-1233.* Such petition may be filed by any ~~natural~~ person who resides in the Commonwealth, ~~or~~ who has custody of a child placed by a child-placing agency of the Commonwealth ~~*or*~~ *is the adopting parent(s) of a child who was subject to a consent proceeding held pursuant to §63.2-1233. The petition shall ask* ~~for~~ leave to adopt a minor child not legally ~~his~~ *the petitioner's* by birth and, if it is so desired by the petitioner, also to change the name of such child. In the case of married persons, the petition shall be the joint petition of the husband and wife but, in the event the child to be adopted is legally the child by birth or adoption of one of the petitioners, such petitioner shall unite in the petition for the purpose of indicating consent to the prayer thereof only. The petition

shall contain a full disclosure of the circumstances under which the child came to live, and is living, in the home of the petitioner. Each petition for adoption shall be signed by the petitioner as well as by counsel of record, if any. In any case in which the petition seeks the entry of an adoption order without referral for investigation, the petition shall be under oath.

A single petition for adoption under the provisions of this section shall be sufficient for the concurrent adoption by the same petitioners of two or more children who have the same birth parent or parents, and nothing in this section shall be construed as having heretofore required a separate petition for each of such children.

(Code 1950, §§ 63-348; 1952, c. 550; 1954, c. 489; 1956, c. 300; 1964, c. 459; 1968, c. 578, §§ 63.1-221, §§ 63.1-219.9; 1970, c. 672; 1973, c. 406; 1975, c. 461; 1978, c. 730; 1983, c. 614; 1988, c. 882; 1989, c. 647; 1991, cc. 76, 602; 1995, cc. 772, 826; 2000, c. 830; 2002, c. 747.)

REASON FOR CHANGES IN §63.2-1201

The basic provisions of the section date back to the 1950 Code and probably earlier. While the 1989 amendments enacted a statutory scheme to address the rapid rise in parental placement adoptions, the basic jurisdictional provision was never updated with respect to parental placement.

Every state has its own unique statutory procedure for the executor of a birth parent consent. If a Virginia birth mother chooses an out-of-state family to make a parental placement of her child, her counsel will inform of her Virginia rights including 10 days until consent and then 15 days to change your mind. But then her counsel will explain if she chooses this family from out-of-state, the family has no jurisdiction to adopt in Virginia. The birth mother would be waiving state's procedures which may have less protections.

The proposal will allow the birth mother to have the option of proceeding under the protections of Virginia laws. The expansion of jurisdiction would only be for those out of state adopters who proceed through our juvenile and domestic relations court because the child was born in Virginia or the birth parent resides here.

The second proposal is striking the word "natural". The adoption community has attempted for years to educate the public to be more sensitive to adoption terminology. One of the key phrases is "natural" parent because that would make the adoptive parent an "unnatural" parent. Although not used in that context here, it appears unnecessary since other jurisdictional provisions of the Code refer only to "person". There is also a change of "his" to "the petitioner's" in an attempt to be gender neutral.

** This is excellent because the new language permit a VA birth parent and adoptive parent(s) to chose between VA law or the foreign jurisdiction's law and brings business to VA, in lieu of "chasing it out of state" (through the use of VA licensed child placing agencies and the services they offer, adoption counselors and attorneys), by permitting adoptive parents to finalize in VA. Further many other states allow a non-resident to finalize in their state based on the jurisdiction of the birth parent.*

#2 §§ 63.2-1202. Parental, or agency, consent required; exceptions.

A. No petition for adoption shall be granted, except as hereinafter provided in this section, unless written consent to the proposed adoption is filed with the petition. Such consent shall be signed and acknowledged before an officer authorized by law to take acknowledgments. The consent of a birth parent for the adoption of his child placed directly by the birth parent shall be executed as provided in §§ 63.2-1233, and the circuit court may accept a certified copy of an order entered pursuant to §§ 63.2-1233 in satisfaction of all requirements of this section, provided the order clearly evidences compliance with the applicable notice and consent requirements of §§ 63.2-1233.

B. A birth parent who has not reached the age of eighteen shall have legal capacity to give consent to adoption *and perform all acts related to adoption* and shall be as fully bound thereby as if the birth parent had attained the age of eighteen years.

** proposed new language is descriptive of what we are permitting and clarifies their capacities.*

C. Consent shall be executed:

1. By the parents or surviving parent of a child born in wedlock. A child born to a married birth mother shall be presumed to be the child of her husband and his consent shall be required. This presumption may be rebutted by sufficient evidence, satisfactory to the circuit court, which would establish by a preponderance of the evidence the paternity of another man, or the impossibility or improbability of cohabitation of the birth mother and her husband for a period of at least 300 days preceding the birth of the child, in such case his consent shall not be required. If the parents are divorced and the residual parental rights and responsibilities as defined in §§ 16.1-228 of one parent have been terminated by terms of the divorce, or other order of a court having jurisdiction, the petition may be granted without the consent of such parent; or

** At the conclusion of the first sentence add:" (in court or out of court consent, under oath and in writing)."*

2. By the parents or surviving parent of a child born to parents who were not married to each other at the time of the child's conception or birth. The consent of the birth father of a child born to parents who were not married to each other at the time of the child's conception or birth shall not be required (i) if the identity of the birth father is not reasonably ascertainable or (ii) if the identity of such birth father is ascertainable and his whereabouts are known, such birth father is given notice of the *adoptive placement or* adoption proceeding, including the date and location of the hearing, *if a hearing has been scheduled*, by registered or certified mail to his last known address, and such birth father fails to object to the adoption proceeding within twenty-one days of the mailing of such notice. Such objection shall be in writing, signed by the objecting party or counsel of record for the objecting party and shall be filed with the clerk of the circuit court in which the petition was filed during the business day of the court, within the time period specified

in this section. Failure of the objecting party to appear at the consent hearing, either in person or by counsel, shall constitute a waiver of such objection; or

** The language "if a hearing has been scheduled" is helpful; however this Code § is referenced in 63.2-1233[1] [a][iii] and [2] ,where no hearing is required for out of wedlock birth father's who receive a 21-day notice of the proceeding, hence providing a conflict of law and constant confusion. Further clarification is recommended. Suggested language for [ii] if the identity of such birth father is ascertainable and his whereabouts are known, such birth father is given notice of the adoptive placement by registered or certified mail. . . (through the sentence that ends "within the tie period specified in this section). Then add the language:" No additional hearing is required when such written notice is given to the birth father. If a hearing is scheduled, failure of the objecting party to appear at the consent hearing, either in person or by counsel, shall constitute a waiver of such objection; or"*

3. By the child-placing agency or the local board having custody of the child, with right to place him for adoption, through court commitment or parental agreement as provided in §§§§ 63.2-900, 63.2-903 or §§ 63.2-1221; or an agency outside the Commonwealth that is licensed or otherwise duly authorized to place children for adoption by virtue of the laws under which it operates; and

4. By the child if he is fourteen years of age or older, unless the circuit court finds that the best interests of the child will be served by not requiring such consent.

D. No consent shall be required of a putative birth father if he denies under oath and in writing the paternity of the child. Such a denial of paternity is a waiver of all rights with respect to the child and can not be withdrawn once executed even if given under his mistaken belief of non-paternity or scientific evidence of paternity

**Good addition clarifying "after-effects" of a denial of paternity.*

~~D~~ *E.* No consent shall be required of the birth father of a child when the birth father is convicted of a violation of subsection A of §§ 18.2-61, §§ 18.2-63 or subsection B of §§ 18.2-366, and the child was conceived as a result of such violation. *If the child has resided in the home of the prospective adoptive parent(s) for less than 3 continuous years, Article 3 shall apply and in particular, §63.2-1233(6).*

**Add language after the last Code cite:" or convicted under a similar statute of another state". . . and the child was conceived as a result of such violation.*

~~E~~ *F.* When a child has been placed by the birth parent(s) with the prospective adoptive parent(s) who is the child's grandparent, adult brother or sister, adult uncle or aunt, or adult great uncle or great aunt, the circuit court may accept the written and signed consent of the birth parent(s) that has been acknowledged by an officer authorized by law to take such acknowledgments.

** Add language after "child's grandparent", "great-grandparent"*

G. No consent shall be required of a birth parent of a child when the birth parent has neither visited nor reasonably supported the child for a period of 9 (6) months without just cause. Once the adopter establishes by a preponderance of the evidence that the birth parent has not met the requirements for the specified period, then the birth parent has the burden to disprove the allegations or establish just cause. Incarceration shall not constitute just cause unless the incarcerated parent can show a reasonable and continuous pattern of attempts to communicate with the child and maintain parental responsibility while the parent is incarcerated. This provision shall not infringe upon the birth parent's right to be noticed and the opportunity to be heard on the allegation of abandonment.

