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LEGAL ISSUES INVOLVING CHILDREN*

*Robert E. Shepherd, Jr.***

I. INTRODUCTION

Compared with the intensive focus on juvenile justice issues in Virginia between 1994 and 1996, and the significant statutory changes generated by that focus, the past two years have been relatively serene, at least for juvenile law. Legislative activity about juvenile justice has been subdued, and few cases have interpreted the major legislative changes wrought during that three-year period, or their effects. The 1998 legislative session did result in the demise of the family court initially created five years earlier contingent on the provision of adequate funding for the court at some future session.¹ The provision of funding for the court pursuant to that legislation was delayed twice by the General Assembly, initially to July 1, 1996,² and then to June 1, 1998.³ No action was taken to implement the authorizing act during the 1998 Session of the Assembly and, thus, the enabling statutes lapsed.

The 1997 and 1998 legislative sessions did enact some major revisions to the statutes governing the handling of child abuse and neglect cases that will have a profound impact on such matters, both procedurally and substantively. The legislation will impact the process from the entry of emergency protective orders through the termination of residual parental rights.

* This article did not appear in the *1997 Annual Survey of Virginia Law*; therefore, this current article will attempt to update developments occurring since the 1996 article. See Robert E. Shepherd, Jr., *Legal Issues Involving Children*, 30 U. RICH. L. REV. 1467 (1996). Because 1997 legislative changes have been in force for well over a year, only the highlights of those amendments will be addressed.

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1. See Acts of Apr. 7, 1993, chs. 929, 930, 1993 Va. Acts 1422, 1464.

2. See Act of Apr. 9, 1994, ch. 564, 1994 Va. Acts 789.

3. See Act of Apr. 5, 1996, ch. 616, 1996 Va. Acts 1076.

These amendments arose partly in response to the 1996 amendments to the federal Child Abuse Prevention and Treatment Act⁴ that accompanied its reauthorization in that year and the subsequent enactment of the Adoption and Safe Families Act of 1997.⁵

In 1997, the Virginia General Assembly also finally enacted a Parental Notice Act, requiring either notice to a parent or a judicial order of bypass before an abortion may be performed on a minor girl.⁶ This occurred after almost two decades of debate, and its timely implementation was authorized only after a judge on the United States Court of Appeals for the Fourth Circuit granted a stay of the decision by the federal district court enjoining its enforcement.⁷ The full court of appeals, sitting en banc, ultimately upheld the constitutionality of the law more than a year later in August of 1998.⁸

The United States Supreme Court addressed two troubling issues regarding public education. In *Agostini v. Felton*,⁹ the court overruled an earlier decision so as to permit greater use of public school teachers in religious schools under title I of the Elementary and Secondary Education Act.¹⁰ Then in *Gebser v. Lago Vista Independent School District*,¹¹ the court provided significant protection for local school officials from pupil lawsuits for sexual harassment by school employees. The Virginia General Assembly also made some history in the education arena during the 1998 Session by adopting charter school legislation after several years of vigorous debate.¹²

4. 42 U.S.C.A. §§ 5106i, 5116 (West 1995 & Supp. 1998).

5. 42 U.S.C.A. §§ 673(B), 678, 679(B) (West Supp. 1998).

6. See VA. CODE ANN. § 16.1-241(V) (Cum. Supp. 1998).

7. See *Planned Parenthood of the Blue Ridge v. Camblos*, 116 F.3d 707 (4th Cir. 1997).

8. See *Planned Parenthood of the Blue Ridge v. Camblos*, 155 F.3d 352 (4th Cir. 1998) (en banc).

9. 521 U.S. 203 (1997).

10. 20 U.S.C.A. §§ 6301-03 (West Supp. 1998).

11. 118 S. Ct. 1989 (1998).

12. See VA. CODE ANN. §§ 22.1-212.5 to -212.15 (Cum. Supp. 1998).

II. JUVENILE DELINQUENCY AND NON-CRIMINAL MISBEHAVIOR

The two years following the significant juvenile justice enactments of the 1996 Session of the Virginia General Assembly have represented a period of relative repose, with few major revisions to the juvenile code and few court decisions interpreting the legislation of the previous four years. In 1997, however, the General Assembly did enact a bill incorporating several technical amendments to the more comprehensive 1996 revisions. That bill, adopted as chapter 862,¹³ amended Virginia Code section 16.1-255 to clarify the primary role of juvenile intake officers in handling detention orders for juveniles, regardless of whether they were initially issued by a judge or a magistrate.¹⁴ These amendments allowed intake officers to informally handle complaints that juveniles are delinquent, in need of supervision, or in need of services if the complaint is not of a "violent juvenile felony" or the youth has "not previously been adjudicated in need of supervision or delinquent."¹⁵ They also provided that a prosecutor's notice of intent to certify the case to the circuit court must be "mailed or delivered to counsel for the juvenile" or, if unrepresented, to the juvenile and a parent or guardian.¹⁶ Furthermore, the amendments stated that a case can proceed in the juvenile court if that court determines in a preliminary hearing that the youth is not yet fourteen years old or, in a transfer hearing, that the necessary notice has not been given, or that probable cause has not been proven, or that the youth is not competent to stand trial.¹⁷

The amendments also clarified that certification of charges to the circuit court pursuant to subsections B and C of section 16.1-269.1 of the Virginia Code does not divest the juvenile court of jurisdiction over unrelated matters or ancillary charges properly within the court's jurisdiction.¹⁸ The amendments further specified that hearings in appeals to the circuit court in

13. Act of Apr. 2, 1997, ch. 862, 1997 Va. Acts 2299.

14. See VA. CODE ANN. § 16.1-255 (Cum. Supp. 1998).

15. *Id.* § 16.1-260(B) (Cum. Supp. 1998).

16. *Id.* § 16.1-269.1(C) (Cum. Supp. 1998).

17. See *id.* § 16.1-269.1(D) (Cum. Supp. 1998).

18. See *id.*

delinquency cases shall be public unless the juvenile waives the right to a public trial.¹⁹ The amendments further stated that the circuit court has the discretion to move a transferred juvenile from the detention facility to the jail, rather than being required to do so,²⁰ and allowed the Department of Juvenile Justice to withdraw a DNA sample from juveniles committed to the department.²¹

Other enactments amended section 16.1-263 to eliminate the requirement of a summons or notification of a juvenile's parent or guardian if their identity or location is not readily ascertainable as proven by judicial certification or an affidavit.²² The amendments further clarified that the dispositions available for children in need of services applied to juveniles determined to be status offenders, such as curfew violators or tobacco offense violators.²³ Another enactment allowed a court to consider a report of an interdisciplinary team, which met not more than ninety days prior to adjudication of a child in need of supervision, in lieu of directing that an interdisciplinary team be convened,²⁴ provided that a court must find that bed space is available and must consider a Department of Juvenile Justice assessment of the appropriateness of a boot camp placement before committing a delinquent juvenile to such a facility.²⁵ Other changes required that Community Policy and Management Teams participate in the development of community-based services and allow the placement of children staffed under the Comprehensive Services Act in a Virginia Juvenile Community Crime Control Act program.²⁶ It was also determined that ju-

19. See *id.* § 16.1-296(C1) (Cum. Supp. 1998).

20. See *id.* § 16.1-269.6(B) (Cum. Supp. 1998); see also Jon Frank, *Murder Suspect, 14, Moved From Jail Because of Assaults; Anthony Carter, Accused of Killing His Half-Sister, was Bruised, Deputy Testifies*, THE VIRGINIAN-PILOT, Jan. 7, 1997, at B5 (reporting that one of the first 14-year-olds transferred to jail under the mandatory provision of the 1996 legislation was assaulted in the Virginia Beach jail).

21. See VA. CODE ANN. § 19.2-310.3 (Cum. Supp. 1998).

22. See *id.* § 16.1-263(E) (Cum. Supp. 1998). This amendment appears to be in response to the Virginia Court of Appeals' decision in *Karim v. Commonwealth*, 22 Va. App. 767, 473 S.E.2d 103 (Ct. App. 1996). See also text *infra* accompanying notes 45-46.

23. See VA. CODE ANN. §§ 16.1-278.4 to -278.6 (Cum. Supp. 1998).

24. See *id.* § 16.1-278.5(A) (Cum. Supp. 1998).

25. See *id.* § 16.1-278.8(4a) (Cum. Supp. 1998).

26. See *id.* §§ 2.1-752, 16.1-286(A), 16.1-309.3 (Cum. Supp. 1998).

veniles charged with a "violent juvenile felony," as specified in Virginia Code sections 16.1-269.1(B) and 16.1-269.1(C)²⁷ should be fingerprinted and photographed and that the juvenile's fingerprints and a report of the disposition be sent to the Central Criminal Records Exchange, subject to a later court order that they be destroyed within six months if the youth is found not guilty.²⁸

Other changes required the reporting of "youth gang" information to the Virginia Crime Information Network²⁹ and provided that records concerning a juvenile charged with a "violent juvenile felony" be open to the public.³⁰ Another change mandated the disclosure of the disposition in marijuana gift or possession cases to a school superintendent as well as in marijuana sale and distribution cases.³¹ The Virginia Code has been amended to authorize the Department of Juvenile Justice or a Commonwealth's Attorney to release information to the public about serious juvenile offenders who have escaped from the department or local facilities.³² Further legislation changed the statutory presumption that a child over ten but under fourteen is not physically capable of rape by reducing the upper age from fourteen to twelve.³³ In addition, the Virginia Code made escapes from a secure facility under contract with the Department of Juvenile Justice punishable in the same manner as escapes from public facilities.³⁴ Although perhaps numerous, these changes were largely superficial.

The 1998 General Assembly session likewise made little impact on the handling of delinquency matters. Amendments to the juvenile code during the session made community service boards responsible for conducting mental health assessments of juveniles in secure facilities who are identified as needing such

27. *Id.* §§ 16.1-269.1(B), -269.1(C) (Cum. Supp. 1998).

28. *See id.* § 16.1-299 (Cum. Supp. 1998).

29. *See id.* § 16.1-299.2 (Cum. Supp. 1998). This section also defines "youth gang" for reporting purposes and requires the Department of State Police to develop policies and procedures for implementing the provision and to address the need for expunging erroneously entered information.

30. *See id.* § 16.1-301 (Cum. Supp. 1998).

31. *See id.* § 16.1-305.1 (Cum. Supp. 1998).

32. *See id.* § 16.1-309.1 (Cum. Supp. 1998).

