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Annual Survey of Virginia Law: Legal Issues Involving Children

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LEGAL ISSUES INVOLVING CHILDREN

*Robert E. Shepherd, Jr.**

I. INTRODUCTION

The past year has been exceptionally important for children and young people caught up in the legal system, both nationally and in Virginia. Beginning with the decision of the Supreme Court of the United States in *Vernonia School District v. Acton*¹ in June of 1995, the ensuing year has seen major shifts in the administration of juvenile justice, and in Virginia's approach to abused and neglected children. The passage of major juvenile justice reform legislation and child abuse legislation in Virginia at the 1996 General Assembly session exemplifies these changes occurring in both the society's and the legal system's approaches to children, youth, and their legal issues.

II. JUVENILE DELINQUENCY AND NON-CRIMINAL MISBEHAVIOR

A. *General Overview*

This year has been a momentous one for juvenile justice in Virginia. For perhaps the first time ever, and certainly for the first time in twenty years, the primary focus of a session of the Virginia General Assembly was on the juvenile justice system.² During 1995, the attention of no less than three studies was focused on the philosophy and procedures for dealing with children and youth. Governor George Allen appointed a Governor's

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1. 115 S. Ct. 2386 (1995).

2. The last major revision of the juvenile code was enacted in 1977 as the result of a comprehensive study under the auspices of the Virginia Advisory Legislative Council. Act of March 31, 1977, ch. 559, 1977 Va. Acts 839.

Commission on Juvenile Justice Reform, co-chaired by Attorney General James Gilmore and Secretary of Public Safety Jerry Kilgore.³ This body released its "Final Report" on December 20, 1995, with a major focus on opening up both juvenile trials and juvenile records to the public and easing the procedures for transfer of juveniles to adult courts.⁴ A second group, the Virginia Commission on Youth, established a Juvenile Justice System Task Force pursuant to 1995 House Joint Resolution 604,⁵ chaired by Delegate Jerrauld C. Jones, which reported in a document entitled "The Study of Juvenile Justice System Reform" on January 10, 1996.⁶ This study and its recommendations focused more on prevention and early intervention, with a somewhat lesser emphasis on court procedures and open trials. The third study, conducted by the Joint Legislative Audit and Review Commission,⁷ resulted in a report entitled "Juvenile Delinquents and Status Offenders: Court Processing and Outcomes," which was intended to provide an accurate picture of the operation of the juvenile justice system in the state.⁸ The Governor's Commission and the Commission on Youth studies reached different conclusions and made generally conflicting recommendations, with the JLARC study largely supporting the conclusions of the Commission on Youth. Roughly two sets of bills were introduced into each house of the General Assembly at the 1996 Session. However, on the eve of consideration of the Senate version of the bills by its Courts of Justice Committee, a compromise was reached between the leadership of the two ideologically conflicting studies. This compromise was embodied in two bills, a Senate version and a House version, that became the vehicles for juvenile justice reform. These bills,

3. Exec. Order No. Forty-Four (95), (March 9, 1995).

4. GOVERNOR'S COMMISSION ON JUVENILE JUSTICE REFORM, FINAL REPORT (December 20, 1995) [hereinafter Governor's Commission Report].

5. H.J. Res. 604, Va. Gen. Assembly, (Reg. Sess. 1995).

6. REPORT OF THE VIRGINIA COMMISSION ON YOUTH ON THE STUDY OF JUVENILE JUSTICE SYSTEM REFORM, H. Doc. No. 37 (1996) [hereinafter Commission on Youth Study].

7. Popularly referred to as "JLARC." The body undertook the study as a result of the adoption of Senate Joint Resolution No. 263 during the 1995 Session of the Virginia General Assembly. S.J. Res. 263, Va. Gen. Assembly, (Reg. Sess. 1995).

8. REPORT OF THE JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION, JUVENILE DELINQUENTS AND STATUS OFFENDERS: COURT PROCESSING AND OUTCOMES, S. Doc. No. 14 (1996) [hereinafter Report on Court Processing and Outcomes].

enacted as Chapters 755 and 914, apply to offenses committed, records created, and proceedings held with respect to those offenses on or after July 1, 1996.⁹ Chapter 914 will be the controlling version of the legislation, as it was the last passed and signed. It differs in mostly minor technical respects, except for section 16.1-256 of the Virginia Code, which is different from the earlier version in some significant respects.¹⁰

B. *Purposes and Philosophy*

The comprehensive 1996 amendments to the juvenile code begin with section 16.1-227, which is set forth below in its entirety with the amendments in italics:

This law shall be construed liberally and as remedial in character, and the powers hereby conferred are intended to be general to effect the beneficial purposes herein set forth. It is the intention of this law that in all proceedings the welfare of the child and the family, *the safety of the community and the protection of the rights of victims are the paramount concerns of the Commonwealth* and to the end that *these* purposes may be attained, the judge shall possess all necessary and incidental powers and authority, whether legal or equitable in their nature.

This law shall be interpreted and construed so as to effectuate the following purposes:

1. To divert from or within the juvenile justice system, to the extent possible, consistent with the protection of the public safety, those children who can be cared for or treated through alternative programs;
2. To provide judicial procedures through which the provisions of this law are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other rights are recognized and enforced;
3. To separate a child from such child's parents, guardian, legal custodian or other person standing in loco parentis only when the child's welfare is endangered or it is in the interest of public safety and then only after consider-

9. Act of April 6, 1996, ch. 755, 1996 Va. Acts 1315; Act of April 17, 1996, ch. 914, 1996 Va. Acts 2209.

10. Compare Act of April 17, 1996, ch. 914, 1996 Va. Acts 2209, with Act of April 6, 1996, ch. 755, 1996 Va. Acts 1315.

ation of alternatives to out-of-home placement which afford effective protection to the child, his family, and the community; and

4. To protect the community against those acts of its citizens, *both juveniles and adults*, which are harmful to others and to reduce the incidence of delinquent behavior *and to hold offenders accountable for their behavior*.¹¹

These amendments may appear more symbolic and political than substantive, but they reflect in a profound fashion the differing perspectives of the two major competing groups. The original bills incorporating the recommendations of the Governor's Commission limited the existing purposes language referring to the "welfare of the child and the family [a]s the paramount concern of the Commonwealth" to civil proceedings, and they defined the new paramount concerns of the court in delinquency proceedings to be "to (i) provide for the safety of the public, (ii) hold the juvenile accountable for his or her actions and (iii) provide the juvenile with a realistic opportunity for rehabilitation."¹² Although purposes clauses are largely hortatory, and indeed rare in the Virginia Code, the presence of such in the code is important in light of the Court of Appeals' reliance on the section in construing other sections of the juvenile code.¹³

C. *Definitions and Jurisdiction*

The definitions section of the juvenile code was amended at the 1996 Session to include definitions contained in the new transfer scheme, "ancillary crime" or "ancillary charge" and

11. VA. CODE ANN. § 16.1-227 (Repl. Vol. 1996) (emphasis added). The 1996 amendments are shown in italics to put them in context.

12. H.B. 278, Va. Gen. Assembly, (Reg. Sess. 1996). Even this statement represented a compromise from the original Commission recommendation which was focused solely on public safety and offender accountability. *Id.*; see also S.B. 44, Va. Gen. Assembly, (Reg. Sess. 1995).

13. See *Hairfield v. Commonwealth*, 7 Va. App. 649, 655, 376 S.E.2d 796, 799 (1989); see also *Tross v. Commonwealth*, 21 Va. App. 362, 370-71, 464 S.E.2d 523, 527 (1996). It was also important to child advocates to preserve as much of the current language as possible, as it affords the lawyer for the juvenile a better opportunity to make an argument in favor of a more benign construction and interpretation of other provisions of the code.

“violent juvenile felony,” and those phrases will be addressed in connection with those amendments.¹⁴ The other new definition, “boot camp,” describes a juvenile residential facility with the important inclusions of education and “no less than six months of intensive aftercare.”¹⁵ Throughout the code, amending legislation substituted “juvenile correctional center” for “learning center.”¹⁶ Chapter 503 also changed the name of the Department of Youth and Family Services to the Department of Juvenile Justice, and did likewise with the Board for the agency.¹⁷ Section 16.1-241 of the Virginia Code introduces the concept of the juvenile court jurisdiction’s being “divested,” as well as “terminated,” to describe those categories under section 16.1-269.1 where the court is limited to conducting a preliminary hearing, and a “transfer” is accomplished by either legislative or prosecutorial action.¹⁸ The section also clarifies the handling and effect of transfer pursuant to either subsections (B) or (C) of section 16.1-269.1.¹⁹ If cases fall under either of those subsections—transfers based solely on the seriousness of the charge or the discretion of the commonwealth’s attorney—the juvenile court’s jurisdiction is limited to conducting a preliminary hearing to determine if there is probable cause to believe the youth committed the charged offense and any ancillary charges (delinquent acts committed as part of the same act or transaction or a part of a common scheme or plan), and that the juvenile was fourteen years of age or older at the time of the commission of the alleged offense.²⁰ The court is also directed to determine “any matters related thereto,” whatever that language may include.²¹

A decision to certify the charge, and any ancillary charges, pursuant to subsections (B) or (C) divests the juvenile court of

14. VA. CODE ANN. § 16.1-228 (Repl. Vol. 1996).

15. *Id.*

16. VA. CODE ANN. § 18.2-473 (Repl. Vol. 1996); *see also* VA. CODE ANN. §§ 22.1-209.1:2, -344 (Cum. Supp. 1996); VA. CODE ANN. § 29.1-317 (Cum. Supp. 1996).

17. VA. CODE ANN. §§ 2.1-1.1, -1.6, -51.18, 9-6.25:2, 66-1, -4 (Cum. Supp. 1996). *See generally* Act of April 1, 1996, ch. 503, 1996 Va. Acts 851.

18. VA. CODE ANN. § 16.1-241(A) (Repl. Vol. 1996).

19. *Id.*

20. *Id.*

21. *Id.*

jurisdiction over the principal charge and any ancillary charges.²² Likewise, a decision to transfer pursuant to subsection (A) of section 16.1-269.1, after a Commonwealth motion and a full transfer hearing, results in jurisdiction being divested after compliance with section 16.1-269.6.²³ Section 16.1-269.6 further provides that in delinquency cases generally, or where an ancillary charge remains after a violent felony charge has been dismissed or the charge reduced to an offense that is not a violent juvenile felony, the court's jurisdiction cannot be divested except pursuant to a section 16.1-269.1(A) transfer.²⁴

D. *Detention*

In addition to being one of the many sections in which the General Assembly made multiple changes of the word "child" to "juvenile," Virginia Code section 16.1-248.1 redefined one of the criteria for the use of secure detention for a youth to "consider[] the seriousness of the current offense or offenses and other pending charges, the seriousness of prior adjudicated offenses, the legal status of the juvenile and any aggravating and mitigating circumstances, the release of the juvenile, [sic] constitutes an unreasonable danger to the person or property of others."²⁵ The legislation did not clarify the meaning of "the legal status of the juvenile," although the Governor's Commission on Juvenile Justice Reform elaborated on the intention of the proposed language by referring to "court supervision" and "out-reach detention" as examples of such "legal status."²⁶

A new section, Virginia Code section 16.1-248.2, is more benign in its purpose by requiring a mental health screening for all youths placed in detention, and a mental health assessment within twenty-four hours for any juvenile needing an assessment after such screening.²⁷ This section came out of a Task Force study in Virginia concluding that there were many young

22. VA. CODE ANN. § 16.1-269.1(D) (Repl. Vol. 1996).

23. VA. CODE ANN. § 16.1-269.6 (Repl. Vol. 1996).

24. *Id.*

25. VA. CODE ANN. § 16.1-248.1 (A)(1)(a) (Repl. Vol. 1996).

26. Governor's Commission Report, *supra* note 4, at 56.

27. VA. CODE ANN. § 16.1-248.2 (Repl. Vol. 1996).

people in secure detention with a history of mental problems or exhibiting problem symptoms.²⁸

Virginia Code section 16.1-249 expands the types of places that may be used for the confinement of juveniles to include "a separate juvenile detention facility located upon the site of an adult regional jail facility," subject to certain limitations and qualifications.²⁹ Among the limitations is one requiring compliance with the federal Juvenile Justice and Delinquency Prevention Act of 1974, relative to the separation of juvenile offenders and adult criminals.³⁰ Amendments to the Virginia Code also clarify that juveniles transferred to the circuit court or certified to the grand jury may be shifted from a detention facility to an adult jail, but juveniles no longer need to be kept separate from adults.³¹ Virginia Code section 18.2-55 added secure facilities and detention homes, as well as any facility designed for the secure detention of juveniles, to the definition of those facilities where injuries inflicted on persons can result in more severe punishments.³²

Virginia Code section 16.1-255 clarifies that, in addition to a judge or intake officer, a magistrate may issue a detention order.³³ A magistrate may also issue an arrest warrant for a juvenile when the juvenile court is not open and the judge and intake officer are "not reasonably available," meaning that neither could be reached or could arrive within an hour after contact.³⁴ The magistrate may also issue a detention order if the criteria set forth in section 16.1-248.1 have been satisfied, thus somewhat broadening the role of magistrates in the charging and detention decisionmaking process.³⁵

28. Commission on Youth Study, *supra* note 6, at 70-71.

29. VA. CODE ANN. § 16.1-249 (Repl. Vol. 1996).

30. 42 U.S.C. § 5633(a)(13) (1994) (as amended).

