

1991

Annual Survey of Virginia Law: Legal Issues Involving Children

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Recommended Citation

Robert E. Shepherd Jr., *Annual Survey of Virginia Law: Legal Issues Involving Children*, 25 U. Rich. L. Rev. 773 (1991).
Available at: <http://scholarship.richmond.edu/lawreview/vol25/iss4/12>

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LEGAL ISSUES INVOLVING CHILDREN

*Robert E. Shepherd, Jr.**

I. INTRODUCTION

The past year was considerably more tranquil than recent years with regard to legal developments involving children. For example, there were no major United States Supreme Court decisions directly affecting children, and the 1991 Virginia General Assembly's actions impacted on children mainly through budget cuts and the disappointing abolition of the Department for Children — a result of those cuts. Virginia's child labor laws were extensively revised in 1991, but few of these revisions will make a noticeable difference in the work relationships of the state's youth because they largely conform state law to existing federal law. Finally, legislation was enacted, after several sessions failed to do so, regarding surrogacy contracts and assisted conception technologies.

II. ABUSE AND NEGLECT, FOSTER CARE, AND TERMINATION OF PARENTAL RIGHTS

A. *Abuse and Neglect*

The appalling toll that abuse and neglect has on the children of Virginia continues to be reflected in the pages of numerous court decisions, mirroring what the United States Advisory Board on Child Abuse and Neglect has called a "national emergency."¹ In *Campbell v. Commonwealth*,² the Virginia Court of Appeals, sitting en banc, affirmed the malicious wounding conviction of a father for beatings he administered with a leather belt to his two children. The injuries inflicted upon one son were so severe that they "shocked" the mother and grandmother. The court commented that the photographs recording the injuries revealed "an

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1. UNITED STATES ADVISORY BOARD ON CHILD ABUSE AND NEGLECT, CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY vii (Dept. of Health and Human Services 1990).

2. 12 Va. App. ___, 405 S.E.2d 1 (1991).

appalling story of a brutal beating of a three-year-old child."³ The court held that excessive disciplining of a child could result in a malicious wounding prosecution. It reasoned that an intent to disfigure or disable could be inferred from the force with which blows were applied and the location of the injuries when considering the "comparative weakness of the victim and the strength of the aggressor. . . ."⁴ This decision helps to resolve a long-standing debate in Virginia concerning the boundaries of a malicious wounding prosecution in a child abuse situation.⁵

Another case involving the "discipline" of a child by a custodian was *Walker v. Commonwealth*.⁶ In *Walker*, the mother's live-in boyfriend was convicted of the sexual battery of her seven-year-old daughter. The court opined that sexual battery could be a lesser included offense of aggravated sexual battery. Furthermore, evidence that Walker had placed his finger in the child's vagina before being interrupted by a knock on the apartment door was sufficient to sustain the conviction.

In *Fisher v. Commonwealth*,⁷ the court overturned a man's conviction for the aggravated sexual battery of his six-year-old step-granddaughter. The court based its decision on the trial court's refusal to consider post-trial evidence that the girl had been extensively exposed to explicit hard core pornography in her home. The grandfather's conviction was largely based on the child's graphic testimony and accusations. Thus, evidence which was highly relevant to the defense, but unavailable to it, could have explained the step-granddaughter's familiarity with male anatomy.⁸

Likewise, the court in *Carter v. Commonwealth*⁹ reversed the defendant's conviction for rape and forcible sodomy of his six-year-old daughter. This reversal was the result of a serious potential conflict of interest between the defendant and his counsel. There were allegations that the defense attorneys had acted inappropriately in their pretrial contacts with the defendant's wife, who was

3. *Campbell*, 12 Va. App. at ___, 405 S.E.2d at 5.

4. *Id.* at ___, 405 S.E.2d at 5.

5. Judge Benton discusses some of these issues in his dissenting opinion where he argues that the evidence was insufficient to sustain the conviction for malicious wounding and addresses much of the earlier case law. *Id.* at ___.

6. 12 Va. App. ___, 404 S.E.2d 394 (1991).

7. 11 Va. App. 302, 397 S.E.2d 901 (1990).

8. *Id.* at 303, 397 S.E.2d at 902.

