

Legal and Legislative Update

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INTRODUCTION

This presentation will address significant legislation and legal developments that affect children and that were enacted or occurred in 2005 and 2006.

CRIMINAL LAW

Sex Offender Accountability and Protection of Minors Act of 2006 (Jessie's Law).

Specific changes to the law are discussed below.

Effective July 1, 2006.

S.C. Code Ann. § 16-3-655 (criminal sexual conduct with minors).

The law provides an exception from conviction for criminal sexual conduct with a minor in the second degree for a person who is eighteen years of age or less when he engages in illicit but consensual sexual conduct with another person who is at least fourteen years of age.

IMPACT: This has been called the "Romeo Provision" and it changes the age of consent in some instances and de-criminalizes consensual teenage sex.

The law also makes mistake of age a defense.

IMPACT: This is a significant change to South Carolina's criminal sexual conduct with a minor statute. Before this change, first and second degree criminal sexual conduct crimes were strict liability crimes – the perpetrator had sex with a child

fourteen or fifteen at the perpetrator's peril. Now the perpetrator may show that the perpetrator had an honest and reasonable belief that the child was sixteen. South Carolina is one of four states with such a broad mistake of age defense.

Jessie's Law changes the maximum sentences for criminal sexual conduct offenses including:

- A mandatory minimum sentence of twenty-five years (no part of which may be suspended or probation granted) or imprisonment for life for a person convicted criminal sexual conduct with a minor in the first degree when the offense involves a victim less than eleven years of age.
- Death penalty (or imprisonment for life) for a person convicted of criminal sexual conduct with a minor in the first degree under the following circumstances:
 - ▶ current offense involves a victim less than eleven years of age;
 - ▶ sexual battery for the current offense involved sexual or anal intercourse by a person or intrusion by an object;
 - ▶ offender to be sentenced had been convicted of, pled guilty or no contest to, or had been adjudicated delinquent on a separate occasion prior to the current adjudication, of an offense constituting first degree criminal sexual conduct with a minor who is less than eleven years of age; and
 - ▶ prior offense involved sexual or anal intercourse by a person or intrusion by an object.
- A mandatory minimum sentence of ten years and no more than thirty years (no part of which may be suspended or probation granted) for conviction of criminal sexual conduct with a minor with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or no contest to, or been adjudicated delinquent for any of the offenses listed in S.C Code Ann. § 23-3-430(c)(sex offender registry offenses) or has been ordered to be included in the sex offender registry.

IMPACT: Increases punishment for criminal sexual conduct with a minor and authorizes death penalty for subsequent offense as specified in the statute.

Four other states allow the death penalty for criminal sexual conduct with a child when the child victim is not killed.

S.C. Code Ann. § 17-23-175 (child hearsay law).

The law allows the admission of a child's out of court statement in a general sessions proceeding or in a delinquency proceeding in family court provided certain conditions are met.

Important provisions of the law:

- Child is under twelve years of age or functions cognitively, adaptively, or developmentally under the age of twelve.
- An investigative interview is questioning of a child by a law enforcement officer, a Department of Social Services case worker, or other professional interviewing the child on behalf of law enforcement or DSS or in response to a case of suspected child abuse.
- The child's out of court statement is admissible when:
 - ▶ statement is given in response to questioning conducted during an investigative interview of the child;
 - ▶ an audio and visual recording of the statement is preserved on film or other electronic means (there is an exception which allows admission of the statement absent the recording after inquiry by the trial judge);
 - ▶ child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out of court statement;
 - ▶ trial judge finds after inquiry that the out of court statement possesses particularized guarantees of trustworthiness.

IMPACT: This law provides solicitors another tool to prosecute criminal sexual conduct with a child and should enhance the testimony of children who testify in those prosecutions.

State v. Ladner, 2007 WL 1223607 (S.C. filed April 23, 2007)

Defendant was convicted of first degree criminal sexual conduct with a minor and sentenced to fourteen years. The criminal sexual conduct consisted of digital penetration of a two and a half year old female child. On appeal, defendant contended that admission of a child's out of court statements to her caretakers violated his right to confrontation under *Crawford v. Washington* and that the child's statements to her caretakers were improperly admitted as excited utterances.

Defendant took the child trick or treating and assaulted her while with her. About forty-five minutes after he left with the child to go trick or treating, defendant returned the child to a female friend of defendant's. The child went to the bathroom at the friend's house and complained that her crotch area hurt when she urinated. The friend noted that the child was bleeding and that her genital area was swollen and red. The friend asked what happened the child said her "tooch" hurt and that appellant did it. At trial the child was determined to be not competent to testify and the child's statement to the friend was admitted as an excited utterance.

