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Annual Survey of Virginia Law: Legal Issues Involving Children

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LEGAL ISSUES INVOLVING CHILDREN

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I. JUVENILE DELINQUENCY

After unusual activity at both the federal and state levels in the previous year, this past year was a relatively uneventful one where the law of juvenile delinquency was concerned. The historic jail removal legislation enacted at the 1985 session of the Virginia General Assembly[1] became fully effective on July 1, 1986. The provisions of this legislation severely limit the use of an adult jail for juvenile detention purposes and completely ban the dispositional use of such a facility for juveniles.[2]

The General Assembly changed little in the juvenile code at the 1986 session. The only amendments made were those: (1) permitting the continuance of a detention hearing to allow the summoning of witnesses for up to three consecutive days instead of requiring the hearing to be held on the next day on which the court sits;[3] (2) eliminating the clerk of the juvenile and domestic relations district court as one of the persons who must be unavailable before a magistrate can issue a warrant authorizing the detention of a juvenile;[4] (3) providing for the permissible detention of a juvenile who has absconded from a facility operated by the Department of Corrections;[5] and (4) expanding the category of offenses for which fingerprints and photographs of a child aged thirteen years or older may be taken.[6] Section 18.2-371.2 was added to the Code of Vir-

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1. *See* Shepherd, *Legal Issues Involving Children*, 19 U. RICH. L. REV. 753, 754-58 (1985).

2. *Id.*; *see* VA. CODE ANN. §§ 16.1-249, -284 (Cum. Supp. 1986).

3. VA. CODE ANN. § 16.1-250(H) (Cum. Supp. 1986).

4. *Id.* § 16.1-256. This amendment was simply a technical correction as the 1985 legislation had already removed the clerk from the category of persons who could issue a detention order for a child. *Id.* §§ 16.1-247 to -249.

5. *Id.* § 16.1-248.1(A)(2).

6. *Id.* § 16.1-299(A). The added offenses include forcible sodomy, inanimate object sexual penetration, grand larceny and burglary, and the attempts to commit such offenses. The amendment also simplified § 16.1-299(C)(4) to permit the forwarding of a juvenile's fingerprints to the Central Criminal Records Exchange for any juvenile 15 years or older who is certified to the circuit court for trial and found guilty as an adult of the offense charged or for any child 13 years or older who is found guilty of any of the listed offenses and adjudi-

ginia ("Code"), making it illegal for any person to sell tobacco products to, or purchase such products for, a minor under the age of sixteen if the individual knows that the juvenile is less than that age.[7] The section also makes illegal the purchase or possession of tobacco products by a person younger than sixteen, unless the possession is pursuant to an order of a parent or for delivery pursuant to employment.[8] Violation of the section is punishable by a fine not to exceed twenty-five dollars and no court costs may be assessed against an individual found guilty under the section.[9] Additionally, a court may defer a finding of guilt pursuant to section 18.2-251.[10] Finally, the General Assembly raised the fee for court-appointed counsel in the juvenile court to eighty-six dollars (from the national low of seventy-five dollars), although no similar increase was provided for attorneys appointed to serve as guardians ad litem in the court.[11]

One relevant case decided during the period covered by this survey was *Harlow v. Clatterbuck*.[12] This case presented the interesting question of the liability of juvenile correctional officials for the subsequent criminal acts of youths who are committed to the state and then later released as rehabilitated under Virginia's scheme of indeterminate commitments in delinquency matters. In *Harlow*, a sixteen-year-old was committed to the Department of Corrections for an assault on a police officer. After approximately seven months in state care, the juvenile's counselor recommended that the juvenile be returned home, and several other state and local juvenile officials agreed with this decision. The youth was discharged, and twelve weeks later robbed Clatterbuck and three others and cut their throats. All of the victims survived, and Clatterbuck sued the correctional officers, claiming that they were

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cated delinquent in juvenile court.

7. *Id.* § 18.2-371.2. The section does not apply to vending machine sales where a notice is posted on the machine noting the illegality of such sales.

8. *Id.* § 18.2-371.2(B).

9. *Id.* § 18.2-371.2(C).

10. *Id.* A violation of the section by a juvenile under the age of 16 would appear to make the minor a "child in need of services" rather than a delinquent child under VA. CODE ANN. § 16.1-228 (Cum. Supp. 1986), because the violation would be "an offense which would not be criminal if committed by an adult," with penalties prescribed by VA. CODE ANN. § 16.1-279(C) (Cum. Supp. 1986).

11. *Id.* §§ 16.1-267, 19.2-163. The new fee schedule still leaves Virginia in last place in the compensation paid attorneys for representing indigent children in juvenile court. *See* R. SPANGENBERG, W. ROSE, P. SMITH & R. THAYER, ANALYSIS OF COSTS FOR COURT-APPOINTED COUNSEL IN VIRGINIA 50 (1985).

12. 230 Va. 490, 339 S.E.2d 181 (1986).

grossly negligent in deciding to release the juvenile.[13] A judgment for the plaintiff was reversed by the Virginia Supreme Court on the ground that the juvenile officials were performing judicial functions within their jurisdiction and in good faith when they decided to release the juvenile. Thus, the doctrine of quasi-judicial immunity shielded them from liability.[14] Justice Poff concurred in the decision on the rationale that the defendants were clothed with public-servant immunity.[15] However, Justice Compton dissented because he believed that the officials were entitled to nothing more than sovereign immunity. Accordingly, Justice Compton stated that the officials lost this immunity upon the plaintiff's showing that the officials acted with gross negligence.[16]

