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OUTPATIENT MENTAL HEALTH CARE SERVICES—A MINOR'S RIGHT

The 1979 Session of the General Assembly made important changes in Title 54 of the Code of Virginia pertaining to health care for minors.¹ One of the principal changes involved the right of unemancipated minors² to seek outpatient treatment for mental health problems without the consent of their parents.³ Additionally, lawmakers deleted the criminal sanctions imposed against medical practitioners who performed authorized abortions on consenting minors.⁴ This bill appears to bring into Virginia a partial realization of a child's right to due process and equal protection under the law.⁵

I. LEGAL BACKGROUND

Traditionally, the parent was regarded as the final authority on the care and upbringing of the child. The child was a chattel of the parent, regarded

1. The bill was sponsored by Senators F. T. Gray and J. Harry Michael, Jr. and added an Article 7 to Chapter 12 of Title 54 of the Code of Virginia. Introduced as Senate Bill 661, the version approved by the General Assembly was signed by Governor Dalton on April 2, 1979. It will become effective on October 1, 1979 as VA. CODE ANN. § 54-325.2.

2. The current law concerning consent to medical or surgical procedures generally regards any person under 18 years of age who has been married as a minor and subject to parental control. VA. CODE ANN. § 1-13.42 (Repl. Vol. 1979) and § 54-325.2(D). However, the law sets out clearly delineated exceptions that allow the minor to be treated as an adult for treatment of venereal disease, or other infectious disease; birth control, pregnancy or family planning; substance abuse; and under the new provision: outpatient care or treatment "for mental illness and emotional disturbance." *Id.*

3. VA. CODE ANN. § 54-325.2(D)(4) (Cum. Supp. 1979).

4. Under the proposed senate bill, the law would have allowed medical treatment including abortions for minors without parental consent but would have placed criminal sanctions on the attending physician for performing the medical procedure under VA. CODE ANN. § 18.2-76 (Repl. Vol. 1975). This section of the Virginia Code stands in direct opposition to the Supreme Court decision in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). See Note, *Sexual Privacy: Access of a Minor to Contraceptives, Abortion, and Sterilization without Parental Consent*, 12 U. RICH L. REV. 221, 236 (1977) which states: "it is clear that section 18.2-76 is unconstitutional at least as to the requirement of parental consent for an abortion during the first trimester." *Id.*, n. 91.

5. STAFF OF SENATE COMM. ON THE JUDICIARY, 95th CONG., 2D SESS., REPORT ON CONSTITUTIONAL RIGHTS OF CHILDREN (Comm. Print 1978). (hereinafter cited as JUDICIARY REPORT). Senator Birch Bayh stated:

. . . that children should be protected by the Constitution, and in particular by the Bill of Rights, is a new frontier . . . [T]hose of us who support this movement hope to establish that a child has the right to . . . adequate nutrition and medical care; . . . to due process of law; to equal protection of the laws; and to privacy.

Id. at V.

as an economic necessity in a mercantile society.⁶ Even the great libertarian thinkers of the last century had little regard for the rights of children. John Stuart Mill noted:

[Children] are still in a state to require being taken care of by others [and] must be protected against their own action as well as against external injury. . . . Liberty, as a principle, has no application to any state of things anterior to the time when mankind have [sic] become capable of being improved by free and equal discussion.⁷

In the event that the parents failed to exhibit proper control or were deceased, the state assumed the role of the parent—*parens patriae*. As economic conditions changed, the state began to impose external influences on the family, such as compulsory education and the restrictions on child labor, which postponed the assumption of adult roles.⁸ This delay in attainment of the adult model resulted in a re-emphasis on the rights of parents to control the actions and activities of the child, especially in areas of education⁹ and religion.¹⁰

A. *Parent's Right v. Children's Rights*

It was not until the case of *Wisconsin v. Yoder*¹¹ that the Supreme Court took notice of the fact that the desires of the child might not coincide with those of the parents. One member of the Court noted that the child should have some due process rights under the Constitution. Justice Douglas (dissenting in part) stated: "It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and the right of students to be masters of their own des-

6. See P. ARIES, *CENTURIES OF CHILDHOOD*, 365-69 (1960); *THE HISTORY OF CHILDHOOD* 250-251 (L. de Mause ed. 1974); Stern, Smith & Doolittle, *How Children Used to Work*, 39 *LAW & CONTEMP. PROB.* 93, 100-104 (1975). For an interesting analysis of the rights of children and parents in 18th century England see 1 BLACKSTONE, *COMMENTARIES* § 443 *et seq.* (1807).