9. 11 Va. App. 569, 400 S.E.2d 540 (1991).

also the victim's mother.¹⁰

Another interesting factual situation was presented in *Accomack County Department of Social Services v. Muslimani*.¹¹ In *Muslimani*, the Department of Social Services sought to obtain custody of three girls from their natural father, Muslimani. The department instituted proceedings because of a prior sexual relationship Muslimani had experienced with his oldest stepdaughter.¹² Muslimani's prior wife had two young daughters when they married. The couple then had three daughters together, the subjects of this custody proceeding.¹³ Muslimani began having sex with his oldest stepdaughter when she was either ten or eleven. This relationship resulted in the birth of two children, the first occurring when the stepdaughter was only twelve years old.¹⁴

At the trial, a psychiatrist testified that despite this relationship he did not believe the stepdaughter was sexually abused, reasoning that it was common in Muslimani's culture to marry young. Thus, in his opinion, Muslimani should have custody of his three natural daughters, who, incidentally, were all at or near the age that the oldest stepdaughter was when the sexual contact began.¹⁵ The trial court relied on the psychiatrist's testimony in granting custody to the father.

Based on an affidavit by a second psychiatrist, the department subsequently petitioned the trial court to reopen the case and vacate the custody order. The second psychiatrist, from the same professional group as the testifying psychiatrist, opined that sexual intercourse between a girl of ten or eleven years and her thirty-eight-year-old stepfather constituted sexual abuse. The affidavit concluded that the custody decision should not have been based on the testimony of the testifying psychiatrist.¹⁶ The trial court refused to reopen the case. However, on appeal the case was reversed. The court of appeals concluded that the governing principle in the case was the best interests of the child, rather than the

10. *Id.* at 574, 400 S.E.2d at 543. The court noted that the lawyers were forced to defend their professional conduct as well as the defendant during the trial because of the trial judge's refusal to conduct an evidentiary inquiry into the possible conflict of interest. This created a presumption of a conflict of interest. *Id.* at 573-74, 400 S.E.2d at 542-43.

11. 12 Va. App. ___, 403 S.E.2d 1 (1991).

12. *Id.* at ___, 403 S.E.2d at 1.

13. *Id.*

14. *Id.* at ___, 403 S.E.2d at 1-2.

15. *Id.* at ___, 403 S.E.2d at 2.

16. *Id.* at ___, 403 S.E.2d at 3.

finality of judicial decisionmaking. It further observed that the sexual relationship admitted by Muslimani constituted a serious criminal offense in Virginia.¹⁷

Two circuit court opinions have addressed issues involving the preliminary stage of child abuse investigations. In the case of *In re J.B.*,¹⁸ the Fairfax County Circuit Court decided that a juvenile and domestic relations district court judge had the authority to appoint a guardian ad litem for a minor child to represent the child's interests during the investigation of a child abuse complaint.¹⁹ In *K.A.M. v. Miller*,²⁰ the Smyth County Circuit Court ruled that the accused in a "founded" child abuse complaint had the right to examine the records of the investigation, but was not entitled to see portions of the records which identified the complainant or collateral sources.

The most highly publicized legislative development in this area during the 1991 General Assembly session was the enactment of legislation establishing a special statute of limitations for civil suits brought by adults who were victims of childhood sexual abuse.²¹ The new law creates a twelve-month "window," effective July 1, 1991. During this "window" period any survivor of child sexual abuse may sue an abuser in tort for such acts, regardless of when the abuse initially occurred or how much time has elapsed since the victim discovered the abuse.²² In the future, a cause of action based on injury "resulting from sexual abuse . . . during the [childhood] or incompetency of [a] person, [accrues] when the fact of the injury and [the] causal connection to abuse is first communicated to the [victim] by a licensed physician, psychologist or clinical psychologist."²³ Thus, the two-year statute of limitations for personal actions does not begin running until that communication occurs, or the victim reaches majority, whichever is later.²⁴ Section 8.01-249 of the Code of Virginia ("Code"), however, further provides that no action based on such sexual abuse may be brought more than ten years after the "removal of the disability of

17. *Muslimani*, 12 Va. App. at ___, 403 S.E.2d at 4.

18. 19 Va. Cir. 158 (County of Fairfax Cir. Ct. 1990).

19. The court relied on VA. CODE ANN. § 16.1-266(D) (Repl. Vol. 1988) to reach this conclusion.

20. 19 Va. Cir. 220 (County of Smyth Cir. Ct. 1990).

