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Annual Survey of Virginia Law: Legal Issues Involving Children

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LEGAL ISSUES INVOLVING CHILDREN

*Robert E. Shepherd, Jr.**

I. INTRODUCTION

Three events in the past year significantly impacted the way the legal system treats children. First, the family court experiment being conducted under the auspices of the Supreme Court of Virginia and the Judicial Council was concluded. Second, the General Assembly established a state-wide, community-based, inter-agency system to deliver services to children and youth. Third, the Virginia Supreme Court promulgated the first set of statewide rules governing proceedings in juvenile and domestic relations district courts. The year's other developments were not as systemic or far reaching as those above, although recommendations flowing from the Youth Services Commission's¹ legislatively-mandated study of services and violent juvenile crime have the potential to impact the way this highly visible problem is dealt with in the future.²

II. FAMILY COURT EXPERIMENT

The family court experiment effectively began over four decades ago with a 1950 report by the Virginia Advisory Legislative Council mandated by the legislature's enactment of Senate Bill 175 in 1948.³ That report, which led to the enactment of the first comprehensive juvenile code in Virginia, inched in the direction of a state-wide system of juvenile and domestic relations courts, but declined to recommend that family courts "should at [that] time be made courts of record as provided for in Senate Bill 175."⁴ Over the years, a state-wide system of juvenile and domestic relations dis-

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1. As of July 1, 1992, the Youth Services Commission became the Virginia Commission on Youth, and its membership expanded from eight to twelve members. Act of April 6, 1992, ch. 778, 1992 Va. Acts 1216 (codified at VA. CODE ANN. § 9-292, -293, -294 (Cum. Supp. 1992)).

2. H.J. Res. 36, Va. Gen. Assembly (Reg. Sess. 1992).

3. REPORT OF THE VIRGINIA ADVISORY LEGISLATIVE COUNCIL ON THE JUVENILE AND DOMESTIC RELATIONS COURTS AND SENATE BILL 175, S. Doc. No. 9 (1950).

4. *Id.* at 6.

strict courts gradually developed, but the courts were still courts not of record and appeals were still tried de novo in the circuit courts. This structure generated much criticism because it lacked finality and stability in deciding family disputes.⁵

When the juvenile code was comprehensively revised in 1977, the focus on its revision engendered more discussion of creating a family court as a court of record, and legislative resolutions endorsed a study of such a concept.⁶ The ensuing study was conducted by the Family Court Subcommittee of the Virginia Advisory Legislative Council Committee to Study Services to Youthful Offenders. A further recommendation was made in 1978 to convene a joint legislative subcommittee "to develop appropriate legislation which addresses the operational and legal problems which exist in the present division of responsibility between juvenile and circuit courts with regard to domestic relations matters."⁷ The subcommittee was formed, met twice, took no further action, and made no recommendations.

In 1983 the Chief Justice of the Virginia Supreme Court and the Judicial Council appointed the Committee on Adjudication of Family Law Matters to examine problems caused by the division of family law matters between juvenile and circuit courts. This committee later reported to the Judicial Council, describing certain enumerated problems and recommending the creation of a family court system in Virginia, with the family court itself to be established as a division of the circuit court. The Judicial Council took this recommendation under advisement, held several public hearings around the state, and issued a report in 1985 on the *Adjudication of Family Law Matters in Virginia's Courts*.⁸ The council recommended that the General Assembly create an experimental family court system on a pilot basis to evaluate the efficacy of such a change in the court system. In 1989, legislation directed the Judicial Council to establish several pilot family courts, to evaluate their operation, and to report to the Governor and to the General

5. See, e.g., Frederick P. Aucamp, *A Family Court for Virginia*, 13 U. RICH. L. REV. 885 (1979); R.P. Zehler & C. Ridley Bain, *The Appeal De Novo in Virginia's Juvenile Court: Time for a Change?*, VA. B. ASS'N J. Summer 1978, at 17.

6. S.J. Res. No. 12, Va. Gen. Assembly (Reg. Sess. 1976); S.J. Res. No. 91, Va. Gen. Assembly (Reg. Sess. 1977).

7. REPORT OF THE VIRGINIA ADVISORY LEGISLATIVE COUNCIL ON SERVICES TO YOUTHFUL OFFENDERS, S. Doc. No. 24, pg. 12 (1978).

8. REPORT OF THE AD HOC COMMITTEE STUDYING THE ADJUDICATION OF FAMILY LAW MATTERS IN VIRGINIA'S COURTS (1985) (on file with U. RICH. L. REV.).

Assembly by December 31, 1992.⁹ Pilot family courts were established at the juvenile court level in Albemarle, Fairfax, and Loudoun counties, and in the cities of Alexandria, Chesapeake, and Lynchburg. They were established at the circuit court level in Roanoke City and the counties of Mecklenburg, Roanoke and Smyth. In those jurisdictions the pilot courts heard the matters normally within the jurisdiction of the juvenile and domestic relations district court, as well as a percentage of the divorce, annulment, and affirmation of marriage cases. The circuit courts in Arlington and Pulaski counties and the counterpart courts in each of these "test" jurisdictions served as "control courts" for research purposes. The experiment lasted from January 1, 1990, until December 31, 1991. The Judicial Council has been charged with evaluating the experiment and making the required report with its findings to the General Assembly and Governor by the end of 1992.¹⁰

III. COMPREHENSIVE SERVICES ACT FOR AT-RISK YOUTH AND FAMILIES

The Virginia General Assembly's 1992 enactment of the Comprehensive Services Act for At-Risk Youth and Families¹¹ marks an important milestone along the road toward a more effective delivery of services to children and youth in the state. Resulting from a study by the Council of Community Services for Youth and Families, including the operation of pilot programs in five diverse localities around the state,¹² the Act will be implemented in several stages over the next few years. The purposes of the legislation are (1) to preserve families, (2) to deliver services to children and their families in the least restrictive environment, (3) to promote early identification of and intervention with children and families who are at risk of emotional and behavioral problems, (4) to increase interagency collaboration and improve family involvement in treatment, (5) to provide greater flexibility in the use of funds, and (6)

9. Act of Mar. 27, 1989, ch. 641, 1989 Va. Acts 1045 (codified at VA. CODE ANN §§ 16.1-241.1, -296.1, 17-116.05:5, 20-96.1, 20-96.2 (Repl. Vol. 1990 & Cum. Supp. 1992)).

10. VA. CODE ANN. § 20-96.2 (Repl. Vol. 1990).

11. Acts of Apr. 15, 1992, chs. 837, 880, 1992 Va. Acts 1560, 1647 (codified at VA. CODE ANN. §§ 2.1-1.7, 9-6.25:1, 16.1-276.5, -286, -294, 22.1-101.1, 37.1-197.1, 63.1-55, -248.6, 66-14, -35 (Cum. Supp. 1992)).

12. The study area included the RADCO Planning District (the City of Fredericksburg and the counties of Caroline, King George, Spotsylvania and Stafford) a grouping of the cities of Lynchburg and Bedford along with Bedford County, and the cities of Norfolk, Richmond, and Roanoke.

to direct both funding and accountability for service decisions to local communities.¹³ The program, as it is fully implemented over three biennia, will pool local and state funds from the Departments of Education, Mental Health, Mental Retardation and Substance Abuse Services, Social Services, and Youth and Family Services to target those children and youth in need of treatment services. The program is not predicated on fitting the child into a category of eligibility, and will base treatment on the child's identified needs. The program places a premium on the development of innovative programs and on the delivery of services in the community rather than in institutions.

IV. JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT RULES

On July 1, 1992, the first set of rules promulgated to govern proceedings in state juvenile and domestic relations district courts went into force as Part Eight of the Rules of the Virginia Supreme Court. The rules are intended to "apply to all proceedings in the Juvenile and Domestic Relations District Courts."¹⁴ Some of the rules, notably Rules 8:7,¹⁵ 8:9,¹⁶ 8:12,¹⁷ 8:13,¹⁸ 8:14,¹⁹ 8:19,²⁰ and 8:20,²¹ are based on and essentially track previously existing circuit and general district court rules. Rules 8:2²² (definitions) and 8:8²³ (pleadings) track the counterpart rules of the circuit and general district courts. However, the former contains slight modifica-

13. THE COUNCIL ON COMMUNITY SERVICES FOR YOUTH & FAMILIES, IMPROVING CARE FOR TROUBLED & "AT RISK" YOUTH & THEIR FAMILIES iv (1992). This pamphlet summarizes the report and recommendations of the Council on Community Services for Youth & Families.

