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## Family and Juvenile Law

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# FAMILY AND JUVENILE LAW

*Robert E. Shepherd, Jr. \**

There were not a lot of significant developments in family or juvenile law during the past year; however, the next year promises to be far more eventful with the so-called “Marriage Amendment” on the November 2006 ballot and the first year of a comprehensive two-year study of the juvenile justice system on tap for the Crime Commission. There does seem to be a reduction in the number of published family law opinions emanating from the Courts of Appeals of Virginia, although that may simply be a coincidental blip on the appellate screen. Certainly, the number of precedentially significant cases is dropping as the court of appeals passes its twenty-first anniversary. This is especially true in the termination of parental rights, where the body of case law has grown markedly over the years as the depths of the statutes that govern these matters have been plumbed rather fully.

## I. FAMILY LAW

### A. *Marriage*

A discussion of all the legal ramifications of the “Marriage Amendment” is beyond the scope of this survey article, but the long-term consequences of the constitutional amendment, whether intended or unintended, are substantial. The language of the proposed amendment to article I of the Constitution of Virginia says, in part, that the “Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage” nor shall they do so for a “union, partnership, or other legal status to which

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is assigned the rights, benefits, obligations, qualities, or effects of marriage.”<sup>1</sup> Governor Tim Kaine’s reservations about the amendment and its legal effects<sup>2</sup> were sufficiently strong that the proposed amendment will go on the November 7, 2006, ballot without the Governor’s signature.<sup>3</sup>

The case of *Rahnema v. Rahnema*<sup>4</sup> has been bouncing around the appellate process for more than six years.<sup>5</sup> In this proceeding, the husband sought to annul his marriage on the grounds of bigamy while simultaneously acting as the complaining witness in the bigamy prosecution against his wife.<sup>6</sup> The Virginia Beach City Circuit Court disregarded a *de bene esse* deposition, taken in Istanbul, of the wife’s putative first husband as inherently unreliable<sup>7</sup> and concluded that the husband had not proven bigamy by clear and convincing evidence.<sup>8</sup> The Court of Appeals of Virginia agreed, adding that there was a strong, if rebuttable, presumption in favor of the regularity of a second marriage which had not been overcome.<sup>9</sup>

In *Lewis v. Lewis*,<sup>10</sup> the Supreme Court of Virginia addressed the jurisdiction of an appellate court to hear an appeal from a trial court in a case in which the wife sued for divorce, and the husband filed a cross-bill seeking an annulment on the grounds

1. S.J. Res. 337, Va. Gen. Assembly (Reg. Sess. 2005).

2. See, for example, *Silverman v. Bernot*, 218 Va. 650, 239 S.E.2d 118 (1977), in which the court upheld an agreement between an employer and his female employee which they entered while living together. *Id.* at 657–58, 239 S.E.2d at 119, 123. The agreement provided that she would be employed by him until she reached age sixty-two or until his death. *Id.* at 651, 239 S.E.2d at 119. Other possible effects of the amendment could include impacts on the commonwealth’s domestic violence laws; the definition of a “family or household member” pursuant to Virginia Code section 16.1-228 (Cum. Supp. 2006); domestic partner benefits provided to employees by companies and institutions in the commonwealth; private agreements between unmarried couples regarding children, property, and support; and “end-of-life” arrangements such as wills, trusts, and advance medical directives.

3. See Act of Apr. 10, 2006, ch. 828, cl. 1, 2006 Va. Acts \_\_\_; see also Pamela Stallsmith, *Marriage Plan Goes Without Signature; Proposed Amendment Moves On, But It’s Missing the Governor’s Name*, RICH. TIMES-DISPATCH, Apr. 11, 2006, at B1.

4. 47 Va. App. 645, 626 S.E.2d 448 (Ct. App. 2006).

5. See *Rahnema v. Rahnema*, No. 1081-99-1, 2000 Va. App. LEXIS 163 (Ct. App. Mar. 7, 2000) (unpublished decision).

6. *Rahnema*, 47 Va. App. at 651, 626 S.E.2d at 451–52.

7. See *id.* at 653–54, 626 S.E.2d at 452–53.

8. See *id.* at 657, 626 S.E.2d at 454.

9. See *id.* at 664–65, 626 S.E.2d at 458.

10. 271 Va. 520, 628 S.E.2d 314 (2006).

that the marriage was bigamous.<sup>11</sup> The trial court rejected the cross-bill because the husband lacked standing, and he appealed.<sup>12</sup> Reversing the court of appeals, the supreme court concluded that the cause in question was a domestic relations dispute involving both divorce and annulment, and a decision on one did not automatically dispose of the other.<sup>13</sup> The appeal in question was not of a final order and was thus inappropriately interlocutory.<sup>14</sup>

In the case of *Martin v. Zihlerl*,<sup>15</sup> the Supreme Court of Virginia struck down Virginia Code section 18.2-344, which proscribes private sexual conduct between consenting adults,<sup>16</sup> as being violative of the due process rights of the adults under *Lawrence v. Texas*.<sup>17</sup> The case arose in an unusual fashion; Martin filed a private tort action alleging the knowing transmission of the herpes virus through consensual sexual conduct, and Zihlerl raised the illegality of the sexual activity as a defense.<sup>18</sup> In the wake of *Martin*, it will be interesting to see what effect the decision has on the validity of other criminal statutes that proscribe sexual conduct by consenting adults, such as cohabitation,<sup>19</sup> consensual sodomy,<sup>20</sup> and adultery.<sup>21</sup>

## B. Prenuptial Agreements

In *Dowling v. Rowan*,<sup>22</sup> the Supreme Court of Virginia affirmed the judgment of the circuit court, ruling that a prenuptial agreement was binding on the husband and barring any contrary action when he sought to elect against the will and take his statu-

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11. *See id.* at 522–23, 628 S.E.2d at 315.

12. *See id.* at 523, 628 S.E.2d at 316.

13. *See id.* at 525–28, 628 S.E.2d at 317–19.

14. *See id.* at 528, 628 S.E.2d at 318–19.

15. 269 Va. 35, 607 S.E.2d 367 (2005). Although the decision in the case dates back to January 2005, it is significant enough to be addressed due to the absence of a family law article in the 2005 *Annual Survey of Virginia Law*.

16. VA. CODE ANN. § 18.2-344 (Repl. Vol. 2004 & Cum. Supp. 2006).

17. *See Martin*, 269 Va. at 42, 607 S.E.2d at 371 (citing *Lawrence v. Texas*, 539 U.S. 558, 564 (2003)).

18. *See id.* at 38, 607 S.E.2d at 368.

19. *See* VA. CODE ANN. § 18.2-345 (Repl. Vol. 2004).

20. *See id.* § 18.2-361(A) (Cum. Supp. 2006).

21. *See id.* § 18.2-365 (Repl. Vol. 2004).

22. 270 Va. 510, 621 S.E.2d 397 (2005).

tory share of his wife's estate.<sup>23</sup> The agreement specified that it was to be effective "upon the death of either or both," and it thus barred any inconsistent action except as to small amounts of property not covered by the agreement.<sup>24</sup> Similarly, in *Plunkett v. Plunkett*,<sup>25</sup> the Supreme Court of Virginia ruled that a prenuptial agreement, supplemented by the contemporaneous execution of two wills consistent with the agreement, controlled the disposition of the husband's estate upon his death, and the documents were to be read together.<sup>26</sup> The trial court thus had erred in considering extrinsic evidence to sustain the husband's children's interpretation of the agreement.<sup>27</sup>

According to the Court of Appeals of Virginia's decision in *Black v. Powers*,<sup>28</sup> a prenuptial agreement signed in the Virgin Islands immediately before a wedding ceremony is governed by Virgin Islands law, despite references in it to Virginia law, because there was no explicit provision that the agreement was governed by Virginia law.<sup>29</sup> The Court of Appeals of Virginia also decided that a prenuptial agreement was ambiguous in *Vilseck v. Vilseck*,<sup>30</sup> particularly with regard to what constituted "separate property" under the agreement, and remanded the case to the trial court with instructions to consider extrinsic evidence in interpreting the intended meaning of the document.<sup>31</sup>

### C. Divorce

In the unusual case of *Cabaniss v. Cabaniss*,<sup>32</sup> the Court of Appeals of Virginia treated a husband's challenge to Virginia's long-arm jurisdiction over him as a demurrer.<sup>33</sup> The court of appeals

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23. See *id.* at 518, 621 S.E.2d at 400-01.

