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# Annual Survey of Virginia Law: Legal Issues Involving Children

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# LEGAL ISSUES INVOLVING CHILDREN

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## I. JUVENILE DELINQUENCY AND STATUS OFFENSES

The most notable development this past year in the area of juvenile delinquency and noncriminal misbehavior was the passage by the Virginia General Assembly of legislation modifying the state's response to status offenses committed by children.[1] Ever since the adoption of the revised juvenile code in 1977 there have been efforts at practically every session of the Assembly to modify the provisions which prohibit the commitment of status offenders to secure institutions, but the efforts were not successful. However, the 1987 bill met with little resistance in the legislature.[2] The 1987 legislation, effective July 1, 1988, does two very significant things: first, it redefines the "Child in Need of Services" (CHINS) category and creates a new "Child in Need of Supervision" label and, second, it allows the use of a physically secure detention facility for incarceration of juveniles for up to a maximum of thirty days for violating court orders issued pursuant to an initial adjudication.[3]

Since 1977, the Virginia philosophy has been to offer and provide services to children engaged in non-criminal misbehavior outside a correctional setting.[4] Many judges and juvenile probation officers have urged that it is difficult to get youths to participate in such services, where available, without some leverage on the part of the court to "hold over the juvenile's head." The 1987 legislation represents an effort to address that concern. The CHINS category has been narrowed to include the "child whose behavior, conduct or condition presents or results in a serious threat to the well-being

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1. Status offenses are acts that would not be criminal if committed by an adult. For example, in Virginia such activities as habitually running away from home, truancy from school, disobeying parental commands or violating local curfew ordinances expose a child to being treated as a "Child in Need of Services." VA. CODE ANN. § 16.1-228 (Cum. Supp. 1987).

2. H. 1219, 1987 Virginia General Assembly.

3. VA. CODE ANN. §§ 16.1-228, -292(E) (Cum. Supp. 1987).

4. VIRGINIA ADVISORY LEGISLATIVE COUNCIL, SERVICES TO YOUTHFUL OFFENDERS: REVISION OF THE JUVENILE CODE 12-13, REPORT TO THE GEN. ASSEMBLY OF 1976, S. DOC. NO. 19.

and physical safety of the child . . .,"[5] while the new "Child in Need of Supervision" appellation applies to the habitual truant or habitual runaway.[6] The dispositional alternatives pursuant to the new legislation are not significantly different than those which existed previously, but if the child is fourteen years of age or older and "willfully and materially" disobeys the court's order of disposition, the child may be detained in a secure facility for a period of no more than ten days.[7] Subsequent violations of the order may result in an additional twenty days in detention, with no more than thirty days incarceration resulting from the same petition.[8]

Despite the overwhelming legislative support for this proposal, it was by no means uncontroversial. The opposition caused the chief patron to put the effective date off until July 1, 1988, and a joint legislative study committee will be addressing the total issue of CHINS in Virginia prior to the 1988 session of the General Assembly.[9] That study will have to confront the issues of the effects of "labeling" troubled young people as CHINS, the incarceration of status offenders in institutions with delinquent youths (even though the legislation mandates separation of the two), the problem of the disparate treatment of male and female status offenders prior to the 1977 code revision, and the difficult question of whether society is penalizing troubled youth who come from even more troubled families because of a paucity of services to assist them in making a healthy adjustment to adolescence.[10]

A difficult question was raised by the prosecution of a young man in Frederick County who was a juvenile at the time he allegedly committed capital murder and robbery but who reached his

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5. VA. CODE ANN. § 16.1-228 (Cum. Supp. 1987); *see* Shepherd, *Legal Issues Involving Children: Annual Survey of Virginia Law*, 20 U. RICH. L. REV. 903, 915 (1986).

6. VA. CODE ANN. § 16.1-228 (Cum. Supp. 1987). The legislature thus left out of both of the new definitions the habitually disobedient child and the child "who commits an offense which would not be criminal if committed by an adult . . . ." *Id.* (definitions effective until July 1, 1988).

7. *Id.* § 16.1-292(E).

8. *Id.*

9. H. J. Res. 247, 1987 Virginia General Assembly.

10. *See generally* J. HANDLER & J. ZATA, NEITHER ANGELS NOR THIEVES: STUDIES IN DEINSTITUTIONALIZATION OF STATUS OFFENDERS (1982); IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR (Tent. Draft 1977); L. TEITELBAUM & A. GOUGH, BEYOND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURT (1977); F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE (1982). For a discussion of the characteristics of these young people who were committed to the state prior to the juvenile code provision, see PROGRAM EVALUATION UNIT, DEPARTMENT OF CORRECTIONS, STATUS OFFENDERS IN THE DIRECT CARE OF DIVISION OF YOUTH SERVICES (1976).