7. J. MILL, *ON LIBERTY* (D. Spitz ed. 1975), 13-14 as cited in *JUDICIARY REPORT*, *supra* note 5, at 3, n. 8.

8. *JUDICIARY REPORT*, *supra* note 5, at 4.

9. *Meyer v. Nebraska*, 262 U.S. 390 (1923) (affirmed the right of parents to have their children instructed in foreign languages); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (held unconstitutional a state law which "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing of children under their control." *Id.* at 534-35).

10. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (held that parental rights and religious freedom were sufficiently important to overcome a state requirement of compulsory school attendance).

11. 406 U.S. 205 (1972).

tiny."¹² The other members of the Court did not, however, share this concern.

The majority opinion in *Yoder* placed greater emphasis on the rights of the parents than on the rights of the child. Chief Justice Burger stated, in dictum, that "an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom. . . ."¹³ In a more recent opinion, the Court has held that before a state can interfere with the family interests and relationships there must be a compelling interest.¹⁴ These decisions are generally considered to represent "parents' rights" which are entitled to constitutional protection.

Contrasted with the deference shown by the Supreme Court toward the rights of parents over minors is the growing trend to acknowledge the rights of children *vis-a-vis* the state. This trend was most clearly illustrated in the case, *In Re Gault*,¹⁵ in which Justice Fortas wrote that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."¹⁶ The Court was careful to note, however, that these words were not to be interpreted as encompassing "the totality of the relationship of the juvenile and the state," but were to be limited to the issue of that case, which involved the commitment of a minor to a detention home.¹⁷

B. *The Balancing of Interests: Health Care*

Recently, the Supreme Court further relaxed the firm line it had previously drawn on parental rights and family interests.¹⁸ This time the

12. *Id.* at 245.

13. *Id.* at 231.

14. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (held that a city zoning ordinance imposing definitional limitations upon extended families was unconstitutional). This case relied upon previous "family" cases such as *Meyer v. Nebraska*, *supra* n. 10, *Pierce v. Society of Sisters*, *supra* n. 10, and *Wisconsin v. Yoder*, *supra* n. 11. Although a 5-4 decision, each of the Justices, except Justice Rehnquist, affirmed the "sanctity of the family" as espoused by Justice Powell. *Id.* 431 U.S. at 503.

15. 387 U.S. 1 (1967).

16. *Id.* at 13.

17. *Id.* See also Burt, *Developing Constitutional Rights Of, In and For Children*, 39 LAW & CONTEMP. PROB. 118 (1975).

18. See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (held parental consent provision in Missouri statute to be unconstitutional). This case first recognized the child's right to privacy and clearly acknowledged that "[M]inors, as well as adults, are protected by the Constitution and possess constitutional rights." *Id.* at 74. Constitutional rights "do not mature and come into being magically only when one attains the state defined age of maturity." *Id.* See also, *Carey v. Population Services International*, 431 U.S. 678 (1977) (affirming a district court decision that held unconstitutional, under the first and fourteenth amendments, a New York law which made it a crime for any person to sell or distribute non-

question was whether parents' rights can override the rights sought by children which, but for their age, would be theirs under the Constitution. The Court acknowledged that there might be a balancing of the rights of adults and children;¹⁹ indeed, the weighing of interests sometimes requires that a child be allowed to make his own choices, especially where the child's own body is involved. Thus, health services have generally evolved as an area which might allow the minor to seek medical care as a matter of right with or without parental consent.

