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From the Nation's Oldest Law School

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A STUDENT PUBLICATION OF
THE MARSHALL-WYTHE SCHOOL OF LAW
COLLEGE OF WILLIAM AND MARY

EDITOR'S BRIEF

In this issue of *The Colonial Lawyer: A Journal of Virginia Law and Public Policy*, four authors present insightful commentary on a number of controversial and changing areas of Virginia law.

On the subject of abortion, Amy Naegele explores the right of an incompetent woman to not have an abortion. Ms. Naegele notes that there is little case law or statutory law on whether the consent of an incompetent's guardian is required in addition to or in lieu of consent by the pregnant woman to an abortion. She further notes that abortion is specifically excluded from the operation of Section 37.1-134.4 of the Virginia Code which provides for surrogate decisionmaking regarding medical treatment for incompetents. After reviewing Virginia law on standards for sterilization, Ms. Naegele proposes the adoption of an Abortion Consent Statute that requires judicial consent to an abortion for an incompetent. The author concludes that such a statute complies with the constitutional requirement to protect an individual's privacy right in procreation.

In another article involving the rights of incompetent individuals, Melanie Michaelson discusses standards of substitute judgment for surrogate decisionmaking regarding medical treatment for incompetent adults. Ms. Michaelson focuses on Virginia Code Section 37.1-134.4 that authorizes surrogate treatment decisionmaking for incompetents. Her article notes the availability of other states' case law for interpreting such a statute, and covers the medical evidence and state interests that should be considered when making a surrogate decision on medical treatment. Ms. Michaelson delineates three standards of substitute judgment available to the surrogate decisionmaker and discusses the evidence examined when applying each standard. She concludes that Virginia has provided a workable set of standards for surrogate treatment decisionmaking.

In the Practitioner's Guide section of *The Colonial Lawyer*, the Research Editors of the journal present articles directed toward the practicing attorney to provide him/her detailed information on select topics. Jim Reynolds addresses the status of the use of the cy pres doctrine to reform racially discriminatory trusts in Virginia following the recent Virginia Supreme Court decision, *Hermitage Methodist Homes of Virginia v. Dominion Trust Company*. Mr. Reynold's article covers a brief history of the cy pres doctrine, the doctrine's general application, its specific application to racially discriminatory trusts, and the general formalities for using the cy pres doctrine.

In our final article, Anne Bowling thoroughly describes the creation and operation of The Division of Child Support Enforcement, Virginia's response to Congressional initiatives to create a unified, national child support enforcement program.

I wish to express my gratitude to my editors and staff for a job well done this semester. The Editors and the Staff of *The Colonial Lawyer: A Journal of Virginia Law and Public Policy* hope that you, the practitioner and the scholar, find the articles of Volume 19, Number 2, insightful and stimulating. Your suggestions, comments, and criticisms are welcomed.

Lisa J. Entress
Editrix-in-Chief

ABOUT THE AUTHORS

Amy K. Naegele, *Abortion: Informed Consent for the Mentally Incompetent*, received her J.D. from Marshall-Wythe in 1990 and her B.A. in American Studies from Franklin & Marshall College in 1986. She is currently working for the West Virginia Supreme Court as a pro curiam clerk for Justice Thomas Miller. Ms. Naegele originally wrote this paper for her Law & Medicine seminar at Marshall-Wythe. She wishes to thank Dr. Thomas Hubbard for his inspiration and editorial comments.

Melanie F. Michaelson, *Standards of Substitute Judgment for Applying Surrogate Treatment Decisionmaking for Incompetent Adults in Virginia*, is a third-year student at Marshall-Wythe. Ms. Michaelson received her B.A. in History, summa cum laude, from the University of Maryland in 1988. She wishes to thank her mother and father for their help and support and Professor Ingo Keilitz for his help in developing this topic and paper.

James W. Reynolds, *The Practitioner's Guide: Racially Discriminatory Trusts & The Cy Pres Doctrine in Virginia*, is a third-year student at Marshall-Wythe and a Research Editor of *The Colonial Lawyer*. Mr. Reynolds received his B.A. in English from the University of Richmond in 1988.

Anne D. Bowling, *The Practitioner's Guide: The Division of Child Support Enforcement: Virginia's Response to Federal Child Support Reform*, is a third-year student at Marshall-Wythe and a Research Editor of *The Colonial Lawyer*. Ms. Bowling received her B.A. in English and Economics from the College of William and Mary in 1988. She wrote her article in an attempt to better comprehend DCSE problems she faced while working for the Legal Aid Clinic this fall.