majority prior to the institution of any proceedings. The essential question was whether the juvenile and domestic relations district court had "exclusive original jurisdiction" over the youth or whether the Commonwealth could proceed by direct indictment. The circuit judge in the case ruled that any proceeding must be initiated in the juvenile court as that tribunal has exclusive original jurisdiction over any "juvenile," and that status is to be determined by the age of the child at the time the wrongful acts are committed.[11] The Virginia Attorney General reinforced this conclusion in an official opinion that the juvenile court has exclusive original jurisdiction over a youth who committed an act prior to turning eighteen. The opinion went further by stating that the court's jurisdiction would be divested if the youth reached the age of twenty-one prior to any proceeding, even if the act was committed prior to reaching the age of majority.[12]

Parental responsibility for acts committed by a juvenile was addressed legislatively through amendments to sections 8.01-43 and -44, which raised the limit from $500 to $750 for damage to public or private property caused by a minor child, and by the Virginia Supreme Court's decision in *Bell v. Hudgins*.[13] In that case the court concluded that parents could not be held liable for the malicious, intentional acts of a minor child in the absence of a principal-agent relationship. The court, speaking through Justice Compton, declined the invitation "to establish in Virginia by judicial decree a blanket rule which would impose civil liability upon parents who fail to control their minor child's criminal behavior."[14] The General Assembly, in a related matter, provided for the juvenile court's ability to order parents to pay for juveniles placed directly in a private program or institution by the court after a hearing to determine ability to pay.[15]

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11. Commonwealth v. Thomas, 6 Va. Cir. 373 (Frederick County 1986) (construing VA. CODE ANN. §§ 16.1-228, -241, -242).

12. Op. Va. Att'y Gen. (October 17, 1986) (opinion to the Honorable Lawrence R. Ambrogi, Commonwealth's Attorney for Frederick County). The reasoning of the opinion appears faulty as to the latter conclusion since the code provision relied on relates to the retention or detention of a juvenile beyond the twenty-first birthday and not the exercise of original jurisdiction.

13. 232 Va. 491, 352 S.E.2d 332 (1987).

14. *Id.* at 494, 352 S.E.2d at 334.

15. VA. CODE ANN. § 16.1-286(A) (Cum. Supp. 1987). This section of the code gives juvenile courts some flexibility in addressing the particular needs of a child outside of the range offered by public programs. Unfortunately, the funds appropriated each year by the General Assembly are seldom sufficient, and this legislation apparently tries to address this difficulty.

In *United States v. Juvenile Male*,[16] the United States Court of Appeals for the Fourth Circuit ruled that the 1984 amendments to the federal Juvenile Delinquency Act[17] could not be applied retroactively. The court refused to allow the prosecution of a minor as an adult when the acts in question were committed in 1981 while the child was fifteen, even though he was not charged until 1986. Such action would violate the ex post facto clause of article I, section 9 of the United States Constitution.

## II. Child Custody and Visitation

### A. *Interstate Custody Disputes*

The proper handling of interstate custody disputes still poses a vexatious problem for state and federal courts. The United States Court of Appeals for the Fourth Circuit and a district court in Virginia both had to deal with the role of the federal judiciary in resolving the validity of competing state custody decrees under the federal Parental Kidnapping Prevention Act (PKPA).[18] In *Hickey v. Baxter*,[19] the Fourth Circuit reiterated its 1981 holding in *Doe v. Doe*[20] that federal habeas corpus does not lie between private parties to determine the custody of a child, but the court concluded that the traditional "domestic relations exception" to federal diversity jurisdiction does not bar a proceeding under the PKPA to enforce a custody order of a state court with proper jurisdiction.[21] In the later case of *Meade v. Meade*,[22] the court became somewhat more bold, asserting that the PKPA empowered the federal courts to act as a "referee" between states with competing and conflicting custody decrees. The Fourth Circuit thus joined with a majority of circuits that hold the PKPA to have reposited jurisdiction in the federal courts to resolve interstate custody disputes.[23] In *Maxie v.*

16. No. 86-5615 (4th Cir. May 26, 1987).

17. 18 U.S.C. § 5032 (Supp. II 1984).

18. 28 U.S.C. § 1738A (1982) [hereinafter PKPA].

19. 800 F.2d 430 (4th Cir. 1986).

20. 660 F.2d 101 (4th Cir. 1981).

21. 800 F.2d at 431. The court did suggest that the district court might choose to return the case to a Virginia juvenile and domestic relations district court to resolve the dispute under the Uniform Child Custody Jurisdiction Act, Va. Code Ann. §§ 20-125 to -146 (Repl. Vol. 1983).

22. 812 F.2d 1473 (4th Cir. 1987).

23. The United States Supreme Court has awarded certiorari in a case from the Ninth Circuit holding to the contrary. Thompson v. Thompson, 798 F.2d 1547 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 946 (1987).

*Fernandez*,[24] the United States District Court for the Eastern District of Virginia exercised jurisdiction under the PKPA to resolve a custody dispute involving conflicting decrees from the District of Columbia and Virginia.

