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Annual Survey of Virginia Law: Legal Issues Involving Children

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LEGAL ISSUES INVOLVING CHILDREN

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I. INTRODUCTION

The past year generally has been another quiet one for children's legal issues in Virginia, although it was a busier than normal year in the United States Supreme Court with the grandparents' visitation case,[1] the Texas high school football game prayer case,[2] a significant Title I case involving the provision of instructional material to religiously operated schools,[3] and the gay Boy Scout leader case.[4] Not as much occurred at the state level, with little legislation of great significance to children and youth being enacted at the 2000 General Assembly session. However, a succession of cases interpreting and applying *Baker v. Commonwealth*[5]—regarding juvenile and domestic relations district court jurisdiction over juveniles in the absence of notice to biological parents—caused a bit of excitement for juvenile law practitioners and much concern for prosecutors.[6]

II. JUVENILE DELINQUENCY AND NON-CRIMINAL MISBEHAVIOR

As noted above, the most significant recent decision in the de-

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1. Troxel v. Granville, 120 S. Ct. 2054 (2000).
2. Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266 (2000).
3. Mitchell v. Helms, 120 S. Ct. 2530 (2000).
4. Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000).
5. 28 Va. App. 306, 504 S.E.2d 394 (Ct. App. 1998), *aff'd sub nom.* Commonwealth v. Baker, 258 Va. 1, 516 S.E.2d 219 (1999) (per curiam).
6. Robert E. Shepherd, Jr., *Annual Survey of Virginia Law: Legal Issues Involving Children*, 33 U. RICH. L. REV. 1001, 1007-08 (1999).

linquency area was *Commonwealth v. Baker*,[7] in which the Supreme Court of Virginia affirmed the Virginia Court of Appeals' decision that the failure of the juvenile court to serve notice on the juvenile's biological father prior to a transfer hearing deprived the Stafford County Circuit Court of jurisdiction to try Baker as an adult.[8] The supreme court affirmed in a per curiam decision, and subsequently declined to grant the Attorney General's request that the ruling be given only prospective effect.[9] The court of appeals had noted that the then applicable version of Virginia Code section 16.1-263 required service on the "parents,"[10] and thus, the absence of service, or even an attempt of service, on the biological father deprived the juvenile and circuit courts of jurisdiction over Baker.[11] Although the General Assembly limited the long-term impact of this decision on future cases by amending the law to require notice to "at least one parent" as of July 1, 1999,[12] one early effect of *Baker* was the staying of executions in two cases involving juveniles on death row for capital murder convictions.[13]

In the first of those cases, *Thomas v. Garraghty*,[14] Thomas, who was seventeen years old at the time of the offenses, was convicted of capital murder, first degree murder, and two firearms charges in 1991 and was sentenced to death and various terms of imprisonment.[15] He had been informally entrusted by his mother to his maternal grandparents in 1982, and legally adopted by them pursuant to consent by both his biological parents, albeit conditional consent by each was not contemplated by the adoption laws.[16] His

7. 258 Va. 1, 516 S.E.2d 219 (1999).

8. *Id.* at 2, 516 S.E.2d at 220.

9. *Id.*

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

11. *Baker*, 28 Va. App. at 315, 504 S.E.2d at 399. There was not even a certification that the identity of the father or his whereabouts were unknown. *Id.* at 312, 504 S.E.2d at 397.

12. VA. CODE ANN. § 16.1-263 (Repl. Vol. 1999). However, since this section of the Virginia Code provides for notice in all matters before the juvenile and domestic relations district court, the amendment presents constitutional problems, at least in abuse and neglect, foster care review, permanency planning, termination of residual parental rights, custody and visitation proceedings, and perhaps other matters as well. *See* Santosky v. Kramer, 455 U.S. 745 (1982); Stanley v. Illinois, 405 U.S. 645 (1972).

13. *See* Thomas v. Garraghty, 258 Va. 530, 522 S.E.2d 865 (1999); Roach v. Dir., Dep't of Corrs., 258 Va. 537, 522 S.E.2d 869 (1999).

14. 258 Va. 530, 522 S.E.2d 865 (1999).

15. *Id.* at 532, 522 S.E.2d at 866.

16. *Id.* at 533, 522 S.E.2d at 867.

adoptive grandparents then both died, and he went to live with his mother for a while.[17] Then, Thomas returned to the rural county where he had been living with his grandparents to live with his aunt and uncle, with whom he lived at the time of the killings.[18] There was no legal custodian or guardian designated by any court.[19] Since there were no "parents" within the meaning of the Virginia Code, notice of the charges and transfer hearing was given to the aunt and uncle as persons "standing in loco parentis."[20] This satisfied the notice requirements of the Virginia Code and thus the writ of habeas corpus was denied.[21]

In the second case, *Roach v. Department of Corrections*,[22] the youth was convicted of capital murder in the commission of robbery while armed with a firearm and sentenced to death.[23] Since he was seventeen at the time of the offenses, the case was heard in the juvenile and domestic relations district court, and he was transferred to Greene County Circuit Court for trial as an adult.[24] He later sought habeas corpus relief on the ground that his parents were not given notice of that proceeding in violation of Virginia Code section 16.1-263 and *Baker*.[25] The parents had been served with notice of the initial juvenile court hearing and were both present at that hearing.[26] The case was continued to a subsequent date, and Roach's mother was served with a witness subpoena for that date at the request of the defense.[27]

At the hearing the witnesses were sequestered, also at the request of the defense.[28] A confession was offered, but the juvenile judge took the admissibility of the statement under advisement and later ruled that there was probable cause to support the transfer.[29] The circuit court thereafter remanded the case to the

17. *Id.* at 534, 522 S.E.2d at 867.
18. *Id.*
19. *Id.*
20. *Id.* at 535, 522 S.E.2d at 868.
21. *Id.* at 536, 522 S.E.2d at 868.
22. 258 Va. 537, 522 S.E.2d 869 (1999).
23. *Id.* at 540, 522 S.E.2d at 869.
24. *Id.*
25. *Id.* at 540, 522 S.E.2d at 870.
26. *Id.* at 541, 522 S.E.2d at 870.
27. *Id.*
28. *Id.*
29. *Id.* at 542, 522 S.E.2d at 870.

juvenile court on a defense appeal because the statement was not admitted into evidence, and thus, there was no probable cause.[30]

The case went back to the juvenile court without any formal notice to the parents although they were present.[31] The statement was then admitted, probable cause found, and the case transferred again.[32] There was, in the judgment of the Supreme Court of Virginia, adequate notice to both parents of the initial transfer hearing and actual notice of subsequent proceedings.[33] As noted in last year's survey,[34] the Virginia Court of Appeals had previously held in *Weese v. Commonwealth*[35] that where a juvenile's parents had notice of the juvenile court proceedings, there was no need to give new notice of the de novo hearing on appeal in the circuit court.[36] Both Thomas and Roach were subsequently executed in January of 2000.[37]

In the wake of these decisions, it seems clear that the failure to give statutory notice to the parents of a juvenile before the juvenile and domestic relations district court deprives that court of jurisdiction over both the juvenile and the case and, in the event of a transfer to the circuit court for trial as an adult, that court would also have no jurisdiction. However, if the biological parents were no longer legally "parents" because their parental rights had been terminated in some fashion and the legal custodians received notice, or if the parents were present pursuant to actual notice despite receiving no legal notice, then the court has jurisdiction.[38] In addition, a longstanding provision in Virginia Code section 16.1-263 had allowed for a case to proceed without notice to a parent if a certification was made on the record that the identity of a parent was "not reasonably ascertainable" or a

30. *Id.*

31. *Id.* at 542, 522 S.E.2d at 871.

32. *Id.*

33. *Id.* at 544, 522 S.E.2d at 872.

34. Shepherd, *supra* note 6, at 1007-08.

35. 30 Va. App. 484, 517 S.E.2d 740 (1999).

36. *Id.* at 491-92, 517 S.E.2d at 744; *see also* Commonwealth v. Frye, 48 Va. Cir. 223 (Cir. Ct. 1999) (Loudoun County) (ruling that the physical presence of the parents pursuant to actual notice obviated the necessity for statutory notice).

37. Thomas was executed on January 10, 2000, and Roach on January 19, 2000. Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973–June 30, 2000, at* http://www.law.onu.edu/faculty/streib/juvdeath.htm.

38. *See Roach*, 258 Va. at 545, 522 S.E.2d at 872.

known parent's whereabouts was unknown.[39]

In another capital case, *Johnson v. Commonwealth*,[40] the Supreme Court of Virginia concluded that the lack of notice to the juvenile's parent was irrelevant because the youth had previously been transferred to circuit court and tried as an adult, and thus, no transfer hearing was necessary on the instant offense pursuant to Virginia Code section 16.1-271.[41]

Since the decisions in *Thomas* and *Roach*, three additional Supreme Court of Virginia cases further clarified the meaning of *Baker*.[42] In *David Moore v. Commonwealth*,[43] petitions were filed against the defendant in the juvenile court in December 1994, charging him with two counts of murder, as well as the use of firearms in the commission of the murders.[44] A transfer hearing was held in June 1995 without notice to his biological father and without the presence of either the father or the mother.[45] Since the proceedings took place prior to the 1996 amendments to Virginia Code section 16.1-269.1, the indictment of Moore following transfer by the juvenile court did not "cure" the jurisdictional defect and the case was governed by *Baker*, even though Moore, unlike Baker, did not object to the jurisdiction of the circuit court prior to indictment.[46] Justices Compton, Kinser, and Lacy dissented.[47]

In *Jackson v. Warden of Sussex I State Prison*,[48] the Supreme Court of Virginia granted Chauncey Jackson's Petition for Rehearing of the dismissal of his Petition for a Writ of Habeas Corpus, based on the failure to give proper notice to petitioner's par-

39. VA. CODE ANN. § 16.1-263(E) (Repl. Vol. 1982).

40. 259 Va. 654, 529 S.E.2d 769 (2000).

41. *Id.* at 670, 529 S.E.2d at 778. Virginia Code section 16.1-271 provides that once a youth has been tried or treated as an adult, the juvenile court is precluded from taking jurisdiction for subsequent offenses. VA. CODE ANN. § 16.1-271 (Repl. Vol. 1999).

42. *See* David Moore v. Commonwealth, 259 Va. 431, 527 S.E.2d 406 (2000); Jackson v. Warden of Sussex I State Prison, 259 Va. 566, 529 S.E.2d 587 (2000); Dennis Moore v. Commonwealth, 259 Va. 405, 527 S.E.2d 415 (2000).

43. 259 Va. 431, 527 S.E.2d 406 (2000)

44. *Id.* at 434, 527 S.E.2d at 407.

45. *Id.* at 435, 527 S.E.2d at 407.

46. *Id.* at 440, 527 S.E.2d at 411.

47. *Id.* at 441, 527 S.E.2d at 411 (Compton, Kinser & Lacy, JJ., dissenting).

48. 259 Va. 566, 529 S.E.2d 587 (2000).

ents in light of the *David Moore* holding.[49]

In *Dennis Moore v. Commonwealth*,[50] however, the juvenile court failed to give notice to Moore's biological father prior to a preliminary hearing on certification to the Henrico County Circuit Court held pursuant to petitions filed on October 15, 1996, charging offenses committed on July 26, 1996.[51] Since the proceedings were governed by Virginia Code section 16.1-269.1(E) as it existed pursuant to amendments effective on July 1, 1996, the failure to object to the jurisdiction of the court prior to indictment in the circuit court amounted to a waiver of any jurisdictional defects.[52]

The *Dennis Moore* holding had been anticipated in *Carter v. Commonwealth*,[53] wherein the Virginia Court of Appeals concluded that even though the juvenile court may not have complied with the requirement of notice to Carter's parents pursuant to Virginia Code sections 16.1-263 and 16.1-264, he "waived his right to challenge that failure by not raising it before his indictment in the circuit court."[54] Since the offense occurred after July 1, 1996, Virginia Code section 16.1-269.1(E) provided that errors or defects in the juvenile court proceeding in a transfer or certification proceeding are cured by indictment in the circuit court.[55] A series of unpublished Virginia Court of Appeals decisions followed the holdings in *Dennis Moore* and *Carter* that failures to give parental notice after July 1, 1996, were cured by failure to object prior to indictment.[56] That position was further reinforced by the

49. *Id.* at 566, 527 S.E.2d at 587.

