Annual Survey of Virginia Law: Legal Issues Involving Children

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LEGAL ISSUES INVOLVING CHILDREN

Robert E. Shepherd, Jr.*

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

A. Abuse and Neglect

This article last year noted the disturbing increase in the number of reported cases involving individuals prosecuted for the sexual abuse of children, and the persistence of legislative efforts to address the profound difficulties encountered by young children called as witnesses in those cases.1 This year, the General Assembly finally yielded to the urgings of those seeking changes in the law, and to the recommendations of a joint legislative subcommittee created in 1987 to study the problem of child abuse victims as witnesses in the courtroom.2 The subcommittee recommended the enactment of four bills in an effort to minimize the adverse impact of the courtroom atmosphere on young children who testify in child abuse cases while trying, at the same time, to protect the legitimate rights of the person accused of abuse.3 All four of the proposed bills were enacted into law with few amendments.

Two of the bills enacted in 1988 are paired, one for criminal proceedings4 and the other for civil matters.5 They allow the use of closed-circuit television cameras and monitors to permit the child

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to testify in another room, out of the physical presence of the accused abuser. The criminal provision permits the use of closed-circuit television, on the motion of either the Commonwealth or the defendant, where the child is unavailable to testify in open court in prosecutions for kidnapping, criminal sexual assault, or family offenses, involving a victim twelve years of age or younger. If the judge makes the requisite finding of unavailability, the examination and cross-examination of the child will take place in a separate room with only the Commonwealth’s Attorney, the defense attorney, the persons necessary to operate the equipment, and “any other person, whose presence is determined by the court to be necessary to the welfare and well-being of the child.” The child’s testimony will be transmitted into the courtroom by closed-circuit television, and the defendant must be provided with a means for communicating with his attorney privately and contemporaneously during the testimony.

The United States Supreme Court decision in Coy v. Iowa, rendered the day before the Virginia law went into effect, raises some doubt about the validity of this provision in criminal cases. The Court struck down an Iowa statute permitting the placement of a screen in the courtroom between child victims of sexual abuse testifying as witnesses and the accused abuser, without any particularized case-by-case determination of necessity. Justice Scalia, writing for a plurality of four justices, concluded that the “right to confrontation” guaranteed by the sixth amendment to the Consti-

6. VA. CODE ANN. § 18.2-67.9(B) (Repl. Vol. 1988). “Unavailability” is predicated on either the child’s persistent refusal to testify despite the judge’s requests to do so, the child’s substantial inability to communicate about the offense, or the substantial likelihood, based upon expert opinion testimony, that the child will suffer severe emotional trauma from testifying in open court. The court’s ruling on unavailability must be supported by findings on the record or by written findings in a court not of record. One court has opined that a finding of psychological unavailability should be based on consideration of the following factors:

(1) the probability of psychological injury as a result of testifying; (2) the degree of anticipated injury; (3) the expected duration of the injury; and (4) whether the expected psychological injury is substantially greater than the reaction of the average victim of a rape, kidnapping or terrorist act. Just as in the case of physical infirmity, it is difficult to state the precise quantum of evidence required to meet the standard of unavailability. The factors should be weighed in the context of each other, as well as in the context of the nature of the crime and the pre-existing psychological history of the witness.

7. VA. CODE ANN. § 18.2-67.9(C).
8. Id. § 18.2-67.9(D).
tution meant "face-to-face" confrontation, and in the absence of "individualized findings that these particular witnesses needed special protection" the statute and convictions under it could not be sustained.\(^{10}\)

Justice O'Connor concurred in an opinion joined by Justice White. In her view, "Confrontation Clause . . . rights are not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony."\(^{11}\) The concurring opinion further argued that if there were a "case-specific finding of necessity . . . [provided by a state statute] . . . our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses."\(^{12}\) Justice Blackmun dissented in an opinion joined by Chief Justice Rehnquist. There were thus four justices disapproving of procedures dispensing with face-to-face confrontation and four justices that would, at the very least, approve of its avoidance in certain matters where there was a "case-specific finding of necessity."\(^{13}\)

The new Virginia civil counterpart allows the use of closed-circuit television in any civil proceedings initiated in the juvenile court, on appeal in the circuit court, or in matters involving custody or visitation pursuant to section 20-107.2 of the Code of Virginia.\(^{14}\) The other provisions of the statute closely parallel the sec-

\(^{10}\) Id. at 4933-34. In a case where the defendant was absent during a pretrial hearing on the competency of the child witnesses, the Court seemed to place more stress on the opportunity for effective cross-examination in preserving rights under the Confrontation Clause. However, the Court pointed out that the defendant would be present during the presentation of any evidence on the merits of the case. Kentucky v. Stincer, 107 S. Ct. 2658, 2666 (1987).

\(^{11}\) Coy, 56 U.S.L.W. at 4934. Justice O'Connor proceeded to note the alarming proportions of child abuse in contemporary society, and the proliferation of state statutes providing procedural protections for child witnesses, most of which require in some manner the presence of the defendant. She also noted that the Iowa statute stood alone in allowing use of a screen. Id.

\(^{12}\) Id. at 4935.

\(^{13}\) Id. During the legislative process, the Virginia General Assembly deleted from House Bill 788 the requirement that the "courtroom setting shall simultaneously be transmitted by closed-circuit television into the room where the child is testifying, to permit the child to view the courtroom participants, including the defendant, jury, judge, and public." (emphasis added). See Act of April 20, 1988, ch. 846, 1988 Va. Acts 1696. Thus, the two-way nature of the closed-circuit television was eliminated, casting some greater doubt on the validity of the criminal statute than would have existed if the deleted language had been retained.

tion applicable to criminal proceedings, with the exception of an allowance for the presence of the child's guardian ad litem, the child's attorney, the defendant's attorney, and counsel for the local Department of Social Services if the child is in the custody of the department.\textsuperscript{15} The closed-circuit television legislation, as were the other two bills adopted, was modeled after a sample law promulgated by the National Legal Resource Center for Child Advocacy and Protection of the American Bar Association.\textsuperscript{16}