ABORTION: INFORMED CONSENT FOR THE MENTALLY INCOMPETENT

Amy K. Naegele

INTRODUCTION

A great deal of attention is focused on the question of abortion in today's society. Courts, legislatures and the media are constantly dealing with the issue of abortion rights. Most of the questions focus on whether a woman has the right to obtain an abortion in a given situation. Little attention is given to the right to **not** have an abortion; it is generally considered absolute. The question often arises, however, in the case of an incompetent woman. When it does, those dealing with it will discover that there is little existing law on which they can rely. Consider, for example, the following scenario:

Ann Smith is a twenty-year-old, mildly mentally retarded woman. Ann has lived in Virginia her entire life. She has always been dependent on her parents. When she reached the age of eighteen, Ann's parents, Mr. and Mrs. Smith, petitioned the court and successfully had her adjudicated incompetent. The Smiths have been appointed Ann's legal guardians. Ann has recently become pregnant. Her obstetrician believes that she is approximately sixteen weeks pregnant. The Smiths feel that Ann should have an abortion, and they have consented to the procedure. They are convinced that Ann would not be able to care for a child by herself. Although they are willing to help raise this grandchild, they are concerned that, should they die before the child reaches adulthood, the state would take the child from Ann, devastating her. Ann, however, does not want an abortion. She is very excited about the possibility of having a baby and believes that, with the help of her parents, she could raise the child. She also believes that, once she proves that she can be a good mother, no one will be able to take her child away. Ann's physician is unwilling to perform the abortion because, although the Smiths, as her legal guardians, have consented to it, Ann herself has repeatedly refused to consent.

What is the physician to do in this situation? Which is the proper party to consent to an abortion for Ann? Does the court have any power to order the procedure?

This paper examines the current law in Virginia and its applicability to the situation presented here. It proposes a scheme which might potentially be enacted by the Virginia legislature, and examines it in terms of Constitutional propriety.

HISTORICAL PERSPECTIVE

In an earlier time, when less was understood about mental retardation, a decision regarding Ann's right to reproduce might have been influenced by the popular notion of eugenics. In the early twentieth century, the belief that mental illness was genetic was widely held. As a result, laws were passed which attempted to prevent procreation by the mentally ill or incompetent.¹

Virginia law authorized involuntary sterilization of persons committed to state institutions for the mentally ill.² The Virginia Supreme Court explained that the purpose of the statute was "to protect the class of socially inadequate citizens named therein from themselves and to promote the welfare of society by mitigating race degeneracy and raising the average standards for intelligence of the people of the State."³ In *Buck v. Bell*,⁴ the court indicated that the interest of society in being free from "mental defectives" outweighed the interest of Carrie Buck, an institutionalized

¹ Annotation, *Validity of Statutes Authorizing Asexualization or Sterilization of Criminals or Mental Defectives*, 53 A.L.R. 3d 960 (1973).

² For a discussion of Virginia sterilization law in the 1920s, see *Buck v. Bell*, 143 Va. 310, 130 S.E. 516 (1925).

³ *Buck v. Bell*, 143 Va. 310, 318, 130 S.E. 516, 519 (1925), *aff'd* 274 U.S. 200 (1927).

⁴ 143 Va. 310, 130 S.E. 516 (1925).

woman, in not being sterilized. The court noted that Buck was the "probable potential parent of socially inadequate offspring, likewise affected as she is."⁵

The United States Supreme Court affirmed the Virginia decision in *Buck v. Bell*.⁶ Justice Holmes, writing for the Court, explained the goal (and propriety) of eugenics:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for the lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.⁷

Holmes' opinion reflects the view, widely held at the time, that the mentally retarded have no interest in nor understanding of procreation. Thus, the Court gave its approval to state policy designed to promote the interest and good of society by subverting the rights of the mentally incompetent.

Had Ann's situation been presented at the time, she would probably have been compelled to submit to the abortion. Evaluated under such a system, her right to make the abortion decision would probably have been ignored. The interests of society in preventing the birth of yet another "socially inadequate" individual would have outweighed her interest in having a child.

The decision of the United States Supreme Court in *Buck v. Bell* has never been officially overturned. Its validity, however, is questionable in light of current understanding of mental illness and retardation and recognition of rights of individuals so impaired.⁸

⁵ *Id.* at 315, 130 S.E. at 517.