II. THE NEW STATUTE

Virginia has enacted a law that will allow a child in certain instances to seek and receive outpatient care without the consent of the parent.²⁰ Under

prescription contraceptives to a minor under the age of sixteen). This case again addressed the issue of a minor's right to privacy "in connection with decisions affecting procreation." *Id.* at 693. The Court cited with approval the language of *Danforth*, *supra* that a State "may not impose a blanket provision . . . requiring the consent of a parent . . . as a condition for abortion during the first 12 weeks of her pregnancy." 428 U.S. at 74." *Id.*

19. "The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible." *Planned Parenthood v. Danforth*, *supra* at 102 (Stevens, J. dissenting). *Accord Carey v. Population Services International*, *supra* at 693 n. 15 (stating that the law regards minors as having a lesser capacity for making decisions than adults, with the consequent result that the state has much greater latitude to regulate the conduct of children). *Compare Tribe, Childhood, Suspect Classifications, and Conclusive Presumptions*, 39 LAW & CONTEMP. PROB. 8 (1975) (questioning whether there exists a general articulable standard that the courts and legislatures can apply to provide comprehensive protection of children's rights).

20. VA. CODE ANN. § 54-325.2(D) (Cum. Supp. 1979) states in full that:

A minor shall be deemed an adult for the purpose of consenting to:

1. Medical or health services needed to determine the presence of or to treat venereal disease or any infectious or contagious disease which the State Board of Health requires to be reported;

2. Medical or health services required in the case of birth control, pregnancy or family planning except for the purposes of 54-325.3 through 54-325.6;

3. Medical or health services needed in the case of outpatient care, treatment or rehabilitation for substance abuse as defined in § 37.1-203 of this Code;

4. Medical or health services needed in the case of outpatient care, treatment or rehabilitation for mental illness or emotional disturbance.

21. Virginia case law does not appear to have recognized a right of recovery for failure to obtain parental consent. A West Virginia case bearing on the subject is *Browning v. Hoffman*, 90 W.Va. 568, 111 S.E. 492 (1922) which states that "a surgeon has no legal right to operate upon a patient without his consent or upon a child without the consent of its parent or guardian." *Id.* at 497. *Browning* cited as authority a Texas case, *Rishworth v. Moss*, 191 S.W. 843 (Tex. Civ. App. 1917), which held that a parent could recover damages for the death of a child from surgery not authorized by the parent. The court in *Rishworth* noted, however, that had the child recovered, damages would have been limited to actual damages. *Id.* at 851. The

section 54-325.2(D) a minor "is deemed an adult" when seeking such treatment, and the potential liability of the physician for a tort suit initiated by the parents for an unlawful touching has been removed.²¹ It also allows the child to give "informed consent"²² to medical procedures that are incidental to treatment for the disorder.

The most significant part of this new law, from a substantive point of view, is its recognition of a minor's right to seek "medical or health services needed in the case of outpatient care, treatment or rehabilitation for mental illness or emotional disturbance."²³ This portion of the law is new and indicates a recognition by the General Assembly of a minor's right to privacy in some aspects of his personal life. Additionally, it reaffirms the right of a minor to seek certain health services regardless of parental desires.²⁴

A. *Extent of the Law*

It is important to note that the minor may seek only "outpatient care." There are several broad reasons for this: (1) once admitted to a medical treatment facility for mental or emotional disorders, a minor loses some personal rights to choose the type and form of treatment, as well as the right to terminate such treatment;²⁵ and (2) Virginia does not have a statu-

age of the children in these cases was nine and eleven years, respectively. For an excellent discussion as to whether the consent of a minor to surgical procedure will preclude a cause of action for assault and battery, see *Lacey v. Laird*, 166 Ohio St. 12, 139 N.E.2d 25 (1956) (held that a surgical procedure, even though beneficial or harmless, if performed on a minor without parental consent, is a technical assault and battery for which the minor may recover nominal damages).

22. This appears to be the more rational and generally accepted approach to obtaining consent from a minor. Whether a court will consider the consent of a minor effective and parental consent unnecessary depends upon such factors as the minor's age, his maturity, marital status, emancipation, and certain public policy considerations. See, 1977 II HOSPITAL LAW MANUAL § 4-2 (Aspen Systems Corporation). Compare RESTATEMENT (SECOND) OF TORTS § 892A(1) (1979): "One who *effectively* consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it." (emphasis added). The comments indicate that effective consent can be granted by a minor without parental consent:

If the person consenting is a child or one of deficient mental capacity, the consent may still be effective if he is capable of appreciating the nature, extent and probable consequences of the conduct consented to, although the consent of a parent, guardian or other person responsible is not obtained or is expressly refused.