33. *See id.* § 18.2-61(C) (Cum. Supp. 1998).

34. *See id.* § 18.2-477.1 (Cum. Supp. 1998).

an assessment and provided that the boards would be reimbursed out of funds appropriated to the Department of Juvenile Justice.³⁵ The legislature also changed the number of hours a juvenile may be housed in a separate room in a jail or other adult detention facility to six hours before and six hours after a court hearing when the court orders the longer period.³⁶ Prior law limited the period to a maximum of six hours. Furthermore, the legislature granted the Board of Juvenile Justice, instead of the Department of Corrections, the authority to certify juvenile detention facilities located upon the site of an adult regional jail facility.³⁷ New amendments also allowed the Department of Juvenile Justice to obtain access to records electronically if the record is maintained by the court in that form, and specified that when so transferred those records become subject to the confidentiality provisions otherwise applicable to the department's records.³⁸ Another amendment addressing records provided that Commonwealth's attorneys and probation officers can receive copies of juvenile records for preparation of sentencing guidelines worksheets.³⁹

Two bills clarified fiscal issues concerning the Virginia Juvenile Community Crime Control Act,⁴⁰ and two others provided for the appointment of alternate members for juvenile detention or residential care facilities commissions.⁴¹ The legislature also enabled detention facilities to charge the cost of capital construction debt service less state reimbursement as part of the cost that may be charged for housing a juvenile in such facilities.⁴² Finally, the General Assembly made it an offense for a juvenile over the age of thirteen, but under eighteen, to take indecent liberties with a child under the age of fourteen who is

35. *See id.* § 16.1-248.2 (Cum. Supp. 1998).

36. *See id.* § 16.1-249 (Cum. Supp. 1998).

37. *See id.* § 16.1-249(A)(5) (Cum. Supp. 1998).

38. *See id.* § 16.1-305(G) (Cum. Supp. 1998).

39. *See id.* § 16.1-305(A)(4) (Cum. Supp. 1998).

40. *See id.* §§ 16.1-309.6, -309.8 (Cum. Supp. 1998).

41. *See id.* §§ 15.2-1535, 16.1-316 (Cum. Supp. 1998).

42. *See id.* § 16.1-322.4 (Cum. Supp. 1998).

at least five years the accused's junior.⁴³ The General Assembly denominated this offense a Class 1 misdemeanor.⁴⁴

As is usually the case, the bulk of the appellate decisions relating to delinquency during the period covered by this article focused on transfer proceedings, and most involved cases that arose under prior statutes. In *Karim v. Commonwealth*,⁴⁵ the Virginia Court of Appeals ruled that the circuit court lacked jurisdiction to try the juvenile as an adult because the juvenile court did not comply with the statutory parental notice requirements,⁴⁶ and the parents were not present at the transfer hearing. This failure to comply with the statute constituted a jurisdictional defect, and the circuit court could not try him.

In *Williams v. Commonwealth*,⁴⁷ the juvenile court's failure to give notice of the juvenile's transfer hearing to his mother likewise was a jurisdictional defect depriving the circuit court of jurisdiction to try him after transfer. Notice that the Code requires more than simply the issuance of a summons. The failure to obtain service on the mother and her consequential absence at the transfer hearing were fatal.

In *Winston v. Commonwealth*,⁴⁸ another case challenging the jurisdiction of the circuit court after a preliminary hearing in the general district court, the defendant contended that he was not yet eighteen when the offenses were committed; therefore, the juvenile court had exclusive jurisdiction over the charges against him. Despite conflicting evidence regarding Winston's age at the time of commission of the offenses, he stated his age as nineteen at his arraignment, and never subsequently pro-

43. See *id.* § 18.2-370.01 (Cum. Supp. 1998). Despite the designation as a Class 1 misdemeanor, the fact that it is an offense only for persons under the age of 18 would make it a status offense under the juvenile code definitions. See *id.* § 16.1-228 (Repl. Vol. 1996).

44. See *id.* § 18.2-370.01 (Cum. Supp. 1998).

45. 22 Va. App. 767, 473 S.E.2d 103 (Ct. App. 1996).

46. See VA. CODE ANN. § 16.1-263 (Cum. Supp. 1998).

47. 26 Va. App. 776, 497 S.E.2d 156 (Ct. App. 1998). In the course of his opinion in the case, Judge Overton stated that "[j]uveniles have been afforded many of the same constitutional guarantees as adults. Indeed, 'society's special concern for children' leads us to a more vigorous examination of proceedings where the young have been accused of violating the law." *Id.* at 780, 497 S.E.2d at 158 (citing *Kent v. United States*, 383 U.S. 541, 554, (1966)).

48. 26 Va. App. 746, 497 S.E.2d 141 (Ct. App. 1998).

duced credible evidence to rebut that assertion. Thus, the circuit court had jurisdiction to try him.⁴⁹

In still another challenge to a circuit court's jurisdiction over a juvenile, the Virginia Court of Appeals ruled that prior to the 1994 legislative changes, the action of the Commonwealth to nolle prosequi indictments required that the charges be initiated again by a petition in the juvenile court.⁵⁰ The 1996 Virginia Code revisions now allow the case to be reinstated by indictment in the circuit court if the nolle prosequi occurs after indictment.⁵¹

In *Panameno v. Commonwealth*,⁵² the Supreme Court of Virginia determined that in the absence of any affirmative assertion of incompetency by a juvenile defendant in a transfer or certification hearing, the juvenile court is not required to make an explicit finding of competency.⁵³ In *Price v. Commonwealth*,⁵⁴ the Virginia Court of Appeals concluded that where the juvenile court transferred Price for trial as an adult and remanded him to jail, there was necessarily the finding of probable cause that triggered the start of the five-month limit for trial under the speedy trial statute. The court dismissed the charges and held that the action of the circuit court in quashing the initial indictments did not affect the running of the time.⁵⁵

In three unpublished opinions concerning transfers, the Virginia Court of Appeals concluded in one opinion that the failure of a juvenile court to forward all papers connected with a case to the circuit court in an appeal of transfer was not a jurisdictional defect.⁵⁶ In another case, the court of appeals

49. See *id.* at 750, 497 S.E.2d at 143; see also *Penn v. Peyton*, 270 F. Supp. 981 (W.D. Va. 1967); *Winston v. Commonwealth*, 41 Va. Cir. 497 (Richmond City 1997). In the *Penn* case, the district judge denied a petition for a writ of habeas corpus to the prisoner by deciding that Penn had waived his right to challenge jurisdiction by his earlier misrepresentation that he was eighteen years old. See *Penn*, 270 F. Supp. at 984.

50. See *Burfoot v. Commonwealth*, 23 Va. App. 38, 49, 473 S.E.2d 724, 730 (Ct. App. 1996).

51. See VA. CODE ANN. § 16.1-269.1(D) (Cum. Supp. 1998).

52. 255 Va. 473, 498 S.E.2d 920 (1998).

53. See *id.* at 475, 498 S.E.2d at 921.

54. 25 Va. App. 655, 492 S.E.2d 447 (Ct. App. 1997).

55. See *id.* at 655, 492 S.E.2d at 447.

56. See *Reid v. Commonwealth*, No. 1175-95-1, 1996 WL 363568, at *1 (Va. Ct.

determined that there was no evidence that a circuit court judge failed to review the transfer documents in a case where there was a typographical error on one transfer order.⁵⁷ In a third decision, the court concluded that the Commonwealth's failure to provide an allegedly exculpatory statement of a co-conspirator prior to a transfer hearing did not deny the youth a proper transfer hearing because the statement was not material to the transfer issues.⁵⁸ In *Broadnax v. Commonwealth*,⁵⁹ the Virginia Court of Appeals also determined that, where a juvenile had been tried as an adult in 1994 for robbery following transfer, even though he was acquitted, the juvenile court had no jurisdiction over the youth for 1995 charges. The court reasoned that Virginia Code section 16.1-271 divested the court of future jurisdiction where the juvenile has been tried or treated as an adult.⁶⁰ In *Wright v. Angelone*,⁶¹ the federal court refused to grant habeas corpus relief to a Virginia juvenile defendant sentenced to death for murder because the allegations of non-compliance with the juvenile transfer statutes had been considered by state courts. The court stated that even erroneous rulings would not be wrongs of constitutional dimensions under the federal Antiterrorism and Effective Death Penalty Act of 1996.⁶²

Two cases from the United States Court of Appeals for the Fourth Circuit also dealt with transfer for adult handling in the federal system. In *United States v. NJB*,⁶³ the court concluded that the government's certification that NJB was charged with a "crime of violence" was correct because murder in furtherance of a continuing criminal enterprise is a violent crime and not merely a penalty enhancement.⁶⁴ The court further concluded

App. July 2, 1996) (unpublished decision).

57. See *Hite v. Commonwealth*, No. 2268-95-1, 1996 Va. App. LEXIS 652, at *1 (Va. Ct. App. Oct. 15, 1996) (unpublished decision).

58. See *Dara v. Commonwealth*, No. 2795-95-1, 1997 WL 52421, at *1 (Va. Ct. App. Feb. 11, 1997) (unpublished decision).

59. 24 Va. App. 808, 485 S.E.2d 666 (Ct. App. 1997).

60. See *id.* at 815, 485 S.E.2d at 669; see also VA. CODE ANN. § 16.1-271 (Repl. Vol. 1996). It would appear that this divestiture would occur at indictment in the circuit court pursuant to transfer or certification.

61. 151 F.2d 151 (4th Cir. 1998).

62. See *id.* at 158; see also 28 U.S.C.A. § 2254(D) (West 1994).

63. 104 F.3d 630 (4th Cir. 1997).

64. See *id.* at 633-35.

that a "substantial federal interest" clearly exists where the legislative history of the delinquency statute expressly included "large-scale drug trafficking" as an example of such interest.⁶⁵ There is no requirement that the government certify that the juvenile records are complete.⁶⁶ Finally, the court found that a state court adjudication for felony escape constituted a finding of guilt for a crime of violence.⁶⁷ In *United States v. White*,⁶⁸ the court disavowed dictum in *NJB* that the government must prove a "substantial federal interest" in connection with prongs (1) and (2) of 18 U.S.C. § 5302 and held that only prong (3) requires such proof.⁶⁹

In *Jackson v. Commonwealth*,⁷⁰ a sixteen-year-old juvenile's police interrogation was deemed to have been conducted properly because his confession was voluntary and secured after advice of his Miranda rights. He was questioned on four separate occasions for less than nineteen hours with the longest session lasting about one hour and twenty minutes. He was not entitled to the presence of his mother during the interrogation, and the alleged police delay in giving her access to her son did not undermine the admissibility of the confessions. The Supreme Court of Virginia also ruled that the death penalty can be constitutionally imposed on a sixteen-year-old.⁷¹ Justice Hassell dissented from the death sentence review, concluding that Jackson's sentence to death was disproportionate to other juvenile capital murder defendants and that the supreme court's sentence review for juveniles should look at other juvenile capital prosecutions rather than capital defendants generally.⁷²

65. See *id.* at 635.

66. See *id.* at 636.

67. See *id.*

68. 139 F.3d 998 (4th Cir. 1998).