The two other bills relating to child victim-witnesses are limited to civil litigation, although they apply to a variety of proceedings, including civil child abuse and neglect matters as well as suits dealing with child custody and visitation.\textsuperscript{17} One bill provides for the admissibility of a videotape of a pretrial statement by a child victim twelve years old or under so long as the child testifies at the trial and is subject to cross-examination or where the child is found to be unavailable to testify on one of several grounds.\textsuperscript{18} The child's recorded statement must also show particularized guarantees of trustworthiness and reliability.\textsuperscript{19} The tape would be admis-

\begin{enumerate}
\item Id. § 63.1-248-13:1(C).
\item See R. Eatman & J. Bulkley, Protecting Child Victim/Witness: Sample Laws and Materials 19 (1986). The authors of this ABA monograph suggest that two-way transmission may be necessary to satisfy the criminal defendant's right to confrontation under the sixth amendment to the Constitution, as pointed out above. There are obviously no such confrontation clause problems presented by the three civil bills, because the sixth amendment only applies to criminal proceedings.
\item The child may be found unavailable because of death, absence from the jurisdiction, a total failure of memory, physical or mental disability, the existence of a privilege involving the child, the child's incompetency, or the substantial likelihood that testimony in person or on closed-circuit television would result in severe emotional trauma (based on expert opinion testimony). Va. Code Ann. § 63.1-248.13:3(B)(1).
\item This determination is to be based on, but not be limited to, the following factors:
1. The child's personal knowledge of the event; 2. The age and maturity of the child;
3. Any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion; 4. The timing of the child's statement; 5. Whether the child was suffering pain or distress when making the statement; 6. Whether the child's age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience; 7. Whether the statement has a "ring of verity," has internal consistency or coherence, and uses terminology appropriate to the child's age; 8. Whether the statement is spontaneous or directly responsive to questions; 9. Whether the statement is responsive to suggestive or leading questions; and 10. Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.
\end{enumerate}

\textit{Id.} § 63.1-248.13:3(D)(1)-(10).
sible as evidence on the merits and not merely for corroboration or other similar purposes.\textsuperscript{20} There are additional procedural safeguards requiring advance notice by the proponent of the evidence to the other party of the intention to use the tape, and an opportunity to view the tape at least ten days prior to trial.\textsuperscript{21}

Similarly, the second exclusively civil bill allows for the admission of an out-of-court hearsay statement by the child if the child testifies at trial and is subject to cross-examination or is deemed to be unavailable,\textsuperscript{22} and if the court finds the necessary indicia of trustworthiness and reliability present.\textsuperscript{23} In both instances, the court is required to make findings on the record, or in writing in a court not of record, to support the conclusions on unavailability and trustworthiness and reliability of the statements.\textsuperscript{24}

The enactment of these four provisions establishes a new high water mark in efforts to deal more sensitively with the problems of young children victimized by abuse or neglect. The provisions especially address sexually abused children, who are called to testify as witnesses in a court whose customary practices and procedures may be quite hostile and traumatic to a young child.

One area in which Virginia has long had a fairly progressive rule governing the handling of children as witnesses relates to a child’s competency to testify. In\textit{ Rogers v. Commonwealth},\textsuperscript{25} the Virginia Supreme Court upheld a trial court’s decision to allow a girl two months short of her sixth birthday and her eight-year-old brother to testify, stating the rule in the Commonwealth to be:

There is no fixed age at which a child must have arrived in order to be competent as a witness. Of course, no one would think of calling a child two or three years of age as a witness in a case, but the

\textsuperscript{20} VA. CODE ANN. § 18.2-67.01 (Cum. Supp. 1987) was enacted at the 1987 General Assembly session by Act of March 26, 1988, ch. 448, 1988 Va. Acts 557. This section was not reenacted at the 1988 session, and as a result, it did not become effective.

\textsuperscript{21} Id. § 63.1-248.13:3(A)(8), (C). This advance warning and opportunity for prior viewing may actually result in more negotiated settlements of matters, thus obviating the necessity of either the testimony or the use of the videotape.

\textsuperscript{22} Id. § 63.1-248.13:2. The events constituting unavailability are identical to those outlined in footnote 18.

\textsuperscript{23} These criteria are substantially identical to those outlined in note 19, with the addition of considering the credibility of the person testifying about the statement and the presence of any motive on that person’s part to falsify or distort the event and whether more than one person heard the statement. Id. § 63.1-248.13:2(D)(3), (D)(6).

\textsuperscript{24} Id. §§ 63.1-248.13:2(E), -248.13:3(E).

\textsuperscript{25} 132 Va. 771, 111 S.E. 231 (1922).
whole question of competency must be left largely to the discretion of the trial court, and its judgment will not be reversed except for manifest error. He has the opportunity of seeing the child and its demeanor on the stand, which cannot be photographed in the record, and unless what is in the record clearly shows that he has committed error, his action will not be reversed. The child may be too young to be convicted of perjury, but this is not decisive of its competency as a witness.

In order to be competent as a witness, the child must have sufficient mental capacity to observe the data about which it has testified and record it in mind, and thereafter understand questions put to it and be able to give intelligent answers. There must also be a sense of moral responsibility, at least to the extent of a consciousness of a duty to speak the truth.26

The recent Virginia Court of Appeals decision in Royal v. Commonwealth27 pointed to the great value of a voir dire on competency that is “searching in proportion to chronological immaturity.”28 Procedurally, Virginia decisions seem to require a voir dire examination on competency at the threshold, although a failure to do so does not necessarily constitute reversible error.29 Virginia also appears to require that the voir dire examination be out of the hearing of the jury,30 that competency is determined as of the date the child is offered as a witness and not the date when the events occurred,31 that where a mental capacity issue overlays the age

26. Id. at 773, 111 S.E. at 231-32 (citation omitted). This articulation of the test draws heavily on the United States Supreme Court’s decision in Wheeler v. United States, 159 U.S. 523, 524-25 (1895). Subsequent cases have confirmed this basic rule. See, e.g., Webster v. Peyton, 294 F. Supp. 1359 (E.D. Va. 1968); Hepler v. Hepler, 195 Va. 611, 79 S.E.2d 652 (1954); Mullins v. Commonwealth, 174 Va. 472, 5 S.E.2d 499 (1939) (four and one-half and six and one-half year-old children); Davis v. Commonwealth, 161 Va. 1037, 171 S.E. 598 (1933) (eight-year-old). Although the Mullins case speaks of an “understanding and appreciation of the sanctity of an oath,” this language has not been repeated in more recent cases, and it goes beyond the “consciousness of a duty to speak the truth” delineated in Rogers. Mullins, 174 Va. at 474, 5 S.E.2d at 500. There is also an early case which speaks of a presumption of competency at age fourteen, but it has largely been ignored by subsequent cases. Oliver v. Commonwealth, 77 Va. 590 (1883).


