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Annual Survey of Virginia Law: Legal Issues Involving Children

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LEGAL ISSUES INVOLVING CHILDREN

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I. INTRODUCTION

The past few years of legal developments involving children have been marked in part by an increase in the number of major decisions from the United States Supreme Court which have had a direct impact on children. Some of those decisions have had a very dramatic effect, as noted in previous surveys, such as juvenile death penalty cases,[1] cases addressing issues involving abused or neglected children,[2] an opinion defining the associational rights of children,[3] two cases further extending the rights of illegitimate children,[4] decisions addressing the educational rights of handicapped children,[5] and three important decisions narrowing the first amendment and other expression rights of public school children.[6] The past year has been one of unusual activity by the Supreme Court, both in the number of cases decided and in the complexity and impact of the issues presented. For example, during the recently concluded 1990 Term alone, the Court issued decisions in no less than ten cases of varying importance that impact on children, sometimes in a very profound fashion.

In *Board of Education of Westside Community Schools v. Mergens*,[7] the Court upheld the constitutionality of the Federal Equal Access Act,[8] granting greater access to the public schools for students seeking to form religious clubs where other sectarian

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1. Stanford v. Kentucky, 109 S. Ct. 2969, *reh'g denied*, 110 S. Ct. 23 (1989); Thompson v. Oklahoma, 487 U.S. 815 (1988).

2. DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189 (1989); Coy v. Iowa, 487 U.S. 1012 (1988).

3. City of Dallas v. Stanglin, 109 S. Ct. 1591 (1989).

4. Reed v. Campbell, 476 U.S. 852, *reh'g denied*, 478 U.S. 1031 (1986); Paulussen v. Herion, 475 U.S. 557 (1986).

5. Dellmuth v. Muth, 109 S. Ct. 2397 (1989); Honig v. Doe, 484 U.S. 305 (1988).

6. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Kadrmas v. Dickinson Public Schools, 487 U.S. 450 (1988).

7. 110 S. Ct. 2356 (1990).

8. 20 U.S.C. §§ 4071-4074 (1988).

clubs are given access. In *Missouri v. Jenkins*,[9] the Court approved of broad enforcement powers for federal district courts enforcing school desegregation orders which may include such controversial measures as directing local governments to levy taxes to carry out desegregation plans. In the abuse and neglect area, the Court upheld the constitutionality of state statutes prohibiting even the possession and viewing of child pornography in one's own home in *Osborne v. Ohio*.[10] In *Baltimore City Department of Social Services v. Bouknight*,[11] the Court rejected a claim to the fifth amendment privilege against self-incrimination of an allegedly abusive mother who refused to disclose the whereabouts of her child who had been returned to her custody pursuant to a juvenile court order directing her to keep social services informed of the child's whereabouts. In two cases handed down the last day of the 1990 Term, *Idaho v. Wright*[12] and *Maryland v. Craig*,[13] the Justices expanded the power of states to protect child abuse victims as witnesses in subsequent court proceedings. The Court addressed issues of child welfare and support under the Social Security Act in two cases, *Sullivan v. Zebley*[14] and *Sullivan v. Stroop*.[15] Finally, the Court once again addressed the abortion rights of pregnant, unmarried minors in the context of two different parental notification or parental consent statutes in *Hodgson v. Minnesota*[16] and *Ohio v. Akron Center for Reproductive Health*.[17]

Several of these decisions will have a significant continuing impact on children and adolescents and may give some forecast of the direction that the Court will take in the future in addressing the constitutional rights of young persons. Perhaps just as significantly, they may herald a further acceleration in the "constitutionalization" of the law as it relates to children.[18]

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9. 110 S. Ct. 1651 *reh'g denied*, 110 S. Ct. 2605 (1990).

10. 110 S. Ct. 1691 (1990).

11. 110 S. Ct. 900 (1990).

12. 110 S. Ct. 3139 (1990).

13. 110 S. Ct. 3157 (1990).

14. 110 S. Ct. 885 (1990).

15. 110 S. Ct. 2499 (1990).

16. 110 S. Ct. 2926 (1990).

17. 110 S. Ct. 2972 (1990).

18. Each of the decisions noted will be discussed in considerably more detail at the appropriate point in this survey article.

II. Abuse and Neglect, Foster Care, and Termination of Parental Rights

A. *Abuse and Neglect*

1. Judicial Developments

The disturbing number of criminal prosecutions for child abuse and neglect continues to increase dramatically in decisions by the Court of Appeals of Virginia and the Supreme Court of Virginia alone.[19] The trend is not only distressing because the reported appellate decisions represent only the proverbial "tip of the iceberg," but also because criminal prosecutions for child abuse represent only a small fraction of the cases brought on the civil side of juvenile and domestic relations district courts for the protection of children.

Two long awaited decisions by the United States Supreme Court clarify somewhat the constitutional limits to the accommodations that may be made at trial for child victims of abuse, especially the young child sexual abuse victims. In *Idaho v. Wright*,[20] the Court in a 5-4 decision authored by Justice O'Connor, affirmed the Idaho Supreme Court's reversal of a mother's criminal conviction for assisting in the sexual abuse of her two-and-a-half-year-old daughter. The conviction rested largely on the testimony of a pediatrician who had interviewed the daughter and elicited statements about which he testified at trial in light of the judge's finding that the then three-year-old girl was unable to testify in court. Justice O'Connor concluded, along with the Idaho Supreme Court, that the admission of the evidence under the state's residual exception

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19. *See* Shepherd, *Legal Issues Involving Children: Annual Survey of Virginia Law*, 22 U. Rich. L. Rev. 691 (1988); Shepherd, *Legal Issues Involving Children: Annual Survey of Virginia Law*, 21 U. Rich. L. Rev. 789, 796 (1987). During the past year, there were eight published criminal appeals decisions clearly involving charges of child abuse or neglect. *See* Rhodes v. Commonwealth, 238 Va. 480, 384 S.E.2d 95 (1989); Frantz v. Commonwealth, 9 Va. App. 348, 388 S.E.2d 273 (1990); Morrison v. Commonwealth, 10 Va. App. 300, 391 S.E.2d 612 (1990); Diehl v. Commonwealth, 9 Va. App. 191, 385 S.E.2d 228 (1989); Guba v. Commonwealth, 9 Va. App. 114, 383 S.E.2d 764 (1989); Johnson v. Commonwealth, 9 Va. App. 176, 385 S.E.2d 223 (1989); Kauffmann v. Commonwealth, 8 Va. App. 400, 382 S.E.2d 279 (1989); Swanson v. Commonwealth, 8 Va. App. 376, 382 S.E.2d 258 (1989). In one additional case an individual was charged with the abduction of an eight-year-old child but the child escaped. Bryant v. Commonwealth, 10 Va. App. 421, 393 S.E.2d 216 (1990). One case decided by the Supreme Court of Virginia involved a civil suit brought on the basis of sexual molestation of young boys by a Scout leader. Infant C. v. Boy Scouts of America, Inc., 239 Va. 572, 391 S.E.2d 322 (1990).