24. See *id.* at 517-18, 621 S.E.2d at 400. The court distinguished the earlier case of *Pysell v. Keck*, 263 Va. 457, 559 S.E.2d 677 (2002), because the prenuptial agreement in that case did not indicate that it was to have any post-death effect. Compare *id.* at 460-61, 559 S.E.2d at 679, with *Dowling*, 270 Va. at 517, 621 S.E.2d at 400.

25. 271 Va. 162, 624 S.E.2d 39 (2006).

26. See *id.* at 169, 624 S.E.2d at 43.

27. See *id.* at 169-70, 624 S.E.2d at 43.

28. 48 Va. App. 113, 628 S.E.2d 546 (Ct. App. 2006).

29. See *id.* at 127, 129-31, 628 S.E.2d at 553-55.

30. 45 Va. App. 581, 612 S.E.2d 746 (Ct. App. 2005).

31. See *id.* at 589, 591-92, 612 S.E.2d at 750-51.

32. 46 Va. App. 595, 620 S.E.2d 559 (Ct. App. 2005).

33. See *id.* at 599, 620 S.E.2d at 560.

affirmed the trial court's denial of the challenge because the wife's complaint alleged sufficient facts to satisfy the requirements of Virginia Code section 8.01-328.1(A)(9) and thus confer jurisdiction over the husband.<sup>34</sup> In *Morrill v. Morrill*,<sup>35</sup> the Court of Appeals of Virginia, sitting en banc, affirmed the circuit court's decision granting a wife a divorce on desertion grounds in spite of its conclusion that she had committed fraud against her husband; however, the fraud could impact the equitable distribution of the parties' property.<sup>36</sup> The circuit court sustained the commissioner in chancery's recommendations regarding the divorce but declined to follow the equitable distribution recommendation that took the fraud into account.<sup>37</sup> The court of appeals was badly split in its decision, with five judges dissenting, but the opinion for the court concluded that only the issue of the divorce had been referred to the commissioner, so the circuit court could disregard any recommendations on the property of the parties.<sup>38</sup>

#### D. *Property Settlement Agreements*

The Court of Appeals of Virginia determined in *Gaffney v. Gaffney*<sup>39</sup> that: (1) a property settlement was not effective because it was not signed by both parties; (2) there was no consent order incorporating the parties' "courthouse steps" agreement; and (3) there was no transcription of the agreement by the court reporter coupled with an affirmation by both parties on the record.<sup>40</sup> Thus, the court of appeals reversed the trial court's incorporation of the terms of the agreement into the final decree of divorce because the agreement did not comply with the statute.<sup>41</sup> In *Galloway v. Galloway*,<sup>42</sup> the Court of Appeals of Virginia accepted the terms of a property settlement agreement, despite a major disparity in the

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34. *Id.* at 603–04, 620 S.E.2d at 562–63; *see also* VA. CODE ANN. § 8.01-328.1(A)(9) (Cum. Supp. 2006). The court of appeals pieced together facts from different paragraphs of the Complaint to reach this result. *See Cabaniss*, 46 Va. App. at 603, 620 S.E.2d at 562.

35. 45 Va. App. 709, 613 S.E.2d 821 (Ct. App. 2005) (en banc), *vacating* 43 Va. App. 621, 600 S.E.2d 911 (Ct. App. 2004).

36. *See id.* at 711, 713–14, 613 S.E.2d at 822–23.

37. *See id.* at 713–14, 613 S.E.2d at 823.

38. *See id.* at 717–18, 613 S.E.2d at 825.

39. 45 Va. App. 655, 613 S.E.2d 471 (Ct. App. 2005).

40. *See id.* at 666–67, 613 S.E.2d at 477 (construing VA. CODE ANN. § 20-155 (Repl. Vol. 2004 & Cum. Supp. 2006)).

41. *See id.* at 672, 613 S.E.2d at 479.

42. 47 Va. App. 83, 622 S.E.2d 267 (Ct. App. 2005).

division of the assets pursuant to that agreement.<sup>43</sup> The wife acknowledged that she knew she had a right to consult with counsel but had not done so; in addition, she was capable of enjoying financial independence because of her own separate assets and employment potential.<sup>44</sup> The court found insufficient evidence of unconscionability.<sup>45</sup> In *O'Hara v. O'Hara*,<sup>46</sup> the Court of Appeals of Virginia ruled that a provision in a property settlement agreement regarding cohabitation by the wife controlled over the relevant statutory provision,<sup>47</sup> thus, cohabitation need only be proven by a preponderance of the evidence.<sup>48</sup>

### E. Spousal Support

In *Barrs v. Barrs*,<sup>49</sup> the Court of Appeals of Virginia concluded that income from assets received as a marital award does not amount to changed circumstances that would justify a modification of a spousal support determination.<sup>50</sup> The court reasoned that the prior action governing the distribution of assets was presumably taken into consideration by the trial court in determining spousal support, so there was no change in circumstances.<sup>51</sup> In *Bruemmer v. Bruemmer*,<sup>52</sup> the Fairfax County Circuit Court, in its final decree, awarded the wife spousal support for a defined duration pursuant to Virginia Code section 20-107.1(C).<sup>53</sup> The Court of Appeals of Virginia determined that the amount of spousal support, which gradually decreased over time, was well within the contemplation of the statute.<sup>54</sup>

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43. See *id.* at 92, 94–95, 622 S.E.2d at 272–73.

44. See *id.* at 94, 622 S.E.2d at 272.

45. See *id.* at 94–95, 622 S.E.2d at 272–73.

46. 45 Va. App. 788, 613 S.E.2d 859 (Ct. App. 2005).

47. See *id.* at 796, 613 S.E.2d at 863 (citing VA. CODE ANN. § 20-109(A) (Repl. Vol. 2004 & Cum. Supp. 2006)).

48. See *id.*

49. 45 Va. App. 500, 612 S.E.2d 227 (Ct. App. 2005).

50. See *id.* at 512–13, 612 S.E.2d at 233.

51. See *id.* at 508–09, 612 S.E.2d at 231.

52. 46 Va. App. 205, 616 S.E.2d 740 (Ct. App. 2005).

53. See *id.* at 206–07, 211, 616 S.E.2d at 740, 742–43 (citing VA. CODE ANN. § 20-107.1(C) (Repl. Vol. 2004 & Cum. Supp. 2006)).

54. See *id.* at 211, 616 S.E.2d at 742–43.

## F. *Child Support*

In 2006, there were some significant revisions to Virginia Code sections 20-108.1 and 20-108.2 which clarified the wording and modified the list of factors that a court may consider in deviating from the guideline amount in making a child support award.<sup>55</sup> For example, the deviation factors now allow for an evaluation of the good faith and reasonableness of a parent's employment decisions when considering imputed income based on a change in employment, consideration of the cost of visitation travel, and consideration of the standard of living for the child rather than for the family, during the marriage.<sup>56</sup> A new provision in Virginia Code section 20-79.3(A)(8) directs an employer to prorate funds among child support orders based upon the current amounts due, with any remaining amounts prorated among the orders for any accrued arrearages where there is more than one child support withholding order against an obligor.<sup>57</sup> Virginia Code section 20-60.3(6) now specifies the date that judicial and administrative support orders are effective and provides payment due dates.<sup>58</sup> A judicial support order is effective in an initial proceeding on the date of filing of the petition, but, in a modification proceeding, the effective date may be the date of notice to the responding party.<sup>59</sup> An initial administrative support order is effective on the date of service, and a modified administrative support order is effective on the date that notice of the review is served upon the nonrequesting party.<sup>60</sup>

Although an unpublished opinion, *Cooper v. Ebert*<sup>61</sup> made an important point—a father's overpayments of child support pursuant to agreement or an order are deemed to be gifts and thus

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55. See VA. CODE ANN. §§ 20-108.1, -108.2 (Cum. Supp. 2006).

56. See *id.* § 20-108.1(B)(2)–(3), (9) (Cum. Supp. 2006). The language in Virginia Code section 20-108.1(B)(3), regarding good faith and reasonableness in a change of employment situation, overrules the Supreme Court of Virginia's decision in *Antonelli v. Antonelli*, 242 Va. 152, 154, 409 S.E.2d 117, 118–19 (1991). There is a provision in the statute that the amendments are not retroactive and cannot be the basis for a material change in circumstances upon which a modification of child support may be based. See VA. CODE ANN. § 20-108.1(F) (Cum. Supp. 2006).