** Good addition, as it would allow many step-parent adoptions to proceed more expeditiously, where there have been "dead-beat dads", which is often the case. Suggest 6 mo., not 9*

H. [TO BE WRITTEN. This provision would deal with the opportunity for notice and developing or dismissing parental rights with respect to unmarried birth father of newborns and young children. Three approaches have been suggested. 1. A putative father registry whereby an unmarried birth father mails a postcard to be entitled to notice of the adoption. 2. The Oregon approach by establishing paternity or filing a pre- or post-birth filiation proceeding. 3. The North and South Carolina approach of finding pre-birth abandonment if there is no financial or emotional support during the pregnancy.]

> **Strongly recommend a putative birth father registry (to be addressed by Mary Beck, Esquire at the September 12, 2005 meeting),to preserve the rights of any birth father genuinely interested in parenting and to save hours of futile, costly searching and significant delay in the proceedings for disinterested birth fathers, who, once found, have the ability to block the adoption or manipulate the birth mother into parenting and are often not genuinely interested in parenting the child.*

> *This commentary also applies to §63.2-1233 [1][a] and §63.2-1222 – Notice provisions to birth fathers generally.*

(Code 1950, §§ 63-351; 1954, c. 489; 1956, c. 300; 1960, c. 331; 1962, c. 603; 1968, c. 578, §§ 63.1-225, §§ 63.1-219.10; 1972, cc. 73, 475, 823; 1974, c. 620; 1978, cc. 730, 735, 744; 1985, c. 18; 1986, c. 387; 1989, c. 647; 1993, c. 553; 1995, cc. 772, 826; 1999, c. 1028; 2000, c. 830; 2002, c. 747.)

REASONS FOR CHANGES IN §63.2-1202

(B) This change codifies other acts that are related to the adoption that a minor can perform such as signing an Interstate Compact on the Placement of Children request, a

denial of paternity or an agreement with an agency to place the child with a specific family.

(C)(2) This provision involves mailing a 21-Day Notice to the birth father not married to the birth mother. Under the current as well as proposed change, he is mailed a 21-Day Letter/Notice by registered or certified mail and if he does not object in writing, his consent is not required. The current version implies that there must be a hearing scheduled when mailing the notice. Currently, counsel must file a motion and notice for a hearing before mailing the letter and then when there is no response, removes the motion from the docket since no hearing is necessary. This provision primarily effects stepparent adoptions. The proposed would make the procedure similar to an agency placement (§63.2-1222) and a parental placement (§63.2-1233(1)(a)(iii)) where a court hearing is not required to be set until he objects to the adoption.

(D) Denial of Paternity by a putative father are commonly used in all types of adoptions but is only specifically mentioned in parental placements (§63.2-1233(1)(a)(iv)) and in the provision for waiving the investigation in stepparent adoptions (§63.2-1241(C)(iii)). Denial of paternity is favored by many birth fathers because of their uncertainty of paternity and their fear that if the birth mother does not consent or revokes her consent, the birth father's consent would act as an admission for purposes of requiring him to pay child support. The proposal will clarify the universal usage of denial of paternity in all types of adoptions. Furthermore, the proposal clarifies that once a putative father makes the decision to deny paternity, he can not later change his mind and attempt to disrupt the adoption.

(E) The Adoption Reports Unit of the Commissioner reports that one of the most common procedural mistakes is the petitioner's failure to follow the parental placement provisions in close relative cases. This change directs them to the necessary procedures.

(G) Most other states have an abandonment provision in their adoption statutes. The basic premise is if you pay attention to your child by either visiting or supporting the child, you have rights. But, if you abandon your child, the birth parent loses rights. The proposal sets out procedures as well as protections. In drafting the proposal, a review of other state's statutes varied between 6 to 12 months so a middle ground was specified. Consistent feedback on this proposal has been to lower the time frame to 6 months. Therefore, 6 months is specified in parenthesis and the time frame should be determined as a policy decision.

(H) While section G deals with the older children, there have been many suggestions for dealing with the newborn or young child. Three approaches are outlined for discussion and policy determination.

#3 §63.2-1205. Best interests of the child; standards for determining.

In determining whether the valid consent of any person whose consent is required is withheld contrary to the best interests of the child, or is unobtainable, the circuit court or juvenile and domestic relations district court, as the case may be, shall consider whether ~~the failure to~~ grant*ing*

the petition pending before it would be ~~detrimental to~~ *in the best interests of* the child. ~~In determining whether the failure to grant the petition would be detrimental to the child,~~ The circuit court or juvenile and domestic relations district court, as the case may be, shall consider all relevant factors, including the birth parent(s)' efforts to obtain or maintain legal and physical custody of the child; *whether the birth parent(s) are currently willing and able to assume full custody of the child;* whether the birth parent(s)' efforts to assert parental rights were thwarted by other people; the birth parent(s)' ability to care for the child; the age of the child; the quality of any previous relationship between the birth parent(s) and the child and between the birth parent(s) and any other minor children; *whether the birth parent(s) have already established and maintained a loving and close relationship with the child; what both birth parents desires and plans are for the child's future; whether the birth parent made an effort to provide reasonable financial support for the child; whether the current home environment allows the child to thrive academically, socially and emotionally; whether the non-custodial parent has made continuous reasonable attempts to contact the child; what emotional and financial support the birth father may have provided the birth mother during the last six months of the pregnancy;* the duration and suitability of the child's present custodial environment; and the effect of a change of physical custody on the child.

** Positive focus on best interest of the child is good. Additional factors for court to consider will be helpful and directive, in terms of evidence produced.*

(1995, cc. 772, 826, §§ 63.1-225.1, §§ 63.1-219.13; 2000, c. 830; 2002, c. 747; 2003, c. 467.)

REASONS FOR CHANGES IN §63.2-1205

The national trend in revising adoption statutes since the infamous Baby Jessica case is to focus on what is in "the best interests of the child." It is the child's interests that are paramount. This change will direct the courts to maintain their focus on the child. The composition of the current stature forces the adopting parent(s) to attack the birth parent in every case. While the adoptive parent(s) do not have to prove the birth parent unfit, they are statutorily required to draw blood. This requirement further polarizes the parties and in reality, their extended families. The factors specified in the statute give the trial court the direction to make the determination of what is in the child's best interests.

The Virginia Court of Appeals in McCray v. Law, 2003 Va. App. LEXIS 260 (2003) articulated a number of additional factors for a court to weight and consider in determining the best interest of the child. While the statute already provides that the trial court shall consider all relevant factors, the statutory list provides the trail court some direction on what to consider. Theses additional factors set forth by our Court of Appeals will provide the trial court with additional and thoughtful direction on what is important to consider in determining what is in a child's best interests.

The Department of Social Services has also recommended the financial support provision as well as the continuous reasonable attempts to contact provision. One of the licensed adoption agencies has recommended the same two provisions as well as the provisions regarding willingness and ability to assume custody as well as whether one has established a loving and close relationship with the child. The factor concerning both birth parents desires and plan for the

child originates from a birth mother. She felt strongly that a birth parent who spends nine months thinking, receiving counseling, discussing her alternatives and planning should have her desires and plans considered as a factor by the court. Finally, a number of agencies and other have voiced that the statute should have a pre-birth abandonment provision. The proposal includes it as only a factor to consider and this Committee will need to make a policy determination as to whether there will be specific results for an individual failure to act.

In the ten years since enacting the Statute we have learned that there are additional factors the court should consider in determining the best interests of the child. All of the suggestions appear beneficial in helping the court focus on what is in the best interest of the child. Once we provide the court with direction, the court may then weight those factors as to importance in the individual case.

#4 § 63.2-1208. Investigations; report to circuit court.

A. Upon filing of the petition, the circuit court shall, upon being satisfied as to proper jurisdiction and venue, immediately enter an order referring the case to a child-placing agency to conduct an investigation and prepare a report unless no investigation is ordered pursuant to the requirements of this chapter. Upon the entry of the order of reference, the court of clerk thereof shall forward a copy of the order of reference, the petition and all exhibits thereto to the Commissioner and the child-placing agency retained to provide investigative, report, and supervisory services. If no Virginia agency provided such services, the order of reference, petition, and all exhibits shall be forwarded to the local director of social services of the locality where the Petitioners reside or resided at the time of the filing of the petition, or had legal residence at the time of the filing of the petition.

