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## Annual Survey of Virginia Law: Legal Issues Involving Children

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## LEGAL ISSUES INVOLVING CHILDREN

*Robert E. Shepherd, Jr.\**

### I. JUVENILE DELINQUENCY AND NONCRIMINAL MISBEHAVIOR

#### A. *Juvenile Delinquency*

The past year was significant on several fronts where delinquency was concerned. The General Assembly responded positively to fifteen years of advocacy for a separate administrative agency to deal with delinquent youths. There were several important Virginia decisions governing the transfer process in an era of growing concern about serious offenses by juveniles, and the Supreme Court of the United States brought some closure to constitutional attacks on the death penalty for minors.

The first of these milestones occurred through legislative action in response to a General Assembly study of the Division of Youth Services of the Department of Corrections.<sup>1</sup> The joint legislative study committee successfully recommended that: the General Assembly separate the Division of Youth Services out of its current placement in the Department of Corrections and create a new, free-standing Department of Youth Services effective July 1, 1990, a director for the new Department be appointed by the Governor prior to July 1, 1989, a policy-making board for the new Department similarly be created effective July 1, 1989, and a sum of money be appropriated to effect the transition from a division to a department over the course of the 1989-1990 fiscal year.<sup>2</sup> There will be a year of transition in implementing the separation of

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1. JOINT SUBCOMMITTEE STUDYING DIVISION OF YOUTH SERVICES, REPORT TO THE GOVERNOR & THE GEN. ASSEMBLY OF 1989, (S. Doc. No. 21 (1989)) [hereinafter YOUTH SERVICES REPORT].

2. For a complete list of all of the statutory changes, see 1989 Va. Acts 739, which has been codified in the following sections: VA. CODE ANN. §§ 2.1-1.1, 2.1-1.3, 2.1-1.6, 2.1-20.4, 2.1-51.18, 2.1-121, 2.1-700 to 701, 2.1-703, 9-6.25:2, 9-168, 9-268, 9-271, 16.1-222, 16.1-228 to 16.1-233, 16.1-238, 16.1-240 to 241, 16.1-246, 16.1-275, 16.1-279, 16.1-284.1, 16.1-286 to 287, 16.1-294 to 295, 16.1-300, 16.1-309 to 311, 16.1-318, 18.2-64.1, 18.2-473, 18.2-480.1, 20-48 to 49, 22.1-340 to 341, 23-35.3, 29.1-317, 36-99.4, 53.1-31, 54.1-2969, 63.1-248.16, 63.1-314.3, 66-1 to 35 (Cum. Supp. 1989).

Youth Services from Corrections. Youth Services will have the responsibility of administering the state-operated court service units providing probation and other services to the juvenile courts in the state, the operation of all juvenile correctional facilities, the administration of juvenile group homes and other similar community-based institutions, the development of programs for the prevention of delinquency, and other similar functions.<sup>3</sup> The patrons argued that the development of a separate agency would heighten the visibility of programs for delinquent youths and others at risk of delinquent behavior, and provide an administrative framework for delivering services to such juveniles in a more efficient and effective manner.<sup>4</sup>

In the waiver of juvenile court jurisdiction area, the court of appeals decided three cases that will have a significant impact on the procedures used by the Commonwealth to transfer a juvenile to the circuit court to be tried as an adult when a fifteen-year-old is charged with an act that would be a felony if committed by an adult. Virginia law provides for the possibility of such transfer at the discretion of the juvenile court judge when the prosecution initiates the process by moving for transfer.<sup>5</sup> The Code of Virginia specifically delineates a procedure for the Commonwealth to seek review of a decision by the juvenile court judge to retain jurisdiction and not transfer the case,<sup>6</sup> but no corresponding statutory procedure exists for review at the instance of the juvenile of a decision to transfer. However, in *Grogg v. Commonwealth*,<sup>7</sup> the court of appeals agreed with the juvenile defendant that he had a similar right to review of the transfer decision by the circuit court, and that this review should be conducted de novo with the circuit court making "an independent determination to remand the case to the juvenile court or to permit the Commonwealth's attorney to seek an indictment."<sup>8</sup> At such a de novo hearing, the "burden of proof remains on the Commonwealth to establish probable cause to believe that the child committed the act alleged and the other factors which must be considered by the court pursuant to Code § 16.1-269."<sup>9</sup> The review may be based on the record created in the juve-

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3. VA. CODE ANN. §§ 66-1 to 35 (Cum. Supp. 1989).

4. YOUTH SERVICES REPORT, *supra* note 1, at 6-9.

5. VA. CODE ANN. § 16.1-269 (Repl. Vol. 1988).

6. *Id.* § 16.1-269(E).

7. 6 Va. App. 598, 371 S.E.2d 549 (1988).

8. *Id.* at 606, 371 S.E.2d at 553.

9. *Id.* The court's conclusion about the burden of proof is also significant because it inti-

nile court, but it must be an independent determination of the propriety of waiver by the circuit court judge.

The *Grogg* conclusion that the transfer decision is appealable was subsequently reinforced in *Hairfield v. Commonwealth*.<sup>10</sup> The court concluded that a juvenile court decision to transfer the minor for trial as an adult is a final order which is immediately appealable because it ends the juvenile court's jurisdiction.<sup>11</sup> On appeal in the circuit court, the juvenile has a right to a separate hearing on the transfer decision at that level, with the court being required to make all the necessary findings that the juvenile court must make under the Code of Virginia.<sup>12</sup> If the circuit court judge affirms the juvenile court's transfer decision, the parties have the same right to a new judge to hear the merits of the case as exists in the juvenile court.<sup>13</sup> The court in *Hairfield* also reaffirmed the conclusion that the failure of the juvenile court to specifically indicate that all the necessary findings pursuant to section 16.1-269<sup>14</sup> had been made renders the transfer order void and deprives the circuit court of jurisdiction over the juvenile.<sup>15</sup>

In *Hutcherson v. Commonwealth*,<sup>16</sup> the court of appeals ruled that the necessary finding in certain cases that a child is not "amenable to treatment or rehabilitation as a juvenile through available facilities"<sup>17</sup> before ordering transfer for trial as an adult, for certain offenses, does not require that the "juvenile has previously been offered treatment or rehabilitation and has failed to respond."<sup>18</sup> Thus, a finding of nonamenability may be based on the nature of the offense and the surrounding circumstances, even though the

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mates that the Commonwealth has the burden of establishing each of the statutory criteria in order to obtain a transfer.

10. 7 Va. App. 649, 376 S.E.2d 796 (1989).

11. *Id.* at 654-55, 376 S.E.2d at 799-800. The court noted that a juvenile who has been transferred loses the right to be detained separate and apart from adult offenders and his or her court records are no longer protected from public inspection.

12. *Id.* at 656-57, 376 S.E.2d at 800-801.

13. VA. CODE ANN. § 16.1-269 (Repl. Vol. 1988).

14. *Id.*

15. *Id.* at 652, 376 S.E.2d at 797; see also *United States v. Blevins*, 802 F.2d 768, 770 (4th Cir. 1986); *Matthews v. Commonwealth*, 216 Va. 358, 361, 218 S.E.2d 538, 541 (1975); *Peyton v. French*, 207 Va. 73, 80, 147 S.E.2d 739, 743 (1966); *Commonwealth v. Blevins*, 13 Va. Cir. 110 (1988). It is quite easy to make the requisite findings now, as it is only necessary to check the appropriate boxes on the pre-printed form provided by the courts entitled Order of Transfer.