50. 259 Va. 405, 527 S.E.2d 415 (2000).

51. *Id.* at 408, 527 S.E.2d at 416.

52. *Id.* at 410, 527 S.E.2d at 418.

53. 31 Va. App. 393, 523 S.E.2d 544 (Ct. App. 2000).

54. *Id.* at 395, 523 S.E.2d at 545.

55. *Id.* at 394, 523 S.E.2d at 545.

56. *See* Adams v. Commonwealth, No. 0641-99-2, 2000 Va. App. LEXIS 382 (Ct. App. May 16, 2000) (unpublished decision); McDonald v. Commonwealth, No. 0679-99-2, 2000 Va. App. LEXIS 304 (Ct. App. May 16, 2000) (unpublished decision); Finney v. Commonwealth, No. 2038-99-3, 2000 Va. App. LEXIS 316 (Ct. App. May 2, 2000) (unpublished decision); Nelson v. Commonwealth, No. 0283-99-1, 2000 Va. App. LEXIS 245 (Ct. App. Apr. 4, 2000) (unpublished decision); Souksengmany v. Commonwealth, No. 1641-99-4, 2000 Va. App. LEXIS 256 (Ct. App. Apr. 4, 2000) (unpublished decision); Gilbert v. Commonwealth, No. 1515-99-1, 2000 Va. App. LEXIS 231 (Ct. App. Mar. 28, 2000) (unpublished decision); Ballard v. Commonwealth, No. 0075-99-1, 2000 Va. App. LEXIS 201 (Ct. App. Mar. 21, 2000) (unpublished decision).

decision in *Shackleford v. Commonwealth*.[57] One reported circuit court opinion concluded that the convictions of a juvenile in February 1996 must be set aside pursuant to motion by the defendant because the juvenile and circuit courts never acquired jurisdiction over the youth because no notice was given to the defendant's father.[58]

A new code provision enacted by the 2000 General Assembly provides that a claim of error must be raised within one year from the date of final judgment in the circuit court or one year from the effective date of the statute, whichever is later.[59] Otherwise, it will not constitute a ground for relief in any judicial proceeding, thus establishing a statute of limitations on *Baker* claims and other errors.[60]

Thus, the current state of *Baker*-type litigation is that matters arising from charges occurring after July 1, 1996, are subject to default if the issue of notice was not raised prior to indictment in the circuit court, and cases based on defects existing prior to July 1, 1996, or on or after July 1, 2000, must be filed within one year from the date of final judgment or one year from the effective date of the statute on July 1, 2000, whichever is later. Thus, there is a narrow window of opportunity for *Baker* claims. Lawyers with such claims also have to deal with such procedural issues as how to raise the claim. Because of the statutory limitations on habeas corpus claims and who has the burden of proof in such proceedings, a motion to vacate the judgment for lack of jurisdiction would seem to be the better approach. It would appear that once the defendant has established from the juvenile court record that no notice was given to a parent as required by the statute, the burden shifts to the Commonwealth.[61]

The Virginia Court of Appeals dealt with some other jurisdictional cases that arose in a different context from *Baker*. In *Woodfork v. Commonwealth*,[62] a juvenile was transferred to New Kent County Circuit Court and convicted of malicious wounding and

57. 32 Va. App. 307, 528 S.E.2d 123 (Ct. App. 2000).
58. Commonwealth v. Nixon, 50 Va. Cir. 454 (Cir. Ct. 1999) (Portsmouth City).
59. VA. CODE ANN. § 16.1-272.1 (Cum. Supp. 2000).
60. *See id.*
61. There may be a practical problem presented by issues of paternity or the like.
62. 31 Va. App. 154, 521 S.E.2d 781 (Ct. App. 1999).

attempted grand larceny.[63] At the initial transfer hearing on October 1, 1997, the juvenile was charged with malicious wounding and abduction, but the juvenile court found that the evidence was insufficient to establish probable cause and no finding was made concerning the youth's age.[64] On the same date, the same victim filed new petitions charging Woodfork with aggravated malicious wounding and attempted grand larceny.[65] A second transfer hearing was held and the juvenile court found both probable cause and that the juvenile was sixteen at the time of the offense.[66] When the case arrived in the circuit court, the defense attorney replied to a court inquiry that he had no objection to the transfer procedures.[67] At a subsequent hearing, the defense attorney repeated his belief that there was no error.[68] However, counsel subsequently asserted that the court never acquired jurisdiction because of the juvenile court's failure to find that he was of an age to be transferred at the initial transfer hearing.[69] The Virginia Court of Appeals found no error in the circuit court's rejection of this claim.[70] The court concluded that the first transfer proceeding was properly dismissed and the juvenile court need not have retained jurisdiction and tried Woodfork as a juvenile because there was no finding that he was not fourteen years of age.[71] The court further found that the second hearing was proper with different charges, and the juvenile judge made all the proper findings, and thus, that jurisdiction properly was vested in the circuit court.[72] The conviction was affirmed on the merits, but the case was remanded for the sole purpose of amending the conviction and sentencing orders to conform to the judge's findings.[73]

Likewise, in *Nelson v. Commonwealth*,[74] the Virginia Court of Appeals not only concluded that the failure to give notice to a

63. *Id.* at 156, 521 S.E.2d at 782.
64. *Id.*
65. *Id.*
66. *Id.* at 156-57, 521 S.E.2d at 782.
67. *Id.* at 157, 521 S.E.2d at 782.
68. *Id.*
69. *Id.* at 158, 521 S.E.2d at 783.
70. *Id.* at 155, 521 S.E.2d at 782.
71. *Id.* at 160, 521 S.E.2d at 784.
72. *Id.*
73. *Id.* at 161, 521 S.E.2d at 784.
74. No. 0283-99-1, 2000 Va. App. LEXIS 245 (Ct. App. Apr. 4, 2000) (unpublished decision).

parent pursuant to *Baker* is cured by Virginia Code section 16.1-269.1(E),[75] but that the inconsistency of the juvenile court's single reference to a charge of malicious wounding where the petition alleged aggravated malicious wounding was rendered moot by Virginia Code section 16.1-269.1(D), which permits the commonwealth to proceed by direct indictment.[76] Also, in *Scott v. Commonwealth*,[77] the Virginia Court of Appeals ruled that any error in the failure of the juvenile court to make any finding with respect to Scott's mental retardation during the certification hearing pursuant to Virginia Code section 16.1-269.1 was waived by the failure to assert the alleged defect prior to indictment in Newport News Circuit Court, again relying on section 16.1-269.1(E).[78]

In *Crawford v. Commonwealth*,[79] the adult defendant was charged with conspiracy to distribute drugs and the indictment charged that the conspiracy began while Crawford was still a juvenile.[80] The defendant moved to dismiss the indictment, arguing the circuit court could not have jurisdiction unless the case began in the juvenile and domestic relations district court.[81] The trial judge denied the motion and amended the indictment to allege that the conspiracy began after Crawford turned eighteen and rearraigned him.[82] This was proper and "did not substantively alter the charge against [Crawford]."[83]

The Fauquier County Circuit Court decided an unusual issue in *Commonwealth v. K.*[84] In October 1998, a juvenile was arrested on a petition charging him with aggravated malicious wounding, and the Commonwealth gave notice of its intention to transfer the case to the circuit court pursuant to Virginia Code section 16.1-269.1(B).[85] A preliminary hearing was held in the juvenile court in January 1999, and at its close the prosecution conceded that

75. *Id.* at *6.
76. *Id.* at *3-4.
77. 31 Va. App. 461, 524 S.E.2d 162 (Ct. App. 2000).
78. *Id.* at 465-66, 524 S.E.2d at 164.
79. No. 1844-99-3, 2000 Va. App. LEXIS 367 (Ct. App. May 16, 2000) (unpublished decision).
80. *Id.* at *1-2.
81. *Id.* at *2.
82. *Id.*
83. *Id.* at *4.
84. 48 Va. Cir. 333 (Cir. Ct. 1999) (Fauquier County).
85. *Id.*

the evidence was insufficient to prove the charge and announced that it would proceed only on malicious wounding under Virginia Code section 16.1-269.1(C), also pursuant to a preliminary hearing.[86] The judge took the case under advisement and ruled two days later that he could not find probable cause of the felony, but did find probable cause of the misdemeanor offense of assault and battery.[87] The juvenile court retained jurisdiction and ordered that a trial date be set.[88] Several days later the parties returned to court, and the youth pled guilty to assault and battery.[89] The prosecution objected to the judge continuing to hear the case, requested a stay of the proceedings and moved to nolle prosequi the case.[90] The judge recused himself, and a second judge accepted the guilty plea, denied the two remaining prosecutorial motions and set the matter for disposition.[91] The Commonwealth had, in the meantime, secured an indictment of the youth on the malicious wounding charge and filed a motion to quash the indictment and a plea autrefois convict.[92] The circuit judge concluded that Virginia Code sections 16.1-241(A)(6), 19.2-5 and 19.2-186 controlled the case, and that sections 16.1-241(A)(6) and 16.1-269.1 must be read together since they were enacted as part of the same legislative package.[93] Thus, the juvenile and domestic relations district court retained jurisdiction to hear the lesser misdemeanor charge, and the circuit court proceedings had to be dismissed.[94]

As noted in last year's survey,[95] the Virginia Court of Appeals addressed a controversial issue in September 1999 in *Chatman v. Commonwealth*[96] when it determined that the insanity defense applied to delinquency cases to diminish the youth's responsibility for the criminal offense.[97] The court found "that the right to

86. *Id.*
87. *Id.* at 333-34.
88. *Id.* at 334.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 333.
93. *Id.* at 335.
94. *Id.*
95. Shepherd, *supra* note 6, at 1012.
96. 30 Va. App. 593, 518 S.E.2d 847 (Ct. App. 1999). The Supreme Court of Virginia granted review on April 25, 2000.
97. *Id.* at 601, 518 S.E.2d at 851.

assert an insanity defense is an essential of 'due process and fair treatment' which is required at a juvenile delinquency adjudication."[98] The court acknowledged that "an adjudication of delinquency has wide and serious ramifications,"[99] and remanded the case for a decision as to whether Chatman was "entitled to a mental health evaluation at state expense."[100]

House Joint Resolution 680, enacted at the 1999 General Assembly Session, called on the Virginia Bar Association to conduct a study regarding the applicability of "not guilty by reason of insanity pleas" in juvenile delinquency proceedings and the procedures which should follow such a plea.[101] The study took place, with a report being made to the General Assembly,[102] and a bill was introduced to implement the recommendations of the study, but it was carried over to the 2001 Session because of the pending appeal in *Chatman*.[103]

In *Bostic v. Commonwealth*,[104] the Virginia Court of Appeals upheld the Campbell County Circuit Court's denial of the defendant's request to impeach the juvenile victim while he was testifying as a witness on the basis of his prior juvenile adjudications, and held that this ruling did not violate Bostic's right to confrontation.[105] The court reaffirmed the prior holdings in *Kiracofe v. Commonwealth*,[106] *Moats v. Commonwealth*,[107] and other similar cases denying such impeachment in spite of the new argument that "the primary focus of juvenile proceedings has changed from rehabilitative to punitive."[108] The court noted that juvenile adjudications and dispositions may be used in connection with a specific attack on the credibility of a witness for bias, as where the youth is still on probation or where he received a break for his

98. *Id.*
99. *Id.* at 599, 518 S.E.2d at 850.
100. *Id.* at 601, 518 S.E.2d at 851.
101. H.J. Res. 680, Va. Gen. Assembly (Reg. Sess. 1999).
102. REPORT ON THE ADJUDICATION OF THE INSANITY DEFENSE IN JUVENILE DELINQUENCY PROCEEDINGS, H. Doc. No. 60 (2000).
103. H.B. 1260, Va. Gen. Assembly (Reg. Sess. 2000).
104. 31 Va. App. 632, 525 S.E.2d 67 (Ct. App. 2000).
105. *Id.* at 636, 525 S.E.2d at 68.
106. 198 Va. 833, 97 S.E.2d 14 (1957).
107. 12 Va. App. 349, 404 S.E.2d 244 (Ct. App. 1991).
108. *Bostic*, 31 Va. App. at 634, 525 S.E.2d at 68.