~~A.~~ *B.* Upon receiving a petition and order of reference from the circuit court, the applicable agency shall make a thorough investigation of the matter and report thereon in writing, in such form as the Commissioner may prescribe, to the circuit court within ~~90~~ 60 days after the copy of the petition and all exhibits thereto are forwarded. A copy of the report to the circuit court shall be served on the Commissioner by delivering or mailing a copy to him on or before the day of filing the report with the circuit court. On the report to the circuit court there shall be appended either acceptance of service or certificate of the local director, or the representative of the child-placing agency, that copies were served as this section requires, showing the date of delivery or mailing. ~~The Commissioner may notify the circuit court within 21 days of the date of delivery or mailing of the report as shown by the agency, during which time the circuit court shall withhold consideration of the merits of the petition pending review of the agency report by the Commissioner, of any disapproval thereof stating reasons for any further action on the report that he deems necessary.~~ *The circuit court shall consider the merits of the petition immediately upon receipt of the report. If the circuit court received comments from the Commissioner within 21 days after entry of a final order of adoption, the finality of judgment shall automatically be suspended for an additional 21 days during which time the circuit court shall review the case.*

** Concur with all provisions except the last new sentence, which I would eliminate, as it undermines the finality of the adoption. The Commissioner has sufficient time to review the file in the proposed 60 days preceding the submission of the Report of Investigation. There still*

remains the ability to appeal a Final Order – a sufficient avenue for challenge if needed. Shortening the finalization process is strongly favored.

~~B.~~ *C.* If the report is not made to the circuit court within the periods specified, the circuit court may proceed to hear and determine the merits of the petition and enter such order or orders as the circuit court may deem appropriate.

~~C.~~ *D.* The investigation requested by the circuit court shall include, in addition to other inquiries that the circuit court may require the child-placing agency or local director to make, inquiries as to (i) whether the petitioner is financially able, except as provided in Chapter 13 (§ 63.2-1300 et seq.) of this title, morally suitable, in satisfactory physical and mental health and a proper person to care for and to train the child; (ii) what the physical and mental condition of the child is; (iii) why the parents, if living, desire to be relieved of the responsibility for the custody, care and maintenance of the child, and what their attitude is toward the proposed adoption; (iv) whether the parents have abandoned the child or are morally unfit to have custody over him; (v) the circumstances under which the child came to live, and is living, in the same home of the petitioner; (vi) whether the child is a suitable child for adoption by the petitioner; and (vii) what fees have been paid by the petitioners or on their behalf to persons or agencies that have assisted them in obtaining the child. Any report made to the circuit court shall include a recommendation as to the action to be taken by the circuit court on the petition. A copy of any report made to the circuit court shall be furnished to counsel of record representing the adopting parent or parents. When the investigation reveals that there may have been a violation of § 63.2-1200 or § 63.2-1218, the local director or child-placing agency shall so inform the circuit court and the Commissioner.

~~D.~~ *E.* The report shall include the relevant physical and mental history of the birth parents if known to the person making the report. However, nothing in this subsection shall require that an investigation of the physical and mental history of the birth parents be made.

~~E.~~ *F.* If the specific provisions set out in §§ 63.2-1228, 63.2-1238, 63.2-1242 and 63.2-1244 do not apply, the petition and all exhibits shall be forwarded to the local director where the petitioners reside or to a licensed child-placing agency.

REASONS FOR CHANGES IN 63.2-1208

A. When the adoption chapter was re-codified in 2000, the provision forwarding petitions was moved resulting that it was only included with respect to agency placements, missing other cases

where the Commissioner has traditionally reviewed the petitions at an early stage. The Commissioner would statutorily be missing those stepparent cases where there is no non-custodial parent consent as well as those cases where an investigation is optional such as in parental placement, stepparent and some relative placements.

The Commissioner is in favor of an early review. This allows the Commissioner to alert the court and the parties to potential technical errors at the beginning of the investigative process instead of learning during the review period just prior to the entry of the final order. Thus, the petitioners might be saved the ordeal of going through an investigation by the wrong agency. As a practical matter, most courts have continued to forward the petitions to the Commissioner in the same manner as prior to the 2000 amendments.

The other aspect contained in this legislation is to set forth the actual procedural steps. The circuit court should immediately enter the order of reference once it is satisfied that there is proper jurisdiction and venue. This allows the investigation to begin. Occasionally, some courts will not begin the investigation until after an order of publication is run thus adding 3 months onto a process where the two procedures can be compatible conducted together. While the statutes previously stated forwarding the petition upon filing, the actual procedure the courts and the Commissioner follow is that the petition is forwarded when the order of reference is entered.

B. Virginia Department of Social Services expressed interest in two changes to shorten the adoption process. The Recommendation does in fact shorten the process by 51 days while have no apparent detrimental impact.

The first change is to shorten the timeframe in which agencies must file their report from 90 to 60 days. Historically, a longer period was necessary because an investigation with multiple visits and interviews was starting from the beginning. As our statutes evolved, pre-placement or pre-filing investigations became mandatory in most types of placement.

The only types of cases under our statutes where an investigation is required and a home study has not been previously conducted are some stepparent and adult adoptee cases. Those investigations are conducted by the local department of social services who typically conduct one interview as opposed to the three visits that are required in other types of adoptions.

The second change is with respect to eliminating the Commissioner's 21-day review period. The Commissioner's office conducts a review in every case when it receives a packet from the court consisting of the petition for adoption and the first order entered, either an Order of Reference, an Interlocutory Order of Adoption or a Final Order of Adoption.

That is the critical juncture and allows the court to receive feedback as to whether the petitioners and the court proceeded within the legal requirements. The Commissioner's review at this time is beneficial because they provide valuable expertise to the courts who tend to have little training or expertise in adoption law.

In practice, the Commissioner only sporadically reviews the agency final reports to the court. Those reports, while they provide valuable information to the court, usually do not require the expertise of the Commissioner. The court can see from the report, as easily as the Commissioner, where specific problems are addressed.

One concern is when a court mistakenly enters a final order of adoption prior to the Commissioner having the opportunity to review the legal framework. While the Commissioner's expertise is valuable information the court of the error, Supreme Court Rule 1:1 limits the court ability to act to 21 days. Under the current law, once a final order is entered, the court must forward it to the Commissioner, the Commissioner must review it, the Commissioner's comments are sent to the circuit court and the court must act upon those recommendations all within the 21 days period.

The proposal would therefore eliminate the required 21-day waiting period for a stage in the process where the Commissioner's expertise is not really needed. Rather, the 21 day period proposed will allow the court additional time to act only in the occasional case where the Commissioner actually comments on a problem.

#5 § 63.2-1210. Probationary period and interlocutory order not required under certain circumstances.

The circuit court may omit the probationary period and the interlocutory order and enter a final order of adoption under the following circumstances:

1. If the child is legally the child by birth or adoption of one of the petitioners and if the circuit court is of the opinion that the entry of an interlocutory order would otherwise be proper.

2. After receipt of the report required by § 63.2-1208, if the child has been placed in the home of the petitioner by a child-placing agency and (i) the placing or supervising agency certifies to the circuit court that the child has lived in the home of the petitioner continuously for a period of at least six months immediately preceding the filing of the petition and has been visited by a representative of such agency at least three times within a six-month period, provided there are not less than ninety days between the first visit and the last visit, and (ii) the circuit court is of the opinion that the entry of an interlocutory order would otherwise be proper. The circuit court may, for good cause shown, in cases of placement by a child-placing agency, omit the requirement that the *three* visits be *within a* ~~in the~~ six month ~~immediately preceding the filing of the petition, provided that such visits were made in some six-month period preceding the filing.~~ *period. If a representative of the child-placing agency or supervising agency has not visited with the petitioner and child within six months immediately prior to filing the petition, such agency shall*

conduct at least one additional visit.

** Not enthusiastic about adding the burden and expense of an additional visit, if the visits not made within six months immediately prior to the filing of the petition.*

3. After receipt of the report, if the child has resided in the home of the petitioner continuously for at least three years immediately prior to the filing of the petition for adoption, and the circuit court is of the opinion that the entry of an interlocutory order would otherwise be proper.

4. When a child has been placed by the birth parent with the prospective adoptive parent who is the child's grandparent, adult brother or sister, adult uncle or aunt, or adult great uncle or great aunt and the circuit court has accepted the written consent of the birth parent in accordance with § 63.2-1202, and the circuit court is of the opinion that the entry of an interlocutory order would otherwise be proper. If the circuit court determines the need for an investigation prior to the final order of adoption, it shall refer the matter to the local director or a licensed child - placing agency for an investigation and report, which shall be completed within such time as the circuit court designates.

5. After receipt of the report, if the child has been legally adopted according to the laws of a foreign country with which the United States has diplomatic relations and if the circuit court is of the opinion that the entry of an interlocutory order would otherwise be proper, and the child (i) has resided in the home of the petitioners for at least one year immediately prior to the filing of the petition, *and a representative of a child-placing agency has visited the petitioner and child at least once in the six months immediately preceding the filing of the petition or during its investigation pursuant to §63.2-1208*,or (ii) has resided in the home of the petitioners for at least six months immediately prior to the filing of the petition, has been visited by a representative of a child-placing agency or of the local department three times within such six-month period with no fewer than ninety days between the first and last visits, *and* the ~~three~~ *last visits* occurred within ~~eight~~ *six* months immediately prior to the filing of the petition.