28. Royal, 2 Va. App. at 63, 341 S.E.2d at 662 (citation omitted).


concern, the test is essentially the same, and that the trial court's determination of competency rarely will be disturbed on appeal.

Virginia also has been quite explicit in holding that there is no need for corroboration of a child abuse victim’s testimony. In *Fisher v. Commonwealth,* the Virginia Supreme Court held that “it is clear that the victim’s testimony, if credible and accepted by the finder of fact, is sufficient evidence, standing alone, to support the conviction.”

The decisions of the Virginia Supreme Court in cases addressing the admissibility of hearsay statements made by children in abuse cases are not nearly as hospitable to the problems of the child witness as their competency holdings. As a general proposition, a pretrial statement is admissible through the testimony of a hearer where it is clearly spontaneous and was uttered under such circumstances that it is clear it was the product of the excitement of the moment—an “excited utterance.” However, this rule has been construed very narrowly by the Virginia Supreme Court in cases involving child sexual abuse victims.

In *Pepoon v. Commonwealth,* a statement by a three-year-old boy to his mother during a bath, some week to ten days after the alleged sodomy, was ruled inadmissible because it was not deemed sufficiently spontaneous and because the “recent complaint” exception to the hearsay rule was confined to rape cases. Similarly, in *Leybourne v. Commonwealth,* the court rejected the admissibility of a statement made by a four-and-a-half year old boy to his mother describing an indecent touching by the defendant five hours earlier, and after he had called to her in a “frightened voice” for the proposition that an earlier determination of incompetency will not necessarily render the child incompetent at a subsequent proceeding. *Id.*

33. Rogers, 132 Va. at 773, 111 S.E. at 231.
35. *Id.* at 299, 321 S.E.2d at 204. This conclusion was reached in spite of an attack on the ten-year-old victim’s credibility on the basis of prior recanted complaints of sexual abuse. *Id.* at 300, 321 S.E.2d at 203; *see also* Lear v. Commonwealth, 195 Va. 187, 77 S.E.2d 424 (1953).
subsequent to being put to bed.40 These two cases represent a very restrictive view of the “excited utterance” exception in child sexual abuse cases.41

These holdings appear to be modified by the recent decision by the Virginia Court of Appeals in Martin v. Commonwealth.42 In Martin, the court upheld the admission of an excited statement by a twenty-three month old girl to a thirteen-year-old babysitter, even though the victim was too young to testify in court. The young victim was in the bath when Martin entered the bathroom and, shortly thereafter, the babysitter heard the girl scream for approximately eight to thirteen seconds. He went to the door and asked what was wrong, with the defendant replying that she had slipped in the tub. After Martin left the bathroom, the babysitter entered, noted the small child’s reddened eyes, and again asked what was wrong. The little girl responded, “That boy put his pee-pee on me.”43 This was some fifteen seconds to five minutes after the offense. The court of appeals concluded that neither the time lapse nor the inquiry from the babysitter prevented the statement from qualifying as an excited utterance, and said:

Moreover, particularly in the case of statements made by young children, the element of trustworthiness underscoring the spontaneous and excited utterance exception finds its source primarily in the child’s lack of capacity to fabricate rather than the lack of time to fabricate. As long ago as 1939, the [Virginia] Supreme Court, in McCann, recognized the special reliability of a statement made by a child “a very few minutes” after an attempted rape, noting that the eight year old child “could not possibly have fabricated such a story.” 174 Va. at 439, 4 S.E.2d at 771. Similarly, the reliability of C’s declaration is bolstered by her lack of capacity, at age 23 months, to fabricate the statement.44

The holding in Martin seems to undercut the holdings in Pepoon and Leybourne and place a premium on laying the proper evidentiary foundation for the admission of the out-of-court statement as

40. Id. at 375, 282 S.E.2d at 14.
43. Id. at 440, 358 S.E.2d at 417-18.
44. Id. at 442, 358 S.E.2d at 418. The court relied on McCann v. Commonwealth, 174 Va. 429, 4 S.E.2d 768 (1939), to support its conclusion.
an excited utterance. Although the new hearsay exception legisla-
tion is limited to civil proceedings, it may well have an effect on
the further development of the law in this area.

A recent decision by the United States Court of Appeals for the
Fourth Circuit, in a highly publicized case, also bears on the ad-
missibility of hearsay and other evidence in a sexual abuse context.
In Morgan v. Foretich, a child and her divorced mother sued the
child’s father for damages arising out of alleged sexual abuse. After
a sensitive and perceptive discussion of the inherent evidentiary
problems in a case involving a young sexual abuse victim, the
court concluded that the district judge erred in excluding evidence
of alleged similar abuse of an older sister from a prior marriage
during periods of visitation with the defendant and his family.
The court decided that this evidence was relevant to issues other
than character, such as identity of the abusers and negation of the
claims that the younger child’s injuries were self-inflicted, caused
by her mother, or fabricated. The court also stated that the pro-
bative value substantially outweighed the prejudicial effect of the
evidence because of the compelling need for testimony in sexual
abuse cases where the only eye-witnesses are the young child and
the perpetrator. Similarly, the mother’s testimony based on a di-
ary she kept of statements made by the young girl immediately
upon returning from visits with her father were admissible as “ex-
cited utterances.” The statements were admissible, even though
made as long as three hours after the events, and in spite of the
fact that the declarant was incompetent to testify as a witness, be-
cause of the different dynamics involved in a child’s perception of
sexual behavior by a trusted adult. Finally, the court concluded
that statements made by the child to the psychologist treating her
were admissible under the medical diagnosis or treatment excep-