20. 110 S. Ct. 3139 (1990).

to the hearsay rule[21] violated the Confrontation Clause of the sixth amendment because it lacked sufficient "particularized guarantees of trustworthiness."[22] Although Justice O'Connor concluded that evidence admitted pursuant to more traditional hearsay exceptions, or evidence admitted in light of the presence of appropriate factors for "trustworthiness," such as "spontaneity and constant repetition," the "use of terminology expected of a child of similar age," or evidence reflecting the "mental state of the declarant" or the presence of a "lack of motive to fabricate" would sustain the admissibility of hearsay statements "worthy of reliance at trial,"[23] the difficulty in the *Wright* case was the trial court's dependence on other corroborating evidence instead of a focus on the independent reliability of the out-of-court statements. The majority opinion indicated that the suggestive manner of the pre-trial interview and other factors undermined the reliability of the hearsay evidence, although it also noted that the incompetency of the declarant to be a witness at trial did not impair the admissibility of her hearsay declarations if those statements were supported by sufficient "particularized guarantees of trustworthiness."[24] Justice O'Connor's opinion is consistent with her earlier concurring opinion in *Coy v. Iowa*,[25] and would also seem to approve the requirements written into the Virginia statute concerning the admissibility of hearsay statements by a child in civil matters where, of course, the Confrontation Clause is not an issue.[26]

The Court of Appeals of Virginia was likewise disturbed with the introduction of hearsay evidence in *Kauffmann v. Commonwealth*,[27] a case concerning an alleged child sexual abuse victim's statements to her friends and comments written in a diary left behind after her suicide which recounted abuse by her father. The court of appeals concluded that the hearsay evidence was not admissible under the state-of-mind exception to the hearsay rule because it related only to past events. Further, the court concluded that the statements could not come in under the "recent com-

21. IDAHO R. EVID. 803(24) (based largely on the Federal Rules of Evidence and the Revised Uniform Rules of Evidence).

22. 110 S. Ct. at 3146.

23. *Id.*

24. *Id.*

25. 487 U.S. 1012, 1023-25 (1988).

26. *See also* VA. CODE ANN. § 63.1-248.13:2 (Cum. Supp. 1990). This section of the Code of Virginia is also discussed in Shepherd, *Legal Issues Involving Children: Annual Survey Virginia Law*, 23 U. RICH L. REV. 691, 694-95 (1988).

27. 8 Va. App. 400, 382 S.E.2d 279 (1989).

plaint" rule because the charge in the case was aggravated sexual battery and the "recent complaint" rule had consistently been limited to rape and attempted rape cases.[28] The Court of Appeals for the Fourth Circuit also affirmed a grant of habeas corpus relief to a state prisoner where he was convicted of the sexual assault of his three-and-a-half-year-old daughter partly on the basis of hearsay statements of the daughter without any contemporaneous corroboration or the necessary indicia of reliability or trustworthiness.[29]

A second United States Supreme Court decision, *Maryland v. Craig*,[30] addressed the constitutionality of a state statute permitting testimony by a child abuse victim by means of closed circuit television. The Court's decision was once again on a five to four vote, with Justice O'Connor being the swing Justice and writing the opinion for the Court.

Justice O'Connor concluded that the Confrontation Clause did not require an actual face-to-face encounter at trial in every criminal proceeding and, although the closed circuit television transmission was only "one way" in Maryland, by permitting the judge, jury, and defendant to view the testifying child witness by way of a video monitor with the child being unable to see the defendant, the Constitution was not offended where there was a "case specific finding of necessity."[31] Justice O'Connor quite pointedly concluded for a Court majority "that a state's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."[32]

In *Osborne v. Ohio*,[33] the Supreme Court upheld the constitutionality of an Ohio statute criminalizing the possession of child pornography because the interest of the state "in protecting the victims of child pornography," described a more important interest than that sought to be protected in the statute struck down in *Stanley v. Georgia*.[34] The Court reversed Osborne's conviction on

28. *Id.* at 407-09, 382 S.E.2d at 282-83.

29. Gregory v. North Carolina, 900 F.2d 705 (4th Cir. 1990).

30. 110 S. Ct. 3157 (1990).

31. *Id.* at 3171.

32. *Id.* at 3167. The Maryland procedure is similar to that in the Virginia statute adopted in 1988, although the Virginia statute is more specific with regard to the particularized findings that must be made. *See* VA. CODE ANN. § 18.2-67.9 (Repl. Vol. 1988).

33. 110 S. Ct. 1691, *reh'g denied*, 110 S. Ct. 2605 (1990).

34. 394 U.S. 557 (1969). The Court in *Stanley* found that the primary motivation behind the Georgia statute was a concern "that obscenity would poison the mind of its viewers." *Id.*

due process grounds because of instructional error, but the broad principle was retained.

In a case addressed by the Court of Appeals of Virginia, *Frantz v. Commonwealth*,[35] the court reversed a conviction of a photographer for soliciting or encouraging children to appear in sexually explicit visual material on the ground that the evidence was insufficient to show that the photographs in question were "sexually explicit."

There were many other Virginia cases in the area of abuse and neglect. In an appeal arising out of a highly publicized incident in Virginia Beach where an adopted child was killed as a consequence of being beaten while shackled to the floor of a converted school bus, the Court of Appeals of Virginia concluded that a legal custodial parent of a child may be found guilty of the felony murder of a child with abduction as the underlying felony.[36] In another criminal child abuse case, the court of appeals reversed a conviction of a child care provider for felony child neglect because of the failure of the Commonwealth to comply with a discovery order.[37] That court also reversed some of the convictions of a minister for sexual activity involving several minor girls because of the failure of the trial court to hold an evidentiary hearing on defense allegations of prior sexual misconduct by some of the victims.[38] The court also found the evidence of penetration sufficient to affirm a rape conviction of a stepfather involving his twelve-year-old stepdaughter,[39] and in another case the evidence was sufficient to establish that acts of indecent liberties committed by an uncle against his nine-year-old niece occurred within the time frame established in the indictment.[40] A first degree murder conviction of a mother for the death of her infant daughter was reversed by the Supreme Court of Virginia because there was insufficient evidence of premeditation and malice.[41]

In another case that is not strictly a child abuse case, but involved a trial for breaking and entering with intent to abduct an

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at 565. This impinged on an individual's "right to receive information in the privacy of his home." *Id.* at 564-68; *see also Osborne*, 110 S. Ct. at 1695-96.

