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Family and Juvenile Law

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FAMILY AND JUVENILE LAW

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I. INTRODUCTION

Over the past year, family and juvenile law in the Commonwealth was affected by three cases from the Supreme Court of the United States and a considerable amount of legislation enacted by the 2004 Session of the Virginia General Assembly. By way of example, on June 25, 2004, the Supreme Court of Virginia amended its appellate rules to include guardians ad litem ("GAL") for children. Along with the *Guardian ad litem Standards*, which took effect in September 2003, there is now a significantly higher benchmark to be met by GALs. The General Assembly also enacted legislation to provide for earlier appointment of lawyers as counsel for juveniles in delinquency cases; however, that provision does not take effect until July 2005. This is about the same time that higher appointment standards for such lawyers are to be established by the new Indigent Defense Commission. Thus, there is much in the works for lawyers who represent children and families in the Commonwealth.

II. GUARDIANS AD LITEM

As discussed extensively in last year's *Annual Survey of Virginia Law*,[1] major developments took place between 2001 and 2003 which reformed the Virginia's guardian ad litem system. These developments created performance standards for GALs in a

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1. Robert E. Shepherd, Jr., *Annual Survey of Virginia Law: Legal Issues Involving Children*, 38 U. RICH. L. REV. 161 (2003).

variety of cases.[2] The new standards went into effect on July 1, 2003, and were reinforced by the Supreme Court of Virginia's adoption of amended appellate rules that facilitate GAL participation in the appeals process.[3] Rule 5A:1 was amended to provide that the term "Counsel for appellee . . . include a Guardian Ad Litem, unless the Guardian Ad Litem is the appellant."[4] Rule 5A:19(c)(3) was further revised to provide that, "[t]he appellant may file a reply brief in the office of the clerk of the Court of Appeals within 14 days after filing of the brief of appelle" or GAL.[5] Rule 5A:19(d) now states:

> If a Guardian Ad Litem joins with either appellant or appellee, the Guardian Ad Litem must notify the Clerk's Office, in writing, which side it joins. Thereafter, the Guardian Ad Litem may rely on the brief of that party and is entitled to oral argument under Rule 5A:26.[6]

Finally, the new rules state that

> [i]f a Guardian Ad Litem joins with either appellant or appellee, the Guardian Ad Litem shall share the time for oral argument with the party. If a Guardian Ad Litem wants additional time to argue, the Guardian Ad Litem must state that request in its brief, subject to approval of the court.[7]

In *Watkins v. Fairfax County Department of Family Services*,[8] the Court of Appeals of Virginia reaffirmed its prior holdings that the GAL was an indispensable party to an appeal of a circuit court judgment terminating a mother's parental rights.[9] Thus, the failure to name the GAL in the notice of appeal, or accompanying certificate of service, was fatal to the perfection of the

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2. *Id.* at 164–68.

3. *See* VA. SUP. CT. R. 5A:1 (Repl. Vol 2004). The amendments discussed in this section are all available at http://www.courts.state.va.us/amend.htm (last visited Sept. 24, 2004). The amend-ed rules took effect September 1, 2004. *See id.*

4. *Id.* at 5A:1(b)(6) (Repl. Vol. 2004).

5. *Id.* at 5A:19(c)(3) (Repl. Vol. 2004).

6. *Id.* at 5A:19(d) (Repl. Vol. 2004). If the GAL fils a separate brief, the brief must have a brown cover. *Id.* at 5A:24 (Repl. Vol. 2004).

7. *Id.* at 5A:28(b) (Repl. Vol. 2004).

8. 42 Va. App. 760, 595 S.E.2d 19 (Ct. App. 2004).

9. *Id.* at 770–71, 595 S.E.2d at 24–25. *See also* M.G. v. Albemarle County Dep't of Soc. Servs., 41 Va. App. 170, 177, 583 S.E.2d 761, 764 (Ct. App. 2003); Hughes v. York County Dep't of Soc. Servs., 36 Va. App. 22, 26, 548 S.E.2d 237, 238–39 (Ct. App. 2001).

mother's appeal in the case; therefore, the appeal was dismissed.[10]

The General Assembly amended Virginia Code section 32.1-127.1:03[11] to bring Virginia's policy regarding the availability of client medical records into compliance with the federal Health Insurance Portability and Accountability Act.[12] The amendments continue to provide access to these records; however, the procedures for obtaining them were further outlined.[13] The General Assembly also amended Virgnia Code section 16.1-267, which discusses the compensation of GALs.[14] The amendment removed the $100 compensation cap stating that

> [t]he court shall assess costs against the parents for such legal services in the maximum amount of that awarded the attorney by the court under the circumstances of the case, considering such factors as the ability of the parents to pay and the nature and extent of the counsel's duties in the case. Such amount shall not exceed the maximum amount specified in subdivision 1 of § 19.2-163. . . .[15]

In at least two separate cases, the Court of Appeals of Virginia has noted the failure of a GAL to participate in the appeal by either filing a brief or otherwise participating in the appellate process. In *Brown v. Spotsylvania Department of Social Services*,[16] the court was very explicit in its admonishment,

> The record reflects that the guardian *ad litem* for D.B. was provided notice pursuant to Rule 5A:6. He did not file a responsive brief with this Court, however. Standard J. of the *Standards to Govern the Performance of Guardians Ad Litem for Children*, effective September 1, 2003, calls for all guardians *ad litem* to "[f]ile appropriate . . . briefs and appeals on behalf of the child and ensure that the child is represented by a [guardian *ad litem*] in any appeal involving the case."[17]

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10. *Watkins* at 775, 595 S.E.2d at 27.

11. VA. CODE ANN. § 32.1-127.1:03 (Repl. Vol. 2004).

12. 42 U.S.C. §§ 1320d–1320d-8 (2000).

13. Act of Mar. 11, 2004, ch. 66, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 16.1-266, -343 (Supp. 2004), 32.1-127.1:03 (Repl. Vol. 2004), 37.1-67.3, -134.9, -134.12, and -134.21 (Cum. Supp. 2004)). Virginia Code section 16.1-266 does not take effect until July 1, 2005.

14. VA. CODE ANN. § 16.1-267 (Supp. 2004).

15. Act of Apr. 8, 2004, ch. 342, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 16.1-267 (Supp. 2004)).

16. 43 Va. App. 205, 597 S.E.2d 214 (Ct. App. 2004).

17. *Id.* at 209 n.1, 597 S.E.2d at 216 n.1 (quoting STANDARDS TO GOVERN THE PERFORMANCE OF GUARDIANS AD LITEM FOR CHILDREN (2003), *available at*

In *C.S. v. Virginia Beach Departmentt of Social Services*[18] the court also noted the absence of participation by the GAL.[19] In an unpublished opinion, the court of appeals held that the circuit court acted properly in holding a parent in civil contempt for failing to pay half of the GAL's fee assessed against the parties at the conclusion of a disputed custody case.[20]

III. FAMILY LAW

A. *The Pledge of Allegiance Case*

Elk Grove Unified School District v. Newdow,[21] which burst into public consciousness as the "pledge of allegiance case,"[22] was originally viewed as an Establishment Clause conflict. The resolution of the case ultimately rested not on First Amendment grounds, but rather on the right of a parent to assert constitutional claims on behalf of his child.[23] The Court decided the case, not on the merits of the constitutionality of the inclusion of "under God" in the pledge of allegiance, but on the much narrower ground of Michael Newdow's standing to challenge the practice as the non-custodial parent of his daughter whose rights he was asserting.[24] Under the "domestic relations" exception to federal court jurisdiction, the question of the father's ability to serve as his daughter's "next friend" was governed by California family law.[25] The California family court ordered "joint legal custody," but gave the child's mother the power to "make[] the final decisions if the two . . . disagree," thus denying the father the right to litigate as the daughter's "next friend."[26] Finding that Newdow

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http://www.courts.state.va.us/gal/gal_standards_children_080403.html (last visited Sept. 24, 2004).

18. 41 Va. App. 557, 586 S.E.2d 884 (Ct. App. 2003).

19. *Id.* at 560 n.2, 586 S.E.2d at 885 n.2.

20. Walker-Duncan v. Duncan, No. 1752-03-1, 2004 Va. App. LEXIS 26, at *9 (Ct. App. Jan. 20, 2004) (unpublished decision).

21. 124 S. Ct. 2301 (2004).

22. For further discussion of the *Newdow* case in the education law context, see D. Patrick Lacy, Jr. & Kathleen S. Mehfoud, *Annual Survey of Virginia Law: Education Law*, 39 U. RICH. L. REV. 183, 184–86 (2004).

23. 124 S. Ct. at 2312.

24. *Id.*

25. *Id.* at 2309–10.

26. *Id.* at 2310, 2312. The Court noted that this issue was not directly raised until the

could not, under California law, serve as his daughter's next friend, the Court held that, "Newdow lacks prudential standing to bring this suit in federal court," and thus reversed the United States Court of Appeals for the Ninth Circuit.[27]

B. *Marriage*

In response to the Attorney General's opinion that changes made at the 2003 legislative session deprived appointed marriage celebrants of their power to celebrate marriages across the Commonwealth,[28] the General Assembly amended the Virginia Code to again allow circuit court judges to appoint persons who are residents of the circuit in which the judge sits to perform marriages anywhere in the Commonwealth.[29] More controversial legislation, described as the "Affirmation of Marriage Act," provides that "[a] civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited."[30] Furthermore, such arrangements entered into in another state or jurisdiction are void in Virginia and "any contractual rights created thereby shall be void and unenforceable."[31] Opponents of the enactment argued that it could impair contractual obligations in Virginia that are unrelated to a so-called "gay marriage."[32] Governor Mark Warner unsuccessfully sought to amend the legislation by deleting the reference to a "partnership contract or other arrangement" and striking the clause invalidating contractual arrangements.[33]

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mother raised it following the court of appeals' first order in the case. *Id.* at 2307–08. The California family court initially granted the mother sole legal custody. *Id.* at 10. After the United States Court of Appeals for the Ninth Circuit issued its decision, the California family court held another hearing whereupon it granted the joint legal custody described above. *Id*

27. *Id.* at 2312.

28. *See* Op. to Hon. Michael D. Wolfe, Clerk (Oct. 10, 2003), *available at* http://www.oag.state.va.us (last visited Sept. 24, 2004).

29. Act of Apr. 12, 2004, ch. 612, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 20-25 (Repl. Vol. 2004)).

30. VA. CODE ANN. § 20-45.3 (Repl. Vol. 2004).

31. *Id.*

32. David Weintraub & Kirk Marusak, *Letter to the Editor: Affirming Inequality in Virginia*, WASH. POST, Sun. July 25, 2004, at B06, *available at* http://www.washington.post.com/ac2/wp-dyn/A12245-2004Jul24 (last visited Sept. 24, 2004).

33. The Governor's recommendation may be found at http://legl.state.va.us/cgi-bin/

C. *Family Abuse and Protective Orders*

One case decided by the Court of Appeals of Virginia addressed the modification of protective orders. In *Shaffer v. Shaffer*,[34] the court of appeals concluded that it was unable to review a husband's claim that a modification of a protective order, which deleted a provision giving his wife exclusive use and possession of their residence, should have also dropped the "no contact" provision because the husband's argument had not been presented to the trial court.[35]

The General Assembly made a number of revisions to the various sections of the Virginia Code that dealt with family abuse and protective orders during the 2004 session. Virginia Code section 16.1-260 now requires juvenile court intake officers to "provide to a person seeking a protective order . . . a written explanation of the conditions, procedures and time limits applicable to the issuance of protective orders" for family and household members.[36] Virginia Code section 9.1-102 requires the Department of Criminal Justice Services to "[e]stablish training standards and publish a model policy for law-enforcement personnel in the handling of . . . sexual assault and stalking cases"[37] and to "[e]stablish training standards and publish a model policy and protocols for local and regional sexual assault response teams."[38] Virginia Code section 19.2-81.4 also requires the Virginia State Police and local law enforcement agencies to institute policies that guide officers on domestic violence incidents involving the police and repeat offenders.[39] Virginia Code section 63.2-1502 directs the Department of Social Services "[t]o establish minimum training requirements for workers and supervisors on family abuse and domestic violence, including the relationship between domestic violence and

legp504.exe?041+amd+HB751AG (last visited Sept. 24, 2004).