14. VA. SUP. CT. R. 8:1.

15. *Id.* 8:7(a). This rule requires all documents filed in any clerk's office in any proceeding pursuant to the rules or statutes be eight and one-half by eleven inches in size.

16. *Id.* 8:9. The court has the power to review and correct any procedures in the clerk's office touching the filing of pleadings or the maturation of suits; this includes the power to extend the time allowed to file.

17. *Id.* 8:12. The court may use electronic or photographic means to preserve the record or parts thereof.

18. *Id.* 8:13. This rule focuses on the formalities of requesting subpoenas for witnesses and subpoenas duces tecum.

19. *Id.* 8:14. This rule addresses continuances, how they are granted, when they are requested, and the procedures to be followed if all parties either agree or disagree to the continuance.

20. *Id.* 8:19. This rule focuses on drafts of orders prepared by counsel and how they are to be endorsed. It also grants the court discretion to disperse with or modify the rule.

21. *Id.* 8:20. All appeals must be in writing and will be noted only upon timely receipt in the clerk's office.

22. *Id.* 8:2. This rule sets forth statutory and additional definitions.

23. *Id.* 8:8.

tions in its citation to the definitions in Virginia Code section 16.1-228,²⁴ and the latter differs somewhat from corresponding rules, reflecting the fact that formal responsive pleadings are rare in juvenile courts.²⁵ Also, Rule 8:8(c) pertains to types of proceedings that are unique to the juvenile and domestic relations district court.²⁶

Other rules are basically straightforward and will have little impact on current proceedings in juvenile courts. For cases arising under Virginia Code section 16.1-278, Rule 8:3 delineates the pleadings and procedures to be followed in proceedings to order services,²⁷ matters to seek judicial consent to emergency surgical or medical treatment for a minor,²⁸ and in proceedings for support.²⁹ Rule 8:4 clarifies the service of process to be utilized when seeking to reduce support arrearages to a judgment,³⁰ and Rule 8:5 incorporates the procedure followed in many courts by requiring that all court-ordered reports be mailed to counsel of record upon request, including to parties appearing pro se.³¹ Rule 8:10 provides the method of making a motion to transfer venue pursuant to Virginia Code section 16.1-243,³² and Rule 8:11 essentially tracks General District Court Rule 7A:4, but distinguishes proceedings that are confidential under the juvenile code from those that are open to the public.³³ Rule 8:16 follows the procedure already used in many juvenile courts across the Commonwealth by establishing a uniform arraignment procedure in delinquency cases.³⁴ Rule 8:21 reiterates the Code requirements that proceedings for the violation of court orders are governed by the due process requirements applicable to the original cases.³⁵ Rule 8:22 describes the procedure to be followed when judicial consent is sought under unusual conditions, as where consent for emergency surgery or other medical treatment is necessary and is given over the telephone.³⁶

24. *Id.* 8:2(a).

25. *See id.* 8:8(a)-(c).

26. *Id.* 8:3. These are delinquency, child in need of services, child in need of supervision and status offense proceedings.

27. *Id.* 8:3(a).

28. *Id.* 8:3(b).

29. *Id.* 8:3(c).

30. *Id.* 8:4.

31. *Id.* 8:5.

32. *Id.* 8:10.

33. *Id.* 8:11.

34. *Id.* 8:16.

35. *Id.* 8:21.

36. *Id.* 8:22.

Rule 8:6 defines, for the first time, the differing roles of attorneys serving as counsel and as guardians ad litem in juvenile courts in Virginia. Virginia Code section 16.1-266 specifies that a child (1) alleged to be delinquent, (2) in need of supervision, or (3) in need of services is entitled to be represented by counsel, either retained or appointed, in proceedings in the juvenile court.³⁷ The same section says that a child alleged to be abused or neglected, or who is the subject of proceedings for the termination of residual parental rights or for approval of an entrustment agreement or other means of being relieved of custody, has the right to a guardian ad litem, who must be "a discreet and competent attorney-at-law . . ."³⁸ This section also gives the court the discretionary power to appoint a guardian ad litem for a child in any other proceedings, with some restrictions for custody cases, without elaboration.³⁹ However, no statute defines the two roles that an attorney in the juvenile court may play, or distinguishes between them. Rule 8:6 says that the "*guardian ad litem* shall vigorously represent the child, fully protecting the child's interest and welfare" and "shall advise the court of the wishes of the child in any case where [those] wishes . . . conflict with the opinion of the guardian ad litem as to what is in the child's interest and welfare."⁴⁰ It thus builds on the recent decisions of the Virginia Supreme Court and the Virginia Court of Appeals addressing the authority of the guardian ad litem in a very expansive fashion.⁴¹

The first part of the rule addresses the role of "*counsel*" in a much more cryptic fashion, defining it as "the representation of the child's legitimate interests."⁴² Omitted from the final rule is a sentence from the drafting committee's version, subsequently deleted by the Rules Committee of the Judicial Council, providing that "in general the determination of the child's legitimate interests in the proceedings is ultimately the responsibility of the child after full consultation with counsel notwithstanding the wishes of the parents or what counsel may believe to be in the child's inter-

37. VA. CODE ANN. § 16.1-266 (Repl. Vol. 1988).

38. *Id.* § 16.1-266(B).

39. *Id.* § 16.1-266(D).

40. VA. SUP. CT. R. 8:6 (emphasis added).

41. See *Stanley v. Fairfax County Dept. of Social Servs.*, 10 Va. App. 596, 395 S.E.2d 199 (1990), *aff'd*, 242 Va. 60, 405 S.E.2d 60 (1991); *Norfolk Div. of Social Servs. v. Unknown Father*, 2 Va. App. 420, 345 S.E.2d 533 (1986); see also Robert E. Shepherd, *Legal Issues Involving Children: Annual Survey of Virginia Law*, 25 U. RICH. L. REV. 773, 778 (1991).

42. VA. SUP. CT. R. 8:6 (emphasis added).

est and welfare."⁴³ However, despite the omission the comment accompanying Rule 8:6 points out that the rule's language is intended "to track that of the ABA Standards and Virginia case law."⁴⁴ As there is no Virginia case law elaborating on the role of counsel, as opposed to that of the guardian ad litem, the ABA Standards are more helpful. The phrase "legitimate interests" is derived from Standard 3.1(a) of the *IJA-ABA Standards Relating to Counsel for Private Parties*,⁴⁵ and is given substance by 3.1(b):

Determination of client's interests.

(i) Generally.

In general, determination of the client's interests in the proceedings, and hence the plea to be entered, is ultimately the responsibility of the client after full consultation with the attorney.

(ii) Counsel for the juvenile.

[a] Counsel for the respondent in a delinquency or in need of supervision proceeding should ordinarily be bound by the client's definition of his or her interests with respect to admission or denial of the facts or conditions alleged. It is appropriate and desirable for counsel to advise the client concerning the probable success and consequences of adopting any posture with respect to those proceedings.

[b] Where counsel is appointed to represent a juvenile subject to child protective proceedings, and the juvenile is capable of considered judgment on his or her behalf, determination of the client's interest in the proceeding should ultimately remain the client's responsibility, after full consultation with counsel.

[c] In delinquency and in need of supervision proceedings, where it is locally permissible to so adjudicate very young persons, and in child protective proceedings, the respondent may be incapable of considered judgment in his or her own behalf.

[1] Where a guardian ad litem has been appointed, primary responsibility for determination of the posture of the case rests with the guardian and the juvenile.

[2] Where a guardian ad litem has not been appointed, the attorney should ask that one be appointed.

43. See Proposed Rule 7D:6, *Rules for Practice Before Juvenile and Domestic Relations District Courts*, VA. LAW WKLY., Aug. 13, 1990, at 180.

44. VA. SUP. CT. R. 8:6 cmt.

45. IJA-ABA JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 77 (1980).

[3] Where a guardian ad litem has not been appointed and, for some reason, it appears that independent advice to the juvenile will not otherwise be available, counsel should inquire thoroughly into all circumstances that a careful and competent person in the juvenile's position should consider in determining the juvenile's interests with respect to the proceeding. After consultation with the juvenile, the parents (where their interests do not appear to conflict with the juvenile's), and any other family members or interested persons, the attorney may remain neutral concerning the proceeding, limiting participation to presentation and examination of material evidence or, if necessary, the attorney may adopt the position requiring the least intrusive intervention justified by the juvenile's circumstances.

(iii) Counsel for the parent.