35. 9 Va. App. 348, 388 S.E.2d 273 (1990).

36. Diehl v. Commonwealth, 9 Va. App. 191, 385 S.E.2d 228 (1989).

37. Guba v. Commonwealth, 9 Va. App. 114, 383 S.E.2d 764 (1989).

38. Johnson v. Commonwealth, 9 Va. App. 176, 385 S.E.2d 223 (1989).

39. Morrison v. Commonwealth, 10 Va. App. 300, 391 S.E.2d (1990).

40. Swanson v. Commonwealth, 8 Va. App. 376, 382 S.E.2d 258 (1989).

41. Rhodes v. Commonwealth, 238 Va. 480, 376 S.E.2d 95 (1989).

eight-year-old child, the Court of Appeals of Virginia upheld the admission of a pre-trial, photographic identification by the child of the abductor despite the unnecessarily suggestive procedure where there was sufficient "independent features of reliability" to overcome the suggestiveness.[42] A circuit court opinion concluded that two sexual abuse offenses involving different victims may be tried together even though they were separated by several months where they involved the same kind of sexual assault and the two child victims and the defendant were members of the same household.[43]

Two cases illustrate the growing number of civil matters seeking damages that are being filed arising out of sexual and other forms of child abuse. In *Infant C. v. Boy Scouts of America, Inc.*,[44] the Supreme Court of Virginia concluded that the record supported a finding that the Boy Scouts did not select or retain a group leader accused of sexually abusing children in his troop. The supreme court also addressed the trial court's error in striking the evidence under a count alleging wilful and wanton misconduct on the part of the abusing scoutmaster.[45] In *Wade v. Foreign Mission Board*,[46] the Circuit Court of the City of Richmond indicated that a two-year statute of limitation applied to non-contract claims of negligence against an employer and that there is no common law duty to report the sexual abuse of a child.

In *Baltimore City Department of Social Services v. Bouknight*,[47] the United States Supreme Court, in an opinion by Justice O'Connor, concluded that a parent could not invoke her fifth amendment privilege against self-incrimination to avoid compliance with a juvenile court order directing her to produce her child where the custody of the child was obtained pursuant to an earlier order of that court, which directed that she comply with extensive conditions in a "protective supervision order," including cooperation with the Department of Social Services.[48] In a recent Fairfax Circuit Court decision, the judge denied a writ of mandamus to parties seeking to force a juvenile and domestic relations district court judge to conduct a private hearing in a child abuse case and

42. Bryant v. Commonwealth, 10 Va. App. 421, 393 S.E.2d 216 (1990).
43. Commonwealth v. R.P., 17 Va. Cir. 52 (Fairfax County 1989).
44. 239 Va. 572, 391 S.E.2d 322 (1990).
45. *Id.*
46. 16 Va. Cir. 61 (Richmond 1989).
47. 110 S. Ct. 900 (1990).
48. *Id.* at 905.

to prevent the parents from tape recording those proceedings.[49] The court refused to issue the writ, concluding that the decisions made were clearly within the discretion of the juvenile court judge and could not be tested by mandamus, although the judge's discretion was not without limits.

2. Legislative Developments

The Virginia General Assembly enacted legislation in its 1990 session prohibiting a prisoner from being eligible for parole unless he has served at least twenty-five years of his sentence where the crime was the first degree murder of a child under the age of eight.[50] The General Assembly also amended section 18.2-371.1 of the Code of Virginia ("the Code"), proscribing abuse and neglect to define "serious injury" as including disfigurement, a fracture, a severe burn or laceration, mutilation, maiming, forced ingestion of dangerous substances, or life-threatening internal injuries. Guardians are also included with parents as persons covered by the section.[51]

Other legislative matters in the area of abuse and neglect provided for the admissibility of medical reports in any civil child abuse or spousal abuse case in a juvenile and domestic relations district court.[52] A further amendment to the child abuse and neglect law requires the reporting by mandated persons of suspected abuse and neglect, regardless of the identity of the persons suspected of inflicting that abuse and neglect.[53] Legislation was enacted permitting any person suspected of abuse or neglect who is the subject of an investigation to tape record any conversations between the suspect and child protective services, provided notice is given of such recording.[54] The Attorney General is given the authority to represent any guardian ad litem appointed by a court in a civil matter for any alleged errors or admissions in the discharge of his or her duties.[55] The General Assembly followed up on its year-long study of Court-Appointed Special Advocates ("CASA")

49. Wilcox v. Fourqurean, 17 Va. Cir. 68 (Fairfax County 1989).
50. VA. CODE ANN. § 53.1-151(c) (Cum. Supp. 1990).
51. *Id.* § 18.2-371.1(A) (Cum. Supp. 1990).
52. *Id.* § 16.1-245.1 (Cum. Supp. 1990).
53. *Id.* § 63.1-248.3(A) (Cum. Supp. 1990).
54. *Id.* § 63.1-248.6:2.
55. *Id.* § 2.1-121 (Cum. Supp. 1990).

by establishing a state-wide CASA Program.[56] The legislation provides that the program shall be administered by the Department of Criminal Justice Services, with the assistance of an advisory committee, to encourage the development of CASA programs around the state to recruit and train volunteer CASA's to assist in the handling of abuse and neglect, and other juvenile court proceedings, through investigation of a case, monitoring the case, assisting the guardian ad litem, and submitting a written report of the advocates' investigation.[57] Also, the General Assembly took the unusual step of directing the staffs of the House Appropriations Committee and the Senate Committee on Finance to review studies over the past five years concerning child abuse and neglect and to identify recommendations that have been implemented, recommendations that have not been implemented, and to prepare a fiscal impact statement for implementation of those recommendations which have not yet been carried through.[58]

B. *Foster Care and Termination of Parental Rights*

In *Wright v. Arlington County Department of Social Services*,[59] the Court of Appeals of Virginia ruled that the burden of proof in a civil child abuse or neglect proceeding for the purpose of obtaining temporary custody of children is preponderance of the evidence. This has long been thought to be the standard of proof in those abuse and neglect proceedings short of termination of residual parental rights, but the *Wright* decision reinforces that perception. In *Vosburg v. Department of Social Services*,[60] the Court of Appeals for the Fourth Circuit dealt with the more difficult issue of whether a social worker enjoys immunity in filing a petition for the removal of allegedly abused or neglected children from their parents. The court concluded that immunity attaches and that the appropriate type of immunity was absolute and comparable to that applying to prosecutors initiating and pursuing criminal prosecutions.[61] In *Weller v. Department of Social Ser-*

56. *Id.* §§ 2.1-121, 9-173.6 to 173.13, 16.1-274 (Cum. Supp. 1990).