⁶ 274 U.S. 200 (1927).

⁷ *Id.* at 207.

⁸ Modern case law has focused not only on involuntary sterilization, but also on the right of the incompetent to choose sterilization as a method of contraception. The states are varied in their approach to these problems. For an explanation of

CURRENT VIRGINIA LAW

Consent and Abortion Law

Virginia's current statutory scheme is ambiguous regarding the dilemma presented by Ann's situation. Analysis of the statutes regarding abortion, mental incompetence, and consent to medical treatment reveals significant gaps in coverage of the topic by the legislature.

Abortion is a crime in Virginia, unless performed in strict compliance with the demands of the statutes.⁹ The requirement most significant to the analysis of Ann's right to decide whether to have an abortion is the requirement of informed consent. The statute provides that the physician must obtain the informed written consent of any woman seeking an abortion; if the woman is incompetent, the doctor may legally perform the abortion only after consent has been given in writing by the woman's guardian.¹⁰ Thus, the law requires two things: (1) consent by the pregnant woman, and (2) consent by the guardian if the woman is incompetent. The statute is silent, however, as to whether the consent of the guardian is required in addition to or in lieu of consent by the pregnant woman.

Section 37.1-134.4 of the Virginia Code¹¹ provides two means for surrogate decision-making regarding medical treatment for incompetents. The first allows persons in designated classes to make decisions on behalf of incompetents.¹² This law specifically excludes abortion from its operation, although the statute states that it is

various theories and approaches, *see* S.J. BRAKEL, J. PARRY, & B.A. WEINER, *THE MENTALLY DISABLED AND THE LAW* 521-30 (1985).

⁹ VA. CODE ANN. § 18.2-71 (1988).

¹⁰ *Id.*

¹¹ VA. CODE ANN. § 37.1-134.4 (Supp. 1990)

¹² *Id.*

simply an "alternative to other statutory and common law authority for making medical decisions on behalf of adult persons unable to make informed decisions."¹³ The surrogate decisionmaking statute is simply procedural; it does not alter the requirements for informed consent.¹⁴ Medical treatment of incompetents may also be authorized by judicial order.¹⁵ Authorization of abortion is, however, specifically excluded from the operation of this statute as well.¹⁶ Although the statutorily prescribed means for substitute decisionmaking cannot apply to abortion, they demonstrate policy consideration by the Virginia legislature of the wishes of the incompetent individual. Prior to authorizing medical treatment, the decisionmaker is required to consider the incompetent's views regarding the proposed procedure, to the extent to which they can be ascertained. The surrogate decisionmaking statute states that action relating to treatment to which the incompetent person objects shall not be taken by the provider of care, nor shall the surrogate authorize treatment to which he knows the incompetent objects.¹⁷ Similarly, in cases of judicial authorization of treatment, the court may not authorize a course of treatment which is shown to be contrary to the basic values or religious beliefs of the incompetent.¹⁸ Thus, it is apparent that while Virginia allows substituted decisionmaking for incompetents, its policy is to consider the feelings and views of the incompetent who is to be subjected to the treatment.

The consent and abortion laws, therefore, shed little light on a solution to the dilemma presented by Ann's situation. The statutes require that a guardian or similarly situated person consent to an abortion for an incompetent woman, yet they provide no

¹³ VA. CODE ANN. § 37.1-134.4(A) (Supp. 1990).

¹⁴ *Id.*

¹⁵ *Id.* at § 37.1-134.5.

¹⁶ *Id.* at § 37.1-134.5(H)(1).

¹⁷ *Id.* at § 37.1-134.4(D).

¹⁸ *Id.* at § 37.1-134.5(G)(4).

means by which the required authorization may be given. They provide mechanisms for consent to medical treatment for Ann, yet they specifically exclude abortion from the operation of these mechanisms. They do, however, leave open the option of other, non-statutory, means by which a substituted decision regarding medical treatment might be made. Additionally, the statutes illuminate Virginia policy choices reflecting a concern for the views of the incompetent individual. The abortion statute specifically requires consent of a guardian to an abortion for an incompetent, but does not specify whether such consent is controlling in the absence of consent by the incompetent.