It is appropriate and desirable for an attorney to consider all circumstances, including the apparent interests of the juvenile, when counseling and advising a parent who is charged in a child protective proceeding or who is seeking representation during a delinquency or in need of supervision proceeding. The posture to be adopted with respect to the facts and conditions alleged in the proceeding, however, remains ultimately the responsibility of the client.⁴⁶

The position implied in Rule 8:6, and made more explicit in Standard 3:1, is that "a lawyer should represent a client zealously within the bounds of the law."⁴⁷

Rule 8:15 greatly expands on the availability of discovery in juvenile and domestic relations district courts. It entitles juveniles charged with those delinquent acts that would be felonies if committed by adults, and those involved in transfer hearings, along with the prosecutors, to the same discovery rights that apply in circuit court pursuant to Rule 3A:11.⁴⁸ It also accords the same discovery rights to juveniles facing misdemeanor delinquency charges

46. *Id.* at 79-80. The commentary accompanying the Standard contains a more complete discussion of particular problems, like that of the incompetent juvenile, but it continues to take a strong advocacy position. It should be noted that the guardian ad litem referred to in the rule is generally a non-lawyer in other jurisdictions, and that appears to be the premise upon which the Standard is based.

47. VA. CODE OF PROFESSIONAL RESPONSIBILITY Canon 7, EC 7-1; see also ECs 7-7, 7-11, & 7-12 (1990), reprinted in 39:2 VA. LAW. REG. 16-18 (Aug. 1990).

48. VA. SUP. CT. R. 8:15(b).

that an adult misdemeanant would have in general district court under Rule 7C:5.⁴⁹ In all other proceedings, the judge has the discretion, upon motion, to enter any orders in aid of discovery that could be entered under Part Four of the Virginia Supreme Court Rules, except that depositions cannot be taken.⁵⁰

Rule 8:17 mandates that the judge far more extensively advise the juvenile of rights at trial at the initial court appearance in a delinquency case. The judge must advise the youth of the right to counsel, the right to a public hearing, the privilege against self-incrimination, the right to confront and cross-examine witnesses, the right to present evidence, and the right to appeal any final court decision. Any waiver of the right to counsel, the right to a public hearing, and of the privilege against self-incrimination can be granted only after the judge determines that the waiver is knowingly, voluntarily, and intelligently made "after a thorough inquiry [and finding by the court] that the juvenile is capable of making an intelligent and understanding decision in light of the child's age, mental condition, education, and experience, considering the nature and complexity of the case."⁵¹ The rule thus would seem to require a fairly extensive colloquy between the judge and the juvenile, including inquiries that are tailored to the child's individual characteristics, such as the existence of a learning disability, mental retardation, or the like.

Rule 8:18 makes clear that the permissible pleas in a delinquency case are "guilty," "not guilty," "nolo contendere," or "no plea," the last to be treated as a denial of the allegations.⁵² Again, the rule requires a searching inquiry into the voluntariness, understanding, and intelligence of a juvenile's plea of guilty.

These rules will ensure greater uniformity and regularity among juvenile and domestic relations district courts around the Commonwealth, and will guarantee a higher level of protection for the juvenile's due process rights in delinquency proceedings.⁵³

49. *Id.*

50. *Id.* 8:15(c).

51. *Id.* 8:17.

52. *Id.* 8:18.

53. It is highly appropriate that this heightened attention to due process occurs during the commemoration of the twenty-fifth anniversary of the United States Supreme Court decision *In re Gault*, 387 U.S. 1 (1967). This ruling first articulated the due process rights of juveniles.

V. JUVENILE DELINQUENCY AND NON-CRIMINAL MISBEHAVIOR

A. *Decisions*

The first capital murder case involving a death sentence for a juvenile defendant in about half a century reached the Virginia Supreme Court in 1992. In *Thomas v. Commonwealth*,⁵⁴ the court affirmed the conviction and death penalty for a youth who was seventeen at the time of his offense. The court found that the young man validly and legally waived a transfer hearing under Virginia Code section 16.1-270, and that the trial court did not err when it denied a change of venue.⁵⁵ The court also found that no violation of the double jeopardy clause arose from prosecuting Thomas for the capital murder of one victim after accepting his guilty plea to the first degree murder of the other victim, despite the fact that the capital murder prosecution was predicated in part on proof of the other murder.⁵⁶ The court upheld the trial court's denial of a continuance to the youth's initial court-appointed counsel, and also affirmed the trial court's action in relieving that attorney from the case for his inability to be prepared for trial on the scheduled date.⁵⁷ In light of the testimony of the prosecution expert and the interrogating officer, Thomas' confession was also deemed voluntarily and intelligently made, in spite of his age, alleged developmental immaturity, and lack of sleep. The waiver of his *Miranda* rights was similarly deemed to be proper.⁵⁸ No error was committed, nor did prejudice occur, when the police failed to preserve marijuana found in a "baggie" in Thomas' room even though allegedly it was laced with PCP and had been smoked by the youth prior to the killings.⁵⁹

The court also concluded that, in capital cases involving juveniles being tried as adults, Virginia's capital murder statutes, Code sections 19.2-264.3 and -264.4, take precedence over section 16.1-272, thus requiring jury sentencing as provided by the former and not sentencing by the judge as mandated in the juvenile code.⁶⁰ The court upheld the death sentence based on the "vileness" predicate, and affirmed the death sentence without discuss-

54. 244 Va. 1, 419 S.E.2d 606 (1992).

55. *Id.* at 7-11, 419 S.E.2d at 609-12.

56. *Id.* at 8-10, 419 S.E.2d at 610-11.

57. *Id.* at 12-13, 419 S.E.2d at 612-13.

58. *Id.* at 14-16, 419 S.E.2d at 613-14.

59. *Id.* at 16-18, 419 S.E.2d at 614-16.

60. *Id.* at 21-23, 419 S.E.2d at 617-18.

ing whether the penalty is appropriate for a person who was a juvenile at the time of the offense.⁶¹ By permitting the execution of juveniles, Virginia is one of a minority of states in a nation that is joined at the present time only by Iraq and Iran in sanctioning the juvenile death penalty.⁶²

In *Duarte v. Commonwealth*,⁶³ the court of appeals upheld as valid a search of a student's dormitory room by private college officials because the search, and the consequent seizure of marijuana, were not under the direction of state officials.⁶⁴ Although Duarte was not a minor, the holding may be instructive in similar cases of searches involving juveniles.

In *Bassett v. Commonwealth*,⁶⁵ the court concluded that the trial court had considered the transferred juvenile defendant's age, mental deficiency, and low academic skills as mitigating factors prior to imposing the maximum sentences for second degree murder and use of a firearm in the commission of a felony.⁶⁶

The court of appeals, sitting en banc, ruled in *Lavinder v. Commonwealth*⁶⁷ that in cases involving non-constitutional error, the harmless error test to be applied is whether the verdict would have been the same had the error not occurred. The error in this case was the admission during cross-examination of the defendant's juvenile adjudications, a violation of the juvenile code's prohibitions against such practice. The court ruled that the error was not harmless in light of the closeness of the evidence in the case.⁶⁸

61. *Id.* at 24-25, 419 S.E.2d at 619-20.

62. *Stanford v. Kentucky*, 492 U.S. 361, 384-85 (1989) (Brennan, J., dissenting); Kenneth E. Gewerth & Clifford K. Dorne, *Imposing the Death Penalty on Juvenile Murderers: A Constitutional Assessment*, 75 JUDICATURE 6 (1991); AMNESTY INTERNATIONAL, CAN CHILDREN BE EXECUTED IN THE UNITED STATES? (1990). Since the Amnesty International flyer was issued, two other nations listed, Bangladesh and Barbados, have ratified the United Nations Convention on the Rights of the Child, which prohibits the death penalty for crimes committed by persons under the age of 18. Merrill Sobie, *Rights of the Child Charged with Violating the Law*, in CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW 315 (Cynthia Price Cohen & Howard A. Davidson eds., 1990).

63. 12 Va. App. 1023, 407 S.E.2d 41 (1991).

64. *Id.* at 1026-27, 407 S.E.2d at 42-43.

65. 13 Va. App. 580, 414 S.E.2d 419 (1992).

66. *Id.* at 583, 414 S.E.2d at 421.

67. 12 Va. App. 1003, 407 S.E.2d 910 (1991).