69. See *id.* at 1000.

70. 255 Va. 625, 499 S.E.2d 538 (1998).

71. See *id.* at 647, 499 S.E.2d at 552.

72. 255 Va. at 652-55, 499 S.E.2d at 555-57 (Hassell, J., dissenting). Justice Hassell looked at ten convictions of sixteen-year-olds for capital murder since 1987 and noted that this was the first death sentence. A Norfolk circuit court decision concludes that a fifteen-year-old can be tried and convicted of capital murder but may not be sentenced to death in light of the United States Supreme Court case of *Thompson v. Oklahoma*, 487 U.S. 815 (1988). See also *Commonwealth v. Evans*, 41 Va. Cir. 584, 587 (Norfolk City 1994).

The Court of Appeals of Virginia only dealt with one juvenile confession case other than *Jackson* during the time covered by this article.⁷³ There, they again upheld the admissibility of a statement obtained as a result of lengthy interrogation with false statements made to the juvenile by the police.⁷⁴ In *Suleiman v. Commonwealth*,⁷⁵ the court of appeals decided that the youth was properly sentenced by the circuit court as a serious juvenile offender pursuant to Virginia Code section 16.1-285.1. After the juvenile court refused to transfer the case, Suleiman appealed the juvenile disposition and was convicted of robbery in the circuit court. The court's written findings in the case satisfied the requirements of the statute by reciting the statutory language; it was not necessary to make more expansive factual findings. The evidence that defendant was the "mastermind" behind the robbery, stole the weapons used in the offense, declined to accept responsibility for the crime, and showed no remorse indicated that he "was not a proper person for non-incarceration juvenile programs. . . ."⁷⁶ In an unpublished decision, the Virginia Court of Appeals ruled that the record showed that a circuit court gave proper consideration to juvenile dispositional possibilities before sentencing the youth as an adult after he waived a transfer hearing, in spite of some ambiguous statements by the judge.⁷⁷

*Commonwealth v. Jackson*⁷⁸ involved an adult matter, but the Supreme Court of Virginia's decision on the standard for expungement of the conviction is relevant to juvenile proceedings. The court ruled that dismissal of a charge pursuant to the satisfactory completion of terms of a deferred judgment does not make a case "otherwise dismissed" for the purpose of Virginia Code sections 19.2-151 and 19.2-392.2.⁷⁹ The same lan-

73. See *Owens v. Commonwealth*, No. 2259-95-1, 1996 WL 666739, at *1 (Va. Ct. App. Nov. 19, 1996) (unpublished decision).

74. See *id.* at *2. The court specifically relied on its earlier decision in *Novak v. Commonwealth*, 20 Va. App. 373, 457 S.E.2d 402 (Ct. App. 1995), where there were similar circumstances and holdings. See generally Ellen R. Fulmer, Comment, *Novak v. Commonwealth: Are Virginia Courts Providing Special Protection to Virginia's Juvenile Defendants?*, 30 U. RICH. L. REV. 935 (1996).

75. 26 Va. App. 506, 495 S.E.2d 532 (Ct. App. 1998).

76. *Id.* at 513, 495 S.E.2d at 536.

77. See *Pressley v. Commonwealth*, No. 3019-96-4, 1998 WL 8507, at *1 (Va. Ct. App. Jan. 13, 1998) (unpublished decision).

78. 255 Va. 552, 499 S.E.2d 276 (1998).

79. See *id.* at 556, 499 S.E.2d at 279; see also VA. CODE ANN. §§ 19.2-151, -392.2

guage is used in section 16.1-306(C) of the juvenile code governing expungement of juvenile adjudications.⁸⁰

The Virginia Court of Appeals concluded in *Harris v. Commonwealth*⁸¹ that an adult defendant's due process rights were not violated by the admission of his prior juvenile record during the sentencing hearing, despite his contention that "the procedures attendant to juvenile proceedings render these adjudications so unreliable that it is fundamentally unfair to consider them during the sentencing phase of later adult criminal prosecutions."⁸² The court deemed this contention invalid and held that the prior juvenile record was properly admitted and considered.⁸³ In *Dodson v. Commonwealth*,⁸⁴ the Virginia Court of Appeals ruled that the defendant's due process rights were not violated by the admission of a 1969 conviction, while under age eighteen, as the predicate offense behind his conviction for attempting to possess a firearm after having been convicted of a felony, because the 1969 action was an adult conviction and not a juvenile adjudication.⁸⁵

In *Oxenham v. J.S.M.*,⁸⁶ the Supreme Court of Virginia reversed a circuit court's decision to grant a writ of prohibition against a juvenile court judge, who chose to appoint independent attorneys as counsel and as guardian ad litem for a ten-year-old defendant charged with assaulting his mother, despite the objections of his parents. The parents wanted their respective divorce attorneys to represent the youth. The juvenile court clearly had jurisdiction over the delinquency charge and possessed the authority to appoint counsel for the young man so the extraordinary remedy of a writ of prohibition was not proper.⁸⁷

In another significant case, the Virginia Court of Appeals ruled that a juvenile judge had the authority to order the local

(Cum. Supp. 1998).

80. See VA. CODE ANN. § 16.1-306(C) (Repl. Vol. 1996).

81. 26 Va. App. 794, 497 S.E.2d 165 (Ct. App. 1998).

82. *Id.* at 807, 497 S.E.2d at 171.

83. See *id.*

84. 23 Va. App. 286, 476 S.E.2d 512 (Ct. App. 1996).

85. See *id.* at 295-98, 476 S.E.2d at 517-18.

86. 256 Va. 180, 501 S.E.2d 765 (1998).

87. See *id.* at 185, 501 S.E.2d at 768.

department of social services to provide treatment in a residential facility for a juvenile in their custody based upon a determination that she qualified for services pursuant to a report issued by a Family Assessment and Planning Team.⁸⁸ The court of appeals ruled in *Wilson v. Commonwealth*⁸⁹ that a juvenile defendant could be summarily punished for criminal contempt for disobeying court orders, decrees, and processes without the formal filing of a juvenile petition.⁹⁰ Additionally, the court held that while there was no need to appoint a guardian ad litem in addition to counsel, the trial court's order sentencing the juvenile to "jail" had to be modified to reflect placement in a juvenile detention facility, because a jail placement was not legal.⁹¹

In another ruling, the Virginia Court of Appeals held that a defendant was properly convicted of contributing to the delinquency of a minor by taking a sixteen-year-old girl to the adult's home, where the girl spent the night—and engaged in sexual relations—with defendant's son, without the permission of her parents.⁹² Similarly, the Virginia Court of Appeals found that a juvenile's mother could be held in contempt of a juvenile court order issued in connection with a finding that her daughter was in need of supervision if the defendant refused to get ordered alcohol treatment and undermined the daughter's residential treatment program.⁹³

A federal district court upheld a Charlottesville curfew ordinance, despite a constitutional attack in a suit requesting an

88. See *S.G. v. Prince William County Dep't of Soc. Servs.*, 25 Va. App. 356, 488 S.E.2d 653 (Ct. App. 1997). The Family Assessment and Planning Team ("FAPT") was created pursuant to the Comprehensive Services Act for at Risk Youth and Families. See VA. CODE ANN. §§ 2.1-745 to -759.1 (Cum. Supp. 1998). The General Assembly amended Virginia Code section 2.1-757 to permit a court to make a disposition other than that recommended by the FAPT and those services will qualify for funding.

89. 23 Va. App. 318, 477 S.E.2d 7 (Ct. App. 1996).

90. See *id.* at 323, 477 S.E.2d at 9.

91. See *id.* at 326, 477 S.E.2d at 10. Pursuant to the authority in sections 16.1-249(B) and 16.1-292 of the Virginia Code, the court of appeals appropriately modified the juvenile's sentence. See VA. CODE ANN. § 16.1-249(B) (Cum. Supp. 1998); *id.* § 16.1-292 (Repl. Vol. 1996).

92. See *Watkins v. Commonwealth*, No. 975-96-3, 1997 WL 221454, at *2 (Va. Ct. App. May 6, 1997) (unpublished decision).

93. See *Hanson v. Commonwealth*, No. 2899-95-3, 1997 WL 147454, at *4 (Va. Ct. App. Apr. 1, 1997) (unpublished decision).

injunction, where the judge concluded that the city had established that the ordinance reflected a justifiable effort to protect youth in the city and to reduce a high level of juvenile crime.⁹⁴ Here, the city's evidentiary showing was viewed as stronger than that offered in *Hutchins v. District of Columbia*,⁹⁵ a federal district court decision overturning the Washington, D.C. curfew ordinance several months earlier.

In *Pennsylvania Department of Corrections v. Yeskey*,⁹⁶ the Supreme Court of the United States ruled that the Americans With Disabilities Act of 1990,⁹⁷ which prohibits discrimination by a "public entity against a qualified individual with a disability," based on that disability, applies to an inmate in a state correctional facility who claimed he had been denied admission to a boot camp program because of his history of hypertension.⁹⁸ Although this case dealt with an adult prisoner, it has significant relevance to juvenile correctional programs where there are frequently youths with disabilities.⁹⁹

The Fourth Circuit Court of Appeals held in *Alexander S. v. Boyd*¹⁰⁰ that the Prison Litigation Reform Act of 1995¹⁰¹ applied to limit attorneys' fees for successful litigation challenging conditions in state juvenile facilities, as well as for adult prisons.¹⁰² In addition, the Act could be applied retroactively to litigation that preceded its adoption where the award of fees takes place after the effective date of the Act.¹⁰³

The Virginia Department of Juvenile Justice adopted new Length-of-Stay Guidelines ("Guidelines") to govern the length of time a juvenile could spend in a correctional facility pursuant to an indeterminate commitment to the Department of Juvenile Justice by a juvenile or circuit court.¹⁰⁴ The new Guidelines

94. See *Schleifer v. City of Charlottesville*, 963 F. Supp. 534 (W.D. Va. 1997).

95. 942 F. Supp. 665 (D.D.C. 1996).