31. VA. CODE ANN. § 16.1-249(D) (Repl. Vol. 1996). There is an anomaly here, as Virginia Code section 16.1-269.6(B) says that the circuit judge *shall* place the juvenile in a jail not separated from adults after receipt of the case from the juvenile court, pursuant to section 16.1-269.1(A). VA. CODE ANN. § 16.1-269.6(B) (Repl. Vol. 1996); *see* VA. CODE ANN. § 16.1-269.1(A) (Repl. Vol. 1996).

32. VA. CODE ANN. § 18.2-55 (Repl. Vol. 1996).

33. VA. CODE ANN. § 16.1-255 (Repl. Vol. 1996).

34. VA. CODE ANN. § 16.1-256 (Repl. Vol. 1996).

35. VA. CODE ANN. § 16.1-256(2) (Repl. Vol. 1996). An often expressed concern is whether magistrates are as well-equipped as juvenile intake officers to deal with the

E. *Intake and Notice to Parties*

Two-way electronic video and audio communication may be used for a youth's appearance before an intake officer, along with the use of electronic facsimile (FAX) machines for the transmission of documents.³⁶ The intake officer can exercise all powers otherwise conferred by law while using such a process.³⁷ Other amendments make clear that an intake officer still may proceed informally to either divert or deflect a "child in need of services,"³⁸ a "child in need of supervision"³⁹ or a delinquent juvenile only if the charge is not a violent juvenile felony and the youth has not been previously adjudicated to be delinquent or in need of supervision.⁴⁰ If the charge is a violent juvenile felony or a CHINSup or delinquency charge if there has been a previous adjudication for CHINSup or delinquency, a petition must be filed.⁴¹ If an intake officer takes informal action on either a CHINServ, CHINSup, or delinquency charge, the officer must (1) develop a plan, including the possibility of restitution or community services, based on the resources and circumstances; (2) create an official record of the actions taken; and (3) advise the juvenile and the parents that a subsequent complaint for CHINSup or delinquency will result in the filing of a petition.⁴² This latter admonition seems a bit curious since the requirement to file a petition is based on a prior adjudication and not simply a prior appearance before the

lack of space in the nearest detention facility by locating an available bed in some other facility in the state. To address this concern, Chapter 914 requires that the Committee on District Courts incorporate a segment on the issuance of warrants and detention orders for juvenile court in the magistrate training program, effective July 1, 1996. Act of April 17, 1996, ch. 914, 1996 Va. Acts 2209.

36. VA. CODE ANN. § 16.1-260(B) (Repl. Vol. 1996); VA. CODE ANN. § 19.2-3.1 (Cum. Supp. 1996).

37. VA. CODE ANN. § 16.1-260(B) (Repl. Vol. 1996); VA. CODE ANN. § 19.2-3.1 (Cum. Supp. 1996).

38. See VA. CODE ANN. § 16.1-228 (Repl. Vol. 1996) (defining "child in need of services") [hereinafter referred to as "CHINServ"].

39. See VA. CODE ANN. § 16.1-228 (Repl. Vol. 1996) (defining "child in need of supervision") [hereinafter referred to as "CHINSup"].

40. VA. CODE ANN. § 16.1-260(B)(1) (Repl. Vol. 1996).

41. *Id.*

42. *Id.*

intake officer. Virginia Code section 16.1-261 provides that statements made by a juvenile during a detention, mental health screening or assessment pursuant to section 16.1-248.2⁴³ are not admissible at any stage of the proceedings, just as statements during intake may not be admitted in any proceeding.⁴⁴

Two cases during the year, one decided by the Supreme Court of Virginia and the other by the court of appeals, addressed the constitutionality of the Virginia statutory scheme that provides for the initial charging decision to be made by an intake officer, an employee of the executive branch, the then Department of Youth and Family Services. In *Tross v. Commonwealth*,⁴⁵ the court of appeals rejected the defendant's attack on the intake process based on the principle of separation of powers embodied in Article I, Section 5, and Article III, Section 1 of the Virginia Constitution. The court of appeals concluded that the statutory scheme for intake was constitutional because there was an overlap between the roles of intake officers and juvenile court judges, and the former did not exercise the "whole power" of the judiciary.⁴⁶ The court of appeals also opined that even if the system were unconstitutional, the juvenile court would not be deprived of the jurisdiction to try *Tross*.⁴⁷ The Supreme Court of Virginia agreed with this analysis in *Roach v. Commonwealth*,⁴⁸ a capital murder case resulting in a death sentence. The supreme court, without citing *Tross*, nonetheless reached the same conclusion on essentially the same reasoning.⁴⁹ Juvenile court judges share the "appointment, assignment, and discharge powers over the intake officers" with the executive branch department, and the "intake officers do not exercise the whole power of the judiciary."⁵⁰

43. See text accompanying footnote 27.

44. VA. CODE ANN. § 16.1-261 (Repl. Vol. 1996). The main purpose for insulating such statements appears to be to encourage the juvenile to speak out frankly and fully without fear of self-incrimination.

45. 21 Va. App. 362, 464 S.E.2d 523 (1995).

46. *Id.* at 377-79, 464 S.E.2d at 530-31.

47. *Id.* at 373-37, 464 S.E.2d at 528-30.

48. 251 Va. 324, 468 S.E.2d 98 (1996).

49. *Id.* at 338, 468 S.E.2d at 106.

50. *Id.*

The summons to the juvenile and the juvenile's parents in a delinquency case must include notice that if the juvenile is committed to the Department of Juvenile Justice or to a secure local facility, "the parent or other person legally obligated to support the juvenile may be required to pay a reasonable sum for support and treatment . . . pursuant to Section 16.1-290."⁵¹

F. Transfer and Certification of the Juvenile to the Circuit Court for Trial as an Adult

The most significant changes to the juvenile transfer and certification process took place in section 16.1-269.1.⁵² A three-tier system was introduced to substitute for the previous "one-and-a-half" tier system.⁵³ Until July 1, 1996, all transfers (except, in rare cases, those initiated by the juvenile pursuant to Section 16.1-270) were judicial transfers—a trial in the circuit court following a transfer hearing in the juvenile and domestic relations district court where the decision on transfer was made by the judge after hearing evidence. There was a prior quasi-exception where, if the juvenile had been previously tried as an adult, he must thereafter be tried as an adult regardless of age at the time of the commission of the offense.⁵⁴ Even within the former transfer or waiver process, however, there were certain offenses which presumptively dictated an adult trial, and for which there was no requirement that evidence be adduced as to whether the youth was "a proper person to remain within the jurisdiction of the juvenile court."⁵⁵

Under the new statutory scheme, effective July 1, 1996, the circuit court has jurisdiction over the trial of juveniles fourteen years of age or older as adults if they are charged with capital murder,⁵⁶ first or second degree murder,⁵⁷ murder by lynch-

51. VA. CODE ANN. § 16.1-263(B) (Repl. Vol. 1996).

52. VA. CODE ANN. § 16.1-269.1 (Repl. Vol. 1996).

53. *See id.*

54. VA. CODE ANN. § 16.1-269.6(C) (Cum. Supp. 1995) (current version at VA. CODE ANN. §16.1-269.6(C) (Repl. Vol. 1996).

55. VA. CODE ANN. § 16.1-269.1(B) (Cum. Supp. 1995) (current version at VA. CODE ANN. § 16.1-269.1(B) (Repl. Vol. 1996).

56. VA. CODE ANN. § 18.2-31 (Repl. Vol. 1996).

57. VA. CODE ANN. § 18.2-32 (Repl. Vol. 1996).

ing,⁵⁸ or aggravated malicious wounding,⁵⁹ without any precipitating action by the commonwealth's attorney.⁶⁰ This is a much shorter list than that initially proposed by the Governor's Commission,⁶¹ or even in the compromise bills.⁶² For this category of juvenile offenses, the juvenile court's role is limited to conducting a preliminary hearing.⁶³ Although the determination of probable cause might seem to be the extent of any inquiry here, the court should also address whether the youth is fourteen years of age or older, a jurisdictional prerequisite; that there is probable cause to support the charge; that notice has been given to the juvenile and the parents; and that the juvenile is competent to stand trial.⁶⁴ Counsel for the juvenile needs to be conscious of the commonwealth's attorney's discretion inherent in this "offense driven" category, as the initial charging decision will ultimately govern the triggering of section 16.1-269.1(B).⁶⁵

This first tier of "legislative waiver" is joined by the second tier, "prosecutorial waiver," where the commonwealth's attorney can trigger the transfer by giving seven days' written notice of the intention to proceed under section 16.1-269.1(C) for a youth fourteen years of age or older for a variety of "violent" offenses, such as felony murder,⁶⁶ mob injury,⁶⁷ abduction,⁶⁸ malicious

58. VA. CODE ANN. § 18.2-40 (Repl. Vol. 1996).

59. VA. CODE ANN. § 18.2-51.2 (Repl. Vol. 1996).

60. VA. CODE ANN. § 16.1-269.1(D) (Repl. Vol. 1996).

61. Governor's Commission Report, *supra* note 4, at 11.

62. S.B. 44, Va. Gen. Assembly, (Reg. Sess. 1996); H.B. 251, Va. Gen. Assembly, (Reg. Sess. 1996).

63. VA. CODE ANN. § 16.1-269.1(B) (Repl. Vol. 1996).

64. VA. CODE ANN. § 16.1-269.1(D) (Repl. Vol. 1996); *see* Lynda Frost & Robert E. Shepherd, Jr., *Juvenile Justice: Mental Health Issues in Juvenile Delinquency Proceedings*, CRIM. JUST., Fall 1996, at 52 (competency to stand trial is a requirement of due process); *see also* *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966); *Dusky v. United States*, 362 U.S. 402 (1960).

65. *See* VA. CODE ANN. § 16.1-269.1(B) (Repl. Vol. 1996).