57. *Id.* § 9-173.8 (Cum. Supp. 1990).

58. S.J. Res. 86, Va. General Assembly, 1990 Sess. (1990).

59. 9 Va. App. 411, 388 S.E.2d 477 (1990).

60. 884 F.2d 133 (4th Cir. 1989).

61. *Id.* at 135. The court left open the question of the immunity that applies to conduct regarding a child once a removal has taken place since the plaintiffs in this case did not appeal the district court's conclusion that absolute immunity applied to that conduct as well. *Id.* at 138.

vices for the City of Baltimore,[62] the appellate court reversed in part the decision of the district court dismissing a father's *pro se* complaint, at least insofar as the pleading alleged a denial of due process in failing to provide a hearing to the father before placing custody of his son with the boy's grandmother and Weller's ex-wife. The court reserved judgment on what process was due but concluded that "the private, fundamental liberty interest involved in retaining the custody of one's child and the integrity of one's family is of the greatest importance."[63]

Partially in recognition of the fundamental interests implicated by the family relationship, the General Assembly amended the purpose and intent clause of the juvenile and domestic relations district court law to reinforce the state policy against breaking up the family by providing that a child should be separated from his or her normal family only when the child's welfare is endangered or in the interest of public safety and then "only after consideration of alternatives to out-of-home placement which afford effective protection to the child, his family, and the community."[64] The legislature also provided that when a juvenile and domestic relations district court determines the placement of legal custody, particularly with a public agency, the party with legal custody need not return to court for a redetermination of where and with whom a child shall live.[65] The legislation also provides that when a dispositional order is entered in the case of an abused or neglected child prohibiting or limiting contact between the child and his or her own parents or guardians, that order is not only effective for a maximum of 180 days, but after a hearing prior to the end of that initial period, a new order may limit or prohibit contact for an additional 180 days.[66]

III. JUVENILE DELINQUENCY AND NONCRIMINAL MISBEHAVIOR

A. *Juvenile Delinquency*

The developments in the delinquency area this year in Virginia were all legislative, as there were no reported appellate decisions. The definition of a delinquent act was amended to include a re-

62. 901 F.2d 387 (4th Cir. 1990).
63. *Id.* at 394.
64. VA. CODE ANN. § 16.1-227(3) (Cum. Supp. 1990).
65. *Id.* §§ 16.1-228, -251, -252.
66. *Id.* § 16.1-279(A)(2a).

fusal to take a blood or breath test and an expanded statutory scheme was devised to deal with the disposition of such juveniles.[67] Two bills expanded the category of offenses for which a child may be taken into immediate custody without a detention order or a warrant where the offense was not committed in the presence of the officer but the arrest was based on probable cause. These offenses include assault and battery and carrying a weapon on school property.[68] A detention order may be issued for a juvenile who has absconded from a detention home or other facility by either the committing judge or a judge in the jurisdiction where the juvenile is taken into custody.[69] Persistent problems involving the transportation of juveniles were addressed in bills that provide that a juvenile court staff or the staff of a detention home are responsible for certain forms of transportation for youths subject to court orders pursuant to state-developed guidelines. The limitation on the use of police patrol wagons previously found in the juvenile code was deleted.[70] The legislature also provided that a proceeding may be initiated by a summons rather than a petition in connection with driving while intoxicated.[71] In the transfer section of the juvenile code, the legislature institutionalized the juvenile's right to appeal to the circuit court a decision by the juvenile court to transfer the juvenile for trial as an adult. However, re-examination of the juvenile court's probable cause decision is precluded.[72] This statutory amendment embodies in the juvenile code the decisions of the Court of Appeals of Virginia concluding that a juvenile has the right to a review of the transfer decision in the circuit court in the cases of *Grogg v. Commonwealth*[73] and *Hairfield v. Commonwealth*.[74] The General Assembly clarified its 1989 legislation providing for trial and treatment as an adult of a juvenile who has been previously tried and convicted as an adult and sentenced to an adult facility who commits a criminal act while confined in that adult facility.[75] The 1990 session also clarified the right of a juvenile court judge to punish for contempt and to utilize the jail for punishment for contempt where a former juvenile has become an

67. VA. CODE ANN. § 16.1-228, -279(E)(Cum. Supp. 1990).
68. *Id.* § 16.1-246(C)(1).
69. *Id.* § 16.1-248.1.
70. *Id.* § 16.1-254 (Repl. Vol. 1988).
71. *Id.* § 16.1-260 (Cum. Supp. 1990).
72. *Id.* § 16.1-269.
73. 6 Va. App. 598, 371 S.E.2d 549 (1988).
74. 7 Va. App. 649, 376 S.E.2d 796 (1989).
75. VA. CODE ANN. § 16.1-271 (Cum. Supp. 1990).

adult in the interim.[76] Another bill deals with the docketing and handling of records in juvenile cases when appealed to circuit courts or in connection with the expungement of certain records in the juvenile court.[77] The General Assembly developed a Community Prevention Initiative Grants Program to deal with "at risk" youths.[78] The legislature also extensively revised the sections of the Code dealing with youthful offender programs.[79] Several bills were also adopted amending section 18.2-255 of the Code dealing with the distribution of drugs to minors and in recruiting minors to assist in the distribution of imitation controlled substances.[80]

B. *Noncriminal Misbehavior*

The General Assembly corrected an oversight noted in this survey last year[81] by creating a new jurisdictional category of "status offense" which constitutes "an act prohibited by law which would not be an offense if committed by an adult."[82] Jurisdiction over such a matter is placed in the juvenile and domestic relations district court, and the range of dispositional orders that may be entered is the same as that for a "child in need of services" pursuant to section 16.1-279(C) of the Code.[83] The principal matters that would likely be included in this new category would be violations of local curfew ordinances and violations of a prescription against purchase or possession of tobacco products by a person younger than sixteen.[84]

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76. *Id.* § 16.1-292(A).

77. *Id.* §§ 8.01-231, 16.1-69.55, -305, -307, 17-27, 19.2-240 (Repl. Vol. 1990).

78. *Id.* §§ 9-272 to -272.1 (Cum. Supp. 1990).

79. *Id.* §§ 19.2-311, -316, 53.1-63, -64, -66, -67 (Repl. Vol. 1990).