68. A panel of the court had already ruled that the admission of the juvenile adjudications was erroneous, and the Attorney General did not challenge this finding. *Id.* at 1007 n.2, 407 S.E.2d at 912 n.2; see *Lavinder v. Commonwealth*, 395 S.E.2d 211 (1990), noted in Rob-

In *Kluis v. Commonwealth*,⁶⁹ the court of appeals opined that the fact that a juvenile is emancipated cannot, standing alone, justify the transfer of the youth from the juvenile court to the circuit court for trial as an adult.⁷⁰ However, the facts in the case were sufficient to support the conclusions of the juvenile court and the circuit court that Kluis was not amenable to treatment as a juvenile.⁷¹

The Supreme Court of the United States ruled in *United States v. R.L.C.*⁷² that where the federal Juvenile Delinquency Act limits incarceration to the "maximum term that would be authorized" if the youth were sentenced as an adult, the proper reference is to the United States Sentencing Guidelines and not to the statutory maximum for the offense.⁷³ The United States Court of Appeals for the Fourth Circuit ruled in *United States v. Romulus*⁷⁴ that before a district court may transfer a juvenile for prosecution as an adult, the court must make findings on the record with respect to each factor that must be considered under the statute.⁷⁵

B. Legislation

Legislative changes enacted by the Virginia General Assembly at its 1992 session included specifying that no appeal bond need be filed to appeal a juvenile court judgment, except in support arrearage cases or for orders suspending payment of support during appeal.⁷⁶ Section 16.1-242 of the Code was amended to provide that a defendant who reaches the age of twenty-one without being prosecuted shall be tried as an adult, even though a juvenile when the

ert E. Shepherd, *Legal Issues Involving Children: Annual Survey of Virginia Law*, 25 U. RICH. L. REV. 773, 781 (1991).

69. 14 Va. App. ___, 418 S.E.2d 908 (1992).

70. *Id.* at ___, 418 S.E.2d at 909.

71. *Id.* at ___, 418 S.E.2d at 909.

72. 112 S.Ct. 1329 (1992).

73. *Id.* at 1338. See 18 U.S.C. § 5037(c)(1)(B) (1988) for the relevant provision in the Juvenile Delinquency Act.

74. 949 F.2d 713 (4th Cir. 1991).

75. *Id.* at 716; see 18 U.S.C. § 5032 (1988 & Supp. II 1990).

76. Act of Mar. 30, 1992, ch. 565, 1992 Va. Acts 726 (codified at VA. CODE ANN. § 16.1-107 (Cum. Supp. 1992)). This clarifies the question presented in *Casey v. Hopewell Dept. of Social Servs.*, 14 Va. App. 222, 415 S.E.2d 878 (1992), wherein the court of appeals concluded that an appeal bond was not required in an appeal from an order terminating parental rights.

offense was committed.⁷⁷ The Assembly also clarified the ability of juvenile and domestic relations district courts, and other courts, to transfer cases to the appropriate court with exclusive jurisdiction.⁷⁸ Other enactments further limit the circumstances under which a juvenile may be held temporarily in adult custody⁷⁹ and require that notice of a detention hearing, or a detention review hearing, must be given to the Commonwealth's Attorney.⁸⁰

Amendments to section 16.1-260 clarify that a juvenile court intake officer has unreviewable discretion to refuse a petition in cases alleging that a child is (1) in need of services, (2) in need of supervision, (3) a status offender, or (4) delinquent for committing a misdemeanor less than Class 1. This section has also been amended to provide that where a magistrate issues a warrant for a juvenile upon review of an intake decision not to file a petition in a Class 1 misdemeanor or felony situation, a petition must then be issued based on the warrant.⁸¹ The "abuse and lose" provision contained in the disposition section of the Code was amended once again to include the unlawful use or possession of a handgun, and public intoxication under a local ordinance, along with the previously included alcohol and drug offenses, as warranting a driver's license sanction.⁸² Fifteen-year-olds are now eligible for serious offender treatment under the juvenile code,⁸³ greater restrictions

77. Act of May 27, 1992, ch. 509, 1992 Va. Acts 645 (codified at VA. CODE ANN. § 16.1-242 (Cum. Supp. 1992)). Two problems may be presented here: where the prosecutor delays indictment until after the juvenile turns 21, and where a juvenile commits an offense prior to the effective date of the statute and is later prosecuted under the section after turning 21. In the latter situation, the decision of the Fourth Circuit Court of Appeals in *United States v. Juvenile Male*, 819 F.2d 468 (4th Cir. 1987), deeming such a change substantive and a violation of the Ex Post Facto Clause of U.S. CONST., art. I, § 9, cl. 3, would seem to be persuasive.

78. Act of Mar. 27, 1992, ch. 496, 1992 Va. Acts 636 (codified at VA. CODE ANN. § 16.1-245 (Cum. Supp. 1992)).

79. Acts of Apr. 5 & Apr. 15, 1992, chs. 728, 830, 1992 Va. Acts 1107, 1475 (codified at VA. CODE ANN. § 16.1-247 (Cum. Supp. 1992)).

80. Act of Mar. 27, 1992, ch. 508, 1992 Va. Acts 644 (codified at VA. CODE ANN. §§ 16.1-250, -250.1 (Cum. Supp. 1992)).

81. Acts of Mar. 27, Mar. 30, & Mar. 30, 1992, chs. 502, 527, & 542, 1992 Va. Acts 639, 669, 684 (codified at VA. CODE ANN. § 16.1-260 (Cum. Supp. 1992)).

82. Acts of Apr. 4, Apr. 5 & Apr. 15, 1992, chs. 701, 736, 830, 1992 Va. Acts 1061, 1115, 1475 (codified at VA. CODE ANN. § 16.1-278.9 (Cum. Supp. 1992)).

83. Act of Mar. 26, 1992, ch. 484, 1992 Va. Acts 617 (codified at VA. CODE ANN. § 16.1-285.1 (Cum. Supp. 1992)). The amendment is not as harsh as it initially seems. Since fifteen-year-olds were eligible for transfer to the adult court, but not for serious offender treatment prior to this General Assembly action, *see* VA. CODE ANN. § 16.1-285.1 (Repl. Vol. 1989), some of the younger offenders were allegedly transferred because of the lack of the stronger juvenile sanction.

were inserted to limit placement of youths in out-of-state facilities,⁸⁴ and section 16.1-291 was amended to clarify that a court has the power to modify the terms of probation, protective supervision, and parole orders rather than merely to revoke the status.⁸⁵ Other amendments to the juvenile code include giving the Virginia Workers' Compensation Commission access to juvenile disposition orders for evaluating whether to make an award for the victim of a crime⁸⁶ and the addition of a new Article 13.2 allowing the establishment of privately operated juvenile detention homes or other secure facilities.⁸⁷

Amendments to Titles 18.2 and 19.2 relevant to juveniles include expansion of prohibitions against false identification cards,⁸⁸ provisions allowing for the forfeiture of driver's licenses in drug cases,⁸⁹ further amendments strengthening the penalties for the distribution of drugs to minors,⁹⁰ expansion of the purposes for which a restricted driver's license may be issued to one convicted of driving while intoxicated to include travel to and from school,⁹¹ increasing the penalty for furnishing a handgun to a minor,⁹² and expansion of eligibility for placement in the Boot Camp Incarceration Program to include juveniles tried as adults by eliminating the minimum age of eighteen for such incarceration.⁹³

84. Act of Apr. 5, 1992, ch. 732, 1992 Va. Acts 1111 (codified at VA. CODE ANN. § 16.1-286 (Cum. Supp. 1992)).

85. Act of Mar. 2, 1992, ch. 90, 1992 Va. Acts 96 (codified at VA. CODE ANN. § 16.1-291 (Cum. Supp. 1992)).

86. Act of Mar. 30, 1992, ch. 547, 1992 Va. Acts 699 (codified at VA. CODE ANN. §§ 16.1-305, 19.2-368.3 (Cum. Supp. 1992)).

87. Act of Apr. 3, 1992, ch. 652, 1992 Va. Acts 958 (codified at VA. CODE ANN. §§ 16.1-322.5 through -322.7 (Cum. Supp. 1992)).

88. Act of Mar. 30, 1992, ch. 531, 1992 Va. Acts 672 (codified at VA. CODE ANN. §§ 18.2-204.2, 46.2-347 (Cum. Supp. 1992)).

89. Acts of Mar. & Apr. 15, 1992, chs. 58, 833, 1992 Va. Acts 56, 1493 (codified at VA. CODE ANN. §§ 18.2-251, -259.1, 46.2-390.1 (Cum. Supp. 1992)). A juvenile may not suffer a double forfeiture under both these sections and § 16.1-278.9. *Id.*

90. Acts of Apr. 4 & Apr. 5, 1992, chs. 708, 724, 1992 Va. Acts 1075, 1104 (codified at VA. CODE ANN. § 18.2-255 (Cum. Supp. 1992)).