34. No. 1945-03-2, 2004 Va. App. LEXIS 269 (Ct. App. Jun. 8, 2004) (unpublished decision).

35. *Id.* at *12. The court based its ruling on Virginia Supreme Court Rule 5A:18, the purpose of which, "is to insure that the trial court and opposing party are given the opportunity to intelligently address, examine, and resolve issues in the trial court, thus avoiding unnecessary appeals." *Id.* at *11 (citing Weidman v. Babcock, 241 Va. 40, 44, 400 S.E.2d 164, 167 (1991)).

36. VA. CODE ANN. § 16.1-260(C) (Supp. 2004).

37. *Id.* § 9.1-102(37) (Cum. Supp. 2004).

38. *Id.* § 9.1-102(46) (Cum. Supp. 2004).

39. *Id.* § 19.2-81.4(6), (7) (Repl. Vol. 2004).

child abuse and neglect."[40] "[T]he Office of the Executive Secretary of the Supreme Court shall determine appropriate standards for the approval of education and treatment programs for persons accused of assault and battery against a family or household member . . . and arrange for such programs to be approved by an appropriate entity."[41] Virginia Code section 16.1-279.1 now provides that temporary child support may be one of the conditions imposed on a respondent in a protective order.[42] A respondent who "commits an assault and battery upon any party protected by the protective order, resulting in serious bodily injury to the party . . . is guilty of a Class 6 felony."[43] Furthermore, a respondent who violates the protective order "by furtively entering the home of any protected party while the party is present, or by entering and remaining in the home of the protected party until the protected party arrives, is guilty of a Class 6 felony."[44] The term "primary physical aggressor" was changed to "predominant physical aggressor" in Virginia Code section 19.2-81.3, which requires arrest in most cases when the officer has probable cause to believe that either family assault or a violation of a protective order has occurred.[45] A police officer is required to "arrest and take into custody the person he has probable cause to believe, based on the totality of the circumstances, was the predominant physical aggressor unless there are special circumstances which would dictate a course of action other than an arrest."[46]

The General Assembly also amended the criminal code in family abuse situations. Virginia Code section 18.2-57.2 now states that

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40. *Id.* § 63.2-1502(13) (Cum. Supp. 2004).

41. Act of Apr. 15, 2004, ch. 979, 2004 Va. Acts ___.

42. VA. CODE ANN. § 16.1-279.1(A1) (Supp. 2004).

43. *Id.* § 16.1-253.2 (Supp. 2004).

44. *Id.*

45. Act of Apr. 21, 2004, ch. 1016, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 19.2-81.3 (Repl. Vol. 2004)).

46. VA. CODE ANN. § 19.2-81.3(B) (Repl. Vol. 2004). The statute also sets standards for determining who is the predominant physical aggressor:

> The standards for determining who is the predominant physical aggressor shall be based on the following considerations: (i) who was the first aggressor, (ii) the protection of the health and safety of family and household members, (iii) prior complaints of family abuse by the allegedly abusing person involving the family or household members, (iv) the relative severity of the injuries inflicted on persons involved in the incident, (v) whether any injuries were inflicted in self-defense, (vi) witness statements, and (vii) other observations.

Id.

> [u]pon a conviction for assault and battery against a family or household member, where it is alleged . . . [the] person has been previously convicted of two offenses against a family or household member of (i) assault and battery . . . (ii) malicious wounding . . . (iii) aggravated malicious wounding . . . (iv) malicious bodily injury by means of a substance . . . or (v) an offense under the law of any other jurisdiction which has the same elements as any of the above offenses, in any combination, all of which occurred within a period of 20 years, and each of which occurred on a different date, such person is guilty of a Class 6 felony.[47]

Virginia Code section 18.2-57.3 allows a court to order a person "charged with [a] first offense of assault and battery against a family or household member" to be placed on probation and to participate in a community-based probation program as part of deferred proceedings.[48]

D. *The Servicemembers Civil Relief Act*

The 2004 General Assembly established civil law protections for service members, thus bringing Virginia law into parity with federal law. Under the new provisions, a Virginia court cannot enter a default judgment absent an affidavit from the plaintiff stating whether the defendant is in military service or that the plaintiff does not know if he is in such service.[49] The amendments also authorize the courts to set aside any default judgment against service members, as provided by federal law.[50]

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47. VA. CODE ANN. § 18.2-57.2(B) (Repl. Vol. 2004). Previously, the Class 6 felony applied only if the prior convictions were for assault and battery against a family or household member. *Id.* § 18.2-57.2 (Cum. Supp. 2003). Another bill enacted this year revised the time period from ten to twenty years in which the three convictions must occur in order that the third one be a Class 6 felony. Act of Apr. 12, 2004, ch. 738, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-57.2 (Repl. Vol. 2004)).

48. VA. CODE ANN. § 18.2-57.3 (Repl. Vol. 2004). Further legislative enactments affect how civilian courts respond to domestic abuse cases involving active members of the armed services. "If any active duty member of the United States Armed Forces is found guilty" of the assault and battery of a household member, the court is required to "report the conviction to family advocacy representatives of the United States Armed Forces." VA. CODE ANN. § 18.2-57.4 (Repl. Vol. 2004).

49. VA. CODE ANN. § 8.01-15.2 (Cum. Supp. 2004).

50. *Id.*

E. *Divorce*

In *De Avies v. De Avies*[51] the Court of Appeals of Virginia ruled that a party to a divorce decree cannot seek to have the decree set aside, eighteen months later, on the ground that the final decree was endorsed only by counsel and not signed by the parties.[52] The parties to the case appeared in court for an *ore tenus* hearing and announced that they had settled all the outstanding issues.[53] In open court, counsel read into the record the details of their understanding, and the parties confirmed to the judge that they were in agreement.[54] A week later, counsel submitted to the trial court a detailed final decree tracking provision-by-provision the agreement reached in open court."[55] The agreement was signed by both parties' counsel.[56] The judge entered the decree on March 15, 2000; no post-judgment motions were filed nor was an appeal noted.[57] In September 2002, the husband filed a "Motion to Vacate Final Decree as to Property and Support," arguing that the agreements were not signed by the parties themselves; the trial judge denied the motion.[58] The court of appeals affirmed the lower court's ruling, concluding that, even if the order was voidable, it was nevertheless a court order and could not be attacked collaterally.[59]

In *Budnick v. Budnick*[60] the court of appeals affirmed the trial court's award of a divorce to a wife where the husband was convicted of a felony and sentenced to pay a substantial fine and serve a lengthy period of incarceration.[61] The court also ruled that there was no abuse of discretion in the distribution of the property, the award of child support, and the reservation of spousal

51. 42 Va. App. 342, 592 S.E.2d 351 (Ct. App. 2004).
52. *Id.* at 347, 592 S.E.2d at 353.
53. *Id.* at 344, 592 S.E.2d at 351–52.
54. *Id.* at 344, 592 S.E.2d at 352.
55. *Id.*
56. *Id.*
57. *Id.* at 344–45, 592 S.E.2d at 352.
58. *Id.* at 345, 592 S.E.2d at 352.
59. *Id.* at 346–47, 592 S.E.2d at 353 (citing Pope v. Commonwealth, 37 Va. App. 451, 456, 559 S.E.2d 388, 390 (2002)).
60. 42 Va. App. 823, 595 S.E.2d 50 (Ct. App. 2004).
61. *Id.* at 831, 595 S.E.2d at 54.

support because the criminal activity had a devastating financial impact on the family and constituted marital waste.[62]

F. *Property Settlement Agreements*

The Court of Appeals of Virginia ruled in *Hale v. Hale*[63] that a property settlement agreement, which provided the wife with a fifty percent share in the husband's "vested pension plan with his employer," included both the husband's 401(k) defined contribution plan and the defined benefit pension plan, since both were part of the husband's total retirement plan.[64] Both plans were considered "employer provided," even though the employer contributed only partially to the 401(k) plan.[65] Since the agreement referred to the employer-provided benefits in the plural, the wife had an interest in both under equitable distribution.[66] The court of appeals held in *Jacobsen v. Jacobsen*[67] that the evidence supported the trial court's conclusion that the husband and wife did not reconcile after their separation.[68] The court noted that the husband had engaged in a "sham reconciliation" with his wife for the sole purpose of getting the house back.[69] As there was no real reconciliation, the marital settlement agreement, giving the wife sole possession of the house, was incorporated into the divorce decree. In an unpublished opinion, *Brewerton v. O'Meara*,[70] the court of appeals affirmed the trial court's judgment that the husband was responsible for a daughter's education expenses, pursuant to the marital agreement incorporated in their Massachusetts divorce decree.[71] Finally, in *Vinson v. Vinson*,[72] the court of appeals affirmed the decision of the circuit court setting aside a property settlement agreement prepared by an attorney who accepted a retainer agreement with both the husband and the wife

62. *Id.* at 845–46, 595 S.E.2d at 61.
63. 42 Va. App. 27, 590 S.E.2d 66 (Ct. App. 2003).
64. *Id.* at 32–33, 590 S.E.2d at 68.
65. *Id.* at 32, 590 S.E.2d at 68.
66. *Id.* at 33, 590 S.E.2d at 68.
67. 41 Va. App. 582, 586 S.E.2d 896 (Ct. App. 2003).
68. *Id.* at 592–93, 586 S.E.2d at 900–01.
69. *Id.* at 592, 586 S.E.2d at 900.
70. No. 0801-03-2, 2003 Va. App. LEXIS 535 (Ct. App. Oct. 28, 2003) (unpublished decision).
71. *Id.* at *5.
72. 41 Va. App. 675, 588 S.E.2d 392 (Ct. App. 2003).

for an uncontested divorce.[73] The court also affirmed an order sanctioning the attorney for his failure to conduct a reasonable inquiry into the possible conflict of interest presented by the representation of the wife, disqualifying the lawyer from representing her.[74]

G. *Equitable Distribution*

Two cases decided this year by the Court of Appeals of Virginia concerned the interpretation of prenuptial contracts. In *Smith v. Smith*[75] the court of appeals ruled that the circuit court erroneously refused to enforce a prenuptial agreement on the ground that it was unclear and imprecise when both parties seemed to agree on what it meant.[76] The equitable distribution of the other property, however, was reasonable.[77] The court therefore reversed in part and affirmed in part.[78] In *Golembiewski v. Golembiewski*,[79] an unpublished opinion, the court of appeals reversed the trial court's decision that a prenuptial contract waived equitable distribution,[80] concluding that the agreement governed only separately acquired property and not marital property.[81]

Disputes concerning the classification of property as marital or separate dominated several cases. In *Utsch v. Utsch*[82] the Supreme Court of Virginia concluded that where the husband conveyed the marital residence—his separate property—to himself and his wife as tenants by the entirety without consideration, "the deed of gift was unambiguous on its face, both for the purpose of retitling and proof of donative intent," and parol evidence was therefore inadmissible.[83] The supreme court remanded the case back to the court of appeals to address the issue of the classi-

73. *Id.* at 683–84, 588 S.E.2d at 396–97.
74. *Id.* at 687, 588 S.E.2d at 398.
75. 43 Va. App. 279, 597 S.E.2d 250 (Ct. App. 2004).
76. *Id.* at 287–88, 597 S.E.2d at 254–55.
77. *Id.* at 286, 597 S.E.2d at 253–54.
78. *Id.* at 291, 597 S.E.2d at 256.
79. No. 2993-02-1, 2003 Va. App. LEXIS 507 (Ct. App. Oct. 7, 2003) (unpublished decision).
80. *Id.* at *6.
81. *Id.* at *11.
82. 266 Va. 127, 581 S.E.2d 508 (2003).
83. *Id.* at 127, 581 S.E.2d at 508.

fication of the marital residence as marital property for the purpose of equitable distribution.[84] In *Fowlkes v. Fowlkes*[85] the supreme court found that the husband's pre- and post-marriage contribution of separate funds to the building of an addition to the wife's house, which became the marital residence, did not transmute the property into partly separate and partly marital.[86] As the property remained the separate property of the wife, it was not subject to equitable distribution.[87] The court further noted that the husband must turn to equity to recover his investment.[88] In *Anderson v. Anderson*,[89] the Court of Appeals of Virginia agreed with the trial court's determination that the wife could be awarded a credit for the fair rental value of the marital home, as part of the equitable distribution award, where the husband rented part of the property after the wife moved out.[90]

In valuing the husband's fifty percent interest in a jointly owned family business, the court of appeals in *Owens v. Owens*[91] determined that the circuit court properly refused to grant a "minority discount" because the ownership was less than fifty-one percent.[92] The lower court correctly applied Virginia's "intrinsic value" concept in assessing the value for equitable distribution purposes.[93] In *Buchanan v. Buchanan*,[94] the Supreme Court of Virginia ruled that the trial court correctly allowed a wife to pursue payment from the husband under the fraudulent conveyance statute since the husband transferred property eleven months after the parties separated and shortly before he filed for divorce.[95]

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84. *Id.* at 130, 581 S.E.2d at 510.