66. VA. CODE ANN. § 18.2-33 (Repl. Vol. 1996).

67. VA. CODE ANN. § 18.2-41 (Repl. Vol. 1996).

68. VA. CODE ANN. § 18.2-48 (Repl. Vol. 1996).

wounding,⁶⁹ poisoning,⁷⁰ products adulteration,⁷¹ robbery,⁷² carjacking,⁷³ rape,⁷⁴ forcible sodomy,⁷⁵ or object sexual penetration.⁷⁶ If the commonwealth's attorney gives the appropriate notice, then the matter will be tried in the circuit court after a preliminary hearing in the juvenile court.⁷⁷

If the juvenile court judge, acting under paragraphs (B) or (C) of section 16.1-269.1, does not find probable cause, or if the charge is dismissed, the Commonwealth may seek direct indictment in the circuit court.⁷⁸ If the proceeding in the juvenile court is terminated by *nolle prosequi*, any subsequent indictment would have to follow a preliminary hearing in the juvenile court.⁷⁹

The third tier, pursuant to section 16.1-269.1(A), is a continuation of the procedures followed prior to July 1, 1996, for a transfer hearing before the juvenile court judge, and it applies for all felonies other than those specified in section 16.1-269.1(B) and (C).⁸⁰ Pursuant to a Commonwealth motion, this section requires a discretionary hearing to determine whether the youth is a "proper person to remain within the jurisdiction of the juvenile court"⁸¹ A 1996 amendment provides that indictment in the circuit court cures any error or defect in any proceeding held in the juvenile court, except with respect to age.⁸² If the indictment is "nolle prossed" in the circuit court

69. VA. CODE ANN. §§ 18.2-51, -51.1 (Repl. Vol. 1996) (The latter section covers malicious wounding of a law enforcement officer).

70. VA. CODE ANN. § 18.2-54.1 (Repl. Vol. 1996).

71. *Id.*

72. VA. CODE ANN. § 18.2-58 (Repl. Vol. 1996).

73. VA. CODE ANN. § 18.2-58.1 (Repl. Vol. 1996).

74. VA. CODE ANN. § 18.2-61 (Repl. Vol. 1996).

75. VA. CODE ANN. § 18.2-67.1 (Repl. Vol. 1996).

76. VA. CODE ANN. § 18.2-67.2 (Repl. Vol. 1996).

77. VA. CODE ANN. § 16.1-269(C), (D) (Repl. Vol. 1996) (giving no explicit requirement of notice to counsel for the juvenile).

78. VA. CODE ANN. § 16.1-269.1(D) (Repl. Vol. 1996)

79. *Id.*

80. VA. CODE ANN. § 16.1-269.1(A) (Repl. Vol. 1996).

81. *Id.* See generally William B. Reichardt *Transfer of Juveniles From the Juvenile Court and Handling Juvenile Cases in the Circuit Court*, in *JUVENILE LAW AND PRACTICE IN VIRGINIA* 141 (Prof. Robert E. Shepherd, Jr., ed., Committee on Continuing Legal Educ. of the Va. Law Found., 1994).

82. VA. CODE ANN. § 16.1-269.1(E) (Repl. Vol. 1996). *Quaere* as to whether this

rather than in the juvenile court, the Commonwealth can seek a new indictment without returning to the juvenile court.⁸³

The Commonwealth is given the right to appeal a judge's decision to retain the case and not transfer it under section 16.1-269.1(A) in any case,⁸⁴ not just in those cases—as previously—where the youth is charged with an offense which would be punishable by death or imprisonment for life or a maximum period of twenty years or more if committed by an adult.⁸⁵ Juveniles also may still appeal the juvenile court judge's decision to transfer a case under section 16.1-269.1(A) to the circuit court.⁸⁶ Section 16.1-269.6 governs the proceedings for appeals in the circuit court by either a juvenile or the Commonwealth where the case is handled under section 16.1-269.1(A).⁸⁷ Cases brought under section 16.1-269.1(B) or (C) can result in the Commonwealth seeking an indictment without obtaining an order from the circuit court.⁸⁸

When a juvenile has been indicted by the grand jury, he or she will be tried for the indicted charge and all ancillary charges⁸⁹ in the same manner as for adults.⁹⁰ Upon a finding of guilt for all charges, other than capital murder, the judge will fix the sentence without a jury.⁹¹ If the youth is convicted of a violent juvenile felony, as defined in section 16.1-228,⁹² the judge will sentence as for an adult, although the court can suspend the sentence conditioned upon the successful completion of such terms and conditions as may be imposed for delinquency in juvenile court.⁹³ If the juvenile is convicted of any other fel-

provision would control as to other jurisdictional defects.

83. *Id.*

84. VA. CODE ANN. § 16.1-269.3 (Repl. Vol. 1996).

85. *Id.* Prior to July 1, 1996, the right of appeal was limited to the more serious offenses. See VA. CODE ANN. § 16.1-269.3 (Cum. Supp. 1995).

86. VA. CODE ANN. § 16.1-269.4 (Repl. Vol. 1996).

87. VA. CODE ANN. § 16.1-269.6 (Repl. Vol. 1996).

88. VA. CODE ANN. § 16.1-269.1(D) (Repl. Vol. 1996).

89. See VA. CODE ANN. § 16.1-228 (Repl. Vol. 1996) (defining "ancillary charge").

90. VA. CODE ANN. § 16.1-272(A) (Repl. Vol. 1996).

91. *Id.*

92. VA. CODE ANN. § 16.1-228 (Repl. Vol. 1996) (defining "violent juvenile felony" to include ". . . any of the delinquent acts enumerated in subsection B or C of § 16.1-269.1 when committed by a juvenile fourteen years of age or older").

93. VA. CODE ANN. § 16.1-272(A)(1) (Repl. Vol. 1996). The General Assembly pro-

ony, the circuit court may utilize either an adult sentence or a juvenile disposition.⁹⁴ If the youth is convicted of a misdemeanor instead of a felony, the court will impose the appropriate juvenile disposition.⁹⁵ An amendment to a different title permits the use of an indeterminate youthful offender commitment to the Department of Corrections for a juvenile tried as an adult in the circuit court.⁹⁶ The Department of Corrections is charged with establishing, staffing, and maintaining programs for juveniles tried and sentenced as adults by circuit courts.⁹⁷ The Department of Correctional Education will develop and run the educational programs for such juveniles.⁹⁸

As is usually the case, the bulk of the appellate decisions relating to delinquency are focused on transfer proceedings, although most involve cases arising under prior statutes. In *Karim v. Commonwealth*,⁹⁹ the court of appeals ruled that the circuit court did not acquire jurisdiction over the juvenile defendant for the purpose of trying him as an adult where there was neither notice to Karim's parents nor certification that the parents' identities or addresses were unknown, or not reasonably ascertainable.¹⁰⁰ The notice requirement is mandatory and jurisdictional, and noncompliance with the statute is fatal to the adult court's power to try the case.¹⁰¹

In *Tross v. Commonwealth*,¹⁰² the court of appeals concluded that the juvenile court need not find that the juvenile was not amenable to treatment since he was charged with capital murder, along with other serious charges, and the nonamenability conclusion was unnecessary.¹⁰³ Likewise, in *Roach v. Common-*

vided in Chapter 914 that the circuit court judge training program should include a mandatory component on juvenile court disposition options for juveniles tried in circuit court, beginning July 1, 1996. Act of April 17, 1996, ch. 914, 1996 Va. Acts 2209.

94. VA. CODE ANN. § 16.1-272(A)(2) (Repl. Vol. 1996).

95. VA. CODE ANN. § 16.1-272(A)(3) (Repl. Vol. 1996).

96. VA. CODE ANN. § 19.2-311 (Cum. Supp. 1996).

97. VA. CODE ANN. § 53.1-63.1 (Cum. Supp. 1996).

98. *Id.*

99. 21 Va. App. 652, 466 S.E.2d 772 (1996).

100. *Id.* at 667-68, 466 S.E.2d at 779-80.

101. *Id.*

102. 21 Va. App. 362, 464 S.E.2d 523 (1995).

103. *Id.* at 379-80, 464 S.E.2d at 531-32.

wealth,¹⁰⁴ the Supreme Court of Virginia decided that the juvenile court in the transfer hearing need not assess the death penalty aggravating factors in order to find that there was probable cause for capital murder.¹⁰⁵

The court of appeals determined in *Porter v. Commonwealth*¹⁰⁶ that the circuit court had jurisdiction to try the youth as an adult even though the juvenile court's detention order recited "that the evidence presented at the transfer hearing was insufficient to establish probable cause to believe that the juvenile committed the alleged delinquent act, and therefore the case is retained . . . for trial at a later date."¹⁰⁷ The Commonwealth had previously appealed the juvenile court's decision not to transfer the case and the circuit judge granted the appeal and authorized the state to seek an indictment.¹⁰⁸ The appellate court affirmed this finding in spite of the clear admonition in the statute that the circuit court could not redetermine a probable cause determination, apparently on the theory that the recital in the detention order was insufficient to preclude a redetermination.¹⁰⁹ Despite the technical deficiencies that may have existed in the juvenile court's order denying transfer, the actions of the circuit court and the court of appeals clearly violated the then-existing statutory proscription against either side appealing the juvenile court's determination on the issue of probable cause.¹¹⁰

In *Cheeks v. Commonwealth*,¹¹¹ the court of appeals decided that the failure of the circuit court to give the juvenile defendant notice of the hearing to review the transfer of the case from juvenile court to the adult court was fatal to the circuit court's jurisdiction.¹¹² The circuit judge's offer before trial to

104. 251 Va. 324, 468 S.E.2d 98 (1996).

105. *Id.* at 338-39, 468 S.E.2d at 106-07.

106. 22 Va. App. 476, 471 S.E.2d 184 (1996).

107. *Id.* at 477, 471 S.E.2d at 185.

108. *Id.* at 478, 471 S.E.2d at 185.

109. *Id.* at 478-79, 471 S.E.2d at 185-86.

110. The 1996 amendments to the code make the unfortunate decision in this case moot for future proceedings. See VA. CODE ANN. §§ 16.1-269.3, -269.4 (Repl. Vol. 1996).

111. 20 Va. App. 578, 459 S.E.2d 107 (1995).

112. *Id.* at 582-85, 459 S.E.2d at 108-10.

afford the juvenile such a hearing did not cure the jurisdictional defect.¹¹³ Likewise, in *Burfoot v. Commonwealth*,¹¹⁴ the decision of the Commonwealth to "nolle pros" an indictment in the circuit court necessitated the filing of a new petition in the juvenile court in order to reinstitute the proceeding.¹¹⁵ The *nolle prosequi* of the indictment terminated both the indictment and the underlying charging instrument as though they never existed.¹¹⁶ Any further proceeding for the juvenile would have to be initiated with the filing of a second petition for any court to acquire jurisdiction.¹¹⁷ In *Commonwealth v. Boyd*,¹¹⁸ the circuit court confirmed the juvenile court's decision to transfer the case in light of the serious nature of the charge, malicious wounding with a broken bottle, and the juvenile's age, seventeen-and-one-half years old.¹¹⁹

The Fourth Circuit Court of Appeals decided in *United States v. Myer*¹²⁰ that the refusal of the trial judge to grant defense counsel a continuance of the transfer hearing, when she was appointed only one day before the proceeding, was not error because of the absence of any affirmative proof of prejudice.¹²¹ The federal appellate court also determined an important issue in *United States v. Juvenile Male # 1*.¹²² The certification decision of the United States Attorney General, acting through the United States Attorney, to proceed against a juvenile as an adult in the federal district court on the ground that there is a "substantial Federal interest"¹²³ is reviewable by the district court judge.¹²⁴

113. *Id.* at 585-86, 459 S.E.2d at 110.

114. 23 Va. App. 38, 473 S.E.2d 724 (1996). The holding in this case is based on the law as it existed prior to 1994. After July 1, 1996, a *nolle prosequi* in the juvenile court in a transfer case necessitates a new preliminary hearing in that court, but such action in the circuit court after indictment can result in reinstatement of the proceedings by a new indictment. VA. CODE ANN. § 16.1-269.1 (Repl. Vol. 1996).