RESTATEMENT (SECOND) OF TORTS § 892A(2), comment b (1979).

23. VA. CODE ANN. § 54-325.2(D)(4) (Cum. Supp. 1979).

24. *Id.*

25. "Mental health statutes do not reveal any significant difference between the rights of voluntary and involuntary patients with respect to correspondence, visitation, mechanical

tory process whereby a minor may voluntarily commit himself to an institution for treatment.²⁶ By restricting the treatment to outpatients, the legislators have wisely avoided potentially difficult problems which might have been created by a broader statute.

As an outpatient, a minor may seek treatment without the consent or knowledge of his parents; he also retains the option to terminate the treatment at his own discretion. This provides the child with maximum flexibility and privacy in solving his personal problems. Whether the child can consent to all types of treatment is, however, still unanswered. Can a child give "informed consent" to receive pharmacological or electroshock treatment? If so, at what age? The answers to these questions are unclear. The *Danforth* decision cautioned that "[not] every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."²⁷ There must be some subjective balancing of the interests of the child against the interests of the parents and government.²⁸ It would seem that particular facts and circumstances must be considered in each case and that a broad general guideline would be both unwise and inappropriate.²⁹

B. *Potential Problem Areas*

There are potential problem areas that have not been resolved. The law does not specify who is to bear the cost for treatment of unemancipated minors when they seek and receive medical care without parental consent. Additionally, it is unclear whether or not parents should have access to medical files of the unemancipated children.

restraints, and the exercise of civil rights." Note, *The Mental Hospitalization of Children and the Limits of Parental Authority*, 88 YALE L.J. 186, 188 n. 9 (1978).

26. Prior to 1976, children under 18 could be admitted to mental institutions without judicial approval under VA. CODE ANN. § 37.1-65 (Repl. Vol. 1976). Parents or persons standing *in loco parentis* could merely request admission of the child. Formal involuntary commitment proceedings did not apply to children under 14. After *Brown v. Allerton*, No. 75-0450-R (E.D. Va. Apr. 20, 1976), the state Department of Mental Health and Mental Retardation agreed not to "voluntarily" admit allegedly mentally ill or mentally retarded juveniles except under the procedures set forth in VA. CODE ANN. § 37.1-67.1 (Repl. Vol. 1976) and if the consent of the minor had been obtained.

27. 428 U.S. at 75.

28. JUDICIARY REPORT at 18. Compare Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CALIF. L. REV. 769 (1978) (protection of children's rights by state support of parental decisions).

29. JUDICIARY REPORT at 18.

1. Who pays for professional services?

In commercial transactions a minor enjoys a protected status.³⁰ There are only limited circumstances under which he may make a binding contract. Generally, he may not obligate himself and, if he does, he may later disaffirm the transaction.³¹ Where medical services are the subject of the contract, some states, such as New York, will not allow the minor, in certain situations, to subsequently disaffirm the obligation.³² Virginia currently has no such legislation and therefore a question exists as to who will bear the cost for treatment of a minor under section 54-325.2(D).

The Virginia Supreme Court has held that it is within the power of the legislature to fix the minimum age at which a minor can enter into a particular contract.³³ The legislature therefore could allow minors not covered by a parent's medical insurance to make a binding contract with the treating physician. In cases where medical insurance is available, the child might be able to receive treatment under the parent's program without the parent's consent. The physician could render treatment and receive compensation directly from the insurer under the master policy.³⁴ It is doubtful that under existing Virginia law any contract of the child for medical services could be binding on the parent unless the parent expressly agreed to that obligation under general surety principles.³⁵

There is some language in Virginia case law to indicate that an "infant

30. 9B MICHIE'S JURISPRUDENCE, *Infants* § 4 (Repl. Vol. 1977) states that infancy is no defense against: (1) forfeiture of an estate for breach of an express condition; (2) contracts to serve as apprentices; (3) contracts of enlistment; (4) reasonable partition or discharge of a mortgage for payment of a debt where a minor is a tenant in common. See also VA. CODE ANN. § 8.01-278 (Rep. Vol. 1977) which bars a plea of infancy where the minor is transacting business as a trader or where the minor accepts loans to defray expenses of higher education.