II. EMANCIPATION

The most dramatic legislative innovation in the past year was the enactment of an emancipation statute.[17] Prior to this action, there was considerable uncertainty about the authority of Virginia's courts to emancipate a minor, except where the common-law doctrine of emancipation was asserted as a defense in some other proceeding. Some juvenile court judges emancipated youths on the basis of the court's statutorily defined equitable powers,[18] but others were loathe to take such a decisive step without specific authority. Case law in Virginia on the doctrine of emancipation was scanty, and it typically arose in another legal context. For example, in *Buxton v. Bishop*,[19] a father denied legal responsibility for the medical bills incurred by his deceased son during his final illness on the ground that the twenty-year-old[20] son was emancipated, thus releasing the father from liability for necessaries provided to his son. The supreme court agreed since the son had supported himself for three years, had worked away from home, had received his own wages and spent them as he pleased, and had lived away from home for the year preceding his death.[21] Seven

13. *Id.* at 493, 339 S.E.2d at 183.
14. *Id.* at 496, 339 S.E.2d at 186.
15. *Id.*
16. *Id.* at 497, 339 S.E.2d at 186.
17. 1986 Va. Acts 990 (codified as amended at VA. CODE ANN. §§ 8.01-229, 16.1-331 to -334 (Cum. Supp. 1986)).
18. *See* VA. CODE ANN. § 16.1-227 (Repl. Vol. 1982).
19. 185 Va. 1, 37 S.E.2d 755 (1946).
20. This case was decided prior to the lowering of the age of majority to 18.
21. *Buxton*, 185 Va. at 5, 37 S.E.2d at 756-57.

years later, in *Brumfield v. Brumfield*,[22] the court concluded that an unemancipated child could not sue a parent for negligence.[23] The court indicated that the burden of proof for establishing emancipation was on the person alleging it[24] and that emancipation "must be determined upon the peculiar facts and circumstances of each case."[25] Emancipation could be either express or implied, and either partial or complete.[26] Finally, in *Lawson v. Brown*,[27] a federal court opined that an emancipated minor is not included within the definition of a dependent child for the purposes of Virginia's aid to dependent children program. The court also noted that under Virginia law the marriage of minor children emancipated such a child from his parents.[28]

The new Virginia statute reposits jurisdiction over proceedings for the emancipation of children in the juvenile and domestic relations district court,[29] provides that a petition for such purpose may be filed by a minor sixteen years of age or older who resides in the commonwealth or by any parent or guardian of such a minor,[30] and sets the venue for such a proceeding in the juvenile court of the county or city in which the juvenile or his parents or guardian reside.[31] The standard petition recitations mandated by Code section

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22. 194 Va. 577, 74 S.E.2d 170 (1953).

23. This broad rule has developed some exceptions through the years in the commonwealth. For example, a child can sue a parent where a master-servant relationship exists between the parent and child. *See* Norfolk Southern R.R. v. Gretakis, 162 Va. 597, 600, 174 S.E. 841, 842 (1934). An unemancipated child may sue the father's employer for injuries inflicted by the negligent servant-father. *Id.* A child can sue the father who was a driver of a common carrier bus upon which she was a passenger. Worrell v. Worrell, 174 Va. 11, 26-27, 4 S.E.2d 343, 349-350 (1939). Parental immunity does not attach in automobile accident litigation in light of liability insurance and mandatory uninsured motorist endorsements to automobile insurance policies. Smith v. Kauffman, 212 Va. 181, 185-86, 183 S.E.2d 190, 194 (1971).

24. *Brumfield*, 194 Va. at 580, 74 S.E.2d at 173.

25. *Id.*

26. *Id.*

> [Complete emancipation] frees the child for all the period of its minority from the care, custody, control and service of its parents, conferring on the child the right to its own earnings and terminating the parents' legal obligation to support it. Partial emancipation frees the child for only a part of the period of minority, or from only a part of the parents' rights, or for some special purpose such as the right to its own wages.

Id. at 580-81, 74 S.E.2d at 173.

27. 349 F. Supp. 203 (W.D. Va. 1972).

28. *Id.* at 207.

29. VA. CODE ANN. § 16.1-241(O) (Cum. Supp. 1986).

30. *Id.* § 16.1-331.

31. *Id.*

16.1-262 must be supplemented by the gender of the juvenile and, if the petitioner is not the minor, the name of the petitioner and his or her relationship to the minor.[32] Upon receiving the petition the court *must* appoint counsel to act as guardian ad litem for the child and *may* require the local department of welfare or social services, or any other agency or person, to investigate the allegations in the petition and file a report with the court.[33] Additionally, the court may appoint counsel for the minor's parents or guardian and make any other orders deemed appropriate by the court.[34]

In order to find that a minor should be emancipated, the court must find after the hearing that: (1) the juvenile has entered into a valid marriage, whether dissolved or not; (2) the minor is on active duty with any of the United States armed forces; or (3) the child willingly lives separate and apart from her or his parents or guardian, with the consent or acquiescence of those persons, and that the minor is, or is capable of, providing his or her own support and competently managing her or his own financial affairs.[35] Thus, both the unmarried civilian child currently living at home and the child living separate and apart without parental consent or acquiescence may not be emancipated. This statute is consistent with the common law bases for emancipation which includes some element of an express or implied agreement between the parent and child.

Code sections 8.01-229 and 16.1-334 detail all the effects of an order of emancipation. In summary, such an order operates to remove from the juvenile virtually all of the disabilities and protections that normally attach to minority.[36] The statute, then, goes beyond common law emancipation, which normally is limited in its effects to the termination of all reciprocal parent-child rights and obligations, but does not serve to end the minor's legal disabilities. For example, emancipation operates to free the minor to enter into contracts, execute a will, sue or be sued, buy and sell real estate, obtain an operator's motor vehicle license, and a number of other

32. *Id.*

33. *Id.* § 16.1-332.

34. *Id.*

35. *Id.* § 16.1-333. The statute deletes as an alternative basis for emancipation the existence of other facts "which demonstrate that the parent-child relationship has irretrievably broken down." *See* S. 72, 1983 Virginia General Assembly; S. 182, 1984 Virginia General Assembly.