80. *Id.* § 18.2-255 (Cum. Supp. 1990). In Pannell v. Commonwealth, 9 Va. App. 170, 384 S.E.2d 344 (1989), the court held that for a conviction of distribution of drugs to a minor, there need be no showing that the defendant knew that the person to whom the drugs were distributed was under the age of eighteen.

81. Shepherd, *Legal Issues Involving Children: Annual Survey of Virginia Law*, 23 U. RICH. L. REV. 705, 715-18, n.77 (1989).

82. VA. CODE ANN. § 16.1-228 (Cum. Supp. 1990).

83. *Id.* §§ 16.1-241, 279(C)(2).

84. *Id.* § 18.2-371.2 (Repl. Vol. 1988).

IV. Child Custody and Adoption

A. *Child Custody*

In *Mason v. Moon*,[85] the Court of Appeals of Virginia concluded that the action of a mother in signing an amended separation agreement giving her husband primary custody of her child did not constitute the "voluntary relinquishment of custody" that will rebut the presumption favoring a natural parent over a nonparent. The custody dispute in the case was between the natural mother and the paternal grandmother following the self-defense killing of the natural father by the mother's boyfriend, who had become her husband by the time of the custody dispute. The trial court had concluded that the mother's execution of the amended separation agreement constituted the relinquishment of custody that would negate the presumption in her favor and that the possible psychological harm to the daughter of being in the household of the man who had killed her father was an "extraordinary circumstance" justifying the award of custody to a nonparent. The court of appeals disagreed, concluding in part that the "voluntary relinquishment" contemplated by the rule did not include a custody agreement between separating or divorcing spouses.[86] In the absence of any factor undermining the presumption in favor of a natural parent, the evidence was insufficient to place custody with the paternal grandmother.

The General Assembly again amended section 16.1-244 of the Code relating to concurrent jurisdiction between juvenile and circuit courts over custody, visitation and support matters involving children or a spouse. This amendment provides that the juvenile court is divested of jurisdiction over a matter when a suit for divorce is filed in the circuit court in which issues of custody, guardianship, visitation, or support of the children or spousal support is "raised by the pleadings and a hearing is set by the circuit court on any such issue for a date certain to be heard within twenty-one days of the filing."[87] Two recently reported circuit court opinions conclude that the best interests of the child in custody suits are paramount, and that the stability of the home environment and the child's need for continuity of relationships are important con-

85. 9 Va. App. 217, 385 S.E.2d 242 (1989).
86. *Id.* at 222, 385 S.E.2d at 245.
87. Va. Code Ann. § 16.1-244 (Cum. Supp. 1990).

siderations in this best interests formula.[88] The award of custody of a child who is the natural child of both parties to the father where the mother was found to be "socially and morally irresponsible" is not inconsistent with awarding custody of his stepchild to her mother because of the different standards that apply in contests between a natural parent and a third party.[89]

In *Farley v. Farley*,[90] the court of appeals ruled that the circuit court did not abuse its discretion in transferring jurisdiction over a child custody and visitation dispute to a South Carolina court where that state was the "home state" of the children and where there was adverse media publicity in Virginia because of allegations of child sexual abuse. The court found that the allegations of child sexual abuse could be adequately investigated and handled by the courts and social services in South Carolina. In *Hutt v. Hutt*,[91] a Virginia circuit court retained jurisdiction over custody and dispute matters involving a minor child who was removed by the mother to the Virgin Islands because of the court's concern about actions of the mother in connection with the litigation in both Virginia and in the newly-filed proceedings in the Virgin Islands. In *Schuelke v. Schuelke*,[92] the court refused to issue an injunction to prevent a custodial parent from making an in-state move with the children, distinguishing earlier cases regarding the power to issue injunctions for out-of-state moves.[93]

B. *Adoption*

In *Linkous v. Kingery*,[94] the Court of Appeals of Virginia concluded that a natural father, who was incarcerated in the penitentiary, had withheld his consent to adoption of his children by their stepfather contrary to the best interests of the children. In that case, the natural father had been a marginal parental figure prior to his criminal convictions, and he was serving a prolonged period of incarceration for serious felonies. In the interim, the stepfather had created a strongly-bonded family with the children, among

88. Hodge v. Hodge, 16 Va. Cir. 510 (Bath County 1982).
89. Collins v. Collins, 16 Va. Cir. 90 (Frederick County 1989).
90. 9 Va. App. 325, 387 S.E.2d 794 (1990).
91. 16 Va. Cir. 320 (Frederick County 1989).
92. 17 Va. Cir. 281 (Chesterfield County 1989).
93. *See, e.g.*, Scinaldi v. Scinaldi, 2 Va. App. 571, 347 S.E.2d 149 (1986); Simmons v. Simmons, 1 Va. App. 358, 339 S.E.2d 198 (1986).
94. 10 Va. App. 45, 390 S.E.2d 188 (1990).

other important factors. Consequently, the adoption was ordered over the objection of the natural father.[95] In a circuit court adoption proceeding, the court concluded that procedural deficiencies in the earlier juvenile court proceeding concerning custody of two children did not foreclose consideration of an adoption by the circuit court where all of the procedural safeguards would be afforded.[96]

The General Assembly enacted legislation providing that where a licensed child-placing agency or local department of social services accepts custody of a child for placement with adoptive parents designated by the birth parents or a person other than a licensed child-placing agency or local board of public welfare, then the procedures outlined in section 63.1-220.3 of the Code regarding judicial approval of consent would apply to that placement.[97] The legislature also provided that fees for adoption services, including home studies, are to be paid to the Department of Social Services and a receipt is to be provided to the court prior to the acceptance of parental consent or entry of any final adoption order.[98]

V. Paternity and Illegitimacy

The Supreme Court of Virginia ruled in an intestate succession case that a 1953 Pennsylvania child support order which was never appealed, ordering the decedent to support his two illegitimate children, was *res judicata*, and the issue of paternity could not be relitigated in Virginia.[99] In a circuit court decision, it was concluded that the defendant in an appeal from a juvenile court's child support decree could seek blood grouping tests to establish his nonpaternity, and the court ordered such tests to be conducted.[100] The General Assembly enacted legislation allowing a court to make an equitable apportionment of living expenses incurred on behalf of a child from the date notice of parentage proceedings was given to the alleged parent. The court's judgment order may be in favor of the natural parent or any other person or agency who incurred the expenses.[101]

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95. *Id.* at 59-60, 360 S.E.2d at 196.
96. *In re* Tabb, 18 Va. Cir. 355 (Chesterfield County 1989).
97. Va. Code Ann. § 63.1-220.2 (Cum. Supp. 1990).
98. *Id.* § 63.1-236.1.
99. Hupp v. Hupp, 239 Va. 494, 391 S.E.2d 329 (1990).
100. Bryant v. Bryant, 17 Va. Cir. 293 (Chesterfield County 1989).
101. Va. Code Ann. § 20-49.8 (Repl. Vol. 1990).