85. 42 Va. App. 1, 590 S.E.2d 53 (Ct. App. 2003).

86. *Id.* at 9, 590 S.E.2d at 56–57.

87. *Id.*

88. *Id.*, 590 S.E.2d at 57.

89. 42 Va. App. 643, 593 S.E.2d 824 (Ct. App. 2004).

90. *Id.* at 648, 593 S.E.2d at 826.

91. 41 Va. App. 844, 589 S.E.2d 488 (Ct. App. 2003).

92. *Id.* at 855–56, 589 S.E.2d at 494.

93. *Id.* at 854, 589 S.E.2d at 494. "Intrinsic value is a very subjective concept that looks to the worth of the property to the parties." *Id.* at 854, 589 S.E.2d at 493 (quoting Howell v. Howell, 31 Va. App. 332, 339, 523 S.E.2d 514, 517 (2000)). "The intrinsic value principle," the court noted, "applies to stock in a family owned company." *Id.*, 589 S.E.2d at 494.

94. 266 Va. 207, 585 S.E.2d 533 (2003).

95. *Id.* at 213, 585 S.E.2d at 536. An amendment to Virginia Code section 20-107.3 adds the use or expenditure of marital property by either of the parties for a nonmarital, separate purpose or the dissipation of such funds when such was done in anticipation of

In a significant case, *Courembis v. Courembis*,[96] the Court of Appeals of Virginia ruled that an "increase in value to separate property attributable to the significant personal contributions of *either* party renders that increase marital property" subject to equitable distribution.[97] This was a matter of first impression to the court,[98] which found that the marital contribution increases the value of separate property, thus rendering it subject to equitable distribution.[99]

H. *Child and Spousal Support*

In *Princiotto v. Gorrell*,[100] the court of appeals affirmed the circuit court's ruling, which ordered the father to pay the children's expenses directly, instead of to the mother because of her alleged financial irresponsibility.[101] In *Hatloy v. Hatloy*[102] the court of appeals ruled that the trial court had appropriately reduced the husband's child support obligation after finding that he should be imputed his current pay, rather than the pay from his former job.[103] On the other hand, in *Jones v. Davis*[104] the court reversed the trial court's ruling which allowed the father a credit against arrearages for non-conforming child support payments while, at the wife's request, the child was in his custody.[105]

A trial court's imposition of sanctions against a litigant and his attorney were affirmed by the court of appeals in *Fox v. Fox*.[106] The court ruled that "the husband was afforded an opportunity to be heard," on his motion to correct his child support arrearage, al-

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divorce or separation, or after the last separation of the parties to the factors that the court is directed to consider in determining the "division or transfer of jointly owned marital property, and the amount of any monetary award, the apportionment of marital debts, and the method of payment." Act of Apr. 12, 2004, ch. 757, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 20-107.3(E)(10) (Repl. Vol. 2004)).

96. 43 Va. App. 18, 595 S.E.2d 505 (Ct. App. 2004).
97. *Id.* at 32, 595 S.E.2d at 512.
98. *Id.*
99. *Id.* at 33, 595 S.E.2d at 513.
100. 42 Va. App. 253, 590 S.E.2d 626 (Ct. App. 2004).
101. *Id.* at 261, 590 S.E.2d at 630.
102. 41 Va. App. 667, 588 S.E.2d 389 (Ct. App. 2003).
103. *Id.* at 674, 588 S.E.2d at 392.
104. 43 Va. App. 9, 595 S.E.2d 501 (Ct. App. 2004).
105. *Id.* at 16, 595 S.E.2d at 504.
106. 41 Va. App. 88, 98, 581 S.E.2d 904, 909 (Ct. App. 2003).

though, by refusing to post bond, he did not avail himself of that opportunity.[107] In *Tucker v. Wimer*,[108] the court of appeals ruled that the father could not challenge an earlier paternity determination in a proceeding to collect his support arrearage, on the ground that he was not appointed a committee because he was incarcerated in jail, as opposed to the penitentiary.[109]

The General Assembly clarified that the retroactive modification of a child support order is not dependent on the court in which the petition was originally filed.[110] Child support orders may be modified retroactively to the date that the petition for modification was filed in the original court.[111]

The General Assembly also revised Virginia's child support guidelines to exclude from "gross income" any "[i]ncome received by the payor from secondary employment income . . . where the payor obtained the income to discharge a child support arrearage."[112] Furthermore, "[t]he cessation of such secondary income . . . shall not be the basis for a material change in circumstances upon which a modification of child support may be based."[113] In regard to medical treatment, the General Assembly replaced "extraordinary medical and dental expenses" with a requirement that "the parents pay in proportion to their gross incomes . . . any reasonable and necessary unreimbursed medical or dental expenses that are in excess of $250 for any calendar year for each child who is subject of the obligation."[114] The computation

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107. *Id.* at 95, 581 S.E.2d at 907–08. An attempted appeal from a juvenile and domestic relations district court to a circuit court in a child support case was unsuccessful because of the respondent's failure to file an appeal bond. Jones v. Commonwealth, No. 2376-03-3, 2004 Va. App. LEXIS 251, at *3–4 (Ct. App. June 1, 2004) (unpublished decision).

108. 42 Va. App. 42, 590 S.E.2d 73 (Ct. App. 2003).

109. *Id.* at 43, 590 S.E.2d at 73. Virginia law provides a committee through which incarcerated persons may assert their rights while in prison. *Id.* at 45, 590 S.E.2d at 74. "A court's authority to appoint and a committee's powers to act are conditioned 'upon the fact of conviction and sentence to confinement to the penitentiary. . . .'" *Id.* (quoting Merchant's v. Schry, 116 Va. 437, 445, 82 S.E. 106, 109 (1914)).

110. Act of Mar. 29, 2004, ch. 204, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 16.1-278.18 (Supp. 2004), 20-74, -108, -108.1, -112 (Repl. Vol. 2004), 63.2-1916 (Cum. Supp. 2004)).

111. VA. CODE ANN. §§ 16.1-278.18 (Supp. 2004), 20-74, -108, -108.1, -112 (Repl. Vol. 2004), 63.2-1916 (Cum. Supp. 2004).

112. VA. CODE ANN. § 20-108.2(C)(4) (Repl. Vol. 2004).

113. *Id.*

114. Act of Apr. 15, 2004, ch. 907, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 20-108.2(D) (Repl. Vol. 2004)).

and payment schedule of medical and dental expenses in sole and split custody arrangements is now identical to that for shared custody arrangements.[115] Under the shared custody arrangement, expenses are allocated in accordance with the parties' income shares and paid in addition to the basic child support obligation.[116] Courts are directed, "upon a showing of the tax savings a party derives from child-care deductions or credits. . . [to] factor actual tax consequences into its calculations of the child-care costs to be added to the basic child support obligation."[117] These guidelines will be reviewed every four years.[118]

In *Newman v. Newman*,[119] the Court of Appeals of Virginia dealt with the legal effect of a consent decree entered to amend spousal and child support.[120] The parties had come before the trial court for a hearing on a "Motion to Amend Spousal Support and Child Support;" however, they advised the court that they had resolved their differences and presented an agreed order "by counsel."[121] Less than five months later, the husband filed a "Motion to Eliminate and/or Reduce Spousal Support," arguing that "the [earlier] agreement could be judicially terminated or modified because (i) it was signed by counsel . . . rather than by the clients themselves, and (ii) it included an express provision contractually authorizing judicial termination or modification."[122] The trial court denied the motion and ruled that the order signed by counsel was the "parties' order," which could not be changed.[123] The court of appeals agreed that the decree was signed by both parties' lawyers acting with "actual authority" and thus satisfied the court's signature requirements.[124] However, the dissent argued that the signed order was simply a resolution of the issues currently in dispute before the court, based on a modifiable order,

115. *Compare* VA. CODE ANN. § 20-108.2(D) (Repl. Vol. 2004) *with* VA. CODE ANN. § 20-108.2(G)(1) *and* § 108.2(G)(2) (Repl. Vol. 2004) *and* § 20-108.2(G)(3)(b) (Repl. Vol. 2004).

116. VA. CODE ANN. § 20-108.2(D) (Repl. Vol. 2004).

117. *Id.* § 20-108.2(F) (Repl. Vol. 2004).

118. *Id.* § 20-108.2(H) (Repl. Vol. 2004).

119. 42 Va. App. 557, 593 S.E.2d 533 (Ct. App. 2004).

120. *Id.* at 561–62, 593 S.E.2d at 535–36.

121. *Id.* at 561, 593 S.E.2d at 535.

122. *Id.* at 561–62, 593 S.E.2d at 535–36.

123. *Id.* at 562, 593 S.E.2d at 536.

124. *Id.* at 568, 593 S.E.2d at 539.

and thus was not a "stipulation or contract" foreclosing later modification.[125]

In *Smith v. Smith*[126] the court ruled that the merger of an agreement, which was silent on the issue providing for spousal support, with a divorce decree, did not make the agreement subject to termination upon cohabitation.[127]

I. *Child Custody and Visitation*

1. Generally

In *Kane v. Szymczak*[128] the Court of Appeals of Virginia reversed the trial court's decision, which transferred custody of the parties' two minor children from the mother to the father, because the court did not specify the grounds for its decision, as required by section 20-124.3 of the Virginia Code.[129] At the same time, the court affirmed the lower court's order refusing to award attorney's fees to the father and directing him to pay the guardian ad litem's fees.[130]

In *Roberts v. Roberts*,[131] the mother "filed a motion to suspend or modify [her] former husband's visitation with their minor children."[132] The circuit court "awarded [the] mother sole legal and physical custody of the children, terminated [the] father's in-person visitation, and limited [the] father's contact with the children to scheduled, telephonic visits."[133] The evidence at the motion hearing revealed that the two children complained of "physical ailments immediately prior to their having to leave for visitation with [their] father."[134] Furthermore, the children testi-

125. *Id.* at 579, 593 S.E.2d at 544.

126. 41 Va. App. 742, 589 S.E.2d 439 (Ct. App. 2003).

127. *Id.* at 751, 589 S.E.2d at 443.

128. 41 Va. App. 365, 585 S.E.2d 349 (Ct. App. 2003).

129. *Id.* at 374, 585 S.E.2d at 354.

130. *Id.* at 376, 585 S.E.2d at 355. *See also* Lanzalotti v. Lanzalotti, 41 Va. App. 550, 555–56, 586 S.E.2d 881, 883 (Ct. App. 2003) (following *Kane* and reversing the trial court's custody order which failed to properly communicate to the parties the basis for it's decision pursuant to the Virginia Code).