** Good – adds clarity.*

6. After receipt of the report, if the child was placed into Virginia from a foreign country in accordance with § 63.2-1104, and if the child has resided in the home of the petitioner for at least six months immediately prior to the filing of the petition and has been visited by a representative of a licensed child-placing agency or of the local department three times within the six-month

period with no fewer than ninety days between the first and last visits. *The circuit court may, for good cause shown, in cases of an international placement, omit the requirement that the three visits be made within a six month period. If a representative of the supervising agency has not visited the petitioner and child within six months immediately prior to filing the petition, such agency shall conduct at least one additional visit.* ~~and the three visits have occurred within eight months immediately prior to the filing of the petition~~.

**Delete the last sentence. Additional visits are costly to adoptive families, who have otherwise met all statutory requirements.*

REASONS FOR CHANGES IN §63.2-1210

The proposed changes effect agency placements and international placements. In the vast majority of these types of cases, the adopters use this provision which is a shortcut by waiving the interlocutory order. These changes primarily affect two areas.

First, is to allow the court some leeway in those instances where for some unforeseen reason, the three post-placement visits do not occur within the six month time frame. This occasionally happens when the third visit gets delayed for an emergency either by the adopter or social worker and reason have included medical emergencies, car accidents and snow storms.

Second, involves the timing of the filing of the petition for adoption. Since the 1995 amendment to this statute, the timing issue has caused a lot of confusion amongst adopters and social workers. While the original goal was to have the agency report filed within a reasonable time for the supervision, it occasionally results in three supervisory visits having to be completely redone because of a missed deadline. This has become particularly troublesome in those international cases under subsection 6 where finalization is not completed in the foreign country (e.g. Korea, India, Philippines, Jamaica, Chile). If the adopters from those countries miss their filing deadline by one day, the only statutory solution is to start the supervisor period of three visits over again. The proposed solution is to require another visit so that the agency has updated information to provide in its court report. The adopters are still encouraged to quickly file their petitions being motivated by not having to incur additional costs for an additional visit by their placing or supervising agency.

The proposed additionally adds the requirement under subsection 5(i) which requires a timely visit in cases where the adopters obtained a final decree in another country (e.g. Russia, China, Guatemala). This codifies what has been an unwritten but universally customary agency practice of conducting at least one recent post-placement visit before writing its report.

#6 **§ 63.2-1213. Final order of adoption**. ~~After the expiration of six months from the date upon which the interlocutory order is entered, and~~ after considering the report made pursuant to § 63.2-1212 , if the circuit court is satisfied that the best interests of the child will be served thereby, the circuit court shall enter the final order of adoption *provided that the child has resided in the home of the Petitioner at least six months immediately prior to entry of the final*

order of adoption. However, a final order of adoption shall not be entered until information has been furnished by the petitioner in compliance with § 32.1-262 unless the circuit court, for good cause shown, finds the information to be unavailable or unnecessary. No circuit court shall deny a petitioner a final order of adoption for the sole reason that the child was placed in the adoptive home by a person not authorized to make such placements pursuant to § 63.2-1200 . An attested copy of every final order of adoption shall be forwarded, by the clerk of the circuit court in which it was entered, to the Commissioner and to the child-placing agency that placed the child or to the local director, in cases where the child was not placed by an agency.
(Code 1950, § 63-356; 1962, c. 603; 1964, c. 429; 1968, c. 578, § 63.1-230, § 63.1-219.20; 1975, c. 364; 1981, c. 318; 1988, c. 431; 2000, c. 830; 2002, c. 747.)

REASONS FOR CHANGES IN §63.2-1213

In non-relative adoptive placements, primarily in parental placements and occasionally in agency placements, an interlocutory order of adoption is entered. This is a temporary adoption order that provides for three more visits within a six month period by the placing or supervising child-placing agency and another court report prior to the finalization. While the agency is given six months to submit their report and the Commissioner under current law is given 21 days to review the report before the Court can enter the final order of adoption, there are occasions where the agency desires to help the family speed through the process to meet that family's particular needs. Often this involves a member of a U.S. military or diplomatic family that is being sent overseas. Under the current statute, even if the agency does rush to meet the family's needs, the statute requires the court to wait up to nine weeks after the agency completes its work before it can enter the final order. The proposal would require the child to be in the home for a reasonable period, ie., six months, and require the same number of visits within the same time frame as currently required by statute but would allow the agency and the court some flexibility in allowing the final order of adoption to be entered a little earlier when a situation justifies it.

* *Good addition.*

#7 **§§ 63.2-1215. Legal effects of adoption.**

A. The birth parents, and the parents by previous adoption, if any, other than any such parent who is the husband or wife of one of the petitioners, shall, by final order of adoption, be divested of all legal rights and obligations in respect to the child including the right to petition any court for visitation with the child. Except where a final order of adoption is entered pursuant to §§ 63.2-1241, any person whose interest in the child derives from or through the birth parent or previous adoptive parent, including but not limited to grandparents, stepparents, former stepparents, blood relatives and family members shall, by final order of adoption, be divested of all legal rights and obligations in respect to the child including the right to petition any court for visitation with the child. In all cases the child shall be free from all legal obligations of obedience and maintenance in respect to such persons divested of legal rights. Any child adopted under the provisions of this chapter shall, from and after the entry of the interlocutory order or from and after the entry of the final order where no such interlocutory order is entered, be, to all intents and purposes, the child

of the person or persons so adopting him, and, unless and until such interlocutory order or final order is subsequently revoked, shall be entitled to all the rights and privileges, and subject to all the obligations, of a child of such person or persons born in lawful wedlock. An adopted person is the child of an adopting parent, and as such, the adopting parent shall be entitled to testify in all cases civil and criminal, as if the adopted child was born of the adopting parent in lawful wedlock.

B. An agreement for post-adoption contact between a birth parent and the adoptive parent(s) shall be enforceable by the court which entered the final order of adoption provided the court finds that such contact is in the best interests of the child. Any agreement for post-adoption contact must be in writing and signed by all parties participating, and acknowledged before an officer or other person authorized by law to take acknowledgments. The court may enforce agreements, despite their provisions, to a maximum of 4 contacts per calender year of which no more than 2 shall involve visitation. A consent or adoption order shall not be revoked, vacated or set aside for failure to comply with any agreement for post adoption contact.

(Code 1950, §§ 63-357; 1968, c. 578, §§ 63.1-233, §§ 63.1-219.22; 1995, cc. 772, 826; 1997, c. 690; 2000, c. 830; 2002, c. 747; 2003, c. 229.)

**Since the placement terms are founded on good faith, and are customarily adhered to, there is concern that adding such a statutory provision may not actually be needed and potentially add to adoption litigation. Practically, have not seen the need for this in my practice.*

REASONS FOR CHANGES TO §63.2-1215

One of the Committee members recommended adding a provision to allow for the enforcement of post-adoption contact agreements. At least 21 states have enacted post-adoption contact statutes, the majority within the last decade. While it is a growing trend, our Court of Appeals found in 1991 that our statute does not accommodate open adoption. That case, Cage v. Harrisonburg DSS, 13 Va App.246, 410 S.E.2d 405 (1991), did not involve a voluntary agreement but rather involved mother whose parental rights were being terminated and insisted upon ongoing contact with the children once they were adopted.

In Virginia parental placement adoptions there is a required exchange of names and addresses so the parties already known each other. Most of the adoptive families and birth mothers become close friends during the pregnancy and then gradually separate after the birth of the child. The birth mothers are not looking to parent the child but rather tend to view themselves more as an aunt with desire to reassure themselves that they made the right choice for the child.

In my practice, over the last 10 years, I would estimate that 90% of the adopters agree to send pictures and updates. I would estimate 20% have occasional telephone contact and maybe 5 % have had post-adoption in-person contact. It is important during the adoption process to air each side's views and post-adoption expectations so that reasonable boundaries are established. In my practice I have not heard of any of my clients not keeping their commitment.

The basic view in the adoption community is that if an adoptive parent has promised pictures or the occasional visit, they should live up to that commitment unless it is contrary to the best interests of the child.

The proposed legislation addresses this principal by giving access to the courts to enforce the agreement but requiring the court to make the determination that doing so is for the benefit of the child. It only allows the court to consider a voluntary act where the parties have set down the terms in a signed and notarized written document. It establishes limits of enforcement to a small number of contacts because the purpose of an agreement is not to allow the birth parent to parent the adopted child but to allow that parent to learn how the child is developing. Finally, it maintains the integrity of the consent and adoption separate from the agreement for post-adoption contact.