VI. Child Support

Two United States Supreme Court decisions concerning the Social Security Act will have quite different impacts on low income and disabled children. In *Sullivan v. Zebley*,[102] the Court held that regulations issued by the Department of Health and Human Services violated the Social Security Act in that the regulations afforded less relief to disabled children than to disabled adults. For adults, the regulatory scheme had a five-step approach for establishing disability while a child had no opportunity to utilize the fourth or fifth steps, and thus the regulations violated the Act. The Act itself sought to authorize the payment of Supplemental Security Income ("SSI") benefits to children who suffered a disability of "comparable severity" to one that would impair an adult. However, in *Sullivan v. Stroop*,[103] the Court concluded that insurance benefits received by a child under the Social Security Act did not constitute "child support payments," for which the first fifty dollars was disregarded in establishing benefits under the Aid to Family with Dependent Children ("AFDC") program. The term "child support" as used in the Act was obviously intended, in the view of the majority of the Court, to be limited to support payments made by absent parents.

In *Duke v. Duke*,[104] the Supreme Court of Virginia concluded that a *pendente lite* order to pay spousal and child support remained in effect after the entry of a final divorce decree which explicitly reserved jurisdiction over support. The deceased husband's real estate could be subjected to the payment of support arrearages under the *pendente lite* order.[105] In *Schoenwetter v. Schoenwetter*,[106] the Court of Appeals of Virginia also ruled that since a divorce case in which a final decree had been entered was improperly discontinued by the circuit court, the circuit court subsequently had the power to modify spousal and child support to increase the husband's obligations. In *Cutlipp v. Cutlipp*,[107] the court of appeals concluded that the circuit court had no jurisdiction to order child support for a daughter who had reached eighteen at the time of the trial court's decree, absent a contrary agreement between

102. 110 S. Ct. 885 (1990).
103. 110 S. Ct. 2499 (1990).
104. 239 Va. 501, 391 S.E.2d 77 (1990).
105. *Id.* at 504-05, 391 S.E.2d at 78-79.
106. 8 Va. App. 601, 383 S.E.2d 28 (1989).
107. 8 Va. App. 618, 383 S.E.2d 273 (1989).

the parents. In *Ware v. Ware,*[108] the court of appeals also concluded that a daughter had become "otherwise emancipated" within the meaning of a property settlement agreement when she became employed on a full-time basis with the knowledge and consent of her mother with whom she continued to live, even though she had not reached her twenty-first birthday, to which the obligation of support continued under the agreement. The court stated that the phrase "otherwise emancipated" was meant "to contemplate any act of emancipation recognized in law."[109]

Another court of appeals decision that is sure to have a significant impact on court jurisdiction is *Scheer v. Isaacs,*[110] wherein the court concluded that an appeal by an ex-husband from a judgment in favor of the ex-wife for child support arrearages from the juvenile and domestic relations district court to the circuit court was invalidated by the failure of the ex-husband to post an appeal bond. The court concluded that section 16.1-107 of the Code clearly provides for a bond in the appeal of any civil case from a court not of record and that juvenile and domestic district courts are clearly courts not of record.[111] Consequently, such a bond must be filed to give a circuit court jurisdiction over the appeal of any "civil case." Many proceedings in juvenile and domestic relations district courts are characterized as "civil," and it is uncertain whether the *Scheer* holding is intended to apply to all of them, or only to require appeal bonds for those matters where the juvenile court's order involves a money judgment or something comparable. It seems unlikely that the court intended the holding to apply to appeals from abuse and neglect adjudications or other non-delinquency proceedings, yet the language of the opinion does not specifically negate such a conclusion.

In circuit courts across the state, there have been many cases in the child support area. The courts have held that a court order requiring a party to submit to a blood test is not a final order for the purposes of appeal.[112] A court has no authority to relieve a delinquent spouse of the obligation to pay accrued installments of child support, but that such arrearages can be ordered to be paid

108. 10 Va. App. 352, 391 S.E.2d 887 (1990).
109. *Id.* at 354, 391 S.E.2d at 888.
110. 10 Va. App. 338, 392 S.E.2d 201 (1990).
111. *Id.* at 341, 392 S.E.2d at 202.
112. Commonwealth v. F.F., 16 Va. Cir. 14 (Wise County 1988).

in installments.[113] Marital settlement agreements between divorcing parents cannot divest the courts of their jurisdiction to enter or modify child support decrees.[114] A juvenile and domestic relations district court has the authority to enforce its support judgments by ordering payroll deductions.[115] Juvenile and domestic relations district courts have exclusive original jurisdiction to modify foreign decrees for child support.[116] Social Security disability benefits paid to a child are to be credited towards a parent's child support payments and even accrued arrearages.[117] The Division of Child Support Enforcement of the Virginia Department of Social Services cannot act on behalf of a child who is not a resident of Virginia.[118] The provision of notice and hearing requirements prior to the collection of child support arrearages satisfies the requirements of due process, even though the initial establishment of the obligation for child support was without such notice.[119]

On the legislative front, the General Assembly provided that paternity established by genetic blood testing which affirms at least a ninety-eight percent probability of paternity would have the same effect as a judgment of paternity.[120] The General Assembly also made other procedural changes in the child support enforcement system, such as a requirement to report Social Security account numbers at the time of a child's birth.[121] Legislation clarified a factor for the provision of child support in connection with the imputation of income to a party who is voluntarily unemployed or underemployed.[122] The amendment changed to the conjunctive the factor that this income may not be imputed "when a child is not in school, child care services are not available, and the cost of such child care services are not included in the computation;" rather than the prior apparent disjunctive where the imputation would not take place "when a child is not in school or *where child care services are not available and the cost of such child care services are not included in the computation.*"[123] The legislature also pro-

113. Maitland v. Miller, 15 Va. Cir. 292 (Prince George County 1989).
114. Bower v. Lawhorne, 15 Va. Cir. 368 (Frederick County 1989).
115. Hartsook v. Hartsook, 17 Va. Cir. 248 (Chesterfield County 1989).
116. Commonwealth v. Giunta, 17 Va. Cir. 1 (Fairfax County 1988).
117. Commonwealth v. Beavers, 16 Va. Cir. 378 (Wise County 1989).
118. Foondle v. Sherry, 16 Va. Cir. 396 (Alexandria 1989).
119. Commonwealth v. Broadnax, 18 Va. Cir. 276 (Richmond 1989).
120. VA. CODE ANN. § 20-49.1 (Cum. Supp. 1990).
121. *Id.* at §§ 20 -60.5, -79.2, 32.1-261.1, and 63.1-250.1.
122. *Id.* § 20-108.1 (Repl. Vol. 1990).
123. *Id.* (emphasis added).