131. 41 Va. App. 513, 586 S.E.2d 290 (Ct. App. 2003).

132. *Id.* at 513, 586 S.E.2d at 290.

133. *Id.* at 522, 586 S.E.2d at 294.

134. *Id.* at 519, 586 S.E.2d at 293.

fied that the father told them their mother was a fornicator and adulterer, was the "devil," and was going to hell.[135] A psychologist "testified [that] the children were 'distressed' by [their] father's proselytizing and condemnation of [their] mother."[136] The trial court determined "that continued in-person visitation with [the] father [was] contrary to the children's best interests.[137] The court of appeals affirmed the termination of visitation and the restrictions on telephone contact despite claims the action violated the First Amendment.[138]

The General Assembly enacted a bill providing that, in considering the best interests of the child with respect to custody and visitation, courts may disregard "[t]he propensity of each parent to actively support the child's contact and relationship with the other parent," if there is "any history of family abuse."[139] In regard to the requirement that parties in custody cases show they have participated in parenting classes,[140] the General Assembly provided that "the court may require the parties to attend such seminar or program in uncontested cases only if the court finds good cause."[141]

The General Assembly created a special rate for filing fees in custody and visitation proceedings, barring any add-on fees in these cases.[142] The special rate for appeals applies, thus avoiding multiple fees where there is more than one child involved in a case or if both custody and visitation are involved.[143]

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135. *Id.* The father and his new wife were very religious and insisted that the children read the Bible and do chores while they were visiting. *Id.*

136. *Id.* at 520–21, 586 S.E.2d at 294.

137. *Id.* at 527, 586 S.E.2d at 297.

138. *Id.* In another case raising similar First Amendment questions, a federal district judge sitting in Virginia upheld the constitutionality of the International Parental Kidnapping Crime Act, 18 U.S.C. § 1204 (2000), and its application to an Iranian father for retaining his daughter in Iran with the intent to obstruct the mother's lawful custody right. United States v. Shahani-Jahromi, 286 F. Supp. 2d 723, 736 (E.D.Va. 2003).

139. Act of Mar. 29, 2004, ch. 221, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 20-124.3(6), (9) (Repl. Vol. 2004)).

140. VA. CODE ANN. § 16.1-278.15 (Supp. 2004).

141. Act of Apr. 12, 2004, ch. 732, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 16.1-278.15(A) (Supp. 2004), 20-103(A) (Repl. Vol. 2004)).

142. Act of Apr. 12, 2004, ch. 727, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 16.1-69.48:5 (Supp. 2004)).

143. VA. CODE ANN. §§ 16.1-296, -296.2 (Supp. 2004).

2. Custodian Relocation

During the past year, three cases addressed the difficult issue of custodian relocation. In *Petry v. Petry*[144] the Court of Appeals of Virginia affirmed the trial court's decision, which granted the mother permission to relocate from Lynchburg, Virginia, to Long Island, New York, where the children had spent much of their time in their early years.[145] The father spent little time with the children, committed adultery with one of his employees and became increasingly detached from his family.[146]

In *Sullivan v. Jones*,[147] the court of appeals considered the case for the second time, having reversed the circuit court's previous order allowing the mother to relocate to South Carolina.[148] Upon remand, the mother petitioned the court for a second time seeking permission to stay in South Carolina, which the circuit court granted.[149] The court of appeals affirmed, agreeing with the circuit court that the child's best interests would be served by remaining in South Carolina in light of the changed circumstances from the first case.[150] Relocation was also permitted in *Wheeler v. Wheeler*.[151] In this case, the mother had significant financial problems residing in northern Virginia, where the father lived, and desired to move to Florida to re-marry and provide a better life for the children in a more economically secure setting.[152] The court of appeals found that the economic distress the mother and children were experiencing constituted a material change in circumstances and, therefore, the trial court did not err in finding relocation to be in the children's best interests.[153]

144. 41 Va. App. 782, 589 S.E.2d 458 (Ct. App. 2003).

145. *Id.* at 793, 796, 589 S.E.2d at 464–65.

146. *Id.* at 787, 589 S..E.2d at 460–61.

147. 42 Va. App. 794, 595 S.E.2d 36 (Ct. App. 2004).

148. Id. at 799, 595 S.E.2d at 38; *see* Sullivan v. Knick, 38 Va. App. 773, 784–85, 568 S.E.2d 430, 435–36 (Ct. App. 2002).

149. 42 Va. App. at 802, 595 S.E.2d at 40.

150. *Id.* at 812, 595 S.E.2d at 45.

151. 42 Va. App. 282, 591 S.E.2d 698 (Ct. App. 2004).

152. *Id.* at 286–87, 591 S.E.2d at 700–01.

153. *Id.* at 294, 591 S.E.2d at 704.

3. Grandparent or Third-Party Visitation or Custody

In *Long v Holt-Tillman*,[154] the child had lived with the grandmother for most of her life,[155] and the grandmother filed a complaint with Child Protective Services (CPS) against the natural parents.[156] During the ensuing investigation, the mother signed a consent order awarding joint legal custody of the child to herself and the grandmother and awarding sole physical custody to the grandmother.[157] The trial court ruled, and the court of appeals agreed, that this consent order, even though intended to be temporary, was a voluntary relinquishment of physical custody, thus making the parental presumption inapplicable.[158] In light of the strong relationship the child had with the grandmother, the stable living environment she enjoyed with her, and the history with the natural parents, the circuit court's order was not an abuse of discretion.[159]

In *Harris v. Boxler*,[160] the trial court correctly found that there was "virtually no evidence" to show that the grandmother's visitation with her granddaughter would be in the child's best interests since her son was incarcerated for sexually assaulting the child's mother.[161] In *O'Leary v. Moore*,[162] the court of appeals ruled that the trial court properly denied a maternal grandmother's petition for visitation of her grandchild where the father, the child's surviving parent, was a fit parent.[163] Furthermore, there was no showing of "actual harm to the child's health or welfare without such visitation."[164] Finally, in *Crawley v. Ford*[165] the court of appeals affirmed the trial court's order awarding legal and primary custody to the father and his wife based on an "agreement" with

154. No. 1434-03-3, 2004 Va. App. LEXIS 239 (Ct. App. May 25, 2004) (unpublished decision).

155. *Id.* at *2.

156. *Id.* at *4.

157. *Id.*

158. *Id.* at *12.

159. *Id.* at *18.

160. No. 0604-03-3, 2003 Va. App. LEXIS 461 (Ct. App. Sept. 2, 2003) (unpublished decision).

161. *Id.* at *10.

162. No. 3187-02-2, 2003 Va. App. LEXIS 391 (Ct. App. July 8, 2003) (unpublished decision).

163. *Id.* at *3.

164. *Id.* at *2.

165. 43 Va. App. 308, 597 S.E.2d 264 (Ct. App. 2004).

the maternal grandmother, who had cared for the child much of her life.[166] The court of appeals found that the grandmother "failed to provide an adequate record to enable us to consider her arguments on appeal."[167]

In an unusual case, *Griffin v. Griffin*,[168] the court of appeals ruled that the trial court had applied the wrong standard in awarding non-parent visitation to the mother's estranged husband, after a paternity test established that another man was the biological father, and it reversed the lower court's judgment.[169] The appropriate standard required clear and convincing evidence of actual harm to the child, by denying visitation, rather than the more customary "best interests" standard.[170]

K. *Adoption*

Legislation enacted in 2004 that impacts the adoption process requires any child-placing agency "outside the Commonwealth, or its agent, [that] executes an entrustment agreement in the Commonwealth with a birth parent for the termination of all parental rights and responsibilities with respect to a child" to comply with the Commonwealth's laws regarding entrustment agreements, revocations of agreements, and birth parent counseling.[171] Any entrustment agreement that fails to follow such requirements is void.[172] An Attorney General's opinion concluded that "a stepchild, that has not been adopted by the stepparent, is not the 'offspring' of a stepparent and, therefore, is not included in the legal definition of 'member of the immediate family' for purposes of § 15.2-2244(A)" when dealing with the family exception to the subdivision of lots or parcels of land.[173]

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166. *Id.* at 309–10, 597 S.E.2d at 265.

167. *Id.* at 310, 597 S.E.2d at 265.

168. 41 Va. App. 77, 581 S.E.2d 899 (Ct. App. 2003).

169. *Id.* at 86, 581 S.E.2d at 903.

170. *Id.* at 85, 581 S.E.2d at 903.

171. Act of April 14, 2004, ch. 815, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 63.2-1200, -1221, -1222, -1817 (Cum. Supp. 2004)). The bill also added the requirement that "an entrustment agreement for the termination of all parental rights and responsibilities shall be executed in writing and notarized." *Id.*

172. *Id.*

173. Op. to Donald D. Litten, County Attorney for Shenandoah County (Mar. 23, 2004), *available at* http://www.oag.state.va.us (last visited Sept. 24, 2004). Addressing name

IV. DELINQUENCY AND CHILDREN IN NEED OF SUPERVISION

A. *Juvenile Death Penalty*

The juvenile death penalty returned to the public eye this year with the high profile trial of Lee Boyd Malvo, who was charged as a juvenile for capital murder.[174] The issue will most likely continue to be one of great interest on both the state and the national level, based on the recent acts of both the Supreme Court of the United States and the Supreme Court of Virginia.

In *Johnson v. Commonwealth*,[175] the Supreme Court of Virginia confirmed a death sentence imposed in a capital murder case involving a defendant who was sixteen years old at the time of the offense.[176] The court considered a range of issues, including the question of whether the circuit court erred in refusing to impose a life sentence pursuant to *Atkins v. Virginia*.[177] Because the court found the defendant's claim of mental retardation to be frivolous, it affirmed the death sentence.[178] The Supreme Court of Virginia also ruled that "any further determination whether 16 and 17-year-old persons convicted of capital murder should be eligible to receive the death penalty in Virginia is a matter to be decided by the General Assembly, not by the courts."[179]

Nonetheless, the court's statement should not deter any lawyer representing a juvenile defendant facing a capital murder charge

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changes after adoption, the Supreme Court of Virginia ruled that a circuit court erred in granting a petition by the child's biological father, who was never married to the mother, to change the child's surname to his own. Spero v. Heath, 267 Va. 477, 480–81, 593 Va. 239, 240–41 (2004). The court found that the father had not successfully carried the burden of proving that the name change was in the best interest of the child, in light of the criteria delineated by prior cases. *Id.* at 80, 593 Va. at 240; *see, e.g.*, Flowers v. Cain, 218 Va. 234, 237 S.E.2d 111 (1977).

174. On May 5, 2004, Lee Boyd Malvo was sentenced to life in prison without parole for his involvement in the October 14, 2002 shooting of an FBI analyst. *Sniper Malvo Sentenced to Life Without Parole* (May 5, 2004), *at* http://www.cnn.com/2004/LAW/03/10/sniper.malvo/index.html (last visited Sept. 17, 2004).

175. 267 Va. 53, 591 S.E.2d 47 (2004).

176. *Id.* at 57, 62, 591 S.E.2d at 49, 51.

177. 536 U.S. 304 (2002) (holding that the execution of mentally retarded individuals is cruel and unusual punishment). For an in-depth discussion of the Court's decision in *Atkins*, see Jaime L. Henshaw, Note, Atkins v. Virginia: *The Court's Failure to Recognize What Lies Beneath*, 37 U. RICH. L. REV. 1185 (2003).

178. *Johnson*, 267 Va. at 75, 591 S.E.2d at 59.

179. 267 Va. at 76, 591 S.E.2d at 60.

in the Commonwealth from challenging the penalty on constitutional grounds. After fifteen years since last taking up the issue of the juvenile death penalty,[180] the Supreme Court of the United States granted a writ of certiorari to review the Supreme Court of Missouri's decision overturning a juvenile's death sentence as cruel and unusual punishment.[181] The case, *Roper v. Simmons*, is set to be heard by the Court in the October 2004 term[182] and will certainly have an impact on any attorney representing juvenile clients in capital cases.