Under the existing statutory structure, perhaps the strongest argument that can be made is one denying the authority of Ann's parents or the court to authorize the abortion to which Ann will not consent. The statutes do not specifically allow for such substituted consent in the case of abortion, and in fact explicitly deny the applicability of consent statutes to the abortion laws. Furthermore, the policy reflected in the existing law is to respect the wishes of the incompetent individual. Ann has made her objection to the abortion very clear, so compulsion of the procedure would apparently violate this state policy.

Sterilization Law

In light of the ambiguity in the abortion and consent laws, an examination of Virginia's law regarding sterilization of incompetents may be helpful in analyzing the law's appropriateness as an analogy to the abortion situation. Virginia law provides a procedure by which performance of a sterilization operation upon an adult incapable of giving informed consent can be judicially authorized.¹⁹ The sterilization law provides clear procedural guidelines to the court in making the decision regarding sterilization. In addition to filing and notification requirements,²⁰ the court must determine that the

¹⁹ VA. CODE ANN. § 54.1-2976 (1988).

²⁰ *Id.* at §§ 54.1-2976(1), (2).

individual has been adjudicated incompetent in accordance with Virginia law and is unlikely to be competent in the foreseeable future to make the sterilization decision.²¹ The physician must have explained to the person to be sterilized, to the best extent possible, the operation and its risks, as well as available alternative means of contraception.²² The court must elicit and consider the views of the person regarding the sterilization.²³ If the court issues an order for sterilization, a thirty-day waiting period applies before the operation may be performed.²⁴

The law also enumerates the requisite evidentiary findings, to be made through medical, social and psychological evaluation of the person, which must precede any authorization of sterilization by the court. Specifically, in order to authorize sterilization, the court must find that:

1. There is a need for contraception. The court shall find that the person is engaging in sexual activity at the present time or is likely to engage in sexual activity in the near future and that pregnancy would not usually be intended by such person if such person were competent and engaging in sexual activity under similar circumstances;
2. There is no reasonable alternative method of contraception to sterilization;
3. The proposed method of sterilization conforms with standard medical practice, and the treatment can be carried out without unreasonable risk to the life and health of a person; and
4. The nature and extent of the person's mental disability renders the person permanently incapable of caring for and raising a child. The court shall base this finding on empirical evidence and not solely on standardized tests.²⁵

²¹ *Id.* at § 54.1-2976(4).

²² *Id.* at § 54.1-2976(3).

²³ *Id.* at § 54.1-2976(5).

²⁴ *Id.* at § 54.1-2976(7).

²⁵ *Id.* at § 54.1-2977.

These procedures and required findings reflect a concern for the rights of mentally incompetent citizens on the part of the Virginia legislature. It is apparent that Virginia currently seeks to ensure that the reproductive capabilities of its citizens are protected and not removed unnecessarily or without due process of law. Perhaps similar provisions allowing substitute decisionmaking in the abortion context could be implemented as well.

Applying the standards for sterilization to the abortion problem seems logical; sterilization is the most closely analogous situation to abortion, although the two clearly differ in significant ways (most notably in that sterilization renders the woman permanently incapable of having a child, whereas abortion affects only a single pregnancy). Virginia could probably serve its legislative goals of protection of the mentally incompetent by enacting an abortion consent statute similar to that for consent to sterilization.

PROPOSED ABORTION CONSENT STATUTE

Applying the policy of Virginia's sterilization laws to the abortion consent decision, a statutory scheme for judicial consent to abortion for an incompetent might be as follows:

1. The guardian must file a petition in circuit court requesting authorization for the abortion;
2. The incompetent must be served with notice of the proceeding and an attorney must be appointed to represent her interests;
3. The court must determine that: (a) the woman has been adjudicated incompetent under Virginia law, and (b) she is unlikely to become competent to make the abortion decision in the foreseeable future;
4. The physician must explain to the woman, to the extent possible, the purpose of the abortion and the risks

associated with the procedure, the process of childbirth and the risks associated with it, and the availability of adoption as an alternative to aborting or raising the child;

5. The court must attempt to elicit and consider the views of the woman regarding abortion;
6. A short waiting period may be imposed (of course, the thirty-day period required in cases of sterilization may be unworkable in the abortion context);
7. Prior to authorizing an abortion, the court must make the following findings:
 - a) The woman is currently pregnant, the pregnancy was not intentional, and the woman would not choose to give birth were she competent;
 - b) Giving birth and placing the child for adoption is not a reasonable alternative for the woman;
 - c) The proposed method of abortion conforms with standard medical practice and can be carried out without unreasonable risk to the life; and
 - d) The woman is permanently incapable of caring for and raising a child.