#8 § 63.2-1222. Execution of entrustment agreement by birth parent(s); exceptions; notice and objection to entrustment; copy required to be furnished; requirement for agencies outside the Commonwealth-

A. For the purposes of this section, a birth parent who is less than 18 years of age shall be deemed fully competent and shall have legal capacity to execute a valid entrustment agreement, including an agreement that provides for the termination of all parental rights and responsibilities, *and perform all acts related to adoption* and shall be as fully bound thereby as if such birth parent had attained the age of 18 years.

** Good clarifying language.*

B. An entrustment agreement for the termination of all parental rights and responsibilities with respect to the child shall be valid notwithstanding that it is not signed by the birth father of a child born out of wedlock if the identity of the birth father is not reasonably ascertainable, or if such birth father is given notice of the entrustment by registered or certified mail to his last known address and fails to object to the entrustment within 21 days of the mailing of such notice. Such objection shall be in writing, signed by the objecting party or counsel of record for the objecting party and shall be filed with the agency that mailed the notice of entrustment within the time period specified in § 63.2-1223 . An affidavit of the birth mother that the identity of the birth father is not reasonably ascertainable shall be sufficient evidence of this fact, provided there is no other evidence that would refute such an affidavit. The absence of such an affidavit shall not be deemed evidence that the identity of the birth father is reasonably ascertainable. For purposes of determining whether the identity of the birth father is reasonably ascertainable, the standard of what is reasonable under the circumstances shall control, taking into account the relative interests of the child, the birth mother and the birth father.

** Would add the following language in first sentence, after "if the identity of the birth father is not reasonably ascertainable": " if the putative birth father named by the birthmother, denies under oath and in writing paternity of the child, or . . . . . ".*

This is language from the direct parental placement Code section (§ 63.2-1233 [1][a][iv]) and should be brought into this section. Many agencies obtain such a denial of paternity statement and do not realize that it is not presently legally sufficient "notice" to the birth father.

**This Code section does not instruct agencies how they are to deal with men married to the birth mother at the time of conception or birth (see §63.2-1233 [1] [d] – direct parental placement adoption). If his Entrustment is required, and he refuses, there needs to be a directive regarding how to proceed. We don't want to require more termination of parental rights actions (creating cost and time delays), but there is currently confusion and uncertainty as to how to deal with married men. Further the statute indicates that the Entrustment of the birth mother is valid when the child is born out of wedlock and birth father is given proper notice of the proceeding. It leaves the question of married men hanging.*

C. An entrustment agreement for the termination of all parental rights and responsibilities with respect to the child shall be valid notwithstanding that it is not signed by the birth father of a child when the birth father has been convicted of a violation of subsection A of § 18.2-61 , § 18.2-63 or subsection B of § 18.2-366 , and the child was conceived as a result of such violation.

** Add language "or convicted under similar statutes of another state", after the last Code cite.*

D. A birth father not married to the mother of the child may execute an entrustment agreement for the termination of all parental rights prior to the birth of the child.

** Outstanding addition and help to moving an adoption along without delay after the birth of a child!*

E. A copy of the entrustment agreement shall be furnished to all parties signing such agreement.

F. When any agency outside the Commonwealth, or its agent, that is licensed or otherwise duly authorized to place children for adoption by virtue of the laws under which it operates executes an entrustment agreement in the Commonwealth with a birth parent for the termination of all parental rights and responsibilities with respect to the child, the requirements of §§ 63.2-1221 through 63.2-1224 shall apply. Any entrustment agreement that fails to comply with such requirements shall be void.
(1989, c. 647, § 63.1-220.2, § 63.1-219.29; 1990, c. 202; 1991, c. 364; 1995, cc. 772, 826; 1999, c. 1028; 2000, c. 830; 2002, c. 747; 2004, c. 815.)

**Eliminate Section F. Although intended to "protect" birth parent rights, this statute mandates conflict of laws between Virginia and other states where a birth parent may choose to place his*

child. Further, it mandates "choice of law", when a birth parent has the Constitutional right to choose where to place his child and the law under which he will proceed. This is a litigation of huge proportions, waiting to happen. It adds tremendous confusion to the placement procedures and several out of state agencies have refused to work with Virginia birth parents since its passage.

This section also appears in 63.2-1200 [4] and should be eliminated.

REASONS FOR CHANGES IN §63.2-1222

A. This change codifies other acts that are related to the adoption that a minor can perform such as signing an Interstate Compact on the Placement of Children request, a denial of paternity or an agreement with an agency to place the child with a specific family.

D. The issue of taking the birth father's consent is the leading issue that causes the most anxiety amongst birth mothers, adoptive families and adoption professionals. Many state allow the unmarried birth father to give his consent, when he is willing, prior to birth. This will allow the agency to firm up the adoption plan with willing birth fathers. Under the current system, the agency may spend months trying to keep track of the birth father and then proceed with a mad dash to locate him and have him sign. This will allow a more orderly process for those individuals wanting to relinquish their rights.

#9 §§ 63.2-1226. Parental placement sections apply if birth parents designate adoptive parents.

When a licensed child-placing agency or a local board accepts custody of a child for the purpose of placing the child with adoptive parents designated by the birth parents or a person other than a licensed child-placing agency or local board, ~~the parental provisions of this chapter shall apply to such placement.~~ *the child-placing agency shall proceed with the approval of the entrustment agreement pursuant to §16.1-277.01 The entrustment agreement shall specify the name(s) of the designated adoptive parents. The proceedings shall be advanced on the juvenile and domestic district court docket so as to be heard within 10 days of filing the petition, or as soon thereafter as practicable so as to provide the earliest possible disposition. The court shall not accept the entrustment agreement until it determines that the requirements of §63.2-1231 and §63.2-1232 have been met.*

(1989, c. 647, §§ 63.1-220.2, §§ 63.1-219.33; 1990, c. 202; 1991, c. 364; 1995, cc. 772, 826; 1999, c. 1028; 2000, c. 830; 2002, c. 747.)

** In the third new sentence, add word "Entrustment" before the wording "proceeding shall be advanced on the juvenile . . . . ." (to read "The Entrustment proceedings shall be advanced . . . .") This language further clarifies that although the requirements of § 63.2-1231 and §63.2-1232 must be met, the actual legal procedure is pursuant to § 16.1-277.01, NOT § 63.2 -1233.*

*Add language at the end: "(there being no adoption consent hearing, pursuant to § 63.2-

1233, required).

This proposed language clarifies the procedure to be followed and is consistent with other agency court actions (such as terminations).

REASON FOR CHANGES IN §63.2-1226

One of the child-placing agencies testified of the difficulty and costs of utilizing §63.2-1226. This section was enacted in 1990 with the legislative intent of prohibiting the changing of parental placement adoptions into agency placements and thereby avoid the disclosure provisions.

The current stature is vague. As such, requirements are unclear and confusing. No one knows which provisions of Article 3 really apply and how do you handle conflicts with Article 2. The result is the both entrustments and consents are taken and two sets of procedures are followed raising the costs for the adoptive parents.

The proposal simplifies the process from what the regular practitioners in this area of law have developed as their own procedures. As is customarily done, the agency entrustment is accepted through the court pursuant to §16.1-277.02. The past legislative intent is followed by requiring the parental placement home study, counseling and exchange of information. What this proposal accomplishes is that only one set of judicial procedures is utilized that being the agency procedures. This eliminates the uncertainty in trying to comply with two, not necessary compatible, sets of judicial procedures.

#10 **63.2-1227. Filing of petition for agency adoption.**- A petition for the adoption of a child placed in the home of the petitioner(s) by a child-placing agency shall be filed in the name by which the child will be known after adoption, provided the name is followed by the registration number of the child's original birth certificate and the state or country in which the registration occurred unless it is verified by the registrar of vital statistics of the state or country of birth that such information is not available. *In the case of a child born in another country, an Affidavit by a representative of the child-placing agency that a birth certificate number is not available may be substituted for verification by a registrar of vital statistics for that country.* The report of investigation required by _ 63.2-1208 and, when applicable, the report required by _ 63.2-1212 shall be identified with the child's name as it appears on the birth certificate, the birth registration number and the name by which the child is to be known after the final order of adoption is entered. *The petition for adoption shall not state the birth name of the child or identify the birth parents unless it is specifically stated in the agency's consent that the parties have exchanged identifying information.*
A single petition for adoption under the provisions of this section shall be sufficient for the concurrent adoption by the same petitioners of two or more children who have the same birth parent or parents, and nothing in this section shall be construed as having heretofore required a

separate petition for each of such children.
(Code 1950, _ 63-348; 1952, c. 550; 1954, c. 489; 1956, c. 300; 1964, c. 459; 1968, c. 578, _ 63.1-221, _ 63.1-219.34; 1970, c. 672; 1973, c. 406; 1975, c. 461; 1978, c. 730; 1983, c. 614; 1988, c. 882; 1989, c. 647; 1991, cc. 76, 602; 1995, cc. 772, 826; 2000, c. 830; 2002, c. 747.)