91. Act of Mar. 30, 1992, ch. 559, 1992 Va. Acts 713 (codified at VA. CODE ANN. § 18.2-271.1 (Cum. Supp. 1992)).

92. Act of Mar. 26, 1992, ch. 487, 1992 Va. Acts 618 (codified at VA. CODE ANN. § 18.2-309 (Cum. Supp. 1992)).

93. Act of Apr. 15, 1992, ch. 861, 1992 Va. Acts 1625 (codified at VA. CODE ANN. § 19.2-316.1 (Cum. Supp. 1992)).

VI. ABUSE AND NEGLECT, FOSTER CARE, AND TERMINATION OF PARENTAL RIGHTS

A. *Abuse and Neglect*

1. Decisions

The most significant legal development in the area of child abuse and neglect was the decision of the court of appeals in *Jackson v. W.*⁹⁴ reversing a circuit court judgment declaring the Department of Social Services' child abuse and neglect guidelines to be unconstitutional. The court of appeals concluded that the Commissioner of the Department had the authority to issue "guidelines" that did not rise to the level of "regulations," which would require a more formal adoption process, and that the definitions of emotional abuse and mental injury in those guidelines were not unconstitutionally vague or overbroad.⁹⁵ The court also found that the procedures used to determine if a complaint of child abuse or neglect was "founded" complied with the requirements of administrative due process.⁹⁶

In *Turner v. Jackson*,⁹⁷ the court likewise upheld an administrative determination, sustained by a court on review, that a child abuse complaint was "founded." The court concluded that the statutory and guideline definitions of "physical abuse" were not unconstitutionally vague, and that the procedures for challenging determinations of abuse comply with due process and use the proper standards of proof.⁹⁸ In *Aquino v. Stone*⁹⁹ the United States Court of Appeals for the Fourth Circuit similarly refused to order the Secretary of the Army to amend records of a criminal investigation of an Army officer's suspected child sexual abuse.

In *White v. Illinois*,¹⁰⁰ the United States Supreme Court again addressed the requirements of the confrontation clause of the Sixth Amendment in the context of a criminal prosecution for child abuse. The statements by a four-year-old sexual assault victim to her babysitter, her mother, an investigating police officer, an emergency room nurse, and a doctor, all of which were admissible

94. 14 Va. App. ___, 419 S.E.2d 385 (1992).

95. *Id.* at ___, 419 S.E.2d at 389-93.

96. *Id.* at ___, 419 S.E.2d at 393-96.

97. 14 Va. App. ___, 417 S.E.2d 881 (1992).

98. *Id.* at ___, 417 S.E.2d at 889-90.

99. 957 F.2d 139 (4th Cir. 1992).

100. 112 S. Ct. 736 (1992).

under state law hearsay exceptions as spontaneous declarations or as statements in the course of medical treatment, could be admitted through those persons as witnesses even though the government did not produce the victim at trial or prove that she was "unavailable."¹⁰¹

The childhood sexual abuse statute enacted in 1991 by the General Assembly did not fare well in the courts during the year since its passage.¹⁰² The Virginia Supreme Court concluded in *Starnes v. Cayouette*¹⁰³ that the provision permitting retroactive revival of civil sexual abuse claims that had been barred by the prior statute of limitations was unconstitutional as a denial of due process.¹⁰⁴ In *Foreign Mission Board v. Wade*,¹⁰⁵ the court reversed a judgment against the Board in favor of the wife and child of a foreign missionary for the missionary's sexual abuse of his daughter, and other daughters, based on an alleged oral contract with the Board by which it agreed to protect the family from harm. This agreement did not create a contractual duty to protect the wife and daughters from illegal acts by the father-employee.¹⁰⁶

In *Jacobson v. United States*,¹⁰⁷ the United States Supreme Court held that the prosecution did not establish that the defendant was predisposed, prior to the first contact by the government, to commit the offense of securing child pornography through the mail, and the actions of government agents thus amounted to entrapment.

Three cases involving illegal sexual acts with minors were decided by the Virginia Court of Appeals during the past year. In *Clark v. Commonwealth*,¹⁰⁸ the court concluded that the defendant teacher's supervisory authority over the student-victim was not sufficient to supply the necessary intimidation to sustain a convic-

101. *Id.* at 743. See the discussions of *Idaho v. Wright*, 497 U.S. 805 (1990), and *Maryland v. Craig* 497 U.S. 836 (1990), in Robert E. Shepherd, Jr., *Legal Issues Involving Children: Annual Survey of Virginia Law*, 24 U. RICH. L. REV. 629, 631-33 (1990).

102. VA. CODE ANN. § 8.01-249 (Cum. Supp. 1992). See the discussion of the statute in Robert E. Shepherd, Jr., *Legal Issues Involving Children: Annual Survey of Virginia Law*, 25 U. RICH. L. REV. 773, 776-77 (1991).

103. 244 Va. 202, 419 S.E.2d 669 (1992).

104. *Id.* at 205-13, 419 S.E.2d at 671-75.

105. 242 Va. 234, 409 S.E.2d 144 (1991).

106. *Id.* at 240, 409 S.E.2d at 147.

107. 112 S. Ct. 1535 (1992).

108. 12 Va. App. 1163, 408 S.E.2d 564 (1991).

tion of sexual battery.¹⁰⁹ In *Corvin v. Commonwealth*,¹¹⁰ the juvenile victim of forcible sodomy failed to report the incident for fourteen months. The court held that the delay did not render his testimony inherently incredible where the defendant was a juvenile probation officer who allegedly threatened the youth with detention unless he engaged in the sexual acts before he took him home.¹¹¹ Finally, in *Nuckoles v. Commonwealth*,¹¹² the court ruled that the trial court had the authority to impose a period of incarceration as a condition of suspending defendant's five-year penitentiary sentence for taking indecent liberties with a minor.¹¹³

In *Archie v. Commonwealth*,¹¹⁴ the court of appeals affirmed the conviction of a father's live-in girlfriend for the first degree murder of a three-year-old girl. The evidence was circumstantial; Archie was with the child when the fatal injuries occurred, and the injuries involved considerable physical force inconsistent with the explanations she offered. However, there was a size disparity inherent in the difference between an adult woman and a three-year-old girl, there was no remorse on the part of the assailant, and there were considerable factors giving rise to a motive for the killing.¹¹⁵

2. Legislation

Legislation enacted in 1992 amended the juvenile code to include a broadened jurisdictional category of "family abuse," which includes abuse against not only spouses, former spouses, parents, children, and others generally included in the previous law, but also in-laws, persons with whom the victim has a child in common, and cohabiters.¹¹⁶ The legislation also gives a magistrate, as well as a judge, the power to enter an order of protection in family abuse cases, and makes a history of family abuse a factor in child custody and visitation cases.¹¹⁷ The Assembly also amended the statute requiring a person charged with sexual assault or child molestation

109. *Id.* at 1166, 408 S.E.2d at 566.

110. 13 Va. App. 296, 411 S.E.2d 235 (1991).

111. *Id.* at 299, 411 S.E.2d at 237.

112. 12 Va. App. 1083, 407 S.E.2d 355 (1991).

113. *Id.* at 1087, 407 S.E.2d at 357.

114. 14 Va. App. —, 420 S.E.2d 718 (1992).

115. *Id.* at —, 420 S.E.2d at 721-22.

116. Acts of Apr. 5 & Apr. 15, 1992, chs. 742, 886, 1992 Va. Acts 1129, 1664 (codified at VA. CODE ANN. §§ 15.1-138, 16.1-228, -241, -253.1, -253.2, -253.4, -278.14, -278.15, -279.1, 18.2-57.2, 19.2-81.3, 20-107.2 (Cum. Supp. 1992)).