Analyzed under this potential statutory scheme, Ann's desire to carry her pregnancy to term would have to be respected by the court and her parents. Although the adjudication of Ann's incompetence would allow the court to make the decision for her, the considerations mandated by the statutes would compel the court to deny any petition by the Smiths to order an abortion. The court would be required to consider Ann's wish to keep her child, although it would not be controlling. Prior to issuing any order authorizing the abortion, the court would be required to find that Ann is permanently incapable of raising a child, and that adoption would not be a reasonable alternative. Evidence of Ann's level of functioning would make such a finding virtually impossible. Ann is only mildly retarded, and she is obviously capable of understanding the process of childbirth. Giving birth and placing the child for adoption would therefore be a reasonable alternative for her. It is also quite possible that Ann

could learn to be an adequate parent and raise the child herself.

Although a substituted consent statute for abortion modeled after the sterilization statute might be workable in a practical sense, it remains to be seen whether Virginia could legally enact such a statute. The proposal must be examined in terms of constitutional requirements.

CONSTITUTIONAL ANALYSIS

Reproductive rights is a very volatile area of constitutional law. The United States Supreme Court has repeatedly addressed the issue in differing contexts. Although the extent to which the rights may be exercised varies in different situations, the Court has generally recognized that the right to procreate and the right to choose not to procreate are fundamental.²⁶ In *Skinner v. Oklahoma*,²⁷ the Court characterized the right to procreate as "one of the basic civil rights of man."²⁸

The choice not to procreate generally receives more attention in litigation. The cases addressing this right usually deal with either contraception or abortion. Contraception is a basic right available to all. In *Eisenstadt v. Baird*,²⁹ the Court stated that an individual has a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."³⁰ The right of a woman to secure an abortion, subject to certain permissible

²⁶ See, e.g. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to contraception for married persons); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to contraception for unmarried persons); *Roe v. Wade*, 410 U.S. 113 (1973) (right to choose to terminate pregnancy).

²⁷ 316 U.S. 535 (1942).

²⁸ *Id.* at 541.

²⁹ 405 U.S. 438 (1972).

³⁰ *Id.* at 453.

restraints imposed by the state, is also fundamental.³¹

The availability of these rights to mentally retarded or incompetent individuals, however, is less often addressed than their availability to competent individuals, and has never been addressed in Virginia. There are few reported cases dealing with the performance of abortions upon incompetent women. The United States Supreme Court has not addressed the issue. The state courts that have heard such cases have generally held that substituted decisionmaking is appropriate to authorize an abortion on an incompetent woman, but have differed in the determination of who should make the surrogate decision and what standards should be used in deciding.

A lower court in New York held that consent by the father to the performance of an abortion on his institutionalized, mentally retarded twenty-five year old daughter was adequate and judicial approval of the decision was unnecessary.³² In addition, the father was not required to use the best interests of his daughter as the standard for making the decision.³³ An Illinois appellate court, on the other hand, held that in making the abortion decision, the guardian must use the best interests of the ward as the standard, although it was not necessary to demonstrate medical necessity for the procedure.³⁴ The Supreme Court of Rhode Island, in denying a stay of a trial court's order that a guardian ad litem consent to an abortion, noted that if the woman were competent she would have an absolute right to terminate her pregnancy.³⁵ The only question for the court, it reasoned, was whether the woman would choose abortion if

³¹ *Roe v. Wade*, 410 U.S. 113 (1973). The current status of this right is the topic of intense controversy. The basic right, however, still exists, having withstood, largely intact, the latest attack upon it in *Webster v. Reproductive Health Services*, ___ U.S. ___, 109 S. Ct. 3040 (1989).

³² *In re Barbara C.*, 101 A.D.2d 137, 474 N.Y.S.2d 799 (1984).

³³ *Id.* at 139, 474 N.Y.S.2d at 801.

³⁴ *In re Estate of D.W.*, 134 Ill. App. 3d 788, 481 N.E.2d 355 (1985).

³⁵ *In re Doe*, 533 A.2d 523 (R.I. 1987).

she were competent.³⁶ In addition, the Supreme Court of California has indicated in dicta that a conservator would have power to choose an abortion for a ward.³⁷ Thus, several states have assumed the power to allow substituted decisionmaking in the abortion context and have apparently been unchallenged.