115. *Burfoot*, 23 Va. App. at 43, 473, 473 S.E.2d at 727.

116. *Id.* at 44, 473 S.E.2d at 727.

117. *Id.* at 49, 473 S.E.2d at 730.

118. 38 Va. Cir. 281 (Fairfax County 1995).

119. *Id.* at 282.

120. 66 F.3d 1364 (4th Cir. 1995).

121. *Id.* at 1369-70.

122. 86 F.3d 1314 (4th Cir. 1996).

123. 18 U.S.C. § 5032 (1994).

124. *Juvenile Male #1*, 86 F.3d at 1317-20. A federal district court in Virginia had

G. Adjudication

Evidence of the age of a youth may be introduced at any time prior to adjudication of the case, whether in a district or circuit court.¹²⁵ In *United States v. Juvenile Male*,¹²⁶ the court of appeals concluded that the juveniles' speedy trial claims under the Juvenile Justice and Delinquency Prevention Act¹²⁷ were without merit because the thirty days prescribed did not begin to run when the juveniles were taken into custody by the Immigration and Naturalization Service but would only start when the juveniles were placed in secure detention awaiting trial on delinquency charges.¹²⁸ In *Roach v. Commonwealth*,¹²⁹ the Supreme Court of Virginia upheld the trial judge's admission of the juvenile defendant's confession in a capital case, over objections that his statements were involuntary based on the sheriff's allegedly misleading remarks.¹³⁰

H. Serious Juvenile Offender Handling

Several changes have been made in the dispositional alternatives available to the court after a finding of guilt as a serious juvenile offender. The serious juvenile offender statute was amended to include within its ambit those juveniles who have been previously adjudicated delinquent for an offense which would be punishable by confinement for twenty years or more if committed by an adult.¹³¹ A further amendment to the section also makes explicit that the statute may be used by either a

ruled the same way in an earlier case. See *United States v. Male Juvenile*, 844 F. Supp. 280 (E.D. Va. 1994).

125. VA. CODE ANN. § 16.1-274.1 (Repl. Vol. 1996).

126. 74 F.3d 526 (4th Cir. 1996), *cert. denied*, 116 S. Ct. 2558 (1996).

127. 18 U.S.C. § 5036 (1994).

128. *Id.*

129. 251 Va. 324, 468 S.E.2d 98 (1996).

130. *Id.* at 340-42, 468 S.E.2d at 107-08. For an excellent survey of recent decisions in Virginia regarding juvenile confessions, see Ellen R. Fulmer, Note, *Novak v. Commonwealth: Are Virginia Courts Providing Special Protection to Virginia's Juvenile Defendants?*, 30 U. RICH. L. REV. 935 (1996).

131. VA. CODE ANN. § 16.1-285.1(A) (Repl. Vol. 1996).

juvenile or circuit court.¹³² The section now also provides that the court must consider the Department of Juvenile Justice's "estimated" length of stay when setting a period of incarceration.¹³³ Another new provision authorizes the judge to order a determinate or indeterminate period of parole supervision to follow the period of serious offender commitment, although the total of commitment time and parole supervision cannot exceed seven years or extend beyond the youth's twenty-first birthday.¹³⁴ The juvenile correctional facility placement decision made by the Department of Juvenile Justice upon such a determinate commitment must be based on the availability of treatment programs at the facility; the level of security; the specific offense; and the welfare, age, and gender of the juvenile.¹³⁵ The release and review hearing held by the court for the determinately committed serious juvenile offender may be held either in person or by two-way electronic video and audio communication complying with section 19.2-3.1(B).¹³⁶ If the victim has submitted a written request for notification of the release and review hearing to the commonwealth's attorney, the prosecutor must provide written notice of the time and place of the review hearing to the victim.¹³⁷

I. *Other Dispositional Changes*

Other dispositional innovations allow a court to suspend a child's driver's license upon terms and conditions if the child is adjudicated in need of supervision.¹³⁸ Also, a new disposition for delinquent juveniles was enacted, allowing for the deferral of disposition and the placement of the juvenile in the temporary custody of the Department of Juvenile Justice to attend a boot camp, provided the youth (i) is otherwise eligible for commitment; (ii) has not been previously, and is not currently being adjudicated guilty of a violent juvenile felony; (iii) has not

132. *Id.*

133. VA. CODE ANN. § 16.1-285.1(B) (Repl. Vol. 1996).

134. VA. CODE ANN. § 16.1-285.1(C) (Repl. Vol. 1996).

135. VA. CODE ANN. § 16.1-285.1(D) (Repl. Vol. 1996).

136. VA. CODE ANN. § 16.1-285.2(B)(1) (Repl. Vol. 1996).

137. VA. CODE ANN. § 16.1-285.2(A) (Repl. Vol. 1996).

138. VA. CODE ANN. § 16.1-278.5(B)(2) (Repl. Vol. 1996).

before attended a boot camp; (iv) and has not previously been committed to and received by the Department.¹³⁹ If the juvenile leaves or is removed from the boot camp program, he or she can be returned to the court for a hearing, where any disposition that could have been imposed originally may be imposed.¹⁴⁰ The Department is also authorized to establish or contract with private entities, localities or commissions to establish juvenile boot camps, and may by agreement with a locality or localities establish detention homes.¹⁴¹

The costs of a juvenile committed to the Department of Juvenile Justice pursuant to section 16.1-278.8(14) and placed in a private facility are to be paid by the Department, rather than by the locality where the juvenile resides.¹⁴² The Department also may contract with private entities to operate community group homes or other residential care facilities.¹⁴³ New Virginia Code sections 11-41.2:02 and 66-25.3 through -25.7 were enacted as the "Juvenile Corrections Private Management Act" to address the anticipated growth in juvenile facilities operated by private entities.¹⁴⁴

A juvenile court sentencing an adult who committed an offense before reaching the age of eighteen may impose the penalties normally imposable on an adult, not to exceed the punishment for a Class 1 misdemeanor, regardless of the number of offenses.¹⁴⁵ Section 16.1-284.1 eliminates the necessity of a social history prior to placing a juvenile in a detention facility

139. VA. CODE ANN. § 16.1-278.8(4)(A) (Repl. Vol. 1996). If such a boot camp is created only for boys it will be vulnerable to the same equal protection clause attack as was successfully leveled against the Virginia adult boot camp incarceration program in *West v. Virginia Dept. of Corrections*, 847 F.Supp. 402 (W.D. Va. 1994).

140. VA. CODE ANN. § 16.1-278.8(4)(A). Chapter 914, enacted at the 1996 Session of the General Assembly, also provides for a three-year follow-up study of juveniles sentenced to boot camps to determine the effectiveness of the option. Act of April 17, 1996, ch. 914, 1996 Va. Acts 2209. Beginning October 1, 1997, and each year thereafter, reports on the evaluations must be made to the chairs of various General Assembly committees. *Id.*

141. VA. CODE ANN. § 66-13 (Cum. Supp. 1996).

142. VA. CODE ANN. § 66-14 (Cum. Supp. 1996).

143. VA. CODE ANN. § 66-24 (Cum. Supp. 1996).

144. VA. CODE ANN. §§ 11-41.2:02, 66-25.3-25.7 to -25.7 (Cum. Supp. 1996).

145. VA. CODE ANN. § 16.1-284 (Repl. Vol. 1996). The court may also transfer the case to the circuit court for trial, if a felony, or the case may be certified to the circuit court if a violent juvenile felony. VA. CODE ANN. § 16.1-269.1 (Repl. Vol. 1996).

for up to thirty days after disposition under certain circumstances.¹⁴⁶

A juvenile committed to the Department of Juvenile Justice on an indeterminate basis may not be held beyond his or her twenty-first birthday, or for longer than thirty-six months, unless the charge is murder or manslaughter.¹⁴⁷ The Board of the Department of Juvenile Justice was directed "[t]o establish length-of-stay guidelines for juveniles indeterminately committed to the Department and to make such guidelines available for public comment."¹⁴⁸ The Board must establish such guidelines no later than October 1, 1996.¹⁴⁹ By November 1, 1996, and annually thereafter, the Department must provide copies of the guidelines, along with their estimated impact, to the General Assembly.¹⁵⁰ Pursuant to section 30-19.1:4(A), the Division of Planning and Budget, in conjunction with the Department of Corrections and the Department of Juvenile Justice, must prepare fiscal impact statements for any bill that will increase incarceration.¹⁵¹

J. Parental Responsibility

The parental responsibility and involvement statutes were amended to eliminate the civil penalty for parental failure to return the previously required statement to the school division, acknowledging the need for parents to cooperate in school discipline.¹⁵² The parents of a juvenile placed in the temporary physical custody of the Department of Juvenile Justice for placement in a juvenile boot camp may be ordered to pay all or part of the cost of the placement, in addition to the existing

146. VA. CODE ANN. § 16.1-284.1 (Repl. Vol. 1996).

147. VA. CODE ANN. § 16.1-285 (Repl. Vol. 1996). This places a cap of thirty-six months on any department-determined "length of stay" pursuant to administrative guidelines. *Id.*

148. VA. CODE ANN. § 66-10(8) (Cum. Supp. 1996).

149. Act of April 17, 1996, ch. 914, 1996 Va. Acts 2209.

150. *Id.*

151. VA. CODE ANN. § 30-19.1:4(A) (Cum. Supp. 1996).

152. VA. CODE ANN. § 16.1-241.2 (Repl. Vol. 1996). Section 22.1-279.3 was also amended to reflect this change. VA. CODE ANN. § 22.1-279.3 (Cum. Supp. 1996).

situations where such support may be ordered.¹⁵³ The cap for amounts for which parents may be responsible civilly for damage to property caused by their children was raised from \$1500 to \$2500.¹⁵⁴

K. Delinquency and School Authorities

The offenses which must be reported to the school superintendent by the intake officer when a delinquency petition has been filed were expanded to include those offenses that are "related" to burglary pursuant to sections 18.2-89 through 18.2-93.¹⁵⁵ When a school superintendent receives such notice of the filing of a petition from an intake officer, or receives a request from a court services unit for information in connection with the preparation of a social history, the superintendent shall provide information about the student's educational and attendance status to the intake officer or court services unit.¹⁵⁶ When a student is committed to the Department of Juvenile Justice, the school superintendent or his or her designee must participate in the preparation of a re-enrollment plan for implementation upon the youth's return to the community.¹⁵⁷ The Department of Juvenile Justice is obligated to advise the local school superintendent of the admission of a juvenile to a department facility.¹⁵⁸ The superintendent must also provide the scholastic records of the youth to the Department, including the "terms and conditions of any expulsion that was in effect at the time of commitment or that will be in effect upon release."¹⁵⁹ The court services unit or the local Department of Social Services, in consultation with the Department of Correctional Education, the local school division, and the juvenile correctional counselor must develop a re-enrollment plan for the youth.¹⁶⁰ At least fourteen days prior to the youth's

153. VA. CODE ANN. § 16.1-290(A) (Repl. Vol. 1996).

154. VA. CODE ANN. §§ 8.01-43 to -44 (Cum. Supp. 1996).

155. VA. CODE ANN. § 16.1-260(G)(8) (Repl. Vol. 1996).

156. VA. CODE ANN. § 22.1-288.2(C) (Cum. Supp. 1996).

157. *Id.*

158. VA. CODE ANN. § 16.1-293 (Repl. Vol. 1996).

159. *Id.*

160. *Id.*

scheduled release, the Department of Correctional Education must notify the school superintendent in the juvenile's resident locality of the impending release.¹⁶¹ The conditions of the re-enrollment plan also may be included in the conditions of parole.¹⁶² A court cannot order a local school board to re-enroll a juvenile expelled in accordance with section 22.1-277 of the Virginia Code.¹⁶³ The pay of teachers at juvenile correctional centers will be raised to be competitive with those in effect for the school division where the centers are located.¹⁶⁴