36. VA. CODE ANN. §§ 8.01-229, 16.1-334 (Cum. Supp. 1986).

actions that would not be possible for an unemancipated infant.[37] Any act done while an order of emancipation is in effect is valid even if the order is subsequently terminated or judicially determined to be void *ab initio*.[38]

The new statute also contemplates the termination of an order of emancipation[39] but prescribes no procedure for doing so. California law provides for the recission of an emancipation decree after notice to the parents,[40] but most other states, like Virginia, do not specifically address the issue. Also, unlike California,[41] the Virginia act is silent as to whether the statute abrogates the common-law emancipation doctrine. Despite these questions, the legislation represents a significant step forward in the delineation of the legal relationship between the older adolescent and his or her parents.

III. Child Custody

The most significant case decided in the field of child custody this past year was *Bailes v. Sours*.[42] In this case, the natural mother petitioned the juvenile and domestic relations district court for custody of her twelve-year-old son upon the death of her ex-husband and became embroiled in a dispute with the boy's stepmother.[43] Upon Jean Bailes' divorce from Wayne Sours in 1975, Wayne retained custody of the couple's three-year-old son pursuant to a juvenile court order entered in 1974. When the couple separated, the boy remained with his father, although Jean visited the child until he was two years old. At that time she ceased the practice because of psychological problems the son experienced after her visits.[44] She visited him only "eight or ten" times over the following nine years, with the last visit being on his seventh birthday.[45] Wayne married Elaine Sours in 1975 and died in 1983 when his son was eleven years old. The juvenile court awarded custody to the natural mother, Jean, but on appeal the circuit court gave custody to Elaine on the ground "that the best

37. *Id.* § 16.1-334.

38. *Id.*

39. *Id.* §§ 16.1-309.1 ("the order has not been terminated"), -333 ("notwithstanding any subsequent action terminating such order").

40. Cal. Civ. Code § 65 (West 1982).

41. Cal. Civ. Code § 61 (West 1982).

42. 231 Va. 96, 340 S.E.2d 824 (1986).

43. *Id.* at 97-98, 340 S.E.2d at 825.

44. *Id.*

45. *Id.* at 98, 340 S.E.2d at 826.

interests of Sean demand that he remain in [Elaine's] custody."[46]

On appeal, the Virginia Supreme Court affirmed the circuit court's holding. Although the court noted that previous cases had indicated that the presumption favoring a parent over a non-parent was conclusive,[47] it stated that this presumption was now only a strong one which could be rebutted by clear and convincing evidence of: (1) parental unfitness; (2) a previous divestiture order; (3) voluntary relinquishment; (4) abandonment; or (5) "a finding of 'special facts and circumstances . . . constituting an extraordinary reason for taking a child from its parent, or parents.' "[48] The court concluded that the evidence that Jean was a virtual stranger to her son, that he considered Elaine to be his mother, that he strongly desired to remain with Elaine, and that, in the opinion of a testifying psychologist, a transfer of custody to Jean would have a "significant, harmful, long-term impact on Sean," all inevitably led to the conclusion that there were "special facts and circumstances" rebutting the presumption in favor of a parent over a non-parent.[49] Thus, although the evidence established that both Jean and Elaine were fit to be parents, "to Sean, Elaine *is* his 'mother.' "[50]

In *Brinkley v. Brinkley*[51] and *Venable v. Venable*,[52] the court of appeals concluded that evidence of adultery on the part of a parent without any showing of improper conduct in the presence of the child or children "is an insufficient basis upon which to find that a parent is an unfit custodian of his or her child."[53] The court thus continued the recent focus of Virginia Courts on *exposure* to the immoral relationship rather than the mere existence of that behavior.[54]

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46. *Id.* at 99, 340 S.E.2d at 826.

47. *Id.* at 100, 340 S.E.2d at 827 (citing Williams v. Williams, 192 Va. 787, 792, 66 S.E.2d 500, 503 (1951); Surber v. Bridges, 159 Va. 329, 335, 165 S.E. 508, 510 (1932)). The court said that these cases were overruled to the extent that they conflicted with the current case or other rulings.

48. *Bailes*, 131 Va. at 100, 340 S.E.2d at 287.

49. *Id.* at 100-01, 340 S.E.2d at 827.

50. *Id.* (emphasis in original). Although this decision does not explicitly amount to a reliance on the doctrine of "psychological parenthood" urged as a governing principle in J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 17-20, 51 (1979), it closely approximates that conclusion.

51. 1 Va. App. 222, 336 S.E.2d 901 (1985).

52. 2 Va. App. 178, 342 S.E.2d 646 (1986).

53. *Brinkley*, 1 Va. App. at 224, 336 S.E.2d at 902; *see also Venable*, 2 Va. App. at 186, 342 S.E.2d at 651.

54. *See* Swisher & Bucur, *Domestic Relations: Annual Survey of Virginia Law*, 19 U. RICH. L. REV. 731, 745-46 (1985).

Simmons v. Simmons[55] reinforced a recent holding by the Virginia Supreme Court that the custodial parent may be permitted to remove children from Virginia over the objection of the noncustodial parent if the court finds this to be in the children's best interests.[56] In *Box v. Talley*,[57] the court of appeals upheld a circuit court's award of custody to the mother after the circuit court had reversed the juvenile and domestic relations district court's decision to the contrary. The court of appeals upheld the circuit court's award even though the circuit court erroneously perceived its role as a court of review rather than hearing the case *de novo* with the burden of proof on the party seeking to change custody.