96. 118 S. Ct. 1952 (1998).

97. 42 U.S.C.A. § 12131(1)(B) (West 1995).

98. See *Yeskey*, 118 S. Ct. at 1952.

99. See, e.g., Robert E. Shepherd, Jr., ed., *Children with Disabilities in the Juvenile Justice System: Overview of the Special Education Process*, JUVENILE LAW AND PRACTICE IN VIRGINIA 445-46 (Supp. 1996).

100. 113 F.3d 1373 (4th Cir. 1997).

101. 42 U.S.C.A. § 1997e (West 1994 & Supp. 1998).

102. See *Alexander*, 113 F.3d at 1392.

103. See *id.*

104. See GUIDELINES FOR DETERMINING THE LENGTH OF STAY OF JUVENILES INDE-

supersede those approved in 1995 and 1996, and they establish four levels of offenses based on the severity and chronicity of the offense to ultimately establish an early and late release date for each level of offending and chronicity. The new Guidelines increase the lengths of stay from a range of thirty to sixty days for the prior lowest level to a range of six months to twelve months for the new lowest level offense, and from eighteen months to thirty-six months for the highest level, excluding murder, to a new range of twenty-four months to thirty-six months. There may also be a three-month reduction or increase for "exceptional aggravating or mitigating circumstances,"¹⁰⁵ and the length of stay may be adjusted for certain mandatory treatment assignments.¹⁰⁶ These Guidelines, and their interpretation, will have a profound effect on the length of time a juvenile may be incarcerated pursuant to an indeterminate commitment to the department.

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

The major legislative developments during 1997 in the area of abuse and neglect included the adoption of an amendment to Virginia Code section 16.1-241(A)(6), which excludes from the description of those parties "with a legitimate interest" in filing a petition for custody, visitation, or other purposes, any individuals whose parental rights have been terminated or any other person whose interest is derived from that individual.¹⁰⁷ Another amendment to the Virginia Code allows Court-Appointed Special Advocate (CASA) programs to directly access criminal background checks on their volunteers.¹⁰⁸ Equally important is the repeal of the "sunset" provision in section 16.1-266.2 so as to allow the continued appointment of pro bono counsel for alleged victims in family abuse cases where protective orders

TERMINATELY COMMITTED TO THE DEPARTMENT OF JUVENILE JUSTICE (adopted on February 11, 1998, and effective on July 1, 1998, pursuant to VA. CODE ANN. § 66-10(8) (Cum. Supp. 1998)).

105. *Id.* ¶ IV.A.3.b.

106. *See id.* ¶ IV.B.

107. *See* VA. CODE ANN. §§ 16.1-241(A)(6), 20-124.1, 63.1-233 (Cum. Supp. 1998).

108. *See id.* §§ 9-173.8, 19.2-389 (Cum. Supp. 1998).

are sought.¹⁰⁹ More changes to the Virginia Code include the amendment of Virginia's "Megan's Law" to add additional offenses requiring re-registration of sex offenders at regular intervals and other procedural changes,¹¹⁰ a new provision that states that the willful killing of an unborn fetus under certain circumstances is murder,¹¹¹ and the addition of a person standing in loco parentis to the list of those individuals who may be guilty of pandering if they allow a person in their charge to be used for prostitution or illicit sex.¹¹²

The most significant changes in 1998 were occasioned by the adoption of a bill to standardize and speed up the process of protecting abused and neglected children.¹¹³ This bill amended several sections and enacted a new one to allow for a vast array of legislative changes. The new section allows the entry of a protective order during a preliminary removal order hearing¹¹⁴ and further mandates that an adjudicatory hearing is to be held within thirty days of a preliminary removal hearing or a hearing on a request for a preliminary protective order.¹¹⁵ If a determination of abuse or neglect is made, then a dispositional hearing must be held within forty-five days, and the foster care plan and protective orders are to be reviewed at the dispositional hearing.¹¹⁶ Any orders entered after such a hearing are final and appealable.¹¹⁷ Additional provisions in the newly created section include the ideas that independent living may be a permanent goal for a child of sixteen years or older,¹¹⁸ foster care review hearings are to be held six months after the dispositional hearing rather than twelve months,¹¹⁹ permanency planning hearings, a new stage of the process, are to be held within eleven months after the foster care review

109. See *id.* § 16.1-266.2 (Repl. Vol. 1996 & Cum. Supp. 1998).

110. See *id.* §§ 18.2-47 to -48, 19.2-298.1 to -298.4, 19.2-390 (Cum. Supp. 1998); *id.* §§ 53.1-116.1, -160.1 (Repl. Vol. 1998).

111. See *id.* §§ 18.2-31, -32.1 (Cum. Supp. 1998).

112. See *id.* § 18.2-355 (Cum. Supp. 1998).

113. Act of Apr. 2, 1997, ch. 790, 1997 Va. Acts 1922.

114. See VA. CODE ANN. § 16.1-252(F) (Cum. Supp. 1998).

115. See *id.* §§ 16.1-252(G) to -253(F) (Cum. Supp. 1998).

116. See *id.* §§ 16.1-252(H) to -253(G), -278.2(B) to (C) (Cum. Supp. 1998).

117. See *id.* § 16.1-278.2(D) to -296(A) (Cum. Supp. 1998).

118. See *id.* § 16.1-281(B) (Cum. Supp. 1998).

119. See *id.* § 16.1-282(A)-(B) (Cum. Supp. 1998).

hearing,¹²⁰ and guardians ad litem, as well as CASA volunteers, are to have access to relevant medical, school and state agency records.¹²¹

Amendments to the law in 1998 further revised the processes for dealing with familial abuse and neglect cases by providing that preliminary protective orders may be entered in the course of any proceedings before the court and on the motion of any person, whether ex parte or sua sponte.¹²² If an ex parte preliminary protective order is issued, the court must include an affidavit or a summary of the allegations and findings in its order.¹²³ Additionally, an adjudicatory hearing is to be held within thirty days of the initial preliminary protective order hearing,¹²⁴ during which the health and safety of the child are to be the paramount concerns in the development and implementation of the foster care plan.¹²⁵ Furthermore, the court may hear and decide a petition for termination of residual parental rights at the same hearing where the foster care plan is approved.¹²⁶

Termination of parental rights is authorized if a parent has been convicted of murder or other homicide-related offenses involving a child of the parent or with whom the parent resided, or for felony sexual or serious physical assaults in such a situation.¹²⁷ Parental rights may also be terminated for failing to maintain continuing contact with a child for six months rather than the previous twelve-month time period and if such rights have been terminated for a sibling.¹²⁸ Finally, foster parents are entitled to notice of proceedings regardless of the length of time they had taken care of the child.¹²⁹

Once these preliminary matters are resolved, the new guidelines provide that an agency having authority to place a child

120. *See id.* § 16.1-282.1 (Cum. Supp. 1998).

121. *See id.* § 16.1-266(E) (Cum. Supp. 1998).

122. *See id.* § 16.1-253(B) (Cum. Supp. 1998).

123. *See id.*

124. *See id.* § 16.1-253(F) (Cum. Supp. 1998).

125. *See id.* § 16.1-281(B) (Cum. Supp. 1998).

126. *See id.*

127. *See id.* § 16.1-283 (Cum. Supp. 1998).

128. *See id.* §§ 16.1-283(C)(1), -283(E) (Cum. Supp. 1998).

129. *See id.* § 16.1-282(C)(4) (Cum. Supp. 1998).

for adoption following termination must file a report with the court every six months until a final adoption order is entered,¹³⁰ appeals of termination cases to the Virginia Court of Appeals are to be given priority on the court's docket,¹³¹ and while an appeal is pending, the juvenile court retains jurisdiction to hear foster care review and permanency planning petitions.¹³²

The General Assembly also provided that child protective services workers or law enforcement officers have the authority to take a child into custody for a maximum of seventy-two hours without the prior approval of the parents if the evidence of abuse is subject to deterioration before a hearing can be held.¹³³ It also required hospitals to notify the community services board in a woman's resident locale to appoint a discharge plan manager if the woman is identified as a substance-abusing postpartum woman so as to bring about implementation and management of the plan.¹³⁴ Finally, the General Assembly directed the Department of Medical Assistance Services to provide for the Medicaid payments of services for victims of child abuse or neglect,¹³⁵ and enacted comprehensive legislation mandating health professionals to report, within seven days of a child's birth, diagnoses of its exposure to a non-prescribed controlled substance or of fetal alcohol syndrome, to child protective services for investigation and possible petitioning of the juvenile court for necessary and appropriate services.¹³⁶

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. The Virginia Court of Appeals held in *Herrera v. Commonwealth*¹³⁷ that the earlier decision of *Commonwealth v. Carter*,¹³⁸ ruling a portion of the child endangerment statute unconstitutional, should be applied retroactively to other cases pending on direct review

130. See *id.* § 16.1-283(G) (Cum. Supp. 1998).

131. See *id.* § 16.1-296(D) (Cum. Supp. 1998).

132. See *id.* § 16.1-242.1 (Cum. Supp. 1998).

133. See *id.* § 63.1-248.9 (Cum. Supp. 1998).

134. See *id.* § 32.1-127(B)(6) (Cum. Supp. 1998).

135. See *id.* § 32.1-325(A)(1) (Cum. Supp. 1998).

136. See *id.* §§ 16.1-241.3, 63.1-248.3, 63.1-248.6 (Cum. Supp. 1998).

137. 24 Va. App. 490, 483 S.E.2d 492 (Ct. App. 1997).