vided that workers' compensation payments shall be subject to "claims for spousal and child support subject to the same exemptions allowed for earnings in § 34-29."[124]

VII. EDUCATION

Two significant decisions were handed down by the United States Supreme Court during the 1989 Term, both dealing with continuing controversies—the enforcement of school desegregation orders and religious activities in the schools. In *Missouri v. Jenkins*,[125] the Supreme Court upheld the power of a federal district court to enjoin state laws restricting local school districts in their power to raise revenues where such restrictions interfere with the ability of a school district to implement court-ordered school desegregation plans. The Court concluded in *Jenkins* that the district court had violated principles of comity by imposing a local property tax increase before considering the less intrusive remedy of enjoining the restrictive state laws and leaving the means of raising the revenues up to the local governmental authorities.[126] In *Board of Education of Westside Community Schools v. Mergens*,[127] the Court held that the Equal Access Act[128] does not violate the Establishment Clause of the first amendment by permitting the recognition of student religious groups and allowing them to meet on school premises during noninstructional time when other noncurriculum-related student groups are also permitted to meet. The phrase "noncurriculum-related student groups" must be interpreted broadly, and when a school allows such an organization to meet on school premises, it must not discriminate against other students who wish to conduct meetings for religious purposes without involvement by the school authorities.

The Court of Appeals for the Fourth Circuit, in *Seemuller v. Fairfax County School Board*,[129] dealt with first amendment rights of teachers, and it concluded that a physical education teacher's letter to the school newspaper which attempted in a satirical fashion to address complaints of sexual discrimination that had previously appeared in the same publication was protected speech. The

124. *Id.* § 65.1-82 (Cum. Supp. 1990).
125. 110 S. Ct. 1651 (1990).
126. *Id.* at 1663.
127. 110 S. Ct. 2356 (1990).
128. 20 U.S.C. §§ 4071-4074 (1988).
129. 878 F.2d 1578 (4th Cir. 1989).

teacher subsequently received a re-evaluation which prevented him from receiving his step increment in pay, and the Fourth Circuit agreed with the teacher that his letter addressed a matter of public concern and thus was protected by the first amendment, rather than simply constituting a personal response to criticism. The Fourth Circuit also continued its somewhat narrow interpretation of the Education of the Handicapped Act[130] by concluding in one case that where a due process hearing officer and review officer's conclusions are in conflict, the district court need not defer to the review officer, and that the local school board was not obligated to provide habilitative services outside of the school day that were related more to behavior management than to the educational program.[131]

In *Shook v. Gaston County Board of Education,*[132] the Fourth Circuit determined that an educationally handicapped child was entitled to reimbursement of expenses paid for by a special insurance program provided to her father by his employer. The school board was bound to provide the amounts expended for private education since these expenses depleted the total amount provided for under the policy.[133] The court also concluded that a school system that placed an autistic child in a special school program, rather than "mainstreaming" him at the nearest high school, did not violate the Act because of evidence that an appropriate program could not be provided for him at the closest school.[134]

The General Assembly adopted a far-reaching statutory program for addressing the problems of school dropout and the delivery of services to children who are at risk and their parents.[135] The statutory scheme enacted does not become effective until July 1, 1992. The legislature also passed several bills addressing the sale, or possession for sale, of controlled substances[136] or firearms or other weapons,[137] or dealing with intoxicated persons,[138] all on school

130. 20 U.S.C. §§ 1400-1485 (1988).

131. Burke County Bd. of Educ. v. Denton, 895 F.2d 973 (4th Cir. 1990).

132. 882 F.2d 119 (4th Cir. 1989).

133. *Id.* at 122.

134. Devries v. Fairfax County School Bd., 882 F.2d 876 (4th Cir. 1989).

135. VA. CODE ANN. §§ 16.1-279 (Cum. Supp. 1990); *id.* § 18.2-371 (Cum. Supp. 1990); *id.*§§ 22.1-17.1, -209, -209.1:1, -252.13:1, -254, -258, -262, -263, -265, -267, -274, -279.2, -280.1, -289, -344 (Cum. Supp. 1990).

136. *Id.* § 18.2-255.2.

137. *Id.* §§ 16.1-246, 18.2-308.1, and 19.2-81.

138. *Id.* § 18.2-415.

property. A bill was also enacted requiring certain criminal acts and violent behavior to be reported to a school principal or his designee,[139] and also authorizing a school board to require any student who has been found guilty of a crime which resulted in or could have resulted in injuries to others to attend an alternative education program instead of being involved in regular school services.[140]

VIII. Mental Health

The 1990 legislative session witnessed the culmination of an effort over a number of years to adopt a new and comprehensive statutory scheme for dealing with the commitment of mentally ill minors to psychiatric hospitals. The result, known as "The Psychiatric Inpatient Treatment of Minors Act", moves the relevant Code sections from title 37.1 of the Code dealing with mental health to title 16.1 of the Code where they become part of the juvenile code.[141] The legislation defines mental illness as "a substantial disorder of the minor's cognitive, volitional, or emotional processes that demonstrably and significantly impairs judgment or capacity to recognize reality or to control behavior," and it also includes "substance abuse" which is the "use, without compelling medical reason, of any substance which results in psychological or physiological dependency as a function of continued use in such manner as to induce mental, emotional, or physical impairment and cause socially dysfunctional or socially disordering behavior."[142] The legislation then defines three categories of mentally ill children: (1) a minor younger than fourteen years of age who may be admitted to a willing mental health facility with the consent of a custodial parent and a minor fourteen years of age or older admitted to such a facility with the consent of the minor and the parent;[143] (2) a minor fourteen years of age or older who objects to admission to a willing facility for up to seventy-two hours upon the application of a custodial parent;[144] and (3) a minor who is involuntarily committed to a mental health facility by a petition filed in the juvenile

139. *Id.* §§ 22.1-65, -280.1.
140. *Id.* § 22.1-277.1.
141. Va. Code Ann. §§ 16.1-335, to -348 (Cum. Supp. 1990).
142. *Id.* § 16.1-336.
143. *Id.* § 16.1-338.
144. *Id.* § 16.1-339.

and domestic relations district court by a parent or by any responsible adult.[145]