The imposition of limitations on the exercise of visitation rights was before the court of appeals in *Eichelberger v. Eichelberger*.[58] The custodial parent had successfully persuaded the trial court to order the other parent to dispose of a mini-bike given to the eight-year-old child during visitation.[59] However, the court of appeals concluded that no evidence was presented in the circuit court demonstrating that the recreational activity in question was dangerous or affected the child's welfare during his visits with the noncustodial parent.[60] The court stated the relevant rule in such a matter:

> [W]hen visitation privileges have been liberally granted without restriction, absent a finding by the court that the non-custodial parent has acted without concern for the child's well-being or best interest, has demonstrated irresponsible conduct, has interfered with basic decisions in areas which are the responsibility of the custodial parent, or finding that the activity which is questioned by the custodial parent presents a danger to the child's safety or well-being, neither the custodial parent nor the court may intervene to restrict activities during visitation.[61]

The United States Court of Appeals for the Fourth Circuit ruled this past year in *United States v. Boettcher*[62] that a parent who aids or abets the kidnapping of his or her own minor child, or who

55. 1 Va. App. 358, 339 S.E.2d 198 (1986).
56. Gray v. Gray, 228 Va. 696, 324 S.E.2d 677 (1985).
57. 1 Va. App. 289, 338 S.E.2d 349 (1986).
58. 2 Va. App. 409, 345 S.E.2d 10 (1986).
59. *Id.* at 411, 345 S.E.2d at 11.
60. *Id.*
61. *Id.* at 413, 345 S.E.2d at 12.
62. 780 F.2d 435 (4th Cir. 1985).

participates in a conspiracy to kidnap that child, is immunized from prosecution under the federal kidnapping statutes[63] just as if she or he had physically participated in the abduction.

The only legislative enactment in the field of child custody in 1986 amended section 2.1-342 of the Virginia Code to give a non-custodial parent the same access as any other parent to his or her child's scholastic, medical, or mental records, unless parental rights have been terminated or a court has denied or restricted such access.[64]

IV. Abuse and Neglect and Termination of Parental Rights

A. *Abuse and Neglect*

Three cases this year addressed, directly or tangentially, the increasingly critical problem of the admissibility of evidence in a child abuse or neglect proceeding, especially where there is a criminal prosecution for sexual abuse of a child. The victim may be quite young and very unsophisticated in sexual matters, even with respect to terminology, and the offense is usually committed in private with little physical evidence to support the child's complaint. Although legislative initiatives to address the problem directly have been unsuccessful, these three cases cast some light on the situation.

In *Church v. Commonwealth*,[65] defendant was charged with forcible sodomy and rape of a seven-year-old girl. The child's mother was a witness for the prosecution, and testified that the child had developed an obsession with her parents' sex life and told the mother that "she didn't want [them] to do that because it was dirty, nasty and it hurt."[66] The mother's testimony at trial concerning this statement was objected to as constituting inadmissible hearsay, but the supreme court agreed with the trial judge that it was not hearsay since it was not being offered to show the truth of the child's assertion. Instead, it was being presented as circumstantial evidence that the girl was a victim of sexual abuse.[67] The opin-

63. 18 U.S.C. § 1201(a) (1982).

64. Va. Code Ann. § 2.1-342(3) (Cum. Supp. 1986).

65. 230 Va. 208, 335 S.E.2d 823 (1985).

66. *Id.* at 211, 335 S.E.2d at 825.

67. *Id.* at 211-12, 335 S.E.2d at 826. *But see* Bacigal, *Implied Hearsay*, 12 Va. B.A.J. 16 (Spring 1986). Professor Bacigal argues that the extra-judicial statement was offered as an implied assertion of a fact, the fact that the child thinks that sex was "dirty, nasty and it

ion also noted, without comment, that a guardian ad litem had been appointed for the child victim in the case.[68] In *Kehinde v. Commonwealth*,[69] the court of appeals approved the practice of using an anatomically correct doll as demonstrative evidence to assist an eleven-year-old girl in describing what had happened during a rape.[70] Finally, in *Royal v. Commonwealth*,[71] the court addressed the competency of children as witnesses in a case where three young children witnessed a murder. The court concluded that the trial judge had correctly allowed the ten-year-old witness to testify once the voir dire revealed that she "possessed the capacity to observe, recollect and communicate what she observed and was well aware of her duty to speak the truth."[72] The court described the indicia of this capacity as follows:

> A summary of portions of her responses discloses that she clearly stated her name, address and age; that she knew she was in court to testify; that she demonstrated that she knew to tell the truth was right, and to lie meant to tell a story and possibly be punished; she knew the school she attended, the class she was in and the good grades she had earned; she proved that she knew left from right and demonstrated an ability to count; she knew that the homicide had occurred in her home and stated its address; and succinctly denied that she had been "coached" concerning her testimony, stating that she should not do so because she might be repeating a lie.[73]

The court further observed "that when children testify, judicial inquiry into the issue of the capacity of the child to give testimony must be searching in proportion to chronological immaturity."[74]

A case involving the starvation and freezing death of an aged woman while in the care of her adult daughter also gives some guidance on the standards to be applied in criminal neglect cases. In *Davis v. Commonwealth*,[75] a conviction of involuntary manslaughter was affirmed where a daughter accepted "sole responsi-

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hurt" because she had experienced a traumatic sexual experience. *Id.* at 17.

68. 230 Va. at 210, 335 S.E.2d at 825. Appointing a guardian ad litem for the child in such a case is recommended by several authorities at the national level and is authorized in the juvenile court in Virginia by VA. CODE ANN. § 16.1-266(D) (Cum. Supp. 1986).

69. 1 Va. App. 342, 338 S.E.2d 356 (1986).

70. *Id.* at 346-47, 338 S.E.2d at 358.

71. 2 Va. App. 59, 341 S.E.2d 660 (1986).

72. *Id.* at 63, 341 S.E.2d at 662.

73. *Id.* at 63 n.1, 341 S.E.2d at 662 n.1.

74. *Id.* at 63, 341 S.E.2d at 662.