B. *Confessions*

In *Yarborough v. Alvarado*,[183] The Supreme Court of the United States reversed a decision of the United States Court of Appeals for the Ninth Circuit granting habeas corpus relief to a state prisoner who was convicted of murder committed as a minor and who had confessed to the crime during an interrogation without being advised of his *Miranda*[184] rights.[185] The court of appeals granted relief because it felt the state courts had erred by failing to take into account Alvarado's age and inexperience when determining whether a reasonable person would have thought he was in custody.[186] The clearly established law of the Supreme Court concerning juvenile status compelled "the extension of the principle that juvenile status is relevant" to a *Miranda* custody determination; therefore, the federal courts did not need to give deference to the state court determinations on habeas review.[187] The Supreme Court determined that the California court's application of "clearly established law was reasonable" because, even without the deference requirement mandated by the federal Antiterrorism and Effective Death Penalty Act,[188] "it can be said that fair-

180. *See* Stanford v. Kentucky, 492 U.S. 361 (1989) (upholding the constitutionality of capital punishment for youths sixteen years of age or older).

181. *See* Simmons v. Roper, 112 S.W.3d 397 (Mo. 2003), *cert. granted*, 124 S. Ct. 1171 (2004).

182. *Id.*

183. 124 S. Ct. 2140 (2004).

184. Miranda v. Arizona, 384 U.S. 436 (1966).

185. *Yarborough*, 124 S. Ct. at 2144.

186. Alvarodo v. Hickman, 316 F.3d 841, 843–44 (9th Cir. 2002).

187. *Id.* at 853.

188. 28 U.S.C. § 2254(d)(1) (2000). Under the AEPPA, a federal court can grant an application for a writ of habeas corpus on behalf of a person held pursuant to a state court

minded jurists could disagree over whether Alvarado was in custody."[189] The Court listed several factors that pointed to him being in custody:

> Comstock [the officer] interviewed Alvarado at the police station. The interview lasted two hours . . . [and] Comstock did not tell Alvarado that he was free to leave. Alvarado was brought to the police station by his legal guardians rather than arriving on his own accord . . . [and] Alvarado's parents asked to be present at the interview but were rebuffed . . . .[190]

On the other hand, there were other factors that pointed to Alvarado not being in custody:

> The police did not transport Alvarado to the station or require him to appear at a particular time. They did not threaten him or suggest he would be placed under arrest. Alvarado's parents remained in the lobby during the interview, suggesting that the interview would be brief. In fact, according to trial counsel for Alvarado, he and his parents were told that the interview was "not going to be long." During the interview, Comstock focused on Soto's crimes rather than Alvarado's. Instead of pressuring Alvarado with the threat of arrest and prosecution, she appealed to his interest in telling the truth and being helpful to a police officer. In addition, Comstock twice asked Alvarado if he wanted to take a break. At the end of the interview, Alvarado went home.[191]

The Court concluded that the state court acted reasonably and the Ninth Circuit should not have granted habeas corpus relief.[192] On the substantive issue of whether age should be a factor in the determination of whether a suspect is "in custody," Justice Kennedy, writing for the majority, applied an objective test,[193] while Justice Breyer's dissent urged a more subjective standard that would consider the suspect's youth in determining what a reasonable person would think.[194] Justice O'Connor, concurring, stated that

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judgment if the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.*

189. *Yarborough*, 124 S. Ct. at 2149.

190. *Id.* at 2150.

191. *Id.* at 2149–50 (citations omitted).

192. *Id.* at 2152.

193. *Id.* at 2151–52.

194. *Id.* at 2153–56.

> [t]here may be cases in which a suspect's age will be relevant to the *Miranda* "custody" inquiry. In this case, however, Alvarado was almost 18 years old at the time of his interview. It is difficult to expect police to recognize that a suspect is a juvenile when he is so close to the age of majority.[195]

In *J.D. v. Commonwealth*,[196] a fourteen-year-old juvenile defendant was convicted of petit larceny for a theft that occurred at his high school.[197] The critical evidence against him was a statement he made during questioning by an associate principal at the school, in the presence of the principal and the school resource police officer.[198] The court concluded that he was not entitled to any *Miranda* warning prior to questioning by the associate principal, that his statements were both voluntary and admissible, and that the youth's "subjective concern that he might have received some disciplinary action" if he refused to answer questions was insufficient to establish any coercion or compulsion against his will.[199] The court of appeals said that "a school principal or other school official who questions a student about a possible violation of law or school regulation does not, absent other circumstances, act as a law enforcement officer or agent of the state with law enforcement authority."[200]

Furthermore, "[w]hile the security officer was present in the room, he made no show of authority suggesting that J.D. was under arrest or not free to leave . . . [and his] mere presence during Wright's questioning did not convert the questioning into a custodial interrogation by a law enforcement officer."[201] Regarding J.D.'s concern about likely administrative action if he refused to cooperate, the court of appeals stated that the "subjective concern that he might have received some disciplinary action is not suffi-

195. *Id.* at 2152.

196. 42 Va. App. 329, 591 S.E.2d 721 (Ct. App. 2004). For further discussion of this case, see Mara G. Decker & Stephen R. McCullough, *Annual Survey of Virginia Law: Criminal Law and Procedure*, 39 U. RICH. L. REV. 133, 146 (2004).

197. *Id.* at 332, 591 S.E.2d at 723.

198. *Id.* at 32–33, 591 S.E.2d at 723. During the interview in question, the student was neither told he could not leave the office, nor was he physically restrained. *Id.* at 333, 591 S.E.2d at 723.

199. *Id.* at 341, 591 S.E.2d at 727.

200. *Id.* at 335, 591 S.E.2d at 724.

201. *Id.* at 337, 591 S.E.2d at 725.

cient to prove that state action coerced or compelled him to answer questions against his will."[202]

C. *Right to Counsel*

An important piece of legislation enacted in 2004 requires the appointment of an attorney for a child prior to the initial detention hearing, unless counsel already has been retained and appears on behalf of the child;[203] Virginia Code section 16.1-267 provides for the payment of such court-appointed attorney.[204] The law requires that the attorney be notified of the detention hearing, and any rehearing, and specifies that the attorney "shall be given the opportunity to be heard."[205]

The statute further provides that if the child is not released and a parent, guardian, legal custodian or other person standing *in loco parentis* is not notified and does not appear or does not waive appearance at the hearing, upon the written request of such person stating that such person is willing and available to supervise the child upon release from detention and to return the child to court for all scheduled proceedings on the pending charges, the court shall rehear the matter on the next day on which the court sits within the county or city wherein the charge against the child is pending.[206] Furthermore, if it is determined that the child is not indigent, the parents must pay the costs of the attorney.[207]

Of special significance, Virginia Code section 16.1-266 states that a child who is alleged to have committed an offense that could lead to commitment in a juvenile correctional center may not waive his right to an attorney unless he or she has consulted with a lawyer.[208]

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202. *Id.* at 341, 591 S.E.2d at 727.

203. VA. CODE ANN. § 16.1-266(B) (Supp. 2004). This code section does not take effect until July 1, 2005. *Id.*

204. *Id.* § 16.1-267(B) (Supp. 2004). This code section does not take effect until July 1, 2005. *Id.*

205. *Id* § 16.1-250(C)–(D) (Supp. 2004). This code section does not take effect until July 1, 2005. *Id.*

206. *Id.* § 16.1-250(H) (Supp. 2004).

207. *Id.* § 16.1-267(A) (Supp. 2004).

208. *Id.* § 16.1-266 (Supp. 2004).

Another major piece of legislation, Virginia Code section 19.2-163.01, established the Indigent Defense Commission.[209] The Commission will establish criteria for the qualification of court-appointed lawyers.[210] In order to qualify as a court-appointed lawyer in juvenile cases, an attorney must have completed six hours of continuing legal education approved by the Commission, as well as four hours of instruction specifically focused on juvenile court practice.[211] Furthermore, as discussed above, the recent legislation also extends the ability of lawyers to access health and other records while representing juveniles.[212] This recent amendment serves to equalize the right of access by counsel in delinquency cases with that already enjoyed by guardians ad litem.[213]

D. *Intake, Detention, and Pretrial Matters*

The General Assembly made several changes to the Virginia Code dealing with juvenile intake. One amendment permits a juvenile intake officer to proceed informally against a juvenile, more than once, where the juvenile is alleged to have committed an offense that would be, at the most, a Class 1 misdemeanor if committed by an adult or is alleged to have committed a status offense.[214] Also, an intake officer is required to notify the school division superintendent of the filing of a petition against a juvenile in cases involving criminal street gang activity.[215]

An amendment to detention provisions in the Virginia Code allows juvenile intake officers and magistrates to order confinement of a person eighteen years of age or older in a jail rather than a juvenile detention home for an offense that occurred prior to the person reaching the age of eighteen.[216] Another amendment

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209. *Id.* § 19.2-163.01 (Repl. Vol. 2004).

210. *Id.* The Commission will also assume the duties of the existing Public Defender Commission, which was abolished by the bill. Act of Apr. 15, 2004, ch. 921, 2004 Va. Acts ___ (codified at VA. CODE ANN. §§ 19.2-163.01, -163.02 (Repl. Vol. 2004)).

211. VA. CODE ANN. § 19.2-163.03(C) (Repl. Vol. 2004). This code section does not take effect until July 1, 2005. *Id.*

212. VA. CODE ANN. § 16.1-266(G) (Supp. 2004).

213. *See id.*

214. Act of Mar. 31, 2004, ch. 309, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 16.1-260 (Supp. 2004)).

215. VA. CODE ANN. § 16.1-260(G)(11) (Supp. 2004).

216. *Id.* § 16.1-249(H) (Supp. 2004).

provides that a juvenile's probation officer may search for less restrictive alternatives when a juvenile is detained in a local detention facility.[217] In a further effort to reduce the detention of juveniles in Virginia, the General Assembly amended the Virginia Code to require a circuit court, when practicable, to hear an appeal of a juvenile court's transfer decision within forty-five days after transfer from the juvenile court.[218] The court must hold a hearing, when practicable, on the merits of any appeal of a juvenile court finding of delinquency or disposition within forty-five days of its filing, if the juvenile is in a secure facility pending appeal.[219]

> A juvenile held continuously in secure detention shall be released from confinement if there is no hearing on the merits of his case within 45 days of the filing of the appeal. The circuit court may extend the time limitations for a reasonable period of time based upon good cause shown . . . .[220]

The court must document the extension in the case record.[221] The General Assembly also eliminated language in Virginia Code section 16.1-275 that authorized the placement of a juvenile who is alleged to be a child in need of services in the temporary custody of the Department of Juvenile Justice for evaluation purposes, something that already existed in practice.[222]

E. *Transfer and Certification for Trial as an Adult*

As almost a decade has passed since the initial major revisions to the transfer statutes in 1994, the number of cases addressing transfer and certification issues has dropped considerably. Only a handful of cases were decided in the past year, and there were no legislative changes.

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217. *Id.* § 16.1-248.1(C) (Supp. 2004).