57. See VA. CODE ANN. § 20-79.3(A)(8) (Cum. Supp. 2006).

58. See *id.* § 20-60.3(6) (Cum. Supp. 2006).

59. See *id.*

60. *Id.* § 63.2-1916(1) (Cum. Supp. 2006).

61. No. 2816-04-4, 2005 Va. App. LEXIS 491 (Ct. App. Dec. 6, 2005) (unpublished decision).



cannot be credited against underpayments.<sup>62</sup> In that case, the parents had entered into a property settlement agreement that was incorporated into their decree of divorce, and the father was obligated to comply strictly with that decree unless and until it was changed.<sup>63</sup> If he paid more, it was a gift, and if he paid less, it was an arrearage.<sup>64</sup> In *Russell v. Russell*,<sup>65</sup> the Court of Appeals of Virginia ruled that although a consent order gave joint legal custody of a child to the paternal grandparents, who were divorced, the grandfather could not be ordered to pay child support in the absence of an agreement to that effect or an adoption.<sup>66</sup> In *Sharma v. Sharma*,<sup>67</sup> the Chesterfield County Juvenile and Domestic Relations District Court entered a judgment increasing child support retroactive to the date the father received notice of the petition and awarded an arrearage to that date.<sup>68</sup> The father appealed both actions to the Chesterfield County Circuit Court but failed to post a bond as required by statute.<sup>69</sup> The circuit court clerk wrote "0" in the blank on the papers for the amount of the bond,<sup>70</sup> but the failure to post a bond was jurisdictional for the arrearage appeal; thus, it and the increase in support were inextricably tied together, so the appeal failed as to the entire case.<sup>71</sup>

### G. *Equitable Distribution*

The General Assembly changed the language in Virginia Code section 20-107.3(A)(3) to add a new subsection (g)<sup>72</sup> to address the

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62. *See id.* at \*13.

63. *See id.* at \*2-3.

64. *See id.* at \*14-15. By way of contrast, see *Acree v. Acree*, 2 Va. App. 151, 342 S.E.2d 68 (Ct. App. 1986) (holding that a father was entitled to credit for nonconforming child support payments when, by agreement of the parties, the father assumed physical custody and total responsibility for the support of the child).

65. 35 Va. App. 360, 545 S.E.2d 548 (Ct. App. 2001).

66. *See id.* at 362, 364, 545 S.E.2d at 549-50.

67. 46 Va. App. 584, 620 S.E.2d 553 (Ct. App. 2005).

68. *See id.* at 586-87, 620 S.E.2d at 554.

69. *See id.* at 587, 620 S.E.2d at 554-55 (citing VA. CODE ANN. § 16.1-296(H) (Cum. Supp. 2006)).

70. *See id.*

71. *See id.* at 591-92, 620 S.E.2d at 556-57.

72. *See* Act of Mar. 30, 2006, ch. 260, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 20-107.3(A)(3)(g) (Cum. Supp. 2006)).

problems raised in *Fowlkes v. Fowlkes*,<sup>73</sup> in which a husband's separate contributions to his wife's separately owned home did not give him any interest in the property that could be subject to equitable distribution.<sup>74</sup> The amendment ensures that separate and marital contributions made to marital assets are all accounted for in the equitable distribution process,<sup>75</sup> although it does not settle whether the spouse gets a dollar-for-dollar return of the contribution or whether the contribution is traced through the *Brandenburg* rule.<sup>76</sup> In *Keeling v. Keeling*,<sup>77</sup> the Court of Appeals of Virginia ruled that a trial court need not apply the *Brandenburg* formula where a large mortgage loan and significant appreciation in the value of the property would make the result pursuant to that formula inequitable.<sup>78</sup>

Two Court of Appeals of Virginia decisions addressed the roles of qualified domestic relations orders ("QDROs") in implementing divorce decrees. In *Turner v. Turner*,<sup>79</sup> the court determined that a trial court could enter a QDRO to implement a final divorce decree even after the time had expired to modify that decree.<sup>80</sup> In *Irwin v. Irwin*,<sup>81</sup> the court ruled that, prior to the entry of a QDRO, a party may be ordered to pay pension shares directly to the other party if that is ordered by the decree.<sup>82</sup>

The case of *Robinson v. Robinson*<sup>83</sup> presented a unique issue and involved the same parties involved in the juvenile alcohol consumption cases reported later in this article.<sup>84</sup> The husband had extensive income from a large family trust, but he spent that income lavishly.<sup>85</sup> The wife did not work outside the home, but she managed the family finances prudently to preserve their in-

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73. 42 Va. App. 1, 590 S.E.2d 53 (Ct. App. 2003).

74. *See id.* at 8–9, 590 S.E.2d at 56–57.

75. *See* VA. CODE ANN. § 20-107.3(A)(3)(g) (Cum. Supp. 2006).

76. Virginia follows the approach in *Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky. Ct. App. 1981), in assessing the separate and marital shares in hybrid property.

77. 47 Va. App. 484, 624 S.E.2d 687 (Ct. App. 2006).

78. *See id.* at 493, 624 S.E.2d at 691.

79. 47 Va. App. 76, 622 S.E.2d 263 (Ct. App. 2005).

80. *See id.* at 82, 622 S.E.2d at 266–67.

81. 47 Va. App. 287, 623 S.E.2d 438 (Ct. App. 2005).

82. *See id.* at 297, 623 S.E.2d at 443.

83. 46 Va. App. 652, 621 S.E.2d 147 (Ct. App. 2005).

84. *See infra* notes 230–32 and accompanying text.

85. *Robinson*, 46 Va. App. at 656–57, 621 S.E.2d at 149–50.

come stream.<sup>86</sup> The Court of Appeals of Virginia determined that the wife's efforts did not convert the trust or bank accounts into marital property for equitable distribution purposes.<sup>87</sup> In *Wiese v. Wiese*,<sup>88</sup> refinancing a marital residence on three separate occasions did not affect the character of the real property as part separate and part marital.<sup>89</sup> In *King v. King*,<sup>90</sup> the Court of Appeals of Virginia ruled that the circuit court properly treated as marital property the excess of income tax refunds obtained through filing a joint return over the refunds that would have been received had they filed separate returns.<sup>91</sup>

#### H. *Child Custody and Visitation*

House Bill 903, enacted by the 2006 General Assembly, provides that a child's parent or legal guardian can petition the court to enjoin an offending parent from petitioning for custody and visitation for up to ten years, if doing so is in the best interest of the child and if the offending parent is convicted of sexual assault or murder of: (1) a child of the parent; or (2) a child residing with a parent of the child.<sup>92</sup>

In *Cantor v. Cohen*,<sup>93</sup> the United States Court of Appeals for the Fourth Circuit ruled that the Hague Convention<sup>94</sup> does not confer jurisdiction on federal courts to consider the substantive issues of visitation, but only on questions regarding the rights conferred under the Convention.<sup>95</sup>

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86. *Id.*

87. *Id.* at 670, 621 S.E.2d at 156.

88. 46 Va. App. 399, 617 S.E.2d 427 (Ct. App. 2005).

89. *See id.* at 407, 617 S.E.2d at 430.

90. 46 Va. App. 677, 621 S.E.2d 159 (Ct. App. 2005). The court of appeals had previously remanded the case to the trial court in *King v. King*, 40 Va. App. 200, 578 S.E.2d 806 (Ct. App. 2003).

91. 46 Va. App. at 681-82, 621 S.E.2d at 161-62.

92. H.B. 903, Va. Gen. Assembly (Reg. Sess. 2006) (enacted as Act of Apr. 5, 2006, ch. 665, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 20-124.2(E) (Cum. Supp. 2006))). The court must appoint a guardian ad litem for the child.

93. 442 F.3d 196 (4th Cir. 2006).

94. The Hague Convention on International Child Abduction is enforced through the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11611 (2000).

95. *See Cantor*, 442 F.3d at 200-01.