16. 7 Va. App. 534, 375 S.E.2d 403 (1989).

17. VA. CODE ANN. § 16.1-269(A)(3)(b) (Repl. Vol. 1988).

18. 7 Va. App. at 536, 375 S.E.2d at 403.

juvenile had not been previously before the court. However, such a finding may not be based solely on the face of the charge, unless the offense is one of the specifically enumerated offenses in the statute. It should also be noted that the issue in *Hutcherson* was raised in the circuit court through a "motion to quash the transfer" rather than by an appeal of the juvenile court's transfer decision, although the latter procedure would have been easier since *Grogg* and *Hairfield*.

Although section 16.1-271 of the Code of Virginia notes that trial of a juvenile as an adult following transfer shall not preclude treatment as a juvenile for subsequent offenses, a 1989 amendment provides that a minor who is tried and convicted as an adult in the circuit court and sentenced to confinement in a state correctional facility shall be considered an adult in any criminal proceeding resulting from an offense while so incarcerated.<sup>19</sup>

The *Grogg* case also presented a difficult confession issue for the court of appeals.<sup>20</sup> Grogg, nine days short of his sixteenth birthday, was initially arrested in Sarasota, Florida, on the evening of October 26, 1985, and placed in jail pending an "advisory proceeding" before a circuit court judge the next morning.<sup>21</sup> He was advised of his rights and gave a Florida police officer a statement which was not introduced at his trial. A public defender was appointed prior to the "advisory proceeding" to represent him, along with about fifteen to eighteen adults at the hearing, and this attorney was surprised to find Grogg detained at the jail with adults. He spoke with Grogg briefly and concluded that he appeared to be "dazed", but he advised that Grogg would be appointed an attorney in Fairfax County. At the hearing, the judge read all of the prisoners their rights simultaneously although the Florida Rules require that a juvenile be engaged in an individual colloquy to ensure understanding of his or her rights. Grogg was returned to the jail and did not see the public defender again until his extradition hearing on October 28th. Prior to that hearing, two Fairfax County police officers, accompanied by a Sarasota officer, interrogated Grogg without the presence of counsel. After being informed of his rights again, he confessed to his involvement in the Virginia crime.<sup>22</sup>

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19. VA. CODE ANN. § 16.1-271 (Cum. Supp. 1989). The amendment does not address the procedural issue of where such a prosecution will begin. Is it to begin in the juvenile court with transfer to take place automatically, or is it to commence in the general district court with a preliminary hearing as for adults?

20. 6 Va. App. 598, 371 S.E.2d 549 (1988).

21. *Id.* at 602, 371 S.E.2d at 550-51.

22. *Id.* at 604-05, 371 S.E.2d at 552.

The court of appeals concluded that Grogg was not denied his sixth amendment rights when he was interrogated by the Fairfax officers without the presence of or notice to his court-appointed counsel since the right to counsel did not attach at the advisory proceeding as that hearing was not the "initiation of adversary judicial proceedings."<sup>23</sup> The court also found that there was no violation of his fifth amendment rights considering the totality of the circumstances surrounding the taking of the statements.<sup>24</sup> Although a juvenile may waive fifth amendment rights, the Commonwealth bears a heavy burden in establishing such a waiver. The fact that his parents, his attorney, or any other interested adult or guardian were not present also weighs against the validity of the waiver, but it is only one factor in the totality of the circumstances. The court also concluded that the fact that the questioning took place in the interrogation room of the jail did not make the environment coercive, and the youth was in good physical health and not under the influence of drugs or alcohol at the time of questioning. Grogg had completed the seventh grade, he had one prior juvenile court appearance, the interrogation only lasted about an hour, and intelligence tests two years earlier showed that his cognitive functioning fell within the average range, his verbal comprehension was within the low average range, and his perceptual organizational ability fell within the high average range.<sup>25</sup> At a pre-trial suppression hearing in Virginia, Grogg also seemed to understand the advice given him by the Virginia officers in Florida and knew what his rights were.<sup>26</sup>

Finally, the court determined that even if Florida statutes regarding the waiver of counsel were violated, this would not render the confession involuntary, and the Virginia statutes governing procedures following arrest of a juvenile were not applicable to the conduct in Florida.<sup>27</sup>

The court's conclusions concerning the admissibility of the statements are disturbing. Using the totality of the circumstances test, there are several significant factors militating against admissibility

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23. *Id.* at 610-11, 371 S.E.2d at 555.

24. *Id.* at 617, 371 S.E.2d at 559.

25. *Id.* at 614, 371 S.E.2d at 557-58.

26. *Id.* at 615-16, 371 S.E.2d at 558.

27. *Id.* at 618, 371 S.E.2d at 559-60.

of the confession: (1) Grogg was facing a first degree murder charge; (2) he was fifteen, the lowest age at which transfer for trial as an adult could take place; (3) he does not appear to be at the correct grade level for his age, which the intelligence tests indicate from his low average functioning on "verbal comprehension ability;"<sup>28</sup> (4) neither his parents nor any other interested adults were present (the only member of his family who was even nearby geographically was his brother who had implicated him); (5) his appointed counsel, was neither present nor notified of the interrogation;<sup>29</sup> (6) there was an apparent violation of the Florida rule governing the waiver of counsel; and (7) the holding of the juvenile in an adult jail for detention and interrogation purposes should have weighed heavily in the equation.<sup>30</sup>

The court of appeals considered another confession by a juvenile charged with murder in *Smith v. Commonwealth*.<sup>31</sup> In *Smith*, a fifteen-year-old was interrogated without his parents being present. Although his parents were with him when he was arrested, they did not accompany him to the sheriff's office.<sup>32</sup> Smith was advised of his rights on at least two occasions prior to making a statement. He was once again advised of his rights prior to a second statement. His parents were present during part of the time he was being questioned at the sheriff's office although he refused to either see them or permit them to be present during the interrogation. The court concluded that the statements were admissible after "viewing the totality of the circumstances and particular facts disclosed by this record. . . ."<sup>33</sup>

The General Assembly did not amend the juvenile code's delinquency provisions very extensively at the 1989 session. One amendment that was passed provided for the extension of the time for a detention hearing beyond seventy-two hours, to the next

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28. See generally T. GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981) (raises some important questions regarding the capacity of minors to waive their rights to counsel or to be protected against self-incrimination).

29. Although the court concluded that Grogg's sixth amendment rights were not violated by the failure to have counsel present for, or notified of, the interrogation, those failures should have been major factors in the totality of the circumstances since counsel was in fact appointed and had interviewed and represented Grogg prior to police questioning.

30. Virginia prohibits the use of an adult jail for the detention of juveniles, and has done so since 1985. VA. CODE ANN. § 16.1-249 (Cum. Supp. 1989). See also Shepherd, *Legal Issues Involving Children: Annual Survey of Virginia Law*, 19 U. RICH. L. REV. 753, 754-58 (1985).

31. 7 Va. App. 310, 373 S.E.2d 340 (1988).

32. *Id.* at 312, 373 S.E.2d at 341-42.