Court determined that the statement was not testimonial under *Crawford* and said the statement was more a kin to a remark to an acquaintance than a formal statement to police officers. As to whether the statement was an excited utterance, the court found that it was and that it was admissible even though the child was declared incompetent to testify.

Impact: Provides another case supporting admission of a child's statement under a traditional hearsay exception.

S.C. Code Ann. §§ 23-3-400 and following (adds mandatory active electronic monitoring to the sex offender registry law).

The new law changes the sex offender registry law to add mandatory active electronic monitoring for certain offenses, to add punishments for electronic monitoring violations, and to provide for procedures a person may use to petition to be removed from electronic monitoring provisions.

- Persons convicted, adjudicated delinquent, or having pled guilty or no contest to criminal sexual conduct with a minor under age eleven or to committing or attempting to commit a lewd act upon a child **MUST** be monitored with an active electronic monitoring device.
- Other offenders required to register in the sex offender registry **MAY** be ordered to be monitored with an active electronic monitoring device.
- The law requires the person to be monitored with an active electronic monitoring device for as long as the person remains on the sex offender registry (currently in South Carolina, sex offenders register for life) unless the person is committed to the custody of the State.
- With the exception of persons required to register in the sex offender registry for committing criminal sexual conduct with a minor in the first degree involving a child under eleven or committing or attempting to commit a lewd act upon a child under sixteen, a person may petition to be released from electronic monitoring ten years from the date the person begins to be monitored. If the petition is denied, the person may petition every five years from the date a petition is denied.
- The law requires the person monitored to pay the cost of the active electronic monitoring device and of the operation of the active electronic monitoring device.

IMPACT: Mandatory electronic monitoring for life for those convicted of criminal sexual conduct with a child under eleven and lewd act on a child.

S.C. Code Ann. 23-3-545 (punishment for willful violation of active electronic monitoring)

- The law was amended to add a new section which punishes willful violation of a term or condition of active electronic monitoring with ten years confinement.
- The amendment also provides that the person may be sentenced for

successive violations and that the maximum aggregate a person may be required to serve may not exceed the period of time the person is required to remain on the sex offender registry.

S.C. Code Ann. § 20-7-105 (methamphetamine offenses committed in the presence of children are criminal offenses).

S.C. Code Ann. § 44 -53-376 (manufacture of amphetamine or methamphetamine in the presence of a child).

S.C. Code Ann. § 44-53-398 (prescribing conditions for packaging and sale of ephedrine or pseudoephedrine products).

Effective May 4, 2006.

The **new Section 20-7-105** makes it unlawful for a person eighteen years of age or older to:

- unlawfully manufacture amphetamine and its derivatives or methamphetamine and its derivatives in the presence of a minor child;
- knowingly permit a child to be in an environment where a person is selling, offering for sale, or having in such person's possession with intent to sell, deliver, distribute, prescribe, administer, dispense, manufacture, or attempt to manufacture amphetamine or methamphetamine;
- knowingly permit a child to be in an environment where drug paraphernalia or volatile, toxic, or flammable chemicals are stored for the purpose of manufacturing or attempting to manufacture amphetamine or methamphetamine.

Conviction for a first offense may result in confinement for not more than five years and a fine of \$5,000.00. Conviction for a second or subsequent offense may result in confinement for not more than ten years and a fine of \$10,000.00.

Impact: Creates additional criminal penalties for involving children in any illegal activities concerning methamphetamine.

NOTE: The South Carolina Drug Endangered Children's Protocol has been in place for almost a year. Child protection workers, guardians ad litem and others who may come into contact with children who have been exposed to the manufacture of methamphetamine should be aware of the protocol.

The **new Section 44-53-398** contains a number of provisions limiting and controlling the retail sale of ephedrine or pseudoephedrine including:

- the product must be packaged in blister packaging;
- the product may not be sold by self-service but only from behind a counter or other barrier such that the product is not accessible by the public;

- limits a single over the counter sale to no more than three packages containing solely ephedrine or pseudoephedrine or no more than nine grams of base ephedrine or pseudoephedrine combined with other ingredients;
- makes it unlawful for a retailer to purchase any product containing ephedrine or pseudoephedrine from any person or entity other than a manufacturer or wholesale distributor registered with the US Drug Enforcement Administration;
- requires a retailer of products containing either ephedrine or pseudoephedrine to require the purchaser to present photo identification and to sign a written log showing the date and time of purchase, name and address of purchaser, amount of the compound, and mixture or preparation;
- retailer must retain the log for two years and the log must be available for inspection within 24 hours of a request made by local, state, or federal law enforcement.