In *Albert v. Ramirez*,<sup>96</sup> the Court of Appeals of Virginia addressed the reach of *Troxel v. Granville*,<sup>97</sup> in a case in which a mother remarried following the death of the father, and she and the stepfather subsequently separated and were given joint custody by a juvenile and domestic relations district court pursuant to a consent decree.<sup>98</sup> Two years later, the mother sought to modify the consent decree and argued that *Troxel* principles should govern that action, while the stepfather urged that ordinary custody modification standards should apply.<sup>99</sup> The trial court agreed with the mother, but the court of appeals reversed because the judicially sanctioned consent decree had established the custodial rights of the parties.<sup>100</sup> Thus, the trial court was required to apply the material change of circumstances and best interests analysis, not the “actual harm” analysis.<sup>101</sup> In *Denise v. Tencer*,<sup>102</sup> the court of appeals similarly ruled that *Troxel* does not apply in a custody dispute between a father and maternal grandfather following the death of the mother, where a consent order entered before her death gave her custody until her death and the father and grandfather joint custody thereafter.<sup>103</sup>

A mother’s former boyfriend, who was unrelated to her child, was held in *Surles v. Mayer*<sup>104</sup> to be a “person with a legitimate interest” under Virginia Code section 20-124.1,<sup>105</sup> and thus a person able to petition for custody of the child.<sup>106</sup> Nevertheless, he lost on the merits of the case based on the evidence presented.<sup>107</sup> In *Schwartz v. Schwartz*,<sup>108</sup> the Court of Appeals of Virginia ruled that the circuit court erred in admitting the testimony of the children’s therapist in proceedings against the mother for interfering with the father’s visitation pursuant to Virginia Code section 20-

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96. 45 Va. App. 799, 613 S.E.2d 865 (Ct. App. 2005).

97. 510 U.S. 57 (2000).

98. See *Albert*, 45 Va. App. at 803, 613 S.E.2d at 867.

99. See *id.* at 803, 806–07, 613 S.E.2d at 867–68.

100. See *id.* at 808–09, 613 S.E.2d at 869–70.

101. See *id.* at 809, 613 S.E.2d at 870.

102. 46 Va. App. 372, 617 S.E.2d 413 (Ct. App. 2005).

103. See *id.* at 393–94, 617 S.E.2d at 424.

104. 48 Va. App. 146, 628 S.E.2d 563 (Ct. App. 2006).

105. See *id.* at 179, 628 S.E.2d at 579 (citing VA. CODE ANN. § 20-124.1 (Cum. Supp. 2006)).

106. See *id.* at 161–62, 628 S.E.2d at 570.

107. See *id.*

108. 46 Va. App. 145, 616 S.E.2d 59 (Ct. App. 2005).

124.3:1.<sup>109</sup> The statute is not limited in its proscription to a parent's therapist, but to any testimony regarding a parent offered without the consent of that parent.<sup>110</sup>

### I. Adoption

Two legislative acts in 2006 modified the larger recodification of and amendment to the adoption laws that took place in 2002 and 2003. One act expanded the jurisdiction and venue choices for parties involved in adoption, reduced the review time of an adoption petition, and added factors for a court to consider when determining whether or not to grant an adoption petition.<sup>111</sup> The act also set out the procedure for close relative adoptions and made several administrative changes to the adoption laws to make navigating through the adoption process easier and facilitate use of the process by all involved.<sup>112</sup> The second act created a new procedure that allows the birth parent to recommend adoptive parents and choose between more open parental placement adoption procedures or more private agency adoption procedures.<sup>113</sup>

In the only recent case dealing with adoption, *Gray v. Bourne*,<sup>114</sup> the Court of Appeals of Virginia affirmed the trial court's decision to permit the Bournes to adopt a child over the objection of the birth father, despite Mr. Bourne's prior conviction of sexual battery of a child and his failure to register as a sex offender in a timely fashion.<sup>115</sup> The court concluded that the prior sex offense was outweighed by expert testimony that Bourne posed no risk to the child.<sup>116</sup> Further, there was clear and convincing evidence that the withholding of consent by parents who

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109. *Id.* at 156, 158, 616 S.E.2d at 65–66 (citing VA. CODE ANN. § 20-124.3:1 (Repl. Vol. 2004 & Cum. Supp. 2006)).

110. VA. CODE ANN. § 20-124.3:1(B) (Repl. Vol. 2004 & Cum. Supp. 2006).

111. Act of Apr. 19, 2006, ch. 848, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 63.2-1200 to -1202, -1205, -1208, -1210, -1213, -1222, -1223, -1227, -1228, -1231 to -1234, -1237, -1241, -1242.1 to -1242.3, -1243 (Cum. Supp. 2006)).

112. *See id.*

113. Act of Apr. 5, 2006, ch. 654, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 63.2-1225, -1226, -1232 (Cum. Supp. 2006)).

114. 46 Va. App. 11, 614 S.E.2d 661 (Ct. App. 2005).

115. *Id.* at 17, 614 S.E.2d at 663.

116. *Id.* at 18, 614 S.E.2d at 664.

were both incarcerated was contrary to the best interests of the young boy.<sup>117</sup>

## J. *Child Abuse, Neglect, and Endangerment*

### 1. Statutory Developments

Two laws enacted in 2006 sought to strengthen Virginia's support of victims of family violence. The first provides that a tenant may not be evicted because of family abuse against him occurring on the leased premises, if the abuser has been barred from the dwelling unit or subjected to a protective order, and the tenant gives timely notice of the abuse or order to the landlord.<sup>118</sup> The second clarifies that a preliminary protective order may enjoin a person from terminating a necessary utility service to a residence where a family abuse victim has been granted exclusive possession.<sup>119</sup>

Several other laws enacted in 2006 addressed the issues of child abuse and neglect and their consequences. One such law provides that it is child abuse or neglect if a parent or other custodian creates a substantial risk of physical or mental injury by knowingly leaving a child alone in the same dwelling with a person to whom the child is not related by blood or marriage and who the parent knows has been convicted of an offense against a minor for which registration as a violent sexual offender is required.<sup>120</sup> Another provides that any eligibility worker for a local department of social services must report suspected child abuse or neglect to the local department or the toll-free child abuse and neglect hotline.<sup>121</sup> The effort over several years to add clergy to

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117. See *id.* at 13, 18–20, 614 S.E.2d at 662, 664–65.

118. Act of Apr. 5, 2006, ch. 717, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 55-248.31(D) (Cum. Supp. 2006)). The amended section is found in the state's landlord-tenant laws.

119. Act of Mar. 30, 2006, ch. 308, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 16.1-253.1, -279.1 (Cum. Supp. 2006)). The respondent also can be ordered to pay deposits to connect or restore necessary utility services if the respondent was required to provide alternative housing for the petitioner, and a court may order any other relief necessary for the protection of the victim-petitioner and other family or household members. VA. CODE ANN. §§ 16.1-253.1, -279.1 (Cum. Supp. 2006).

120. Act of Apr. 19, 2006, ch. 868, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 16.1-228, 63.2-100 (Cum. Supp. 2006)).

121. Act of Apr. 4, 2006, ch. 530, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE

the mandatory child abuse reporting system was finally resolved by legislation requiring any adult who has received training in the detection of child abuse and neglect to report it to the local department of social services or the toll-free abuse and neglect hotline;<sup>122</sup> however, the law exempts from the reporting requirement information required to be kept confidential by the doctrine of the religious organization or denomination and information that a practitioner would not be required to disclose in court testimony.<sup>123</sup> Another law enacted in 2006 added a "safe haven" requirement that a baby delivered to a qualifying hospital or rescue squad be delivered in a manner that is reasonably calculated to ensure the child's safety in order for the parent to have an affirmative defense to prosecution for abuse or neglect.<sup>124</sup> Further legislation enhanced the concept of kinship care by requiring a local board of social services, before making a foster care placement, to first seek out kinship care.<sup>125</sup>

## 2. Case Law

Only a few court decisions involved the civil aspects of child abuse and neglect. In *Jones v. West*,<sup>126</sup> the Chesterfield County Circuit Court had entered an order setting aside and dismissing a founded complaint of sexual abuse involving the plaintiff.<sup>127</sup> The Court of Appeals of Virginia agreed that the decision not to tape-record an interview with the alleged child victim did not fall within the statutory exception to the recording requirement for team investigations with law enforcement personnel; thus, that decision violated mandatory regulatory procedure and was inva-

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ANN. § 63.2-1509(A)(14) (Cum. Supp. 2006)). The amendment is effective January 1, 2007, and the Department of Social Services must provide training to implement its provisions.

122. Act of Apr. 6, 2006, ch. 801, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 63.2-1509(A)(13) (Cum. Supp. 2006)).

123. *Id.* (codified as amended at VA. CODE ANN. § 63.2-1509(A) (Cum. Supp. 2006)).

124. Act of May 18, 2006, ch. 935, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 18.2-371, -371.1, 40.1-103 (Cum. Supp. 2006)).