Even the United States Supreme Court got into the act in a somewhat unusual twist on the normal setting for an interstate child custody contest. In *California v. Superior Court of California*,[25] the Court dealt with a request for extradition of a California father by the state of Louisiana to answer a charge of parental kidnapping flowing from the father's use of "self-help" to seize his minor children and return them to California where he had a decree awarding him custody. The father sought to challenge the validity of the Louisiana custody decree and the ensuing criminal charge in the extradition proceeding. The Court concluded that this was not a proper forum to challenge the decree, as the only inquiry should be whether the requirements of the Extradition Act had been met on the face of the documents.

In another unusual case the federal district court in Alexandria ruled in *McMurtry v. Brasfield*[26] that the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO)[27] did not apply to the removal of a child from one state to another in connection with a custody dispute.

The General Assembly enacted a new parental kidnapping act making it a Class 6 felony to withhold a child from the custodial parent in violation of a court order, if the withholding occurs in another state.[28] In the case of *In re Johnston*,[29] the Virginia Court of Appeals concluded that a writ of prohibition would not lie to bar a juvenile and domestic relations district court from hearing a petition for a change of custody and reconsidering a sister state's custody decree. The issue of the juvenile court's jurisdiction includes questions of fact as well as law, and appeals may be taken from any adverse decision if the forum is not proper for adjudicating custody. Three recently reported circuit court decisions conclude that under the Uniform Child Custody Jurisdiction Act (UCCJA): (1) a Virginia court will decline to accept jurisdiction

24. 649 F. Supp. 627 (E.D. Va. 1986).
25. 107 S. Ct. 2433 (1987).
26. 654 F. Supp. 1222 (E.D. Va. 1987).
27. 18 U.S.C. 1964(c) (1982).
28. VA. CODE ANN. § 18.2-49.1 (Cum. Supp. 1987).
29. 3 Va. App. 492, 350 S.E.2d 681 (1986).

over custody where a foreign court is a more convenient forum;[30] (2) where only Virginia residents contest the custody of a child, a Virginia court can entertain the case even though there is an outstanding custody decree from another state;[31] and (3) a Virginia court will decline jurisdiction to hear a custody matter where another state has a closer connection with the children.[32] The Virginia Court of Appeals further clarified the Virginia rule in a case where the custodial parent wishes to move from the state, making the noncustodial parent's exercise of visitation difficult. In *Scinaldi v. Scinaldi*,[33] the court overturned an injunction forbidding the mother from moving the children's residence from the Tidewater area, stating that the focus should be on "the best interests of these children" and whether the benefit of a close relationship with both parents "is available to the child only if he or she lives in close proximity to the non-custodial parent."[34]

### B. *The "Maternal Preference Rule"*

The continued vitality of the "maternal preference rule" remains an issue despite numerous legislative efforts to bury it.[35] In *Visikides v. Derr*,[36] the Virginia Court of Appeals tried to put the "rule" or "presumption" or "inference" to death forever. The trial court had changed custody from the father to the mother and based that decision in part on the fact that the child was of "tender years" and should be with her mother, all other things being equal. The Virginia Court of Appeals said that "it is clear that any use of such an inference in determining what is in the best interests of the child is reversible error."[37] The court also indicated that the process of determining whether a change of custody is appropriate involved "a two-pronged test: (1) whether there has been a change in circumstances since the most recent custody award; and (2) whether a change in custody would be in the best interests of the child."[38]

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30. Dalot v. Dalot, 6 Va. Cir. 18 (Norfolk 1982).
31. Wise v. Cowley, 6 Va. Cir. 334 (Norfolk 1986).
32. *In re* Cumbie, 8 Va. Cir. 443 (Roanoke 1987). The court's opinion is quite well-researched and is very sensitive to the policies behind the UCCJA.
33. 2 Va. App. 571, 347 S.E.2d 149 (1986).
34. *Id.* at 575, 347 S.E.2d at 150-51.
35. VA. CODE ANN. § 20-107.2 (Cum. Supp. 1987); *id.* § 31-15 (Repl. Vol. 1985).
36. 3 Va. App. 69, 348 S.E.2d 40 (1986).
37. *Id.* at 72, 348 S.E.2d at 42.
38. *Id.* at 70, 348 S.E.2d at 41 (citation omitted).

In *Ferris v. Underwood*,[39] the custody contest was between the mother and the paternal grandmother. At the time of the parents' divorce, the child was living with the grandmother. Later, the mother petitioned for custody. The divorce decree was silent as to custody. The court held that these circumstances did not deprive the mother of the parental presumption to custody and the burden of proof should have been placed on the grandmother.

In *Turner v. Turner*,[40] the trial court did not err in transferring custody from the father to the mother when her life stabilized through remarriage, the child expressed a preference to live with her mother, and two experts recommended placement with the mother. One judge dissented, finding the evidence of material change of circumstances to be insufficient.[41]

### C. *Termination of Visitation Rights*

In *Fariss v. Tsapel*,[42] the Virginia Court of Appeals indicated that where a reduction or termination of visitation rights is sought, reasonable notice should be given to the parent.[43] The court also noted that a social worker's testimony based on a home visit held two years before the hearing and two months prior to the entry of visitation decree was not germane to the present inquiry, and the absence of a transcript of the judge's *in camera* discussions with the children made it impossible for the appellate court to consider matters relied upon therein by the trial court.[44]

In *M.E.D. v. J.P.M.*,[45] the Virginia Court of Appeals dealt with a difficult case where allegations of sexual abuse during visitation were levelled at the non-custodial father. The court concluded that the trial judge had unduly restricted the admission of evidence rel-

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39. 3 Va. App. 25, 348 S.E.2d 18 (1986).