33. *Id.* at 315, 373 S.E.2d at 343.

court day if the limitation expires on a Saturday, Sunday or other legal holiday.<sup>34</sup> Another amendment stated that the predispositional detention of persons eighteen years of age or older could be in either a juvenile or adult facility with a preference for the latter.<sup>35</sup> In addition, the General Assembly set limits on reincarceration of an adult or juvenile pursuant to a motion to increase bail or recognizance.<sup>36</sup> The General Assembly also raised the maximum court-appointed fee for attorneys representing indigent juveniles to \$100.<sup>37</sup> The category of cases wherein a minor may be treated as a serious juvenile offender by the juvenile court was increased.<sup>38</sup> Finally, there was a required assessment of clerk's fees in cases where the juvenile is ordered to complete traffic school or a driver improvement clinic in lieu of a finding of guilty in a traffic case,<sup>39</sup> and there is a statute which provides for drug testing as a condition of probation for adults or juveniles.<sup>40</sup>

The 1989 legislative session also made some significant changes in the dispositional authority of the juvenile court with the "abuse and lose" and automobile curfew amendments to section 16.1-279<sup>41</sup> of the Code of Virginia. The so-called "abuse and lose"<sup>42</sup> law provides for a suspension of the privilege of securing a driver's license for a juvenile, who is at least thirteen years old with no license, for at least one year or until reaching the age of seventeen, whichever is longer, for a first offense. Then for a second or subsequent offense, the suspension lasts until the juvenile's eighteenth birthday if the juvenile is found to be delinquent as a result of driving while intoxicated,<sup>43</sup> or for refusing to take a blood or breath test,<sup>44</sup> and for the surrender of a driver's license for minors in possession of such for the same period of time.<sup>45</sup> For a child found to be in need of services because of involvement in the unlawful purchase or pos-

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34. VA. CODE ANN. § 16.1-250(A) (Cum. Supp. 1989).

35. *Id.* § 16.1-249(G). This provision primarily applies to those persons within the jurisdiction of the juvenile court because the offense was committed prior to their eighteenth birthday. *Id.* § 16.1-241.

36. *Id.* § 19.2-132.1.

37. *Id.* § 19.2-163, which must be read in conjunction with section 16.1-266 (Repl. Vol. 1988) of the Code of Virginia.

38. *Id.* § 16.1-285.1 (Cum. Supp. 1989).

39. *Id.* § 14.1-112 (Repl. Vol. 1989).

40. *Id.* § 19.2-123 (Cum. Supp. 1989).

41. *Id.* § 16.1-279(E1).

42. *Id.*

43. *Id.* § 18.2-266 (Repl. Vol. 1988).

44. *Id.* § 18.2-268 (Cum. Supp. 1989).

45. *Id.* § 16.1-279(E1).



session of alcohol, a six month suspension is levied unless the child is younger than sixteen, in which event the ability to apply for a license shall be delayed until six months following the sixteenth birthday.<sup>46</sup> Various other procedural provisions are also included in the act. The motor vehicle curfew provision enacted at the 1989 session allows for the imposition of a curfew on the use of a child's driver's license in lieu of the suspension of such license for delinquency and for the issuance of a restricted permit allowing the juvenile to drive to and from school or for other purposes.<sup>47</sup>

One further issue addressed by the court of appeals in *Grogg v. Commonwealth*<sup>48</sup> was whether a juvenile convicted as an adult by a circuit court following transfer has an appeal as of right to the court of appeals because it involved the "control or disposition of a child."<sup>49</sup> The court of appeals concluded that although the proceeding may initially have been such a case, it lost that character once the juvenile was convicted of a criminal offense and sentenced as an adult.<sup>50</sup> The court of appeals specifically reserved the question as to whether an appeal could be taken by right if the circuit court imposed a juvenile disposition rather than an adult sentence.<sup>51</sup> The General Assembly also provided that when a circuit court either refers or transfers a case to a juvenile court, the appeal must be taken to the referring court.<sup>52</sup>

The confidentiality of juvenile court records continues to raise troublesome issues for the courts and the General Assembly. The legislature gave the Commonwealth access to juvenile records in connection with guilty findings on offenses for which an abstract must be filed with the Division of Motor Vehicles ("DMV") upon certification that they are needed for evidentiary purposes in a pending matter.<sup>53</sup> The General Assembly also prohibited expungement of records of juvenile convictions involving DMV reports for a period of ten years,<sup>54</sup> and allowed for the release of information

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46. *Id.* With the creation of the new jurisdictional categories for noncriminal misbehavior, the inclusion of the child in need of services in this legislation seems to be far less appropriate than for the child in need of supervision. *See id.* § 16.1-228.

47. *Id.* § 16.1-279(E)(6).

48. 6 Va. App. 598, 371 S.E.2d 549 (1988).

49. *See* VA. CODE ANN. § 17-116.05(3)(e) (Repl. Vol. 1988).

50. 6 Va. App. at 608, 371 S.E.2d at 553-54.

51. *Id.* at 608 n.4, 371 S.E.2d at 554 n.4.

52. VA. CODE ANN. § 16.1-296 (Cum. Supp. 1989).

53. *Id.* § 16.1-305(D).

54. *Id.* § 16.1-306(A).

about a juvenile, before the court on delinquency charges arising on school property in connection with a school sponsored activity, where disclosure is made only to school personnel for the purpose of school disciplinary action.<sup>55</sup> The court of appeals in *Scott v. Commonwealth*<sup>56</sup> denied a criminal defendant access to the juvenile court files of an adverse witness for impeachment purposes, since a list of juvenile adjudications were furnished to him and there was no claim that those adjudications were relevant to impeachment on the grounds of bias.<sup>57</sup>

There has been an increasing number of cases around the state, especially high-profile cases, where the news media has sought access to information about juveniles involved in the juvenile justice process, or access to court hearings. A recent Richmond case involved a motion filed by Richmond Newspapers, Inc., seeking to examine all the juvenile court's records concerning a deceased juvenile who was alleged to be a "hit man" in drug cases, and who had been the subject of prior articles in the newspaper.<sup>58</sup> The juvenile court denied access, ruling that the juvenile's right to privacy and the interests of his surviving child, his mother, and other family members outweighed the interests of the news media.<sup>59</sup> On appeal, the Circuit Court of the City of Richmond reached a different conclusion.<sup>60</sup> The circuit judge concluded that the deceased juvenile had no surviving right to privacy and there was no valid reason for shielding the family from disclosure of information about the juvenile. Although in the normal juvenile case, the court must balance the juvenile's interest in rehabilitation and being shielded from the consequences of his acts against society's right to access, the minor's interests were diminished by his death.<sup>61</sup> Even though

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55. *Id.* § 16.1-309(B).

56. 7 Va. App. 252, 372 S.E.2d 771 (1988).

57. *Id.* at 259-262, 372 S.E.2d at 775-77. The case was thus distinguished from *Davis v. Alaska*, 415 U.S. 308 (1974), where the juvenile's prior record was sought to demonstrate that his testimony was in exchange for leniency in treatment, or other similar matters involving bias.

58. *In re Richmond Newspapers, Inc.*, No. J-21548-11 (Richmond, Jur. & Dom. Rel. Dist. Ct. Oct. 7, 1988).

59. *Id.*

60. *In re Richmond Newspapers, Inc.*, 14 Va. Cir. 227 (City of Richmond 1988). Although neither court cited the opinion, the decision of the Supreme Court of the United States in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), provided a model for an in camera examination when access is sought to confidential records by a party with a constitutionally protected interest in such access. See *Scott v. Commonwealth*, 7 Va. App. at 261-62, 372 S.E.2d at 776-77 (discussed *supra* p.713 and notes 56-57).