125. Act of Mar. 30, 2006, ch. 360, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 63.2-900(A) (Cum. Supp. 2006)). The Board of Social Services is mandated to adopt regulations for determining whether the child has an eligible relative, and such placements are subject to the requirements and benefits of other foster care placements, including payments for the care of the child. VA. CODE ANN. § 63.2-900.1 (Cum. Supp. 2006).

126. 46 Va. App. 309, 616 S.E.2d 790 (Ct. App. 2005). Judge McClanahan concurred in part and dissented in part, with an opinion. *Id.* at 334, 616 S.E.2d at 803 (McClanahan, J., concurring in part and dissenting in part).

127. *Id.* at 313, 616 S.E.2d at 792.

lid.<sup>128</sup> The court also concluded that the failure to record the interview was not mere harmless error and thus required that the disposition of the investigation be set aside, although the accused party was not entitled to an award of attorney fees and costs.<sup>129</sup> As in the past, the bulk of the cases dealing with abuse and neglect were criminal prosecutions of persons who abused a child in some fashion. Three such cases were prosecutions of felony child neglect. In *Morris v. Commonwealth*,<sup>130</sup> a mother was convicted of two counts of felony child neglect, and a divided panel of the Court of Appeals of Virginia reversed the convictions.<sup>131</sup> On rehearing en banc, the court held that the evidence was sufficient to support the convictions; specifically, it showed that the two children, five and one-half and two and one-half years old, were frequently left unattended, sometimes outside the residence and often for long stretches of times while the mother was in drug-induced comas.<sup>132</sup> Further, the older child was hearing-impaired and unable to respond to normal auditory stimuli, and the younger child was found outside and unclothed, with dried fecal matter on his legs.<sup>133</sup> In *Barnes v. Commonwealth*,<sup>134</sup> a mother was convicted of two counts of child endangerment, and the Court of Appeals of Virginia held that the evidence was sufficient to support the convictions, as it showed that she had left her two-year-old and four-year-old children alone in her apartment while she went shopping at the grocery store for a sufficient amount of time to purchase ten bags of groceries.<sup>135</sup> The children awakened while she was gone and left the apartment to go to a neighbor's apartment, but the evidence showed that they easily could have wandered into the street.<sup>136</sup> In *Jones v. Commonwealth*,<sup>137</sup> a mother was convicted of felonious child neglect, and the Court of

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128. *See id.* at 325–26, 616 S.E.2d at 799 (citing 22 VA. ADMIN. CODE § 40-705-80(B)(1) (2003)).

129. *See id.* at 331, 334, 616 S.E.2d at 802–03.

130. 47 Va. App. 34, 622 S.E.2d 243 (Ct. App. 2005). Judge Elder dissented in an opinion joined by Judges Benton and Humphreys, urging that there was insufficient proof of the willfulness necessary to support the convictions. *Id.* at 47, 622 S.E.2d at 249 (Elder, J., dissenting).

131. *Id.* at 36–37, 622 S.E.2d at 244.

132. *Id.* at 37, 46, 622 S.E.2d at 244–45, 249.

133. *See id.* at 37, 622 S.E.2d at 244–45.

134. 47 Va. App. 105, 622 S.E.2d 278 (Ct. App. 2005).

135. *See id.* at 111, 622 S.E.2d at 281.

136. *See id.* at 109, 111–12, 622 S.E.2d at 279–81.

137. 46 Va. App. 713, 621 S.E.2d 676 (Ct. App. 2005).



Appeals of Virginia agreed that by selling heroin from her apartment where she lived with her eight-year-old son and keeping the drugs in close proximity to the boy, she created a substantial risk of serious injury to or death to the child.<sup>138</sup>

### 3. Sexual Abuse

In *Nobrega v. Commonwealth*,<sup>139</sup> the defendant was charged with two counts of rape of a child under the age of thirteen and two counts of sexual abuse of the same child, over whom he had a custodial or supervisory relationship.<sup>140</sup> Prior to trial, the defendant moved for an independent psychiatric or psychological examination of the complaining witness, but the Norfolk City Circuit Court denied his motion and, after hearing the evidence, found him guilty of the crimes charged.<sup>141</sup> The Court of Appeals of Virginia and the Supreme Court of Virginia both affirmed, holding that a trial court has no authority to require a complaining witness in a rape case to undergo a psychiatric or psychological examination.<sup>142</sup> However, in *Welch v. Commonwealth*,<sup>143</sup> the Supreme Court of Virginia held that the alleged victim's testimony that she had engaged in "sexual relations" with the accused was too vague and thus failed to satisfy the particularity required to prove carnal knowledge under the statute.<sup>144</sup> In *Wilson v. Commonwealth*,<sup>145</sup> a child victim wrote a letter to her grandmother in which she described the abuse allegedly perpetrated upon her by the defendant.<sup>146</sup> The Court of Appeals of Virginia held that the letter was admissible under the "recent complaint" exception to the hearsay rule and that the evidence was consequently sufficient to support the convictions.<sup>147</sup> In *Gilbert v. Commonwealth*,<sup>148</sup> the Court of Appeals of Virginia determined that an employer-employee relationship was a sufficient predicate to support a con-

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138. See *id.* at 716, 724, 621 S.E.2d at 677, 681.

139. 271 Va. 508, 628 S.E.2d 922 (2006).

140. *Id.* at 511-12, 628 S.E.2d at 923.

141. *Id.* at 512-14, 628 S.E.2d at 923-24.

142. See *id.* at 514, 519, 628 S.E.2d at 925, 927.

143. 271 Va. 558, 628 S.E.2d 340 (2006).

144. *Id.* at 565, 628 S.E.2d at 344 (citing VA. CODE ANN. § 18.2-63 (Repl. Vol. 2004 & Cum. Supp. 2006)).

145. 46 Va. App. 73, 615 S.E.2d 500 (Ct. App. 2005).

146. *Id.* at 80, 615 S.E.2d at 503.

147. See *id.* at 89-90, 615 S.E.2d at 508.

148. 47 Va. App. 266, 623 S.E.2d 428 (Ct. App. 2005).

viction for indecent liberties by a person in a supervisory capacity.<sup>149</sup>

In the long-running case of *In re Carpitcher*,<sup>150</sup> the petitioner sought a writ of habeas corpus relating to his convictions for aggravated sexual battery, taking indecent liberties with a minor, and animate object sexual penetration.<sup>151</sup> The Roanoke County Circuit Court denied the petition, and the Supreme Court of Virginia denied a petition for appeal.<sup>152</sup> Thereafter, the petitioner sought a writ of actual innocence based upon newly discovered non-biological evidence, alleging that the victim had recanted her allegations of inappropriate sexual touching.<sup>153</sup> The circuit court, acting pursuant to an order from the Court of Appeals of Virginia, held an evidentiary hearing and made findings of fact relating to two certified questions.<sup>154</sup> The court of appeals thereafter held, as matters of first impression, that the petitioner did not establish that the victim's recantation of her testimony at trial was true, and that the victim's newly discovered lack of credibility in light of her recantation, when considered along with all of the other evidence in the case, did not establish that victim perjured herself at trial.<sup>155</sup> Finally, in *Schneider v. Commonwealth*,<sup>156</sup> the Court of Appeals of Virginia held that the circuit court's finding that an alleged minor rape victim was unavailable, and her preliminary hearing testimony was therefore admissible at trial, was not an abuse of discretion.<sup>157</sup>

### K. *Children and Computer Crimes*

In *Hix v. Commonwealth*,<sup>158</sup> the defendant was convicted of attempted indecent liberties with a minor and the use of a computer to solicit a minor.<sup>159</sup> The Supreme Court of Virginia held

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149. *See id.* at 273, 623 S.E.2d at 431–32.

150. 47 Va. App. 513, 624 S.E.2d 700 (Ct. App. 2006).

151. *Id.* at 516–17, 519, 624 S.E.2d at 702–03.

152. *Id.* at 519, 624 S.E.2d at 703.

153. *Id.* at 519–20, 624 S.E.2d at 703.

154. *Id.* at 517, 624 S.E.2d at 702.

155. *Id.* at 530, 624 S.E.2d at 708–09.

156. 47 Va. App. 609, 625 S.E.2d 688 (Ct. App. 2006).

157. *Id.* at 616, 625 S.E.2d at 691.

158. 270 Va. 335, 619 S.E.2d 80 (2005).