40. 3 Va. App. 31, 348 S.E.2d 21 (1986).

41. *Id.* at 38, 348 S.E.2d at 24-25 (Duff, J., dissenting).

42. 3 Va. App. 439, 350 S.E.2d 670 (1986).

43. *Id.* (construing VA. CODE ANN. § 20-127 (Repl. Vol. 1983)).

44. Virginia appellate court decisions give little guidance concerning *in camera* interviews of children by a trial judge. In M.E.D. v. J.P.M., 3 Va. App. 391, 350 S.E.2d 215 (1986), the trial court did not err in declining an invitation to conduct an *in camera* interview where no formal offer was made, and the offering party declined to call the child as a witness. In Miller v. Miller, No. 820159 (Va. 1983), the Virginia Supreme Court issued some guildelines in a memorandum opinion which was not published and which "may not be cited or relied upon as precedent in future cases." The court said that such an interview may be held over the objection of a party, and it observed that no record existed of the evidence adduced *in camera* because the parties failed to ask that one be made. *Id.*

45. 3 Va. App. 391, 350 S.E.2d 215; *see also supra* note 44.

evant to the charge and used visitation as a weapon to punish the custodial parent for making such allegations.

## III. Abuse and Neglect, Foster Care and Termination of Parental Rights

### A. *Abuse and Neglect*

The most distressing aspect of this subtopic is that a total of seven Virginia Court of Appeals criminal cases during the past year address prosecutions for the sexual abuse of children, a marked increase in the number of reported cases of this nature over previous years.[46] Consequently, legislative efforts to deal with sexual abuse by child-care providers and others have continued.

The troublesome issue of facilitating the taking of evidence from child victims was addressed only through the 1987 enactment of a bill allowing the use of a videotape deposition of a victim through stipulation by the parties.[47] A joint legislative subcommittee created to study the hearsay rule and the videotaping of testimony used in child sexual abuse cases and make its recommendations to the 1988 session.[48]

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46. In Tharrington v. Commonwealth, 2 Va. App. 491, 346 S.E.2d 337 (1986), the court sustained the sufficiency of the evidence for attempted aggravated sexual battery of an eleven-year-old friend of the defendant's daughter. In Marlowe v. Commonwealth, 2 Va. App. 619, 347 S.E.2d 167 (1986), the court affirmed convictions for enticement and aggravated sexual battery of two girls, age ten and age nine, despite some uncertainty about dates. In Cantwell v. Commonwealth, 2 Va. App. 606, 347 S.E.2d 523 (1986), three convictions of indecent exposure to a child were affirmed. The court in Chrisman v. Commonwealth, 3 Va. App. 89, 348 S.E.2d 399 (1986), reversed convictions for various sexual offenses involving children because of the erroneous admission for impeachment purposes of defendant's prior conviction for indecent exposure. *See also* Bacigal, *Criminal Procedure: Annual Survey of Virginia Law*, 21 U. Rich. L. Rev. 727, 740 (1987). In Clinebell v. Commonwealth, 3 Va. App. 362, 349 S.E.2d 676 (1986), the court affirmed defendant's convictions for sexually assaulting his minor daughter even though the trial court excluded "expert" testimony that the daughter suffered from hysteric amblyopia. The trial court had also refused to hear testimony of specific prior incidents where the daughter was alleged to have made false accusations of sexual misconduct. The court upheld sexual abuse convictions in Chrisman v. Commonwealth, 3 Va. App. 371, 349 S.E.2d 899 (1986), but a sodomy conviction was overturned because of insufficient evidence of penetration of the victim's vagina by defendant's tongue. In Bridgeman v. Commonwealth, 3 Va. App. 523, 351 S.E.2d 598 (1986), a conviction for incest was overturned because the results of HLA blood tests alone were insufficient to establish guilt beyond a reasonable doubt.

47. Act of March 26, 1987, ch. 448 1987 Va. Acts 577 (amending Va. Code Ann. § 18.2-67, adopting § 18.2-67.01 and requiring reenactment by the 1988 Assembly Session to become effective).