117. VA. CODE ANN. §§ 16.1-253.4, 20-107.2 (Cum. Supp. 1992).

to undergo HIV testing, in order to clarify the procedures,¹¹⁸ and enacted new statutes and amended others to proscribe purchase and possession of child pornography, and the use of electronic communications systems to facilitate child pornography.¹¹⁹

An amendment also expanded the possible composition of multi-discipline child protection teams by providing that the professions listed should be included on the team, if practicable, but membership need not be limited to those disciplines.¹²⁰ Section 63.1-248.9 of the Code was amended to provide that if the seventy-two hour period for holding an abused or neglected child in emergency custody expires on a weekend or legal holiday, the period may be extended to the next work day, but not beyond ninety-six hours.¹²¹ New legislation provides that a parent who deserts or abandons a child will not be permitted to inherit from that child unless the period of desertion or abandonment is terminated and the parental relationship and duties resume until the child's death.¹²² The legislature also mandated the establishment of services for substance-abusing pregnant women in a variety of state agencies and settings in order to enhance the health and future of children exposed to illegal substances prior to birth.¹²³ The child restraint laws were broadened to apply to all motor vehicles using Virginia highways and to increase the civil penalty for violation.¹²⁴

B. *Foster Care and Termination of Residual Parental Rights*

1. Decisions

The most significant development of the past year in the area of permanency planning for children removed from their homes was

118. Acts of Mar. 27 & Mar. 31, 1992, chs. 500, 587, 1992 Va. Acts 638, 798 (codified at VA. CODE ANN. § 18.2-62 (Cum. Supp. 1992)).

119. Acts of Mar. 10, Apr. 5 & Apr. 4, 1992, chs. 234, 745, 699, 1992 Va. Acts 295, 1137, 1058 (codified at VA. CODE ANN. §§ 18.2-374.1, -374.1:1, -374.3 (Cum. Supp. 1992)).

120. Act of Mar. 5, 1992, ch. 214, 1992 Va. Acts 273 (codified at VA. CODE ANN. § 63.1-248.6 (Cum. Supp. 1992)).

121. Act of Apr. 3, 1992, ch. 688, 1992 Va. Acts 1012 (codified at VA. CODE ANN. § 63.1-248.9 (Cum. Supp. 1992)).

122. Act of Apr. 6, 1992, ch. 795, 1992 Va. Acts 1259 (codified at VA. CODE ANN. § 64.1-16.3 (Cum. Supp. 1992)).

123. Act of Mar. 23, 1992, ch. 428, 1992 Va. Acts 548 (codified at VA. CODE ANN. §§ 2.1-51.17:1, 32.1-127, 37.1-182.1, 54.1-2403.1 (Cum. Supp. 1992)).

124. Acts of Mar. 3 & Mar. 23, 1992, chs. 119, 405, 1992 Va. Acts 131, 511 (codified at VA. CODE ANN. §§ 46.2-1095, -1098, -1099 (Cum. Supp. 1992)).

the United States Supreme Court decision in *Suter v. Artist M.*¹²⁵ The Court ruled that the “reasonable efforts” language of the Adoption Assistance and Child Welfare Act¹²⁶ cannot be enforced by private individuals through class action lawsuits. The legislation in question, a major weapon in the effort to discourage long-term placements of children in foster care and to facilitate permanency planning for those children, requires state and local child welfare agencies to use “reasonable efforts” to prevent removal of children from their homes and to return them to their parents if they have been removed.¹²⁷ The Court concluded that enforcement of this mandate rested with the Secretary of Health and Human Services, and not with individuals or groups through private litigation.¹²⁸

An unusual number of Virginia cases involved a critical aspect of this “reasonable efforts” requirement — the termination of residual parental rights as a means of providing greater permanency for children. In *Helen W. v. Fairfax County Department of Human Development*,¹²⁹ the court of appeals affirmed the termination of residual parental rights for a couple who failed to comply with several court orders relative to their care of their multiply-handicapped daughter, whose visits with the child were full of conflict and left her agitated and suicidal, who did not follow the visitation time schedules, and whose paranoid personality disorders made it very difficult for them to care for their daughter properly.¹³⁰ Likewise, in *Jenkins v. Winchester Department of Social Services*,¹³¹ the court affirmed the trial court’s determination that a mother’s mental retardation prevented her from adequately caring for and rearing her children and that the termination of her rights to older children were relevant to the decision in this case.¹³² The court of appeals decided that the termination of parental rights in *Ward v. Commonwealth of Virginia Department of Social Services for Alexandria*¹³³ was supported by the evidence

125. 112 S. Ct. 1360 (1992).

126. 42 U.S.C. § 671(a)(15) (1988).

127. *Id.*

128. *Artist M.*, 112 S. Ct. at 1370.

129. 12 Va. App. 877, 407 S.E.2d 25 (1991).

130. *Id.* at 884-85, 407 S.E.2d at 29-30.

131. 12 Va. App. 1178, 409 S.E.2d 16 (1991).

132. *Id.* at 1183, 1186, 409 S.E.2d at 19, 21.

133. 13 Va. App. 144, 408 S.E.2d 921 (1991).

where the mother was addicted to narcotics and unable to care properly for her son.¹³⁴

In *Logan v. Fairfax County Department of Human Development*,¹³⁵ the court concluded that the family court gave adequate consideration to the possibility of placing the child with his grandmother rather than giving custody to the Department, and again ruled that patterns of behavior with other children were relevant to the termination decision.¹³⁶ In *Cage v. Harrisonburg Department of Social Services*,¹³⁷ termination of parental rights was appropriate following the mother's earlier voluntary entrustment of the children to social services where there was no effort to remedy the problems.¹³⁸ The court also decided that the trial court correctly refused to consider an "open adoption" approach following termination, which would still allow contacts and visitation, because such an approach is not contemplated by the statute.¹³⁹

At least one circuit court in the past year has addressed the standing of foster parents to seek legal custody of a child in their physical custody pursuant to placement by a local department of social services, where the agency attempted to remove the child from the foster parent. In the case of *In re Michael Drayton*,¹⁴⁰ the court held that the foster parent had no standing, but this decision appears to fly squarely in the face of Code section 16.1-241(A), especially that portion which says that "the authority of the juvenile court to consider a petition involving the custody of a child shall not be proscribed or limited where the child has previously been awarded to the custody of a local board of social services."¹⁴¹

134. *Id.* at 149, 408 S.E.2d at 924. The court also found that it had jurisdiction over the appeal because of the participation of the Alexandria Juvenile and Domestic Relations District Court in the Family Court Pilot Project, thus giving the court appellate jurisdiction pursuant to VA. CODE ANN. §§ 16.1-296.1, 17-116.05 and 17-116.05:5 (Cum. Supp. 1992). *Ward*, 13 Va. App. at 146, 408 S.E.2d at 922.

135. 13 Va. App. 123, 409 S.E.2d 460 (1991).

136. *Id.* at 132, 409 S.E.2d at 465.

137. 13 Va. App. 246, 410 S.E.2d 405 (1991).

138. *Id.* at 248, 410 S.E.2d at 406.

139. *Id.* at 249-50, 410 S.E.2d at 406-07.

140. Juvenile Appeal No. CJ-90-1097 (Arlington County Cir. Ct. June 4, 1991).

141. VA. CODE ANN. § 16.1-241(A)(b) (Cum. Supp. 1992). Amendments to the Code in 1992 indicate that the term "legitimate interest" as used in § 20-107.2 is to "be construed broadly to accommodate the best interests of the child." Act of Mar. 31, 1992, ch. 585, 1992 Va. Acts 784 (codified at VA. CODE ANN. § 20-107.2 (Cum. Supp. 1992)); *cf.* *Kogon v. Ulerick*, 12 Va. App. 595, 504 S.E.2d 441 (1991).

2. Legislation

An amendment to section 16.1-282 requires a local social services board or agency to initiate a petition to (1) return a foster child to his home, (2) transfer custody to a relative, (3) place the child in permanent foster care, (4) terminate parental rights, (5) or keep custody with the board or agency, if no final action has been taken within twenty-four months of placement, and the board or agency is placed under a stricter mandate to engage in permanency planning.¹⁴² The Commissioner of Social Services is also directed to establish an advocacy project to assist general relief recipients and children in foster care to apply for federal Supplemental Security Income (SSI) benefits.¹⁴³

VII. CHILD CUSTODY AND VISITATION

A. Decisions

In *Wilson v. Wilson*,¹⁴⁴ the court of appeals concluded that the trial court erred (1) in granting the father joint custody and liberal unsupervised visitation, despite concluding that many of the father's parenting practices were inappropriate and had continued despite court orders to the contrary,¹⁴⁵ and (2) in ordering that the father would become primary custodian if the mother ever moved out of the state.¹⁴⁶ Any decision regarding future out-of-state moves must be based on the best interests of the child at the time of the move.¹⁴⁷ In another case, *Hur v. Virginia Department of Social Services*,¹⁴⁸ the court ruled that an oral request for visitation during a child support proceeding, unaccompanied by a petition for visitation, does not properly give notice to the other parent or place the issue before the trial court.¹⁴⁹ The court also concluded in *Sutherland v. Sutherland*¹⁵⁰ that the fact that a mother

142. Act of Apr. 15, 1992, ch. 869, 1992 Va. Acts 1631 (codified at VA. CODE ANN. § 16.1-282 (Cum. Supp. 1992)).

143. Act of Mar. 24, 1992, ch. 170, 1992 Va. Acts 224 (codified at VA. CODE ANN. § 63.1-89.1 (Cum. Supp. 1992)).

144. 12 Va. App. 1251, 408 S.E.2d 576 (1991).