159. *Id.* at 337, 619 S.E.2d at 81.

that the fact that Hix was communicating with an adult law enforcement officer posing as a child was not a defense to attempted indecent liberties with a minor, and that the evidence was sufficient to support the conviction.<sup>160</sup> In another technology-related case, *Kromer v. Commonwealth*,<sup>161</sup> the defendant was convicted, in a bench trial, of fifteen counts of misdemeanor possession of child pornography.<sup>162</sup> The Court of Appeals of Virginia ruled that evidence of knowing possession was sufficient to support a conviction.<sup>163</sup> Further, the court held that, as a matter of first impression, a finding of "possession" of child pornography, in the context of computer electronics and the Internet, requires that the defendant intentionally sought out and viewed child pornography on the Internet, knowing that such images would be saved on his computer.<sup>164</sup> Finally, the court of appeals held that evidence of constructive possession also was sufficient to support the conviction.<sup>165</sup> In a third case, *Colbert v. Commonwealth*,<sup>166</sup> the defendant was convicted of computer solicitation of sex with a minor and, as part of his sentence, he was required to register as a sex offender.<sup>167</sup> The Court of Appeals of Virginia ruled that he was indeed required to register as a sex offender under the Sex Offender and Crimes Against Minors Registry Act<sup>168</sup> even though, in committing the offenses, he had been communicating with an undercover police officer posing as a minor, not an actual minor.<sup>169</sup>

#### L. *Termination of Parental Rights*

Only three published opinions addressed the termination of residual parental rights. In *Fields v. Dinwiddie County Department*

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160. *See id.* at 346, 349, 619 S.E.2d at 86, 88.

161. 45 Va. App. 812, 613 S.E.2d 871 (Ct. App. 2005).

162. *Id.* at 814, 613 S.E.2d at 872.

163. *See id.* at 816, 613 S.E.2d at 873.

164. *See id.* at 817–18, 613 S.E.2d at 873–74 (citing *United States v. Tucker*, 305 F.3d 1193, 1204–05 (10th Cir. 2002)).

165. *See id.* at 819–21, 613 S.E.2d at 874–76.

166. 47 Va. App. 390, 624 S.E.2d 108 (Ct. App. 2006).

167. *Id.* at 393, 624 S.E.2d at 109.

168. *See id.* at 403, 624 S.E.2d at 115 (citing VA. CODE ANN. §§ 9.1-900 to -920 (Repl. Vol. 2006)).

169. *See id.* at 393, 624 S.E.2d at 109.

of *Social Services*,<sup>170</sup> a mother appealed from an order terminating her residual parental rights to her two-year-old son, but the Court of Appeals of Virginia held that admissible evidence proved, clearly and convincingly, that termination of her residual parental rights was in the child's best interests.<sup>171</sup> Likewise, in *Toms v. Hanover Department of Social Services*,<sup>172</sup> a father appealed the circuit court's termination of his residual parental rights and approval of a goal of adoption for six of his children.<sup>173</sup> The Court of Appeals of Virginia concluded that the evidence demonstrated termination of parental rights was in the best interests of the children, and that the neglect and abuse suffered by the children presented a serious and substantial threat to their life, health, and development.<sup>174</sup> In addition, the evidence supported the finding that the father could not, within a reasonable period of time, substantially remedy the conditions that resulted in the children being placed in foster care.<sup>175</sup> Further, the Department of Social Services was not required to provide the father with rehabilitative services before terminating his parental rights,<sup>176</sup> and the circuit court did not violate the father's due process rights by terminating his parental rights without first ensuring that he had received rehabilitative services.<sup>177</sup> In *Richmond Department of Social Services v. Crawley*,<sup>178</sup> the Department of Social Services petitioned the Juvenile and Domestic Relations District Court to terminate a mother's residual parental rights to two children who had been placed in foster care and grant the department the authority to place the children for permanent adoption.<sup>179</sup> The court granted the petition, and the mother appealed.<sup>180</sup> The Richmond City Circuit Court then denied the petition, and the department appealed.<sup>181</sup> The Court of Appeals of Virginia found that the circuit court was not plainly wrong or without evidence to support its decision and affirmed

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170. 46 Va. App. 1, 614 S.E.2d 656 (Ct. App. 2005).

171. *See id.* at 3-4, 11, 614 S.E.2d at 657, 661.

172. 46 Va. App. 257, 616 S.E.2d 765 (Ct. App. 2005).

173. *Id.* at 261, 616 S.E.2d at 767.

174. *See id.* at 267, 616 S.E.2d at 770.

175. *Id.*

176. *See id.* at 268, 616 S.E.2d at 770-71.

177. *See id.* at 274-75, 616 S.E.2d at 773-74.

178. 47 Va. App. 572, 625 S.E.2d 670 (Ct. App. 2006).

179. *Id.* at 574, 625 S.E.2d at 671.

180. *Id.* at 577, 625 S.E.2d at 672.

181. *Id.* at 574, 625 S.E.2d at 671.

the circuit court's decision that terminating the mother's residual parental rights was not in the children's best interests.<sup>182</sup>

### M. *Other Developments in Family Law*

#### 1. Generally

Three statutes enacted in 2006 do not fall neatly within any of the subjects above. The first provides that any military reservist or national guardsperson who is a party to a petition seeking the determination of custody, visitation, or support of a child predicated on a change in circumstances because one of the parents has been called to active duty shall be entitled to have such a petition expedited on the court's docket.<sup>183</sup> The second provides that, in civil proceedings for the determination of child or spousal support, the court may allow one expert witness for each party to remain in the courtroom throughout the hearing upon the request of any party.<sup>184</sup> A third creates a class 1 misdemeanor for the fraudulent procurement, sale, or receipt of telephone records,<sup>185</sup> an issue that arises from time to time in family law disputes.

#### 2. Attorney's Fees

In *Batra v. Batra*,<sup>186</sup> the Court of Appeals of Virginia reversed the trial court's denial of a husband's request for attorney's fees that were expended in connection with the wife's challenge to the property settlement agreement.<sup>187</sup> As provided for in the agreement, fees were sought only in connection with the property settlement agreement, not child custody or visitation issues, and the

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182. See *id.* at 574, 584, 625 S.E.2d at 671, 676.

183. VA. CODE ANN. § 20-108 (Cum. Supp. 2006).

184. *Id.* § 8.01-375 (Cum. Supp. 2006).

185. *Id.* § 18.2-152.17(A) (Cum. Supp. 2006). The misdemeanor involves: (1) knowingly procuring, attempting to procure, soliciting, or conspiring with another to procure a telephone record without authorization by fraudulent means; (2) knowingly selling, or attempting to sell, a telephone record without authorization; or (3) receiving a telephone record knowing that such record has been obtained without authorization by fraudulent means. *Id.* The third predicate may catch some lawyers if they are not careful.

186. No. 0047-05-4, 2005 WL 3754000 (Va. Ct. App. Feb. 14, 2006) (unpublished decision).

187. *Id.* at \*1.

court also awarded attorney's fees for the appeal.<sup>188</sup> In *Virginia State Bar ex rel. Second District Committee v. Pinkard*,<sup>189</sup> an attorney's license to practice law was suspended for two years by a three-judge court for, among other things, billing for hours spent as a guardian ad litem in two child support enforcement cases and a related paternity matter in which he had been appointed that were clearly excessive under the facts of the case.<sup>190</sup>

## II. JUVENILE LAW

The Virginia General Assembly continues to widen the net in dealing with juvenile participation in gang activity and in addressing sexual offenders, including youths who commit sex offenses.

### A. *Gang Activity*

One new statutory section requires the Departments of Corrections and Juvenile Justice to collect information on individuals identified as gang members and transmit it to the Commonwealth's Attorneys' Services Council, which then disseminates the information to attorneys for the Commonwealth.<sup>191</sup> Virginia Code section 16.1-300(A)(6) now provides that law-enforcement agencies, school administrations, and probation offices are included as entities that may examine certain juvenile records held by the Department of Juvenile Justice if there is a court order determining that they have a legitimate interest.<sup>192</sup> Another gang-focused law provides that where the consideration of public safety requires, gang-related information pertaining to others obtained

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188. *Id.*

189. 54 Va. Lawyer Register, No. 6, Jan. 2006, at 8 (Va. Cir. Ct. Nov. 30, 2005) (Norfolk City).

190. *Id.* at 9–10, 13.

191. VA. CODE ANN. §§ 2.2-2618(4), 53.1-10(8) (Supp. 2006); *id.* § 66-3.2(B) (Cum. Supp. 2006); *see also id.* § 16.1-300(A)(8) (Cum. Supp. 2006).