45. In Church v. Commonwealth, 230 Va. 208, 212, 335 S.E.2d 823, 826 (1985), the Vir-
ginia Supreme Court avoided the problems of Pepoon and Leybourne by concluding that
the evidence offered there was not hearsay. See Shepherd, Legal Issues Involving Children:
Annual Survey of Virginia Law, 20 U. Rich. L. Rev. 903, 911 (1986), for a discussion of
Church.
47. Id. at 943.
48. Id. at 945.
49. Id. at 944-45.
50. Id.
51. Id. at 945-48.
52. Id.
tition to the hearsay rule found in Federal Rule of Evidence 803(4).\textsuperscript{53}

One other evidentiary issue in child abuse or neglect cases was addressed by the Virginia General Assembly in 1988 by an amendment to section 19.2-271.2 of the Code of Virginia. The amendment completely abrogates the husband-wife testimonial privilege in any case dealing with criminal sexual assault or abuse of children.\textsuperscript{54} The section previously eliminated the privilege with regard to the abuse of the children of either or both of the spouses, but this amendment applies to abuse of any child.\textsuperscript{55}

An amendment to section 18.2-371.1 of the Code of Virginia broadens the Class five felony of abuse or neglect of children to include any "willful act or omission or by refusal to provide any necessary care."\textsuperscript{56} Two further bills allow a judge entering a preliminary protective order in spouse or child abuse cases to prohibit "such other contacts with the allegedly abused spouse or children as the court deems necessary to protect the safety of such persons,"\textsuperscript{57} and to make violation of a protective order a Class three misdemeanor.\textsuperscript{58}

In *Marshall v. Commonwealth*,\textsuperscript{59} the Virginia Court of Appeals held that evidence concerning the rape of a minor, subsequent to the one charged, and for which a defendant had already been convicted, was admissible at trial to show the relationship between the parties and the fact of complaint. However, a failure to instruct the jury on those limited purposes for the evidence was error.\textsuperscript{60} In *Clinebell v. Commonwealth*,\textsuperscript{61} the Virginia Supreme Court reversed the court of appeals' affirmation of a conviction for two counts of rape of the defendant's daughter.\textsuperscript{62} The court agreed

\textsuperscript{53} Id. at 949-50. Retired Justice Lewis F. Powell, Jr., dissented from this part of the court's decision. He questioned whether a four-year-old's statements to a psychologist are made with the frame of mind comparable to that of a patient seeking treatment, and stressed that deference should be paid to the rulings of a trial judge on evidentiary matters. Id. at 950-53.


\textsuperscript{55} Id.

\textsuperscript{56} Id. § 18.2-371.1 (Repl. Vol. 1988).


\textsuperscript{58} Id. § 16.1-253.2.


\textsuperscript{60} Id. at 257, 361 S.E.2d at 640.

\textsuperscript{61} 235 Va. 319, 368 S.E.2d 263 (1988).

with the lower court that the indictments were legally sufficient even though they failed to specify the exact dates of the offenses. However, the court disagreed with the holdings that the trial court had correctly excluded evidence of the daughter's prior rape accusations against others and the testimony of an optometrist that the daughter suffered from "hysterical amblyopia," a condition frequently caused by a desire for attention. The court concluded that the "rape shield law" did not apply to exclude the evidence of the prior complaints as they were not being offered to show prior sexual conduct, but rather to demonstrate that the daughter was "fantasizing about sexual matters."

Two statutes enacted in 1988 address the difficult problem caused when a person is falsely accused of child abuse or neglect. The first statute requires the local department of social services to retain, for thirty days, the records relating to abuse or neglect complaints that are deemed "unfounded" after an investigation. The thirty days do not begin to run until the subject of the complaint is notified to advise that person of procedures that may be followed to pursue unfounded complaints made in bad faith or with malicious intent. The statute establishes a procedure for securing access to the identity of the complainant after an in camera inspection of the records by a circuit judge.

The second statute establishes a procedure for appeal of the local department's conclusions in abuse or neglect cases. In *D'Alessio v. Lukhard*, the Virginia Court of Appeals concluded that a noncustodial parent of an allegedly abused or neglected child had no standing to appeal the Commissioner of Social Services' ruling expunging the name of a suspected abuser from the central registry for child abuse and neglect.

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64. Clinebell, 235 Va. at 322, 368 S.E.2d at 264.
68. Id. at 407, 363 S.E.2d at 717.
B. Foster Care and Termination of Parental Rights

The General Assembly enacted legislation requiring a local department of social services to accept care and custody of a child, for a period not to exceed fourteen days, pursuant to an order of the juvenile and domestic relations district court in an emergency, even without prior notice to the department.\(^6\) In the case of \textit{L.J. v. Massinga},\(^7\) the Fourth Circuit Court of Appeals affirmed the entry of a preliminary injunction against the Baltimore City Department of Social Services. The injunction requires the correction of significant problems which were resulting in the abuse and neglect of children who had been placed in the custody of the department for foster care.