State court cases dealing with sterilization have included more in-depth analysis of the reproductive rights of the mentally retarded. In *In re Moe*,³⁸ a Massachusetts appellate court was asked, in the absence of an authorizing statute, to allow a guardian to consent to the sterilization of an incompetent woman. The court noted that "[t]he right to reproduce and the decision whether or not to beget or bear a child is at the very heart of the constitutionally protected right to privacy."³⁹ The inability of the incompetent to exercise this right to choose, the court felt, did not mean that the right was inapplicable to the incompetent.⁴⁰ It was necessary, therefore, to exercise the woman's right to choose sterilization in an alternate way. The court held that, due to the intrusiveness and permanency of the sterilization operation, the guardian must obtain a court order authorizing consent.⁴¹ The court determined that, in deciding whether to issue a sterilization order, a court "should attempt to ascertain the ward's actual preference for sterilization, parenthood, or other means of contraception."⁴² This decision emphasizes the importance to an incompetent woman of the right to make procreational choices, and identifies a means by which this right might be exercised.

³⁶ *Id.* at 526.

³⁷ *Mildred G. v. Valerie N.*, 40 Cal. 3d 143, 707 P.2d 760, 219 Cal. Rptr. 387 (1985).

³⁸ 385 Mass. 555, 432 N.E.2d 712 (1982).

³⁹ *Id.* at ___, 432 N.E.2d at 719.

⁴⁰ *Id.* at ___, 432 N.E.2d at 720.

⁴¹ *Id.* at ___, 432 N.E.2d at 716-17.

⁴² *Id.* at ___, 432 N.E.2d at 722.

This concern with the right of reproductive choice, and a means to exercise it, are similarly reflected in the proposed Virginia statute.

In *Mildred G. v. Valerie N.*,⁴³ the legality of a California statute prohibiting the sterilization of incompetent individuals was challenged. The California Supreme Court held that the law unconstitutionally deprived incompetent individuals of their liberty and privacy interests in procreative choice.⁴⁴ Incompetent women, according to the court, must have available to them the same contraceptive choices available to competent women, including sterilization. Nonetheless, the court recognized that an incompetent woman would be unable to realistically exercise the choice available to her. It concluded, therefore, that "[t]rue protection of procreative choice can be accomplished only if the state permits the court-supervised substituted judgment of the conservator to be exercised on behalf of a conservator who is unable to personally exercise this right."⁴⁵ As with the Massachusetts decision, the proposed Virginia law addresses the concerns of the court regarding reproductive choice and offers a potential solution.

Chief Justice Bird entered a strong dissent to the decision in *Valerie N.*⁴⁶ She found serious problems with the majority's characterization of the possibility of substituted consent, writing as follows:

Today's holding will permit the state, through the legal fiction of substituted consent, to deprive many women permanently of the right to conceive and bear children. The majority run roughshod over this fundamental constitutional right in a misguided attempt to guarantee a right of procreative choice or one they assume has never been capable of choice and never will be. Yet precisely because choice and consent are meaningless concepts when applied to such a person, the majority's invocation of the theory of procreative choice and the fiction of substituted consent cannot withstand constitutional scrutiny.⁴⁷

⁴³ 40 Cal. 3d 143, 707 P.2d 760, 219 Cal. Rptr. 387 (1985).

⁴⁴ *Id.* at 160-61, 707 P.2d at 771-72, 219 Cal. Rptr. at 399.

⁴⁵ *Id.* at 168, 707 P.2d at 777, 219 Cal. Rptr. at 404.

⁴⁶ *Id.* at 174, 707 P.2d at 781, 219 Cal. Rptr. at 408 (Bird, C.J., dissenting).

⁴⁷ *Id.* at 174-75, 707 P.2d at 781-82, 219 Cal. Rptr. at 408-09.

Bird disagreed with the majority's unsupported conclusion that the conservator could authorize an abortion for the conservatee.⁴⁸ She argued that abortion only occurs as a result of choice, which is meaningless to one incapable of choosing. She characterized the right to procreate, on the other hand, not as a result of choice, but rather as a deeper, constitutional right.⁴⁹ According to Bird, the right of an incompetent woman to procreate is not diminished by her incompetence because it is not a function of a capacity to make informed decisions; her right to make reproductive choices, on the other hand, is a function of the capacity to make informed decisions and is therefore diminished by incompetence.⁵⁰ Under Bird's analysis, a law allowing substituted consent for abortion would not be upheld because the incompetent's right to procreate is to be respected above any fictional attempt to allow choice to a woman incapable of exercising it. Bird's view, however, is not that of the majority.