agreement to testify.[109]

In an unusual case, the Virginia Court of Appeals reversed the conviction of a defendant for attempting to purchase a firearm as a convicted felon because of the trial court's refusal to allow testimony by the defendant that the juvenile court judge had advised him in 1994, when he was convicted of the felony charge, that all records of the adjudications would be expunged once he reached the age of eighteen.[110] Although the judge's statement was hearsay, it was not being offered for its truth, but rather to establish the "verbal act" of its effect upon Parsons, and it was thus admissible.[111] In *Hutchins v. Commonwealth*,[112] the Virginia Court of Appeals, sitting en banc, concluded that for the purposes of the Virginia Speedy Trial Statute[113] the time began to run when the juvenile court held a preliminary hearing and found probable cause to certify the charges to the grand jury, and did not stop until the first juror was sworn for voir dire, well beyond the five month limitation prescribed.[114] In *Heath v. Commonwealth*,[115] the en banc court decided that the defendant's speedy trial rights had not been violated where much of the delay was attributable to his motion for a psychiatric evaluation.[116]

In *Hertz v. Times-World Corp.*,[117] the Supreme Court of Virginia ruled that a petition for a writ of mandamus is not the appropriate procedural device for challenging a juvenile court judge's decision to close a hearing as opposed to a motion to inter-

109. *Id.* at 635, 525 S.E.2d at 69; *see also* Davis v. Alaska, 415 U.S. 308 (1974); Fulcher v. Commonwealth, 226 Va. 96, 306 S.E.2d 874 (1983). In two other cases, defendants unsuccessfully sought to impeach juvenile witnesses based on their prior records, but did not adequately preserve the issue for appellate review. Brant v. Commonwealth, 32 Va. App. 268, 527 S.E.2d 476 (Ct. App. 2000); Boyce v. Commonwealth, No. 1463-99-4, 2000 Va. App. LEXIS 477 (Ct. App. June 27, 2000). Also, although *Rankins v. Commonwealth*, 31 Va. App. 352, 523 S.E.2d 524 (Ct. App. 2000), involved a juvenile defendant, the issues discussed in the case involve hearsay and confrontation clause issues unrelated to his youth. *Id.* at 357-58, 523 S.E.2d at 526-27.

110. Parsons v. Commonwealth, 32 Va. App. 576, 529 S.E.2d 810 (Ct. App. 2000).

111. *Id.* at 580, 529 S.E.2d at 812.

112. 30 Va. App. 574, 518 S.E.2d 838 (Ct. App. 1999).

113. VA. CODE ANN. § 19.2-243 (Repl. Vol. 2000).

114. *Hutchins*, 30 Va. App. at 576-77, 518 S.E.2d at 841. The juvenile court preliminary hearing was on October 23, 1996, and voir dire did not begin until June 6, 1997. *Id.*

115. 32 Va. App. 176, 526 S.E.2d 798 (Ct. App. 2000).

116. *Id.* at 182, 526 S.E.2d at 801.

117. 259 Va. 599, 528 S.E.2d 458 (2000). The trial court's opinion may be found at 50 Va. Cir. 25 (Cir. Ct. 1999) (Bedford County).

vene in the proceedings.[118] Justice Koontz dissented in an opinion joined by Justices Lacy and Kinser.[119] The dissenting opinion clearly reflects the view that "public access plays a significant positive role in the functioning of these hearings despite the fact that they are held in the juvenile court."[120]

Commonwealth v. Johnson[121] is this year's continuation of the Virginia Court of Appeals' high bar for suppression of a confession made by a juvenile. The Norfolk Circuit Court had suppressed a seventeen-year-old's confession based on his waiver of his *Miranda* rights, and the appellate court reversed.[122] Johnson was a suspect in a robbery investigation and his grandmother, who was his legal guardian, was summoned to the police station with the youth and she signed the *Miranda* waiver form along with her ward.[123] The grandmother was then escorted out of the interview room after being told that Johnson was not a suspect and that he would be free to go in about two hours.[124]

The interrogation began about 2:15 p.m., was suspended at 2:55 p.m., resumed at 4:35 p.m., was broken with a visit to the crime scene from 6:00 to 6:25 p.m., resumed again at 8:50 p.m. and concluded at 9:18 p.m. with the signing of a written statement.[125] Johnson claimed he was "high" from smoking a marijuana cigarette shortly before the interrogation but the police officer said he discerned no problem with the youth.[126] Johnson's father and uncle came to the station during the interrogation but were denied access to him.[127]

The trial court found that Johnson was not deprived of any physical comforts; that he was doing well in the eleventh grade of school and appeared to be intelligent; that he had not had "appreciable" contact with the police nor had he previously experienced "police interrogation"; that he had smoked a marijuana "blunt"

118. *Hertz*, 259 Va. at 609-10, 528 S.E.2d at 463-64.
119. *Id.* at 610, 528 S.E.2d at 464 (Koontz, J., dissenting).
120. *Id.* at 613, 528 S.E.2d at 465 (Koontz, J., dissenting).
121. No. 1244-99-1, 1999 Va. App. LEXIS 624 (Ct. App. Nov. 9, 1999) (unpublished decision).
122. *Id.* at *1.
123. *Id.* at *4.
124. *Id.* at *5.
125. *Id.*
126. *Id.* at *6.
127. *Id.*

sometime on the day of his arrest; that he continued to be questioned after denying any involvement in the robbery; and that he was deprived of the presence of his guardian.[128]

The court also stated that the police tactic of excluding his guardian violated the very purpose of guardianship.[129]

The Virginia Court of Appeals applied the "totality of the circumstances"[130] test, concluding that there had been a valid waiver of Johnson's *Miranda* rights and that the confession was voluntary.[131] Although the fact that the police officer misled the grandmother was "disconcerting," it "was immaterial to the voluntariness" of the confession.[132]

There were no search and seizure cases during the past year, although the General Assembly enacted legislation directing school boards to adopt and revise, effective for the 2001-2002 school year, regulations governing student searches that are consistent with Board of Education's recently issued guidelines.[133]

In *Atabaki v. Commonwealth*,[134] a seventeen-year-old defendant entered an *Alford* guilty plea in the Arlington County Circuit Court and was sentenced to the penitentiary for twelve years, with four years suspended.[135] He subsequently sought to withdraw his guilty plea or be resentenced in light of newly discovered evidence of the victim's propensity for violence.[136] The trial court considered the motion and denied it because there was no showing of manifest injustice.[137] Atabaki also claimed that he misunderstood, based on the advice given him by counsel and the court, who would be doing the sentencing if he proceeded to trial before a jury.[138] He believed in light of the fact that he was a juvenile,

128. *Id.*
129. *Id.* at *7.
130. *Id.* at *8.
131. *Id.* at *9.
132. *Id.* at *11.
133. VA. CODE ANN. § 22.1-277.01:2 (Repl. Vol. 2000). For text of the Board of Education's recently issued guidelines, see REPORT OF THE BD. OF EDUC., GUIDELINES FOR STUDENT SEARCHES IN PUBLIC SCHOOLS TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VA., H. Doc. No. 62 (2000).
134. No. 1411-98-4, 2000 Va. App. LEXIS 89 (Ct. App. Feb. 8, 2000) (unpublished decision).
135. *Id.* at *4.
136. *Id.* at *4-5.
137. *Id.* at *5.
138. *Id.* at *5-6.

the jury, not the judge, would sentence him, and he contended that the trial judge falsely conveyed the impression that he could be sentenced as a juvenile.[139] The Virginia Court of Appeals decided that the judge did not abuse his discretion in denying the motion for a new trial.[140] Judge Benton dissented, noting that the advice given at trial was confusing, especially for a seventeen-year-old youth, and at points legally erroneous.[141]

Legislation enacted by the General Assembly during the 2000 session did not substantially alter the Virginia juvenile justice system. One change requires that detention orders "state the offense for which the juvenile is being detained, and to the extent practicable, other pending and previous charges."[142] The statute also alters one of the standards to be considered in determining whether the juvenile should be released from "unreasonable danger to the person or property of others"[143] to "a clear and substantial threat to the person or property of others."[144] A bill also provided that

> [t]eacher staffing ratios for regional or local detention homes shall be based on a ratio of one teacher for every twelve beds based on the capacity of the facility; however, if the previous year's average daily attendance exceeds this bed capacity, the ratio shall be based on the average daily attendance at the facility as calculated by the Department of Education from the previous school year.[145]

Other legislation increased the caps for fees paid to court-appointed counsel in indigent cases in annual increments contingent upon the appropriation of funds to pay these fees.[146] The increases were not included in the final budget for the first year of the biennium, but there was about a sixty percent allocation for the second year, so it appears that beginning in 2001 there will be an increase in the cap for court-appointed cases in juvenile court from $100 to $120.[147] Virginia Code section 16.1-272 will now al-

139. *Id.*
140. *Id.* at *6-7.
141. *Id.* at *10 (Benton, J., dissenting).
142. VA. CODE ANN. § 16.1-248.1 (Repl. Vol. 1999 & Cum. Supp. 2000).
143. *Id.* § 16.1-248.1(A)(1)(a) (Repl. Vol. 1999).
144. *Id.* (Cum. Supp. 2000).
145. *Id.* § 22.1-211 (Repl. Vol. 2000). This effectuated the reenactment clause found in Chapter 511 of the 1999 Acts of Assembly.
146. VA. CODE ANN. § 19.2-163 (Repl. Vol. 2000).
147. Act of Apr. 4, 2000, ch. 436, 2000 Va. Acts 687, 688.

low circuit courts to punish a juvenile convicted of a non-violent felony by imposing and suspending an adult sentence conditioned upon successful completion of terms and conditions as might be imposed by a juvenile court.[148] The bill did not remove the circuit court's ability to punish the juvenile as an adult.[149]

An omnibus drug bill requires that juveniles found delinquent for a first drug offense be subject to periodic substance abuse testing, drug treatment, and education, and mandates six months extra time on a felony sentence if the mandatory drug assessment indicates a substance abuse problem.[150] Among other things, the bill also revises the penalty for violation of the "drug-free school zone" law (possession with intent to distribute within 1,000 feet of a school or designated school bus stop) to include a one-year minimum, mandatory term of incarceration for a second or subsequent conviction.[151] At the request of the Department of Juvenile Justice, a bill changed the criteria for commitment to the Department.[152] Prior provisions of the Virginia Code provided, somewhat ambiguously, that only a child older than ten years of age may be committed to the Department,[153] and this legislation changed the permissible age to eleven or older.[154] The bill also provided for commitment to the Department for an offense which would be a Class 1 misdemeanor only if the juvenile has been previously convicted of three Class 1 misdemeanors or a felony,[155] while prior law allowed commitment for a Class 1 misdemeanor if the prior conviction was a felony or a single Class 1 misdemeanor.[156] It also clarified that abused and neglected children may not be committed to the Department, and any juvenile who is in the custody of the Department and is subsequently convicted as an adult is to be transferred to the Department of Correc-

148. VA. CODE ANN. § 16.1-272 (Repl. Vol. 1999 & Cum. Supp. 2000).

149. *Id.* The legislation appears to codify the holding of the Virginia Court of Appeals last year in *Jackson v. Commonwealth*, 29 Va. App. 418, 512 S.E.2d 838 (Ct. App. 1999). The court held that the trial court had authority to impose a juvenile sentencing option as a condition of the suspension of the prison sentence. *Id.* at 423-24, 512 S.E.2d at 841; *see also* Shepherd, *supra* note 6, at 1012.

150. VA. CODE ANN. § 16.1-278.8:01 (Repl. Vol. 1999 & Cum. Supp. 2000).

151. *Id.* § 18.2-255.2 (Repl. Vol. 1996 & Cum. Supp. 2000).

152. *Id.* §§ 16.1-278.7, -278.8(14) (Repl. Vol. 1999 & Cum. Supp. 2000).

153. *Id.* § 16.1-278.8(14) (Repl. Vol. 1999).

154. *Id.* (Cum. Supp. 2000).

