

Virginia State Crime Commission

Killing of a Newborn Baby

2008

KILLING OF A NEWBORN BABY

Background

The Virginia State Crime Commission received a letter from Senator Hurt, asking the Commission to study the standard required for prosecuting the death of a newborn. Specifically, a Commonwealth's Attorney from his district asked the Senator to look into changing the standard, as it is currently set forth in Lane v. Commonwealth.

Analysis

The standard for prosecuting the killing of a newborn was established by the Virginia Supreme Court in Lane v. Commonwealth. This standard, as articulated in Lane, requires the Commonwealth to prove three elements to find an individual guilty of infanticide: (1) the child was born alive; (2) the child had an independent and separate existence from its mother; and, (3) the accused was the criminal agent that caused the infant's death. The Virginia Supreme Court did not develop or create the "born alive rule;" rather, the Court adopted a long standing common law rule. The "born alive rule" has been prevalent in the common law since the 16th century, and is still followed in at least the majority of jurisdictions. This standard is an adaptation and extension of the traditional *corpus delicti* rule in homicide cases, which requires that a living person be killed by the criminal act of the defendant. It should be understood that the "born alive rule" does not require direct evidence to prove each element. Rather, as in all *corpus delicti* cases, proof of each or all elements "may be furnished by circumstantial evidence."

In Lane the defendant was accused of killing her newborn child. The Commonwealth proved that the child was "born alive;" however, it could not prove conclusively that the child had an "independent and separate existence" from its mother. Also, while the evidence showed the child's death was caused by a lack of oxygen, the evidence was insufficient to prove the criminal agency of the mother. There is only one other published decision in the Commonwealth using the Lane standard. In Aldridge v. Commonwealth, the Virginia Court of Appeals upheld the conviction of a defendant for killing her newborn

child. The medical evidence, like the medical evidence in Lane, was not conclusive to a "medical certainty" to prove the elements required in Lane, but combined with the defendant's statements, there was sufficient evidence for the Court of Appeals to uphold the conviction in Aldridge.

While the Lane standard does require evidence to prove three separate elements, it does not require definitive medical evidence to prove each or all of the elements. This standard requires, as in all homicide cases, that the Commonwealth prove that a living human being's death was caused by the defendant. This determination is a question to be made by the finder of fact. Since the Lane standard is flexible, and not fixed, any advances in forensic science and medical technology will increase the ability of a finder of fact to determine whether each element of the Lane standard is satisfied.

There has been some criticism of the "born alive rule" because it does not cover deaths prior to birth, that is, the killing of a fetus cannot be prosecuted under the rule. In Virginia, as well as other jurisdictions, feticide is also punishable as a separate crime. This crime applies when the killing occurs prior to birth. The crime of feticide in the Virginia code, § 18.2-32.2, is punished as a Class 2 felony for any "person who unlawfully, willfully, deliberately, maliciously and with premeditation kills the fetus of another." Additionally, under § 18.2-32.2, an individual may receive a sentence of no less than 5 years or more than 40 years if the malicious killing of a fetus is done without premeditation.

Only six states (Arkansas, California, Massachusetts, Missouri, Oklahoma and South Carolina) have adopted standards treating the fetus as a person before birth for the purposes of prosecuting feticide cases. However, in all of these states the prosecution must prove either viability or a separate and independent existence prior to birth. Even though these states have abrogated the "born alive rule," all they have done is extend the rule to cover feticide. It is also very likely that these states will continue to follow the "born alive" standard after birth, just as South Carolina expressly did when it extended the "born alive" rule to feticide.

Conclusion

Senator Hurt, at the suggestion of his constituent, requested that language be drafted for a bill that would alter the Lane standard. The proposed language sought to add the following definition to §18.2-6: *The word "person" includes a human infant that has been born alive regardless of whether the infant has achieved an independent and separate existence from the mother.* This proposal would essentially remove the requirement of proving the "separate and independent existence" of the newborn, as required by Lane. This proposed change is a very significant departure from not only the Lane standard, but also from the common law *corpus delicti* requirement that murder requires the death of a live, human being. The entire purpose of the Lane or "born alive" rule was to ensure that the newborn was "alive," so that the defendant could not be convicted of murdering a dead or stillborn child. Even if the proposal were adopted, the difficulties in proving a "separate and independent existence" would likely shift to become a sub-issue concerning the criminal agency of the defendant.