Some commentators argue that the right to procreate is a function of mental capacity because it involves the exercise of an informed choice. Scott believes that the right to procreate involves the right to produce children to rear, and thus requires the intention and ability to parent.⁵¹ She suggests that the right to bear a child is not available to a woman who is incapable of caring for a child, while a woman with adequate mental capacity to parent has a legally protected interest in procreation.⁵² She would employ the standard used to terminate parental rights in determining whether the woman is capable of becoming a parent.⁵³ Her concerns regarding parenting capacity

⁴⁸ *Id.* at 183, 707 P.2d at 787-88, 219 Cal. Rptr. at 414-15.

⁴⁹ *Id.* at 181-82, 707 P.2d at 786, 219 Cal. Rptr. at 413.

⁵⁰ *Id.* at 182, 707 P.2d at 786-87, 219 Cal. Rptr. at 414.

⁵¹ Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 829 (1986).

⁵² *Id.* at 831, 850.

⁵³ *Id.* at 833.

are addressed by provision 3 in the proposed statute requiring that the court find that a woman is permanently incapable of raising a child prior to issuing an order for an abortion.

Robertson similarly suggests that the right to procreate depends upon mental capacity. He argues that true reproductive choice encompasses both the right not to procreate and the right to procreate.⁵⁴ He believes that the right to procreate depends not upon the ability to parent, but upon the ability to comprehend the significance of procreation.⁵⁵ Under his model, compelling abortion upon a mildly mentally retarded woman capable of understanding the significance of procreation, whether or not she is fit to parent, would infringe upon her right of procreation.⁵⁶ The proposed statute allows procreational rights to all who deserve them according to Robertson's scheme. In order to authorize an abortion, the court is required to find that the woman is unfit to parent and that adoption is not a reasonable option for her. If the court finds that adoption is an option for the woman because, although she is incapable of parenting, she can comprehend the process of childbirth and wishes to experience it, it must allow her to give birth.

The general conclusion of most courts that have considered the issue of reproductive rights of the incompetent is that the right to procreate or not to procreate is a personal right which cannot be denied simply because the individual is mentally disabled. As a result, the right can be exercised for the person by another. The proposed statutory scheme provides a means to assure the mentally incompetent in Virginia the same reproductive choices available to competent women, and therefore, properly complies with constitutional requirements.

⁵⁴ Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 406, 463 (1983).

⁵⁵ *Id.* at 413.

⁵⁶ *Id.*

CONCLUSION

Although significant changes in the law regarding the reproductive rights of incompetents have occurred since the days of *Buck v. Bell*,⁵⁷ Virginia's current law contains significant ambiguities regarding performance of abortions upon incompetent women. The statute requires consent of a guardian to the procedure, but provides no means by which such consent can be given. In addition, it fails to specify whether the consent of the incompetent woman or the consent of the guardian is controlling in cases in which there is conflict. No statute authorizes courts to resolve such conflicts. Virginia law does, however, allow substituted consent to sterilization and other medical treatment, but specifically excludes abortion from the operation of the authorizing statutes. Therefore, under current Virginia law, it is not legal to perform an abortion upon an incompetent woman who has not consented to the procedure regardless of consent by her guardian.

The Virginia legislature could, however, enact a statute allowing for judicial authorization of performance of abortions upon incompetent women. Were the law to be modeled after the current statute for involuntary sterilization, it would serve the state's policy goals of protection of the rights of the mentally incompetent. Although courts have expressed concern regarding the wishes of the incompetent, a statute which mandated consideration of the expressed views of the incompetent would likely be legal.

⁵⁷ 274 U.S. 200 (1927).

**STANDARDS OF SUBSTITUTE JUDGMENT
FOR APPLYING SURROGATE TREATMENT DECISIONMAKING
FOR INCOMPETENT ADULTS IN VIRGINIA**

Melanie F. Michaelson

INTRODUCTION

In the Spring, 1990, issue of the *Colonial Lawyer*,¹ Deborah A. Ryan criticized the Virginia Natural Death Act and its narrow definition of persistent vegetative state.² This article will discuss Section 37.1-134.4 of the Virginia Code that authorizes, among other things, an appointed surrogate to provide, withhold, and withdraw life-sustaining medical treatment for certain incompetent persons.³ This statute is one of the most progressive in the country, as evidenced by the number of cases from other jurisdictions that underscore their state legislature's lack of action in this area.⁴