48. H.J. Res. 319, 1987 Virginia General Assembly.

Other legislation added the rental of sexually explicit material to the proscribed activities in the child obscenity law,[49] and provided that statements made to a child protective services worker by a person arrested for child abuse or neglect cannot be admitted into evidence unless the accused was advised of his or her constitutional rights beforehand.[50] Two other bills provided that a teacher may be suspended when charged with a sexual offense involving a child,[51] and that the making of a materially false statement concerning conviction of a sexual offense involving a child on a teacher employment application will be a Class 1 misdemeanor and grounds for the revocation of the certificate to teach.[52] Three bills addressed the use of preliminary protective orders in child or spousal abuse cases in juvenile and domestic relations district courts.[53] The legislature also addressed the dissemination of criminal history information to regulators of child-care providers and proscribed the hiring of employees or use of volunteers by child-care providers when the persons have been convicted of certain offenses.[54]

The United States Supreme Court held in *Pennsylvania v. Ritchie*[55] that confidential protective service agency files concerning an investigation into suspected child abuse and neglect are not wholly discoverable by defense counsel in a criminal prosecution of the alleged abuser. However, the trial court may be obligated to review the files *in camera* for the presence of exculpatory evidence or other material relevant to the defense of the charges. In *Commonwealth v. Stincer*,[56] Justice Scalia denied an application for stay of a Kentucky Supreme Court decision which held that an accused child-molester has a right to be present at the hearing inquiring into the competency of his child victim to testify. Even though Justice Scalia doubted the validity of the Kentucky court's conclusion, since the Kentucky legislature had adopted later legislation contrary to the decision and since he was unaware of any

49. VA. CODE ANN. § 18.2-391 (Cum. Supp. 1987).
50. *Id.* § 63.1-248.6(G).
51. *Id.* § 22.1-315.
52. *Id.* § 22.1-296.1.
53. *Id.* §§ 16.1-244, -253, -253.1, -253.2, -279.1 (relating to preferential docket treatment for hearings on such orders, the conditions that may accompany such an order, and allowing prosecution for trespass in addition to contempt for entering on to premises in violation of a protective order).
54. *Id.* §§ 19.2-389, 63.1-197, -198.1, -198.2, -199.
55. 107 S. Ct. 1519 (1987).
56. 107 S. Ct. 7 (1986).

other state having rendered a similar decision, there was no reasonable probability that four Justices would vote to grant certiorari.

Finally, in *M.E.D. v. J.P.M.*[57] the Virginia Court of Appeals concluded that a trial court improperly restricted the admission of evidence in a hearing to determine whether to terminate visitation by a father who was accused of sexually abusing his child during earlier periods of visitation. While noting that a young child may understand intervals of time differently than an adult, the court acknowledged that cases involving the *res gestae* exception to the hearsay rule indicate that the absence of temporal precision removes the child's statements from the scope of the exception.[58] The court did conclude that the psychiatrists and psychologists should be allowed to rely on the child's statements as a basis for their expert opinions, and the statements would be admissible under the "state of mind" exception to the hearsay rule as affecting the child's reluctance to engage in visitation.[59] The trial court also erred in excluding the rebuttal testimony of a clinical social worker regarding the interpretation of psychological tests.[60]

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

Legislation adopted at the 1987 session of the General Assembly requires a court to make a finding at the conclusion of a foster care review hearing as to whether reasonable efforts have been made to reunite the child with his or her parents, if applicable.[61] In addition, the code now provides that where a child is in foster care by court commitment, entrustment, or by voluntary relinquishment, termination of parental rights may take place if the parents have been unwilling or unable to remedy the problems, within a reasonable time "not to exceed twelve months," and requiring the social service agency to submit a written plan for finding a permanent placement for the child within six months after termination of the parents' rights.[62]

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57. 3 Va. App. 391, 350 S.E.2d 215; *see also supra* note 44.

58. 3 Va. App. at 400, 350 S.E.2d at 221 (citing Pepoon v. Commonwealth, 192 Va. 804, 811, 66 S.E.2d 854, 858 (1951)).

59. 3 Va. App. at 400-01, 350 S.E.2d at 221-22.

60. *Id.* at 403-04, 350 S.E.2d at 223.

61. VA. CODE ANN. § 16.1-282 (Cum. Supp. 1987).

62. *Id.* § 16.1-283.

In *Robinette v. Keene*,[63] the Virginia Court of Appeals reversed the termination of a mother's parental rights and the adoption of the children by another, holding that the evidence of the mother's abandonment of the children was insufficient. After the mother learned that her husband had sexually abused one of their children and was threatening to kill the mother, she left home with the two children.

The termination of parental rights of a mentally ill mother was upheld in *Barkey v. Alexandria Department of Human Services*,[64] where the mother had refused treatment for her mental illness, had failed to maintain contact with her child or plan for the child's future, and where the child's development improved markedly while in foster care. In *Martin v. Pittsylvania County Department of Social Services*,[65] the court affirmed an order denying custody to a mentally retarded mother who was deemed incapable of caring for the child by herself, but reversed for lack of jurisdiction the order of permanent foster care where no petition had been filed requesting it. In another Virginia Court of Appeals case, it was decided that where a child's natural mother knows the identity of the father, but refuses to reveal his identity, notice by order of publication must be given to the unknown father before his rights may be terminated.[66]

## IV. Child Support and Paternity

### A. *Child Support*

The General Assembly adopted several bills in 1987 dealing with child support and its enforcement, many of them stemming from the delay in payments through the Virginia Department of Social Services. These bills: (1) provide that juvenile court venue shall be the same in child support and spousal support cases;[67] (2) bar retroactive modification of support awards but permit modification during any period in which a petition for modification is pending,

63. 2 Va. App. 578, 347 S.E.2d 156 (1986).