31. As a general rule a minor's contracts are voidable and not void, and the minor may affirm or disaffirm the contracts within a reasonable period after reaching the age of majority. 9B MICHIE JURISPRUDENCE, *Infants* § 3 (Repl. Vol. 1977).

32. N.Y. GEN. OBLIG. LAW § 3-102 (Rep. Vol. 1977).

33. See *Humphrees v. Boxley Bros. Co.*, 146 Va. 91, 135 S.E. 890 (1926); *Strother v. Lynchburg Trust and Sav. Bank*, 155 Va. 826, 156 S.E. 426 (1931).

34. Under the current arrangement between Blue Cross and Blue Shield of Virginia and its subscribing physicians, there is only a contractual relationship between the physician and the corporation. Under the plan, the person who purchases the insurance coverage is a subscriber and all eligible members of his household are "participants." Doctors are required to render treatment to participants when needed, and then bill their services to Blue Cross and Blue Shield. Even if the subscriber were to notify the corporation that he did not desire that a bill be paid, the contract between physician and the corporation would still be honored. Thus, a child who is a "participant" under this particular program can get treatment under the subscriber's policy without the consent of the subscriber.

35. *Stimpson v. Hunter*, 234 Mass. 61, 125 N.E. 155 (1919).

may do acts for his benefit which are binding," but this exception is applied most generally to the acquisition of property.³⁶ More certainly though, a minor can bind himself in "contracts for necessities."³⁷ These contracts include such items as food, lodging, clothing and other things "essential to life and comfort."³⁸ The Virginia court has not addressed the question of whether medical treatment is a necessary, but other jurisdictions³⁹ have held that medical services are not necessities if the minor resides in his parents' home and there is no showing that the parents refused or neglected to support the child.⁴⁰ There are no reported cases that have specifically considered whether mental health care, family planning, substance abuse or treatment for venereal disease is, in fact, a "necessary." It is doubtful whether these services would be considered as such in light of those cases that have refused to acknowledge medical treatment as being a "necessary."⁴¹

The unemancipated minor is not foreclosed from obtaining treatment simply because of his infancy and the lack of consent by the parent, but may receive aid through state and federally-funded programs as an indigent.⁴² Currently, federal law requires that a minor be automatically classified as indigent in cases involving alcohol and substance abuse. It would appear that state facilities would be able to grant similar status to minors for the treatment of venereal disease or mental health disorders. But, it is unclear at this time whether state funds could be used to provide family planning services beyond giving information on family planning and issu-

36. 9B MICHIE'S JURISPRUDENCE, *Infants* § 4 (Repl. Vol. 1977).

37. In such contracts, the minor is not bound by the express contract, but rather on an implied contract to pay the reasonable value of goods or services rendered. A mere recital in a contract that the goods or services provided are necessities, does not preclude scrutiny by a court of the actual nature of goods or services. See generally, *Bear v. Bear*, 131 Va. 447, 109 S.E. 313 (1921); 42 AM. JUR. 2D, *Infants* §§ 65, 67 (1969).

38. Cf., *Gordon, Infant's Liability for Legal Services*, 6 WM. & MARY L. REV. 105 (1965) (discussing attorney's fees as necessities).

39. *Foster v. Adcock*, 161 Tenn. 217, 30 S.W.2d 239 (1930); *Cole v. Wagner*, 197 N.C. 692, 150 S.E. 339 (1929).

40. Where the life of the child is in jeopardy the state, under the doctrine of *parens patriae*, may intervene. It is still doubtful at this point who would bear the cost of the medical procedures when the parents refuse consent based on religious or philosophical grounds. See e.g., *Comment*, 28 ROCKY MTN. L. REV. 235 (1956).