The General Assembly provided that where a parent of a child enters into an entrustment agreement with a local social services department, the parental rights of the remaining parent may also be terminated if such termination is in the best interests of the child and notice is given to that parent in some meaningful fashion.\(^7\) Also, residual parental rights may be terminated for a child who is abandoned and either the identity or the whereabouts of the parent or parents cannot be determined.\(^7\)

In \textit{Edwards v. County of Arlington},\(^7\) the Virginia Court of Appeals reversed an order terminating the residual parental rights of a Korean mother who suffered from mental illness. The mother also had significant language and cultural difficulties and a thyroid problem that was not properly medicated. There was no real abuse or neglect of the child, and the mother maintained persistent contact with the child during periods of foster care. The court concluded that a "less radical" remedy than termination of all parental rights would protect the child.\(^7\) The court of appeals also reversed a termination of parental rights in \textit{Rader v. Montgomery County Department of Social Services}\(^7\) because both the juvenile court and circuit court lacked jurisdiction to terminate parental rights in the absence of a prior initial petition by the department seeking custody of the children. The absence of a prior valid court

\(^7\) 838 F.2d 118 (4th Cir. 1988).
\(^7\) VA. CODE ANN. § 16.1-279(B).
\(^7\) Id. § 16.1-283(D).
\(^7\) Id. at 311-14, 361 S.E.2d at 653-55.
commitment of the children to the custody of the department precluded termination of parental rights.\textsuperscript{78}

II. JUVENILE DELINQUENCY

The United States Supreme Court's decision on the death penalty for juveniles in the case of Thompson \textit{v. Oklahoma}\textsuperscript{77} was the highlight of the past year. William Wayne Thompson was convicted of capital murder in Oklahoma for a homicide committed when he was fifteen years old. Oklahoma had no minimum age for the death penalty. With Justice Kennedy on the sidelines, the Court split into three camps. Brennan, Marshall and Blackmun joined Stevens' opinion stating that the eighth amendment's prohibition against "cruel and unusual punishment" precluded the execution of a person who was under the age of sixteen at the time of his or her offense.\textsuperscript{79} Scalia dissented, in an opinion joined by Chief Justice Rehnquist and Justice White.\textsuperscript{79} Justice O'Connor supplied the majority by concluding that the absence of a minimum age for capital punishment constituted a lack of the deliberation and serious consideration that should accompany a death-eligible decision.\textsuperscript{80}

The Court apparently will not take long to answer some of the questions left by Thompson. The Court granted certiorari to two more death penalty cases only a day later, one involving an individual who was sixteen years old when the offense was committed,\textsuperscript{81} and the other involving a seventeen-year-old murderer.\textsuperscript{82} However, Thompson does cast doubt on the constitutionality of sentencing fifteen-year-old juveniles to death in Virginia. This practice is possible because such minors can be transferred to the circuit court to be tried as adults without any limitation on the sentence that may be imposed.\textsuperscript{83} The plurality decision by Stevens would undoubtedly preclude such a penalty in Virginia, and the mere implication of a minimum age through the operation of the

\textsuperscript{76} Id. at 528, 365 S.E.2d at 236-37.
\textsuperscript{77} 108 S. Ct. 2687 (1988).
\textsuperscript{78} Id. at 2696.
\textsuperscript{79} Id. at 2711.
\textsuperscript{80} Id. at 2706.
\textsuperscript{82} Wilkins \textit{v. Missouri}, 736 S.W.2d 409 (Mo. 1987), \textit{cert. granted}, 56 U.S.L.W. 3894 (U.S. June 30, 1988).
transfer statute may fall short of the deliberate decision that Justice O'Connor would require.

Nevertheless, the General Assembly has broadened the possibility of transferring a juvenile to the circuit court by providing that such a transfer may take place if probable cause exists to believe that the child committed a lesser-included delinquent act that would be a felony if committed by an adult, as well as the act charged. The Virginia Court of Appeals also rendered a decision that has consequences where transfer has taken place. In *LaFleur v. Commonwealth*, the court opined that conviction of an offense requiring a mandatory minimum sentence precluded the use of the indeterminate commitment provisions of the Youthful Offender Act.

In 1988, the General Assembly also continued its examination of Virginia's treatment of “status offenders”—those children who have engaged in misbehaviors that would not be criminal if committed by an adult. House Joint Resolution 143 continues the joint legislative committee studying the handling of Children in Need of Services (CHINS), and further legislation postponed until July 1, 1989, the statutory scheme for CHINS adopted in 1987.

Further developments took place in the area of the confidentiality of juvenile records and the use of an individual's juvenile record in subsequent proceedings. One act significantly revised the Virginia Juvenile Justice Information System. The legislature also amended the juvenile code to allow for the release, upon the petition of the Commonwealth's Attorney, of personally identifying information about a juvenile charged with a serious delinquent act who becomes a fugitive from justice prior to disposition. In *O'Dell v. Commonwealth*, the Virginia Supreme Court concluded that juvenile offense records may be admitted in the penalty phase of a capital murder case, and in *McCain v. Commonwealth*, the Virginia Court of Appeals determined that, during attempted impeachment of a prosecution witness on the basis of his juvenile rec-

84. *Id.* § 16.1-269(A)(3)(a).
89. *Id.* § 16.1-309.1.
ord, the defense attorney should have been permitted to use the phrase "not innocent," rather than "within the purview of the juvenile court law," as the latter may convey something less than guilt.

Three bills enacted in 1988 dealt with the intake phase of the juvenile court process. The first provides that petitions filed by the Commonwealth's Attorney and department of social services must be filed with the clerk but an attorney may file petitions directly, except in those petitions alleging that a child is delinquent or in need of services. The second provides that the juvenile court's jurisdiction over intrafamily offenses is predicated on offenses "in which one family member is charged with an offense in which another family member is the victim." The third provides that a law enforcement officer investigating a motor vehicle accident may proceed on a summons in lieu of a petition. Other bills allow a juvenile to be detained prior to adjudication for up to 21 days, prohibit a juvenile court judge from serving on a juvenile detention home commission, and provide that a juvenile fifteen years of age or older may be moved from a detention facility to another such facility, or a jail, for a period not to exceed six hours, if his or her presence creates a threat to the security or safety of other children detained, or the staff of the facility.

Clinical psychologists were added to the list of professionals who may recommend that the court send a child to a state mental hospital for evaluation. The General Assembly also allowed the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services to place a child fifteen or older in a state mental hospital for evaluation, or pursuant to a commitment, a child who has been certified to the circuit court for trial as an adult or who has been convicted as an adult in the circuit court in an adult forensic unit where it is necessary to protect other patients, staff or the public.