61. *Richmond Newspapers*, 14 Va. Cir. at 234-35.

there may be a further interest in protecting the confidentiality of persons providing information to the probation officer preparing the social history, that interest should not be safeguarded by a blanket prohibition against access. The circuit court thus concluded that the competing interests could best be balanced by an in camera examination of the records by the juvenile judge and an individualized determination of which records should be disclosed or safeguarded.<sup>62</sup>

As noted previously, the Supreme Court revisited the issue of capital punishment for juveniles this term, which had been addressed for persons under the age of sixteen in *Thompson v. Oklahoma*.<sup>63</sup> The Court jointly decided two cases both under the style of *Stanford v. Kentucky*.<sup>64</sup> The first case involved Kevin Stanford, who was sentenced to death for a murder committed when he was seventeen years old. The second case dealt with an appeal by Heath Wilkins, who received a death sentence in Missouri for a homicide when he was sixteen. The *Stanford* Court concluded that the imposition of the death sentence on persons sixteen and over, is not a per se violation of the eighth amendment's proscription against cruel and unusual punishment.<sup>65</sup> Justice Scalia, writing for the four member majority, stated that since capital punishment for juveniles was not considered cruel and unusual at the time the *Bill of Rights* was adopted, the Court must consider whether the "evolving standards of decency" in the United States treat death as inappropriate for such defendants today.<sup>66</sup> Of the thirty-seven states that allow capital punishment, twenty-two permit its imposition on sixteen-year-olds and twenty-five will allow it for seventeen-year-olds. This tally does not "establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual."<sup>67</sup> Justice O'Connor, as in last year's *Thompson* case, provided the decisive fifth vote, this time in favor of death. Although she agreed with Scalia that there was no strong national consensus against capital punishment for older minors, she disagreed with his view that age-based statutory classifications were irrelevant to an eighth

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62. *Id.* at 235.

63. 108 S.Ct. 2687 (1988); see also Shepherd, *Legal Issues Involving Children: Annual Survey of Virginia Law*, 22 U. RICH. L. REV. 691, 703 (1988).

64. 109 S. Ct. 2969 (1989).

65. *Id.* at 2980.

66. *Id.* at 2974

67. *Id.* at 2975-76.

amendment proportionality analysis.<sup>68</sup> Brennan wrote a dissenting opinion for Marshall, Blackmun, Stevens and himself, arguing that an examination of state statutes must include an assessment of the consensus in those states prohibiting capital punishment, as well as the consensus of Congress, which declined to include juveniles in its most recent death penalty enactment.<sup>69</sup> The dissent also examined the views of other nations and respected national organizations who filed *amicus curiae* briefs in support of the petitioners, as well as various age-based legislative classifications. In addition, the dissent examined data and studies concerning the maturity of minors, the characteristics of juveniles on death rows in the country, the questions of the blameworthiness and culpability of minors for their criminal acts, and the reduced deterrence value of the death sentence for adolescents.<sup>70</sup> When coupled with *Thompson*, the conclusion is inescapable that death is a constitutionally permissible punishment for juveniles over fifteen, at least until there is some consistent national trend against minors that creates a new and different consensus persuasive to Justice O'Connor, assuming the same composition of the Court.

### B. *Noncriminal Misbehavior*

The General Assembly this spring concluded its work on Virginia's "children in need of services" jurisdictional category that was begun in 1987.<sup>71</sup> Since the 1988 legislative session, a joint legislative subcommittee has continued to examine the problems presented by children who have committed no act that would be criminal if committed by an adult, and yet have engaged in behaviors that are generally disapproved by society—runaways, truants, and the like. That subcommittee reported to the 1989 General Assembly and legislation was enacted embodying its recommendations.

On July 1, 1989, the prior category of "child in need of services"<sup>72</sup> will be separated into two categories, the "child in need of

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68. *Id.* at 2982.

69. *Id.* at 2982-83. Brennan's analysis would thus array 26 states and the District of Columbia against death for 17-year-olds and 29 states and the District in opposition to capital punishment for those who were 16 years old at the commission of the offense.

70. *Id.* at 2984-994.

71. See Shepherd, *Legal Issues Involving Children: Annual Survey of Virginia Law*, 21 U. RICH. L. REV. 789 (1987).

72. VA. CODE ANN. § 16.1-228 (Repl. Vol. 1988).

services" and the "child in need of supervision."<sup>73</sup> The "services" child is now one "whose behavior, conduct or condition presents or results in a serious threat to the well-being and physical safety of the child"<sup>74</sup> but not a child who is being treated by spiritual means or a runaway from home because of physical, emotional or sexual abuse. The new "supervision" child is defined as one who is habitually truant without justification, provided the child has been offered an adequate opportunity to receive the benefit of any and all required educational services which meet the child's particular needs and the school system has made a reasonable effort to effect the child's regular attendance without success.<sup>75</sup> Also, the new "supervision" child is defined as a child who is a habitual runaway from either home or a residential care facility without consent or authority, and such conduct presents a clear and substantial danger to the child's life or health, the child or family is in need of treatment, rehabilitation or services are not presently received, and the court's intervention is essential to provide the services.<sup>76</sup> Neither classification includes the prior categories of the "child who is habitually disobedient of the reasonable and lawful commands of his or her" parents nor the "child who commits an offense which would not be criminal if committed by an adult."<sup>77</sup>

The intake section of the Code of Virginia was amended to prohibit the filing of a "services" or "supervision" petition by an attorney. That section also states that an intake officer may refuse to file such a petition if there is no probable cause, if the authorization of a petition is not in the best interest of the family or child,

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73. *Id.* § 16.1-228 (Cum. Supp. 1989).

74. *Id.* This was category 5 of the previous definition of a child in need of services. In order to be classified as such, there must also be findings that the conduct in question presents a clear and substantial danger to the child's life or health or the child or family is in need of treatment, rehabilitation or services not being received, and the intervention of the court is essential to provide the needed services. *Id.*

75. *Id.*

76. *Id.* Note that the conjunction "and" is used here between the nature of the conduct and the child or parent's need of services unlike in the "services" category where "or" is the link.

77. The second, pure "status offense," category may have been unintentionally omitted as it eliminates juvenile court jurisdiction over enforcement of local curfew ordinances and the like and over purchase or possession of tobacco products. The definition of "delinquent act" still excludes "an act, which is otherwise lawful, but is designated a crime only if committed by a child." *Id.* § 16.1-228 (Cum. Supp. 1989). The enforcement of such provisions would now seem to fall in the General District Court, a curious anomaly as it would be the only instance of that court's jurisdiction over a juvenile, or these pure "status offenses" are unenforceable anywhere.

or if the matter may be effectively dealt with by some agency other than the court.<sup>78</sup> The same section requires the exhaustion of available treatment or services and all appropriate nonjudicial remedies before the intake officer can file a "supervision" petition, however, it states that when the officer determines that the parties have made a reasonable effort to utilize such community services, he "shall permit the petition to be filed."<sup>79</sup> Limitations on the use of detention for both "services" and "supervision" children are retained,<sup>80</sup> and the right to counsel is preserved for both jurisdictional categories.<sup>81</sup>

The amendments retain the court's dispositional alternatives over "services" children except for the deletion of probation as an option,<sup>82</sup> but an entirely new dispositional scheme is introduced for the "supervision" child.<sup>83</sup> Before disposition for the adjudicated "supervision" child, the court must direct an appropriate public agency to evaluate the child's service needs using an interdisciplinary team approach.<sup>84</sup> The interdisciplinary team should include the local department of social services, the community services board, the schools, the court service unit, and other appropriate public and private agencies. The team must file a written report for the court and counsel.<sup>85</sup> The court may then utilize any disposition available for a "services" child, and may order probation or the participation by the child and parents in rehabilitative programs. Further, the court must give the child written notice of the possible consequences of violating the dispositional order.<sup>86</sup>

The most controversial aspect of the new statutory scheme involves the so-called "valid court order" provision, outlining the power of the court to deal with violations of its dispositional order.<sup>87</sup> If a "services" child willfully and materially violates the court's dispositional order for a second or subsequent time, the court may suspend the child's driver's license or pursuant to sec-

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78. *Id.* § 16.1-260 (Cum. Supp. 1989).