The minor who is subjected to an involuntary commitment is afforded significant procedural protections by the Act, including the appointment of an attorney who is directed to perform certain specific duties prior to the hearing,[146] and the right to have a clinical evaluation by a qualified evaluator arranged by the community services board who is not and will not be treating the minor and has no significant financial interest in the facility to which the minor would be committed.[147] The Act defines a qualified evaluator as a psychiatrist or psychologist licensed in Virginia, skilled in diagnosis and treatment of mental illness in minors, or a mental health professional licensed in Virginia or employed by a community services board.[148] The Act further describes certain minimal due process requirements for an involuntary commitment hearing,[149] and defines precise and demanding criteria for the involuntary commitment of a minor to a mental health facility.[150] After a commitment order has been entered by the court, an individualized treatment plan must be prepared with the involvement of the minor and the minor's family that includes a provision for a periodic review of the minor's status "by appropriate hospital medical staff review."[151] The most troublesome aspect of the legislation is its failure to require a pre-admission evaluation of younger children, of consenting minors fourteen years of age or older, and of objecting minors who are committed by their parents, prior to the loss of liberty involved by placement in the hospital.[152] The Act does require that an objecting minor fourteen years of age or older must be examined by a qualified evaluator within twenty-four hours of admission and that the facility must file a petition for judicial approval of the admission with the juvenile and domestic relations district court for the jurisdiction in which the facility is located.[153] A major concern presented by the ability to place or admit a child to a psychiatric hospital without a prior evaluation by a

145. *Id.* § 16.1-341.
146. *Id.* § 16.1-343.
147. *Id.* § 16.1-342.
148. *Id.* § 16.1-336.
149. *Id.* § 16.1-344.
150. *Id.* § 16.1-345.
151. *Id.* § 16.1-346.
152. *Id.* § 16.1-338.
153. *Id.* § 16.1-338 to -339.

"qualified evaluator" is the growing concern around the nation about the dramatic increase in the number of commitments of "troubled youth" to private psychiatric hospitals, especially in light of aggressive advertising campaigns in the media by such facilities.[154] An additional problem in the Act is some inconsistency in the language regarding the necessity for hearings before a judge of the juvenile and domestic relations district court or before a special justice pursuant to section 37.1-88 of the Code.[155] Section 37.1-67.1 of the Code, as amended in 1990, allows for the placement of a child, as well as other individuals, suspected to be mentally ill in a hospital pursuant to a temporary detention order, but only after a prior evaluation by a "person skilled in the diagnosis and treatment of mental illness."[156] The 1990 Act marks a significant improvement in the procedures for the commitment of children to psychiatric hospitals with the few, but possibly major, deficiencies noted in this discussion.

IX. MISCELLANEOUS

The most significant developments in the United States Supreme Court involving children, other than those already described, were the two cases decided the last week of the October 1989 Term concerning parental consent to an abortion, and notification of a minor daughter's intention to have an abortion. In *Hodgson v. Minnesota*,[157] a deeply divided and fragmented Supreme Court concluded that the Minnesota statute requiring that a pregnant woman under eighteen years of age could not have the pregnancy aborted until at least forty-eight hours had passed after notification of both of her parents was unconstitutional. However, the same statute also provided that if the two-parent notification provision were enjoined, then a procedure would go into effect that would require notification of both parents or allow bypass of that requirement through a judicial proceeding in which a court may conclude that the minor is mature or that parental notification is not in her best interest. This latter provision saved the entire stat-

154. *See, e.g.*, Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773 (1988); Jackson-Beeck, Schwartz & Rutherford, *Trends and Issues in Juvenile Confinement for Psychiatric and Chemical Dependency Treatment*, 10 INT'L J. OF L. & PSYCHIATRY 153 (1987).

155. *See* VA. CODE ANN. §§ 16.1-228, -339, -341, -348 (Cum. Supp. 1990); *id.* §§ 37.1-1 (Cum. Supp. 1990).

156. *Id.* § 37.1-67.1.

157. 110 S. Ct. 2926 (1990).

utory scheme from unconstitutionality, in the judgment of the Court. Similarly, in *Ohio v. Akron Center for Reproductive Health*,[158] the Court upheld the constitutionality of an Ohio statute making it criminal for a physician to perform an abortion on an unmarried, unemancipated woman under eighteen unless (1) one parent has consented in writing, (2) the physician has given notice to one parent or guardian, or (3) a court has authorized the abortion based on a finding that the woman is sufficiently mature and intelligent to have an abortion without parental notice, that the parent has abused her or that the notice is not in her best interest, or (4) if a court by its inaction has constructively authorized the abortion.[159] The Court also upheld the procedural aspects of the statute even though the judicial procedures did not guarantee complete anonymity and there was a possibility that the court proceedings might require up to twenty-two days for completion.

Closure was finally achieved in the long-running case of *American Booksellers Association, Inc. v. Virginia*,[160] when the Fourth Circuit Court of Appeals upheld the constitutionality of Virginia's statute[161] prohibiting the sale of sexually explicit materials to juveniles in light of the interpretation of that statute by the Virginia Supreme Court.[162] The Virginia Supreme Court also concluded that an action for the wrongful death of a child could be maintained against a motorist whose negligence occurred when the child was a fetus so long as the child was born alive and suffered from the effects of the injury, even where the child subsequently died.[163] A Virginia circuit court also held that parents were not bound by a contract agreeing to pay for damages to property caused by the vandalism of their children because such contract was not supported by consideration in the absence of the parents' tort liability for such actions.[164] Another circuit court concluded that a motorist who killed an infant child crossing a public highway could not sue the parents for exoneration or contribution on a theory of negligent supervision.[165] The General Assembly amended

158. 110 S. Ct. 2972 (1990).

159. *Id.* at 2977.

160. 882 F.2d 125 (4th Cir. 1989) *cert. denied*, 110 S. Ct. 1525 (1990).

161. VA. CODE ANN. §§ 18.2-390, -391 (Repl. Vol. 1988).

162. See Commonwealth v. American Booksellers Ass'n, Inc., 236 Va. 168, 372 S.E.2d 618 (1988).

163. Kalafut v. Gruver, 239 Va. 278, 389 S.E.2d 681 (1990).

164. Poe v. Yanke, 16 Va. Cir. 202 (Frederick County 1989).

165. Harrison v. Shelton, 17 Va. Cir. 210 (Northumberland County 1989).

the emancipation statute to preclude an emancipated child from being found in need of supervision or in violation of a curfew ordinance, and that legislation also provides for the issuance of emancipation identification cards by the Department of Motor Vehicles.[166]

166. VA. CODE ANN. §§ 16.1-334, 334.1 (Cum. Supp. 1990).