L. *Appeal*

Upon the circuit court rendering a final judgment upon an appeal from a juvenile court, a copy of the judgment shall be filed with the juvenile court within twenty-one days of the entry of the appeal order.¹⁶⁵

M. *Record Keeping and Confidentiality*

A juvenile of any age may be fingerprinted and photographed upon arrest, if charged with a delinquent act for which a report to the Central Criminal Records Exchange (CCRE) is required pursuant to section 19.2-390(A) of the Virginia Code if committed by an adult.¹⁶⁶ Fingerprints must still be maintained separately from adult records, and a copy filed with the juvenile court.¹⁶⁷ If the juvenile is found guilty of a felony, or any offense for which a report must be made to the CCRE if committed by an adult, copies of the fingerprints and a report of the disposition must be sent to the CCRE.¹⁶⁸ If a petition or warrant is not filed against a juvenile, all copies of the fingerprints or photographs must be destroyed at least sixty days after the

161. *Id.*

162. *Id.*

163. *Id.*

164. VA. CODE ANN. § 22.1-342.1 (Cum. Supp. 1996).

165. VA. CODE ANN. § 16.1-297 (Repl. Vol. 1996).

166. VA. CODE ANN. § 16.1-299(A) (Repl. Vol. 1996).

167. *Id.*

168. VA. CODE ANN. 16.1-299(B) (Repl. Vol. 1996).

prints were taken.¹⁶⁹ If the juvenile is acquitted, or if the prints were taken in a case for which forwarding to the CCRE would not be required for an adult, the court shall order the fingerprints and photos destroyed within sixty days of disposition of the case.¹⁷⁰ If a juvenile who was fourteen years old or older at the time of the commission of an offense is convicted of a felony, a sample of his blood shall be taken for DNA analysis.¹⁷¹

An amendment to section 16.1-301 clarifies that police departments may release current information on juvenile arrests to other departments for current investigation purposes.¹⁷² In *Brandon v. Commonwealth*,¹⁷³ the court of appeals reiterated that a juvenile witness may be cross-examined to determine the possibility of bias because of potentially favorable treatment in his own prosecution in exchange for his testimony.¹⁷⁴

Proceedings in juvenile court cases involving adults, or proceedings involving juveniles fourteen years of age or older being tried for felonies, have been presumptively open since July 1, 1996, although the judge may, *sua sponte*, or on motion of the accused or the Commonwealth, close proceedings for good cause shown.¹⁷⁵ If the proceedings are closed, the court shall state in writing its reasons, and the statement must be made part of the public record.¹⁷⁶ The victim may remain in the courtroom during any delinquency proceedings and, if the victim is a minor, an adult chosen by the victim may be present in addition to or in lieu of the minor's parent or guardian.¹⁷⁷ If either the Commonwealth or defendant represents that the victim, or adult chosen by the victim, is to be called as a material witness, the court, on motion, shall exclude the person from the proceeding.¹⁷⁸ The commonwealth's attorney has responsibility

169. VA. CODE ANN. 16.1-299(C) (Repl. Vol. 1996).

170. *Id.*

171. VA. CODE ANN. § 16.1-299.1 (Repl. Vol. 1996).

172. VA. CODE ANN. § 16.1-301(C) (Repl. Vol. 1996).

173. 22 Va. App. 82, 467 S.E.2d 859 (1996).

174. *Id.* at 87-88, 467 S.E.2d at 861.

175. VA. CODE ANN. § 16.1-302(C) (Repl. Vol. 1996).

176. *Id.*

177. VA. CODE ANN. § 16.1-302.1 (Repl. Vol. 1996).

178. *Id.*

to give notice of the proceedings and any continuances to the victim and any known adult designated by a minor victim.¹⁷⁹ The disclosure of information otherwise available to the public does not constitute a violation of the Virginia Code prohibiting the disclosure of confidential information.¹⁸⁰

The category of "children in need of supervision" is added to the other jurisdictional predicates where certain records and reports—such as social histories, and social, medical, psychiatric, and psychological records—must be kept separate from adult records and confidential to the public.¹⁸¹ If a juvenile fourteen years of age or older is found guilty of delinquency for a charge that would be a felony if committed by an adult, all court records for that youth are public except those described above.¹⁸² When a court hearing is closed, certain records, or portions thereof, may remain confidential on the judge's order to protect any juvenile victim or witness.¹⁸³ As previously noted with respect to arrest, section 16.1-305.1 adds those offenses related to burglary, pursuant to sections 18.2-89 through 18.2-93, to the other offenses for which a report must be made by the clerk of the court to the school superintendent within fifteen days of the disposition, if no appeal is filed.¹⁸⁴

If a juvenile is found guilty of a felony delinquency, the records of the proceeding are to be retained and not expunged.¹⁸⁵ If a juvenile fourteen years of age or older is found guilty of a felony delinquency or is found guilty of a felony in circuit court, any court records are likewise public and must be available and treated like adult criminal records.¹⁸⁶ Those records required to remain confidential under section 16.1-305(A), similarly remain confidential under this section.¹⁸⁷ An amendment to section 16.1-308 clarifies that a juvenile found guilty of a felony in circuit court, and who receives an adult criminal

179. *Id.*

180. VA. CODE ANN. § 16.1-303 (Repl. Vol. 1996).

181. VA. CODE ANN. § 16.1-305(A) (Repl. Vol. 1996).

182. VA. CODE ANN. § 16.1-305(B)(1) (Repl. Vol. 1996).

183. *Id.*

184. VA. CODE ANN. § 16.1-305.1 (Repl. Vol. 1996).

185. VA. CODE ANN. § 16.1-306(A) (Repl. Vol. 1996).

186. VA. CODE ANN. § 16.1-307 (Repl. Vol. 1996).

187. *Id.*

disposition, is subject to the same civil disabilities as an adult.¹⁸⁸ Section 16.1-309(A) explicitly provides that a person cannot be found guilty of a misdemeanor for disclosing information about a juvenile that is otherwise available to the public.¹⁸⁹ The Serious or Habitual Offender Comprehensive Action Program (SHOCAP) law was similarly amended to eliminate the requirement that any person, including a member of a SHOCAP committee, who receives information must submit a signed statement acknowledging confidentiality duties.¹⁹⁰

Amendments to section 19.2-388 removed the requirement for automatic expungement of juvenile records in the Central Criminal Records Exchange received pursuant to section 16.1-299.¹⁹¹ CCRE juvenile records information may be disseminated to commonwealth's attorneys for sentencing purposes, and to prosecutors and probation officers for the preparation of sentencing guidelines worksheets.¹⁹² Clerks are required to report to the CCRE any adjudication of delinquency for an offense which would require a CCRE fingerprint filing for an adult pursuant to section 19.2-299(A).¹⁹³

N. *Virginia Juvenile Community Crime Control Act*

The General Assembly built upon the foundation established in 1995 by the Virginia Juvenile Community Crime Control Act (VJCCCA) by significantly extending the state's commitment to community-based juvenile justice services in 1996.¹⁹⁴ Section 16.1-309.2 broadened the VJCCCA to apply to intake as well as to the court.¹⁹⁵ Amendments in 1996 also expanded the list of predispositional and postdispositional services under the VJCCCA to include community service, restitution, and first

188. VA. CODE ANN. § 16.1-308 (Repl. Vol. 1996).

189. VA. CODE ANN. § 16.1-309(A) (Repl. Vol. 1996).

190. VA. CODE ANN. § 16.1-330.1(D) (Repl. Vol. 1996).

191. VA. CODE ANN. § 19.2-388 (Cum. Supp. 1996).

192. VA. CODE ANN. § 19.2-389.1 (Cum. Supp. 1996).

193. VA. CODE ANN. § 19.2-390(C)(ii) (Cum. Supp. 1996).

194. See Robert E. Shepherd, Jr., *Annual Survey of Virginia Law: Legal Issues Involving Children*, 29 U. RICH. L. REV. 1117, 1118-9 (1995), for a description of the 1995 legislation creating the VJCCCA.

195. VA. CODE ANN. § 16.1-309.2 (Repl. Vol. 1996).

time offender programs, and excluded secure detention from the definition of such services.¹⁹⁶ The action of the General Assembly on the 1996 budget bill resulted in new funding in excess of \$21 million for the 1996-1998 biennium, with a total appropriation of \$22,737,604 in fiscal year 1997 and of \$26,906,936 for fiscal year 1998.¹⁹⁷

O. *Miscellaneous*

Amendments to section 18.2-371.2 placed further restrictions on the sale of tobacco products to minors, including sales through vending machines.¹⁹⁸ The Secretary of Public Safety must provide annual reports to the Governor and General Assembly regarding juvenile offenders, and, beginning in July, 1998, recidivism rates of juveniles committed to agencies within the Secretariat.¹⁹⁹ Section 4.1-305 makes it a Class 1 misdemeanor for persons under the age of twenty-one to use false identification to operate a motor vehicle, or purchase or attempt to purchase an alcoholic beverage.²⁰⁰ The offense is punishable by a fine of at least \$500 or the performance of a minimum of fifty hours of community service, along with suspension of the driver's license for not more than one year.²⁰¹ Minors must be directed to attend driver improvement clinics for the accumulation of a lower threshold of points based on traffic convictions than adults—nine within twelve months or twelve within twenty-four months.²⁰² Chapter 616 extended the effective date for

196. VA. CODE ANN. § 16.1-309.3 (Repl. Vol. 1996). Other amendments to the VJCCCA substituted the term "juvenile correctional center" for "learning center," VA. CODE ANN. § 16.1-309.4 (Repl. Vol. 1996), clarified the amount of the local contribution to VJCCCA services, VA. CODE ANN. §§ 16.1-309.6, -309.8 (Repl. Vol. 1996), and determined the state financial assistance to be paid to the localities under the Act, VA. CODE ANN. § 16.1-309.7 (Repl. Vol. 1996).

197. H.B. 30, Va. Gen. Assembly, (Reg. Sess. 1996).

198. VA. CODE ANN. § 18.2-371.2 (Repl. Vol. 1996).

199. VA. CODE ANN. § 2.1-51.17 (Cum. Supp. 1996). This action establishes an important precedent through the evaluation of the effectiveness of correctional and other programs.