79. *Id.* § 16.1-260(B1). There is thus an apparent conflict between the intake officer's discretion in subsection B and the limitation on that discretion in B1.

80. *Id.* § 16.1-248.1. The code now makes explicit in this section the judge's power to punish for summary contempt.

81. *Id.* § 16.1-266(B).

82. *Id.* § 16.1-279(C).

83. *Id.* § 16.1-279(C1).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* § 16.1-294(D), (E).

tion 16.1-279(E)(6) of the Code of Virginia,<sup>88</sup> impose a driving curfew.<sup>89</sup> If a "supervision" child willfully and materially violates the dispositional order, even for the first time, the court may suspend the driver's license, or order a child fourteen years of age or older to be placed in a foster home, group home or nonsecure residential facility; or, if it finds such a nonsecure placement unlikely to meet the child's needs, that all other treatment options in the community have been exhausted, and that placement in a secure facility is necessary to meet the child's service needs, the court may detain the child in a detention home for no more than thirty consecutive days.<sup>90</sup>

This comprehensive statutory plan for addressing noncriminal behavior is not without controversy, and the legislative subcommittee heard a number of conflicting views on the appropriateness of using secure facilities to house status offenders.<sup>91</sup> The approach taken is sometimes referred to as a "gatekeeping" approach since it allows for a more severe handling of youths who violate court orders, but it also establishes strict criteria to narrow the gate through which a youth may pass, or be pushed, to be subject to these serious consequences. The legislative subcommittee also insisted that further studies be undertaken of the minimum level of services that should be available in each community for children who are at risk, and of the means for funding such services.<sup>92</sup>

## II. ABUSE AND NEGLECT, FOSTER CARE AND TERMINATION OF PARENTAL RIGHTS

In *Vaughan v. Commonwealth*,<sup>93</sup> the court of appeals reversed the conviction of a sixteen-year-old mother for the first degree murder of her newborn infant. The court concluded that the "sole fact that . . . [a mother] . . . has recently experienced childbirth does not excuse her from a legal duty to care for the baby,"<sup>94</sup> but there was insufficient evidence to establish that the teenage mother

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88. *Id.* § 16.1-279(E)(6).

89. *Id.* § 16.1-292(D).

90. *Id.* The court must express all the necessary findings in the order and the multidisciplinary team must be reconvened to reevaluate the child and develop further treatment plans. Such an order is treated as final and appealable to the circuit court.

91. See Shepherd, *supra* note 71, at 790.

92. H.R.J. Res. 414, Va. General Assembly, 1989 Sess. (1989).

93. 7 Va. App. 665, 376 S.E.2d 801 (1989).

94. *Id.* at 670, 376 S.E.2d at 804.

"acted with malice, willfulness, deliberation, or premeditation."<sup>95</sup> In another case, a conviction of a mother for the aggravated sexual battery of her daughter was overturned for an improper comment by the commonwealth on her post-arrest, post-*Miranda* silence.<sup>96</sup> The court also noted the error committed by the trial judge in refusing to allow the defendant's seven-year-old son to testify for the defense regarding duress by his father. The court opined that the record demonstrated the child's understanding of the obligation to tell the truth, and the trial judge's exclusion of the boy as a witness was improperly predicated on credibility and not competency.<sup>97</sup> In *Garland v. Commonwealth*,<sup>98</sup> the court again reversed an aggravated sexual battery conviction, this time because the trial judge improperly admitted evidence of a recent complaint by the victim to a school counselor to bolster her credibility, and the admissibility of such evidence is limited to rape and attempted rape cases. Convictions for sodomy, statutory rape, aggravated sexual battery, and taking indecent liberties with a minor were affirmed in *MacKenzie v. Commonwealth*,<sup>99</sup> against claims of collateral estoppel or double jeopardy, and suppression of allegedly exculpatory evidence arguments.

The Supreme Court of the United States dealt a blow to those who seek to invoke federal civil rights remedies to force public protective services agencies to act to protect abused children in *DeShaney v. Winnebago County Social Services*.<sup>100</sup> In *DeShaney*, the department of social services took no action to intervene on behalf of Joshua DeShaney, even though there were multiple reports of abuse by his father. Joshua ultimately suffered a beating that resulted in a coma and brain damage so severe as to result in probable institutionalization, with profound retardation for the remainder of his life.<sup>101</sup> Joshua's mother filed suit alleging that the social services department had deprived him of his liberty under the due process clause of the fourteenth amendment by failing to protect him against physical harm. Her suit was dismissed at trial and the Court of Appeals for the Seventh Circuit and the Supreme Court affirmed that ruling. The decision was narrow, concluding

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95. *Id.* at 678, 376 S.E.2d at 807.

96. *Durant v. Commonwealth*, 7 Va. App. 454, 375 S.E.2d 396 (1988).

97. *Id.* at 466-67, 375 S.E.2d at 402.

98. 8 Va. App. 189, 379 S.E.2d 146 (1989).

99. 8 Va. App. 236, 380 S.E.2d 173 (1989).

100. 109 S. Ct. 998 (1989).

101. *Id.* at 1001-02.



that no federal constitutional right was violated since Joshua was not in the custody of the agency, and there was thus no affirmative duty of care and protection.<sup>102</sup> Justices Brennan, Marshall and Blackmun dissented.<sup>103</sup> *DeShaney* had an immediate impact in the Fourth Circuit, when the court of appeals affirmed dismissal of a suit against a local department of social services in Maryland, state foster parents, and others for abuse to a child voluntarily placed in foster care by his parents.<sup>104</sup> The court could easily have distinguished *DeShaney* because of the out-of-home custody in a state-approved foster home, but it declined to do so. That refusal is somewhat ironic as the Supreme Court refused certiorari in a recent Fourth Circuit case, *L.J. v. Massinga*.<sup>105</sup> In *Massinga*, the court held that foster children might pursue damage claims against public welfare officials who fail to ensure the provision of proper care while in state foster homes.<sup>106</sup>

A mother fared somewhat better in the Supreme Court of Virginia, when the court held that the state recognized a tort of negligent hiring.<sup>107</sup> The Supreme Court of Virginia also held that the trial court erred in sustaining a demurrer to an amended motion for judgment alleging that a church was negligent in hiring an employee recently convicted of aggravated sexual battery of a young girl, thus exposing the plaintiff's daughter to similar sexual assaults while he was in the church's employ.<sup>108</sup>

In *Massachusetts v. Oakes*,<sup>109</sup> the Supreme Court of the United States reversed and remanded a Massachusetts decision overturning the conviction of a father for taking color photographs of his partially nude and physically mature fourteen-year-old stepdaughter for overbreadth of a statute, after concluding that the posing of the child was speech for first amendment purposes.