21. VA. CODE ANN. § 8.01-249 (Cum. Supp. 1991).

22. Act of April 3, 1991, ch. 674, 2 1991 Va. Acts 1273.

23. VA. CODE ANN. § 8.01-249 (Cum. Supp. 1991).

24. *Id.*

infancy or incompetency" regardless of the time of communication, or more than ten years after "the last act by the same perpetrator which was part of a common scheme or plan of abuse."²⁵ The definition of sexual abuse as provided by this section includes "rape, sodomy, inanimate object sexual penetration, . . . sexual battery," or other acts of sexual abuse defined in paragraph 6 of section 18.2-67.10 of the Code.²⁶

Other legislation was enacted by the General Assembly which impacted abuse and neglect law. Section 18.2-370.1 of the Code was amended to clarify that persons proscribed thereby from taking indecent liberties with a child include, but are not limited to, a parent or other such custodian.²⁷ Section 18.2-57.2 of the Code was added to make assault and battery against a family member, including a child or grandchild, a Class 1 misdemeanor and a third or subsequent conviction a Class 6 felony.²⁸ Section 9-173.7 of the Code was amended to give local boards the authority to govern court-appointed special advocate (CASA) programs.²⁹ Additionally, 1991 legislation expanded the powers of the juvenile and domestic relations district courts by granting them the authority to enter protective orders in spousal abuse cases,³⁰ and "recklessly [leaving] a loaded, unsecured firearm in such a manner as to endanger . . . a child under the age of fourteen,"³¹ was made a Class 3 misdemeanor. Furthermore, procedures for addressing the reporting and investigation of child deaths where an autopsy indicates evidence of abuse or neglect were established.³² Resolutions of the 1991 session continued the "Joint Subcommittee Studying the Problems of Maternal and Perinatal Drug Exposure and Abuse and the Impact on Subsidized Adoption and Foster Care."³³ Finally, "a joint sub-

25. *Id.*

26. *Id.*

27. VA. CODE ANN. § 18.2-370.1 (Cum. Supp. 1991).

28. *Id.* § 18.2-57.2. Although the new section broadens the definitions to include "household members," which may be one with whom the victim has a child in common, § 16.1-241(J) of the Code was not similarly amended to give the juvenile courts jurisdiction over such criminal charges.

29. *Id.* § 9-173.7(B)(2).

30. *Id.* §§ 16.1-241, -253.2, -253.4, 19.2-81.3. The legislation also broadens the definition of such abuse to include persons with whom the abuser "has a child in common", and it includes sanctions for violations of protective orders in child abuse as well as spouse abuse matters, and permits arrest without a warrant.

31. *Id.* § 18.2-56.2.

32. *Id.* § 32.1-285(B); see generally *id.* § 63.1-248.6 (Interim Supp. 1991) (for the procedure the department must follow when it receives this information).

33. H.J. Res. 387, 1991 Reg. Sess., 2 1991 Va. Acts 1920.

committee to study the need for restructuring . . . local social services delivery systems"³⁴ in the state was also established.

B. *Foster Care and Termination of Residual Parental Rights*

In *Stanley v. Fairfax County Department of Social Services*,³⁵ the court of appeals concluded that the statutory requirement for a separate proceeding to terminate residual parental rights does not require the initiation of a new case. Rather, only a separate hearing on the termination question is required after a petition has been filed specifically requesting termination so as to provide adequate notice.³⁶ Furthermore, a foster care plan outlining that termination is in the best interest of the child must accompany, or be filed prior to, the petition seeking termination.³⁷ The court also discussed the role of the guardian ad litem, concluding that the appointed guardian ad litem had the authority to file a petition seeking termination of residual parental rights.³⁸ The supreme court affirmed the conclusion of the court of appeals in a decision limited to the issue of the guardian ad litem's authority.³⁹

Three other cases also dealt with the termination of the residual rights of parents who were incarcerated, with quite differing results. In *Kaywood v. Halifax County Department of Social Services*,⁴⁰ the court of appeals affirmed the termination of a father's parental rights where he was serving a twenty-year sentence for abusing the child. The court considered several factors: the father had inflicted severe injuries on the boy and sought no medical treatment for the injuries; the father demonstrated a persistent inability to hold a full-time job; and the father had shown no interest in establishing any visitation rights with the child.⁴¹

Conversely, in *Cain v. Commonwealth ex rel. Department of So-*

34. H.J. Res. 314, 1991 Reg. Sess., 2 1991 Va. Acts 1872.

35. 10 Va. App. 596, 395 S.E.2d 199 (1990).

36. *Id.* at 601-02, 395 S.E.2d at 202.

37. *Id.* at 602, 395 S.E.2d at 204; see VA. CODE ANN. § 16.1-283(A) (Repl. Vol. 1988).

38. *Stanley*, 10 Va. App. at 602-03, 395 S.E.2d at 201-03; see also *Norfolk Division of Social Services v. Unknown Father*, 2 Va. App. 420, 345 S.E.2d 533 (1986).