200. VA. CODE ANN. § 4.1-305(A) (Cum. Supp. 1996).

201. VA. CODE ANN. § 4.1-305(B) (Cum. Supp. 1996).

202. VA. CODE ANN. § 46.2-498 (Cum. Supp. 1996).

the previously adopted family court legislation until June 1, 1998.²⁰³

The compromise between the leaders of the Commission on Youth on the one hand, and the Governor and Attorney General on the other, was built upon both the substantive legislation and significant funding initiatives. Like the two comprehensive juvenile justice bills, the budget bill went to the last day of the session for action by members of the conference committee. In addition to the new funding for the Virginia Juvenile Community Crime Control Act described above,²⁰⁴ over \$5 million was added for juvenile probation officers and support staff; almost \$260 thousand was allocated for training in the Department of Juvenile Justice (DJJ); \$50 thousand was added in the second year of the biennium for a DJJ wilderness work camp program; over \$5.5 million was allocated for boot camps and boot camp placements; more than \$4 million went to create new positions in commonwealth's attorneys' offices; \$1.5 million was allotted to new public defender slots; almost \$240 thousand was appropriated for mental health assessments in detention centers; in excess of \$12 million was allocated for additional staff and maintenance at the juvenile correctional centers; over \$4 million was allocated for statewide truancy and safe schools programs; more than \$2.75 million was allocated for Offices on Youth; \$100 thousand was budgeted for juvenile court docket management; about \$3 million was allocated for new juvenile court judges and other court expenses; and about \$30.5 million was designated for new juvenile capital construction and improvements.²⁰⁵

P. Study Resolutions

House Joint Resolution 38 requests the Department of Juvenile Justice to report on the development of a state-wide plan for implementing Virginia Code section 16.1-309.4, relating to the VJCCCA, including the need for additional shelters for

203. Act of April 5, 1996, ch. 616, 1996 Va. Acts 1076.

204. See *supra* note 196 and accompanying text.

205. Act of April 17, 1996, ch. 912, Va. Gen. Assembly.

runaways.²⁰⁶ The Department of Juvenile Justice was also requested to develop internal policies and procedures allowing for local use of VJCCCA funds,²⁰⁷ and to develop a risk assessment instrument for juvenile felony cases by House Joint Resolution 65.²⁰⁸ The Virginia State Crime Commission was directed to study the cost-effectiveness of public defender offices versus court-appointed counsel, and to address the level of court-appointed fees,²⁰⁹ and also, in conjunction with the Commission on Youth, was directed to study youth gangs in Virginia.²¹⁰ The Office of the Executive Secretary of the Supreme Court of Virginia was requested to establish guidelines for race-neutral decisionmaking in juvenile cases.²¹¹ In House Joint Resolution 131, the Virginia Criminal Sentencing Commission was requested to study the sentencing of juveniles in both juvenile and circuit courts.²¹² The Commission on Youth, in conjunction with the Department of Juvenile Justice, was requested to study the laws affecting children in need of services, children in need of supervision, and status offenders.²¹³ House Joint Resolution 152 encourages the exhaustion of administrative remedies prior to litigation in cases handled under the Comprehensive Services Act.²¹⁴ The Virginia Commission on Youth and the Virginia Housing Study Commission were directed to study homeless children in Virginia.²¹⁵ One resolution established a joint legislative subcommittee to study the Comprehensive Services Act,²¹⁶ and another directed the Joint Leg-

206. H.J. Res. 38, Va. Gen. Assembly, (Reg. Sess. 1996).

207. H.J. Res. 70, Va. Gen. Assembly, (Reg. Sess. 1996).

208. H.J. Res. 65, Va. Gen. Assembly, (Reg. Sess. 1996).

209. H.J. Res. 79, Va. Gen. Assembly, (Reg. Sess. 1996).

210. H.J. Res. 92, Va. Gen. Assembly, (Reg. Sess. 1996).

211. H.J. Res. 85, Va. Gen. Assembly, (Reg. Sess. 1996). This resolution was generated, at least in part, by the observations in the JLARC study about the over-representation of youths of color in juvenile institutions in Virginia. Report on Court Processing and Outcomes, *supra* note 8, at VI-VII, 64-70.

212. H.J. Res. 131, Va. Gen. Assembly, (Reg. Sess. 1996).

213. H.J. Res. 141, Va. Gen. Assembly, (Reg. Sess. 1996).

214. H.J. Res. 152, Va. Gen. Assembly, (Reg. Sess. 1996). This is obviously a response to the decision of the Virginia Court of Appeals in *Fauquier County Department of Social Servs. v. Robinson*, 20 Va. App. 142, 455 S.E.2d 734 (1995), where the court held that parents were *not* required to exhaust possible administrative remedies as a predicate to filing a petition under the Comprehensive Services Act.

215. H.J. Res. 181, Va. Gen. Assembly, (Reg. Sess. 1996).

216. S.J. Res. 93, Va. Gen. Assembly, (Reg. Sess. 1996).

islative Audit and Review Commission to study the administration of the same Act.²¹⁷ Senate Joint Resolution 99 established and directed a joint subcommittee to study the concept of "restorative justice" for nonviolent adult and juvenile offenders.²¹⁸

III. ABUSE AND NEGLECT, FOSTER CARE, AND TERMINATION OF RESIDUAL PARENTAL RIGHTS

During the past year, the major developments in the area of abuse and neglect were the study conducted by the Joint Subcommittee Studying the Child Protective Services System in the Commonwealth and the legislation resulting from this study.²¹⁹ In the more than thirty years since Virginia began addressing the issue of child abuse and neglect, this study represented the first major retreat from a focus on child protection, and instead accommodated the concerns of those claiming to be falsely accused of such abuse and neglect. The legislation resulting from the study was somewhat more benign than the tone of the study process itself, but it included enactments requiring records of unfounded cases to be kept for one year, with access limited to state and local social service agencies;²²⁰ it also included a new statute making it a crime for persons fourteen years of age or older to knowingly make a false report of child abuse or neglect;²²¹ and created a new three-year pilot multiple-response system for addressing child abuse or neglect complaints.²²² The pilot program will be established in three to five areas of the state, and will require that abuse or neglect complaints be evaluated by the local department of social services with three levels of intervention: (1) formal investigation; (2) family assessment and services for less serious reports that do not require formal handling; and (3) referral by the local department for services, even though the complaint does not fit within the definition of abuse or neglect.²²³ The joint subcom-

217. S.J. Res. 123, Va. Gen. Assembly, (Reg. Sess. 1996).

218. S.J. Res. 99, Va. Gen. Assembly, (Reg. Sess. 1996).

219. REPORT OF THE JOINT SUBCOMMITTEE STUDYING THE CHILD PROTECTIVE SERVICES SYSTEM IN THE COMMONWEALTH, H. Doc. No. 74 (1996).

220. VA. CODE ANN. § 63.1-248.5:1(A) (Cum. Supp. 1996).

221. VA. CODE ANN. § 63.1-248.5:1.01(A) (Cum. Supp. 1996).

222. VA. CODE ANN. § 63.1-248.18 (Cum. Supp. 1996).

223. *Id.* Certain reports must be investigated, including those of sexual abuse;

mittee was continued for the purpose of monitoring the implementation of the pilot multiple-response system.²²⁴ Other new legislation requires the exercise of reasonable diligence to locate a child who is the subject of an abuse or neglect report and whose custodians may have left the jurisdiction.²²⁵ This legislation further requires local departments to notify other child welfare agencies when the subject of the complaint has relocated, whether within or outside Virginia; requires the agency initially receiving the complaint to forward its reports to the agencies in the relocated area; and extends the time for the completion of an investigation in such a case.²²⁶ Also passed were a statute proscribing retaliation by a child-welfare agency against a person making a good-faith report of child abuse or neglect,²²⁷ and a statute modifying the husband-wife testimonial privilege to eliminate the requirement of a spouse's consent for the other spouse's willing testimony in a criminal case.²²⁸ The long-standing saga of victims of child sexual abuse who seek to sue for damages resulting from child sexual abuse, despite the passing of the statute of limitations, finally came to an end with the enactment of legislation retroactively removing the statute of repose adopted in 1995 pursuant to Article IV, Section 14 of the Virginia Constitution.²²⁹

Once again, there were a significant number of court decisions concerning abuse or neglect, and some of these cases have major consequences for future proceedings. In *Jenkins v. Commonwealth*,²³⁰ for example, the defendant was convicted of aggravated sexual battery of his two- to three-year-old nephew over a seven-month period. The conviction was at least partly

child fatality; abuse or neglect resulting in serious injury; where the child has been taken into the custody of the local department; or cases involving a caretaker at a day care center, family day home, school, hospital, or any institution. VA. CODE ANN. § 63.1-248.18(C) (Cum. Supp. 1996).

224. S.J. Res. 8, Va. Gen. Assembly, (Reg. Sess. 1996); H.J. Res. 11, Va. Gen. Assembly, (Reg. Sess. 1996).

225. VA. CODE ANN. § 63.1-248.6(E)(10) (Cum. Supp. 1996).

226. VA. CODE ANN. § 63.1-248.6(E)(11), (12) (Cum. Supp. 1996).

227. VA. CODE ANN. § 63.1-198.03:1 (Cum. Supp. 1996).

228. VA. CODE ANN. § 19.2-271.2 (Cum. Supp. 1996).

229. Act of March 31, 1996, ch. 377, 1996 Va. Acts 653.

230. 21 Va. App. 222, 463 S.E.2d 330 (1995), *reh'g granted en banc*, 22 Va. App. 508, 471 S.E.2d 785 (1996).

based on testimony from a psychologist who interviewed and counselled the young boy during ten sessions, beginning shortly after the abuse was disclosed. The psychologist was qualified as an expert and testified that the child's observed adjustment disorder was a product of stress caused by sexual abuse, and further said that the boy stated during one session that he had been "sexed" and proceeded to gyrate "his pelvic area in . . . a forward-thrusting motion."²³¹ A panel of the court of appeals concluded that the psychologist's testimony about the source of the stress and disorder constituted an opinion on an ultimate fact in issue,²³² and that testimony concerning the child's statement was hearsay,²³³ therefore, both statements were inadmissible, necessitating reversal of the conviction.²³⁴

Sitting *en banc*, however, the court of appeals agreed with the panel's view of the inadmissibility of the psychologist's opinion, but concluded that any error resulting therefrom was harmless in light of other admissible evidence that the child was a victim of sexual abuse.²³⁵ The testimony about the child's statement and actions, however, was deemed admissible as it either was not hearsay because it was not admitted for the truth of the matter asserted but to show how the expert reached his opinion,²³⁶ or, if it constituted hearsay, it was admissible under the exception to the hearsay rule for a patient's statements to a physician or psychologist about the symptoms of the illness or condition.²³⁷

The issues in *Crump v. Commonwealth*,²³⁸ were whether the evidence of guilt was legally sufficient and whether the defendant was denied his right to confrontation when the eight-year-old victim refused to answer questions on cross-examination that were repetitive of her testimony on direct examination. The court of appeals found that the defendant was given "a full

231. *Id.* at 224, 463 S.E.2d at 331.

232. *Id.* at 224-26, 463 S.E.2d at 331-32.

233. *Id.* at 226-27, 463 S.E.2d at 332-33.

234. *Id.* at 227, 463 S.E.2d at 333.

235. *Jenkins v. Commonwealth*, 22 Va. App. 508, 517-19, 471 S.E.2d 785, 789-90 (1996) (*en banc*).

236. *Id.* at 519-21, 471 S.E.2d at 790-91.

237. *Id.* at 521-22, 471 S.E.2d at 791-92.

238. 20 Va. App. 609, 460 S.E.2d 238 (1995).

opportunity to conduct an effective cross-examination²³⁹ and “[w]hen the child failed to respond, she had been extensively and repetitively questioned by two lawyers and the judge.”²⁴⁰ The court of appeals also observed that “the transcript does suggest that the child was being questioned in a manner that did not reflect a sensitivity for her age.”²⁴¹ The evidence was also sufficient in light of the credibility of the victim and the mother’s corroboration of the girl’s testimony.²⁴²

In *Lindsey v. Commonwealth*,²⁴³ the court of appeals upheld the admission of an out-of-court complaint of rape of a thirteen-year-old made to a friend two years after the event.²⁴⁴ The out-of-court statement was deemed corroborative of the victim’s complaint and the delay went to the weight to be accorded the evidence, and not its admissibility.²⁴⁵

The United States Court of Appeals for the Fourth Circuit ruled in *United States v. Powers*²⁴⁶ that the district court properly admitted evidence of defendant’s physical violence against the sexual abuse victim and her family members to explain her “submission to the acts and her delay in reporting the sexual abuse.”²⁴⁷ The court of appeals further held that the district court ruled correctly in excluding evidence of the victim’s sexual relations with her boyfriend over a year after the alleged rapes,²⁴⁸ and that the trial judge did not abuse his discretion in declining to admit expert testimony that defendant did not exhibit the characteristics of a “fixated pedophile.”²⁴⁹

Two decisions addressed the criminal consequences of placing children in danger through hazardous driving practices. In *Commonwealth v. Carter*,²⁵⁰ the court of appeals concluded

239. *Id.* at 617, 460 S.E.2d at 241.