* *Good additions. Consistent with actual practice.*

REASONS FOR CHANGES IN §63.2-1227

The ability to put a birth certificate number in the heading of a petition has been a constant and recurring problem with children placed form Korea, one of the most popular countries from which American families adopt. Korea does not use numbered certificates rather they use a document entitled "Family Census Register" which is issued to the head of the family and lists the vital statistics for the decedents.

These numberless documents are issued to minors who were abandoned at the orphanage. Customarily, the orphanages issue an affidavit (again without a number) to establish birth and to obtain the Korean passport. Obtaining a verification from a registrar of vital statistics in another country is extremely difficult, if not impossible. Many judges are aware of this problem and allow the case to proceed without the number but the problem arises frequently enough that the agencies go through the time consuming efforts and those judges usually resolve the matter by requiring the agency to submit an Affidavit and then waiving the statutory requirement. The proposed legislation will provide a statutory procedure for countries such as Korea where it has been impossible to meet the terms of the statute.

The Adoption Report Unit of the Commissioner states that it is a recurring problem that petitioner's counsel reveal undisclosed identities by including them in the petition for agency adoptions. This proposal would clearly prohibit that unless the agency specifically acknowledges it is an identified adoption in the agency's consent. Agencies will frequently provide petitioner's counsel confidential identifying information to enable them to pursue the mechanical steps of the adoption.

#11 §63.2-1228. Forwarding of petition.

Upon filing of the petition, the circuit court shall, *upon being satisfied as to proper jurisdiction and venue, immediately enter an order referring the case to a child-placing agency to conduct an investigation and prepare a report. Upon the entry of the order of reference, the court or clerk thereof shall* forward a copy of the order of reference, the petition and all exhibits thereto to the Commissioner and to the agency that placed the child. In cases where the child was placed by an agency in another state, or by an agency, court, or other entity in another country, the petition and all exhibits shall be forwarded to the local director or licensed child-placing agency, whichever agency completed the home study or provided supervision. If no Virginia agency provided such services, the petition and all exhibits shall be forwarded to the local director of the locality where the

petitioners reside or resided at the time of filing the petition, or had legal residence at the time of the filing of the petition.

**Good, consistent with additions to §63.2-1208 (above)*

REASONS FOR CHANGES IN 63.2-1228

This proposal mirrors the proposal in §63.2-1208 in setting forth the actual procedural steps. The circuit court should immediately enter the order of reference once it is satisfied that there is proper jurisdiction and venue. This allows the investigation to begin. While the statutes previously stated forwarding the petition upon filing, the actual procedure the courts and the Commissioner follow is that the petition is forwarded when the order of reference is entered.

#12 §§ 63.2-1230. Placement of children by parent or guardian.

The birth parent or legal guardian of a child may place his child for adoption directly with the adoptive parents of his choice. Consent to the proposed adoption shall be executed upon compliance with the provisions of this chapter before a juvenile and domestic relations district court or, if the birth parent or legal guardian does not reside in Virginia, before a court having jurisdiction over child custody matters in the jurisdiction where the birth parent or legal guardian resides when requested by a juvenile and domestic relations district court of this Commonwealth, pursuant to §§ 20-146.11. Consent proceedings shall be advanced on the juvenile and domestic relations district court docket so as to be heard by the court within ten days of filing of the petition, or as soon thereafter as practicable so as to provide the earliest possible disposition. *In all cases, the hearing shall be heard within 15 days of the filing of the petition unless the petitioner requests a later date.*

(1989, c. 647, §§ 63.1-220.3, §§ 63.1-219.37; 1991, cc. 364, 602; 1992, c. 125; 1993, cc. 338, 553; 1995, cc. 772, 826; 1999, c. 1028; 2000, c. 830; 2001, c. 305; 2002, c. 747.)

**** New language is fine, but maintain 10 days, not 15, as this will delay hearings in some jurisdictions.***

REASON FOR CHANGES TO §63.2-1230

The legislative intent for advancing the case on the docket was to have the birth mother appear before the court on the 10th day after birth, or as soon thereafter as possible, so as to allow her revocation period to begin running. It was contemplated in 1989 that the birth parent's revocation period on parental placements would be similar to the agency placement 25 day revocation period.

Problems arose after 1989 because some courts would not schedule the taking the birth parent consent for months in the future. This resulted in extending the revocation period to

maybe 75 days or longer.

In order to correct the problem and follow the intent of the 25 days revocation period, the current docket preference provision was enacted in 1995. In most jurisdictions the current statute has helped the courts understand the importance of an early hearing. The consent hearing usually take 15 to 20 minutes

A number of comments were received that some courts just will not give the hearing docket preference. The proposal will require the court to schedule the case within a narrow window of time to keep those courts within a reasonable time frame. An exception is provided to allow the petitioner not to hold the hearing quickly if the case is not ready such as the parties not available or the home study not completed.

#13 § 63.2-1233. Consent to be executed in juvenile and domestic relations district court; exceptions.- When the juvenile and domestic relations district court is satisfied that all requirements of § 63.2-1232 have been met with respect to at least one birth parent and the adoptive child is at least *in the tenth calendar day of life,* ~~ten days old~~ that birth parent or both birth parents, as the case may be, shall execute consent to the proposed adoption in compliance with the provisions of § 63.2-1202 while before the juvenile and domestic relations district court in person and in the presence of the prospective adoptive parents. The juvenile and domestic relations district court shall accept the consent of the birth parent(s) and transfer custody of the child to the prospective adoptive parents, pending notification to any nonconsenting birth parent, as described hereinafter.

* *Good clarification.*

1. a. The execution of consent before the juvenile and domestic relations district court shall not be required of a birth father who is not married to the mother of the child at the time of the child's conception or birth if (i) the birth father consents under oath and in writing to the adoption; (ii) the birth mother swears under oath and in writing that the identity of the birth father is not reasonably ascertainable; (iii) the identity of the birth father is ascertainable and his whereabouts are known, he is given notice of the proceedings by registered or certified mail to his last known address and he fails to object to the proceeding within twenty-one days of the mailing of such notice. Such objection shall be in writing, signed by the objecting party or counsel of record for the objecting party and shall be filed with the clerk of the juvenile and domestic relations district court in which the petition was filed during the business day of the court, within the time period specified in this section. Failure of the objecting party to appear at the consent hearing, either in person or by counsel, shall constitute a waiver of such objection; or (iv) the putative birth father named by the birth mother denies under oath and in writing paternity of the child. An affidavit of the birth mother that the identity of the birth father is not reasonably ascertainable shall be sufficient evidence of this fact, provided there is no other evidence before the juvenile and domestic relations district court that would refute such an affidavit. The absence of such an affidavit shall not be deemed evidence that the identity of the birth father is reasonably ascertainable. For purposes of determining whether the identity of the birth father is reasonably

ascertainable, the standard of what is reasonable under the circumstances shall control, taking into account the relative interests of the child, the birth mother and the birth father.

** Pick up recommendations in parallel section 63.2-1202[C] [2]. The constant confusion in this section is whether or not a hearing must be scheduled for a birth father where notice was given by 21-day certified mailing. Such a second hearing should not be required as the notice provision should stand on its own. A putative birth father registry would resolve this matter.*

b. The juvenile and domestic relations district court may accept the written consent of the birth father who is not married to the birth mother of the child at the time of the child's conception or birth, provided that the identifying information required in § 63.2-1232 is filed in writing with the juvenile and domestic relations district court of jurisdiction. Such consent ~~shall be executed after the birth of the child~~, shall advise the birth father of his opportunity for legal representation, and shall be presented to the juvenile and domestic relations district court for acceptance. The consent may waive further notice of the adoption proceedings and shall contain the name, address and telephone number of the birth father's legal counsel or an acknowledgment that he was informed of his opportunity to be represented by legal counsel and declined such representation.

** Excellent provision*

c. In the event that the birth mother's consent is not executed in the juvenile and domestic relations district court, the consent of the birth father who is not married to the birth mother of the child shall be executed in the juvenile and domestic relations district court.
d. A child born to a married birth mother shall be presumed to be the child of her husband and his consent shall be required. This presumption may be rebutted by sufficient evidence, satisfactory to the juvenile and domestic relations district court, which would establish by a preponderance of the evidence the paternity of another man or the impossibility or improbability of cohabitation of the birth mother and her husband for a period of at least 300 days preceding the birth of the child, in which case the husband's consent shall not be required.

**Suggest adding language after first sentence of [d]: "The Court may grant the Petition without such consent and find that he is withholding his consent contrary to the best interests of the child or is unobtainable, and enter an order waiving the requirement of consent, if he is given notice of the proceeding by service of a summons and he fails to execute consent to the adoption.*

This provision should also be picked up in § 63.2-1222 although the word "entrustment" should be substituted for "consent".