39. *Stanley v. Fairfax Co. Dept. of Social Services*, 12 Va. App. —, 405 S.E.2d 621 (1991). The court reaffirmed the expansive view of the guardian's role, relying in part on § 16.1-227 of the Code which states that the Juvenile and Domestic Relations District Court law should be "construed liberally and as remedial in character." VA. CODE ANN. § 16.1-227 (Cum. Supp. 1991).

40. 10 Va. App. 535, 394 S.E.2d 492 (1990).

41. *Id.* at 539-40, 394 S.E.2d at 493-94.

cial Services for the City of Roanoke,⁴² the court concluded that termination of parental rights was inappropriate for a mother who was imprisoned when there was no showing that the department had developed or offered any services to enable the mother to recover custody of her children.⁴³ The court observed that the mother's incarceration alone could not *per se* establish good cause for termination of parental rights.⁴⁴

The third case similarly dealt with an incarcerated parent and residual parental rights. *Tullos v. Roanoke City Department of Social Services*⁴⁵ involved a mother imprisoned for the murder of another child. In *Tullos*, the court upheld the termination of parental rights, but not premised solely on her incarceration. It also based its decision on evidence that the mother had let her abusive husband back in the home; that she failed to report home difficulties to the department; and, that she intentionally murdered the child's sibling.⁴⁶

The 1991 General Assembly was also active in this area. It enacted legislation requiring courts to assess fees for payment to the departments of social services or court services units, for investigations, supervised visitation, or mediation services.⁴⁷ Other legislation addressed arrangements for foster care placements pursuant to verbal agreements with parents or agencies,⁴⁸ and mandated that foster care plans include descriptions of the programs and services available to assist in preparing foster children sixteen years old or over for the transition from foster care to independent living, where appropriate.⁴⁹

III. JUVENILE DELINQUENCY AND NONCRIMINAL MISBEHAVIOR

In *Johnson v. Commonwealth*,⁵⁰ the court of appeals upheld the admission of a confession by a fifteen-year-old boy convicted of murder. The juvenile was a good student, capable of reading and writing at a seventh grade level, and suffered from no disabilities.

42. 12 Va. App. 42, 402 S.E.2d 682 (1991).

43. *Id.* at 45, 402 S.E.2d at 684.

44. *Id.* at 44, 402 S.E.2d at 683.

45. 12 Va. App. —, 405 S.E.2d 433 (1991).

46. *Id.* at —, 405 S.E.2d 434.

47. VA. CODE ANN. § 16.1-274 (Cum. Supp. 1991).

48. *Id.* §§ 63.1-56, -204 (Interim Supp. 1991).

49. *Id.* §§ 16.1-281, -282 (B)(&)(ii) (Cum. Supp. 1991).

50. 12 Va. App. —, 404 S.E.2d 384 (1991).

He was also advised of and waived his rights in the presence of his father, an ordained minister, prior to questioning. Yet, the court recognized that false representations were made to the youth during interrogation by one of the police officers. Nevertheless, little attention was paid to this fact, despite the presumptive greater vulnerability of the suspect because of his age.⁵¹ The court also rejected the contention that prejudicial error was committed by the trial judge when, prior to sentencing, he read from Johnson's file an inculpatory statement made by the youth to the juvenile court's intake officer.⁵² The court's opinion further notes the weight accorded by the trial judge to this matter. The judge brought the matter to the attention of the commonwealth's attorney, suggesting that the intake officer be called as a witness at the sentencing hearing.⁵³

This court's decision renders section 16.1-261 of the Code, which insulates the intake process from the rest of the proceedings, virtually lifeless, thus undermining the strong policy of encouraging candor by juveniles in the intake process. Lawyers representing youths prior to intake should now be more reticent to advise the child to "come clean." The court of appeals would have been well-advised to remand the case for resentencing before another judge. This is similar to the absolute right that a juvenile who is retained in the juvenile court after a transfer hearing has to a new judge because of the transfer hearing judge's exposure to evidence which later becomes inadmissible in the adjudicatory hearing.⁵⁴

In *California v. Hodari D.*,⁵⁵ a juvenile running from an approaching unmarked police car was chased by the police. Just prior to being tackled by a police officer, the youth threw away a rock of crack cocaine. The Court held that, for fourth amendment purposes, no seizure occurred when the youth threw the rock of crack cocaine. The majority concluded that the cocaine was abandoned

51. *Johnson*, 12 Va. App. at ___, 404 S.E.2d at 386.