218. Act of Apr. 12, 2004, ch. 468, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 16.1-269.6(B) (Supp. 2004)).

219. VA. CODE ANN. § 16.1-269.6(B) (2004 Supp.).

220. *Id.*

221. *Id.*

222. Act of Mar. 31, 2004, ch. 321, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 16.1-275 (Supp. 2004)).

In *Cook v. Commonwealth*,[223] a juvenile's past certification as an adult by the juvenile court established his status as an adult, pursuant to Virginia Code section 16.1-271, for the jurisdictional purposes of the instant case.[224] The juvenile was considered an adult in the circuit court where he was indicted and arraigned.[225] Although those charges were dismissed by nolle prosequi, he was nonetheless treated as an adult during the pendency of those proceedings according to the language of Virginia Code section 16.1-271.[226] Because of his previous treatment as an adult, the juvenile courts were precluded from exercising jurisdiction over him in relation to the current charges because he had been previously treated as an adult,[227] and, therefore, the circuit court properly acquired jurisdiction.[228] The Supreme Court of Virginia affirmed convictions in *Schwartz v. Commonwealth*,[229] where the juvenile defendant was convicted as an adult of three separate counts of arson.[230] The personal property items burned were located in a residential driveway.[231] The fire began in a pick-up truck, spread to a sport utility vehicle and then to the house.[232] The three burnings were separate and distinct offenses and could be prosecuted as such.[233] The juvenile appealed the ruling that treated the burning objects as separate arson counts.[234] The supreme court upheld the ruling.[235]

223. 268 Va. 111, 597 S.E.2d 84 (2004).

224. *Id.* at 113, 116, 597 S.E.2d at 85, 87. The juvenile had been certified by the circuit court; however, his charges were dismissed nolle prosequi by the grand juries. *Id.* at 113, 597 S.E.2d at 85.

225. *Id.*

226. *Id.*; *see also* VA. CODE ANN. § 16.1-271 (Repl. Vol. 2003).

227. *Cook*, 268 Va. at 114, 597 S.E.2d at 86.

228. *Id.* at 116, 597 S.E.2d at 87.

229. 267 Va. 751, 594 S.E.2d 925 (2004). For addition discussion, see Decker & McCullough, *supra* note 196, at 164.

230. *Id.* at 752–53, 594 S.E.2d at 926.

231. *Id.*

232. *Id.* at 753, 594 S.E.2d at 926.

233. *Id.*

234. *Id.*

235. *Id.* at 755, 594 S.E.2d at 927.

F. *Adjudication and Disposition*

In *Jarrett v. Commonwealth*,[236] the Court of Appeals of Virginia held that the appeal was without merit.[237] Jarrett sought credit for time served.[238] The circuit judge had already given Jarrett the relief she sought, providing in the sentencing order that the Department of Juvenile Justice give her credit for the time she had served in pretrial detention, even though there was no statutory authority for that action in an indeterminate commitment.[239] Legislation adopted in 2004 requires that, for a juvenile eleven years of age or older to be committed to the Department of Juvenile Justice for an offense that would be a Class 1 misdemeanor if committed by an adult, the juvenile must have previously been adjudicated a delinquent on three separate occasions.[240]

G. *Juvenile Court Records and Confidentiality*

In *Williams v. Commonwealth*,[241] the defendant, an adult, sought to use a prosecution witness's juvenile convictions to attack his credibility, rather than to demonstrate that the witness was biased.[242] Under a long line of precedential cases, the trial judge properly limited the questioning.[243]

The General Assembly mandated the taking of fingerprints and photographs of any juvenile taken into custody and charged with a delinquent act if the charge is one that has to be reported to the Central Criminal Records Exchange.[244] If the juvenile is found not guilty, the fingerprints and photographs are destroyed.[245] If the

236. No. 1390-02-2, 2003 Va. App. LEXIS 503 (Ct. App. Oct. 7, 2003) (unpublished decision).

237. *Id.* at *4.

238. *Id.* at *3–4.

239. *Id.* at *4–5. The court stated that Virginia Code section 53.1-187 had no applicability to adults. *Id.*; *see* VA. CODE ANN. § 53.1-187 (Repl. Vol. 2002).

240. Act of Mar. 31, 2004, ch. 325, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 16.1-278.8(14) (Supp. 2004)).

241. No. 0170-03-1, 2003 Va. App. LEXIS 695 (Ct. App. Dec. 30, 2003) (unpublished decision).

242. *Id.* at *2–3.

243. *Id.* at *3–4.

244. Act of Apr. 12, 2004, ch. 464, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 16.1-299(B) (Supp. 2004)).

245. VA. CODE ANN. § 16.1-299(C) (Supp. 2004).

juvenile was charged with a violent juvenile felony, the records are maintained in the Central Criminal Records Exchange and the juvenile court.[246] Another amendment to the juvenile code authorizes the Commonwealth's Attorney to obtain from a juvenile court papers filed in connection with a juvenile adjudication of guilt for an offense "that would be a felony if committed by an adult" for use as "evidence in a pending criminal prosecution for a violation of § 18.2-308.2"—possession or transportation of firearms, stun weapons, tasers, or concealed weapons by a convicted felon.[247]

H. *Criminal Street Gangs*

One issue addressed by the General Assembly was the involvement of juveniles in criminal street gangs.[248] Virginia Code section 16.1-330.1 was amended so that juveniles who have been convicted of a criminal street gang felony are considered serious juvenile offenders and qualify for the Serious or Habitual Offender Comprehensive Action Program ("SHOCAP").[249] Previously, the only way a juvenile could qualify was if they had been convicted of three felonies or misdemeanors, unless the felonies were murder, attempted murder, armed robbery, or malicious wounding.[250] Another amendment makes it a Class 1 misdemeanor to recruit a person into a criminal street gang; an adult recruiting a minor is a Class 6 felony.[251] It is now a Class 6 felony to encourage a person to become a gang member through the use, or threat, of force against that person or another person.[252] Furthermore, a third or subsequent conviction within ten years of

246. *Id.*

247. Act of Apr. 12, 2004, ch. 446, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 16.1-305(D1) (Supp. 2004)). The legislation also allows a bail bondsman to know the status of his bond on a juvenile without obtaining access to any other part of the juvenile's record. VA. CODE ANN. § 16.1-305(c) (Supp. 2004).

248. For a further discussion of the criminal law implications of these recent amendments, see Decker & McCullough, *supra* note 196, at 178–79.

249. Act of Apr. 12, 2004, ch. 418, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 16.1-330.1(A) (Supp. 2004)). SHOCAP is a program providing control, supervision, and treatment for serious or habitual juvenile offenders. VA. CODE ANN. § 16.1-330.1(B) (Supp. 2004).

250. Va. Code Ann. § 16.1-330.1(B) (Repl. Vol. 2003).

251. VA. CODE ANN. § 18.2-46.3(A) (Repl. Vol. 2004).

252. *Id.* § 18.2-46.3(B) (Repl. Vol. 2004).

prohibited criminal street gang participation or recruitment is a Class 3 felony.[253]

I. *Weapons Issues*

The General Assembly enacted legislation allowing a locality to regulate or restrict the use of pneumatic guns by ordinance.[254] This includes requiring that minors under the age of sixteen have adult supervision when using pneumatic guns,[255] although "[n]o such ordinance . . . shall prohibit the use of pneumatic guns at facilities approved for shooting ranges or on other property where firearms may be discharged."[256] "Commercial or private areas designated for use of pneumatic paintball guns may be established," but such areas must provide protective equipment for the face and ears of participants, and "signs must be posted to warn against entry into the paintball area" by unprotected persons.[257] If a school operates a Junior Reserve Officers Training Corps ("JROTC") program, the school cannot "prohibit the JROTC program from conducting marksmanship training when such training is a normal element of such programs. . . . The administration of a school operating a JROTC program shall cooperate with the JROTC staff in implementing such marksmanship training."[258]

Another amendment was enacted clearly to authorize school divisions to establish disciplinary policies prohibiting the possession of firearms "on school property, school buses, and at school-sponsored activities" by students.[259] It authorizes school divisions to take disciplinary actions against students who violate

253. *Id.* § 18.2-46.3:1 (Repl. Vol. 2004).

254. Act of Apr. 15, 2004, ch. 930, 2004 Va. Acts ____ (codified at VA. CODE ANN. § 15.2-915.4 (Supp. 2004)). The Virginia Code Commission changed the numbering of this section. The General Assembly originally numbered this section as 15.2-915.2; however, since section 15.2-915.2 already existed in the Code, and the General Assembly did not intend to repeal this section, the Virginia Code Commission renumbered the new section as section 15.2-915.4. VA. CODE ANN. § 15.2-915.4 (Supp. 2004).

255. VA. CODE ANN. § 15.2-915.4(A) (Supp. 2004).

256. *Id.* § 15.2-915.4(B) (Supp. 2004).

257. *Id.* § 15.2-915.4(D) (Supp. 2004). A pneumatic gun means "any implement, designed as a gun, that will expel a BB or a pellet by action of pneumatic pressure." *Id.* § 15.2-915.4(E) (Supp. 2004). The definitions of other types of firearms are clarified to distinguish between firearms and pneumatic guns. *Id.* § 18.2-299 (Repl. Vol. 2004).

258. VA. CODE ANN. § 22.1-277.07(D) (Supp. 2004).

259. Act of Apr. 12, 2004, ch. 560, 2004 Va. Acts ___ (codified at VA. CODE ANN. § 22.1-277.07:1 (Supp. 2004)).

such policies.[260] This measure will allow school boards to establish policies to discipline students who carry weapons on school property, including an unloaded firearm in a closed container. The bill was in response to an October 2003 opinion of the Attorney General indicating that

> a school board has authority to discipline, in the context of the complete analysis herein, a student whose action is in conformance with the language of Chapter 619 of the 2003 Acts of Assembly which amends and reenacts § 18.2-308.1(B), pertaining to the possession of an unloaded firearm in a locked vehicle trunk.[261]

While noting that the 2003 legislation is not a model of clarity, the Attorney General stated that

> [a]s long as the regulations of the school authorities are not inconsistent with the 2003 amendment, school authorities are authorized to promulgate reasonable regulations that may result in the discipline of a student whose action is in conformance with the language of the 2003 amendment pertaining to the possession of an unloaded firearm.[262]

The 2004 legislation attempts to clarify the extent of the authority of school divisions. In *Esteban v. Commonwealth*,[263] the Supreme Court of Virginia affirmed the lower court's ruling, holding that the statute proscribing possession of a firearm on school property is "one of strict criminal liability, and that the Commonwealth was required to prove only that the defendant had possessed, on school property, a firearm of the type described in the statute."[264]

260. *Id.*

261. Op. to Hon. Kevin G. Miller, Member, Senate of Virginia (Oct. 15, 2003), *available at* http://www.oag.state.va.us (last visited Sept. 24, 2004).

262. *Id.*

263. 266 Va. 605, 587 S.E.2d 523 (2003).

264. *Id.* at 610, 587 S.E.2d at 526. Although Esteban was not a juvenile, the case is included here because the charge is frequently placed against juveniles.

V. ABUSE OR NEGLECT AND TERMINATION OF PARENTAL RIGHTS

A. *Civil Handling of Abuse or Neglect Matters*

In *Mulvey v. Jones*,[265] the Court of Appeals of Virginia agreed that substantial evidence supported the circuit court's finding that an injury inflicted by a teacher on a student constituted physical abuse, and was not simply accidental.[266] In another federal civil rights case, *Gedrich v. Fairfax County Department of Family Services*,[267] a family's federal and state claims against various social service agencies and individuals, which were connected to the allegedly false allegations of sexual abuse that resulted in the daughter's three-month separation from her family, were dismissed on immunity and statute of limitations grounds.[268] Some of the private individuals were retained, however, in the pending case.[269]

Addressing a persistent issue, the Attorney General of Virginia issued an opinion ruling that "a juvenile court judge has the authority to order a local board of social services to accept a noncustodial entrustment of a child found to be in need of services."[270]

The General Assembly amended the definition of child abuse and neglect to include

> a child who is with his parent or other person responsible for his care either (i) during the manufacture or attempted manufacture of a Schedule I or II controlled substance, or (ii) during the unlawful sale of such substance by that child's parents or other person responsible for his care, where such manufacture, or attempted manufacture or unlawful sale would constitute a felony.[271]

Another amendment provides that in civil proceedings involving child abuse, neglect, or abandonment

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265. 41 Va. App. 600, 587 S.E.2d 728 (Ct. App. 2003).

266. *Id.* at 604, 587 S.E.2d at 730.

267. 282 F. Supp. 2d 439 (E.D. Va. 2003).

268. *Id.* at 439–40, 479–80.