145. *Id.* at 1252, 408 S.E.2d at 578.

146. *Id.* at 1255, 408 S.E.2d at 579.

147. *Id.* at 1256, 408 S.E.2d at 579.

148. 13 Va. App. 54, 409 S.E.2d 454 (1991).

149. *Id.* at 62-63, 409 S.E.2d at 459-60.

150. 14 Va. App. 42, 414 S.E.2d 617 (1992).

lived in an adulterous relationship with another man does not automatically disqualify her from custody of her child.¹⁵¹

B. Legislation

The General Assembly amended three sections of the Code to broaden the categories of persons who may be considered for custody and visitation, and to further emphasize that the focus is on the best interests of the child.¹⁵² The legislature also clarified the ability of agencies to charge fees for services rendered in connection with custody, visitation, and support cases, including mediation services.¹⁵³

VIII. ADOPTION

The court of appeals ruled in *Carlton v. Paxton*¹⁵⁴ that the statutes providing for order of publication must be strictly adhered to and in the absence of evidence of such adherence, an order of adoption should have been vacated.¹⁵⁵ Legislative action included amending section 63.1-220.3 of the Code to correct the reference to the new disposition sections of the juvenile code,¹⁵⁶ and several amendments to sections dealing with out-of-state placements and requests for non-identifying adoption information.¹⁵⁷

151. *Id.* at 43, 414 S.E.2d at 618. The court refused the invitation to pass on the continued vitality of *Brown v. Brown*, 218 Va. 196, 237 S.E.2d 89 (1977), which appeared to place great emphasis on the influence of such adultery to child custody decisions. *Brown* does not establish a per se rule; the supreme court also considered other factors highly relevant to the best interests of the child. *Sutherland*, 14 Va. App. at 43, 414 S.E.2d at 618.

152. Act of Mar. 31, 1992, ch. 585, 1992 Va. Acts 784 (codified at VA. CODE ANN. §§ 16.1-241, -278.15, 20-107.2 (Cum. Supp. 1992)).

153. Act of Mar. 30, 1992, ch. 554, 1992 Va. Acts 708 (codified at VA. CODE ANN. § 16.1-274 (Cum. Supp. 1992)).

154. 14 Va. App. 105, 415 S.E.2d 600 (1992).

155. *Id.* at 113, 415 S.E.2d at 604.

156. Act of Mar. 3, 1992, ch. 125, 1992 Va. Acts 137 (codified at VA. CODE ANN. § 63.1-220.3 (Cum. Supp. 1992)).

157. Act of Apr. 1, 1992, ch. 607, 1992 Va. Acts 873 (codified at VA. CODE ANN. §§ 63.1-223, -226, -228, -229, -231, -236 (Cum. Supp. 1992)). The act repealed VA. CODE ANN. § 63.1-228.1.

IX. PATERNITY AND ILLEGITIMACY

A. *Decisions*

In *Shelton v. Shelton*,¹⁵⁸ the court of appeals concluded that a child was not barred from obtaining support from her biological father merely because the mother's former husband had been deemed to be her father in a divorce action as neither she nor the biological father were parties in that proceeding.¹⁵⁹ In *Batrouny v. Batrouny*,¹⁶⁰ the court affirmed the circuit court's decision to set aside a divorce decree where the wife fraudulently misrepresented that the husband was the father of her first child.¹⁶¹ The court ruled in *Zubricki v. Motter*¹⁶² that a trial court must consider a father's support requirements for legitimate children in fixing the amount of support the father owed to his two additional children born to another woman to whom he was not married, even though there was no current court order regarding support.¹⁶³ In *Aviles v. Aviles*,¹⁶⁴ the court determined that a former husband could not set aside a divorce decree that adjudged him to be the father of a child born during the marriage, where he had filed the proceeding and alleged the child to be his, and where he did not establish by clear and convincing evidence that the wife had committed fraud on the court.¹⁶⁵

B. *Legislation*

The 1992 General Assembly expanded the means for determining parentage to include "scientifically reliable genetic tests, including blood tests,"¹⁶⁶ and determined that paternity proceedings might be brought against a prisoner without requiring appointment of a committee.¹⁶⁷

158. 12 Va. App. 859, 406 S.E.2d 421 (1991).

159. *Id.* at 861, 406 S.E.2d at 422.

160. 13 Va. App. 441, 412 S.E.2d 721 (1991).

161. *Id.* at 443, 412 S.E.2d at 723.

162. 12 Va. App. 999, 406 S.E.2d 672 (1991).

163. *Id.* at 1001, 406 S.E.2d at 672 (1991).

164. ___ Va. App. ___, 416 S.E.2d 716 (1992).

165. *Id.* at ___, 416 S.E.2d at 719.

166. Act of Mar. 30, 1992, ch. 516, 1992 Va. Acts 660 (codified at VA. CODE ANN. §§ 20-49.1 to -49.4 (Cum. Supp. 1992)).

167. Act of Mar. 20, 1992, ch. 398, 1992 Va. Acts 507 (codified at VA. CODE ANN. § 53.1-223 (Cum. Supp. 1992)).

X. CHILD SUPPORT

A. *Decisions*

In *Alexander v. Alexander*,¹⁶⁸ the court concluded once again that a trial court must go through the statutory guidelines to determine the presumptive amount of support before considering other factors, including the parties' written separation agreement.¹⁶⁹ Likewise, in *Scott v. Scott*,¹⁷⁰ the court ruled that a separation agreement between divorcing parents could not divest a court of its power to set child support, although the judge may use the guidelines to establish the presumptive amount of support and then look at the agreement to deviate from the guidelines if justified by guideline factors.¹⁷¹ In *Watkinson v. Henley*,¹⁷² it was determined that the judge must take the child support provided in the divorce decree into account when determining whether to modify support downward. The process in such a case for modification should be to determine whether the statutorily presumptive amount would be unjust or inappropriate.¹⁷³ Similarly, in *Kelley v. Kelley*,¹⁷⁴ a property settlement agreement in which the wife waived the right to child support and agreed to repay her husband for any amounts ordered in exchange for a property transfer was held unenforceable as against public policy.¹⁷⁵

In *Milligan v. Milligan*,¹⁷⁶ the court concluded that a trial court erred by requiring the wife to show a material change in circumstances since the prior award even though she demonstrated a wide variance between the support being paid and the guideline amount in Virginia Code section 20-108.2. There is no need to prove a change in circumstances as a condition precedent to review of a previous award in light of the support guidelines, even where that

168. 12 Va. App. 691, 406 S.E.2d 666 (1991).

169. *Id.* at 695, 406 S.E.2d at 668. The court also concluded that the trial court did not err in refusing to hold the father in contempt although he had paid no child support since May, 1989, where he had been the sole support of the children living with him, and where he had made payments into an escrow account controlled by his attorney since the filing of the show cause motion. *Id.* at 696, 406 S.E.2d at 669.

170. 12 Va. App. 1245, 408 S.E.2d 579 (1991).

171. *Id.* at 1249, 408 S.E.2d at 582.

172. 13 Va. App. 151, 409 S.E.2d 470 (1991).

173. *Id.* at 158, 409 S.E.2d at 474.

174. 13 Va. App. 424, 412 S.E.2d 465 (1991), *reh'g granted*, Jan. 27, 1992.

175. *Id.* at 426-27, 412 S.E.2d at 466.

176. 12 Va. App. 982, 407 S.E.2d 702 (1991).

award preceded the effective date of the guidelines.¹⁷⁷ In *Buchanan v. Buchanan*,¹⁷⁸ reversible error was committed by the trial court in deviating from the presumptive amount in the child support guidelines without making written findings to explain the deviation and why the guidelines were deemed unjust or inappropriate.¹⁷⁹ Child support guidelines cannot be retroactively applied to determine a father's debt for past public assistance paid for benefit of the child accruing before guidelines were in effect, according to *Morris v. Commonwealth of Virginia Department of Social Services*.¹⁸⁰ Likewise, the court decided in *Powers v. Commonwealth of Virginia Department of Social Services*¹⁸¹ that a divorce decree could not limit a parent's legal responsibility for public assistance paid on behalf of a child.