41. See notes 37-40, *supra* and accompanying text.

42. See Drug Abuse and Treatment Act of 1972, 21 U.S.C. § 1176 (1976); Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, 42 U.S.C. § 4576 (1976). Cf.: Public Health Service, 42 C.F.R. § 54 a. 103 (1978) which states: ". . . no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

ing contraceptives. Although the Supreme Court has recognized the minor's right to an abortion⁴³ there is no requirement for the state to provide funding for such treatment.⁴⁴

2. Who has access to medical records?

Even though a child may now seek and receive treatment for mental disorders, it is possible that the new law will not adequately insure his privacy. Currently, if the minor receives treatment in a publicly funded mental health facility, the parents would have access to those health records under the Virginia Freedom of Information Act.⁴⁵ Under this provision the minor could not protect access to the records from his parents or guardians.

Under the new law,⁴⁶ a child would exercise his right to consent to mental health care when he wished to preserve his privacy or when such treatment was opposed by the parents. Unless the Freedom of Information Act is amended, however, a mental health professional could not guarantee that the confidences of a minor could be withheld from the parent. The parent who vigorously opposes such treatment may harass and disrupt any program of care or therapy by instituting Freedom of Information requests or suits,⁴⁷ and thus destroy any possible private or confidential relationship between the physician, or mental health care professional, and the minor patient. Such interference would defeat the very purpose for which the new statute was intended—to provide the minor with a means of obtaining health services while recognizing a certain right to privacy.⁴⁸

The minor who participates in a treatment program administered by a

43. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). See notes 20-21, *supra*, and accompanying text.

44. See, *Beal v. Doe*, 432 U.S. 438 (1977) (held that medicaid program under Title XIX does not require a state to underwrite the cost of "non-therapeutic" abortions); *Maher v. Roe*, 432 U.S. 464 (1977) (held that even though a state provides childbirth-related services there is "no obligation on the States to pay the pregnancy-related medical expenses of indigent women"). The Court decided *Beal* on statutory grounds and *Maher* on constitutional grounds. For a more complete discussion of these cases see Note, *Beal, Maher and Poelber: The End of An Era?*, 17 J. OF FAM. L. 49 (1978).

45. VA. CODE ANN. § 2.1-342(b)(3) (Rep. Vol. 1979) states in part:

Where the person who is the subject of scholastic or medical and mental records is under the age of eighteen, his right of access [to his records] may be asserted only by his parent or guardian

46. VA. CODE ANN. § 54-325.2 (Cum. Supp. 1979). See notes 1-5, *supra*, and accompanying text.

47. VA. CODE ANN. § 2.1-346 (Repl. Vol. 1979).

48. See notes 24-25, *supra*, and accompanying text.

private physician would generally be protected from disclosures of information under Virginia's physician-patient communications statute.⁴⁹ It should be noted, however, that this privilege is very limited and in civil actions, such as commitment proceedings or custody disputes, the court may "in the exercise of sound discretion" require such disclosures when "necessary to the proper administration of justice."⁵⁰ Thus, a court could require a physician to divulge all relevant information as to the mental health status of the minor in a civil proceeding on such an issue.⁵¹

It is also unclear at this point whether a person enrolled in joint counseling or "group therapy" retains the right to physician-patient communication privilege. A recent Virginia circuit court decision⁵² held that, at least between husband and wife involved in joint counselling, there is no privileged communication. Thus, if tested, the physician-patient privilege might also be abrogated. This would again jeopardize a child's right to privacy, since a common means of resolving adolescent problems is through group therapy and social interaction.⁵³

3. Can a child withhold consent to treatment?

The final issue that this new statute⁵⁴ raises, but fails to answer, is

49. VA. CODE ANN. § 8.01-399 (Repl. Vol. 1977).

50. Foster & Freed, *Child Custody*, 39 N.Y.U. L. REV. 423, 443, 616-18 (1964) (advising use of psychiatric reports in child custody disputes and documenting the use of such reports by the states). The court may determine that the mental health of the minor is at issue in custody disputes. In an effort to determine which parent the child prefers, or with which parent the child is more comfortable, the court may require a health care professional to testify on any therapy that might reveal such facts. This destroys the confidentiality that a patient has a right to expect, and could greatly reduce any real expectation of privacy. For an excellent discussion of Virginia's physician-patient communication privilege, see W. BRYSON, *DISCOVERY IN VIRGINIA* (1978) and W. BRYSON, *NOTES ON VIRGINIA CIVIL PROCEDURE* (1979).