138. 21 Va. App. 150, 462 S.E.2d 582 (Ct. App. 1995).

and on cases not yet decided.¹³⁹ In *Commonwealth v. Brew*,¹⁴⁰ a circuit court ruled that contributing to the delinquency of a minor was not a lesser included offense of statutory rape.¹⁴¹ The Supreme Court of Virginia ruled in *Jenkins v. Commonwealth*¹⁴² that the court of appeals erred in concluding that the trial court's admission of expert testimony regarding the sexual abuse of a two-year-old child constituted harmless error.¹⁴³ A reversible error was committed by allowing a licensed clinical psychologist to testify that a child "had been sexually abused."¹⁴⁴ The court also erred in permitting the psychologist to testify that the boy had told the psychologist that the boy had been "sexed." The admission of the psychologist's testimony was erroneous because this hearsay evidence did not fit within any recognized exception to the hearsay rule.¹⁴⁵

In *Pavlick v. Commonwealth*,¹⁴⁶ a two-month-old child died of head injuries as a result of the "shaken baby syndrome." The father was convicted of the second degree murder of the infant.¹⁴⁷ The en banc Virginia Court of Appeals decided that the trial court did not err in admitting evidence of rib fractures between two to four weeks old and of a separate head injury that occurred about four to eight days before the death.¹⁴⁸ The prior injuries occurred during a time when either Pavlick had sole physical custody of the infant or when the paternal grandmother was present. The grandmother testified without contradiction that she had never shaken the infant.¹⁴⁹ The evidence of the prior injuries was relevant and the jury was entitled to

139. See *Herrera*, 24 Va. App. at 494, 483 S.E.2d at 494.

140. 43 Va. Cir. 611 (Richmond County 1996).

141. See *id.* at 613.

142. 254 Va. 333, 492 S.E.2d 131 (1997). For the prior history of the case, see 22 Va. App. 58, 471 S.E.2d 785 (Ct. App. 1996), and 21 Va. App. 222, 463 S.E.2d 330 (Ct. App. 1995).

143. See *Jenkins*, 254 Va. at 338, 492 S.E.2d at 134.

144. *Id.* at 336, 492 S.E.2d at 133-34.

145. See *id.* at 339, 492 S.E.2d at 134-35.

146. 27 Va. App. 219, 497 S.E.2d 920 (Ct. App. 1998), *rev'g* 25 Va. App. 538, 489 S.E.2d 72 (Ct. App. 1997).

147. See *id.* at 223, 497 S.E.2d at 922.

148. See *id.* at 227, 497 S.E.2d at 924.

149. See *id.* at 225, 497 S.E.2d at 923.

consider the evidence in determining the credibility of the witnesses.¹⁵⁰

In *Webber v. Commonwealth*,¹⁵¹ the evidence was deemed sufficient to prove that a father had murdered his twenty-nine-day-old son where the medical symptoms were consistent with the "shaken baby syndrome" and where that diagnosis was coupled with the father's inculpatory admissions.¹⁵² The Virginia Court of Appeals reversed a conviction for sexual molestation of an eleven-year-old girl in *Blaylock v. Commonwealth*¹⁵³ because the trial court erred in excluding the proffered testimony of two former neighbors of the victim that the victim's reputation for truthfulness was bad in her old neighborhood.¹⁵⁴ The remoteness of the reputation evidence was a matter of its probative value rather than its admissibility.¹⁵⁵ The trial court also erred in admitting pornographic images from Blaylock's computer involving children.¹⁵⁶ This evidence of other and prior "bad acts" would have been relevant to prove intent, but intent was not an issue in the case.¹⁵⁷ Testimony from the now grown victim's husband that she had told him several years before that Blaylock had molested her was admissible to counter the contention that her testimony was a recent fabrication.¹⁵⁸ In *Marshall v. Commonwealth*,¹⁵⁹ the defendant's convictions for attempted object sexual penetration and murder of his eight-month-old son were affirmed because the injuries occurred while the infant was within his exclusive control and the medical evidence demonstrated that they were not accidental.¹⁶⁰

The Virginia Court of Appeals ruled in *Patrick v. Commonwealth*¹⁶¹ that the circumstantial evidence of penetration was

150. *See id.* at 229, 497 S.E.2d at 925.

151. 26 Va. App. 549, 496 S.E.2d 83 (Ct. App. 1998).

152. *See id.* at 561, 496 S.E.2d at 100.

153. 26 Va. App. 579, 496 S.E.2d 97 (Ct. App. 1998).

154. *See id.* at 585, 496 S.E.2d at 100.

155. *See id.* at 586, 496 S.E.2d at 100.

156. *See id.* at 592, 496 S.E.2d at 103-04.

157. *See id.*

158. *See id.* at 595, 496 S.E.2d at 105.

159. 26 Va. App. 627, 496 S.E.2d 120 (Ct. App. 1998).

160. *See id.* at 630, 496 S.E.2d at 122.

161. 27 Va. App. 655, 500 S.E.2d 839 (Ct. App. 1998).

sufficient to support a conviction of statutory rape of an eleven-year-old girl.¹⁶² In *Terry v. Commonwealth*,¹⁶³ however, the conviction for carnal knowledge of a child was reversed where the accused was questioned by a police officer and a social worker in the jail without any notice to, or presence of, his attorney after arraignment in violation of his Sixth Amendment rights.¹⁶⁴ A trial court did not violate the rights of a defendant charged with forcible rape and sodomy of a sixteen-year-old girl when it refused to permit questions of the jury venire regarding whether any juror had ever caught a child in a lie.¹⁶⁵

The difficulties in communication by children in abuse and neglect cases were illustrated in *Moore v. Commonwealth*,¹⁶⁶ where the Supreme Court of Virginia ruled that a young girl's testimony that defendant had placed his penis on her vagina was insufficient to prove penetration for the purpose of a prosecution for rape of a child under the age of thirteen.¹⁶⁷ Similarly, a lack of evidence of school achievement scores or similar proof was fatal to a prosecution for rape of a fourteen-and-one-half-year-old girl where the intercourse was consensual and she was at the upper range of educable mental retardation but had progressed in school with her peers.¹⁶⁸ The evidence of mental incapacity for the purpose of Virginia Code section 18.2-61 was not sufficient.¹⁶⁹ The uncorroborated testimony of a thirteen-year-old girl that her father had committed sexual acts on her was sufficient to sustain the convictions in *Hebden v. Commonwealth*,¹⁷⁰ although only by an equally divided Virginia Court of Appeals. The conviction was sustained even though the evidence was in conflict and there was testimony that the girl had

162. See *id.* at 663, 500 S.E.2d at 843.

163. 27 Va. App. 664, 500 S.E.2d 843 (Ct. App. 1998), *reh'g* granted and mandate stayed by 28 Va. App. 237, 503 S.E.2d 257 (Ct. App. 1998).

164. See *id.* at 673, 500 S.E.2d at 848.

165. See *Skipper v. Commonwealth*, 23 Va. App. 420, 429-30, 477 S.E.2d 754, 759 (Ct. App. 1996).

166. 254 Va. 184, 491 S.E.2d 739 (1997).

167. See *id.* at 189, 491 S.E.2d at 741.

168. See *White v. Commonwealth*, 23 Va. App. 593, 597-98, 478 S.E.2d 713, 714-15 (Ct. App. 1996).

169. VA. CODE ANN. § 18.2-61 (Cum. Supp. 1998).

170. 26 Va. App. 727, 496 S.E.2d 169 (Ct. App. 1998), *vacating* 25 Va. App. 448, 489 S.E.2d 245 (Ct. App. 1997).

reason to fabricate the complaint.¹⁷¹ In *Crawford v. Commonwealth*,¹⁷² the convictions for carnal knowledge and crimes against nature were reversed where the victim's daughter was unable to testify clearly when the offenses occurred and where the consequent amendments to the indictment should have entitled the father to a continuance.¹⁷³

A juvenile victim's complaint of rape made to her mother ten months after the alleged rape was admissible under the "recent complaint" exception to the hearsay rule¹⁷⁴ where the delay is explained by circumstances entirely consistent with both the circumstances and the fact that the assault was on a child victim.¹⁷⁵ The lack of "recentness" of the complaint goes to the weight of the evidence rather than its admissibility.¹⁷⁶ Similarly, in *Mitchell v. Commonwealth*,¹⁷⁷ the Virginia Court of Appeals ruled that rebuttal testimony by the brother of a twelve-year-old victim of a sodomy proposal regarding statements the victim made to him were admissible as a recent complaint of sexual assault although it could not be admitted as a prior consistent statement.¹⁷⁸ In a circuit court case, the judge ruled that there was no exception to the "rape shield law"¹⁷⁹ that would allow cross-examination of a child sexual assault victim on her prior sexual experience, especially because that alleged prior experience was dissimilar to what was alleged in the case.¹⁸⁰

In *Holden v. Commonwealth*,¹⁸¹ the Virginia Court of Appeals ruled that the circuit court had properly revoked defendant's suspended sentences for aggravated sexual battery of a child where he had written letters graphically describing

171. See *Hebden v. Commonwealth*, 25 Va. App. 448, 449-50, 489 S.E.2d 245, 246 (Ct. App. 1997).

172. 23 Va. App. 661, 479 S.E.2d 84 (Ct. App. 1998) (en banc), *vacating* 22 Va. App. 663, 472 S.E.2d 658 (Ct. App. 1996).

173. See *id.* at 666-67, 479 S.E.2d at 86-87.

174. See VA. CODE ANN. § 19.2-268.2 (Cum. Supp. 1998).

175. See *Terry v. Commonwealth*, 24 Va. App. 627, 636, 484 S.E.2d 614, 618 (Ct. App. 1997).

176. See *id.* at 635-36, 484 S.E.2d at 618.

177. 25 Va. App. 81, 486 S.E.2d 551 (Ct. App. 1997).

178. See *id.* at 85-86, 486 S.E.2d at 553.

179. See VA. CODE ANN. § 18.2-67.7 (Repl. Vol. 1996).

180. See *Commonwealth v. Hagy*, 41 Va. Cir. 51 (Roanoke City 1996).

181. 27 Va. App. 38, 497 S.E.2d 492 (Ct. App. 1998).

his desire to have sex with children while a prisoner serving time for an unrelated offense.¹⁸² As usual, there also were several other reported criminal cases where the victims were children but where no significant issues were presented relating to the age of the victims.¹⁸³

The Virginia Court of Appeals ruled in *Padilla v. Norfolk Division of Social Services*¹⁸⁴ that the standard of proof in cases establishing or modifying foster care plans is "preponderance of the evidence."¹⁸⁵ The United States Court of Appeals for the Fourth Circuit decided in *Renn v. Garrison*¹⁸⁶ that social workers who dealt with a family in trying to address problems surrounding a troubled runaway teenage daughter had qualified immunity in a suit alleging a deprivation of the family's constitutional right to privacy.¹⁸⁷ Similarly, social workers have qualified immunity in a mother's suit alleging they violated her and her daughter's due process rights by removing the daughter to a foster home where the daughter died from abuse.¹⁸⁸ In *Hawks v. Dinwiddie Department of Social Services*,¹⁸⁹ the Virginia Court of Appeals concluded that the circuit judge erred in refusing to permit an eleven-year-old child to testify in a proceeding for the termination of the mother's residual parental rights without first making an individualized factual determination as to whether he was of an "age of discretion."¹⁹⁰ A circuit court in a divorce case does not have jurisdiction to terminate a parent's residual parental rights.¹⁹¹

In *J.P. v. Carter*,¹⁹² the Virginia Court of Appeals made the following conclusions: (i) the failure of a social worker to con-

182. See *id.* at 43-44, 497 S.E.2d at 494-95.

183. See *Horton v. Commonwealth*, 255 Va. 606, 499 S.E.2d 258 (1998); *Bottenfield v. Commonwealth*, 25 Va. App. 316, 487 S.E.2d 883 (Ct. App. 1997); *Mueller v. Murray*, 252 Va. 356, 478 S.E.2d 542 (1996); *Mickens v. Commonwealth*, 252 Va. 315, 478 S.E.2d 302 (1996).