In *Antonelli v. Antonelli*,¹⁸² the Virginia Supreme Court reversed the court of appeals and ruled the trial court did not err in denying the husband's petition for a reduction in child support based on a career change that lowered his income. The trial court denied the petition solely because of a determination that the change was "voluntary."¹⁸³ The trial court applied the proper standard of proof in holding, at least implicitly, that the risk of success of the career move must be on the father and not on the children.¹⁸⁴ Similarly, in *Hur v. Virginia Department of Social Services*,¹⁸⁵ the trial court properly imputed higher income to an under-employed father who was engaged in a lackluster college career with no concrete plans for future employment.

In *Sutherland v. Sutherland*,¹⁸⁶ it was decided that a trial court need not consider the wife's interest in recently inherited real estate in fixing child support in the absence of proof of any income

177. *Id.* at 988, 407 S.E.2d at 705.

178. 14 Va. App. 53, 415 S.E.2d 237 (1992).

179. *Id.* at 56-57, 415 S.E.2d at 239.

180. 13 Va. App. 77, 84-85, 408 S.E.2d 588, 593 (1991). The court also said that the doctrine of laches may not be set up against the Commonwealth acting in its official capacity, and that giving a person notice and an opportunity to be heard prior to final adjudication of indebtedness for past public assistance satisfies the requirements of due process. *Id.* at 84, 408 S.E.2d at 592-93.

181. 13 Va. App. 309, 411 S.E.2d 230 (1991).

182. 242 Va. 152, 409 S.E.2d 117 (1991).

183. *Id.* at 154, 409 S.E.2d at 118.

184. *Id.* at 156, 409 S.E.2d at 119-20.

185. 13 Va. App. 54, 409 S.E.2d 454 (1991).

186. 14 Va. App. 42, 414 S.E.2d 617 (1992).

from that source.¹⁸⁷ A trial court properly treated a home equity credit line drawn on by the wife for a child's educational expenses as a lien on the property to be paid by both parties in the case of *Amburn v. Amburn*.¹⁸⁸ The court of appeals concluded, in *Zubricki v. Motter*,¹⁸⁹ that a court must consider a father's support obligations to his legitimate children in fixing a support award for children born out of wedlock.¹⁹⁰ The court also found that the trial court erred in imputing income to the father based on unauthenticated wage statements, as such statements are inadmissible hearsay.¹⁹¹

B. Legislation

The General Assembly enacted legislation specifying that no person may be required to obtain child support services from social services as a condition to filing a juvenile court petition,¹⁹² amended the child support guidelines to include higher monthly incomes and to exclude SSI benefits from gross income and address out-of-state obligors,¹⁹³ provided that the guidelines create a rebuttable presumption of the correct amount of child support and requiring the department to make written findings to rebut the presumptions,¹⁹⁴ applied the child support guidelines to split or shared custody cases based on a formula,¹⁹⁵ and dealt with the pro-ration of child support payments among several obligees.¹⁹⁶

187. *Id.* at 44, 414 S.E.2d at 619.

188. 13 Va. App. 661, 666, 414 S.E.2d 847, 850 (1992).

189. 12 Va. App. 999, 406 S.E.2d 672 (1991).

190. *Id.* at 1001, 406 S.E.2d at 672.

191. *Id.* at 1001-02, 406 S.E.2d at 673-74.

192. Act of Mar. 30, 1992, ch. 527, 1992 Va. Acts 669 (codified at VA. CODE ANN. §§ 16.1-260, 63.1-250.2 (Cum. Supp. 1992)).

193. Act of Apr. 4, 1992, ch. 716, 1992 Va. Acts 1085 (codified at §§ 16.1-278.15, 20-107.2, -108.1, -108.2, 34-34, 51.1-102, 51.1-802, 63.1-250.1, -251, -256, -270 (Cum. Supp. 1992)).

194. Act of Mar. 2, 1992, ch. 79, 1992 Va. Acts 79 (codified at §§ 20-108.2, 63.1-264.2 (Cum. Supp. 1992)).

195. Act of Apr. 4, 1992, ch. 716, 1992 Va. Acts 1085 (codified at §§ 20-108.1, -108.2 (Cum. Supp. 1992)).

196. Act of Mar. 5, 1992, ch. 199, 1992 Va. Acts 256 (codified at §§ 20-60.3, 63.1-251.2 (Cum. Supp. 1992)).

XI. EDUCATION

A. *Decisions*

Once again, most of the decided cases in the field of education involved the schooling of handicapped children. An exception was the Supreme Court decision in the case of *Franklin v. Gwinnett County Public Schools*,¹⁹⁷ which concluded that a damages remedy was available¹⁹⁸ in an action to enforce Title IX of the Education Amendments of 1972.¹⁹⁹ In a special education case, *School Board of County of York v. Nicely*,²⁰⁰ the Virginia Court of Appeals ruled that the one-year "catch-all" limitations period for personal actions, rather than the Administrative Process Act's thirty-day limitation, applies to a special education appeal from a school board's action.²⁰¹ The Fourth Circuit Court of Appeals ruled that annual grade promotion is not the proper gauge for attainment of a "free appropriate public education" although Maryland law may establish a higher floor for the level of educational services to handicapped children,²⁰² and the same court concluded that a teacher with a learning disability may be "otherwise qualified" for the position of a school teacher under section 504 of the Rehabilitation Act with regard to her difficulty in passing the National Teachers Examination.²⁰³ In *Doyle v. Arlington County School Board*,²⁰⁴ the court ruled that district courts should give greater deference to the factual findings of a state administrative hearing officer than to those reached by the state reviewing officer, and in *Carter v. Florence County School District Four*,²⁰⁵ the court determined that the unaccredited status of a private school for handicapped students is not a bar to reimbursement of parents of such a student under the Individuals with Disabilities Education Act.²⁰⁶

197. 112 S. Ct. 1028 (1992).

198. *Id.* at 1035-37.

199. 20 U.S.C. §§ 1681-1688 (1988). Although the case involved sexual abuse by a teacher, the decision is likely to have its greatest effect in the gender discrimination area, especially for women's sports.

200. 12 Va. App. 1051, 408 S.E.2d 545 (1991).

201. *Id.* at 1061, 408 S.E.2d at 550.

202. *In re Conklin*, 946 F.2d 306 (4th Cir. 1991).

203. *Pandazides v. Virginia Board of Education*, 946 F.2d 345 (4th Cir. 1991).

204. 953 F.2d 100 (4th Cir. 1991).

205. 950 F.2d 156 (4th Cir. 1991).

206. 20 U.S.C. §§ 1400 -1485 (1988 & Supp. II 1990).

B. Legislation

The General Assembly again strengthened the laws dealing with weapons and "beepers" on school property,²⁰⁷ allowed broader access to criminal history record information for use by school boards in screening potential employees,²⁰⁸ and authorized the popular election of local school boards pursuant to a local referendum.²⁰⁹

XII. MENTAL HEALTH

Little action took place in the mental health arena, although the General Assembly deleted the special confidentiality provisions governing juvenile mental commitments,²¹⁰ and allowed emergency commitment hearings to be held on the next court business day if the seventy-two hour period expires on a weekend or holiday, with no extension beyond ninety-six hours.²¹¹

XIII. MISCELLANEOUS

The Virginia Birth-Related Neurological Injury Compensation Program was ruled to be constitutional by the Virginia Supreme Court in *King v. Virginia Birth-Related Neurological Injury Compensation Program*.²¹²

207. Act of Apr. 5, 1992, ch. 738, 1992 Va. Acts 1126 (codified at VA. CODE ANN. §§ 18.2-279, -280, -282, -308.1, -322.1 (Cum. Supp. 1992)).

208. Act of Apr. 4, 1992, ch. 718, 1992 Va. Acts 1100 (codified at § 19.2-389 (Cum. Supp. 1992)).

209. Act of Apr. 1, 1992, ch. 594, 1992 Va. Acts 852 (codified at VA. CODE ANN. §§ 22.1-57.1 through -57.5 (Cum. Supp. 1992)).

210. Act of Mar. 30, 1992, ch. 539, 1992 Va. Acts 679 (codified at VA. CODE ANN. §§ 16.1-337, -341, -344, and -345 (Cum. Supp. 1992)).

211. Act of Apr. 15, 1992, ch. 884, 1992 Va. Acts 1661 (codified at VA. CODE ANN. § 16.1-340 (Cum. Supp. 1992)).

212. 242 Va. 404, 410 S.E.2d 656 (1991).