155. *Id.*

156. *Id.* (Repl. Vol. 1999).

tions.[157] In addition, amendments to several sections allow a court to defer disposition and place a juvenile in the temporary custody of the Department of Juvenile Justice to attend a boot camp, provided bed space is available and the juvenile has been found delinquent, has not previously been and is not currently being adjudicated delinquent or found guilty of a violent juvenile felony, has not previously attended a boot camp or been committed to the Department, and has been assessed as appropriate for boot camp.[158] Additional legislation provides that

> [i]f a juvenile fourteen years of age or older is found to have committed an offense which if committed by an adult would be punishable by confinement in a state or local correctional facility . . . , and the court determines (i) that the juvenile has not previously been and is not currently adjudicated delinquent or found guilty of a violent juvenile felony, (ii) that the interests of the juvenile and the community require that the juvenile be placed under legal restraint or discipline, and (iii) that other placements authorized by this title will not serve the best interests of the juvenile, then the court may order the juvenile confined in a detention home or other secure facility for juveniles for a period not to exceed six months . . . . The period of confinement ordered may exceed thirty calendar days if the juvenile has had an assessment completed . . . concerning the appropriateness of the placement.[159]

Several bills addressed juvenile records. An amendment to Virginia Code section 16.1-299 allows law-enforcement agencies to retain fingerprints and photographs of juveniles fourteen years old or older charged with, but not convicted of, violent juvenile felonies or ancillary crimes.[160] Another change allows the Department of Juvenile Justice to share confidential information regarding a child with persons having a legitimate interest (e.g., providing services to the child under a department contract or under the Virginia Juvenile Community Crime Control Act or release of the information for security purposes).[161] Virginia Code section 16.1-301 was amended to allow law-enforcement agencies to release records of a juvenile fourteen years of age or older

157. *Id.* § 16.1-278 (Cum. Supp. 2000).

158. *Id.* § 16.1-278.8(4)(a) (Repl. Vol. 1999 & Cum. Supp. 2000); *see also id.* §§ 16.1-284.1, -292 (Repl. Vol. 1999 & Cum. Supp. 2000).

159. *Id.* § 16.1-284.1(A) (Repl. Vol. 1999 & Cum. Supp. 2000).

160. *Id.* § 16.1-299(B) (Repl. Vol. 1999 & Cum. Supp. 2000).

161. *Id.* § 16.1-300 (Repl. Vol. 1999 & Cum. Supp. 2000).

charged with certain felonies.[162] Under prior law, this information could be released only if the juvenile was charged with murder or aggravated malicious wounding.[163] The bill also allows release of the records if the charge is felonious injury by mob, abduction, malicious wounding, malicious wounding of a law-enforcement officer, felonious poisoning, adulteration of products, robbery, carjacking, rape, forcible sodomy, or object sexual penetration.[164] Further legislation provides that a victim in a juvenile or adult proceeding may not be excluded from the courtroom unless the court determines that "the presence of the victim would impair the conduct of a fair trial."[165] Finally, another bill provides that "a copy of any court order that imposes a curfew or other restriction on a juvenile may be provided to the chief law-enforcement officer of the county or city wherein the juvenile resides."[166]

One amendment to the Juvenile Community Crime Control Act requires that the community-based services developed pursuant to the Act be based on an annual review and objective assessment of court-related data.[167] The biennial plan, required to be submitted to the State Board of Juvenile Justice, must provide the projected number of juveniles that will not require secure detention or state commitment because of the community-based services, and each locality must submit a quarterly progress report to the Department of Juvenile Justice.[168]

Two minor amendments to the juvenile competency legislation enacted in 1999 add licensed professional counselors to the list of experts who may perform a juvenile forensic evaluation,[169] and provide for the civil commitment to an adult facility of a person who was charged with a crime when younger than eighteen, but who reaches the age of eighteen during the time that the court finds him unrestorable to competency and in need of inpatient hospitalization.[170]

One interesting amendment to the Virginia Code limits the ap-

162. *Id.* § 16.1-301 (Repl. Vol. 1999 & Cum. Supp. 2000).
163. *Id.* (Repl. Vol. 1999).
164. *Id.* § 16.1-269.1(C) (Repl. Vol. 1999 & Cum. Supp. 2000).
165. *Id.* § 16.1-302.1 (Cum. Supp. 2000).
166. *Id.* § 16.1-309.1(F) (Cum. Supp. 2000).
167. *Id.* § 16.1-309.3(A) (Repl. Vol. 1999 & Cum. Supp. 2000).
168. *Id.* § 16.1-309.3(D) (Repl. Vol. 1999 & Cum. Supp. 2000).
169. *Id.* §§ 16.1-356(A), -361 (Repl. Vol. 1999 & Cum. Supp. 2000).
170. *Id.* § 16.1-358 (Repl. Vol. 1999 & Cum. Supp. 2000).

plication of the death penalty for a Class 1 felony conviction to those who are sixteen years of age or older at the time of the offense.[171] Amendments to the youthful offender provisions require a suspended period of confinement in addition to the four years of indeterminate commitment and also require confinement in a state facility for youthful offenders.[172] Initial confinement must be followed by at least one and one-half years of supervised parole,[173] and the legislation changes those eligible for indeterminate commitment by excluding certain sex offenders and all misdemeanants[174] (currently misdemeanors involving injury to persons or property are included).[175] The legislation also allows participation of all who committed the offense prior to age twenty-one (current law is limited to juveniles tried as adults and to persons who committed the offense after becoming eighteen but before twenty-one years of age).[176] The provision also adds specific program requirements for youthful offender facilities.[177]

Several Virginia Code provisions concerning offices on youth were revised by amendments to the Delinquency Prevention and Youth Development Act.[178] Local youth services citizen boards are required to participate actively with community representatives in developing a comprehensive plan and to make formal recommendations to the governing authority about the plan and its implementation at least once a year.[179] Activities of the offices on youth are standardized in the areas of assessment,[180] assisting in planning and modifying services,[181] collaborating in the development and dissemination of local service inventories[182] and in identifying service gaps and potential funding sources.[183]

In a somewhat tangential case, the Supreme Court of Virginia

171. *Id.* § 18.2-10(a) (Repl. Vol. 1996 & Cum. Supp. 2000).
172. *Id.* § 19.2-311(A) (Repl. Vol. 2000).
173. *Id.*
174. *Id.* § 19.2-316.1 (Repl. Vol. 2000).
175. *Id.*
176. *Id.* § 19.2-311(B)(1) (Repl. Vol. 2000).
177. *Id.* § 53.1-63(B) (Repl. Vol. 1998 & Cum. Supp. 2000).
178. *Id.* §§ 66-28-30, -34, -35 (Cum. Supp. 2000).
179. *Id.* §§ 66-34 to -35 (Repl. Vol. 1995 & Cum. Supp. 2000).
180. *Id.* § 66-35(1) (Repl. Vol. 1995 & Cum. Supp. 2000).
181. *Id.* § 66-35(2) (Repl. Vol. 1995 & Cum. Supp. 2000).
182. *Id.* § 66-35(3) (Repl. Vol. 1995 & Cum. Supp. 2000).
183. *Id.* § 66-35(4) (Repl. Vol. 1995 & Cum. Supp. 2000).

ruled, in *Commonwealth v. Luzik*,[184] that the state could assert its sovereign immunity to prevent a suit by employees of the former Department of Youth and Family Services alleging a violation of the Fair Labor Standards Act because of the Department's failure to pay overtime to juvenile probation officers and others working in court services units.[185]

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

An amendment to the family abuse statutory scheme provides that a protective order may grant the petitioner use of a motor vehicle owned solely by the petitioner, clarifying that this power exists in a court in addition to the power to grant use of a motor vehicle jointly owned by the parties.[186]

In *Carter v. Crabtree*,[187] the Virginia Court of Appeals concluded that Crabtree did not file his appeal of the Commissioner's decision sustaining the abuse determinations against him in a timely fashion, and the circuit court thus did not have jurisdiction to entertain the appeal.[188] In *Beaton v. Virginia Department of Social Services*,[189] the Virginia Court of Appeals ruled that a juvenile court's decision that Beaton's children were not neglected was not binding on the department's administrative hearing officer.[190] Two other unpublished decisions upheld on appeal the abuse or neglect determinations reached in the lower courts.[191] In *Ferguson v. City of Charleston*,[192] the United States Court of Ap-

184. 259 Va. 198, 524 S.E.2d 871 (2000).

185. *Id.* at 208, 524 S.E.2d at 878.

186. VA. CODE ANN. §§ 16.1-253.1(A)(5), -279.1(A)(4) (Repl. Vol. 1998 & Cum. Supp. 2000).

187. No. 1437-98-3, 1999 Va. App. LEXIS 515 (Ct. App. Sept. 7, 1999) (unpublished decision).

188. *Id.* at *6-7.

189. No. 0917-99-1, 2000 Va. App. LEXIS 172 (Ct. App. Mar. 7, 2000) (unpublished decision).

190. *Id.* at *3-6.

191. Shepherd-Carper v. Roanoke City Dep't of Soc. Servs., No. 1935-99-3, 2000 Va. App. LEXIS 56 (Ct. App. Feb. 8, 2000) (unpublished decision); Hash v. Campbell Co. Dep't of Soc. Servs., No. 1058-99-3, 1999 Va. App. LEXIS 605 (Ct. App. Oct. 26, 1999) (unpublished decision).

192. 186 F.3d 469 (4th Cir. 1999), *cert. granted* 120 S. Ct. 1239 (2000). Oral argument took place on October 4, 2000. For a sequence of events in this case, see

peals for the Fourth Circuit affirmed the district court's decision upholding the use of urine screens for drugs with pregnant women seen at the Medical University of South Carolina when characteristics of cocaine use were observed during prenatal care.[193]

The General Assembly passed legislation at the 2000 Session that places a medical laboratory on the same footing as a medical facility for the purpose of allowing laboratory analysis results into evidence.[194] This change would allow a laboratory analysis to be admitted into evidence in child or family abuse cases with only an affidavit of the analyst attesting to the truth and accuracy of the results and would avoid requiring the analyst to testify.[195]

Other legislation requires the Virginia Department of Social Services to implement a statewide child protective services differential response system for responding to reports of child abuse and neglect.[196] Rather than requiring a full-scale investigation of every report, the reports would now be evaluated by the local department of social services and less serious reports would be subject to a family assessment.[197] The emphasis is on offering services rather than on making a determination of abuse or neglect. In family assessments, no disposition would be entered into the central registry.[198]

Other legislation mandates that the State Board of Social Services implement emergency regulations on out-of-family child protective services joint investigations to be accomplished in consultation with state agencies with oversight of the protection of children.[199] That bill requires a report by the Commissioner of the Department to the General Assembly standing committee overseeing these issues by September 30, 2000, outlining the recommendations of the state board advisory committee that was set up

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http://www.supremecourt.us.gov/docket/99-936.htm.

193. *Id.* at 483.

194. VA. CODE ANN. § 16.1-245.1 (Repl. Vol. 1998 & Cum. Supp. 2000).

195. *Id.*

196. *Id.* § 63.1-248.2:1 (Repl. Vol. 1995 & Cum. Supp. 2000); *see also id.* § 2.1-380 (Repl. Vol. 1995), §§ 63.1-209, -248.2, -248.7:1, -248.10, -248.13, -248.19 (Repl. Vol. 1995 & Cum. Supp. 2000).

197. *Id.* § 63.1-248.2:1 (Repl. Vol. 1995 & Cum. Supp. 2000).

198. *Id.* § 63.1-248.6:02(A)(6) (Repl. Vol. 1995 & Cum. Supp. 2000).

