

# **Things You Should Know About Your Child's Personal Injury Case**

Virginia law treats often children differently than it treats adults for many reasons. Children are not considered mature enough to understand and look out for their own interests, therefore the law supplies many safeguards and protections for children that adults do not receive. This is very evident in personal injury cases. The differences between an adult's personal injury case and a child's case are very important and can make a difference in any recovery that your child makes.

## **1. The Time Limit for a Child to File His Suit Is Extended.**

An adult must file a personal injury lawsuit against the person who is responsible within two years of the injury. This time limit is due to Virginia "*statute of limitations.*" If a person attempts to file a lawsuit after the time limit has run out, the case will be dismissed, and there is nothing that can be done about it. There are different statutes of limitations for different types of cases (e.g. contract, property damage, defamation). If a child is injured in an accident, the statute of limitations does not end until his twentieth birthday (two years after the child legally becomes an adult). Because Virginia law considers a minor to be "under a disability," the statute of limitations is tolled, or on hold, until the child is eighteen years old. Therefore, the statute of limitations does not start to run until the child is legally an adult and no longer considered to be under a disability.

[Virginia Code 8.01-8, 8.01-229]

There is one important exception to this rule. If a child has been legally *emancipated* — a process which requires a Court hearing — then he is no longer under a disability, and is considered to be an adult. If the child is emancipated when the injury occurs, he has two years from the date of injury (the normal statute of limitations for a personal injury case). If the child becomes emancipated after the injury, he has two years from the date of emancipation to file his personal injury lawsuit. [Virginia Code 8.01-229]

## **2. The Claim for Medical Bills for Treatment of the Injuries Belongs to the Parents**

Parents are legally responsible for paying the medical bills of their children, so when a child is injured and files a personal injury action, the child cannot claim the

medical bills as damages, unless the parent legally waive their right to recover the medical bills. The child's parents have the right to file a claim for the losses they have incurred as a result of paying medical bills. The parents can file a lawsuit with the child in the same action or they can file separate law suits. If they file separate actions, the child's case and the parents' case can be joined and tried as one, as long as the request is made at least a week before trial. If the child's case and the parents' case are tried together, the jury will render two separate verdicts. The parents receive a verdict for the medical bills and the child for the non-economic losses (e.g. the injury, its affect on his health, disfigurement, pain and mental anguish).

[Virginia Code 8.01-36]

It is important to note that the statute of limitations is different for each case. As previously explained, the child's statute of limitations does not run out until two years after his eighteenth birthday, while the parents have only five years from the date of the accident to file suit for the medical bills or any other economic losses. In other words, if a 5 year-old is injured in a car wreck, the parents must file a lawsuit for the medical bills within five (5) years (before the child is 10 years-old). The child, however, does not have to file a lawsuit until two years after becoming an adult (normally prior to turning 20).

### **3. A Child Cannot File His Own Personal Injury Lawsuit**

Virginia law classifies every child under the age of 18 as an "infant." An infant is considered to be incapacitated and therefore unable to file a lawsuit in his own name. If a child has a personal injury case, or any other type of case, he may only file a lawsuit through his "next friend." Either one of the child's parents or both parents can be the child's next friend. While the most frequent next friend is a parent, if a parent is not available then another adult or his legal guardian can file the suit as the child's next friend.

[Virginia Code 8.01-8, 1-207]

This is the normal way of proceeding on cases involving children. It is very rare that a family would want to wait numerous years before pursuing the injured child's case.

#### **4. Children's Lost Wages**

If a child is legally emancipated and has a personal injury case pending, he may make a recovery for any lost wages that he may have procured as a result of his injuries. [Virginia Code 8.01-50]

If the child is not emancipated, the law does not determine whether he can make a lost wage claim or if that claim would belong to the child's parents. Virginia Courts have held that a future lost wage claim for a deceased, or disabled, child is too speculative to make. No matter how smart, or how well the child was doing in school, the Virginia Supreme Court does not allow the family to claim future lost wages for a child, who was not working. You are not even allowed to claim an amount equal to minimum wage.