240. *Id.* at 616, 460 S.E.2d at 241.

241. *Id.*

242. *Id.* at 618, 460 S.E.2d at 242.

243. 22 Va. App. 11, 467 S.E.2d 824 (1996).

244. *Id.* at 16, 467 S.E.2d at 827.

245. *Id.* at 14-16, 467 S.E.2d at 826-27.

246. 59 F.3d 1460 (4th Cir. 1995).

247. *Id.* at 1464, 1464-68.

248. *Id.* at 1469-70.

249. *Id.* at 1470-73.

250. 21 Va. App. 150, 462 S.E.2d 582 (1995).

that parties could not be prosecuted under section 40.1-103 of the Virginia Code for "willfully or negligently caus[ing] or permit[ting]' minors in their 'care . . . to be placed in a situation that their life, health, or morals may be endangered,'" through driving while under the influence of alcohol,²⁵¹ because the clause in question is unconstitutionally vague.²⁵² In *Mosby v. Commonwealth*,²⁵³ on the other hand, the first clause of the same statute sanctioning "willfully or negligently . . . caus[ing] or permit[ting] the life of such child to be endangered or the health of such child to be injured. . . ." ²⁵⁴ was deemed to be constitutional because it "defines readily understandable proscribed conduct and is constitutionally firm."²⁵⁵ The conviction of Ms. Mosby for injuries suffered by her son resulting from an automobile accident while she was intoxicated was reversed, however, because the jury was instructed on simple negligence.²⁵⁶

Two additional cases in the past year concerned administrative proceedings that may flow from the investigation of child abuse or neglect complaints. In *J.B. v. Brunty*,²⁵⁷ the requirement in Virginia Code section 63.1-248.6(A)(7)²⁵⁸ that a department of social services complete its investigation of an abuse or neglect complaint within forty-five days was viewed to be directory and not mandatory; the court of appeals held that the accused abuser did not demonstrate any prejudice to him resulting from the agency finding which was made after the forty-five day-period had lapsed.²⁵⁹ In *Brunty v. Smith*,²⁶⁰ the court of appeals ruled that the circuit judge erred by appointing

251. *Id.* at 152-53, 462 S.E.2d at 583-84.

252. *Id.* at 155, 462 S.E.2d at 585.

253. 23 Va. App. 53, 473 S.E.2d 732 (1996).

254. VA. CODE ANN. § 40.1-103 (Repl. Vol. 1994 & Cum. Supp. 1996).

255. 23 Va. App. at 57, 473 S.E.2d at 734.

256. *Id.* at 57-59, 473 S.E.2d at 734-35.

257. 21 Va. App. 300, 464 S.E.2d 166 (1995).

258. VA. CODE ANN. § 63.1-248.6(A)(7) (Cum. Supp. 1996).

259. *Brunty*, 21 Va. App. at 303-05, 464 S.E.2d at 168-69 (1995). The code section has been amended since the time of the incidents involved in this case. *See also* Warren County Dep't of Soc. Servs. v. Sivik, 37 Va. Cir. 581 (Warren County 1994), (reaching the same conclusion with regard to the time limitations in VA. CODE ANN. §§ 16.1-281 to -282 (Repl. Vol. 1996)).

260. 22 Va. App. 191, 468 S.E.2d 161 (1996).

a special prosecutor to represent a department of social services in an appeal from the administrative finding that abuse had occurred.²⁶¹ In a related matter, the Supreme Court of Virginia concluded in *Fairfax County Department of Human Development v. Donald*,²⁶² that the circuit court erred in awarding attorney's fees against the local department because the department's appeal from the juvenile court was untimely and the circuit court thus had no jurisdiction to act in the case.²⁶³

The federal district judge and Fourth Circuit Court of Appeals ruled in *Daley v. Ferguson*²⁶⁴ that a custodial mother could not sue a department of social services for the death of her son at the hands of her ex-husband's live-in girlfriend during the exercise of visitation rights, despite the report of suspected earlier child abuse to the agency.²⁶⁵ In light of *DeShaney v. Winnebago County Department of Social Services*,²⁶⁶ the plaintiff has no federal civil rights remedy in the absence of any affirmative constitutional duty by the department.²⁶⁷ In the case of *In re Bates*,²⁶⁸ the circuit court ruled that a case involving child abuse or neglect appealed from a juvenile court to a circuit court should be tried by a judge and not a jury.²⁶⁹ Other criminal cases that arose out of prosecutions involving child abuse or neglect, but without any specific focus on the issue of child abuse, are *Howard v. Commonwealth*²⁷⁰ and *Crawford v. Commonwealth*.²⁷¹

Chapter 866 was adopted by the 1996 General Assembly in an effort to amend various sections of the Virginia Code in order to address family violence issues in a fairly comprehensive fashion, especially through the expansion of protective

261. *Id.* at 193-96, 468 S.E.2d at 162-64.

262. 251 Va. 227, 467 S.E.2d 803 (1996).

263. *Id.* at 229-30, 467 S.E.2d at 804-05. The court of appeals decision may be found in *Donald v. Fairfax County*, 20 Va. App. 155, 455 S.E.2d 740 (1995).

264. No. 3:95CV304, 1995 U.S. Dist. LEXIS 14507 (E.D. Va. 1995), *aff'd sub nom.* *Daley v. Hanover County*, 86 F.3d 1149 (4th Cir. 1996).

265. *Id.* at 7-8.

266. 489 U.S. 189 (1989).

267. No. 3:95CV304, 1995 U.S. Dist. LEXIS 14507 at 9-12.

268. 38 Va. Cir. 515 (Roanoke City 1992).

269. *Id.* at 515.

270. 21 Va. App. 473, 465 S.E.2d 142 (1995).

271. 22 Va. App. 663, 472 S.E.2d 658 (1996).

orders, the authorization of warrantless arrests, mandated arrests under certain circumstances, and prohibitions against purchasing or carrying firearms.²⁷² The Commission on Family Violence Prevention, where this legislative package originated, was continued for another year.²⁷³ The legislature also called on the Virginia State Crime Commission to study "Megan's Law," the New Jersey statute that requires public notification of the presence of a sex offender in the community.²⁷⁴

IV. EDUCATION

Legislation during the 1996 General Assembly Session included a number of education provisions linked to the juvenile justice reform efforts. These provisions included amendments to the parental responsibility and involvement legislation adopted in 1995,²⁷⁵ and various truancy intervention provisions, such as the requirement that the school board must send a copy of the compulsory school attendance requirements and the enforcement procedures within one month of the opening of school to the parents of each student.²⁷⁶ Other legislation provided for a new definition of truancy, triggering school action if a child is absent three consecutive days, absent a total of five school days per month, or absent seven school days in a quarter, whichever occurs first.²⁷⁷ Also passed was a provision permitting the attendance officer, as well as the division superintendent, to check school census reports and vital statistics records to identify children who should be in school,²⁷⁸ as well as a requirement that the attendance officer act "with the knowledge and approval of the division superintendent," when filing a truancy complaint with the juvenile court.²⁷⁹ Finally provisions were

272. Act of April 9, 1996, ch. 866, 1996 Va. Acts 1593. For a fuller discussion of this legislation, see Katharine Salmon Cary & Mary Kathryn Hart, *Annual Survey of Virginia Law: Domestic Relations*, 30 U. RICH. L. REV. 1329 (1996).

273. S.J. Res. 27, Va. Gen. Assembly, (Reg. Sess. 1996).

274. H.J. Res. 130, Va. Gen. Assembly, (Reg. Sess. 1996).

275. VA. CODE ANN. § 16.1-241.2 (Repl. Vol. 1996); VA. CODE ANN. § 22.1-279.3 (Cum. Supp. 1996).

276. VA. CODE ANN. § 22.1-254 (Cum. Supp. 1996).

277. VA. CODE ANN. § 22.1-258 (Cum. Supp. 1996).

278. VA. CODE ANN. § 22.1-261 (Cum. Supp. 1996).

279. VA. CODE ANN. § 22.1-262 (Cum. Supp. 1996).

adopted making some violations of the compulsory school attendance law Class 2 and 3 misdemeanors.²⁸⁰ Inducing students to be truant becomes a more serious misdemeanor than at present,²⁸¹ and local school superintendents are required to make reports to the public about the incidence of school-based criminal activity.²⁸² In addition, a youth must provide evidence that he or she is in compliance with the compulsory school attendance law in order to secure a driver's license.²⁸³

Other legislation continued the Commission on Equity in Public Education in existence until July 1, 1998;²⁸⁴ called on the Board of Education and Attorney General to collaborate in developing guidelines for the recitation of the pledge of allegiance;²⁸⁵ established the School-to-Work Transition Grants Program;²⁸⁶ required school divisions to submit special education plans to the Board of Education according to a schedule set by the board;²⁸⁷ and defined more precisely the reimbursement standards for special education placements.²⁸⁸ Other legislation also established new guidelines whereby certain students may be required to attend summer school,²⁸⁹ provided for enhancements of drop out prevention programs,²⁹⁰ and broadened the requirements for the licensure of teachers to include studies of attention deficit disorders.²⁹¹

*Vernonia School District 47J v. Acton*²⁹² was the headline court decision in the area of education law during the past year, as the United States Supreme Court upheld a public school program requiring submission to suspicionless and random urine drug testing of students for participation in extracurricular athletics. The Supreme Court concluded that the testing

280. VA. CODE ANN. § 22.1-263 (Cum. Supp. 1996).

281. VA. CODE ANN. § 22.1-265 (Cum. Supp. 1996).

282. VA. CODE ANN. § 22.1-280.1 (Cum. Supp. 1996).

283. VA. CODE ANN. §§ 46.2-334(1)(A), -335(A) (Repl. Vol. 1996).

284. VA. CODE ANN. § 9-310 (Cum. Supp. 1996).

285. VA. CODE ANN. § 22.1-202(B) (Cum. Supp. 1996).

286. VA. CODE ANN. § 22.1-208.2:2 (Cum. Supp. 1996).

287. VA. CODE ANN. § 22.1-215 (Cum. Supp. 1996).

288. VA. CODE ANN. §§ 22.1-218 (Cum. Supp. 1996).

289. VA. CODE ANN. §§ 22.1-253.13:1(C), -254(E), -254.01 (Cum. Supp. 1996).

290. VA. CODE ANN. § 22.1-253.13:1(D)(2) (Cum. Supp. 1996).

291. VA. CODE ANN. § 22.1-298 (Cum. Supp. 1996).

292. 115 S. Ct. 2386 (1995).

did constitute a search under the Fourth Amendment, but the program in question was reasonable in light of the evidence of a drug problem in the school district largely caused by athletes.²⁹³ In *Herndon v. Chapel Hill-Carrboro City Board of Education*,²⁹⁴ the Fourth Circuit Court of Appeals ruled that a school district's mandatory community service program was constitutional and did not violate (1) the parents' right to direct the education of their children,²⁹⁵ (2) the substantive due process rights of the youths or their parents,²⁹⁶ nor (3) the Thirteenth Amendment prohibition against involuntary servitude.²⁹⁷ The Fourth Circuit Court of Appeals also concluded in *Virginia Department of Education v. Riley*²⁹⁸ that the Tenth Amendment does not prevent the United States Department of Education from withholding funds from the Commonwealth of Virginia, where the state refused to provide education services to disabled students who are expelled or suspended, unless there is a causal connection between the disability and the misconduct. The state is required to provide a free appropriate public education to disabled students, even though it may be in an alternative setting.²⁹⁹ In *Goodall v. Stafford County School Board*,³⁰⁰ the parents of a disabled child sought to have the county pay the cost of a cued speech transliterator in his private religious school, but the court of appeals concluded that there was no obligation to do so, as no substantial burden was imposed on the Goodalls' free exercise of religion.³⁰¹

Resolutions adopted at the 1996 Session of the General As-

293. *Id.* at 2390-91. Subsequent cases appear to be relying on *Vernonia* to expand the power of school officials to conduct searches in the absence of individualized suspicion. See, e.g., *Thompson v. Carthage Sch. Dist.*, 87 F.3d 979 (8th Cir. 1996).