The law also makes it unlawful:

- to possess, have under control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute any substance containing ephedrine or pseudoephedrine or their derivatives which have been altered from their original condition.

The law provides requirements for retailers:

- Retailers convicted of the packaging and product sales limitations are guilty of a misdemeanor and may be fined \$5,000.00 for a first offense and \$10,000.00 for a second or subsequent offense.
- Retailers convicted of not maintaining the log as prescribed are guilty of a misdemeanor and may be fined not less than \$500.00 and not more than \$1,000.00 for a first offense and not more than \$5,000.00 nor less than \$1,000.00 for a second or subsequent offense.
- Persons convicted of offenses involving altered ephedrine or pseudoephedrine are guilty of a felony and may be confined for not more than five years and fined \$5,000.00 for a first offense and confined for not more than ten years and fined \$10,000.00 for a second or subsequent offense (the statute provides that the court, upon approval of the solicitor, may request that the offender enter and complete a drug treatment program).
- Making false statements or misrepresentations on the log is misdemeanor for a first offense and carries a fine of \$1,000.00. A second or subsequent offense is a felony and carries a fine of \$5,000.00.

S.C. Code Ann. § 23-3-465 (Prohibition Against Sex Offender Living in Campus Student Housing).

Effective June 1, 2005

This law prohibits any person required to register as a sex offender from living in campus student housing at a public institution of higher learning supported in whole or in part by the State.

State v. Claypoole, 637 S.E.2d 571 (S.C. Ct. App. 2006)

Appellant convicted of contributing to delinquency of a minor and accessory before the fact to criminal sexual conduct with a minor. Appellant challenged her conviction on accessory before the fact claiming trial court should have directed the verdict in her behalf due to insufficient evidence.

The Court of Appeals rejected appellant's argument and affirmed the conviction. The court found sufficient evidence to show that appellant aided and abetted her boyfriend (a registered sex offender) in committing sexual conduct against the younger of her two children. The older child testified that she told appellant of the boyfriend's advances and that appellant knew about those advances. After the boyfriend informed appellant about the sex, appellant told the younger daughter it was all right as long as it felt good. The court considered that the appellant allowed the boyfriend to reside in the same house as the children despite the court order preventing contact between the boyfriend and the children. The court also considered that appellant did not stop the boyfriend from having sex with the younger daughter. The court also considered that appellant told her neighbor that she did not understand why everyone was so concerned with he boyfriend and the daughter having sex as permitting older men to have sex with a young girl is a good way to teach the young girl about sex.

IMPACT: This case gives law enforcement and child protection an option to pursue both abuse and neglect in family court and criminal prosecution in general sessions court in an appropriate case.

FAMILY COURT

De Facto Custodian

S.C. Code Ann. § 20-7-420 (jurisdiction); 20-7-1540 (de facto custodian).

Effective July 1, 2006.

- The amendment to Section **20-7-420** provides for jurisdiction in the family court to order custody of a minor child to a de facto custodian.
- Section **20-7-1540** provides for a de facto custodian.
- Under Section 20-7-1540, a de facto custodian is a person who has shown by clear and convincing evidence that he or she has been the primary caregiver for and has provided financial support of a child who: has resided with the person for six months or more if the child is under three; or has resided with the person for a period of one year if the child is three years old or older.

- Once the court determines that the person is a de facto custodian, the person has standing to seek visitation or custody of the child.
- The court may award custody or visitation if the court finds by clear and convincing evidence that the natural parents are unfit or that compelling circumstances exist.
- No proceeding to establish a person as a de facto custodian may be brought while the child is in the custody of the Department of Social Services.
- If the court has determined that a person is a de facto custodian, the court must join that person in the action as a necessary party.

S.C. Code Ann. § 20-7-650 (Central Registry of Abuse and Neglect).

Effective May 26, 2005.

The law amended S.C. Code Ann. §20-7-650 which governs child abuse and neglect investigations and establishes criteria for placing names of perpetrators in the Central Registry of Child Abuse and Neglect.

- The name of a person who physically or sexually abuses or willfully or recklessly neglects a child must be placed in the Central Registry, and this requirement cannot be waived by any party or by the court.
- The amendment preserves an exception for cases that involve only excessive corporal punishment. In cases of excessive corporal punishment, the court may order entry in the Central Registry only if the circumstances indicate the person would present a significant risk if in a position involving care of children outside the home.

The law also amended S.C. Code Ann. §20-7-650 by adding two new sections.