199. *Id.* § 63.1-248.6(A) (Repl. Vol. 1995 & Cum. Supp. 2000).

to address all such out-of-family investigations.[200] Further legislation deletes the requirement that the central registry of the names of those persons who have been found to have abused or neglected a child in an out-of-family situation also contain the name of the abused child when the parent or guardian is not the abuser.[201] If a child's name currently appears on the registry without the consultation and permission of the parents or guardians for a founded case of abuse and neglect that does not name the parents or guardians of the child as the abuser or neglector, such parents or guardians may have the child's name removed by written request to the department.[202]

By further bill, the multiple response child protective services system pilot program that is underway in five jurisdictions of the Commonwealth pursuant to legislation passed by the 1996 General Assembly, continues until July 1, 2002.[203] The pilot program provides an alternative response to reports of child abuse and neglect other than the current single investigatory track.[204]

The flood of appellate decisions involving criminal prosecutions for abuse and neglect continued unabated for yet another year. In *Clark v. Commonwealth*,[205] the Virginia Court of Appeals agreed that a trial court has the discretion to require the victim of an alleged sexual assault to "submit to an independent physical examination provided the defendant has made a threshold showing of a compelling need or reason."[206] In *Santillo v. Commonwealth*,[207] the Virginia Court of Appeals ruled that the due process interest in privacy did not apply to non-consensual acts of sodomy with a sixteen-year-old girl.[208] In addition the court stated that the state's sodomy statute was not unconstitutionally vague.[209] The Virginia Court of Appeals further decided in *Will v. Commonwealth*[210] that the Confrontation Clause of the United

200. *Id.*
201. *Id.* § 63.1-248.8 (Repl. Vol. 1995 & Cum. Supp. 2000).
202. *Id.*
203. *Id.* § 63.1-248.18 editor's note (Cum. Supp. 2000).
204. *Id*; *see also* Robert E. Shepherd, *Annual Survey of Virginia Law: Legal Issues Involving Children*, 30 U. RICH. L. REV. 1467, 1495-96 (1996).
205. 31 Va. App. 96, 521 S.E.2d 313 (Ct. App. 1999).
206. *Id.* at 109, 521 S.E.2d at 320.
207. 30 Va. App. 470, 517 S.E.2d 733 (Ct. App. 1999).
208. *Id.* at 480-81, 517 S.E.2d at 738-39.
209. *Id.* at 484, 517 S.E.2d at 740.
210. 31 Va. App. 571, 525 S.E.2d 37 (Ct. App. 2000).

States Constitution was not violated by the trial court granting a recess to allow the Commonwealth's attorney to talk with a testifying child victim.[211] A panel of the Virginia Court of Appeals ruled in *Moyer v. Commonwealth*[212] that the use of a teacher's diaries as evidence against him for taking indecent liberties with a minor violated the privilege against self-incrimination,[213] and that buttocks are not "sexual parts" within the meaning of the criminal code.[214] The court, sitting en banc, reversed the panel and affirmed the convictions.[215] In *Barrett v. Commonwealth*,[216] a mother's convictions for felony murder and felony child neglect were reversed because of the trial court's refusal to instruct the jury on the meaning of "willful" in the context of felony abuse or neglect.[217] In *Lane v. Commonwealth*,[218] the Virginia Court of Appeals affirmed the convictions of a man for the rape and sodomy of his stepdaughter[219] and ruled that the trial court properly admitted testimony of experts regarding the dynamics of victim recantation and the causes and effects of post-traumatic stress disorder.[220] The court of appeals addressed other issues not specific to children in the context of other cases where children were victims of criminal actions.[221] The Fourth Circuit Court of Appeals

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211. *Id.* at 580, 525 S.E.2d at 42.

212. 30 Va. App. 744, 520 S.E.2d 371 (Ct. App. 1999).

213. *Id.* at 754, 520 S.E.2d at 376.

214. *Id.* at 756, 520 S.E.2d at 377.

215. Moyer v. Commonwealth, 33 Va. App. 8, 13, 531 S.E.2d 580, 582-83 (Ct. App. 2000).

216. 32 Va. App. 693, 530 S.E.2d 437 (Ct. App. 2000).

217. *Id.* at 699, 530 S.E.2d at 440.

218. No. 2161-98-2, 1999 Va. App. LEXIS 544 (Ct. App. Sept. 28, 1999) (unpublished decision).

219. *Id.* at *11.

220. *Id.* at *4-7.

221. *See* Semple v. City of Moundsville, 963 F. Supp. 1416 (N.D. W. Va. 1999), *aff'd*, 195 F.3d 708 (4th Cir. 1999); Bailey v. Commonwealth, 259 Va. 723, 529 S.E.2d 570 (2000); Taylor v. Commonwealth, No. 0411-99-2, 2000 Va. App. LEXIS 353 (Ct. App. May 9, 2000) (unpublished decision); Renoir v. Commonwealth, No. 2097-98-3, 2000 Va. App. LEXIS 236 (Ct. App. Mar. 28, 2000) (unpublished decision); Shifflett v. Commonwealth, No. 2600-98-2, 2000 Va. App. LEXIS 150 (Ct. App. Feb. 29, 2000) (unpublished decision); Stoudt v. Commonwealth, Nos. 2386-98-4, 2387-98-4, 2000 Va. App. LEXIS 92 (Ct. App. Feb. 15, 2000) (unpublished decision); Wilson v. Commonwealth, 31 Va. App. 495, 525 S.E.2d 1 (Ct. App. 2000); DeAmicis v. Commonwealth, 31 Va. App. 437, 524 S.E.2d 151 (Ct. App. 2000); Majette v. Commonwealth, No. 2307-98-2, 2000 Va. App. LEXIS 31 (Ct. App. Jan. 27, 2000) (unpublished decision); Perkins v. Commonwealth, 31 Va. App. 326, 523 S.E.2d 512 (Ct. App. 2000); Brandon v. Commonwealth, No. 2434-98-2, 2000 Va. App. LEXIS 14 (Ct. App. Jan. 11, 2000) (unpublished decision); Sanderson v. Commonwealth, No. 1555-98-1, 2000 Va. App. LEXIS 9 (Ct. App. Jan. 11, 2000) (unpublished decision); Rothwell v. Commonwealth, No. 1342-98-1, 2000 Va. App. LEXIS 2 (Ct. App. Jan. 4, 2000)

granted a writ of habeas corpus to a North Carolina prisoner convicted of raping his step-granddaughter in *Bell v. Jarvis*[222] because his appellate counsel was ineffective in failing to argue that the state court erred in closing the courtroom over the prisoner's objection.[223] In *Commonwealth v. Bennett*,[224] the Page County Circuit Court ruled that Virginia Code section 18.2-67.9, allowing the use of closed circuit television in child abuse prosecutions with children under the age of thirteen, applies to a child who meets that age criterion at the date of the trial, not at the time of the incident.[225]

A comprehensive bill addressing foster care and permanency planning provides that when it is necessary to remove a child from his home he may be placed with a relative or other interested individual, including grandparents, in lieu of placement with a local department of social services.[226] The bill establishes standards for such placements which are appropriate for each stage of the dependency process.[227] The bill also creates a new permanent goal known as "another planned permanent living arrangement" for foster children who require long-term residential treatment.[228] Annual foster care review hearings must be held for children whose parental rights have been terminated until a final order of adoption is entered, instead of until they are placed for adoption.[229] The bill also modifies the child's objection to a termination of parental rights.[230]

A number of unpublished Virginia Court of Appeals decisions address situations where parental rights of an incarcerated parent are being terminated. There is no per se rule in Virginia that

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(unpublished decision); Booker v. Commonwealth, No. 1603-98-1, 1999 Va. App. LEXIS 471 (Ct. App. Aug. 3, 1999) (unpublished decision); Clark v. Commonwealth, 30 Va. App. 406, 517 S.E.2d 260 (Ct. App. 1999); Felder v. Commonwealth, No. 1617-98-2, 1999 Va. App. LEXIS 474 (Ct. App. Aug. 3, 1999) (unpublished decision); Mathews v. Commonwealth, 30 Va. App. 412, 517 S.E.2d 263 (Ct. App. 1999); Terry v. Commonwealth, 30 Va. App. 192, 516 S.E.2d 233 (Ct. App. 1999); Bartz v. Commonwealth, No. 1374-98-2, 1999 Va. App. LEXIS 408 (Ct. App. June 29, 1999) (unpublished decision).

222. 198 F.3d 432 (4th Cir. 1999).

223. *Id.* at 444.

224. 48 Va. Cir. 190 (Cir. Ct. 1999) (Page County).

225. *Id.* at 191-92.

226. VA. CODE ANN. § 16.1-252(F)(1) (Cum. Supp. 2000).

227. *Id.*

228. *Id.* § 16.1-282.1(A2)(4) (Cum. Supp. 2000).

229. *Id.* § 16.1-282.1(D) (Cum. Supp. 2000).

230. *Id.* § 16.1-283(G) (Cum. Supp. 2000).

states that incarceration will justify termination of residual parental rights without any other facts, but the court of appeals has stated that "[i]t is clearly not in the best interests of a child to spend a lengthy period of time waiting to find out when, or even if, a parent will be capable of resuming his responsibilities."[231] Thus, during the past year the court has upheld the trial court's termination of parental rights in every case involving an incarcerated parent.[232] Similarly, although the existence of a mental disability or mental illness will not automatically result in the termination of residual parental rights, the existence of such, coupled with other factors, almost invariably results in termination.[233] A number of other unpublished memorandum opinions from the Virginia Court of Appeals upheld decisions terminating parental rights, especially where minimal efforts were made to remedy the situations that led to the abuse or neglect,[234] where a

231. Kaywood v. Halifax County Dep't of Soc. Servs., 10 Va. App. 535, 540, 394 S.E.2d 492, 495 (Ct. App. 1990).

232. Terry v. Roanoke City Dep't of Soc. Servs., No. 3091-99-3, 2000 Va. App. LEXIS 420 (Ct. App. June 6, 2000) (unpublished decision); Pennybacker v. Spotsylvania County Dep't of Soc. Servs., No. 2599-99-2, 2000 Va. App. LEXIS 273 (Ct. App. Apr. 11, 2000) (unpublished decision); Stergiou v. Frederick County Dep't of Soc. Servs., No. 0156-99-4, 2000 Va. App. LEXIS 202 (Ct. App. Mar. 21, 2000) (unpublished decision); Marlowe v. Chesterfield/Colonial Heights Dep't of Soc. Servs., No. 1913-99-2, 2000 Va. App. LEXIS 104 (Ct. App. Feb. 15, 2000) (unpublished decision); Fields v. Hopewell Dep't of Soc. Servs., No. 1936-99-2, 2000 Va. App. LEXIS 58 (Ct. App. Feb. 8, 2000) (unpublished decision); Foreman v. Fairfax County Dep't of Family Servs., No. 1432-99-4, 1999 Va. App. LEXIS 675 (Ct. App. Dec. 14, 1999) (unpublished decision); Eaton v. Dep't of Soc. Servs. for County of Bedford, No. 0868-99-3, 1999 Va. App. LEXIS 443 (Ct. App. July 20, 1999) (unpublished decision).

233. *See* Patterson v. Nottoway County Dep't of Soc. Servs., No. 2528-99-2, 2000 Va. App. LEXIS 234 (Ct. App. Mar. 28, 2000) (unpublished decision); Harold Jackson v. Richmond Dep't of Soc. Servs., No. 0648-99-2, 1999 Va. App. LEXIS 702 (Ct. App. Dec. 28, 1999) (unpublished decision); Mary Jackson v. Richmond Dep't of Soc. Servs., No. 0226-99-2, 1999 Va. App. LEXIS 697 (Ct. App. Dec. 28, 1999) (unpublished decision); Murphy v. Norfolk Div. of Soc. Servs., No. 1474-99-1, 1999 Va. App. LEXIS 663 (Ct. App. Dec. 7, 1999) (unpublished decision); Harvey v. Lynchburg Div. of Soc. Servs., No. 2691-98-3, 1999 Va. App. LEXIS 561 (Ct. App. Oct. 5, 1999) (unpublished decision).