64. 2 Va. App. 662, 347 S.E.2d 188 (1986).

65. 3 Va. App. 15, 348 S.E.2d 13 (1986).

66. Augusta County Dep't of Social Servs. v. Unnamed Mother, 3 Va. App. 40, 348 S.E.2d 26 (1986). Judge Benton dissented on the ground that notice by publication would be inadequate and thus the mother should retain responsibility for the child if she will not reveal the father's identity. *Id.* at 47, 348 S.E.2d at 30 (Benton, J., dissenting).

67. Va. Code Ann. § 16.1-243 (Cum. Supp. 1987).

but only from the date of notice;[68] (3) modify the provisions in various ways relating to the support enforcement system;[69] (4) provide for the payment of interest by the Department of Social Services where there is a delay of more than thirty days following the end of the month in which the payment was received;[70] and (5) provide for the payment of interest at the judgment interest rate by an arrearage obligor.[71]

In *Rose v. Rose*,[72] the United States Supreme Court concluded that a state court has jurisdiction to hold a disabled veteran in contempt of court for failing to make child-support payments, even though the only means available to pay the support is disability benefits from the United States Veterans' Administration. The court in reaching this conclusion rejected an argument of federal preemption under the supremacy clause of article VI of the United States Constitution. Also, in *Hicks ex rel. Feiock v. Feiock*,[73] Justice O'Connor granted a stay of a California Court of Appeals order granting habeas corpus relief to a father held in civil contempt for failure to make child support payments because of a statute shifting the burden of proof to the contemnor. Justice O'Connor concluded that it was likely that certiorari would be granted and that the state would prevail on the merits.

The Virginia Supreme Court ruled in *Edwards v. Lowry*[74] that an ex-husband was not entitled to a reduction in child support after being discharged from employment for theft from his employers or because he incurred increased expenses through remarriage and the assumption of additional responsibilities for his new family. The court also awarded attorneys' fees to the wife for defending the numerous proceedings brought to reduce child support.[75] In *Hausman v. Hausman*,[76] the Virginia Supreme Court concluded that a lien for child support docketed after divorce had priority over a recorded deed of trust on the marital home executed solely by the husband prior to divorce.

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68. *Id.* §§ 16.1-279, 20-74, -88.28:2, -88.30:6, -108, -112 (Cum. Supp. 1987); *id.* § 63.1-252.1 (Repl. Vol. 1987).

69. *Id.* §§ 20-60.3, -60.5, -78.1, -79.1, -88.29:1, -107.2, (Cum. Supp. 1987); *id.* §§ 63.1-249, -250.3, -252.1, -256, -267.1, -268.1 (Repl. Vol. 1987).

70. *Id.* § 20-60.5 (Cum. Supp. 1987); *id.* § 63.1-250.1:1 (Repl. Vol. 1987).

71. *Id.* § 20-78.2 (Cum. Supp. 1987).

72. 107 S. Ct. 2029 (1987).

73. 107 S. Ct. 259 (1986) (O'Connor, Circuit Justice); *see also In re* Feiock, 180 Cal. App. 3d 649, 225 Cal. Rptr. 748 (1986), *cert. granted*, 107 S. Ct. 1367 (1987).

74. 232 Va. 110, 348 S.E.2d 259 (1986).

75. *Id.* at 114, 348 S.E.2d at 262.

76. 233 Va. 1, 353 S.E.2d 711 (1987).

The Virginia Court of Appeals rendered a variety of child support decisions as well. In *Young v. Young*,[77] the court concluded that even if both parents earn about the same income, one parent may be required to pay more than half of the support if the other parent provides considerably more nonmonetary contributions to the welfare of the child. The court upheld a trial court decision concluding that a father had not unreasonably withheld his consent to his daughter's enrollment at a boarding school in *Harris v. Woodrum*[78] where the parents' separation agreement included the father's right to approve of the daughter's choice of schools.

In *Rippe v. Rippe*,[79] the court concluded that a trial court could not refuse to order child support simply because of strained relationships and antagonisms in the family. In another decision, the court held that when a separation agreement provides unequivocally for the payment of child support on a monthly basis for all children of the marriage, the father cannot refuse to make such a payment simply because one or more of the children was temporarily in his custody.[80] In *Lee v. Lee*,[81] the court reversed a trial court for considering only factors that would be relevant to a motion to reduce support due to changed circumstances when the hearing was actually an initial child-support hearing. In the case of *Walthall v. Commonwealth*,[82] the court determined that a commonwealth's attorney should not have appeared on behalf of the ex-wife in a purely "civil" proceeding for increased child support. In *Williams v. Williams*,[83] the chancellor's consideration of child support in making a monetary award under section 20-107.3 of the Virginia Code[84] providing for equitable distribution was deemed erroneous.