- When a statute or regulation makes the determination of a person's history of child abuse or neglect a condition for employment or volunteer service in a facility regulated by the Department of Social Services (DSS), the person must be screened against the Central Registry of Child Abuse and Neglect before such employment or volunteer service.
- The person must be screened each time the license, registration, or other operating approval of the facility is renewed.

Section 20-7-650 was further amended to provide that, when a statute or regulation makes the determination of an applicant's history of child abuse and neglect a condition for issuance of a license, registration or other operating approval by DSS, the applicant must be screened against the Central Registry of Child Abuse and Neglect prior to issuance and renewal of the license, registration, or other approval.

S.C. Code Ann. § 20-7-1572 (termination of parental rights).

Effective June 7, 2005.

The law amended S.C. Code Ann. §20-7-1572 by providing that the conception of a child as a result of criminal sexual conduct is a ground for termination of parental rights of a biological parent who is convicted of the offense of criminal sexual conduct. However, a conviction cannot be used as a ground for terminating parental rights if the sentencing court makes a specific finding that the criminal sexual conduct conviction resulted from consensual sexual conduct where both the victim and the actor were at least 14 years of age, but not older than 18 years of age, at the time of the offense.

S.C. Code Ann. § 20-7-85 (Daniel’s Law).

Effective June 12, 2006.

This law amended S.C. Code Ann. §20-7-85 to expand Daniel’s Law. When an infant has not otherwise been abused or neglected, Daniel’s Law provides immunity from prosecution to a parent, or person acting on behalf of a parent, who voluntarily leaves the infant at a hospital or hospital out-patient facility.

The amendment expands the locations at which a parent may properly leave an infant.

- A parent may now leave an infant at various ‘safe havens.’
- A ‘safe haven’ is defined as a hospital or hospital out-patient facility, a law enforcement agency, a fire station, an emergency medical service station, or any house of worship during hours when the facility is staffed.
- The infant must be left with an employee or staff member of the safe haven.
- If the infant is left at a law enforcement agency, fire station, emergency medical service station, or house of worship, these facilities must, within six hours, transport the infant to a hospital or hospital outpatient facility.

IMPACT: Expands the locations which may be “safe havens.”

JUVENILES

S.C. Code Ann. § 16-17-500 (sale of tobacco to minors).

Effective August 21, 2006.

The law added several provisions to Section 16-7-500 regarding sales and possession of tobacco by minors. Most notably, effective August 21, 2006, it is unlawful for a minor under eighteen to purchase, possess, attempt to purchase or possess, or present fraudulent identification for the purpose of purchasing or possessing a tobacco product.

A minor who violates this provision commits a noncriminal offense and is subject to a civil fine, or may be ordered to attend a smoking cessation program or perform community service. (emphasis added) Failure to comply with a court order may result in the delay or restriction of the minor’s driving privileges. Under no circumstances may a minor be detained, taken into custody, arrested, or incarcerated for any amount of time as a result of such noncompliance with a court order regarding tobacco; nor may a minor be held

in contempt of court for failure to pay a fine, complete a smoking cessation program, or perform community service.

Other provisions added to Section 16-7-500 include increased fines for unlawful tobacco sales to minors, restrictions on selling tobacco products through vending machines, and a requirement that stores selling tobacco products must train employees regarding unlawful sales to minors.

Jurisdiction to hear violations of this section is vested in the magistrates' and municipal courts.

S.C. Code § 20-7-8920 alcohol possession/consumption by minors.

Passed in the 2007 legislative session.

This law amended the current statute by allowing law enforcement to use minors as purchasers of alcohol in sting operations and enhancing other portions of the statute.

S.C. Code Ann. § 59-63-110 and following (Safe School Climate Act).

Effective June 12, 2006.

The Act was enacted to prevent school harassment, intimidation, and bullying of students. The purpose of this Act is to protect the health and welfare of children, and to improve the learning environment for children in South Carolina's schools.

- A person may not engage in harassment, intimidation, or bullying, nor may a person retaliate or make a false accusation against a victim or witness.
- Any school employee, student, or volunteer who has reliable information that a student has been subject to harassment, intimidation, or bullying must report the incident to an appropriate school official.
- The Act also requires that, prior to January 1, 2007, each local school district must adopt a policy which prohibits the proscribed conduct and includes certain components specified in the Act.
- In an effort to assist local school districts in developing such policies, by September 1, 2006, the State Board of Education is required to develop model policies and teacher preparation program standards on the identification and prevention of bullying.
- The Act requires that training on the school district's policy against bullying must be provided to school employees and volunteers. Schools are also encouraged to establish bullying prevention programs and other initiatives which involve school staff, students, administrators, volunteers, parents, law enforcement, and community members.