75. 230 Va. 201, 335 S.E.2d 375 (1985).

bility for the total care" of her aged and senile mother. The daughter lived in her mother's home expense-free while sharing the mother's social security, and acted as the mother's authorized food stamp representative.[76] Thus, she had assumed a legal, and not merely a moral, duty to care for her mother. Nevertheless, her mother died of starvation. An autopsy indicated that she had received no food for at least thirty days, and she had lain helpless in a bed in an unheated room in freezing weather.[77] Thus, the evidence supported a conclusion that there was more than simple negligence: "Davis' breach of duty was so gross and wanton as to show a callous and reckless disregard of [her mother's] life and that Davis' criminal negligence proximately caused [her] death."[78]

In *Bowen v. American Hospital Association*,[79] the United States Supreme Court addressed the highly controversial and troublesome issue of handicapped newborn infants in the context of regulations[80] promulgated by the Secretary of Health and Human Services under section 504 of the Rehabilitation Act of 1973.[81] The Court, agreeing with both the district court and the court of appeals, concluded that the regulations require: (1) health care providers receiving federal funds to post notices warning against the withholding of health care from infants on the basis of their physical or mental handicaps; (2) child protective agencies of the several states to establish procedures to protect handicapped infants; (3) expedited access to patient medical records by the department; and (4) expedited action to ensure compliance by health care providers.[82] The Court concluded that the regulations were not authorized by section 504 since there were no instances where a hospital receiving federal funds, as opposed to the parents, had withheld medical care on the basis of handicap, and because without parental consent to medical treatment, a handicapped child could not be "otherwise qualified" within the meaning of the Act.[83] In addition,

76. *Id.* at 205, 335 S.E.2d at 378.

77. *Id.* at 206, 335 S.E.2d at 379.

78. *Id.* at 206-07, 335 S.E.2d at 379.

79. 106 S. Ct. 2101 (1986).

80. 45 C.F.R. § 84.55 (1985). These have become known popularly as the "Baby Doe" regulations after the notorious case occurring in Bloomington, Indiana, in April, 1982, where an infant with Down's Syndrome and other handicaps died after the parents refused to consent to surgery to remove an esophageal blockage preventing oral feeding. *See* J. LYON, PLAYING GOD IN THE NURSERY 21-58 (1985).

81. 29 U.S.C. § 794 (1982).

82. *Bowen*, 106 S. Ct. at 2106-07.

83. *Id.* at 2115-17.

state protective service agencies cannot "be conscripted against their will as the foot soldiers in a federal crusade" to seek the compliance of other recipients of federal funds. [84] Thus, the regulations were invalid and their enforcement was properly enjoined.

B. *Termination of Residual Parental Rights*

In *Banes v. Pulaski Department of Social Services*,[85] the court of appeals affirmed the termination of a father's residual parental rights where it was demonstrated by clear and convincing evidence that the father failed to remedy the neglectful conditions causing the child's removal from the home and that he had not complied with any conditions for the child's return, despite the efforts of the social service agency to help him improve home conditions. Likewise, in *Lowe v. Department of Public Welfare*,[86] the Virginia Supreme Court upheld the termination of a mother's residual parental rights where she had been schizophrenic, psychotic, mentally deficient, and a chronic alcoholic for a number of years and "no appreciable improvement could be detected at the time of trial," thus evidencing that she was not substantially likely to correct or eliminate the conditions within a reasonable time.[87]

In *Norfolk Division of Social Services v. Unknown Father*,[88] the question presented involved the validity of an entrustment agreement entered into by a mother and the Divison of Social Services which granted legal custody of her child to the agency, over the objections of the child's grandparents and the guardian ad litem for the unknown father of the illegitimate child. Although the court of appeals reversed the circuit court's finding that the agreement was invalid on the ground that the evidence at trial was insufficient to establish any duress or coercion in the agreement's execution, the more interesting issue addressed by the court dealt with the role of the unknown father's guardian ad litem. Social services and the child's guardian ad litem both argued that the guardian for the father had no standing to appeal the juvenile court's decision because the guardian ad litem's representation of the father ceased when the father failed to come forward.[89] The court of

84. *Id.* at 2120.
85. 1 Va. App. 463, 339 S.E.2d 902 (1986).
86. 231 Va. 277, 343 S.E.2d 70 (1986).
87. *Id.* at 281-82, 343 S.E.2d at 73.
88. 2 Va. App. 420, 345 S.E.2d 533 (1986).
89. *Id.* at 424, 345 S.E.2d at 535.

appeals disagreed with this argument, concluding that the guardian ad litem's role was a continuing and important one. In particular, the court said:

> We note that the duties of a guardian *ad litem* when representing an infant are to defend a suit on behalf of the infant earnestly and vigorously and not merely in a perfunctory manner. He should fully protect the interests of the child by making a bona fide examination of the facts and if he does not faithfully represent the interests of the infant, he may be removed. The duties of a guardian *ad litem* are the same when representing any person under a disability, including an unknown parent.[90]

The legislative activity at the 1986 session of the General Assembly was moderate in this area. One enactment revised the definition of an "abused or neglected child" to include one "who is without parental care or guardianship caused by the unreasonable absence or the mental or physical incapacity of the child's parent, guardian, legal custodian or other person standing in loco parentis."[91] Additionally, the definition of "child in need of services" (CHINS) was expanded to include "[a] child whose behavior, conduct or condition presents or results in a serious threat to the well-being and physical safety of the child."[92] This last amendment is troubling as it appears to take the CHINS definition back to the earlier vague "habits and practices" category for court jurisdiction in noncriminal misbehavior cases.[93] The insertion of the qualifying phrase "however, no child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall for that reason alone be considered to be a child in need of services"[94] indicates that this provision is intended to apply more narrowly to a child at risk of physical harm.[95]

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90. *Id.* at 425 n.5, 345 S.E.2d at 536 n.5 (internal citations omitted).

91. VA. CODE ANN. §§ 16.1-228, 63.1-248.2 (A)(5) (Cum. Supp. 1986).

92. *Id.* § 16.1-228.

93. The pre-Juvenile Code Revision jurisdictional section had a category for a child "[w]hose occupation, behavior, environment, condition, association habits or practices are injurious to his welfare." VA. CODE ANN. § 16.1-158(1)(f) (Repl. Vol 1975). One reason for the tighter definintions of a "child in need of services" in the 1977 revision of the juvenile chapter was to eliminate such vague categories.

94. *Id.* §§ 16.1-228, 63.1-248.2(A)(5).