93. Id. § 16.1-241(J).
94. Id. § 16.1-260(E)(1).
95. Id. § 16.1-277.1.
96. Id. § 16.1-249(E)(1).
97. Id. §§ 16.1-316 to -317.
98. Id. § 16.1-275.
99. Id.
The juvenile court was given the power to entertain motions to reconsider an order directing a person to participate in therapy, counseling or other continuing programs. An order disposing of such a motion is a final order for appeal purposes. A child paroled from state care shall be returned to a local supervising agency after a consultation taking place at least two weeks prior to such release. Funds were provided to the Department of Corrections to pay for continuing treatment services for juveniles placed on parole. Recently, the Federal District Court in Alexandria held that a juvenile court outreach counselor was not discharged in retaliation for his legitimate exercise of his free speech rights, and that, even if he had been prohibited from using a religious perspective in his counseling, the juvenile court was justified in preventing the imposition of religious views on clients of the court.

III. CHILD CUSTODY, ADOPTION, AND CHANGE OF NAME

A. Child Custody

The most significant development in the past year in the area of child custody was the final resolution of the legislative debate over "joint custody." The General Assembly enacted a statute that gives both juvenile and circuit courts the power to decree joint custody, as well as sole custody, while preserving "the welfare of the child or the children" as the primary consideration. The statute defines "joint custody" to mean either:

(i) joint legal custody where both parents retain joint responsibility for the care and control of the child and joint authority to make decisions concerning the child even though the child's primary residence may be with only one parent, or (ii) joint physical custody where both parents share physical and custodial care of the child or (iii) any combination of joint legal and joint physical custody which the court deems to be in the best interest of the child.104

100. Id. §§ 16.1-289.1, -298.
101. Id. § 16.1-293.
102. Id. § 16.1-294.
104. VA. CODE ANN. §§ 16.1-228, 20-107.2 (Repl. Vol. 1988). The legislature thus avoided creating either a presumption or an inference in favor of joint custody, but merely added it as an option to the court deciding custody. Although the influential case of Mullen v. Mullen, 188 Va. 259, 272-73, 49 S.E.2d 349, 355 (1948), has been cited to sanction joint custody in Virginia, that decision really stands for approving of dividing or alternating custody during the year in appropriate cases. See also Crouse v. Crouse, 207 Va. 524, 151 S.E.2d 412 (1966); Andrews v. Guyer, 200 Va. 107, 104 S.E.2d 747 (1958). There are no reported cases
The legislation also provides that neither parent shall be denied access to the academic, medical, hospital or other health records of a minor child unless otherwise ordered by a court for good cause shown. The legislature also decided that a circuit court transferring future support or custody issues to a juvenile court for resolution may do so to any such court within the Commonwealth that constitutes a more appropriate forum.

Custody cases decided or reported this year included determinations that a trial court's award of custody was not plainly wrong, especially where the appellant chose not to present evidence on his behalf; that an unappealed prior custody order by a juvenile court could only be modified by a circuit court based on a "change of circumstances" test rather than by conducting a de novo hearing; that the wishes of a child who has reached the age of discretion should be taken into consideration and that, where possible, siblings should be raised together; that the custody of a child will not be taken away from a parent simply because of occasional adultery of which the child is not aware; and that where both parents are fit, the court will award custody to the parent who will provide the highest quality of care.

In the absence of special circumstances in a custody dispute between parents and a third party, the best interests of a child are presumed to be served by custody in the natural parents. Temporary placement of children with an aunt, while the parents relocate, is not a special circumstance sufficient to overcome that presumption. Also, in fixing visitation rights, a trial court cannot


106. Id. § 20-79.
111. Rogers v. Rogers, 10 Va. Cir. 192 (Henrico County 1987).
arbitrarily disregard a commissioner in chancery's report allowing visitation with a mother out of state and decide the case "in light of human experience" where there is no evidence of record to establish the facts to support such experience.\textsuperscript{113}

The United States Supreme Court decided two cases dealing with interstate custody issues in the past year. In \textit{California v. Superior Court of California},\textsuperscript{114} the Court concluded that a father and grandfather could be extradited from California for kidnapping a child under Louisiana law, even though they possessed a California decree establishing the father as the lawful custodian. In \textit{Thompson v. Thompson},\textsuperscript{115} the Court resolved a dispute among the circuits by ruling that the Parental Kidnapping Prevention Act of 1980\textsuperscript{116} does not, by language or implication, create federal court jurisdiction to determine which of two conflicting child custody determinations is valid and enforceable.\textsuperscript{117} The Virginia Court of Appeals ruled that the jurisdictional section of the Uniform Child Custody Jurisdiction Act\textsuperscript{118} does not establish the proper forum for support matters.\textsuperscript{119}

\section*{B. Adoption and Change of Name}

There was considerable legislative activity in the adoption area in the 1988 session of the General Assembly. Legislation was passed requiring a court inquiry and a finding that the physical and mental health of the prospective adoptive parents is satisfactory to care for the child.\textsuperscript{120} Inclusion of relevant physical and mental history of the biological parents, if known, is now required in the adoption preliminary investigation report.\textsuperscript{121} The Commissioner of Social Services will now have twenty-one days, rather than fifteen, to notify the court of disapproval of the adoption placement investigation report.\textsuperscript{122} Legislation clarifying the provi-

\begin{footnotesize}
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\item\textsuperscript{114} 107 S. Ct. 2433 (1987).
\item\textsuperscript{115} 108 S. Ct. 513 (1988).
\item\textsuperscript{116} 28 U.S.C. § 1738(A) (1982).
\item\textsuperscript{117} This decision effectively negates the Fourth Circuit Court of Appeals' prior holdings to the contrary in Hickey v. Baxter, 800 F.2d 430 (4th Cir. 1986) and Meade v. Meade, 812 F.2d 1473 (4th Cir. 1987).
\item\textsuperscript{118} VA. CODE ANN. §§ 20-125(2), -126 (Repl. Vol. 1983).
\item\textsuperscript{120} VA. CODE ANN. §§ 63.1-223(D) (Cum. Supp. 1988).
\item\textsuperscript{121} Id. § 63.1-223(E).
\item\textsuperscript{122} Id. §§ 63.1-223, -228.
\end{itemize}
\end{footnotesize}
sions on the disclosure of information from adoption records was
adopted which distinguishes between identifying and nonidentifying
information, and narrowing access to the former. Bills were
passed to increase the level of adoption subsidy payments and to
authorize the Governor to enter into interstate compacts on adop-
tion assistance across state lines.