234. Cook v. Dep't of Soc. Servs. of Mecklenburg County, No. 2256-99-2, 2000 Va. App. LEXIS 444 (Ct. App. June 20, 2000) (unpublished decision); *Terry*, 2000 Va. App. LEXIS 420; Fisher v. Warren County Dep't of Soc. Servs., No. 2860-99-4, 2000 Va. App. LEXIS 403 (Ct. App. May 30, 2000) (unpublished decision); Chasem v. Fairfax County Dep't of Family Servs., No. 2537-99-4, 2000 Va. App. LEXIS 339 (Ct. App. May 9, 2000) (unpublished decision); Sawyers v. Tazewell Dep't of Soc. Servs., No. 1605-99-3, 2000 Va. App. LEXIS 346 (Ct. App. May 9, 2000) (unpublished decision); Ripley v. Charlottesville Dep't of Soc. Servs., No. 2879-99-2, 2000 Va. App. LEXIS 307 (Ct. App. Apr. 25, 2000) (unpublished decision); DiMauro v. Virginia Beach Dep't of Soc. Servs., No. 1533-99-1, 2000 Va. App. LEXIS 267 (Ct. App. Apr. 11, 2000) (unpublished decision); Tibbits v. Dep't of Soc. Servs. for Henrico County, No. 2487-99-2, 2000 Va. App. LEXIS 274 (Ct. App. Apr. 11, 2000) (unpublished decision); Baker v. Fredericksburg Dep't of Soc. Servs., No. 1089-99-2, 2000 Va. App. LEXIS 203 (Ct. App. Mar. 21, 2000) (unpublished decision); Cook v. Petersburg Dep't of Soc. Servs., No. 1385-99-2, 2000 Va. App. LEXIS 165 (Ct. App. Mar. 7, 2000)

parent did little to protect the child or children from another abusive caretaker,[235] where there was unremedied substance abuse by the parent[236] or where a parent was convicted of a serious felony involving his or her child.[237]

The 2000 General Assembly repealed the prior chapter of Virginia Code Title 63.1 on adoption[238] and reorganized the sections into six separate articles of a new chapter.[239] The new articles are: general provisions,[240] which applies to all types of adoptions; agency adoptions;[241] parental placement adoptions;[242] stepparent adoptions;[243] adult adoptions;[244] and records.[245] Prior to this change, all of the types of adoptions were lumped into the same Virginia Code sections, creating confusion among the courts, parties and agencies involved. The changes separate each type of adoption into individual articles which clearly identify the procedures necessary to complete the process.[246] There were no policy changes in the legislation, only a reorganization of the prior law.[247]

(unpublished decision); Eckley v. Virginia Beach Dep't of Soc. Servs., No. 1863-99-1, 2000 Va. App. LEXIS 59 (Ct. App. Feb. 8, 2000) (unpublished decision); Wilson v. Alexandria Div. of Soc. Servs., No. 1839-99-4, 2000 Va. App. LEXIS 57 (Ct. App. Feb. 8, 2000) (unpublished decision); Lewis v. Fredericksburg Dep't of Soc. Servs., No, 1121-99-2, 1999 Va. App. LEXIS 651 (Ct. App. Nov. 30, 1999) (unpublished decision); Bivins v. New Kent County Dep't of Soc. Servs., No. 0304-99-2, 1999 Va. App. LEXIS 612 (Ct. App. Nov. 2, 1999) (unpublished decision); Malave v. Fairfax County Dep't of Family Servs., No. 2708-98-4, 1999 Va. App. LEXIS 579 (Ct. App. Oct. 19, 1999) (unpublished decision); Smith v. Roanoke City Dep't of Soc. Servs., No. 0830-99-3, 1999 Va. App. LEXIS 554 (Ct. App. Oct. 5, 1999) (unpublished decision); Terry v. Franklin County Dep't of Soc. Servs., No. 1527-99-3, 1999 Va. App. LEXIS 567 (Ct. App. Oct. 5, 1999) (unpublished decision); *In re* Neblett, 50 Va. Cir. 457 (Cir. Ct. 1999) (Richmond City).

235. *DiMauro*, 2000 Va. App. LEXIS 267; *Eckley*, 2000 Va. App. LEXIS 59; Calloway v. Bedford County Dep't of Soc. Servs., No. 1841-99-3, 2000 Va. App. LEXIS 209 (Ct. App. Nov. 23, 1999) (unpublished decision).

236. Woolfolk v. Loudoun County Dep't of Soc. Servs., No. 2715-99-4, 2000 Va. App. LEXIS 402 (Ct. App. May 30, 2000) (unpublished decision); Howard v. Charlottesville Dep't of Soc. Servs., No. 1275-99-2, 2000 Va. App. LEXIS 364 (Ct. App. May 16, 2000).

237. Johnson v. Roanoke City Dep't of Soc. Servs., No. 0604-00-3, 2000 Va. App. LEXIS 471 (Ct. App. June 27, 2000) (unpublished decision).

238. VA. CODE ANN. § 63.1 (Cum. Supp. 2000).

239. *Id.* §§ 63.1-219.7 to -219.55 (Repl. Vol. 1995 & Cum. Supp. 2000).

240. *Id.* §§ 63.1-219.7 to -219.27 (Cum. Supp. 2000).

241. *Id.* §§ 63.1-219.28 to -219.36 (Cum. Supp. 2000).

242. *Id.* §§ 63.1-219.37 to -219.47 (Cum. Supp. 2000).

243. *Id.* §§ 63.1-219.48 to -219.49 (Cum. Supp. 2000).

244. *Id.* §§ 63.1-219.50 to -219.51 (Cum. Supp. 2000).

245. *Id.* §§ 63.1-219.52 to -219.55 (Cum. Supp. 2000).

246. *See id.* §§ 63.1-219.7 to -219.55 (Cum. Supp. 2000).

247. *See id.*

Other legislation requires the local board of social services or child-placing agency to give adoptive parents information about the child's eligibility for subsidy,[248] the child's special needs,[249] the current and potential impact of these needs and the appeal process.[250] The law also clarifies that the local board that initiated the adoption assistance agreement continues to be responsible for subsidy payments if the adoptive parents move to another jurisdiction.[251]

Companion cases involving a mother and father addressed their criminal prosecutions for attempting to sell their infant daughter.[252] The Virginia Court of Appeals found the evidence sufficient to support the convictions for solicitation of money in connection with placement or adoption and of conspiracy where it showed several efforts to secure money in exchange for the child.[253] These efforts included one attempt where the parents agreed to give the baby to a Texas couple for three thousand dollars and the mother attempted to have the baby's birth certificate delivered while that couple was present.[254]

Two other unpublished cases dealt with the unreasonable withholding of consent to adoption by an incarcerated father in one case,[255] and by a mentally impaired mother in the other.[256] In both cases the Virginia Court of Appeals affirmed the trial courts' decisions granting the adoption over the objection of the parent.[257]

IV. EDUCATION

The United States Supreme Court revisited the issue of stu-

248. *Id.* § 63.1-238.3(A)(1) (Repl. Vol. 1995 & Cum. Supp. 2000).

249. *Id.* § 63.1-238.3(A)(2) (Repl. Vol. 1995 & Cum. Supp. 2000).

250. *Id.* § 63.1-238.3(B) (Repl. Vol. 1995 & Cum. Supp. 2000).

251. *Id.* § 63.1-238.3(B)–(C) (Repl. Vol. 1995 & Cum. Supp. 2000).

252. Nathan Combs v. Commonwealth, 30 Va. App. 802, 520 S.E.2d 400 (Ct. App. 1999); Lillie Combs v. Commonwealth, 30 Va. App. 778, 520 S.E.2d 388 (Ct. App. 1999).

253. *Nathan Combs*, 30 Va. App. at 810, 520 S.E.2d at 403; *Lillie Combs*, 30 Va. App. at 787, 520 S.E.2d at 392.

254. *Nathan Combs*, 30 Va. App. at 807, 520 S.E.2d at 392; *Lillie Combs*, 30 Va. App. at 784, 520 S.E.2d at 391.

255. Peters v. Hagerman, No. 2901-98-4, 1999 Va. App. LEXIS 365 (Ct. App. June 22, 1999) (unpublished decision).

256. Mills v. Mills, No. 0884-99-4, 2000 Va. App. LEXIS 259 (Ct. App. Apr. 4, 2000) (unpublished decision).

257. *Mills*, 2000 Va. App. LEXIS 259, at *1; *Peters*, 1999 Va. App. LEXIS 365, at *2.

dent prayer in a public school setting in the case of *Santa Fe Independent School District v. Doe*,[258] where students delivered prayers prior to high school football games pursuant to school policy.[259] Until 1995, a student council chaplain elected by the student body delivered a prayer over the public address system prior to every football game at Santa Fe High School in Texas.[260] A lawsuit filed by students and their parents challenged the practice and the school district adopted a new policy authorizing two elections—one to determine whether the students at the school wished to have prayers at the games and a second, if the first vote was in the affirmative, to select the student representative to deliver the invocation.[261] The district court had permitted the practice to continue, but only with nonsectarian, nonproselytizing prayer.[262] The Fifth Circuit Court of Appeals held the prayer policy to be constitutionally flawed, even as modified by the lower court.[263]

The Supreme Court concluded that the case was controlled by the 1992 decision in *Lee v. Weisman*,[264] the graduation prayer case, and said that any message delivered on school property, at school-sponsored events, "over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer" could not be characterized as private speech.[265] Despite the seemingly voluntary nature of attendance at a high school football game, the Court pointed out that attendance was mandatory for certain students—the football team, the band and the cheerleaders—and the pressure was strong on other students.[266] The Court reasoned that students should not have to choose between attending a game or participating in religious ritual.[267] Even if attendance at the game was optional, "the delivery of a pre-game prayer has the improper effect of coercing those present to participate in an act of religious worship."[268]

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258. 120 S. Ct. 2266 (2000).
259. *Id.* at 2271.
260. *Id.*
261. *Id.* at 2272.
262. *Id.* at 2271.
263. Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (5th Cir. 1999).
264. 505 U.S. 577 (1992).
265. *Santa Fe*, 120 S. Ct. at 2279.
266. *Id.* at 2280.
267. *Id.*
268. *Id.*

In another important First Amendment case, *Mitchell v. Helms*,[269] the United States Supreme Court ruled that there was no constitutional violation presented by the use of Title I funds to purchase library and media materials, computer hardware and software, and other instructional materials for students in both public schools and secular and religious non-public schools.[270] The funds and equipment were allocated on an equal per-student basis regardless of the nature of the school.[271]

In *Koenick v. Felton*,[272] the Fourth Circuit Court of Appeals held that a Maryland statute providing for public school holidays on the Friday before Easter through the Monday following the religious holiday was constitutional and did not violate the Establishment Clause of the First Amendment.[273]

In hotly debated action, the Virginia General Assembly revised pre-existing law that authorized school boards to establish minutes of silence for meditation, prayer or other silent activity to now require daily observation of a one-minute period of silence in every classroom in the public schools in Virginia.[274] The requirement that "the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display" during this time is retained, but the students may "meditate, pray, or engage in any other silent activity that does not interfere with, distract, or impede other pupils in the like exercise of individual choice."[275] The Attorney General of Virginia also issued an opinion upholding prayers before local school board meetings.[276]

In *Lovern v. Edwards*,[277] the Fourth Circuit Court of Appeals upheld a district court's dismissal of a noncustodial father's lawsuit challenging a school's insistence that he schedule meetings to

269. 120 S. Ct. 2530 (2000).

270. *Id.* at 2537-38. *See generally* Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 7301-7373 (1994).

271. *Mitchell*, 120 S. Ct. at 2537 (following Agostini v. Felton, 521 U.S. 203 (1997)).

272. 190 F.3d 259 (4th Cir. 1999).

273. *Id.* at 261. Once the teacher challenging the statute left her employment as a public school teacher, she had no further standing to pursue her Equal Protection Clause claim. *Id.* at 261 n.1.

274. VA. CODE ANN. § 22.1-203 (Repl. Vol. 2000).

275. *Id.* The Office of the Attorney General is authorized by the legislation to intervene in any case, and must provide legal counsel for the defense of this provision. *Id.*

276. Educ.: Powers & Duties of Sch. Bds., Op. Att'y Gen. No. 00-002 (Mar. 13, 2000).

277. 190 F.3d 648 (4th Cir. 1999).

discuss his children in advance so that the custodial mother could be present.[278] In *Brown v. Brown*,[279] the Virginia Court of Appeals upheld a circuit court ruling denying a mother sole or joint legal custody of her children and refusing to order the father to discontinue home-schooling them.[280]

There were not as many cases dealing with children with disabilities in a school setting in the Fourth Circuit Court of Appeals this year as usual, although in *Baird v. Rose*,[281] the court ruled that a Fairfax County high school student and her parents stated an American with Disabilities Act claim when they alleged that the principal had discriminated against the girl by excluding her from the school's show choir because of absenteeism associated with her clinical depression.[282] The court concluded that a valid claim could rest on proof that a "disability was a motivating cause—as opposed to the sole cause—of discrimination."[283]

Three Fourth Circuit Court of Appeals cases this past year addressed the lingering effects of historic school segregation and judicial efforts to purge those effects.[284] In *Tuttle v. Arlington County School Board*,[285] the Fourth Circuit Court of Appeals ruled that the school board's efforts to achieve diversity, rather than to remedy past discrimination, were flawed by its use of a lottery for admission to alternative kindergartens so that children from under-represented groups were given weighted lottery numbers.[286] Similarly, in *Eisenberg v. Montgomery County Public Schools*,[287] the Fourth Circuit Court of Appeals found that a Maryland school used an unconstitutional transfer policy that weighted race more heavily than other factors to achieve balanced diversity.[288] Finally, in *Belk v. Charlotte-Mecklenburg*

278. *Id.* at 650-51.
279. 30 Va. App. 532, 518 S.E.2d 336 (Ct. App. 1999).
280. *Id.* at 535, 518 S.E.2d at 337.
281. 192 F.3d 462 (4th Cir. 1999).
282. *Id.* at 473.
283. *Id.* at 468.
284. Belk v. Charlotte-Mecklenburg Bd. of Educ., 211 F.3d 853 (4th Cir. 2000); Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999).
285. 195 F.3d 698 (4th Cir. 1999).
286. *Id.* at 707.
287. 197 F.3d 123 (4th Cir. 1999).
288. *Id.* at 133.