192. *Id.* § 16.1-300(A)(6) (Cum. Supp. 2006). A court order allowing access may be granted if the person, agency, or institution has a legitimate interest in the juvenile. *Id.* Under current law, the interest is limited to the case or in the work of the court. In addition, the Department of Juvenile Justice will be allowed to release the social reports and records of a child to certain law enforcement employees for the purpose of investigating criminal street gang activity. *Id.* § 16.1-300(A)(10) (Cum. Supp. 2006). The breadth of this provision may be problematic because of the presence of mental health records and other confidential matters that may not be relevant to gang participation.

from investigation or supervision of a juvenile affiliated with a criminal street gang can be released by the Department of Juvenile Justice or a court service unit to a law-enforcement agency investigating criminal street gang activity.<sup>193</sup>

## B. *Sexual Offenses*

The Virginia Code now contains provisions which could have some troubling possibilities for juveniles who engage in consensual acts with minors three or more years younger than them.<sup>194</sup> The Sex Offender and Crimes against Minors Registry website will include persons convicted of all registrable sex offenses,<sup>195</sup> not just persons convicted of violent sex offenses as under prior law.<sup>196</sup> Local school boards are now required to ensure that schools within their divisions are registered to receive electronic notice of sex offenders within that school division and develop and implement policies to provide information to parents regarding the registration of sex offenders and the availability of information on the registry.<sup>197</sup> The Virginia Code also requires a mandatory minimum term of confinement of twenty-five years for the following offenses committed in the course of an abduction, burglary, or aggravated malicious wounding in which the offender is more than three years older than the victim: sexual intercourse with a child under thirteen years of age,<sup>198</sup> sodomy of a child under thirteen years of age,<sup>199</sup> and object sexual penetration of a child under thirteen years of age.<sup>200</sup> The sex offender website may include adolescents who engage in consensual sexual activities with each other if there are sufficient age differences.<sup>201</sup> Procedures to be used by correctional institutions and juvenile facilities

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193. *Id.* § 16.1-309.1(G) (Cum. Supp. 2006).

194. *See id.* §§ 2.2-3706, -3802, 37.2-900 to -900.2, -903 to -908, -910, -912, -919, -920, 46.2-323, -324, -330, -345, -348, 53.1-23.2, -115.1, -116.1 to -116.1:01, -121, -136, -145, -160.1 (Supp. 2006); *id.* §§ 9.1-102, -902 to -910, -913, -914, -918 to -921, 22.1-79, -79.3, 23.1-2.2:1 (Repl. Vol. 2006); *id.* §§ 16.1-249.1, -278.7:01, -278.7:02, 18.2-48, -61, -67.1, -67.2, -370.2 to -370.4, -472.1, 19.2-169.3, -295.2:1, -299, -303, -390.1, 63.2-105 (Cum. Supp. 2006).

195. *See id.* § 9.1-902 (Repl. Vol. 2006).

196. *Id.* (Cum. Supp. 2005).

197. *Id.* §§ 22.1-79(10), -79.3(C) (Repl. Vol. 2006).

198. *Id.* § 18.2-61 (Cum. Supp. 2006).

199. *Id.* § 18.2-67.1 (Cum. Supp. 2006).

200. *Id.* § 18.2-67.2 (Cum. Supp. 2006).

201. *Id.* § 9.1-902(C) (Repl. Vol. 2006).

to obtain registration information from sex offenders under their custody are now more comprehensive, and there are faster timelines for transmission of information to the State Police.<sup>202</sup>

### C. *Intake, Detention, and Pretrial Matters*

Another law provides that if a juvenile and domestic relations district court does not sit within the county or city where a charge is pending on the day following the day a child is taken into custody, and there is no possibility of holding the hearing electronically, the judge may conduct the detention hearing in another county or city.<sup>203</sup> An amendment to the juvenile intake statute clarifies that it is unnecessary to file a petition for the refusal to take a blood or breath test for alcohol-related offenses, so as to make it consistent with the implied consent statutes.<sup>204</sup> Another new provision allows the Department of Social Services to establish the amount of the support obligation by parents when their child is committed to the custody of the Department of Juvenile Justice, and allows the latter to collect child support from the parents from the date it receives the child.<sup>205</sup> Another high-profile political issue is addressed by a new requirement that a juvenile intake officer shall report to the United States Immigration and Customs Enforcement Agency a juvenile who has been detained in a secure facility based on an allegation that he committed a violent juvenile felony and whom the intake officer has probable cause to believe is in the United States illegally.<sup>206</sup>

### D. *Misbehavior in Schools*

Several bills were passed in the 2006 Session of the General Assembly dealing with juvenile misbehavior related to the schools. One of these added teacher aides, school bus drivers, and school bus aides to the protected class of persons who are not deemed guilty of assault and battery for incidental or minor con-

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202. *See id.* §§ 53.1-23.2, -116.1, -116.1:01 (Supp. 2006).

203. *Id.* § 16.1-250(A) (Cum. Supp. 2006). The attorney for the Commonwealth, the attorney for the child, and the parents may appear electronically. *Id.* § 16.1-250(B) (Cum. Supp. 2006).

204. *Id.* § 16.1-260(H)(3) (Cum. Supp. 2006).

205. *Id.* § 16.1-290(D) (Cum. Supp. 2006).

206. *Id.* § 16.1-309.1(H) (Cum. Supp. 2006).



tact with a student in an attempt to maintain order.<sup>207</sup> Another new provision requires a parent, guardian, or other person having control or charge of a child of school age to provide to a public school, upon registration of the student, information concerning certain criminal convictions or delinquency adjudications.<sup>208</sup> Virginia Code section 22.1-277.07 now requires a school board to expel from school, for at least one year, a student who possesses certain weapons on school property or at a school-sponsored activity.<sup>209</sup> Yet another bill requires that principals or their designees receive notification from local law-enforcement authorities when students in their schools commit certain crimes whether the student is released to the custody of his parent or, if eighteen years of age or more, is released on bond.<sup>210</sup>

### E. *Punishment and Penalties*

In the only relevant Supreme Court of the United States case, *Clark v. Arizona*,<sup>211</sup> a seventeen-year-old defendant, who was indisputably suffering from paranoid schizophrenia, was convicted

207. H.B. 70, Va. Gen. Assembly (Reg. Sess. 2006) (enacted as Act of Apr. 19, 2006, ch. 829, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 18.2-57(F) (Cum. Supp. 2006))). This exception applies to charges of simple assault or assault and battery while acting in the course and scope of their official capacity when using:

- (i) incidental, minor or reasonable physical contact or other actions designed to maintain order and control;
- (ii) reasonable and necessary force to quell a disturbance or remove a student from the scene of a disturbance that threatens physical injury to persons or damage to property;
- (iii) reasonable and necessary force to prevent a student from inflicting physical harm on himself;
- (iv) reasonable and necessary force for self-defense or the defense of others;
- (v) reasonable and necessary force to obtain possession of weapons or other dangerous objects or controlled substances or associated paraphernalia that are upon the person of the student or within his control.

*Id.*

208. VA. CODE ANN. § 22.1-3.2(A)(2) (Repl. Vol. 2006). When the registration results from a foster care placement, the information shall be furnished by the local social services agency or licensed child-placing agency that made the placement. *Id.* § 22.1-3.2(B) (Repl. Vol. 2006).

209. *Id.* § 22.1-277.07 (Repl. Vol. 2006). Under the prior version of this section, a school board was required to expel a student who "brought a fire arm onto school property." *Id.* (Repl. Vol. 2003).