52. When a juvenile is transferred to the circuit court for trial as an adult, the sentencing is done by the judge, regardless of whether guilt or innocence is heard by a jury. VA. CODE ANN. § 16.1-272 (Repl. Vol. 1988). The juvenile and domestic relations district court law insulates the intake process from subsequent proceedings by making statements made by the juvenile to the intake officer inadmissible at any stage of subsequent proceedings. *Id.* § 16.1-261.

53. 12 Va. App. at ___, 404 S.E.2d at 387. The court doesn't even mention the questionable propriety of this communication between the judge and one party in an adversarial setting.

54. VA. CODE ANN. § 16.1-269 (Cum. Supp. 1991).

55. 111 S. Ct. 1547 (1991).

while the young man was running; therefore its recovery by the police was not the result of a seizure, and certainly not the product of an illegal seizure.⁵⁶

This year, all the other cases in this area addressed the use of prior juvenile adjudications for various purposes. In *Lavinder v. Commonwealth*,⁵⁷ a court of appeals panel concluded that the prosecutor's cross-examination of a defendant about his juvenile convictions for impeachment purposes was erroneous and not harmless error.⁵⁸ Then in *Moats v. Commonwealth*,⁵⁹ the court of appeals decided that the judge in a murder trial properly refused to permit the defendant to impeach the credibility of witnesses with their prior juvenile convictions, as distinguished from specific bias. The court noted that the trial court allowed questioning regarding the juvenile witnesses' probation status to demonstrate the possibility that the witnesses "were trying to curry favor with probation officers or law enforcer officials."⁶⁰ Furthermore, in *Peterson v. Murray*,⁶¹ the United States Court of Appeals for the Fourth Circuit ruled that juvenile adjudications could be considered during the penalty phase of a capital murder trial in Virginia. Then in *United States v. Daniels*,⁶² the court concluded that a federal court may consider juvenile convictions in determining the applicable sentencing guideline range in a criminal case.

Legislation enacted in 1991 permits the chief judge of a juvenile and domestic relations district court to establish a voluntary civil mediation program and specifies that diversion may take place within as well as outside the juvenile justice system.⁶³ New legislation also grants the Commonwealth's Attorney the discretion to prosecute misdemeanor charges in the juvenile court;⁶⁴ eliminates

56. *Id.* at 1552.

57. 12 Va. App. ___, 395 S.E.2d 211 (1990) (*reh'g en banc granted*).

58. The court reaffirmed the holding of the earlier supreme court decision in *Kiracofe v. Commonwealth*, 198 Va. 833, 97 S.E.2d 14 (1957), despite the intervening revision of the juvenile code which substituted an adjudicatory finding of guilt for the earlier characterization of "not innocent." The court of appeals, sitting *en banc*, affirmed this decision. *Lavinder v. Commonwealth*, 12 Va. App. ___, 395 S.E.2d 211 (1991).

59. 12 Va. App. ___, 404 S.E.2d 244 (1991).

60. *Id.* at ___, 404 S.E.2d at 247. The cross-examination permitted was that contemplated by the Supreme Court in *Davis v. Alaska*, 405 U.S. 308 (1974).

61. 904 F.2d 882 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 537 (1991).

62. 929 F.2d 128 (4th Cir. 1991).

63. VA. CODE ANN. §§ 16.1-69.35, -227 (Cum. Supp. 1991).

64. *Id.* § 16.1-232.

the necessity of a petition in alcohol-related offenses in the court,⁶⁵ and permits the use of substituted service pursuant to section 8.01-296(2) of the Code for juvenile court summons.⁶⁶ Other enactments included a bill permitting localities to adopt ordinances prohibiting the possession of loaded firearms by a juvenile in a public place or on a public highway.⁶⁷ Legislation was also passed expanding the prohibition against selling tobacco products to or possession of such products by juveniles up to age eighteen.⁶⁸ The penalty for violation of this law was made a civil penalty instead of a penal fine.⁶⁹

The legislature performed more fine-tuning of the "abuse and lose" legislation,⁷⁰ and embarked on a major recodification of section 16.1-279 of the Code, the dispositional section. Section 16.1-279 of the Code was broken down into eighteen separate sections, sections 16.1-278.1 through 16.1-278.18, with each addressing the dispositional alternatives in a particular type of case.⁷¹ Furthermore, section 16.1-278.19 of the Code, which was enacted as part of the same bill, provides that "in any matter properly before the court, the court may award attorneys' fees and costs on behalf of any party as the court deems appropriate based on the relative financial ability of the parties."⁷² The purpose of the section is unclear, especially as it interrelates with section 16.1-267 of the Code, which governs the payment of counsel. Legislation dealing with the private operation of juvenile detention facilities was also enacted by the General Assembly.⁷³ Finally, the Assembly requested that the Virginia State Crime Commission study the issue of releasing identifying information about juveniles.⁷⁴

65. VA. CODE ANN. § 16.1-260.

66. *Id.* § 16.1-264. This legislation negates the effect of the holding in *Garrity v. Virginia Dep't of Social Serv.*, 11 Va. App. 39, 396 S.E.2d 150 (1990).