Board of Education,[289] the Fourth Circuit Court of Appeals declined to bypass the normal three-judge panel procedure and go immediately to an en banc review of a long-standing school desegregation case.[290]

The Winchester Circuit Court ruled in *Woods v. Winchester School Board*[291] that a school board may expel a student for making a bomb threat even after he has withdrawn from school and enrolled in another school system.[292] Furthermore, in *McLean v. Hatrick*,[293] the Loudoun County Circuit Court found that a fourth grade student and his parents were given adequate notice of a hearing prior to suspension from school for possession of a toy plastic gun.[294] The Attorney General of Virginia opined that the propriety of the use of drug-sniffing dogs to search the person of students attending public schools depends on the facts supporting a suspicionless search and the unobtrusiveness of the search itself.[295] As noted previously, the General Assembly directed school boards to adopt and revise, effective for the 2001-2002 school year, regulations governing student searches that are consistent with the Board of Education's recently issued guidelines.[296] Legislation enacted in 2000 defines "school property" for the purpose of mandatory expulsion for possession of firearms on school property as any school owned or leased real property or vehicle and a vehicle operated by or on behalf of the school board.[297] A new enactment, based on legislation from other states, requires that "each school board shall include, in its standards of student conduct, prohibitions against profane or obscene language or conduct."[298] Another provision permits local school boards to

> require any student who has been found, in accordance with the procedures set forth in [Virginia Code section] 22.1-277, to have been in possession of, or under the influence of, drugs or alcohol on a school

289. 211 F.3d 853 (4th Cir. 2000).
290. *Id.* at 854.
291. 49 Va. Cir. 330 (Cir. Ct. 1999) (Winchester City).
292. *Id.* at 330.
293. No. 18910 (Va. Cir. Ct. May 2, 2000) (Loudon County). This case is scheduled to be reported in volume 52 of the Virginia Circuit Court Opinions.
294. *Id.*
295. Op. to Hon. Charles R. Hawking (Jan. 31, 2000).
296. VA. CODE ANN. § 22.1-277.01:2 (Repl. Vol. 2000); *see also* REPORT OF THE BD. OF EDUC., *supra* note 133.
297. VA. CODE ANN. § 18.2-308.1 (Cum. Supp. 2000); *id.* § 22.1-277.01 (Repl. Vol. 2000).
298. *Id.* § 22.1-277.02:1 (Repl. Vol. 2000).

> bus, on school property, or at a school-sponsored activity in violation of school board policies, to undergo evaluation for drug or alcohol abuse, or both, and, if recommended by the evaluator and with the consent of the student's parent, to participate in a treatment program.[299]

Conduct involving firebombs, explosive materials or devices, hoax explosive devices, chemical bombs, or other incendiary devices on a school bus, on school property or at a school-sponsored activity and bomb threats or false bomb threats made against school personnel or involving school property or school buses were added to those incidents to be reported to school principals or their designees.[300] Another reporting statute authorizes law-enforcement officers to report to school principals any suspected violations of the Drug Control Act by students that "occurred on a school bus, on school property or at a school-sponsored activity."[301]

One enacted bill provides that a juvenile and domestic relations court, upon finding "that a parent has willfully and unreasonably failed to accompany a suspended student to meet with school officials" to discuss improving the student's behavior, "or upon the student's receiving a second suspension or being expelled," may order not only the student or his parent, but both parents if they have legal and physical custody, "to participate in such programs or such treatment," including "parenting counseling or a mentoring program," as the court deems appropriate to improve the student's behavior.[302] Another bill requires a juvenile court to order the denial of driving privileges for at least thirty days to any child at least thirteen years old upon a finding that the child has failed to comply with certain school attendance and parent-school conference meeting requirements.[303]

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299. *Id.* § 22.1-277.1 (Repl. Vol. 2000). The Virginia Attorney General had expressed the opinion that a school board lacked the authority to require parents to pay for a testing and treatment program as a condition to granting excused absences to pupils suspended for substance abuse. Op. to Hon. Joseph V. Gartlan, Jr. (Jan. 11, 2000).

300. VA. CODE ANN. §§ 8.01-47, 22.1-280.1(B) (Repl. Vol. 2000). The principal or his designee is to report all such incidents to the division superintendent, who must relay an annual report to the Department of Education pursuant to Virginia Code section 22.1-280.1(C). School principals must also report these incidents to law-enforcement officials pursuant to Virginia Code section 22.1-280.1(D). *Id.* § 22.1-280.1(C)–(D) (Repl. Vol. 2000).

301. *Id.* § 22.1-280.1(B) (Repl. Vol. 2000).

302. *Id.* § 22.1-279.3(G) (Repl. Vol. 2000). In addition, the court may order both the student and his parents to be subject to such conditions and limitations as the court deems appropriate for the supervision, care, and rehabilitation of the student or the parents. *Id.*

303. *Id.* § 16.1-278.9(A)(1) (Repl. Vol. 1999 & Cum. Supp. 2000). The measure provides

In *School Board of Portsmouth v. Colander*,[304] the Supreme Court of Virginia ruled that a school system could not be held liable for damages for the actions of a teacher in secretly videotaping the plaintiff student in various stages of undress where there was no evidence of deliberate indifference to the risk of such behavior by the school board.[305] A federal district court held in *Baynard v. Lawson*[306] that parents do not have a cause of action under 42 U.S.C. 1983, in their own names against a school superintendent for failing to warn them and others of the complaints brought against their son's teacher for alleged sexual molestation.[307] The court held that the son clearly has a claim for any direct injury he suffered but there is no separate parental cause of action.[308] The Department of Social Services is now required to respond to requests by local school boards in cases where there is no match within the central registry of a founded complaint of child abuse or neglect regarding applicants for employment within ten business days, whereas in cases where there is a match, the Department must respond within thirty business days.[309]

Other important 2000 legislation includes the revision of various statutes addressing evidence of residence in the school division for public school enrollment of homeless pupils.[310] Persons deemed to reside in a school division now include those who lack

> a fixed, regular, and adequate nighttime residence and [have] a primary nighttime residence located within the school division, that is: (a) a supervised publicly or privately operated shelter designed to provide temporary living accommodations . . . ; (b) an institution that provides a temporary residence for individuals intended to be institutionalized; or (c) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.[311]

Another bill permits the creation of residential charter schools for at-risk students by a single school division or by two or more

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for restricted licenses to be issued upon demonstration of hardship. *Id.* This represents yet another instance of a legislative mandate being issued to judges which restricts their exercise of discretion.

304. 258 Va. 417, 519 S.E.2d 374 (1999).
305. *Id.* at 423, 519 S.E.2d at 377.
306. 76 F. Supp. 2d 688 (E.D. Va. 1999).
307. *Id.* at 689.
308. *Id.*
309. VA. CODE ANN. §§ 22.1-296.4, 63.1-248.8 (Repl. Vol. 2000).
310. *Id.* §§ 22.1-3, -4.1, -270 (Repl. Vol. 2000).
311. *Id.* § 22.1-3 (Repl. Vol. 2000).

school divisions as a joint school,[312] and legislation also clarified that school divisions may authorize the creation of regional charter schools to be operated and chartered by two or more participating school boards.[313] This bill emphasizes that charter schools are public schools, and that charter schools, as public schools, are subject to the requirements of the Standards of Quality, including the Standards of Learning and the Standards of Accreditation.[314] Yet another bill established that the guidelines for the at-risk four-year-old preschool program may be differentiated according to the agency delivering the services in order to comply with various federal or state requirements and that the guidelines for the programs delivered by the public schools must require certain specific requirements.[315]

Other controversial legislation required local school boards to develop and implement policies no later than January 1, 2001,

> to ensure that public school students are not required to convey or deliver any materials that (i) advocate the election or defeat of any candidate for elective office, (ii) advocate the passage or defeat of any referendum question, or (iii) advocate the passage or defeat of any matter pending before a local school board, local governing body or the General Assembly of Virginia or the Congress of the United States.[316]

A less volatile bill conformed Virginia law to the requirements of the federal Family Educational Rights and Privacy Act ("FERPA")[317] by directing schools to "annually notify parents of students currently enrolled and in attendance of their rights under [FERPA] . . . and related regulations."[318]

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312. *Id.* §§ 22.1-26, -212.5, -212.7 to -212.9, -212.13, -212.14 (Repl. Vol. 2000).

313. *Id.* §§ 22.1-26, -212.5 to -212.15 (Repl. Vol. 2000).

314. *Id.*

315. *Id.* § 22.1-199.1 (Repl. Vol. 2000).

316. *Id.* § 22.1-278.3 (Repl. Vol. 2000).

317. 20 U.S.C. § 1232(g) (1994).

318. VA. CODE ANN. § 22.1-289(D) (Repl. Vol. 2000). Specifically, Virginia Code section 22.1-289(D) provides:

> [A] school responding to a request for the transfer of [a student's] scholastic record from another school division need not provide written notice of the transfer . . . to the parent, . . . or to a student who is eighteen years of age or older, if the school has previously included in the annual notice . . . a statement that it forwards such records to such requesting school divisions.

Id.

V. MENTAL HEALTH

A recent Virginia Attorney General's opinion stated that a magistrate lacked the authority to issue an emergency custody order under Virginia Code section 37.1-67.01 "if the person believed to be mentally ill and in need of hospitalization is a minor."[319] The General Assembly then enacted legislation at the 2000 Session to authorize magistrates to issue such emergency custody orders for juveniles and admit the youth for inpatient treatment.[320]

VI. MISCELLANEOUS

In *Troxell v. Granville*,[321] the United States Supreme Court ruled that Washington's child visitation statute was overly broad under the due process clause of the Fourteenth Amendment to the extent that it permitted a court to grant visitation rights to grandparents over the objection of a surviving custodial parent.[322] The Court's holding was complicated by the existence of a plurality opinion for four justices authored by Justice O'Connor,[323] separate concurring opinions by Justices Souter[324] and Thomas,[325] and separate dissenting opinions by Justices Stevens,[326] Scalia,[327] and Kennedy.[328] The diversity of opinions make it difficult to apply the decision to other cases, and Justice O'Connor's opinion for four justices is a fairly narrow one limited to the Washington statute itself.[329] However, she opined that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge be-

319. 1999 Op. Va. Att'y Gen. 129, 131.

320. VA. CODE ANN. § 16.1-340 (Cum. Supp. 2000). Section 37.1-67.01, regarding emergency custody orders, was added to the Virginia Code in 1995, but the cross reference was not picked up in the Psychiatric Inpatient Treatment of Minors Act in Title 16.1. *Id.* § 37.1-67.01 (Repl. Vol. 1996 & Cum. Supp. 2000).

321. 120 S. Ct. 2054 (2000).

322. *Id.* at 2063-64.

323. *Id.* at 2057.

324. *Id.* at 2065.

325. *Id.* at 2067.

326. *Id.* at 2068.

327. *Id.* at 2074.

328. *Id.* at 2075.