A final order of adoption may not be entered until the informa-
tion necessary to locate a birth certificate, or evidence of date of
birth for a foreign-born child, has been furnished to the court. In
Frye v. Spotte, the Virginia Court of Appeals affirmed an order
of adoption over the objection of the natural father where the fa-
ther had deserted the family (including removal of the food and
disconnection of electricity and water), persistently refused to sup-
port the family or contact them, and had a history of severe abuse,
including sexual abuse, of the children and wife.

In the circuit court case of In re Change of Name, the court
denied a petition by the divorced natural mother of the two-year-
old boy, to change his surname to her maiden name over the objec-
tion of the father. The court concluded that the change of name
was not in the best interest of the child.

IV. Paternity

The General Assembly was uncommonly active in 1988 in revis-
ing and amending the laws relating to paternity. Two identical
bills amended the “long-arm statute” to provide personal jurisdic-
tion in Virginia over a person who conceived or fathered a child in
the state, so long as personal service is obtained. The same bills
establish a new statutory scheme for addressing the establish-
ment of parentage in the courts of the state, repealing sections 20-61.1
and 20-61.2 of the Code of Virginia. Under the new scheme, par-
entage is established prima facie: (i) for a woman, by proof of her

123. Id. § 63.1-236.
124. Id. § 63.1-238.3.
125. Id. §§ 63.1-238.6 to -238.11.
126. Id. §§ 32.1-262, 63.1-230.
128. 11 Va. Cir. 42 (Frederick County 1986).
supported by an affidavit.
having given birth to the child, or by other means in the statute; (ii) for a man prima facie by proof of a written statement of the father and mother, made under oath, acknowledging paternity, or by other statutory means; and (iii) for an adoptive parent by proof of lawful adoption.\textsuperscript{131}

A proceeding to establish parentage may be filed by a child, by a parent, by a person claiming parentage, by a person standing \textit{in loco parentis} to the child or having legal custody of the child, or by a representative of either the Departments of Social Services or Corrections.\textsuperscript{132} A court considering parentage may order a blood grouping test on its own motion or upon motion of either party.\textsuperscript{133}

The standard of proof to establish parentage is “clear and convincing evidence,” and all relevant evidence is admissible. That evidence may include, but is not limited to: (1) evidence of open cohabitation or sexual intercourse between the known parent and alleged parent at the probable time of conception; (2) medical or anthropological evidence based on tests performed by experts; (3) results of medically reliable genetic blood grouping tests; (4) evidence of the alleged parent consenting to or acknowledging, by a general course of conduct, the common use of such parent’s surname by the child; (5) evidence of the alleged parent claiming the child as his on any statement, tax return or other document filed with any governmental body or agency; (6) a true copy of a formal acknowledgment of parentage;\textsuperscript{134} and (7) an admission by a male between the ages of fourteen and eighteen.\textsuperscript{135}

Proceedings under the parentage act are deemed to be civil.\textsuperscript{136}

\begin{footnotes}
\footnote{Id. \textsection{} 20-49.2. The child may be made a party to the proceedings and, if a minor and a party, shall be appointed a guardian \textit{ad litem}. The determination of a court is not binding on any person who is not a party. \textit{Id}.}
\footnote{Id. \textsection{} 20-49.3. The person requesting the test shall pay for it, unless indigent, in which case, the cost shall be paid by the Commonwealth. The court may assess the costs of the test to the party or parties determined to be the parent or parents. The results of the test may be admitted into evidence when contained in a written report prepared and sworn to by a duly qualified expert so long as the results are filed with the clerk at least fifteen days prior to trial. \textit{Id}.}
\footnote{Id. \textsection{} 20-49.5, allows for an acknowledgement executed on a form provided by the Department of Social Services where a man voluntarily testifies under oath or affirmation that he is the father of a child.}
\footnote{Id. \textsection{} 20-49.4. Section 20-49.6 provides for the validity of a determination of paternity or an order for support, concerning a male between the ages of fourteen and eighteen, who is represented by a guardian \textit{ad litem}. \textit{Id}. \textsection{} 20-49.6.}
\footnote{Id. \textsection{} 20-49.7.}
\end{footnotes}
judgment order establishing parentage may include provisions concerning support obligations, custody, visitation, or any matter in the best interest of the child. If a putative father fails to appear, after having been personally served with notice, the court may nonetheless proceed to hear the case as if the putative father were present.

In Clark v. Jeter, the United States Supreme Court unanimously determined that Pennsylvania’s now superseded six-year statute of limitations for actions to establish paternity violated the Equal Protection Clause of the fourteenth amendment. Where other evidence sufficiently established the chain of custody, admission of the results of human leukocyte antigen (HLA) blood tests is not precluded merely because the courier who carried blood from one laboratory to another was not identified. Nor does the absence of testimonial identification of the person who drew blood samples for an HLA test defeat the admissibility of the results of the test. A circuit court concluded that where the evidence in a paternity suit is diametrically opposed, and the blood tests are less than 95 per cent conclusive, paternity is not established.