95. The same phrase is used in connection with the definition of an abused or neglected child in VA. CODE ANN. §§ 16.1-228 & 63.1-248.2 (A)(2) (Cum. Supp. 1986). The new lan-

An amendment to the indecent liberties statute criminalized proposals that a child expose himself or herself and proposals that a person feel or fondle the child's sexual parts.[96] Also, the statute was amended to include grandparents and step-grandparents in the category of persons in a custodial or supervisory relationship with the child.[97] The child restraint law was broadened in scope to include any person transporting a child under four, not just parents or legal guardians.[98] Several sections of the Code were amended to include language stressing further the state policy against the unnecessary use of foster care.[99] A similar enactment to further facilitate permanency planning for children provides that the appeal of a case involving termination of residual parental rights from a juvenile court shall be heard on the merits within ninety days of the perfection of the appeal.[100]

V. Child Support and Paternity

The establishment of the Court of Appeals of Virginia has led to a greater number of opinions involving child support and paternity, even more so than in the child custody area. A continuation of this volume of decisions will aid immeasurably in fleshing out the law on parental support obligations.

A. *Child Support*

In *Acree v. Acree*,[101] the court concluded that the husband was "entitled to credit for nonconforming child support payments when he has, by agreement of the parties, assumed physical custody and total responsibility for the support of the child, but has obtained no modification of the decree."[102] The agreement pro-

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guage in the CHINS definition is taken from the New Jersey Family Court Act's definition of "juvenile-family crisis". N.J. Stat. Ann. § S2A:4A-22(g) (Cum. Supp. 1986). The language was proposed by the Fairfax County Attorney's office on behalf of the county's department of social services to address the problem of suicidal or otherwise self-destructive children who were not either abused or neglected or committable to a mental institution. Telephone interview with Doreen Williams, former Assistant County Attorney for Fairfax County (Oct. 27, 1986).

96. *Id.* §§ 18.2-370, -370.1.

97. *Id.* § 18.2-370.1.

98. *Id.* §§ 46.1-314.2, -314.4.

99. 1986 Va. Acts 484 (codified as amended at Va. Code Ann. §§ 16.1-228, 63.1-55, 63.1-55.8, 63.1-56, 63.1-195 (Cum. Supp. 1986)).

100. Va. Code Ann. § 16.1-296 (Cum. Supp. 1986).

101. 2 Va. App. 151, 342 S.E.2d 68 (1986).

102. *Id.* at 152, 342 S.E.2d at 68.

vided for permanent relinquishment of custody, and had been fully performed.[103] The traditional rule that a parent's duty to "support minor children is a continuing obligation subject to review at any time as changing circumstances may dictate" was reiterated in *D'Auria v. D'Auria*.[104] In *Johnson v. Johnson*,[105] the court ruled that the wife's ten-year delay in seeking support arrearages did not constitute laches as that doctrine does not apply to noncompliance with a lawful decree. Also, the husband was not entitled to the wife's tax returns for the ten years as such information was irrelevant in light of the court's inability to make any change in past-due installments.[106] Finally, the court held that a father, under a unitary award, may be obliged by contract to support a child who has reached majority, and in order to avoid support payments for such a child, the father must seek a modification of the divorce decree.[107]

In *Keyser v. Keyser*,[108] the court of appeals ruled that a court order establishing an automatic yearly adjustment in the husband's child support obligation tied to the percentage increase or decrease in the salaries of certain employees of the Virginia Department of Highways and Transportation was improper because any modification "should result from a change in the parties' circumstances and be based upon a consideration of the factors set forth in Code § 20-107.2."[109] In *Venable v. Venable*,[110] the court remanded the case for reconsideration of the equitable distribution award and directed that the child support be redetermined as well in light of Code section 20-107.3(F), which provides that child support be considered "*after or at the time of*" the determination of a monetary award.[111]

The language of a divorce decree subsequent to the execution of a property settlement and custody agreement may be very critical, as demonstrated in *Rodriguez v. Rodriguez*.[112] The agreement between the parties, executed in 1975, provided that child support

103. *Id.* at 157, 342 S.E.2d at 71.
104. 1 Va. App. 455, 461, 340 S.E.2d 164, 168 (1986).
105. 1 Va. App. 330, 338 S.E.2d 353 (1986).
106. *Id.* at 332, 338 S.E.2d at 355.
107. *Id.* at 333, 338 S.E.2d at 355.
108. 2 Va. App. 459, 345 S.E.2d 12 (1986).
109. *Id.* at 461, 345 S.E.2d at 14.
110. 2 Va. App. 178, 342 S.E.2d 646 (1986).
111. *Id.* at 186, 342 S.E.2d at 651 (emphasis added in court's opinion).
112. 1 Va. App. 87, 334 S.E.2d 595 (1985).

was to be paid until both children reached the age of twenty-five, and the 1977 divorce decree adjudged "that the terms of said agreement settling property be and are hereby *approved, ratified,* and *confirmed.*"[113] This language was not sufficient to incorporate the agreement regarding child support in the decree, and the decree itself could not be utilized to enforce a child support obligation beyond the eighteenth birthday.[114] In *Ross v. Craw*,[115] the Virginia Supreme Court again pointed to the importance of careful drafting. In *Ross*, the parties used the precatory term "may" and the obligatory language "shall" throughout their agreement, indicating a distinction between the two.[116] Thus, a provision saying that child support "may be increased annually in proportion to the increase in cost of living as determined by the Federal Cost of Living Index for the United States" was not sufficiently definite to impose a legal obligation giving rise to an arrearage.[117]

The interpretation of the language in a property settlement agreement was also the focus of the court of appeal's decision in *Tiffany v. Tiffany*.[118] The father contractually assumed the responsibility to contribute to the support of the children while they were full-time college students conditioned on his right "to participate in the decision making process as to the college to be attended by the said children."[119] The father was consulted as to the older son's choice of a college and participated fully in the process although the son ultimately attended a college other than one of those preferred by the father. The court concluded that *participation* in the college decision was all the father insisted on and such participation was afforded him. Since all the other conditions for the continuation of support were satisfied, the father was obliged to pay support so long as the son was a full-time college student.[120]