294. 89 F.3d 174 (4th Cir. 1996).

295. *Id.* at 177-79.

296. *Id.* at 179-80.

297. *Id.* at 180-81. The district court also rejected a claim that the program violated the students' right to privacy. *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 899 F. Supp. 1443, 1453-55 (M.D.N.C. 1995).

298. 86 F.3d 1337 (4th Cir. 1996). For the prior proceedings in the case, see *Virginia Dep't. of Educ. v. Riley*, 23 F.3d 80 (4th Cir. 1994).

299. *Riley*, 86 F.3d at 1344.

300. 60 F.3d 168 (4th Cir. 1995) *cert. denied*, 116 S. Ct. 706 (1996). For the prior history of the case, see *Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363 (4th Cir. 1991), *cert. denied*, 502 U.S. 864 (1991).

301. *Id.* at 173.

sembly included urging the President and Congress to support consolidated state plans under the Improving America's Schools Act of 1994,³⁰² continuing the Joint Subcommittee Studying Remedial Summer School Programs,³⁰³ establishing a joint subcommittee to study the educational needs of underserved gifted students,³⁰⁴ and creating a joint subcommittee to study the efficacy and appropriateness of a school incentive reward program for Virginia.³⁰⁵ Other resolutions requested the Virginia Department of Education to study social promotions of students,³⁰⁶ established the Virginia Commission on the Future of Public Education,³⁰⁷ and continued the study of dropouts under the Standing Subcommittee on School Dropout Prevention,³⁰⁸ directing that body to study the effects of school expulsions and suspensions.³⁰⁹ The General Assembly further directed the Virginia Commission on the Future of Public Education to study the efficacy and appropriateness of both lengthening the school year,³¹⁰ and establishing full-time regional vocational high schools and an institute of industrial arts.³¹¹ Finally, the General Assembly urged Congress to provide disciplinary flexibility to state and local education agencies during reauthorization of the Individuals with Disabilities Education Act,³¹² and expressed the desire of the General Assembly that high academic standards be required of all students.³¹³

V. ADOPTION

In the wake of the significant revisions to the adoption statute in 1995, there were few developments in the past year. In

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302. H.J. Res. 82, Va. Gen. Assembly, (Reg. Sess. 1996).
303. H.J. Res. 84, Va. Gen. Assembly, (Reg. Sess. 1996).
304. H.J. Res. 90, Va. Gen. Assembly, (Reg. Sess. 1996).
305. H.J. Res. 165, Va. Gen. Assembly, (Reg. Sess. 1996).
306. H.J. Res. 175, Va. Gen. Assembly, (Reg. Sess. 1996).
307. H.J. Res. 196, Va. Gen. Assembly, (Reg. Sess. 1996).
308. H.J. Res. 241, Va. Gen. Assembly, (Reg. Sess. 1996).
309. S.J. Res. 85, Va. Gen. Assembly, (Reg. Sess. 1996).
310. S.J. Res. 59, Va. Gen. Assembly, (Reg. Sess. 1996).
311. S.J. Res. 112, Va. Gen. Assembly, (Reg. Sess. 1996).
312. S.J. Res. 75, Va. Gen. Assembly, (Reg. Sess. 1996).
313. S.J. Res. 113, Va. Gen. Assembly, (Reg. Sess. 1996).

Sozio v. Thorpe,³¹⁴ the court of appeals decided that a man could not adopt a child born to his former wife, who was not his biological child. The man's present wife did not join in the petition for adoption, and the circuit court had dismissed the petition because of that failure to join as required by the Virginia Code.³¹⁵ The court of appeals agreed with the trial court that the wife's failure to join was fatal to the petition and the court could not waive the statutory requirement.³¹⁶ Adoption is a creature of statute and the Virginia Code must be strictly followed.³¹⁷ The court of appeals resolved another, more controversial dispute by ruling that children's biological grandparents and siblings have standing to seek visitation rights in spite of these children being adopted by third parties.³¹⁸ Although adoption extinguished the legal relationship between the children and their relatives, the blood relationship nonetheless gave the relatives standing to seek visitation pursuant to Virginia Code section 16.1-241(A).³¹⁹ In the case of *In re Adoption of Smith*,³²⁰ the circuit court ruled that it had exclusive original jurisdiction over adoption proceedings, including the termination of a biological mother's parental rights, when she withheld consent to the adoption by the father's new wife contrary to the best interests of the child.³²¹

VI. MISCELLANEOUS

Several bills during the 1996 Session dealt with the abolition of the Virginia Council on Child Day Care and Early Childhood Programs,³²² and the elimination of the sunset provision in Virginia Code section 9-291.1, which would have terminated the

314. 22 Va. App. 271, 469 S.E.2d 68 (1996).

315. *Id.* at 272, 469 S.E.2d at 68-69; see VA. CODE ANN. § 63.1-221 (Repl. Vol. 1995 & Cum. Supp. 1996).

316. *Id.* at 274-75, 469 S.E.2d at 70.

317. *Id.* at 274, 469 S.E.2d at 69.

318. *Thrift v. Baldwin*, 23 Va. App. 18, 473 S.E.2d 715 (1996).

319. *Id.* at 20, 473 S.E.2d at 716.

320. 37 Va. Cir. 259 (Spotsylvania County 1995).

321. *Id.* at 259-60.

322. VA. CODE ANN. §§ 2.1-1.7, -20.4, -51.15 (Cum. Supp. 1996); VA. CODE ANN. §§ 9-268, -271, -291.1 (Cum. Supp. 1996); VA. CODE ANN. §§ 63.1-196.5, -211.2, -314.8 (Cum. Supp. 1996).

existence of the Commission on Early Childhood and Child Day Care Programs.³²³ In a related matter, the statute regulating smoking in buildings was amended to prohibit smoking in the "interior of a child day care center . . ."³²⁴ The concern about affordable child day care continued with the adoption of a House Joint Resolution directing the Commission on Early Childhood and Child Day Care Programs to study the child day care fee system,³²⁵ and a similar resolution which expressed the sense of the legislature that it was the goal and policy of the Commonwealth to assure and participate in funding quality day care for all children.³²⁶

Health-related measures enacted in 1996 provide for the Department of Health to operate a program to distribute child restraint devices to applicants (parent or others) who are financially unable to acquire one,³²⁷ and allow for the sharing of immunization and child locator information among health providers, without the necessity of parental consent, "[f]or the purpose of protecting the public health . . ."³²⁸ Another act requires the Department of Medical Assistance Services, in cooperation with the Department of Education, to examine the funding and components of the pilot school/community health centers.³²⁹

A resolution that cuts across several areas of child- and family-related services established a Commission on Federal Block Grant Programs, to address planning for the implementation of block grant programs as the federal government moves in the direction of utilizing such a mechanism for the transmission of money to the states.³³⁰

One circuit court decision published during the past year concluded that courts in Virginia do not have jurisdiction to

323. VA. CODE ANN. § 9-291.1 (Cum. Supp. 1996).

324. VA. CODE ANN. § 15.1-291.2(B) (Cum. Supp. 1996).

325. H.J. Res. 112, Va. Gen. Assembly, (Reg. Sess. 1996).

326. H.J. Res. 134, Va. Gen. Assembly, (Reg. Sess. 1996).

327. VA. CODE ANN. § 11-45(O) (Cum. Supp. 1996); VA. CODE ANN. § 46.2-1097 (Repl. Vol. 1996).

328. VA. CODE ANN. § 32.1-46(E) (Cum. Supp. 1996).

329. Act of April 9, 1996, ch. 864, 1996 Va. Acts 1591.

330. S.J. Res. 84, Va. Gen. Assembly, (Reg. Sess. 1996).

consent to the withholding of life-saving medical treatment from an infant.³³¹ Another court determined that an appeal that is taken from a juvenile court after the judge has rendered a decision, but more than ten days prior to the entry of a final order, is valid and becomes effective upon the entry of the final order.³³² A third circuit court ruled that an unloaded pistol is not a dangerous instrumentality, and that where a parent took reasonable precautions to deny children access to the weapon, that parent is not vicariously liable for his child's negligence in shooting a playmate.³³³ In *Horne v. Close*,³³⁴ the circuit court determined that whether a birth-related injury falls within the scope of the Virginia Birth-Related Neurological Injury Compensation Act³³⁵ is a matter to be decided by the Workers' Compensation Commission, and not by a circuit court.³³⁶ It was also held that "ambulatory" in the context of the same Act³³⁷ means not totally bedridden.³³⁸

Finally, the Commission on Youth was directed to study the problem of homelessness among children and their families prior to the 1997 General Assembly Session.³³⁹

VII. CONCLUSION

The past year has witnessed the continuance of a trend toward diminishing society's regard for children, both as persons with legal rights that must be recognized, and as persons different from adults with unique needs and special vulnerabilities. The political rhetoric that was used during the debate over the

331. *In re Infant C.*, 37 Va. Cir. 351, 352 (Richmond City 1995). The circuit court ruled that the jurisdiction given to juvenile and domestic relations district courts to consent to "emergency surgical or medical treatment" did not by implication include consent to *withholding* treatment. *Id.*; see VA. CODE ANN. § 16.1-241(D) (Repl. Vol. 1996).

332. *Stewart v. DeJonghe*, 35 Va. Cir. 237, 238 (Loudoun County 1994).

333. *Hughes v. Brown*, 36 Va. Cir. 444, 447-50 (Stafford County 1995).

334. 36 Va. Cir. 275 (Fairfax County 1995).

335. VA. CODE ANN. § 38.2-5000 to 5021 (Repl. Vol. 1994 & Cum. Supp. 1996).

336. *Horne*, 36 Va. Cir. at 275-76.

337. VA. CODE ANN. 38.2-5000 to 5021 (Repl. Vol. 1994 & Cum. Supp. 1996).

338. *Huff v. Medical College of Va. Associated Physicians*, 35 Va. Cir. 319, 320 (Richmond City 1994).

339. H.J. Res. 181, Va. Gen. Assembly, (Reg. Sess. 1996).

shape of juvenile justice in Virginia was frequently marked with a regular "demonization" of youth as "young thugs" and "predators," with a consequent disregard for their special needs. Much of the juvenile justice debate centered on the procedures incorporated in the juvenile court, with little focus on the much greater cost benefits and enhanced sensitivity and efficacy of a system focused on prevention and early intervention. Recent studies have demonstrated the advantages of a focus on the "front end" of the system rather than on transfer to adult court or punitive correctional programs,³⁴⁰ but these proposals do not always have the political glamour associated with "get tough" initiatives. Virginia took a significant step backwards at the 1996 General Assembly Session, both in the handling of juvenile justice and in continuing society's dedication to the protection of abused and neglected children, but what happened in Virginia is illustrative and typical of what is happening elsewhere in the United States.³⁴¹ Meaningful and lasting progress in reducing juvenile crime will not take place until there is real emphasis placed on delinquency prevention.³⁴²

340. See, e.g., PETER W. GREENWOOD, ET AL., *DIVERTING CHILDREN FROM A LIFE OF CRIME: MEASURING COSTS AND BENEFITS* (1996).

341. See, e.g., Martha Minow, *Children's Rights: Where We've Been, and Where We're Going*, 68 TEMP. L. REV. 1573 (1995).

342. Robert E. Shepherd, Jr., *Focusing on the Playpen or the State Pen*, 22 VA. B. ASS'N J. 14 (1996).