#### **5. Children Are Not Held to the Same Standards as Adults**

In Virginia, to succeed in a personal injury action, you must prove that the party that caused you harm was *negligent*. Negligence is the failure to use ordinary care. If the defendant is found to be negligent, he can try to prove that the injured party was also negligent. If the injured party was negligent, and is found to have partially caused his own injuries, he is considered *contributorily negligent*. To be free from contributory negligence, an adult must have acted with ordinary care, as a reasonable person in the same situation would have acted. If a jury finds that the injured party was contributorily negligent, then that injured party cannot make an economic recovery for his injuries. Even if the defendant was 99% at fault and the injured person was 1% at fault, the injured person cannot make a recovery. Virginia is one of three states that still has this rule.

For children, however, the standard of contributory negligence is different. Under Virginia law, a child under the age of seven is incapable of being negligent. Children between the ages of seven and fourteen are legally presumed to be incapable of negligence. The defense can attempt to prove the child knew better and that the child is capable of understanding the risks of his actions. If the defense can prove a child between the ages of seven and fourteen knew that his conduct did not conform to that of a reasonably prudent child of the same age, intelligence, maturity and experience, then a jury can find that child to be contributorily negligent.

## **6. A Settlement of an Injury Case May Require Court Approval**

Because children are considered to be under a disability, almost all settlements involving a child's personal injuries will require court approval. Approval requires a hearing by the court to determine if the settlement is appropriate and in the best interest of the child. A hearing may not be necessary if the child is only making a modest recovery. If the child and his family are not represented by an attorney, the Court will appoint a guardian ad litem for the child to make sure the settlement is fair to the child. Some Courts require a guardian ad litem even if the parents are represented by an attorney.

## **7. Upon Court Approval, the Child Will Not Receive Any Funds until He Is 18**

If the court approves the settlement, then the funds will be paid to the Clerk of the Court and held until the child is 18. There are some rare exceptions to this requirement. If the child is legally emancipated, the court can release the money to the child. If the child is not emancipated, the court can also allow the money to be paid to a parent to be held in trust for the child. A judge may release a portion of the money if the child has a special need which the family cannot afford. While the law does allow the parents to receive the money in trust for the child, courts are very hesitant to do so. As a practical matter, courts will not release the funds except in very rare circumstances. In the past, I have seen a judge release money so the child could buy a computer for schoolwork, and for a student to buy a car so he could attend the Governor's school.

Because funds held by the Clerk of the Court are only placed in a savings account earning minimal interest, *structured settlements* for children can often significantly increase their recovery. Structured settlements can pay significantly higher interest rates. The law allows the child's funds to be structured as long as certain requirements are met. Structuring also provides the added advantage of flexibility and security. Payments can also be delayed past the age of eighteen or can be paid out at different ages. It is usually not smart to give an eighteen year old a large sum of money and expect them to invest it wisely. The possibilities of how to structure the settlement are endless and vary depending on the needs of each individual.

If the court holds the funds, the child simply needs to appear before the court when he is eighteen and the funds will be released to him. If the money is structured, it will be mailed to the child from the annuity company. In either case, if the child dies, the money would be left to his heirs.

## **8. In a Wrongful Death, the Parent Is First to Be Administrator**

When a person dies as a result of the negligence of another person, the deceased person's estate has a cause of action for wrongful death. The case belongs to the estate of the deceased, and the administrator of the estate (assuming there is no will) is the party that pursues the action and files the lawsuit. For an adult, any family member may qualify as the administrator. If after thirty days no family member has qualified, then anyone outside of the family can qualify as the administrator for the limited purpose of filing the suit on behalf of the estate.

When the deceased party is a child, Virginia law favors the custodial parent to be the administrator. The custodial parent may qualify as the administrator, or he may designate another person to be the administrator. If the custodial parent (or his designee) does not apply to qualify within thirty days of the child's death, then an administrator may be appointed in the same way as in an adult case.

[Virginia Code 8.01-50]