General Assembly action broadened the types of child abuse or neglect cases for which a local department of social services must

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102. *Id.* at 1003-06.

103. *Id.* at 1007.

104. *Milburn v. Anne Arundel County Dept. of Social Servs.*, 871 F.2d 474 (4th Cir. 1989).

105. 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 816 (1989). The denial of certiorari was contrary to the recommendation of the Solicitor General and was followed by settlement of the lawsuit for \$800,000 in the district court. See *L.J. v. Massinga*, 699 F. Supp. 508 (D. Md. 1988).

106. *Massinga*, 838 F.2d at 123-24.

107. *J. v. Victory Tabernacle Baptist Church*, 236 Va. 206, 372 S.E.2d 391 (1988).

108. *Id.* at 210-11, 372 S.E.2d at 394.

109. 109 S. Ct. 2633 (1989).

report to the Commonwealth's Attorney,<sup>110</sup> allowed the transmittal of information about child abuse or neglect complaints or investigations from departments of social services to family advocacy representatives of the armed forces,<sup>111</sup> and provided for the use of independent living arrangements for older adolescents by child-placing agencies.<sup>112</sup> The 1989 legislative session also created a joint subcommittee to evaluate the feasibility of establishing a statewide Court Appointed Special Advocate ("CASA") Program in the state.<sup>113</sup>

### III. CHILD CUSTODY AND ADOPTION

#### A. *Child Custody*

The number of child custody cases decided by the Court of Appeals of Virginia declined drastically this year, as there were no cases dealing with custody in a divorce or other domestic relations setting. However, there was one case that presented a custody issue in an unusual criminal law context. In *Bennett v. Commonwealth*,<sup>114</sup> a mother and her boyfriend were convicted of abducting her twin daughters from the custody of her in-laws where they had been placed by their father who had been awarded custody. The action of the father in transferring physical custody to his parents gave them superior custodial rights against the mother and the taking of the children was from one "lawfully entitled to . . . [their] . . . charge."<sup>115</sup> The court interpreted section 18.2-47 of the Code of Virginia so as to apply only to those cases in which the person abducted is taken to another state.<sup>116</sup>

Two significant reported circuit court decisions<sup>117</sup> decided during the past year have concluded that the application of a "primary caretaker" rule would be contrary to state law and that religious affiliations of the parents generally should not be weighed heavily

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110. VA. CODE ANN. § 63.1-248.6(D)(5) (Cum. Supp. 1989).

111. *Id.* §§ 2.1-380, 63.1-248.6.

112. *Id.* §§ 63.1-195, -205.

113. H.R.J. Res. 261, Va. Gen. Assembly, 1989 Sess. (1989). This program exists in a number of other states and in several Virginia localities. It most often involves the designation of a volunteer guardian, or "Court Appointed Special Advocate" to assist the attorney serving as guardian ad litem in investigating the case and monitoring the disposition.

114. 8 Va. App. 228, 380 S.E.2d 17 (1989).

115. VA. CODE ANN. § 18.2-47 (Repl. Vol. 1988).

116. 8 Va. App. at 235, 380 S.E.2d at 21.

117. *In re Nichols*, 14 Va. Cir. 341 (City of Roanoke 1989); *Crute v. Crute*, 12 Va. Cir. 190 (Henrico County 1988).

in the custody decision,<sup>118</sup> and that evidence in custody cases normally should be heard by a judge rather than by an advisory jury.<sup>119</sup>

The Court of Appeals for the Fourth Circuit had to deal with the application of the Indian Child Welfare Act<sup>120</sup> to custody matters in *In re Larch*,<sup>121</sup> where there were competing decrees between a North Carolina court granting custody to the non-Indian mother in a 1983 divorce and a Cherokee Indian Court awarding custody to the father in a 1987 order. The Indian Child Welfare Act is not applicable to the situation as it expressly excludes custody provisions in divorce decrees from its ambit,<sup>122</sup> and thus a writ of habeas corpus will not lie.

General Assembly custody actions were also minimal as the legislature gave juvenile courts, to which a case had been transferred for enforcement, the same power to transfer venue in custody, maintenance, and support cases, as in cases originally brought in the court.<sup>123</sup> The General Assembly also affirmed that juvenile courts have the jurisdiction to enforce their valid orders prior to the entry of a conflicting circuit court order in matters where there is concurrent jurisdiction for any period of time during which the order was in effect.<sup>124</sup> Further, the General Assembly clarified the parental abduction offense by providing that it applied to an unlawful withholding of a child from a custodial parent "outside the Commonwealth," thus widening its application to international abductions, as well as those in other states.<sup>125</sup>

## B. Adoption

The Virginia General Assembly made important changes in the ability of persons to participate in private adoptions at the 1989

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118. *Crute v. Crute*, 12 Va. Cir. 190 (Henrico County 1988). The "primary caretaker rule" would give a preference to, or create a presumption in favor of, the parent who has been the primary caretaker for the children during the course of the marriage. See 2 CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 499 (2d ed. 1987); Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

119. *In re Nichols*, 14 Va. Cir. 341 (City of Roanoke 1989).

120. 25 U.S.C. §§ 1901-1963 (1982).

121. 872 F.2d 66 (4th Cir. 1989).

122. 25 U.S.C. § 1903(1).

123. VA. CODE ANN. § 16.1-243 (Cum. Supp. 1989).

124. *Id.* § 16.1-244.

125. *Id.* § 18.2-49.1.

Session. House Bill 1491<sup>126</sup> still allows the birth parents to place a child for adoption directly with adoptive parents, but there is a requirement for the acceptance of consent to such an adoption by a juvenile and domestic relations district court with extensive inquiries to be made.<sup>127</sup> There are also stringent limitations on the fees that may be paid in connection with an adoption.<sup>128</sup>

In *Mississippi Band of Choctaw Indians v. Holyfield*,<sup>129</sup> the Supreme Court ruled that the term "domicile," within the meaning of the Indian Child Welfare Act of 1978,<sup>130</sup> is defined by federal rather than state law, and thus a Mississippi adoption decree placing native American twins with persons to whom the mother gave them after their birth was invalid. The mother and father in *Holyfield* were domiciled on the Choctaw Reservation, but the mother gave birth off the reservation to circumvent the provisions of the Act.<sup>131</sup> The Act was passed to deal with the growing problem of Native American children being separated from their families and tribes and being placed in non-Indian tribes through foster care, termination of parental rights and adoption.<sup>132</sup>

Although there will be a more extensive discussion of the case in the following section, it is best to note here that the Court of Appeals of Virginia held in *NPA v. WBA*<sup>133</sup> that Virginia does not recognize common law adoption.

#### IV. PATERNITY AND ILLEGITIMACY

There were several major decisions handed down by the Supreme Court of Virginia and the Court of Appeals of Virginia this past year in the paternity area. As noted above, *NPA v. WBA*<sup>134</sup> dealt with several important issues. In a divorce proceeding, the trial court ordered the parents to submit to human leukocyte antigen ("HLA") blood testing to determine paternity. Those tests established conclusively that the husband was not the biological fa-

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126. *Id.* §§ 63.1-195, -204, -220 to 221, -223, -225 to 226, -228, -238.01 to 238.02. Individuals participating in any direct placement for adoption should review these amended and new sections carefully before proceeding.