184. 22 Va. App. 643, 472 S.E.2d 648 (Ct. App. 1996).

185. See *id.* at 644-45, 472 S.E.2d at 649.

186. 100 F.2d 344 (4th Cir. 1996).

187. See *id.* at 350-51.

188. See *White v. Chambliss*, 112 F.3d 731, 740 (4th Cir. 1997).

189. 25 Va. App. 247, 487 S.E.2d 285 (Ct. App. 1997).

190. See *id.* at 254-55, 487 S.E.2d at 288-89.

191. See *Church v. Church*, 24 Va. App. 502, 508, 483 S.E.2d 498, 501 (Ct. App. 1997).

192. 24 Va. App. 707, 485 S.E.2d 162 (Ct. App. 1997).

tact an alleged child abuser prior to making an initial determination of "founded sexual abuse" did not violate due process;¹⁹³ (ii) a circuit court can properly deny the addition of evidence not presented at the Department of Social Services level;¹⁹⁴ (iii) any defect in qualifications for an agency hearing officer did not undermine subject matter jurisdiction;¹⁹⁵ and (iv) listing a juvenile as an abuser in the child abuse central registry did not violate the juvenile code.¹⁹⁶ In *Carter v. Ancel*,¹⁹⁷ the Virginia Court of Appeals determined that the department of social services had jurisdiction to act and determine whether a sexual abuse complaint was "founded," even though the forty-five days stipulated in Virginia Code section 63.1-248.6(E)(7) had passed.¹⁹⁸ Criminal acquittals do not act as a bar for administrative determinations that child abuse or neglect have occurred and that the person tried and acquitted was the abuser.¹⁹⁹

Significant administrative action also took place during the period covered by this article as the Board of Social Services adopted new child protective services regulations.²⁰⁰ Among the major changes are that determinations of whether abuse or neglect complaints are "founded" are to be based on a preponderance of the evidence and not clear and convincing evidence.²⁰¹ New standards are included for interviewing the child and the alleged abuser, including a preference for tape recording interviews with children.²⁰² Also, the protective services worker may request that an alleged abuser who is believed to be abusing substances submit to substance abuse screening or a court may be petitioned to order screening.²⁰³ The last major change states that, upon the completion of an investigation, the protective services worker shall give the alleged abus-

193. See *id.* at 716-17, 485 S.E.2d at 167-68.

194. See *id.* at 719, 485 S.E.2d at 168-69.

195. See *id.* at 722, 485 S.E.2d at 170.

196. See *id.* at 725, 485 S.E.2d at 171-72.

197. 28 Va. App. 76, 502 S.E.2d 149 (Ct. App. 1998).

198. See *id.* at 79, 502 S.E.2d at 151.

199. See *Sesay v. Carter*, 43 Va. Cir. 31, 32 (Alexandria City 1997); *Danyus v. Dep't of Soc. Servs.*, 43 Va. Cir. 603, 607 (Newport News City 1992).

200. See 22 VA. ADMIN. CODE. 40-705-10 to -190 (1998).

201. See *id.* at 40-705-10.

202. See *id.* at 40-705-80.

203. See *id.* at 40-705-90.

er notice of any decision to consider the case founded and advise the person of his or her options.²⁰⁴

IV. EDUCATION

Major legislative changes involving education that were enacted during the 1997 Session of the Virginia General Assembly provide greater access to schools for children in homeless shelters²⁰⁵ and require school boards to permit the transfer of students who have been victims of crime in one school to another school in the division.²⁰⁶ The legislature encouraged the expansion of programs for at-risk four-year-olds,²⁰⁷ created the Virginia Innovative Remedial Education Program,²⁰⁸ and authorized school boards to create "educational technology foundations" for the purpose of implementing public-private partnerships to expand and improve technology in a school division.²⁰⁹ Changes also directed the state Board of Education to encourage the use of mediation in special education disputes²¹⁰ and required students who do not pass the literacy tests to participate in summer school or some other remediation program.²¹¹ In addition, legislation allowed school boards to eliminate the right of appeal to the board for student suspensions of ten days or less and permitted the final decisions to rest with division superintendents.²¹² The General Assembly also expanded the power of teachers to remove "disruptive students" from their classes and provided that the state board and local school boards should develop regulations and procedures to govern these actions.²¹³

Other changes to the Virginia Code (i) authorized school boards to establish a committee of not less than three members to deal with expulsions and provided for appeal to the full

204. *See id.* at 40-705-120.

205. *See* VA. CODE ANN. § 22.1-3 (Repl. Vol. 1997).

206. *See id.* § 22.1-3.3 (Repl. Vol. 1997).

207. *See id.* § 22.1-199.1 (Repl. Vol. 1997).

208. *See id.* § 22.1-209.1:4 (Repl. Vol. 1997).

209. *See id.* §§ 11-35, 22.1-212.2:2 (Repl. Vol. 1997).

210. *See id.* § 22.1-214 (Repl. Vol. 1997).

211. *See id.* §§ 22.1-253.13:1 to .13:4, -254, -254.1 (Repl. Vol. 1997).

212. *See id.* §§ 22.1-277, -277.2, -278 (Repl. Vol. 1997).

213. *See id.* §§ 22.1-276.2, -277, -278 (Repl. Vol. 1997).

board if a decision is not unanimous,²¹⁴ (ii) authorized the suspension or expulsion of students convicted of Drug Control Act offenses and required juvenile court clerks to report convictions for the gift or distribution of marijuana to division superintendents, in addition to the offenses already reported,²¹⁵ and (iii) authorized the exclusion from school attendance of students who have been suspended for more than thirty days and private school students for whom admission has been withdrawn with the provision of some due process safeguards.²¹⁶

The General Assembly made several other changes that (i) mandated school safety audits by local school boards;²¹⁷ (ii) provided for greater access to school activities by non-custodial parents in the absence of a contrary court order;²¹⁸ (iii) required school boards to provide information, developed by the Attorney General's office, to students about the prosecution of juveniles as adults;²¹⁹ (iv) allowed parents to access computerized and written school records on their child;²²⁰ (v) required school boards to conduct state child abuse and neglect registry searches for information on all applicants for employment after July 1, 1997;²²¹ and (vi) directed the Departments of Corrections, Correctional Education, and Juvenile Justice to collect demographic, educational, learning disabilities, health, and other data on their correctional populations and report these data annually to the General Assembly.²²²

The 1998 legislative year also was an active one for education. The General Assembly, among other amendments, enacted sweeping laws on excellence in public schools. This included requiring remediation if a student fails any standard of learning assessment test,²²³ expanding the at-risk four-year-olds

214. *See id.* § 22.1-277 (Repl. Vol. 1997).

215. *See id.* § 22.1-277.02 (Repl. Vol. 1997). The suspensions or expulsions may be for offenses occurring outside of school.

216. *See id.* § 22.1-277.2 (Repl. Vol. 1997).

217. *See id.* § 22.1-278.1 (Repl. Vol. 1997).

218. *See id.* § 22.1-279.5 (Repl. Vol. 1997).

219. *See id.*

220. *See id.* § 22.1-287 (Repl. Vol. 1997).

221. *See id.* §§ 22.1-296.1 to -296.4 (Repl. Vol. 1997).

222. *See id.* §§ 22.1-340, 53.1-8, 66-13 (Repl. Vol. 1997 & Cum. Supp. 1998).

223. *See id.* §§ 22.1-199.1 to -199.2, -209.1:4, -253.13:1, -253.13:3, -254.01, -278 (Cum. Supp. 1998).

programs further,²²⁴ and beginning the process of phasing out the Literacy Passport testing requirements as set forth in the Standards of Quality.²²⁵ The General Assembly established the Commonwealth Character Initiative to develop character education programs,²²⁶ created the Virginia Gifted Education Pilot Program to provide a model for school divisions,²²⁷ amended the Standards of Quality in several respects including technological proficiency,²²⁸ established Standards of Learning assessment requirements,²²⁹ and created a number of initiatives supporting professional training and development among public school personnel based on recommendations of the Commission on the Future of Public Education.²³⁰

In addition, the General Assembly took the following actions: (i) provided that notice of a student's absences are to be given to both parents if they have joint physical custody;²³¹ (ii) modified further the hearing procedures for students who have been suspended for more than ten days, making it comparable to the 1997 amendments regarding expulsion;²³² (iii) directed school boards to expel any student determined to have brought drugs onto school property;²³³ (iv) directed the Board of Education and Office of Attorney General to develop guidelines for school searches;²³⁴ (v) provided that students for whom reports are received from juvenile court clerks may be suspended or expelled from school;²³⁵ (vi) required local school boards to notify parents of a student who has been suspended or expelled of information about the action and about alternative programs;²³⁶ and (vii) allowed school principals to disseminate in-

224. See *id.* § 22.1-199.1 (Cum. Supp. 1998). This provision is similar to the Gun-Free Schools provision of VA. CODE ANN. § 22.1-277.01 (Repl. Vol. 1997).