329. *Id.* at 2064.

lieves a 'better' decision could be made."[330] However, the Spotsylvania County Circuit Court held in *Decatur v. Eskam*[331] that a court could award visitation rights to grandparents where their son, the child's father, was dead, the mother did not oppose visitation, and the best interests of the child were served by the visitation.[332]

Gonzalez v. Reno[333] settled a very contentious event in American life, where Elian Gonzalez's relatives in Miami argued for the custody and immigrant status of Elian Gonzalez—a six-year-old boy rescued out of the ocean.[334] The court ruled for the father on the narrower basis of "the separation of powers under our constitutional system of government, a statute enacted by Congress, the permissible scope of executive discretion under that statute, and the limits on judicial review of the exercise of that executive discretion."[335] The Virginia Court of Appeals wrote another chapter in the long-playing custody and visitation saga of a lesbian mother pitted against her mother when it upheld the trial court order excluding all contact between the child and the mother's companion and refused expanded visitation rights.[336] In *May v. Grandy*,[337] the Supreme Court of Virginia affirmed the trial court's action changing the surname of a child on the motion of the mother where the father had not maintained contact with the girl and the change was in her best interest.[338] In *Rowland v. Shurbutt*,[339] the Supreme Court of Virginia reversed an order granting a change of name to that of the biological father of a child born to a woman married to another man because the action

330. *Id.*

331. 49 Va. Cir. 357 (Cir. Ct. 1999) (Spotsylvania County).

332. *Id.* at 359. The court cited *Williams v. Williams*, 256 Va. 19, 501 S.E.2d 417 (1998), *aff'g* 24 Va. App. 778, 485 S.E.2d 651 (Ct. App. 1997), but distinguished that case and relied on the later case of *Dotson v. Hylton*, 29 Va. App. 635, 513 S.E.2d 901 (Ct. App. 1999).

333. 212 F.3d 1338 (11th Cir. 2000), *reh'g denied*, 215 F.3d 1243 (11th Cir. 2000), *cert. denied*, 120 S. Ct. 2737 (2000).

334. *Id.* at 1344-46.

335. *Id.* at 1344.

336. Bottoms v. Bottoms, No. 0589-98-2, 1999 Va. App. LEXIS 402, at *8-10 (Ct. App. June 29, 1999) (unpublished decision). *See generally* Bottoms v. Bottoms, 249 Va. 410, 457 S.E.2d 102 (1995).

337. 259 Va. 629, 528 S.E.2d 105 (2000).

338. *Id.* at 632-33, 528 S.E.2d at 107.

339. 259 Va. 305, 525 S.E.2d 917 (2000).

was not proven to be in the child's best interests.[340] Finally, in *Taylor v. Commonwealth*,[341] the Virginia Court of Appeals held that a person who assists her fiancé in abducting his illegitimate child from the mother does not share any legal excuse the fiancé may have in a criminal prosecution.[342]

A court is not required to appoint a guardian ad litem to represent a child in a case initiated by a petition to change custody even where the petition alleges abuse by the custodian, because it is not a petition alleging that the child is abused or neglected under the juvenile code where such an appointment is mandated.[343] In *Miller v. Easter*,[344] the Virginia Court of Appeals reversed a suspension of visitation for an incarcerated father because the decision was based on the hearsay testimony by the mother about her daughter's allegations of sexual abuse.[345] In *Tyson v. Tyson*,[346] the Fairfax County Circuit Court awarded reasonable fees to the guardian ad litem for the couple's children and apportioned the fees between the parents based on the income share percentages.[347]

An amendment to the Comprehensive Services Act for At-Risk Youth and Families ("CSA")[348] created the new Office of Comprehensive Services for At-Risk Youth and Families,[349] under the lead of the Secretary of Health and Human Resources.[350] That office will assume the responsibilities of the former state management team to "promote and support cooperation and collaboration in the provision of services to troubled and at-risk youths and their families at the state and local levels," and will also provide

340. *Id.* at 309, 525 S.E.2d at 919. The court also concluded that the jurisdiction over the appeal lay with it because it was not a matter relating to "control or disposition of a child" in the court of appeals statute. *Id.* at 307, 525 S.E.2d at 918 (quoting VA. CODE ANN. § 17.1-405(3)(e) (Repl. Vol. 1996)).

341. 31 Va. App. 54, 521 S.E.2d 293 (Ct. App. 1999) (en banc).

342. *See id.* at 64, 521 S.E.2d at 297.

343. Santoro v. Owens, No. 1801-99-1, 2000 Va. App. LEXIS 55, at *4 (Ct. App. Feb. 8, 2000) (unpublished decision).

344. No. 2094-99-2, 2000 Va. App. LEXIS 375 (Ct. App. May 16, 2000) (unpublished decision).

345. *Id.* at *5.

346. 49 Va. Cir. 386 (Cir. Ct. 1999) (Fairfax County).

347. *Id.* at 388.

348. VA. CODE ANN. §§ 2.1-746, -748, -752, -759, -759.1 (Repl. Vol. 1995 & Cum. Supp. 2000).

349. *Id.* § 9-6.25.3 (Repl. Vol. 1998 & Cum. Supp. 2000).

350. *Id.* § 2.1-51.14 (Repl. Vol. 1995 & Cum. Supp. 2000).

training, oversight and technical assistance to localities, "serve as a liaison to the participating state agencies," and hire a director and staff.[351] The state executive council would also be expanded.[352] Another amendment requires courts, prior to final disposition, to refer cases where the pool of funds for at-risk youth and families are to be accessed to a local assessment and planning team ("FAPT") for a recommendation regarding the level of treatment and services needed by the child and family.[353] The local FAPT must make a report or forward a copy of the individual family services plan to the judge within thirty days of the written referral, and the court then shall consider the recommendation, but is not bound by it.[354] In *Comprehensive Services Act Office of Richmond v. J.M.*,[355] the juvenile court had ordered the CSA Office to provide a residential placement for J.M., a child in need of supervision, and the Office appealed the order to the circuit court.[356] That court was obligated to provide the Office a de novo evidentiary hearing limited to the order regarding the residential placement.[357] The Attorney General of Virginia, in an official opinion, deferred to the state management team's interpretation of the CSA in its manual and ruled that administrative or case management costs are the responsibility of the locality and are not reimbursable from the state pool of funds.[358]

In *Virginia Electric & Power Co. v. Dungee*,[359] a personal injury case that generated a jury verdict of $20,000,000 in damages, the Supreme Court of Virginia ruled, among other things, that the question of whether a ten-year-old boy suffering from an attention deficit hyperactivity disorder was guilty of contributory negligence was properly one for the jury and it was resolved in his favor.[360] In *Breeding v. Breeding*,[361] it was established that a child

351. *Id.* § 2.1-746.1 (Cum. Supp. 2000).

352. *Id.* § 2.1-746 (Cum. Supp. 2000).

353. *Id.* § 2.1-757(E) (Cum. Supp. 2000).

354. *Id.*

355. No. 1620-98-2, 1999 Va. App. LEXIS 473 (Ct. App. Aug. 20, 1999) (unpublished decision).

356. *Id.* at *4.

357. *Id.* at *6.

358. 1999 Op. Va. Att'y Gen. 3, 5.

359. 258 Va. 235, 520 S.E.2d 164 (1999).

360. *Id.* at 241, 250, 520 S.E.2d at 167, 173. The court noted yet again that a defendant has the initial burden in a case involving a child to rebut the presumption that "a child between the ages of 7 and 14 does not have the capacity to understand the peril and dangers of his acts and is, therefore, legally incapable of committing acts of negligence." *Id.* at

bicyclist and her mother may assert a public nuisance claim against a locality for negligently placing a garbage dumpster so that it protruded into the street.[362] In *Johnson v. Campbell*,[363] the Supreme Court of Virginia held that an infant defendant in a tort case arising out of an automobile accident in which the plaintiffs were injured could assert that the plaintiffs contributed to their injuries by providing her with alcohol and marijuana, prevailing on her to drive, and distracting her while they were traveling on the highway.[364] The Supreme Court of Virginia also reaffirmed that no common-law negligence claim lies against a restaurant and bartender who sold alcoholic beverages to a patron, and ruled that such was true even where the patron was under age.[365] The Supreme Court of Virginia also determined that a teenager who lives with her mother and the mother's male companion is not a "foster child" within the coverage of the companion's automobile liability insurance policy.[366]

An amendment to Virginia Code section 16.1-69.24 increased the fine for contempt of court in a district court from $50 to $250.[367] In *Mahoney v. Mahoney*,[368] the Virginia Court of Appeals ruled that an appeal from an order holding a parent in contempt for failure to pay child support was not an appeal from an order establishing a support arrearage and no appeal bond was required.[369] Although the decision of the Supreme Court of Virginia in *Commonwealth ex rel. Virginia Department of Corrections v. Brown*[370] related to the lack of power in a general district court to issue a transportation order for inmates in a civil case brought by

246, 520 S.E.2d at 171. Even if that is done, the defendant must prove contributory negligence itself, by showing "that the [child's] conduct did not conform to the standard of what a reasonable person of like age, intelligence, and experience would do under the circumstances." *Id.* at 247, 520 S.E.2d at 171. The court found the evidence that the youth suffered from ADHD to be relevant to his appreciation of the danger. *Id.* at 248, 258, 520 S.E.2d at 172, 178.

361. 258 Va. 207, 519 S.E.2d 369 (1999).

362. *Id.* at 213-14, 519 S.E.2d at 372.

363. 258 Va. 453, 521 S.E.2d 764 (1999).

364. *Id.* at 457-58, 521 S.E.2d at 766-67.

365. Robinson v. Matt Mary Moran, Inc., 259 Va. 412, 417, 525 S.E.2d 559, 562 (2000).

366. Va. Farm Bureau Mut. Ins. Co. v. Gile, 259 Va. 164, 169, 524 S.E.2d 642, 644-45 (2000).

367. VA. CODE ANN. § 16.1-69.24 (Repl. Vol. 1999 & Cum. Supp. 2000).

368. 32 Va. App. 139, 526 S.E.2d 780 (Ct. App. 2000).

369. *Id.* at 142, 526 S.E.2d at 781-82.

370. 259 Va. 697, 529 S.E.2d 96 (2000).

a prisoner,[371] the implications extend well beyond the facts of the case itself. The holding in the case appears similarly applicable to juvenile and domestic relations district courts, and could include cases more significant than the faulty television set in *Brown*, such as custody and visitation matters, child and spousal support proceedings and even cases involving the termination of residual parental rights. Although the effects of *Brown* in such matters could be ameliorated somewhat through the appointment of counsel or guardians ad litem for the prisoners or the participation of the inmate, or inmates, through electronic audio or video communication, there still may be significant due process issues, especially in termination cases. After several years of effort, the General Assembly finally prohibited, with exemptions for farming operations and organized parades, transportation of persons less than sixteen years of age in the beds of pickup trucks.[372]

The Supreme Court of Virginia ruled in *Rivera v. Nedrich*[373] that minors could maintain an action by their next friend for payment under a note anytime between accrual of the cause of action and the termination of their infancy since the statute of limitations was tolled.[374] Although the decision in *Farrow v. Carlton*[375] dates back to 1962, its ruling that an infant is not bound by the allegations in a motion for judgment filed by its next friend has only recently been published.[376]

In *Boy Scouts of America v. Dale*,[377] the Supreme Court of the United States ruled that the New Jersey public accommodations law could not be applied to the private, not-for-profit association to require it to accept members or leaders who are homosexual in light of the group's teachings disapproving of homosexuality which are protected by the First Amendment.[378] In *Mercer v. Duke University*,[379] the Fourth Circuit Court of Appeals determined that Title IX of the Education Amendments of 1972[380] protected a

371. *Id.* at 706, 529 S.E.2d at 101.
372. VA. CODE ANN. §§ 46.2-1095, -1156.1 (Cum. Supp. 2000).
373. 259 Va. 1, 529 S.E.2d 310 (1999).
374. *Id.* at 4-5, 529 S.E.2d at 311-12.
375. 49 Va. Cir. 513 (Cir. Ct. 1962) (Spotsylvania County).
376. *Id.* at 518.
377. 120 S. Ct. 2446 (2000).
378. *Id.* at 2455.
379. 190 F.3d 643 (4th Cir. 1999).
380. 20 U.S.C. §§ 1681–1688 (1994).

female athlete's right to be free from gender discrimination where the university and football coach allowed her to try out for the team in a contact sport.[381]

381. *Mercer*, 190 F.3d at 644.

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