269. *Id.* at 479–80.

270. Op. to Hon. Frank D. Hargrove, Sr., Member, House of Delegates (Mar. 22, 2004), *available at* http://www.oag.state.va.us (last visited Sept. 24, 2004).

271. Act of Apr. 12, 2004, ch. 753, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 16.1-228(1) (Supp. 2004)).

> based solely on the parent having left the child at a hospital or rescue squad, it shall be an affirmative defense that such parent safely delivered the child to a hospital that provides 24-hour emergency services or to an attended rescue squad that employs emergency medical technicians, within 14 days of the child's birth.[272]

Addressing the responsibility of teachers with respect to child abuse, another enactment requires

> [e]ach public school board and each administrator of every private or parochial school shall post . . . a notice . . . that: (i) any teacher or other person employed in a public or private school . . . is required to report such suspected cases of child abuse or neglect to local or state social services agencies or the person in charge of the relevant school or his designee; and (ii) . . . [that they] are immune from civil or criminal liability or administrative penalty or sanction on account of such reports unless such person has acted in bad faith or with malicious purpose.[273]

The General Assembly also added legislation requiring the Child Protective Services Unit to establish standards of training "regarding the legal duties of the [child protective services] workers in order to protect the constitutional and statutory rights and safety of children and families from the initial time of contact during investigation through treatment."[274] Virginia Code section 63.2-1503 was amended to require

> [t]he local department [to] notify the custodial parent and make reasonable efforts to notify the noncustodial parent . . . of a report of suspected abuse or neglect of a child who is the subject of an investigation or is receiving family assessment, in those cases in which such custodial or noncustodial parent is not the subject of the investigation.[275]

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272. Act of Mar. 31, 2004, ch. 245, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 16.1-228(5) (Supp. 2004)). For the purposes of terminating parental rights and placing a child for adoption, a court may find that the child has been neglected upon the ground of abandonment. *Id.*

273. Act of Apr. 12, 2004, ch. 752, 2004 Va. Acts ___ (codified at VA. CODE ANN. § 22.1-291.3 (Supp. 2004)). "The notice shall also include the Virginia Department of Social Services' toll-free child abuse and neglect hotline." VA. CODE ANN. § 22.1-291.3 (Supp. 2004).

274. Act of Mar. 29, 2004, ch. 233, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 63.2-1502(b) (Cum. Supp. 2004)). The legislation also requires local departments of social services, "at the initial time of contact with the person subject to a child abuse and neglect investigation, [to] advise such person of the complaints or allegations made against the person." VA. CODE ANN. § 63.2-1516.01 (Cum. Supp. 2004).

275. Act of Apr. 15, 2004, ch. 886, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 63.2-1503(O) (Cum. Supp. 2004)).

New legislation also enables local social services departments to develop "multidisciplinary teams to provide consultation to the local department during the investigation of selected cases involving child abuse or neglect, and to make recommendations regarding the prosecution of such cases."[276] The teams may include "members of the medical, mental health, legal and law-enforcement professions, including the attorney for the Commonwealth or his designee; a local child-protective services representative; and the guardian ad litem or other court-appointed advocate for the child."[277]

Another amendment adds to the general duties of the Advisory Board on Child Abuse and Neglect the duty advising "the Department, Board and Governor on matters concerning programs for the prevention and treatment of abused and neglected children and their families and child abuse and neglect issues identified by the Commissioner of the Department of Social Services."[278] A further amendment changed the makeup and operations of the Out-Of-Family Investigations Advisory Committee.[279]

B. *Internet Crimes Involving Children*

In the state counterpart to a federal case involving the same defendant,[280] the Court of Appeals of Virginia concluded, in *Jarrett v. Commonwealth*,[281] that an unknown Turkish internet hacker was not a government agent for Fourth Amendment purposes when he turned over information to law enforcement officers about Jarrett's use of the internet in connection with child molestation.[282]

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276. Act of Mar. 29, 2004, ch. 220, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 63.2-1503(K) (Cum. Supp. 2004)).

277. Va. Code Ann. § 63.2-1503(K) (Cum. Supp. 2004).

278. Act of Mar. 12, 2004, ch. 69, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 63.2-1528 (Cum. Supp. 2004)).

279. Act of Mar. 15, 2004, ch. 103, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 63.2-1527(B) (Cum. Supp. 2004)).

280. United States v. Jarrett, 229 F. Supp. 2d 503 (E.D. Va. 2002), *rev'd*, United States v. Jarrett, 338 F.3d 339 (4th Cir. 2003); *see also* Shepherd, *supra* note 1, at 188–89.

281. 42 Va. App. 702, 594 S.E.2d 295 (Ct. App. 2004).

282. *Id.* at 716–17, 594 S.E.2d at 302. For another noteworthy case decided by the court of appeals involving the use of the internet in soliciting a child for sex acts, see *Brooker v. Commonwealth*, 41 Va. App. 609, 587 S.E.2d 732 (Ct. App. 2003). Brooker was convicted "of three counts of the use of a communications system for soliciting a minor in a sex

The General assembly added to the list of those required to register under the Sex Offender and Crimes Against Minors Registry Act, any person who has solicited or has attempted to solicit, by use of a communications system, certain acts that constitute violations of Virginia Code section 18.2-374.3, which makes it unlawful to use the internet as a means of taking indecent liberties with children.[283] Virginia Code section 18.2-374.3 was also amended to clarify that eighteen-year-olds are covered by the statute criminalizing the use of a communications system, such as the internet, to solicit sexual activity with children.[284]

C. *Other Criminal Prosecutions of Abuse or Neglect*

In *Guda v. Commonwealth*,[285] the court of appeals affirmed the conviction of a high school security officer for taking indecent liberties with a child by a person in a custodial or supervisory relationship.[286] The Supreme Court of Virginia reversed the court of appeals in *Commonwealth v. Duncan*,[287] ruling that the defendant was properly convicted of criminal child abuse and neglect for putting alcoholic beverages in his infant son's bottle, after he had deprived the child of food and drink.[288] In *Kelly v. Commonwealth*[289] the court of appeals affirmed a father's involuntary manslaughter and felony child neglect conviction for the death of his twenty-one-month-old daughter.[290] The daughter was left strapped in a car seat, in a locked van with the windows closed, for approximately seven hours on a very hot day.[291] The court of appeals also ruled, in *Wolfe v. Commonwealth*,[292] that the General

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crime." *Id.* at 611, 587 S.E.2d at 733.

283. Act of Apr. 12, 2004, ch. 444, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 9.1-902 (Cum. Supp. 2004)); *see also* VA. CODE ANN. § 18.2-374.3 (Repl. Vol. 2004).

284. Act of Apr. 14, 2004, ch. 864, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-374.3(B) (Repl. Vol. 2004)); *see also* Decker & McCullough, *supra* note 196, at 173.

285. 42 Va. App. 453, 592 S.E.2d 748 (Ct. App. 2004).

286. *Id.* at 461, 592 S.E.2d at 751–52.

287. 267 Va. 377, 593 S.E.2d 210 (2004).

288. *Id.* at 386, 593 S.E.2d at 215. For additional discussion of this case, see Decker & McCullough, *supra* note 196, at 165–66.

289. 42 Va. App. 347, 592 S.E.2d 353 (Ct. App. 2004).

290. *Id.* at 351, 592 S.E.2d at 355. Her body temperature was determined to be 105.7 two hours after she was pronounced dead by emergency workers. *Id.*

291. *Id.* at 356–57, 592 S.E.2d at 357–58.

292. 42 Va. App. 776, 595 S.E.2d 27 (Ct. App. 2004).

Assembly "did not preclude prosecution for felony child abuse . . . when it provided an enhanced punishment for driving under the influence 'while transporting a person seventeen years of age or younger.'"[293]

As in the past, a number of criminal cases came before the court of appeals in which the victims were children. Sadly, these cases are only the tip of the iceberg and too numerous to be described in depth here.[294]

The General Assembly amended the definition of "sexual abuse" used in criminal cases to apply to those situations where "the complaining witness is under the age of 13, the accused causes or assists the complaining witness to touch the accused's, the witness's own, or another person's intimate parts or material directly covering such intimate parts."[295] Another amendment provides that the venue for trial of "[a]ny person transporting or attempting to transport through or across this Commonwealth, any person for the purposes of unlawful sexual intercourse or prostitution . . . [is] in any county or city in which any part of such transportation occurred."[296] A new provision states that videotaping, photographing, or filming of a nude or undergarment-clad non-consenting person under the age of eighteen, under circumstances where the person would have a reasonable expectation of privacy, is punishable as a Class 6 felony.[297]

Legislation successfully passed that created the crime of feticide as a Class 2 felony and defined it as "unlawfully, willfully,

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293. *Id.* at 782, 595 S.E.2d at 30.

294. *See, e.g.*, Luttrell v. Commonwealth, 42 Va. App. 461, 592 S.E.2d 752 (Ct. App. 2004); Richardson v. Commonwealth, 42 Va. App. 236, 590 S.E.2d 618 (Ct. App. 2004); Via v. Commonwealth, 42 Va. App. 164, 590 S.E.2d 583 (Ct. App. 2004); Nelson v. Commonwealth, 41 Va. App. 716, 589 S.E.2d 23 (Ct. App. 2003); Knight v. Commonwealth, 41 Va. App. 617, 587 S.E.2d 736 (Ct. App. 2003); Brooks v. Commonwealth, 41 Va. App. 454, 585 S.E.2d 852 (Ct. App. 2003); Barrett v. Commonwealth, 41 Va. App. 377, 585 S.E.2d 355 (Ct. App. 2003); White v. Commonwealth, 41 Va. App. 191, 583 S.E.2d 771 (Ct. App. 2003); Pilcher v. Commonwealth, 41 Va. App. 158, 583 S.E.2d 70 (Ct. App. 2003).

295. Act of Apr. 12, 2004, ch. 741, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-67.10 (Repl. Vol. 2004)).

296. Act of Apr. 14, 2004, ch. 869, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-359(A) (Repl. Vol. 2004)). In cases where the alleged victim is under eighteen years of age, "when the county or city where the offense is alleged to have occurred cannot be determined," the trial may be "in the county or city where the [victim] resided at the time of the offense." VA. CODE ANN. § 18.2-359(C) (Repl. Vol. 2004).

297. Act of Apr. 14, 2004, ch. 844, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-386.1 (Repl. Vol. 2004)).

deliberately, maliciously and with premeditation kil[ling] the fetus of another."[298] The bill also provided that "[a]ny person who unlawfully, willfully, deliberately and maliciously kills the fetus of another is guilty of a felony punishable by confinement in a state correctional facility for not less than five nor more than 40 years."[299]

D. *Missing or Abducted Children*

Legislation enacted in 2004 clarified that "[t]he initial decision to make a local or regional Amber Alert shall be at the discretion of the local or regional law-enforcement officials," but that the local or regional law-enforcement officials must provide information regarding the abducted child to the State Police prior to issuing the alert.[300] Another amendment requires that local law-enforcement agencies

> shall immediately, but in all cases within two hours of receiving the report, enter identifying and descriptive data about the child into the Virginia Criminal Information Network and National Crime Information Center Systems, forward the report to the Missing Children Information Clearinghouse within the Department of State Police, notify all other local law-enforcement agencies in the area, and initiate an investigation of the case.[301]

Another recent enactment increases from eighteen to twenty-one years the age of a person for whom a missing child report is filed when that person's whereabouts are unknown and the person has been reported missing to a law-enforcement agency.[302]

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298. Act of May 21, 2004, ch. 1023, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-32.2 (Repl. Vol. 2004)). For a further discussion of the feticide statute, see Decker & McCullough, *supra* note 196, at 178.