67. VA. CODE ANN. § 18.2-287.3 (Cum. Supp. 1991). The section does have some exceptions to the prohibition and only provides for a fine and forfeiture of the weapon as a penalty.

68. *Id.* § 18.2-371.2.

69. *Id.*

70. *Id.* § 16.1-279 (Virginia Code Commission codified the amendment to § 16.1-279 as part of the new dispositional statutory scheme).

71. For other changes along similar lines see the following sections of the Code of Virginia: 8.01-511, 16.1-228, -253.3, -260, -274, -278.1, -278.19, -286, -291, -292, -296, -298, 18.2-64.1, -119, 20-49, -78.1, -79.1, -79.2, 37.1-97, 63.1-195, -226, 66-13, -17. *Id.* There are no real substantive changes in these sections.

72. VA. CODE ANN. § 16.1-278.19.

73. *Id.* §§ 16.1-322.5 -322.7.

74. S.J. Res. 212, 1991 Reg. Sess., 2 1991 Va. Acts 2120.

IV. ADOPTION

Several recent Virginia cases have dealt with the subject of adoption. In *Welborn v. Doe*⁷⁵ the court of appeals upheld the right of a husband, who consented to artificial insemination with sperm from an anonymous donor, to file a petition to adopt twins born as the result of the insemination. Although section 64.1-7.1 of the Code currently creates a presumption that a child born as a result of artificial insemination is the child of a consenting husband, it is rebuttable, and therefore the adoption proceeding would conclusively establish a parent-child relationship. Additionally, the Circuit Court of the City of Richmond set aside an adoption order in the case of *In re Adoption of A.R.M.*,⁷⁶ concluding that the Uniform Child Custody Jurisdiction Act⁷⁷ was inapplicable to adoption proceedings and that the adoption was void because proper notice was not given to the birth mother in the adoption proceeding. Finally, in the case of *In re Adoption of Renaud*,⁷⁸ the court concluded that where a natural parent withholds consent to an adoption, that parent cannot waive the required reference to the Superintendent of Public Welfare for an investigation.

There have been various legislative developments in the area of adoption. Changes include: amending section 63.1-220.3 of the Code, which governs adoption placements by a parent or legal guardian, by deleting the requirement for a meeting between the birth parent and prospective adoptive parents where the latter are related to the child as grandparents, adult sibling or adult aunt or uncle; delineating instances where the consent of the father of a child born to an unmarried woman is not required; allowing the execution of the consent to adoption to occur before a notary, rather than the judge, where the adoption is to be by relatives; and providing for the transfer of the child directly to the adoptive parents after the consent is accepted by the court, rather than appointing them as guardians of the child.⁷⁹ Other legislation specifies that a married couple or an unmarried individual may adopt;⁸⁰ and that an adoption petition must be signed by the petitioner and counsel, as well as be under oath if an adoption without referral for

75. 10 Va. App. 631, 394 S.E.2d 732 (1990).

76. 20 Va. Cir. 301 (City of Richmond Cir. Ct. 1990).

77. VA. CODE ANN. §§ 20-125 to -146 (Cum. Supp. 1991).

78. 21 Va. Cir. 293 (County of Stafford Cir. Ct. 1990).

79. VA. CODE ANN. §§ 63.1-220.3, -221 (Interim Supp. 1991).

80. *Id.* §§ 63.1-220.2, -220.3 (Cum. Supp. 1991).

investigation is sought.⁸¹

V. PATERNITY AND ILLEGITIMACY

There have been several recent developments in the area of paternity and illegitimacy. In *Wyatt v. Virginia Department of Social Services*,⁸² the court affirmed a finding of paternity predicated on a clear and convincing standard of proof, the applicable statutory standard at the time of the *de novo* hearing in the circuit court. This occurred despite that when the proceeding was in the juvenile court a higher reasonable doubt standard governed.⁸³ In *Slagle v. Slagle*,⁸⁴ an ex-husband was barred from raising the issue of paternity in a subsequent child support proceeding, and was held to be obligated to pay child support where the divorce decree recited that the child was "born of the marriage."⁸⁵ The court did not allow the blood test admitted in the later proceeding establishing non-paternity to affect the application of the doctrine of collateral estoppel.⁸⁶ In *Batrouny v. Batrouny*,⁸⁷ a circuit court set aside a divorce decree because the wife fraudulently misrepresented that the husband was the father of her first child.⁸⁸ Lastly, legislation amended section 20-88.26:1 of the Uniform Reciprocal Enforcement of Support Act (URESA) to permit the continuance of a case when additional proof regarding paternity is required from a non-resident obligee.⁸⁹ And, section 64.1-5.2 of the Code was also amended conforming the methods of proving paternity to those contained elsewhere in the Code.⁹⁰