In *Fry v. Schwarting*,[85] the court said that a property settlement agreement incorporated by reference into a divorce decree may be enforced by contempt. Furthermore, its provision which required support until each child either reached the age of 21 or was "other-

77. 3 Va. App. 80, 348 S.E.2d 46 (1986).
78. 3 Va. App. 428, 350 S.E.2d 667 (1986).
79. 3 Va. App. 506, 351 S.E.2d 181 (1986).
80. Henderlite v. Henderlite, 3 Va. App. 539, 351 S.E.2d 913 (1987).
81. 3 Va. App. 631, 352 S.E.2d 534 (1987).
82. 3 Va. App. 674, 353 S.E.2d 169 (1987).
83. 4 Va. App. 19, 354 S.E.2d 64 (1987).
84. VA. CODE ANN. § 20-107.3 (Cum. Supp. 1987).
85. 4 Va. App. 173, 355 S.E.2d 342 (1987).

wise emancipated" did not contemplate emancipation by the statutory lowering of the age of majority.[86] Therefore the support obligation continued to age 21. Likewise, the Court of Appeals has made it clear that neither party can contract away a child's right to future support.[87] The Circuit Court of the City of Lynchburg also ruled that parents are legally responsible for the care and treatment of their incompetent or incapacitated adult children.[88]

In three cases under the Revised Uniform Reciprocal Enforcement of Support Act, it was held that: (1) a clause in a property settlement agreement, providing that 35% of a husband's take-home pay was to go to child support, referred to adjusted gross income as it appeared on the federal income tax return, less social security taxes and state and federal taxes;[89] (2) a husband's deliberate refusal to obey an order directing the payment of counsel fees constituted contempt of court;[90] and (3) a social services agency from another state may sue in Virginia to collect child-support payments where the parents reside in Virginia, even though the children live in a third state.[91]

### B. *Paternity*

In *Florence v. Roberts*,[92] the Virginia Supreme Court concluded that in a civil support proceeding brought on behalf of an illegitimate child, either party has the right to appeal an adverse paternity determination made in juvenile and domestic relations district court to the circuit court.

## V. ADOPTION

The General Assembly enacted one amendment to the adoption law by providing that no reference to the Department of Social Services need be made where a petition for adoption is filed by a natural parent or adoptive parent and his/her new spouse, and the

86. *Id.* at 180-81, 355 S.E.2d at 346.
87. Mabry v. Stewart, 8 Va. Cir. 69 (Warren County 1983).
88. Department of Mental Health v. Miller, 7 Va. Cir. 354 (Lynchburg 1986).
89. Hederick v. Hederick, 3 Va. App. 452, 350 S.E.2d 526 (1986).
90. Frazier v. Commonwealth, 3 Va. App. 84, 348 S.E.2d 405 (1986).
91. Henderson County Dep't of Social Servs. v. Lehman, 7 Va. Cir. 369 (Warren County 1986) (construing Virginia Uniform Reciprocal Enforcement of Support Act, VA. CODE ANN. §§ 20-88.12 to -88.31 (Repl. Vol. 1983 & Cum. Supp. 1987)).
92. 233 Va. 297, 355 S.E.2d 316 (1987).

other parent is deceased.[93] The General Assembly also clarified a point raised in the Virginia Supreme Court's decision in *Hyman v. Glover*,[94] wherein the court concluded that the use of the term "issue" in a will did not include adopted children. The statutory amendment provides that the terms "issue," "children," "heirs," and similar words include adopted children while the words "issue of the body" or "natural children" exclude such children.[95]

The Circuit Court of Frederick County awarded an adoption over the objections of the natural father, concluding that his consent was being withheld contrary to the best interests of the child.[96] The court referred to the father as suffering from the "beget and forget" syndrome as he had failed to maintain contact with the child and provided no support.[97]

## VI. EDUCATION

### A. *Free Speech*

The United States Supreme Court again defined the constitutional rights of minors more narrowly than for adults in *Bethel School District No. 403 v. Fraser*.[98] The Court upheld the discipline of a public high school student for delivering a nominating speech for a fellow student at an assembly which contained graphic and explicit sexual metaphors. The Court distinguished the lewd language used by Fraser from the wearing of armbands in *Tinker v. Des Moines Independent Community School District*[99] and concluded that the expression in this case was entitled to less protection than the expression in *Tinker*.[100]

### B. *Education of the Handicapped*

Several cases dealt with the educational rights of handicapped children. In *Robinson v. Pinderhughes*,[101] the Fourth Circuit Court

93. VA. CODE ANN. § 63.1-231 (Repl. Vol. 1987).
94. 232 Va. 140, 348 S.E.2d 269 (1986).
95. VA. CODE ANN. §§ 55-49.1, -66.5 (Supp. 1987); *id.* § 64.1-71.1 (Repl. Vol. 1987); *see also* Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 21 U. RICH. L. REV. 857 (1987).
96. *In re* Adoption of Anglin, 8 Va. Cir. 356 (Frederick County 1987).
97. *Id.* at 358.
98. 106 S. Ct. 3159 (1986).
99. 393 U.S. 503 (1969).
100. *Fraser*, 106 S. Ct. at 3166.
101. 810 F.2d 1270 (4th Cir. 1987).