299. *Id.*

300. Act of Mar. 31, 2004, ch. 270, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 52-34.3(B) (Cum. Supp. 2004)). "The initial decision to make a statewide Amber Alert shall be at the discretion of the Virginia State Police." *Id.*

301. Act of Apr. 12, 2004, ch. 443, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-1718 (Supp. 2004)).

302. Act of Mar. 31, 2004, ch. 248, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 52-32 (Cum. Supp. 2004)).

E. *Foster Care and Termination of Parental Rights*

In *Harrison v. Tazewell County Department of Social Services*,[303] the court of appeals held that the evidence was sufficient to support the termination of Harrison's residual parental rights.[304] There were repeated problems stemming from the child's Down's Syndrome and special care needs, which were not being met because of the father's persistent drug abuse, drug dealing, and his incarceration in both the state and federal correctional systems.[305] By the time of the father's release, L.H. would be almost eighteen years old and needs stability in her life which Harrison cannot provide.[306]

The court of appeals held that the termination of parental rights in *C.S. v. Virginia Beach Department of Social Services*[307] was erroneous where the evidence showed that "the mother had substantially remedied, within twelve months, the conditions that led to foster care placement."[308] It appeared that the mother's problems seemed to stem from her distrust of the government in general, and, more specifically, the department of social services.[309] In *Norfolk Division of Social Services v. Hardy*,[310] the court of appeals affirmed the trial court's decision not to terminate the mother's residual parental rights.[311] The petition did not request the option of permanent foster care, only termination for the purposes of adoption.[312] The evidence showed that the children did very well with their current foster mother, who was unable to adopt them, and the foster mother got along well with the biological mother.[313] The court also found that the mother had not substantially remedied the conditions that led to foster care;

303. 42 Va. App. 149, 590 S.E.2d 575 (Ct. App. 2004).
304. *Id.* at 159, 590 S.E.2d at 580–81.
305. *See id.* at 162–63, 590 S.E.2d at 582–83.
306. *Id.* at 162, 590 S.E.2d at 582.
307. 41 Va. App. 557, 586 S.E.2d 884 (Ct. App. 2003).
308. *Id.* at 557, 586 S.E.2d at 884.
309. *Id.* at 561, 563 n.4, 586 S.E.2d at 886, 887 n.4.
310. 42 Va. App. 546, 593 S.E.2d 528 (Ct. App. 2004).
311. *Id.* at 556, 593 S.E.2d at 533.
312. *Id.* at 548, 593 S.E.2d at 529.
313. *See id* at 550–51, 593 S.E.2d at 530–31.

however, under the circumstances, termination would not have been in the best interests of the children.[314]

In *M.G. v. Albemarle County Department of Social Services*,[315] the court of appeals supported the determination that a mother's residual parental rights should be terminated, because the mother's federal conviction for abusive sexual contact was the equivalent of a conviction for "felony sexual assault."[316] In *Brown v. Spotsylvania Department of Social Services*,[317] the court of appeals, agreeing with the circuit court, found that the Department of Social Services "need not continue its efforts to reunite Brown with [the child]" because of Brown's convictions for abuse and neglect of another child.[318] The court felt that a sufficient investigation, regarding placement with family members, had been made to justify the termination of parental rights.[319]

The General Assembly directed the Department of Social Services to "establish a subsidized custody program for the benefit of children in the custody of local boards on or after July 1, 2004, who are living with relative caregivers and for whom reunification with their natural parents and adoption by relatives are ruled out as placement options."[320]

> Within the limitations of federal funding and the subsidized custody appropriation to the Department, the subsidized custody program shall include:
>
> 1. A one-time only special-need payment, which shall be a lump sum payment for expenses resulting from the assumption of care of the child when no other resource is available to pay for such expense;
>
> 2. Services for the child, including but not limited to, short-term casework, information and referral, and crisis intervention; and

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314. *Id.* at 554–55, 593 S.E.2d at 532.

315. 41 Va. App. 170, 583 S.E.2d 761 (Ct. App. 2003).

316. *Id.* at 182–84, 583 S.E.2d at 767.

317. 43 Va. App. 205, 597 S.E.2d 214 (Ct. App. 2004).

318. *Id.* at 212, 597 S.E.2d at 217–18.

319. *Id.* at 218–19, 597 S.E.2d at 220–21.

320. Act of Apr. 14, 2004, ch. 814, 2004 Va. Acts ___ (codified at VA. CODE ANN. § 63.2-913 (Cum. Supp. 2004)). The act "shall not become effective unless federal funds are made available through a federal Title IV-E waiver and an appropriation of funds effectuating the purposes of this act is included in" the biennial budget passed by the 2004 "General Assembly and signed into law by the Governor." *Id.* A relative caregiver means a person, other than a natural parent, to whom the child is related by blood, marriage, or adoption. *Id.*

> 3. A maintenance subsidy that shall be payable monthly to the relative caregiver equal to the prevailing foster family rate to provide for the support and care of the child.[321]

Furthermore, "the subsidized custody payment shall be made pursuant to a subsidized custody agreement entered into between the local board and the relative caregiver."[322] The General Assembly defined the practice of kinship care as "the full-time care, nurturing, and protection of children by relatives."[323] Local social services are required to "seek out kinship care options to keep children out of foster care and as a placement option for those children in foster care, if it is in the child's best interest."[324]

New legislation also provides that "a child-placing agency may approve as a foster parent an applicant convicted of statutory burglary for breaking and entering . . . to commit larceny, who has had his civil rights restored by the Governor, provided 25 years have elapsed following the conviction."[325] Another amendment adds foster parents to the list of persons who can certify that a person, under eighteen, has driven for forty hours or more, with at least ten of those hours being at night.[326]

F. *Pre-Release Parenting Programs*

In 2004, the General Assembly authorized the Department of Correctional Education to arrange "for noncustodial parent offenders committed to the custody of the Department of Corrections to participate in pre-release parenting programs that include parenting skills training and anger management."[327] The programs must be administered by the Department "directly or by contract and shall include integration with transitional programs and such other programs for offenders as may be appropri-

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321. VA. CODE ANN. § 63.2-913(B) (Cum. Supp. 2004).

322. *Id.* § 63.2-913(C) (Cum. Supp. 2004).

323. Act of Mar. 12, 2004, ch. 70, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 63.2-100 (Cum. Supp. 2004)).

324. VA. CODE ANN. § 63.2-900 (Cum. Supp. 2004).

325. Act of Apr. 12, 2004, ch. 714, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 63.2-1721(F) (Cum. Supp. 2004)).

326. Act of Apr. 14, 2004, ch. 805, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 46.2-335 (Cum. Supp. 2004)).

327. Act of Apr. 15, 2004, ch. 912, 2004 Va. Acts ___ (codified at VA. CODE ANN. § 22.1-345.1 (Supp. 2004)).

ate."[328] The individuals "may be required to establish, reestablish, or maintain family ties and communications in order to continue to participate in the programs. A pre-release parenting program may be part of an offender's treatment program."[329]

VI. MISCELLANEOUS ISSUES IN JUVENILE AND DOMESTIC RELATIONS LAW

A. *Comprehensive Services Act*

The Comprehensive Services Act was amended to add "the chairman of the state and local advisory team" to the State Executive Council for Comprehensive Services for At-Risk Youth and Families.[330] In addition, a representative from the Department of Medical Assistance Services was added to the state and local advisory team.[331] Another amendment provides that where a juvenile court places a juvenile in a community or facility-based treatment program, or a shelter care facility, in accordance with the requirements of Virginia Code section 16.1-248.1(B), the costs of that placement shall be funded out of the "[s]tate pool of funds for community policy and management teams."[332] The General Assembly clarified that

> in any instance that an individual 18 through 21 years of age, inclusive, who is eligible for funding from the state pool and is properly defined . . . pursuant to [state education law as a school-aged child with disabilities] is placed by a local social services agency that has custody across jurisdictional lines in a group home in the Commonwealth and the individual's individualized education program (IEP), as prepared by the placing jurisdiction, indicates that a private day school placement is the appropriate educational program for such individual, the financial and legal responsibility for the individual's special education services and IEP shall remain, in compliance with

328. VA. CODE ANN. § 22.1-345.1 (Supp. 2004).

329. *Id.* The provisions of this act will not become effective, however, "unless an appropriation of general funds effectuating the purposes of this act is included in the general appropriation act . . . and signed into law by the Governor." Act of Apr. 15, 2004, ch. 912, 2004 Va. Acts ___.

330. Act of Apr. 14, 2004, ch. 836, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 2.2-2648(B) (Cum. Supp. 2004)).

331. *Id.* (codified as amended at VA. CODE ANN. § 2.2-5201 (Cum. Supp. 2004)).

332. Act of Mar. 31, 2004, ch. 286, 2004 Va. Acts ____ (codified as amended at VA. CODE ANN. § 2.2-5211 (Cum. Supp. 2004)).

> the provisions of federal . . . [and state law and regulations], the responsibility of the placing jurisdiction until the individual reaches the age of 21, inclusive, or is no longer eligible for special education services.[333]

B. *Mental Health Commitments*

New legislation provides that "the juvenile and domestic relations district court serving the jurisdiction in which the minor" requiring a mental health residential placement is located is responsible for scheduling the involuntary commitment hearing and, for emergency admissions, the hearing shall be scheduled where the juvenile is located or resides.[334]

C. *Court-Related Compulsory School Attendance Issues*

Virginia Code section 22.1-254 was amended to provide that active pursuit of a general educational development (GED) certificate by persons sixteen through eighteen years of age "who are housed in adult correctional facilities," but who "are not enrolled in an individual student alternative education plan," will satisfy the requirements of the compulsory school attendance law.[335] The mechanisms for enforcement of the compulsory school attendance law were strengthened by removing the restriction on the juvenile court's use of their contempt power when enforcing compulsory school attendance and parental responsibility provisions.[336] The court's authority to order "the student or his parent to participate in such programs . . . including . . . extended day programs and summer school or other education programs and counseling," is clarified and reinforced.[337] The court is explicitly given the authority to summon and force a parent to appear in court with the child.[338] The parental responsibility and involvement statute was

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333. VA. CODE ANN. § 2.2-5211(D) (Cum. Supp. 2004). Individualized education programs are discussed in greater depth in Lacy & Mehfoud, *supra* note 22, at 194–95.

334. Act of Mar. 31, 2004, ch. 283, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 16.1-341 (Supp. 2004))

335. Act of Mar. 31, 2004, ch. 251, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 22.1-254, -254.2 (Cum. Supp. 2004)).

336. Act of Apr. 12, 2004, ch. 573, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 16.1-241.2 (Supp. 2004)).

337. VA. CODE ANN. § 16.1-241.2(A)(2) (Supp. 2004).

338. *Id.* § 16.1-263 (Supp. 2004)).

amended to include compliance with compulsory school attendance and now allows a parent to be guilty of a Class 3 misdemeanor for violating provisions of the law.[339]

The Supreme Court of the United States ruled in *Ashcroft v. American Civil Liberties Union*[340] that the United States Court of Appeals for the Third Circuit was correct in affirming the district court's ruling that enforcement of the Child Online Protection Act[341] should be enjoined because there were plausible, less restrictive alternatives to the Act, which did not violate the First Amendment to the United States Constitution and which would protect minors from sexually explicit materials on the internet.[342] Similarly, the United States Court of Appeals for the Fourth Circuit ruled in *PSINet, Inc. v. Chapman*[343] that the Virginia statute which criminalized the dissemination over the Internet, for commercial purposes, of materials harmful to minors[344] was unconstitutionally overbroad.[345]

339. *Id.* § 22.1-263 (Supp. 2004)).

340. 124 S. Ct. 2783 (2004).

341. 47 U.S.C. § 231 (2000).

342. *Ashcroft*, 124 S. Ct. at 2795.

343. 362 F.3d 227 (4th Cir. 2004).

344. *See* VA. CODE ANN. § 18.2-391 (Cum. Supp. 2003).

345. *PSINet, Inc.*, 362 F.3d at 239. The court of appeals denied a petition for rehearing and for rehearing *en banc*. PSINet, Inc. v. Chapman, 372 F.3d 671, 671 (4th Cir. 2004).