Would also add the language: "The consent of such husband of the birth mother may be executed in court or under oath and in writing.

2. A birth parent whose consent is required as set forth in § 63.2-1202 , whose identity is known and who neither consents before the juvenile and domestic relations district court as described above, nor executes a written consent to the adoption or a denial of paternity out of court as provided above, shall be given notice, including the date and location of the hearing, of the proceedings pending before the juvenile and domestic relations district court and be given the opportunity to appear before the juvenile and domestic relations district court. Such hearing may occur subsequent to the proceeding wherein the consenting birth parent appeared but may not be held until twenty-one days after personal service of notice on the nonconsenting birth parent, or if personal service is unobtainable, ten days after the completion of the execution of an order of publication against such birth parent. The juvenile and domestic relations district court may appoint counsel for the birth parent(s). If the juvenile and domestic relations district court finds that consent is withheld contrary to the best interests of the child, as set forth in § 63.2-1205 , or is unobtainable, it may grant the petition without such consent and enter an order waiving the requirement of consent of the nonconsenting birth parent and transferring custody of the child to the prospective adoptive parents, which order shall become effective fifteen days thereafter. If the juvenile and domestic relations district court denies the petition, the juvenile and domestic relations district court shall order that any consent given for the purpose of such placement shall be void and, if necessary, the court shall determine custody of the child as between the birth parents.

** Eliminate the order becoming effective "fifteen days thereafter". It should be effective immediately.*

3. Except as provided in subdivision 4, if consent cannot be obtained from at least one birth parent, the juvenile and domestic relations district court shall deny the petition and determine custody of the child pursuant to § 16.1-278.2 .
4. If the child was placed by the birth parent(s) with the prospective adoptive parents and if both birth parents have failed, without good cause, to appear at a hearing to execute consent under this section for which they were given proper notice pursuant to § 16.1-264 , the juvenile and domestic relations district court may grant the petition without the consent of either birth parent and enter an order waiving consent and transferring custody of the child to the prospective adoptive parents, which order shall become effective fifteen days thereafter. Prior to the entry of such an order, the juvenile and domestic relations district court may appoint legal counsel for the birth parents and shall find by clear and convincing evidence (i) that the birth parents were given proper notice of the hearing(s) to execute consent and of the hearing to proceed without their consent; (ii) that the birth parents failed to show good cause for their failure to appear at such hearing(s); and (iii) that pursuant to § 63.2-1205 , the consent of the birth parents is withheld contrary to the best interests of the child or is unobtainable. *Under this subsection, the court shall waive the requirement of the simultaneous meeting under §63.2-1231 and the requirements of §63.2-1232 (A)(1),(3) and (7) where the opportunity for compliance is not reasonably available under the circumstances of the case.*

** Necessary revision*

5. If both birth parents are deceased, the juvenile and domestic relations district court, after hearing evidence to that effect, may grant the petition without the filing of any consent.
6. When a child has been placed by the birth parent(s) with prospective adoptive parents who are the child's grandparents, adult brother or sister, adult uncle or aunt or adult great uncle or great aunt, consent does not have to be executed in the juvenile and domestic relations district court in the presence of the prospective adoptive parents. The juvenile and domestic relations district court may accept written consent that has been signed and acknowledged before an officer authorized by law to take acknowledgments. No hearing shall be required for the court's acceptance of such consent.
When such child has resided in the home of the prospective adoptive parent(s) continuously for three or more years, this section shall not apply, and consent shall be executed in accordance with subsection E of § 63.2-1202 .
7. No consent shall be required from the birth father of a child placed pursuant to this section when such father is convicted of a violation of subsection A of § 18.2-61 , § 18.2-63 or subsection B of § 18.2-366 , and the child was conceived as a result of such violation, nor shall the birth father be entitled to notice of any of the proceedings under this section.

** Add language, after last Code cite "or convicted of a violation of a similar statute in another state", and. . . . . .*

8. The juvenile and domestic relations district court shall review each order entered under this section at least annually until such time as the final order of adoption is entered.
(1989, c. 647, § 63.1-220.3, § 63.1-219.40; 1991, cc. 364, 602; 1992, c. 125; 1993, cc. 338, 553; 1995, cc. 772, 826; 1999, c. 1028; 2000, c. 830; 2002, c. 747.)

REASONS FOR CHANGES IN §63.2-1233

The first change is to assist with court docketing of cases. By allowing on the tenth calendar day, cases can be scheduled in the morning when a child's time of birth has been in the afternoon. There have been cases where the birth mother has had to wait in court for the minutes to pass before she could sign her consent and other cases where-out-of-state adopters have had to wait in Virginia over the weekend to meet the ten day rule.

The second change involves birth fathers not married to the birth mother. The issue of taking the birth father's consent is the leading issue that causes the most anxiety with birth mothers and adopters. Many states allow the unmarried birth father to execute his consent, when he is willing, prior to birth. This would allow the birth mother to firm up her adoption plan knowing the birth father is agreeable instead of the mad dash to locate him and have him sign within the normal 10 days prior to the court hearing.

The third change was a request from Judge Roush's (Fairfax Circuit Court) law clerk based upon a case heard in April 2005. In that case the birth mother placed the child with non-

relatives and left the country after executing an out-of-court consent. The county social worker counseled the birth mother by telephone overseas but was unable to hold the simultaneous meeting. The birth father was unlocatable and noticed by order of publication. Although not specifically addressed in the opinion, the juvenile and domestic court presumably found her (in court) consent unobtainable pursuant to §63.2-1233(4).

The Circuit Court drafted a letter opinion painfully rejecting entry of the interlocutory order because the home study report did not comply with the simultaneous meeting provision of §63.2-1231. The Court noted that separate code sections could imply the requirement could be waived. But, the Court went on to state "However, this Court is not willing to fashion a legislative intent that does not comport with the plain meaning of the statutes as written. We must determine the legislature intent by what the statute says and not by what we think it should have said." After drafting the letter opinion, the Court did not issue it, did allow the adoption to proceed and is seeking an avenue to have this issue addressed.

Judge Roush is technically correct. When §63.2-1233(4) was enacted in 1995, that provision, as was as many of the parental placement provisions, were in the same lengthy statute, §63.1-220.3. The provision prohibiting the court from waiving the parental placement requirements (then §63.1-221; now §63.2-1237) referenced the entire §63.1-220.3 which the missing birth parent issue was integrated.

In 2000, Title 10.2 was enacted which attempted to simplify the Adoption Code by breaking down section and reorganizing them. In doing so, it left what now appears to be an inadvertent gap which would render the missing birth parent statute virtually ineffective.

#14 §§ 63.2-1237. Petition for parental placement adoption; jurisdiction; contents.

Proceedings for the parental placement adoption of a minor child and for a change of name of such child shall be instituted only by petition to the circuit court in the county or city in which the petitioner resides *or in the county or city where a birth parent has executed a consent pursuant to §63.2-1233.* Such petition may be filed by any ~~natural~~ person who resides in the Commonwealth *or is the adopting parent(s) of a child who was subject to a consent proceeding held pursuant to §63.2-1233. The petition shall ask* ~~for~~ leave to adopt a minor child not legally ~~his~~ *the petitioner's* by birth and, if it is so desired by the petitioner, also to change the name of such child. In the case of married persons, the petition shall be the joint petition of the husband and wife but, in the event the child to be adopted is legally the child by birth or adoption of one of the petitioners, such petitioner shall unite in the petition for the purpose of indicating his or her consent to the prayer thereof only. The petition shall contain a full disclosure of the circumstances under which the child came to live, and is living, in the home of the petitioner. Each petition for adoption shall be signed by the petitioner as well as by counsel of record, if any. In any case in which the petition seeks the entry of an adoption order without referral for investigation, the petition shall be under oath.

The petition shall state that the findings required by §§ 63.2-1232 have been made and shall be accompanied by appropriate documentation supporting such statement, to include copies of documents executing consent and transferring custody of the child to the prospective adoptive

parents, and a copy of the report required by §§ 63.2-1231. The court shall not waive any of the requirements of this paragraph nor any of the requirements of §§ 63.2-1232. *except as allowed pursuant to* §63.2-1233(4)

A single petition for adoption under the provisions of this section shall be sufficient for the concurrent adoption by the same petitioners of two or more children who have the same birth parent or parents; and nothing in this section shall be construed as having heretofore required a separate petition for each of such children.

(Code 1950, §§ 63-348; 1952, c. 550; 1954, c. 489; 1956, c. 300; 1964, c. 459; 1968, c. 578, §§ 63.1-221, §§ 63.1-219.44; 1970, c. 672; 1973, c. 406; 1975, c. 461; 1978, c. 730; 1983, c. 614; 1988, c. 882; 1989, c. 647; 1991, cc. 76, 602; 1995, cc. 772, 826; 2000, c. 830; 2002, c. 747.)