Another important bill provides that a child conceived and born to a married couple, consenting in writing to the performance of reproductive technology and accepting the parentage of any resulting child, will result in the child being the legitimate natural child of the couple.⁹¹ The reproductive technology may include artificial

81. *Id.* § 63.1-221.

82. 11 Va. App. 225, 397 S.E.2d 412 (1990).

83. *See id.*

84. 11 Va. App. 341, 398 S.E.2d 346 (1990).

85. *Id.* at 343, 398 S.E.2d 347.

86. *Id.* at 348, 398 S.E.2d at 350.

87. 21 Va. Cir. 388 (County of Chesterfield Cir. Ct. 1990).

88. *Id.* at 388.

89. *See* VA. CODE ANN. § 20-88.26:1 (Cum. Supp. 1991).

90. *Id.* § 64.1-5.2. Methods added include genetic blood grouping tests and medical or anthropological evidence on parentage based on tests performed by experts.

91. *Id.* §§ 32.1-256, 64.1-7.1.

insemination, in vitro fertilization, or other technology performed under the supervision of a licensed health care professional, and donors of sperm or ova will have no parental rights or duties concerning the child.⁹² Extensive legislation was also enacted creating Chapter 9 in Title 20 on the status of children of assisted conception.⁹³ This statutory scheme takes effect on July 1, 1993. It covers assisted conception and sanctions surrogacy contracts, although it requires prior court approval of such contracts.⁹⁴

VI. EDUCATION

Several cases have been recently decided which impact on the area of educating children in Virginia. In *Johnson v. Prince William County School Board*,⁹⁵ the Supreme Court of Virginia upheld the decision of the school board that a couple's desire for home instruction of their children was based on political or philosophical belief rather than bona fide religious training or belief, thus denying approval.⁹⁶ The Johnsons contended that both the school board and the circuit court erroneously applied a two-prong test to the question. This test required them to not only establish that their desire for home instruction was based on religious belief, but also that their beliefs could not be accommodated by other alternatives to public school attendance.⁹⁷ The supreme court held that the first prong was the only inquiry to be resolved under the law. It further concluded that both lower decisionmakers had correctly resolved that question against the Johnsons, with the evidence fully supporting those conclusions.⁹⁸ Three justices dissented, agreeing with the parents that an impermissible second prong had been added to the statutory test by the earlier decisionmakers.⁹⁹

Two cases involving the education of handicapped children were decided by the Fourth Circuit Court of Appeals. In *Tice v. Botetourt County School Board*,¹⁰⁰ the court decided that the

92. *Id.*

93. *Id.* §§ 20-156, -165.

94. *Id.* The legislation also amends §§ 32.1-261, 32.1-289.1 and 63.1-236.1 of the Code of Virginia. *Id.*

95. 241 Va. 383, 404 S.E.2d 209 (1991).

96. *Id.* at 392, 404 S.E.2d at 213.

97. *Id.* at 385, 404 S.E.2d at 210-11.

98. *Id.* at 389-90, 404 S.E.2d at 211.

99. *Id.* at 395, 404 S.E.2d at 215.

100. 908 F.2d 1200 (4th Cir. 1990).

school system did not provide a learning disabled and emotionally disturbed youth a "free appropriate public education" during his psychiatric hospitalization. Consequently, the school board will be obligated to reimburse the parents for the educational and related services portion of the costs of that placement, if the lower court finds that the placement was appropriate.¹⁰¹ The parents need not establish a causal connection between the denial of appropriate services and the subsequent hospitalization. They need only show that the schools denied the child his or her right to services under the special education laws and regulations.

In *Goodall v. Stafford County School Board*,¹⁰² the court addressed the constitutional problems presented by the provision of special education services in private religious schools. The court concluded that the special education laws do not require that a cued speech interpreter be provided to a deaf student in a private religious school, even though the state would be obligated to provide such a service in a public school or in a private nonsectarian school if the child is placed there either by the state or pursuant to the child's individualized education plan.