In *Cass v. Lassiter*,[121] the court found that the revision of a settlement agreement which took place prior to its incorporation in a divorce decree was a clerical error. Therefore, a North Carolina support order under the Uniform Reciprocal Enforcement of Sup-

113. *Id.* at 89, 334 S.E.2d at 596 (emphasis in original).
114. *Id.* at 91, 334 S.E.2d at 597.
115. 231 Va. 206, 343 S.E.2d 312 (1986).
116. *Id.* at 214, 343 S.E.2d at 317.
117. *Id.* at 208, 214, 343 S.E.2d at 313, 317.
118. 1 Va. App. 11, 332 S.E.2d 796 (1985).
119. *Id.* at 14, 332 S.E.2d at 798.
120. *Id.* at 17, 332 S.E.2d at 801.
121. 2 Va. App. 273, 343 S.E.2d 470 (1986).

port Act (URESA)[122] did not nullify the corrected Virginia decree since a court cannot use URESA to modify or alter a valid support order.[123] The court of appeals ruled in *Lester v. Bennett*[124] that a father who entered the state to pursue a change of custody proceeding was not immunized from process or arrest in conection with a proceeding to collect delinquent child support. In *Dickens v. Commonwealth*,[125] the court held that there are no time limitations on the validity of supporting affidavits to a URESA petition, thus the fact that these documents were more than two years old was not critical to the proceeding.[126]

Three federal decisions are also relevant to this child support discussion. In *Sorenson v. Secretary of the Treasury*,[127] the United States Supreme Court concluded that an excess earned-income credit under sections 6401 and 6402 of the Internal Revenue Code[128] may properly be intercepted pursuant to section 464 of the Social Security Act,[129] which requires the interception of tax refunds payable to persons who have failed to meet their state child support obligations. The United States Court of Appeals for the Fourth Circuit ruled in *Caswell v. Lang*[130] that past-due child support obligations may not be included in a Chapter Thirteen plan under the federal Bankruptcy Code. In *McClelland v. Massinga*,[131] the Fourth Circuit held that Maryland's Tax Refund Interception Program did not violate the constitutional due process rights of the new, nonobligated spouses of the delinquent fathers by failing to give adequate notice to the spouses or to afford them a pre-intercept hearing.

In the legislative arena, the General Assembly: (1) clarified the juvenile court's jurisdiction in child support cases to include all matters involving the custody, visitation, support, control or disposition of a child;[132] (2) provided that motions and subsequent

122. VA. CODE ANN. §§ 20-88.12 to -88.31 (Repl. Vol. 1983 & Cum. Supp. 1986).
123. *Cass*, 2 Va. App. at 279-80, 343 S.E.2d at 474.
124. 1 Va. App. 47, 333 S.E.2d 366 (1985).
125. 2 Va. App. 72, 341 S.E.2d 392 (1986).
126. *Id.* at 76, 341 S.E.2d at 394.
127. 106 S. Ct. 1600 (1986).
128. 26 U.S.C. § 6401-02 (1982).
129. 42 U.S.C. § 664 (1982).
130. 757 F.2d 608 (4th Cir. 1985).
131. 786 F.2d 1205 (4th Cir. 1986).
132. VA. CODE ANN. § 16.1-241(A)(3) (Cum. Supp. 1986). The prior language seemed to limit such jurisdiction to cases where a duty of support was owed under section 20-61 of the Virginia Code.

pleadings in a pending juvenile court case need not go through the intake officer but may be filed directly with the clerk;[133] (3) gave the juvenile court the clear authority to impose civil sanctions against an employer for failing to comply with a payroll deduction order under section 20-79.1 of the Code;[134] (4) provided that appeals from a juvenile court under the Revised Uniform Reciprocal Enforcement of Support Act must be taken within thirty days from the entry of a final order or judgment;[135] (5) established that venue for an appeal from an administrative hearing officer in a support enforcement case should go to the juvenile court of the jurisdiction where the responsible party resides or where real property belonging to that person is located;[136] (6) decided that the homestead exemption should not apply to debts for child support;[137] and (7) enacted other technical amendments to several statutes based on recommendations of the Governor's Commission on Child Support.[138] Two final, yet significant, provisions require that a court awarding child support take into account the "tax consequences to each party" as one of the "other factors" to be considered in making such an award,[139] and mandate that the use of a mathematical formula in the computation of child and spousal support "shall be restricted to its use as a general guideline only."[140]

B. *Paternity and Illegitimacy*

In *Prestera v. Denny*,[141] the court of appeals held that a petition for support of an illegitimate child pursuant to Code section 16.1-241(A)(3) is civil in nature, and the petitioner may appeal a ruling in favor of the respondent dismissing the proceeding. In a similar vein, the court of appeals determined in *Lawrence v. Bluford-Brown*[142] that sections 20-61.1 and 20-61.2 of the Code apply to both civil and criminal proceedings to enforce the support of an

133. *Id.* §§ 16.1-260(A), -279(0). These amendments appear to facilitate the handling of support enforcement matters in the court.

134. *Id.* § 16.1-279(S).

135. *Id.* § 16.1-296.

136. *Id.* § 63.1-267.1. This section only provides for venue where real property is located.

137. *Id.* § 34-5.

138. Ch. 594, 1986 Va. Acts (amending VA. CODE ANN. §§ 20-60.3, -60.5, -79.1, 63.1-53, -250 to 250.3, -252.1, -271, -287, and adding *id.* § 63.1-250.4 (Cum. Supp. 1986)).

139. VA. CODE ANN. § 20-107.2 (2)(h) (Cum. Supp. 1986).

140. *Id.* § 20-108.1.

141. 1 Va. App. 103, 336 S.E.2d 169 (1985).