225. See *id.* §§ 22.1-199.2, -209.1:4, -253.13:1, -253.13:3 to -253.13:4, -254.01 (Cum. Supp. 1998).

226. See *id.* § 22.1-208.01 (Cum. Supp. 1998).

227. See *id.* § 22.1-209.1:5 (Cum. Supp. 1998).

228. See *id.* § 22.1-253.13:1 (Cum. Supp. 1998).

229. See *id.* § 22.1-253.13:3 (Cum. Supp. 1998).

230. See *id.* §§ 22.1-253.13:5, -298 (Cum. Supp. 1998).

231. See *id.* § 22.1-258 (Cum. Supp. 1998).

232. See *id.* § 22.1-277 (Cum. Supp. 1998).

233. See *id.* § 22.1-277.1 (Repl. Vol. 1997).

234. See *id.* §§ 22.1-277.01:1 to -277.01:2 (Cum. Supp. 1998).

235. See *id.* §§ 22.1-277.02, -277.1 (Cum. Supp. 1998).

236. See *id.* § 22.1-277.03 (Cum. Supp. 1998).

formation received from a juvenile court clerk about the conviction of a student to those school personnel with a legitimate educational interest in the information.²³⁷

The General Assembly also enacted a charter school bill after several years of attempts, authorizing local school divisions to establish two charter schools per school division, one of which must enhance opportunities for at-risk students.²³⁸ This bill provided that admission will be through a lottery process, requiring schools to meet or exceed the Standards of Quality and to be subject to all Standards of Accreditation requirements.²³⁹ The bill further defined the schools so as to be tuition-free, nonsectarian, non-religious, and non-home-based alternative educational institutions.²⁴⁰

In another significant legislative development in 1997, Congress amended the Individuals with Disabilities Education Act (IDEA). The changes were substantive and sweeping.²⁴¹ There is not sufficient space in this article to discuss all the changes,²⁴² but the major changes affect such matters as eligibility, evaluation, development of individualized education programs (IEPs), public and private placements, discipline, funding, attorney's fees, resolution of disputes, and procedural safeguards for students and their parents. The legislation will be supplemented by extensive regulations, which have been issued only in draft form at this time.²⁴³

The United States Supreme Court decided two education-based cases during the 1996-1998 period. The first, *Agostini v. Felton*,²⁴⁴ overruled the landmark cases of *Aguilar v. Felton*²⁴⁵ and *School District of Grand Rapids v. Ball*²⁴⁶ by

237. See *id.* § 22.1-288.2 (Cum. Supp. 1998).

238. See *id.* § 22.1-212.11(A) (Cum. Supp. 1998).

239. See *id.* §§ 22.1-212.5 to -212.15 (Cum. Supp. 1998).

240. See *id.*

241. See Pub. L. No. 105-17, 111 Stat. 37 (1997) (codified as amended at 20 U.S.C.A. §§ 1400-21) (West Supp. 1998)).

242. For further discussion, see Dawn Snow Huefner, *The Individuals with Disabilities Education Act Amendments of 1997*, 122 WEST'S EDUC. L. REP. 1103 (1998).

243. See 62 Fed. Reg. 55066-55130 (1997) (to be codified at 34 C.F.R. pts. 300-03) (proposed Oct. 22, 1997).

244. 521 U.S. 203 (1997).

245. 473 U.S. 402 (1985).

246. 473 U.S. 373 (1985).

ruling that public school teachers could be sent into sectarian schools to provide remedial education to disadvantaged children under title I of the Elementary and Secondary Education Act of 1965.²⁴⁷

The second case, *Gebser v. Lago Vista Independent School District*,²⁴⁸ made it considerably more difficult for sexually abused students to recover damages against school districts. A divided court determined that school districts are not liable to the student or family unless the district had actual notice of the abuse and then failed to act.

Virginia cases included the following: (i) *Wall v. Fairfax County School Board*,²⁴⁹ where the Supreme Court of Virginia decided that school student election results are exempt from disclosure under the Virginia Freedom of Information Act;²⁵⁰ (ii) *Virginia High School League v. J.J. Kelly High School*,²⁵¹ where the supreme court concluded that the league violated its own by-laws when it re-classified the high school for sports competitions and other purposes; and (iii) *Wood v. Henry County Public Schools*,²⁵² where the supreme court determined that the school system did not violate Wood's due process rights in disciplinary proceedings, which arose from his bringing a pocket knife on a school field trip. The court did, however, conclude that a pocket knife is not a "firearm" within the meaning of the appropriate statutes, and its possession cannot lead to the automatic expulsion of at least one year.²⁵³ In *McMahon v. Randolph-Macon Academy*,²⁵⁴ a circuit court judge ruled that a private boarding school that takes a minor into its custody has an in loco parentis relationship with that student. This relationship creates certain fiduciary duties, and "where a choice exists between the interests of a staff member and the best interests of a student . . . the school must choose to act in the student's best interest."²⁵⁵

247. 20 U.S.C. §§ 6301-6514 (1994 & Cum. Supp. 1996).

248. 118 S. Ct. 1989 (1998).

249. 252 Va. 156, 475 S.E.2d 803 (1996).

250. VA. CODE ANN. §§ 2.1-340 to -346.1 (Repl. Vol. 1995 & Cum. Supp. 1998).

251. 254 Va. 528, 493 S.E.2d 362 (1997).

252. 255 Va. 85, 495 S.E.2d 255 (1998).

253. See *id.* at 93, 495 S.E.2d at 260.

254. 42 Va. Cir. 417 (Warren County 1997).

255. *Id.* at 419.

The United States Court of Appeals for the Fourth Circuit made the following rulings: (i) upheld the constitutionality of a school district's rule which required high school students to perform fifty hours of community service prior to graduation;²⁵⁶ (ii) ruled that Virginia's plan for educating disabled students under the IDEA qualifies the state for federal funding in spite of allowing school districts to discontinue providing an education to disabled students who are suspended or expelled for disciplinary reasons;²⁵⁷ (iii) reversed a district court decision and concluded that the district court judge had the power to order the state department of education to pay private school costs of a disabled student for violation of the IDEA;²⁵⁸ (iv) ruled that under the IDEA a regular school classroom would not be the least restrictive environment for an autistic student who had made no progress in that setting;²⁵⁹ (v) agreed with the administrative review hearing officer and district court judge that a youth with major behavior problems was not suffering from a serious emotional disturbance and, thus, was not disabled under the IDEA;²⁶⁰ (vi) concluded in a sharply split en banc holding that a play performed by high school students under the direction of a drama teacher is part of the school curriculum which is subject to the control of school administrators and, thus, does not implicate the teacher's First Amendment rights;²⁶¹ and (vii) decided that parents of a disabled student could not recover damages from the school board for failing to diagnose the youth and to provide services.²⁶²

In *Austin v. Lambert*,²⁶³ a federal district court ruled that assistant principals at a public high school had qualified immunity from a damages claim for conducting a body search of a male student for drugs. The decision was based partially in light of what the district judge perceived as the absence of

256. See *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996).

257. See *Virginia v. Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc), *superseded by statute* as stated in *Amos v. Megland*, 126 F.3d 589 (4th Cir. 1997).

258. See *Gadsby v. Grasmick*, 109 F.3d 940 (4th Cir. 1997).

259. See *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996 (4th Cir. 1997).

260. See *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659 (4th Cir. 1998).

261. See *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998) (en banc).

262. See *Sellers v. School Board of Manassas*, 141 F.3d 524 (4th Cir. 1998).

263. No. 97-0465-R, 1998 U.S. Dist. LEXIS 8062, at *1 (W.D. Va. 1998).

definitive case law on the subject of student searches in schools. The student in this case had his pants removed and a search was conducted of his person, allegedly in front of a full-length window where he was visible to passersby.²⁶⁴

V. MISCELLANEOUS

The most significant legislative action for this section in 1997 was the adoption of the parental notification abortion statute that came after persistent attempts over a number of years.²⁶⁵ The statute provides that no doctor may perform an abortion upon an unemancipated minor unless notice is given to a parent, guardian, or some other person having custody of the minor, or unless a court order has been entered authorizing the abortion without parental notice.²⁶⁶ The physician may go forward without notice if the minor claims to be abused or neglected.²⁶⁷ If the physician has reason to suspect that the minor has been abused or neglected and the minor makes a complaint, the physician may go forward without notice if the abortion is medically necessary to avert the girl's death or if there is insufficient time to give notice or utilize the judicial bypass procedure because of serious medical risks.²⁶⁸

In the absence of such exceptional circumstances, the minor may secure an abortion without parental notice only by seeking a judicial bypass through filing a petition with a juvenile court.²⁶⁹ The judge must then order a hearing to determine whether the minor is mature, or if not, whether the performance of an abortion without notice would be in her best interest.²⁷⁰ The statute provides that if a determination is made that the minor is mature, the judge "may" authorize the abortion without notice.²⁷¹

264. See *id.* at *3-6, 11.

265. See VA. CODE ANN. § 16.1-241(V) (Cum. Supp. 1998).

266. See *id.*

267. See *id.*

268. See *id.*

269. See *id.*

270. See *id.*

271. See *id.*

If the abortion is in the minor's best interest, the judge "shall" authorize the abortion.²⁷² The discretionary language under the "mature minor" provision was a principal basis for the constitutional attack on the statute. Prior to the effective date of the statute, a federal district judge granted a preliminary injunction which was then stayed by a single circuit judge. That stay was affirmed by the full federal circuit court.²⁷³ After more than a year, the court, sitting en banc, upheld the constitutionality of the statute by concluding that the language permitting the exercise of discretion is not an unconstitutional provision for a parental notification statute, as opposed to a parental consent statute.²⁷⁴ Although the decision was unanimous, a number of the concurring judges joined in the judgment by viewing "may" as meaning "must."²⁷⁵

An article in *The Washington Post* in the Spring of 1998 indicated that teen-aged girls in Virginia obtained about twenty percent fewer abortions in the first five months after the law went into effect than during the same period in the year before.²⁷⁶ Although this reduction could be attributed to a drop in abortions generally in the state and in the nation, interviews indicated that a number of pregnant young women were leaving the state to have abortions elsewhere.²⁷⁷ For example, there appeared to be a definite increase in inquiries from Virginia to national abortion "hot lines" and to clinics in the District of Columbia.²⁷⁸ Data for the first year of the law indicate that thirty-one judicial bypass cases were filed in Virginia juvenile courts and twenty-seven of them resulted in approval of the teenaged petitioner's request.²⁷⁹

272. *See id.*

273. *See Planned Parenthood of the Blue Ridge v. Camblos*, 116 F.3d 707 (4th Cir. 1997), *aff'd*, 125 F.3d 884 (4th Cir. 1997) (en banc).

274. *See Planned Parenthood of the Blue Ridge v. Camblos*, 155 F.3d 352, 355 (4th Cir. 1998) (en banc).

275. *See id.* at 385 (Widener, J., concurring).