**** Excellent revisions.***

ARTLCLE 7
CONFIDENTIALITY

#15 **63.2-1249. Child-Placing Agency Confidentiality.** *A child-placing agency may divulge identifying information if it is of the opinion that such information would be in the best interests of the child and it has the written consent of the birth parent(s) and the adoptive parent(s). If the adopted person is 21 years of age or older, the child-placing agency may accept the adopted person's consent in lieu of the adoptive parent(s). When the child-placing agency is contacting any individual for consent, it shall approach the individual in a confidential and sensitive manner and provide any reasonable counseling it deems appropriate.*

****No objection to this language, however, it may be wise to reference §63.2-1226, indicating that when exchanged prior to an adoptive placement, these statutory provisions must be followed (the newly recommended provisions).***

REASONS FOR §63.2-1249

A number of child-placing agencies expressed concern that they were statutorily prohibited from divulging identifying information when the parties desired such and the agency was in agreement that it was best for that particular adoption. The proposal is worded broadly as to be inclusive of both during the placement stage as well as after the entry of the final order of adoption. One agency expressed that the more options for birth parents, adoptive parents and adoptees to personalize their adoption experience, the better.

The proposed statute keeps the agency professional in control by allowing them to decide if such action will be in the best interest of the child. A written consent is utilized to protect all parties in that they will clearly understand their consent. The age of 21 is utilized for the adoptee to be consistent with §63.2-1247(A) and the legislative intent therein of using an age over majority where the adoptee have gained some additional maturity. Finally, this section requires the agency to approach the individuals in an appropriate manner and require and provide counseling where appropriate.

#16 §63.2-1250. Court Proceedings; Duty of Attorney.

A. If requested by the adoptive petitioner, birth parent or adoption agency to obtain confidentiality in the proceedings, the court shall endeavor to maintain confidentiality of identifying information. Identifying information for the purpose of the Article shall include names, addresses and any information that could reasonably lead to the discovery of a party's identity.

B. Petitions for adoption, petitions to accept consents and entrustment agreements shall not be served on any opposing party. Rather, a notice of the proceedings, as provided by statute, shall by served when required. Home studies, reports of home studies, court reports, licensed child placing agency records, local social service agency records and the Commissioner's records shall not be available to anyone opposing an adoption without the specific approval of the court hearing the adoption proceeding after determining release of any such information would benefit the interests of the child and only after the opportunity to review and redact identifying information or information the court believes is not relevant to the proceedings.

C. Whenever an attorney is provided with or learns of identifying information regarding another party whose identity is not known to the attorney's client, the attorney shall not knowingly and intentionally reveal the identifying information to the client. If such identifying information is knowingly and intentionally revealed, the court, upon motion or on its own initiative, may sanction the attorney.

**No objections to new language. Perhaps should reference confidentiality as it relates to "nonconsenting birth parents or opposing parties".*

This provision should also be referenced in Title §16.1 of the Code (TPRs, Petitions to approve Entrustment Agreements, etc.).

REASONS FOR §63.2-1250

There has been a long history of confidentiality in adoption proceedings. The modern trend has been for more openness. While openness has been positive with most modern adoptions, these are still situations where it is in the best interests of the child to maintain confidentiality. Example may be the mentally unstable birth parent, the criminal birth parent or in a contested case where a successful adoptive parent may live in fear that the birth parent may attempt to kidnap the child.

Section A provides a mechanism for a party to request confidentially it a specific case and that the court will attempt to maintain that confidentiality.

Section B covers documents. Our statutes currently provide that *notice* of proceedings and entrustments agreements are served (see §63.2-1222 for entrustments and §63.2-1233(2) for

juvenile and domestic relation court petitioner) While the statutes only specify notices, some courts routinely serve petitions on opposing or non-responsive parties as they would in other types of cases. Our statutes should provide the courts with a clear and consistent approach to the initial stage of an adoption proceeding.

The second part of section B is to protect the confidentiality of home studies, court reports and agency records. These items contain not only identifying information, but some of the most personal and intimate information on the parties. This section will allow the judge handling the adoption proceedings to determine whether the information should be released and if so, what information.

Section C is with respect to attorneys. In order to effectuate an adoption or in opposition to an adoption, it may be necessary for counsel to learn identifying information that would not or should not be revealed to the client. This provision protects confidentiality while providing counsel with the ability to provide services on behalf of his or her client that are unique to an adoption without potential conflict with the Rules of Professional Responsibility.

ADDITIONAL LEGISLATIVE PROPOSAL BY STANTON PHILLIPS,ESQ., MEMBER, AMERICAN ACADAMY OF ADOPTION ATTORNEYS

§ 63.2-1218. ~~(Effective October 1, 2002)~~ Certain exchange of property, advertisement, solicitation prohibited; penalty.

A. 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 or any act undertaken pursuant to this chapter except (i) reasonable and customary services provided by a licensed or duly authorized child-placing agency and fees paid for such services; (ii) payment or reimbursement for medical expenses and insurance premiums that are directly related to the birth mother's pregnancy and hospitalization for the birth of the child who is the subject of the adoption proceedings, for mental health counseling received by the birth mother or birth father related to the adoption, and for expenses incurred for medical care for the child; (iii) payment or reimbursement for reasonable and necessary expenses for food, clothing, and shelter when, upon the written advice of her physician, the birth mother is unable to work or otherwise support herself due to medical reasons or complications associated with the pregnancy or birth of the child; (iv) payment or reimbursement for reasonable expenses incurred incidental to any required court appearance including, but not limited to, transportation, food and lodging; (v) usual and customary fees for legal services in adoption proceedings; and (vi) payment or reimbursement of reasonable expenses incurred for transportation in connection with any of the services specified in this section or intercountry placements as defined in § 63.2-100 and as necessary for compliance with state and federal law in such placements. No person shall advertise or solicit to perform any activity prohibited by this section. Any person violating the provisions of this section shall be guilty of a Class 6 felony. The Commissioner is authorized to investigate cases in which fees paid for legal services appear to be in excess of usual and customary fees in order to determine if there has been compliance with the provisions of this section.

B. No person or entity shall advertise that a child is offered or wanted for adoption or that the person is able to place, locate, dispose of, or receive a child for adoption except (i) the Commissioner, local department, a licensed Virginia child-placing agency or an agent or employee of the entity; (ii) a person who has completed a home study by a licensed Virginia child-placing agency and has received a favorable recommendation for which a written declaration by the agency who prepared the home study is sufficient verification of compliance with this subsection; (iii) a person who has completed a home study by an agency or qualified individual in another state provided that a licensed Virginia agency has reviewed the home study and found it reasonably similar to Virginia's requirements, has provided to the person a copy of §63.2-1218, and has a written agreement to provide counseling services if an adoption match is made and a written declaration by the Virginia licensed agency who provided these services is sufficient verification of compliance with this subsection; (iv) any person who seeks placement of a child who meets at least one factor of §63.2-1300 provided no fee is made for placement by anyone other than a child-placing agency. Nothing in this chapter shall prohibit an attorney licensed to practice law in Virginia from advertising for legal services. As used in this section, "advertise" shall mean a paid communication by newspaper, other print media, handbills, placards, radio, or television that originates in or is primarily intended for distribution in Virginia. Any person violating the provisions of this section shall be guilty of a Class 1 misdemeanor.

REASONS FOR CHANGES IN §63.2-1218

Virginia, like the majority of states, prohibits paid intermediaries or facilitators, that being individuals, who are not licensed child placing agencies, who charge a fee to match birth and adoptive parents. Yet, these facilitators from their own state advertise in Virginia and collect large fees for matching without any regulation or supervision. The birth mothers who respond to the glitzy ads often do not receive the minimal counseling requirements as required in Virginia cases.

This legislation will allow for a minimal level of protection to prevent fraud in adoption advertising. Anyone advertising in Virginia will need to be qualified by means of an adoption home study or be a licensed or authorized professional. If an out-of-state adopter desires to advertise here then they would also need to be qualified, receive a copy of the law on legal payments and have counseling services available to the Virginia birth parent. By a standardized verification, the print media and broadcasters can be assured that only those pre-qualified will be advertising in Virginia.

This proposed change is modeled after Oregon's statute (109.311 O.R.S.). In the last few years, many states have enacted legislation to limit those placing adoption ads to qualified individuals.

ADDTIONAL COMMENTS/QUESTIONS/CONCERNS REGARDING PROPOSED LEGISLATIVE CHANGES

1) The scenario of a child being left in a potential petitioner's care for a long period of time but without the "intent" of adoption and essentially the birth parents have abandoned the child. This does not seem to be addressed by the proposals.

2) If the birth father does not pick up the 21 day letter at the post office and there is no receipt, are the birth father's rights terminated and should that be more clearly stated.