142. 1 Va. App. 202, 336 S.E.2d 899 (1985).

illegitimate child, and the use of a mandatory blood grouping test does not violate a putative father's privilege against self-incrimination. In addition, the two sections in question are not unconstitutionally vague because they simply require the use of expert witnesses to interpret the laboratory findings regarding the genetic blood grouping test, rather than providing specific standards for the determination of paternity.[143]

In *Marks v. Sanzo*,[144] the Virginia Supreme Court affirmed the award of death benefits to the illegitimate child of a fireman who died from injuries suffered in the line of duty. The court concluded that the deceased's acknowledgment of paternity to a number of disinterested witnesses and hearsay evidence of statements by the child's mother were sufficient to affirm the finding of paternity.[145] Likewise, in *Marshall v. Bird*,[146] the Virginia Supreme Court expanded the rights of illegitimate children by allowing them to inherit through a putative father, thus acknowledging the effect of *Trimble v. Gordon*[147] on Virginia's statutory scheme regarding inheritance by such children.[148] In *Marshall*, the court invalidated a statutory bar on the daughter's right of inheritence by or through her putative father and tolled the statute of limitations until her right to claim the inheritance accrued.[149] In *Beyah v. Shelton*,[150] the Virginia Supreme Court ruled that Code section 8.01-217 applies to both wed and unwed parents so that the father of an illegitimate child must be given notice of, and the opportunity to object to, proceedings to change the child's name.

The United States Supreme Court continued its expansion of the rights of illegitimate children in *Reed v. Campbell*,[151] by ruling that a claim filed by such a child could not be rejected even though

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143. *Id.* at 204-05, 336 S.E.2d at 901.

144. 231 Va. ___, 345 S.E.2d 263 (1986).

145. *Id.* at ___, 345 S.E.2d at 265-66. The natural mother's hearsay statements were admissible under the "pedigree" exception to the hearsay rule. Since the mother was last known to be in California and her whereabouts were unknown, she was considered to be either "deceased or out of the State" for purposes of invoking the "pedigree" exception. *Id*; *see also* Smith v. Givens, 223 Va. 455, 459, 290 S.E.2d 844, 846 (1982); Rawles v. Bazel, 141 Va. 734, 755, 126 S.E. 690, 696 (1925).

146. 230 Va. 89, 334 S.E.2d 573 (1985).

147. 430 U.S. 762 (1977).

148. *See* VA. CODE ANN. §§ 64.1-5.1 to -5.2 (Repl. Vol. 1983) (sections governing the inheritance rights of illegitimate children).

149. *Marshall*, 230 Va. at 92-93, 334 S.E.2d at 575.

150. 231 Va. ___, 344 S.E.2d 909 (1986).

151. 106 S. Ct. 2234 (1986).

Trimble was decided after the father's death but prior to the filing of the claim. In *Paulussen v. Herion*,[152] the Court remanded a case in which the Pennsylvania courts had barred a paternity claim by applying a six-year limitation with instructions that the case be reconsidered in light of Pennsylvania's subsequent enactment of an eighteen-year period of limitation.

VI. Education

Because *Bender v. Williamsport Area School District*[153] was decided on the procedural ground of standing rather than on the merits, the most significant decision in the realm of education during the period of this discussion was *Riddick v. School Board*.[154] In *Riddick*, the Fourth Circuit Court of Appeals concluded that when the district court determined in 1975 that racial discrimination had been eliminated from the Norfolk school system, the school system had become unitary. This prior unitary finding shifted the burden of proof to those parties now charging the school district with discriminatory intent in devising a new pupil assignment plan which would abolish mandatory cross-town busing.[155] The new neighborhood school assignment plan, which was designed on the basis of the residence rather than the race of the child, constituted "a reasonable attempt by the school board to keep as many white students in public education as possible and so achieve a stably integrated school system [and] to improve the quality of the school system by seeking a program to gain greater parental involvement."[156] The court observed that the effort to diminish "white flight" by reverting to neighborhood schools might have the effect of "creating several black schools" but concluded that there was no demonstration of a discriminatory intent.[157]

The only significant legislation in the area of education, other than the regular revisions of the Standards of Quality,[158] was the enactment of the provision standardizing the opening of the school year until after Labor Day.[159]

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152. 106 S. Ct. 1339 (1986).
153. 106 S. Ct. 1326 (1986).
154. 784 F. 2d 521 (4th Cir. 1986).
155. *Id.* at 534.
156. *Id.* at 543.
157. *Id.*
158. *See* Va. Code Ann. §§ 22.1-253.1 to -253.12 (Cum. Supp. 1986).
159. *Id.* § 22.1-79.1.

VII. MISCELLANEOUS

In *Miller v. Johnson*,[160] the Virginia Supreme Court recognized the existence of an action for "wrongful conception" or "wrongful pregnancy" where the negligent performance of a sterilization or abortion procedure results in the subsequent birth of a child.[161] However, the court also determined that the parents bringing such an action are not entitled to recover damages for the expenses of rearing the child to the age of majority, because such damages cannot be established with reasonable certainty and are inherently speculative and conjectural.[162]

160. 231 Va. 177, 343 S.E.2d 301 (1986).

161. *Id.* at 182-83, 343 S.E.2d at 304-05. The court distinguished this cause of action from "wrongful birth," which is an action on behalf of the parents where a defective child is born either after a failed abortion or the failure of a physician to advise parents of a risk of genetic or birth defects. The court also distinguished this cause of action from "wrongful life," which is a suit on behalf of the child where the child is born defective after a physician has failed to warn of potential defects or to prevent or terminate the pregnancy in light of known risks. Virginia has previously recognized the former in Naccash v. Burger, 223 Va. 406, 409, 290 S.E.2d 825, 826-27 (1982), but has not yet considered the viability of the latter. Dictum in *Miller* indicates that most courts reject this cause of action. 231 Va. at 181, 343 S.E.2d at 303.

162. *Id.* at 187, 343 S.E.2d at 307.