of Appeals concluded that a section 1983 civil rights claim[102] was available to a handicapped child for the purpose of enforcing a favorable decision by an administrative hearing officer when a school system failed to implement the decision within the time limits set by that officer. In *Schimmel v. Spillane*,[103] the Fourth Circuit ruled that a school system was not obligated to pay for the placement of a handicapped child in a residential placement that is not approved as a school for handicapped children. The court also determined that the appropriate statute of limitations for proceeding to secure a court review of an adverse administrative ruling would be the one-year period prescribed for civil actions[104] and not the more restrictive 30-day limitation set forth in the Virginia Administrative Process Act.[105]

The federal district court ruled in *Linkous v. Davis*[106] that parents' unilateral decision to place a handicapped child in a private school would not be an automatic bar to their seeking reimbursement for the tuition from the public schools. In *Spielberg v. Henrico County Public Schools*,[107] the district judge concluded that the schools violated the procedural due process rights of a handicapped pupil by resolving to place the youth in a program provided by the schools and remove him from a private residential placement prior to the development of the Individualized Educational Program (I.E.P.).[108] The court also noted that the Henrico County schools apparently adhered to the erroneous view that all handicapped children may be given an appropriate education in a daily program as opposed to a residential one.

In *Doe v. Rockingham County School Board*,[109] the district court ruled that suspending a handicapped child for disciplinary reasons related to his handicap violated the Education of the Handicapped Act.[110]

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102. 42 U.S.C. § 1983 (1982).

103. Nos. 86-3033, -3041, -3044 (4th Cir. 1987).

104. VA. CODE ANN. § 8.01-248 (Repl. Vol. 1982).

105. *Id.* § 9-6.14:16 (Cum. Supp. 1987); VA. SUP. CT. R. 2A:2 and 2A:4.

106. 633 F. Supp. 1109 (W.D. Va. 1986).

107. No. 86-0304-R (E.D. Va. 1987).

108. The I.E.P. is a written statement which must be developed for each handicapped child by the schools and parents acting collaboratively. 20 U.S.C. § 1401(19) (1982); 34 C.F.R. §§ 300.342(b)(1), -.533(a)(4), -.552(a)(2) (1986).

109. No. 86-0009-H (W.D. Va. 1987).

110. 20 U.S.C.A. §§ 1400-1485 (West 1978 & Supp. 1987).

The Virginia Court of Appeals decided one case involving education of handicapped children. In *Martin v. School Board of Prince George County*,[111] the court concluded that an emotionally disturbed youth could be provided an appropriate program by the public schools without resort to a residential placement.

### C. *Curriculum*

In *Schwartz v. Highland County School Board*,[112] the Court of Appeals ruled that it had no jurisdiction to entertain an appeal from a circuit court's decision upholding a school board's denial of a request for a religious exemption from compulsory school attendance, as the local school board is not an "administrative agency" under state law.

Three 1987 legislative enactments mandated the development of a family life education curriculum by the State Board of Education[113] and addressed the need for stronger educational programs in juvenile institutions such as detention homes.[114]

## VII. MISCELLANEOUS

The 1987 session of the General Assembly also enacted legislation which: (1) provided that a juvenile and domestic relations district court may enter *pendente lite* orders in matters referred to it by a circuit court;[115] (2) revised the venue statute governing juvenile courts;[116] (3) provided that the Department of Social Services may charge a fee for conducting an investigation in child custody, support and visitation cases;[117] and (4) authorized an attorney to file a noncriminal petition on behalf of a client in juvenile court without going through intake.[118]

In *Hurdle v. Currier*,[119] the circuit court concluded that a court of equity had the jurisdiction to approve organ transplants from infant donors and that it will do so when the parents, the donor

111. 3 Va. App. 197, 348 S.E.2d 857 (1986).
112. 2 Va. App. 554, 346 S.E.2d 544 (1986).
113. VA. CODE ANN. § 22.1-207.1 (Cum. Supp. 1987).
114. *Id.* §§ 22.1-209.2, -343.
115. VA. CODE ANN. §§ 16.1-243, -279 (Cum. Supp. 1987).
116. *Id.* § 16.1-243.
117. *Id.* §§ 14.1-114, 16.1-274, 63.1-236.1.
118. *Id.* § 16.1-260.
119. 5 Va. Cir. 509 (Arlington County 1977).

and the donee have maturely considered the problems and the risks associated with the procedure. In *O'Brien v. O'Brien*,[120] the court determined that when a circuit court referred future questions of custody, visitation and support to a juvenile court and no appeal is taken from a final decision, the circuit court will not reconsider those matters when it decides the issue of divorce.

120. 7 Va. Cir. 26 (Henrico County 1980).