127. *Id.* § 63.1-220.3(B)(4).

128. *Id.* § 63.1-220.4.

129. 109 S. Ct. 1597 (1989).

130. 25 U.S.C. § 1911(a) (1982).

131. *Holyfield*, 109 S. Ct. at 1602.

132. *See* 25 U.S.C. §§ 1901-1902.

133. 8 Va. App. 246, 380 S.E.2d 178 (1989).

134. 8 Va. App. 246, 380 S.E.2d 178 (1989).

ther of the five-year-old son, but he was of the three-year-old daughter. The court then ruled that the husband was not liable for support of the son. The court of appeals rejected the wife's argument that the husband was liable on theories of common law adoption, in loco parentis, implied contract, and equitable estoppel, concluding that these doctrines do not establish a relationship obligating a husband to support the wife's illegitimate child in Virginia.<sup>135</sup>

In *Ruth v. Fletcher*,<sup>136</sup> the Supreme Court of Virginia concluded that a former putative father could not recover in tort for intentional infliction of emotional distress against the mother when she cut off visitation rights and proved through HLA testing that he was not the father. A son fared better in *Murphy v. Holland*<sup>137</sup> when he was declared the sole heir of a decedent who died intestate while owning land. Although Virginia does not recognize common law marriages contracted in the state, the court held that such a marriage is one "null in law" within the meaning of section 64-7 of the Code of Virginia (which is currently section 20.31.1<sup>138</sup> of the Code of Virginia) and the son is therefore entitled to a declaration of legitimacy pursuant to that provision.<sup>139</sup>

In *Commonwealth v. Johnson*,<sup>140</sup> the court of appeals ruled that the doctrine of res judicata may bar a mother from reasserting a claim for civil child support which has been previously decided against her,<sup>141</sup> but that a prior decision is not res judicata with respect to a claim brought on behalf of the child by the Division of Child Support Enforcement. The *Johnson* court ruled that the mother and child are not deemed to be in privity, and the child will not be bound by a determination of non-paternity, "unless the child is formally named a party, represented by a guardian *ad litem* and given an adequate opportunity to litigate the issue."<sup>142</sup> The rights of an illegitimate child were similarly protected in *Birdsong Peanut Co. v. Cowling*,<sup>143</sup> wherein the court ruled that a puta-

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135. *Id.* at 251-54, 380 S.E.2d at 180-82.

136. 237 Va. 366, 377 S.E.2d 412 (1989).

137. 237 Va. 212, 377 S.E.2d 363 (1989).

138. VA. CODE ANN. § 20-31.1 (Repl. Vol. 1983).

139. *Murphy*, 237 Va. at 217-20, 377 S.E.2d at 366-68.

140. 7 Va. App. 614, 376 S.E.2d 787 (1989).

141. See also *Walters v. Cheagle*, 14 Va. Cir. 123 (Henrico County 1988) (a finding of a juvenile and domestic relations court on the issue of paternity is res judicata).

142. *Johnson*, 7 Va. App. at 621, 376 S.E.2d at 790.

143. 8 Va. App. 274, 381 S.E.2d 24 (1989).

tive father's pre-birth acknowledgement of the child may establish dependency for workers' compensation benefit purposes.

In *Michael H. v. Gerald D.*,<sup>144</sup> the Supreme Court upheld the constitutionality of a California statute creating a conclusive presumption that a woman's husband is the father of her children, if he is living with her and is neither sterile nor impotent, even though blood tests established paternity by another man. Justice Stevens concurred, agreeing that there may be "a constitutionally protected relationship between a natural father and his child" but that relationship may be asserted through a request for visitation rights under other provisions of California law.<sup>145</sup> Justices Blackmun, Brennan, Marshall and White dissented, urging that the putative father should at least have a right to a hearing at which he could prove his paternity.<sup>146</sup>

The General Assembly gave the circuit court and the juvenile and domestic relations court concurrent jurisdiction over proceedings to determine parentage,<sup>147</sup> and decided to mandate blood testing in any parentage case in which child support is in issue.<sup>148</sup>

## V. EDUCATION

### A. *Educational Rights of the Handicapped*

The Supreme Court of United States ruled in *Dellmuth v. Muth*<sup>149</sup> that the Education of the Handicapped Act<sup>150</sup> does not explicitly abrogate the eleventh amendment's assertion of state immunity from suit in the federal courts and that the child's parents are not entitled to collect tuition reimbursement against the state of Pennsylvania.<sup>151</sup> There were four justices who dissented from the Court's ruling.<sup>152</sup>

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144. 109 S. Ct. 2333 (1989).

145. *Id.* at 2347.

146. *Id.* at 2358-59.

147. VA. CODE ANN. §§ 16.1-241, 20-49.2 (Cum. Supp. 1989).

148. *Id.* § 20-49.3.

149. 109 S. Ct. 2397 (1989).

150. 20 U.S.C. §§ 1400-1485 (1982 & Supp. V 1987).

151. One interesting aspect to the case is that the district court found that the offered educational program was appropriate, but that there were procedural flaws which made both the local and state educational agencies liable for reimbursement of tuition costs. Neither the court of appeals nor the Supreme Court disturbed the award against the local school division.

152. *Dellmuth*, 109 S. Ct. at 2403.

In *Child v. Spillane*,<sup>153</sup> the Court of Appeals for the Fourth Circuit concluded that a child with Acquired Immune Deficiency Syndrome ("AIDS") was not a "prevailing party," within the meaning of the Rehabilitation Act<sup>154</sup> for the purpose of awarding attorney's fees when a medical committee recommended readmission of the child to school after the filing of a federal lawsuit.<sup>155</sup> A significantly different approach was taken in *DeVries v. Spillane*<sup>156</sup> where the court found that the district court had improperly dismissed a suit seeking review of administrative proceedings regarding educational placement of a handicapped child. The child's mother wanted him educated in his neighborhood school rather than at the residential school where he was previously placed, and she sought court review of the administrative rulings that the youth should remain at the residential school. While the court proceeding was pending, the county initiated efforts to remove the child from the residential facility and place him in a public school, but still one other than the neighborhood school. The mother still objected but did not initiate administrative hearings to review that decision, instead insisting that her son remain where he was while she pursued the court proceeding. The district court sua sponte dismissed the action, contending that DeVries had to exhaust his administrative remedies.<sup>157</sup> The court of appeals disagreed, concluding that the mother's position had not changed from her original suit—no placement was appropriate but the neighborhood school—and the district court should have entertained the case addressing that claim.<sup>158</sup>

In *Spielberg v. Henrico County Public Schools*,<sup>159</sup> the court ruled that the county had violated the procedural requirements of the Education of the Handicapped Act<sup>160</sup> by predetermining a placement for the child prior to the meeting with the parents to establish an individualized education program ("IEP"), and the child should remain in his current placement. The Supreme Court of Virginia concluded in *School Board of Campbell County v.*

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153. 866 F.2d 691 (4th Cir. 1989).

154. 29 U.S.C. § 794a(b) (1982).

155. Judge Murnaghan dissented, concluding that the "district court did not clearly err in finding that the child's lawsuit contributed to her readmission to kindergarten." 866 F.2d at 696.