V. Education

A. Generally

In Kadrmas v. Dickinson Public Schools, the United States Supreme Court upheld a North Dakota statutory scheme permitting some local school districts to charge pupils a fee for transportation to school, while other districts provided free transportation. The Court declined to apply a strict or “heightened” scrutiny to the challenged practice, even though it placed “a greater obstacle to education in the path of the poor than it does in the path of

137. Id. § 20-49.8.
138. Id. § 20-61.3.
144. 56 U.S.L.W. 4777 (U.S. June 24, 1988).
wealthier families. Justice O'Connor reiterated that education was not a fundamental right triggering strict scrutiny when government interfered with access, and that the intermediate scrutiny test was limited to cases involving discrimination based on gender or illegitimacy. Justice Marshall dissented, in an opinion joined by Justice Brennan, wherein he condemned the Court's "retreat from the promise of equal educational opportunity by holding that a school district's refusal to allow an indigent child who lives [sixteen] miles from the nearest school to use a schoolbus service without paying a fee does not violate the Fourteenth Amendment's Equal Protection Clause." Justice Stevens joined by Justice Blackmun also dissented.

The Virginia General Assembly reenacted its 1987 legislation directing that school divisions could not begin the school year until after Labor Day, and it adopted new Standards of Quality to govern the schools of the Commonwealth.

B. First Amendment and Other Student Rights

The Supreme Court upheld censorship of a student newspaper by a high school principal, in Hazelwood School District v. Kuhlmeier, on the grounds that the paper, published by a journalism class, did not qualify as a "public forum" and the excision of two pages, on the basis that articles therein unfairly impinged on the privacy rights of other students, did not violate first amendment freedom of speech. However, in Crosby v. Holsinger, the Fourth Circuit Court of Appeals reversed a summary dismissal sua sponte on frivolousness grounds of an action seeking a preliminary injunction against a ban of a high school's "Johnny Reb" mascot. In Burnham v. West, the district court concluded that general searches for "magic markers", marijuana and portable radios conducted at a middle school by teachers, under the direction of the principal, violated the fourth amendment. The court stated that

145. Id. at 4779.
152. 816 F.2d 162 (4th Cir. 1987).
there were no reasonable grounds at the inception of the search to suspect that any particular student had the prohibited items or substances. 154

C. Rights of Handicapped Students

Congress took a significant step to reverse the effect of the United States Supreme Court’s decision in Grove City College v. Bell155 when it adopted the “Civil Rights Restoration Act of 1987.”156 The purpose of the Act is to address discrimination on the basis of race, gender, handicap or age in any program of an educational institution that receives any federal funds. In Honig v. Doe,157 the United States Supreme Court concluded that the “stay put” provisions of the Education of the Handicapped Act158 precluded the unilateral exclusion of educationally handicapped children from school for dangerous or disruptive behaviors, without utilizing the procedures for addressing changes of placement under the federal Education for the Handicapped Act.

The Fourth Circuit Court of Appeals decided several cases concerning reimbursement of parents for special education. Where the district court decided that the public school placement decision was appropriate and no procedural violations occurred, the Fourth Circuit concluded that parents’ unilateral decision to withdraw their son from the public schools and place him in a private setting did not preclude reimbursement for that placement.159 In a second case, the court dismissed as moot an appeal challenging North Carolina’s refusal to allow administrative hearing officers in special education cases to award tuition reimbursement to parents who have successfully proven that the public school program is inappropriate.160 The court also affirmed a district court decision finding grievous procedural defects in a school board’s handling of a parents’ special education claims and awarding substantial amounts for tuition and related expenses in a private placement.161

154. Id. at 1165-66.
Likewise, the District Court for the Western District of Virginia decided that procedural due process required a prompt administrative hearing on claims by parents of handicapped students, and the student should be kept in his current placement while disciplinary proceedings took place.\textsuperscript{162} In addition, the court declared that available administrative procedures, under the Education of the Handicapped Act, should be exhausted before resorting to litigation.\textsuperscript{163} Also, the court held that parents were barred from recovering reimbursement for private placement tuition after a school system offered an appropriate educational placement for their child.\textsuperscript{164} The District Court for the Eastern District of Virginia decided that handicapped students and their parents had no right to remove cases brought by school divisions in state courts to federal court, in order to challenge decisions of administrative reviewing officers.\textsuperscript{165}

In \textit{Beasley v. School Board of Campbell County},\textsuperscript{166} the Virginia Court of Appeals ruled that the court had jurisdiction over an appeal from a circuit court decision reversing the decision by an administrative hearing officer determining the rights of a handicapped child. The court further concluded that the hearing officer's decision that the public school was not providing an appropriate education was correct.\textsuperscript{167} In \textit{Erickson v. City of Richmond School Board},\textsuperscript{168} the circuit court judge decided that an individualized education program (IEP) was not rendered inappropriate by the fact that a learning disabled student with above average intelligence would benefit more from a better program in the public schools.

\textbf{VI. MISCELLANEOUS}

In \textit{Hartigan v. Zbaraz},\textsuperscript{169} an equally divided United States Supreme Court affirmed the Seventh Circuit Court of Appeals' decision\textsuperscript{170} that portions of the Illinois Parental Notification Act deal-

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\textsuperscript{167} \textit{Id.} at 213, 367, S.E.2d at 742.
\textsuperscript{168} 9 Va. Cir. 172 (City of Richmond 1987).
\textsuperscript{169} 108 S. Ct. 479 (1987).
\textsuperscript{170} Zbaraz v. Hartigan, 763 F.2d 1532 (7th Cir. 1985).
ing with abortions by minors were unconstitutional. In *Winchester Memorial Hospital, Inc. v. Boyce*,\(^{171}\) the Circuit Court of Frederick County held that an elective abortion performed on an unemancipated minor is not a necessity for which the minor's parents are legally responsible. In *Houchins v. Kennedy's Piggly Wiggly Stores, Inc.*,\(^{172}\) the circuit court judge ruled that a child born alive does not have an independent cause of action for injuries suffered prior to birth, through the negligence of another. Legislation having implications for an increasing number of Virginia mediation programs that impact on children, provided confidentiality to mediation communications and immunized mediators and mediation programs from civil liability for acts or omissions in the absence of bad faith, malicious intent, or willful and wanton disregard of the rights, safety, or property of another.\(^{173}\)

\(^{171}\) 10 Va. Cir. 541 (Frederick County 1984).

\(^{172}\) 10 Va. Cir. 392 (Wise County 1988).