51. Even though the physician or group leader might be required to divulge this information, it is doubtful whether the court could demand that the records themselves be permitted in the case of custody proceedings. However, where the medical health of the minor is in direct controversy, *i.e.*, civil commitment proceedings, the court could require such records to be produced under Va. Sup. Ct. Rule 4:10 (Repl. Vol. 1977).

52. *Haut v. Haut*, No. 54404 (Fairfax Co. Cir. Ct., Dec. 14, 1978, held that "when a husband and wife are in a counselling session with a psychiatrist which is between the husband and wife, there is no confidentiality because the statements were made not in private to a doctor. . . ."). See, *Psychiatric News*, May 4, 1979, at 1, col. 1.

53. This group therapy most commonly involves: (1) activity therapy; and (2) group psychoanalysis. Activity therapy is an analytically oriented group method for treating children between the ages of 7 and 11 with disturbed peer relationships. Group psychoanalysis is used both for adolescents and adults, and involves the patient's transference and resistance feelings of increased complexity and helps participants to resume normal interactions in society. *HANDBOOK OF PSYCHIATRY* 384 (3d ed. P. Soloman and V. Patch 1974).

54. VA. CODE ANN. § 54-325.2 (Cum. Supp. 1979).

whether or not a child who may consent to treatment may also withhold that consent and thus preclude parental "right to consent." This problem involves the entire relationship of the rights of the parent over the child and the question of the permissible constitutional infringements on the substantive rights of minors.⁵⁵ There must be established specific constitutional limits on the state's sanctioning of parental rights at the expense of children's rights. The right of parents to control the affairs of a minor child is necessary when dealing with pre-adolescents and minors adjudged mentally incompetent. In these instances the parent must retain broad discretion. Once the child develops some maturity, however, he ought to be allowed to influence his own destiny. The legislature should consider this question and provide some guidance to both medical practitioners and laymen alike. One author has devised a three part analysis to determine whether a child should be allowed to become involved in selecting his own treatment process.⁵⁶ The determination hinges upon: (1) the extent to which the parent's decision intrudes on the constitutional rights of the child; (2) the extent to which the underlying parental purpose in seeking the treatment is a valid expression of parental authority; and (3) the extent to which the child is capable of making his own choice.⁵⁷ This might require an administrative review by the court if a child feels that his personal constitutional rights have been threatened by unilateral action on the part of his parents. But, by requiring a hearing or administrative review, the state can preserve and enforce an articulable standard of children's rights.

III. CONCLUSIONS

The new statute is innovative and a significant step forward for Virginia. The General Assembly has demonstrated a progressive and realistic view of the problems of adolescents who are seeking to make the difficult transition to adulthood. This law represents a recognition of a minor's constitutional right to a degree of personal privacy. There is no complete abrogation of the rights and responsibilities of the parents, but rather recognition of a minor's right to give, or not give, consent to certain medical treatment.

This enlightened piece of legislation is not, however, without its weaknesses. The General Assembly must now consider when a child is capable of providing informed consent and when a child may be able to withhold that consent over a parent's desires for treatment. Additionally, a minor's

55. See notes 19-20, *supra*, and accompanying text. See also, *Parham v. J. R.*, 99 S.Ct. 2493 (1979).

56. Note, *The Mental Hospitalization of Children and the Limits of Parental Authority*, 88 *YALE L.J.* 186 (1978).

57. *Id.* at 216.

right to privacy, clearly recognized by the courts, must be further protected by limiting access to medical records of the consenting minor. Also, we must insure that the minor is not deprived of health services due to an inability to pay. The child should be able to obligate himself contractually for services, or freely use the benefits of the parents' health care program. State-sponsored services should be used when applicable. These problems should be addressed in the next session of the General Assembly.

This new legislation has provided a substantive framework that can easily be refined and made even more effective by providing a comprehensive program that will include all health care services and not just those currently addressed.

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