276. Ellen Nakashima, *Fewer Teens Receiving Abortions in Virginia*, THE WASH. POST, Mar. 3, 1998, at A1.

277. *See id.*

278. *See id.*

279. CASE MANAGEMENT SYSTEM REPORT, ANNUAL REPORT OF JUDICIAL BYPASS PROCEEDINGS (July 1, 1997-June 30, 1998). In addition to the 27 petitions granted by the Virginia juvenile courts, one petition was granted on appeal. *See id.*

In 1998, the General Assembly passed a "Standby Guardianship Act" after a year-long study by the Commission on Youth.²⁸⁰ Under the Act, a parent with a progressive and chronic illness, such as AIDS, can name an individual to assume temporary care of a child without the drastic remedy of a termination of residual parental rights.²⁸¹ The standby guardian can be appointed by the juvenile court or be designated more informally by the parent in writing.²⁸² The guardian's authority will be activated by some "triggering event" specified by the court order or by the parent, such as the parent's incompetence or debilitation.²⁸³ The court also has the power to review the continuation of the standby guardianship and to revoke or otherwise terminate it.²⁸⁴ The guardian is allocated responsibility to ensure that permanent arrangements are made for the care of the child when the parent is no longer capable of doing so.

Legislation in 1997 gave guardians ad litem access to medical and mental health records upon presentation of a court order and, upon at least seventy-two hours notice, the ability to consult with a mental health provider to review and interpret the child's treatment records.²⁸⁵ The General Assembly clarified that the statute of limitations in lawsuits arising out of child sexual abuse is subject to the "discovery" accrual rule when the plaintiff is not previously aware of the abuse.²⁸⁶ It also prohibited the tattooing of minors without a parent or guardian's presence, unless done under the supervision of licensed medical personnel²⁸⁷ and provided that drivers transporting children at least four years old but younger than sixteen ensure that they are provided and secured with seat belts.²⁸⁸ In 1998, the General Assembly also enacted legislation allowing either or both of a minor's parents to sue on behalf of the child as next

280. REPORT OF THE VIRGINIA COMMISSION ON YOUTH ON STUDY OF STANDBY GUARDIANSHIP TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, S. Doc. No. 20 (1998).

281. See VA. CODE ANN. §§ 16.1-349 to -355 (Cum. Supp. 1998).

282. See *id.* §§ 16.1-349, -350(A) (Cum. Supp. 1998).

283. See *id.*

284. See *id.* § 16.1-354 (Cum. Supp. 1998).

285. See *id.* § 16.1-266(E) (Cum. Supp. 1998).

286. See *id.* § 8.01-249 (Cum. Supp. 1998).

287. See *id.* § 18.2-371.3 (Cum. Supp. 1998).

288. See *id.* § 46.2-1095 (Cum. Supp. 1998).

friend²⁸⁹ and exempted minors holding a valid driver's license issued by some other state from the requirement that they receive their Virginia license from a juvenile court in a formal ceremony.²⁹⁰

The United States Supreme Court decided an historic case in *Reno v. American Civil Liberties Union*²⁹¹ in which the Communications Decency Act was ruled to be a violation of the First Amendment's guarantee of free speech for adults in its attempt to make it a federal crime for "content providers" to send "indecent" words or pictures to minors in cyberspace.²⁹²

The Supreme Court of Virginia addressed significant issues in *Williams v. Williams*,²⁹³ decided in three very different opinions but with a fairly narrow holding. All of the justices concluded that grandparents could not successfully petition a court for visitation rights over the objection of both parents in an intact family.²⁹⁴ In the Virginia Court of Appeals, the same conclusion was based on broader and stronger language about the fundamental nature of parents' rights that conceivably could have had significant implications for the protection of children in the abuse and neglect arena and for decision-making by school officials and other public officials.²⁹⁵

In the field of negligence law, the Supreme Court of Virginia ruled in *Pavlick v. Pavlick*²⁹⁶ that the normal rule granting immunity from suit for most intra-family acts of negligence does not apply to an unemancipated minor who is injured or killed by a parent through an allegedly intentional tortious act.²⁹⁷ In *A.H. v. Rockingham Publishing Company*,²⁹⁸ the Supreme Court of Virginia concluded that a publisher had no duty to warn a minor newspaper carrier of the risk of sexual assault even though three prior carriers had been assaulted

289. See *id.* § 8.01-8 (Cum. Supp. 1998).

290. See *id.* § 46.2-336 (Cum. Supp. 1998).

291. 117 S. Ct. 2329 (1997).

292. See *id.* at 2347-48.

293. 256 Va. 19, 501 S.E.2d 417 (1998).

294. See *id.* at 19, 501 S.E.2d at 417.

295. See *Williams v. Williams*, 24 Va. App. 778, 781-82, 485 S.E.2d 651, 653-54 (Ct. App. 1997).

296. 254 Va. 176, 491 S.E.2d 602 (1997).

297. See *id.* at 182, 491 S.E.2d at 605.

298. 255 Va. 216, 495 S.E.2d 482 (1998).

over a five-year period. The court reasoned that the prior assaults were neither geographically proximate to the assault on the plaintiff, nor had they occurred with sufficient frequency or closeness in time to make an assault of the plaintiff reasonably foreseeable.²⁹⁹ In *Chapman v. City of Virginia Beach*,³⁰⁰ however, the Supreme Court of Virginia reversed the action of the circuit court by striking a nuisance count in a lawsuit and setting aside a jury verdict for parents on a gross negligence claim where an eight-year-old girl was killed while playing on a broken gate giving access to the boardwalk. The court agreed with the trial court that the boardwalk was a recreational facility requiring proof of gross negligence, but disagreed with setting aside the jury verdict.³⁰¹ The court overturned the striking of the nuisance count and found error in the admission of expert testimony on whether the condition of the gate created a dangerous condition and in the giving of an instruction on the contributory negligence of the mother.³⁰²

In *Lee v. Nationwide Mutual Insurance Company*,³⁰³ the Supreme Court of Virginia found that a thirteen-year-old boy was barred from successfully suing for injuries suffered in an automobile accident where he freely consented and participated in the illegal act of being driven by a sixteen-year-old who was not licensed to drive the car.³⁰⁴ The court also concluded that the rebuttable presumption of incapacity for a child under fourteen in criminal cases does not apply to the illegality defense in a negligence action although the proof of consent "necessarily includes consideration of the maturity, intelligence, and mental capacity of the plaintiff, regardless of age."³⁰⁵ In litigation arising out of injuries suffered by a child who ingested lead-based paint in rented property, the Supreme Court of Virginia

299. *See id.* at 222-23, 495 S.E.2d at 486.

300. 252 Va. 186, 475 S.E.2d 798 (1996).

301. *See id.* at 186-87, 475 S.E.2d at 800-01.

302. *See id.* at 191-92, 475 S.E.2d at 801-02.

303. 255 Va. 279, 497 S.E.2d 328 (1998).

304. *See id.* at 284-85, 497 S.E.2d at 330.

305. *Id.* at 283, 497 S.E.2d at 330. The court implicitly recognized the continued viability of the infancy or age incapacity defense in criminal or delinquency proceedings by its opinion in the case.

upheld an insurance company's health hazard exclusion clause in the policy insuring the landlord.³⁰⁶

In two circuit court opinions, the courts ruled that punitive damages were not recoverable by parents for ordinary or gross negligence claims against a child care facility, especially where there was no evidence of willful and wanton conduct.³⁰⁷ In addition, the courts ruled that the parents could not recover for loss of consortium of a child in Virginia.³⁰⁸ Furthermore, the courts held that the parents' claim for reimbursement of medical expenses incurred by their child as a result of the alleged negligence of another, although derivative, was not protected by the tolling provision of the statute of limitations.³⁰⁹ In *Hutchins v. Carrillo*,³¹⁰ the Virginia Court of Appeals concluded that a father was deprived of due process when he lost his right to appeal a juvenile court's order concerning child custody and support because the clerk's office was improperly closed on the last day to file an appeal bond.³¹¹

Two 1997 cases addressed the competency of child witnesses. In *Greenway v. Commonwealth*,³¹² the Supreme Court of Virginia concluded that an inadequate foundation had been laid for testimony by a twelve-year-old about the speed of an automobile in an involuntary manslaughter case.³¹³ In *Braxton v. Commonwealth*,³¹⁴ a three-year-old's out-of-court statement about his mother's murder was deemed to have been admitted properly as an excited utterance.³¹⁵ The child was dazed, visibly distressed, clearly under the influence of the acts, and speaking spontaneously in reaction to a startling event.³¹⁶

306. See *Monticello Ins. Co. v. Baecher*, 252 Va. 347, 477 S.E.2d 490 (1996).

307. See *Cocoli v. Children's World Learning Ctrs., Inc.*, 41 Va. Cir. 589, 591-92, 594 (Fairfax County 1994).

308. See *id.*

309. See *Mays v. Rockingham Mem'l Hosp.*, 42 Va. Cir. 19, 20 (Rockingham County 1996).

310. 27 Va. App. 595, 500 S.E.2d 277 (Ct. App. 1998).

311. See *id.* at 613, 500 S.E.2d at 286.

312. 254 Va. 147, 487 S.E.2d 224 (1997).

313. See *id.* at 153-54, 487 S.E.2d at 227-28.

314. 26 Va. App. 176, 493 S.E.2d 688 (Ct. App. 1997).

315. See *id.* at 182-84, 493 S.E.2d at 691-93.

316. See *id.* at 184, 493 S.E.2d at 692.

VI. CONCLUSION

The past two years have seen the continued development of a body of law concerning children, but the pace slowed a bit, especially in the field of juvenile justice. The General Assembly quite wisely decided to allow the juvenile justice system a degree of repose to allow for some evaluation of the reforms adopted in 1994 and 1996. Unfortunately, no formal process for conducting such an evaluation or assessment was put in place. Although there was some anecdotal evidence that Commonwealth's Attorneys across the state were not deviating significantly from pre-1996 practices in determining which juveniles to try as adults during the first year after passage of the legislation, with a few geographic exceptions. Similar evidence indicates that there may be important changes in that early trend. More juveniles now seem to be facing adult prosecution in Virginia. The trends and practices should be studied with some care to determine what is happening, how and why, especially as the incidence of serious juvenile crime continues to drop. It also is ironic that as adolescents are being held more accountable for their acts in the criminal justice system, and at a younger age, they are being afforded less discretion in serious matters such as abortion or in less serious areas such as being tattooed.