210. H.B. 1279, Va. Gen. Assembly (Reg. Sess. 2006) (enacted as Act of Mar. 23, 2006, ch. 146, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 22.1-279.3:1(B) (Repl. Vol. 2006))). The bill further requires that any superintendent who receives notification that a juvenile has committed an act that would be a crime if committed by an adult pursuant to Virginia Code section 16.1-260(G) must report such information to the principal of the school in which the juvenile is enrolled. *Id.*

211. 126 S. Ct. 2709 (2006).

as an adult of first-degree murder for killing a police officer in the line of duty.<sup>212</sup> The Supreme Court, through Justice Souter, concluded that neither Arizona's narrowing of its insanity test nor the exclusion of evidence of mental illness and incapacity due to mental illness on the issue of mens rea violated due process.<sup>213</sup>

The Supreme Court of Virginia likewise had only one case involving delinquency or criminal behavior, *Overbey v. Commonwealth*,<sup>214</sup> in which the court held that the Commonwealth failed to prove that a defendant charged with possession of a firearm by a convicted felon had in fact been previously convicted of a felony.<sup>215</sup> The Commonwealth had introduced into evidence a copy of a petition filed against Overbey in juvenile court, including two pages of notes relating to the proceedings.<sup>216</sup> However, the notes simultaneously referred to two charges, burglary and petit larceny, and it was unclear to which Overbey had pled guilty.<sup>217</sup> Thus, there was no evidence to establish he had been convicted of a felony rather than a misdemeanor.<sup>218</sup>

In an analogous case, *Conkling v. Commonwealth*,<sup>219</sup> a juvenile was convicted of petit larceny, and the court enhanced his sentence based on prior juvenile larceny adjudications.<sup>220</sup> The Court of Appeals of Virginia held that prior juvenile larceny adjudications could not be used as predicates for sentence enhancement under the recidivist larceny statute.<sup>221</sup> In *Locklear v. Commonwealth*,<sup>222</sup> the defendant filed motions to set aside his sexual battery convictions after ten months had passed.<sup>223</sup> The Norfolk City Circuit Court denied the motions.<sup>224</sup> The Court of Appeals of Virginia held that the trial judge lacked the authority to consider the

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212. *Id.* at 2716, 2718.

213. *Id.* at 2724, 2732. Justice Breyer filed an opinion concurring in part and dissenting in part. *Id.* at 2737 (Breyer, J., concurring in part and dissenting in part). Justice Kennedy dissented in an opinion in which Justices Stevens and Ginsburg joined. *Id.* at 2738 (Kennedy, J., dissenting).

214. 271 Va. 231, 623 S.E.2d 904 (2006).

215. *See id.* at 232, 623 S.E.2d at 904.

216. *Id.*

217. *Id.* at 232–33, 623 S.E.2d at 904–05.

218. *Id.* at 234, 623 S.E.2d at 906.

219. 45 Va. App. 518, 612 S.E.2d 235 (Ct. App. 2005).

220. *See id.* at 520, 612 S.E.2d at 236.

221. *See id.* at 521, 612 S.E.2d at 237.

222. 46 Va. App. 488, 618 S.E.2d 361 (Ct. App. 2005).

223. *Id.* at 490–91, 618 S.E.2d at 362–63.

224. *Id.* at 490, 618 S.E.2d at 362.

defendant's motions, which alleged that his guilty plea was not voluntarily, intelligently, or knowingly made and that his conviction should be vacated because his misdemeanor prosecution was commenced more than one year after the date of the alleged offense.<sup>225</sup> In *Mattox v. Commonwealth*,<sup>226</sup> a juvenile was convicted of felony hit and run, reckless driving, and assault and battery and was sentenced as a serious offender.<sup>227</sup> The Court of Appeals of Virginia held that the trial court's decision to sentence the youth as a serious offender was not an abuse of discretion in light of the circumstances in the case, which involved vehicular assault on a game warden.<sup>228</sup> In addition, the circuit court had properly delineated the factual findings necessary to utilize the serious offender statute.<sup>229</sup>

In *Robinson v. Commonwealth*,<sup>230</sup> a panel of the Court of Appeals of Virginia affirmed the convictions of parents, who were present at an underage drinking party at their house, for contributing to the delinquency of a minor.<sup>231</sup> On the grant of the defendants' petitions for rehearing en banc, the court held that: (1) the defendants extended to the public an implied invitation to enter their driveway and the front sidewalk of their premises; (2) the police officer in question did not exceed the scope of that implied invitation; and (3) the police officer, who was thus lawfully present on defendants' driveway, had sufficient probable cause and exigent circumstances to justify his warrantless entry into the defendants' backyard.<sup>232</sup>

The Virginia Code now reflects the elimination of capital punishment for minors and the restriction of the death penalty to those who are eighteen years of age or older at the time of the capital offense.<sup>233</sup>

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225. See *id.* at 490, 499, 618 S.E.2d at 362, 367.

226. 46 Va. App. 577, 620 S.E.2d 550 (Ct. App. 2005).

227. *Id.* at 578, 620 S.E.2d at 550.

228. See *id.* at 582-83, 620 S.E.2d at 552-53.

229. See *id.* at 581-82, 620 S.E.2d at 552.

230. 47 Va. App. 533, 625 S.E.2d 651 (Ct. App. 2006).

231. See *id.* at 541-42, 625 S.E.2d at 654-55.

232. See *id.* at 539, 562, 625 S.E.2d at 654, 665. Judge Bumgardner concurred and filed a separate opinion in which Judge McClanahan joined. *Id.* at 562, 625 S.E.2d at 665 (Bumgardner, J., concurring). Judge Elder concurred in part, dissented in part, and filed a separate opinion. *Id.* at 563, 625 S.E.2d at 665 (Elder, J., concurring in part and dissenting in part). Judge Benton dissented. *Id.* at 568, 625 S.E.2d at 668 (Benton, J., dissenting).

233. VA. CODE ANN. § 18.2-10 (Cum. Supp. 2006). Until July 1, 2006, the age require-

In *Gilman v. Commonwealth*,<sup>234</sup> a defendant mother was convicted of contempt of a juvenile and domestic relations district court for an incident that took place when she appeared before the court because her daughter was in foster care.<sup>235</sup> The mother had previously tested positive for drugs, and the court ordered another drug screen, whereupon she “said she needed something to drink and then left the building.”<sup>236</sup> The Henry County Circuit Court affirmed the conviction, and the Court of Appeals of Virginia held that, in a petty direct summary contempt appeal, the admission of the certificate of conviction for direct summary criminal contempt prepared by the juvenile court judge did not implicate the defendant’s rights under the Confrontation Clause.<sup>237</sup>

#### F. Other Developments in Juvenile Law

The General Assembly amended the Psychiatric Commitment of Minors Act to provide that state mental health facility recommendations are admissible during an involuntary commitment hearing of a minor<sup>238</sup> and that the minor’s hearing is to be scheduled by the juvenile court in the jurisdiction where the minor is located, as opposed to where the minor resides.<sup>239</sup> In addition, a proposal to create the Office of Children’s Services Ombudsman within the legislative branch was referred to the Committee on General Laws for further study.<sup>240</sup> Two resolutions were passed to study the Comprehensive Services for At-Risk Youth and Families Program, one by the Joint Legislative Audit and Review

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ment to receive the death penalty was sixteen years of age or older at the time of the offense. *Id.* (Repl. Vol. 2004). The change was made in response to the Supreme Court of the United States’s ruling that the Eighth and Fourteenth Amendments forbid the execution of offenders who were under the age of eighteen at the time of the crime. *See Roper v. Simmons*, 543 U.S. 551, 578 (2005).

234. 48 Va. App. 16, 628 S.E.2d 54 (Ct. App. 2006).

235. *Id.* at 20–21, 628 S.E.2d at 56.

236. *Id.* at 21, 628 S.E.2d at 56.

237. *See id.* at 20–21, 30, 628 S.E.2d at 56, 61. Judge Fitzpatrick dissented on the basis of *Crawford v. Washington*. *Id.* at 30–31, 628 S.E.2d at 61 (Fitzpatrick, J., dissenting) (citing *Crawford v. Washington*, 541 U.S. 36 (2004)).

238. Act of Mar. 31, 2006, ch. 401, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 16.1-341(B) (Cum. Supp. 2006)).

239. *Id.* (codified as amended at VA. CODE ANN. § 16.1-340 (Cum. Supp. 2006)).

240. S.B. 208, Va. Gen. Assembly (Reg. Sess. 2006).

Commission,<sup>241</sup> and the other by a joint subcommittee studying the cost effectiveness of the program.<sup>242</sup> Finally, House Joint Resolution 136 directed the Virginia State Crime Commission to conduct a study of Virginia's juvenile justice system, which will "focus on recidivism, disproportionate minority contact with the justice system, improving the quality of and access to legal counsel . . . accountability in the courts, and diversion."<sup>243</sup> In addition, Title 16.1 of the Code of Virginia will be analyzed "to determine the adequacy and effectiveness of Virginia's statutes and procedures relating to juvenile delinquency."<sup>244</sup>

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241. H.J. Res. 60, Va. Gen. Assembly (Reg. Sess. 2006).

242. S.J. Res. 96, Va. Gen. Assembly (Reg. Sess. 2006).

243. H.J. Res. 136, Va. Gen. Assembly (Reg. Sess. 2006).

244. *Id.*