156. 853 F.2d 264 (4th Cir. 1988).

157. *Id.* at 265.

158. *Id.* at 266.

159. 853 F.2d 256 (4th Cir. 1988).

160. 20 U.S.C. §§ 1400-1485 (1982 & Supp. V 1987).

*Beasley*<sup>161</sup> that the court of appeals had erred in reversing the trial court's decision because it essentially reweighed the evidence before the circuit court. The supreme court did note that "the burden of proof in inquiries concerning free appropriate public education lies with the school board."<sup>162</sup>

One of the more troublesome cases before the Supreme Court of Virginia this year involved the attack on the prohibition against corporal punishment in Virginia's "core standards" governing the licensure and regulation of residential facilities for children in the state. In *Cullum v. Faith Mission Home*,<sup>163</sup> the court affirmed a circuit court ruling exempting the home from licensure by the state due to its character as a religious facility operated by the Beachy Amish Mennonite Church. Since the court found that the home was ministering to its mentally retarded residents by the use of spiritual means, the home is exempt from licensure and the restrictions included within licensure.<sup>164</sup>

#### B. Other Educational Issues

In *Crosby v. Holsinger*,<sup>165</sup> the Court of Appeals for the Fourth Circuit upheld the district court's decision in favor of a high school principal who removed the school's "Johnny Reb" mascot symbol as offensive to black students at the school. Under recent Supreme Court decisions "school authorities have the authority to disassociate the school from controversial speech even if it may limit student expression."<sup>166</sup> A federal district court held in *Croteau v. Fair*<sup>167</sup> that a female high school student who was cut from the school's varsity baseball team did not prove that the decision was motivated by gender bias.

The Supreme Court of Virginia concluded in *Lentz v. Morris*<sup>168</sup> that the doctrine of sovereign immunity protects a high school physical education teacher from an action based on simple negli-

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161. 6 Va. App. 206, 367 S.E.2d 738 (1988), *rev'd* 238 Va. 44, 380 S.E.2d 884 (1989).

162. *Id.* at 51, 380 S.E.2d at 889.

163. 237 Va. 473, 379 S.E.2d 445 (1989).

164. 237 Va. at 482-83, 379 S.E.2d at 450; *see* VA. CODE ANN. § 37.1-188 (Repl. Vol. 1984).

165. 852 F.2d 801 (4th Cir. 1988).

166. *Id.* at 803. The court relied on *Hazlewood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

167. 686 F. Supp. 552 (E.D. Va. 1988).

168. 236 Va. 78, 372 S.E.2d 608 (1988).



gence brought by a student injured in the class.<sup>169</sup>

Legislation affecting education passed at the 1989 session of the General Assembly included amendments to the criminal code strengthening the prohibitions against the sale or distribution of drugs on or near school property or while on a school bus,<sup>170</sup> the enactment of a prohibition against the possession of "beepers" on school property after admonitions to leave,<sup>171</sup> amendments broadening the restrictions against trespasses on school property,<sup>172</sup> and further amendments to the family life curricula which also include raising the compulsory school attendance age to eighteen.<sup>173</sup> An important new law prohibits the use of corporal punishment in the schools of the Commonwealth, making Virginia the first Southern state to ban school paddling.<sup>174</sup>

## VI. MISCELLANEOUS

The Supreme Court upheld an ordinance in *City of Dallas v. Stanglin*<sup>175</sup> that segregated teenagers in dance halls that bar adults other than parents and employees. In reversing the Court of Appeals of Texas that struck down the law for interfering with the first amendment associational rights of young people, the Court ruled that the only rights infringed are those of limited social association and of such a chance encounter basis as to escape first amendment protection.<sup>176</sup> There was also no equal protection problem with the classification which readily survives the rational basis scrutiny.<sup>177</sup> In *Brock v. Wendell's Woodwork, Inc.*,<sup>178</sup> the Court of Appeals for the Fourth Circuit upheld the application of statutory bans against child labor and the wage-hour provision of federal law

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169. The Court expressly overruled its prior decisions in *Crabbe v. School Board*, 209 Va. 356, 164 S.E.2d 639 (1968) and *Short v. Griffiths*, 220 Va. 53, 255 S.E.2d 479 (1979), which held the contrary. Chief Justice Carrico and Justice Stephenson dissented.

170. VA. CODE ANN. § 18.2-255.2 (Cum. Supp. 1989).

171. *Id.* § 18.2-322.1.

172. *Id.* § 18.2-128.

173. *Id.* §§ 22.1-207.2, -254.

174. *Id.* § 22.1-279.1. The legislation excludes from the prohibition reasonable force necessary in order to maintain order and control, to quell disturbances, to prevent a student from inflicting physical harm on himself or others, in self-defense by the teacher or school official, and to obtain possession of weapons, dangerous objects, or controlled substances or paraphernalia.

175. 109 S. Ct. 1591 (1989).

176. *Id.* at 1595.

177. *Id.* at 1595-97.

178. 867 F.2d 196 (4th Cir. 1989).

against religious free exercise claims by commercial businesses operated largely by members of a religious sect. Some of the jobs at which children in the sect were employed were hazardous and proscribed for children by federal laws intended for their protection.

The long journey of *Commonwealth v. American Booksellers Association, Inc.*<sup>179</sup> continued as the Supreme Court of Virginia answered questions certified to it by the United States Supreme Court regarding a statute, regulating access of minors to materials harmful to them, by concluding that a book would pass muster if it had serious value for a legitimate minority of juveniles, that the specific books presented as examples in the litigation passed muster under the law,<sup>180</sup> and that there is a scienter element in the prohibition against displaying books in such a fashion that juveniles may peruse them.<sup>181</sup>

The General Assembly took the first of two important steps toward the future by approving legislation establishing experimental family courts in several jurisdictions in the Commonwealth, effective January 1, 1990, to test the efficacy of such a judicial structure with the Judicial Council of Virginia to study the operation of the experimental courts and report back to the General Assembly and Governor by December 31, 1992.<sup>182</sup> The second step was in the creation of a Youth Services Commission to come into existence on July 1, 1990, consisting of four members of the House of Delegates, two Senators, and two citizen members to address the needs of, and services to, youth in the Commonwealth and make recommendations to the legislature and state agencies concerning such.<sup>183</sup>

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179. 236 Va. 168, 372 S.E.2d 618 (1988).

180. *Id.* at 174-75, 372 S.E.2d at 622 (The books in question ranged from J. BLUME, *FOREVER . . .* (1975), J. JOYCE, *ULYSSES* (1961), and *THE PENGUIN BOOK OF LOVE POETRY* (J. Stallworthy ed. 1973) to J. COLLINS, *HOLLYWOOD WIVES* (1983)).

181. The statute had been struck down by the federal district court in 617 F. Supp. 699 (E.D. Va. 1985), a decision affirmed by the court of appeals at 802 F.2d 691 (4th Cir. 1986). The Supreme Court of the United States had certified questions to the Supreme Court of Virginia in its January 1988 opinion reported at 108 S. Ct. 636 (1988).

182. VA. CODE ANN. §§ 16.1-241.1, -296.1, 17-116.05:5, 20-96.1 to 96.2 (Cum. Supp. 1989).

183. *Id.* §§ 9-281 to 285 (Repl. Vol. 1989). The Act also provides for the appointment of an executive director and staff to aid the commission in carrying out its duties.