Legislation adopted at the 1991 General Assembly session made some portions of the school dropout prevention statutes effective July 1, 1991, and other portions effective on July 1, 1992.¹⁰³ Other legislation was enacted which impacts the area of education, including: requiring law enforcement officers to report to the school division arrests of school personnel for certain sexual offenses;¹⁰⁴ increasing the fines for drinking or possessing alcoholic beverages on school property;¹⁰⁵ broadening the prohibition against carrying certain weapons on school property to include a prohibition of possessing such weapons as well;¹⁰⁶ and permitting juvenile and domestic relations district courts to require a juvenile charged with certain offenses to attend alternative educational programs instead of the regular instructional program.¹⁰⁷ The General Assembly also

101. *Tice*, 908 F.2d at 1208.

102. 920 F.2d 363 (4th Cir. 1991).

103. Acts of March 20, 1991, ch. 295, 1 1991 Va. Acts 416 (amending and reenacting ch. 797 of the 1990 Acts). See amendments to VA. CODE ANN. §§ 16.1-279, 18.2-371, 22.1-17.1, -209, -209.1:1, -253.13:1, -254, -258, -262, -263, -265, -267, -274, -279.2, -280.1, -289, -344 (Cum. Supp. 1991).

104. VA. CODE ANN. § 19.2-83.1 (Cum. Supp. 1991).

105. *Id.* §§ 4-78.1, -112.4.

106. *Id.* § 18.2-308.1.

107. *Id.* § 22.1-257.

continued the study of special education services for handicapped youth in Virginia jails.¹⁰⁸

VII. MENTAL HEALTH

The General Assembly made a few technical amendments in the Psychiatric Inpatient Treatment of Minors Act enacted last year,¹⁰⁹ and increased the fees for special justices and substitute judges who sit in commitment hearings.¹¹⁰

VIII. MISCELLANEOUS

In *Doe v. Dewhirst*,¹¹¹ the Supreme Court of Virginia reaffirmed the rule that a child between the ages of seven and fourteen is presumed incapable of contributory negligence. Yet, this presumption may be overcome "when the evidence shows that a reasonable person of like age, intelligence, and experience would understand the danger of his conduct under the same or similar circumstances."¹¹² The General Assembly also effectuated other legislation. It created a Commission on Early Childhood and Child Day Care Programs;¹¹³ abolished the Department for Children as a separate agency;¹¹⁴ and made the release of fifty or more nonbiodegradable balloons within an hour an offense under certain conditions, with a civil penalty, for environmental reasons.¹¹⁵

The 1991 General Assembly also enacted a general revision of the child labor laws at the behest of the Special Subcommittee Studying Child Labor Laws.¹¹⁶ The legislation enacted generally conforms Virginia law to the various federal provisions relating to the employment of children, and provides for greater administrative involvement in the child labor area through the promulgation

108. H. J. Res. 367, 1991 Reg. Sess., 2 1991 Va. Acts 1905.

109. VA. CODE ANN. §§ 16.1-336, -338, -341, -346, -346.1, 37.1-67.1 (Cum. Supp. 1991). See Shepherd, *Legal Issues Involving Children: Annual Survey of Virginia Law*, 24 U. RICH. L. REV. 629, 649 (1990).

110. VA. CODE ANN. § 37.1-89 (Cum. Supp. 1991).

111. 240 Va. 266, 396 S.E.2d 840 (1990).

112. *Id.* at 268, 396 S.E.2d at 842.

113. VA. CODE ANN. § 9-291.1 (Cum. Supp. 1991).

114. Acts of March 25, 1991, ch. 563, 1 1991 Va. Acts 1009.

115. VA. CODE ANN. § 29.1-556.1 (Cum. Supp. 1991). This provision is included in this survey because of the past popularity of balloon releases by school groups and other groups of children.

116. See REPORT OF THE SPECIAL SUBCOMMITTEE STUDYING CHILD LABOR LAWS, H. DOC. No. 51, 1991 Reg. Sess.

of regulations. Yet, there are some deviations from federal law with respect to employment in agricultural occupations not in interstate commerce. Also, the fines for violation of the law were increased generally from \$250 to \$1,000, and the penalty for cruelty to children was raised from a misdemeanor to a Class 6 felony.¹¹⁷

117. VA. CODE ANN. §§ 16.1-241, -260, -279, 40-78, -79.01, -79.1, -80.1, -81.1, -84, -85, -87, -89, -92, -93, -96, -100, -101, -109, -112, -113 (Cum. Supp. 1991).