Because Section 37.1-134.4 is a relatively new statute, Virginia courts have little statutory interpretation. As a result, Virginia must look to decisions in other state courts in order to give guidance to those making health care decisions for an incompetent adult. This article will first discuss the requirements of the statute itself and then address the medical evidence necessary to support the different standards of substitute judgment decisionmaking. Next, the article will discuss the three different standards of substitute judgment available to a decisionmaker when fulfilling the statute's requirements: (1) the substitute-intent standard, (2) the limited-objective standard, and (3) the pure-objective standard. These standards will then be balanced

¹ Ryan, *Virginia's Natural Death Act: Is It Useful to Individuals in a Persistent Vegetative State?*, 19 COL. LAW. 34 (1990).

² See VA. CODE ANN. §§ 54.1-2981 to -2992 (1988 & Supp. 1990).

³ VA. CODE ANN. § 37.1-134.4 (Supp. 1990). See Appendix A.

⁴ See cases discussed *infra*.

against five state interests: (1) preserving life, (2) protecting innocent third parties, (3) preventing suicide, (4) maintaining the medical profession's ethical integrity, and (5) the cost of medical care. Finally, the article will conclude that Virginia has provided a workable solution for surrogates making medical decisions for incompetent adults.

THE VIRGINIA SURROGATE DECISIONMAKING STATUTE

In Section 37.1-134.4 of the Virginia Code, the Virginia General Assembly has provided for substituted consent to medical treatment in the case of an incompetent and terminally ill adult patient.⁵ Since the General Assembly has already weighed the

⁵ VA. CODE ANN. § 37.1-134.4 (Supp. 1990). *See also* VA. CODE ANN. § 54.1-2986 (1988). This statute, the Natural Death Act, limits substituted consent decisionmaking by providing that:

Life-prolonging procedures may be withheld or withdrawn from an adult patient with a terminal condition who (i) is comatose, incompetent or otherwise physically or mentally incapable of communication and (ii) has not made a declaration in accordance with this article, provided there is consultation and agreement for the withholding or the withdrawal of life-prolonging procedures between the attending physician and [certain individuals to refuse treatment on behalf of the patient].

See also, Note, The 'Terminal Condition' Condition in Virginia's Natural Death Act, 73 VA. L. REV. 749, 750 (1987). Under the Natural Death Act, a patient has a "terminal condition" if "there is 'a reasonable degree of medical certainty [that] (i) there can be no recovery and (ii) [the patient's] death is imminent.'" *Id.* (quoting VA. CODE ANN. § 54.1-2982 (1988)). Under the statute, life-prolonging procedures may be withdrawn from only a "qualified patient." *Id.* at n.8. A "qualified patient" is defined as one who has a "terminal condition." *Id.* "Terminal," however, does not clearly define a medical condition. *Id.* Colloquially, "terminal" is equated with incurability. *Id.* In medicine, however, many chronic diseases, such as chronic congestive heart failure, are rarely terminal. *Id.* For medical purposes, the word "imminent" is rarely defined. *Id.* at 150 n.11.

See also, Note, The Virginia Natural Death Act - A Critical Analysis 17 U. RICH. L. R. 863, 871-72 (1983) [hereinafter *Critical Analysis*]. *But see* Letter From Attorney General Gerald L. Baliles to The Honorable G. Steven Agee, Member, House of Delegates (August 2, 1983), regarding the issue of whether one may, pursuant to the Virginia Natural Death Act, have the use of kidney dialysis, intravenous feeding, and oxygen withdrawn or terminated as life-prolonging procedures under the provisions of VA. CODE ANN. § 54.1-2982 (1988):

A different result would undoubtedly follow if oxygen were administered by

benefits and burdens of substituted consent,⁶ this article will focus on the standards that are available to the decisionmaker making a substituted judgment for an incompetent adult. By restricting this article to the case of an adult who was formerly competent, this article avoids the slippery slope argument, predicting that the use of substituted judgment will result in the forced termination of care for society's "undesirables," that is more readily available when the adult always lacked competency.⁷ The case of an adult who could never have been found competent is similar to the more difficult cases of infants, children, and other so-called "incompetents," such as the mentally retarded, where federal statutes may be implicated.⁸ For this reason, these cases are beyond the scope of this article.

In examining the standards the decisionmaker may utilize, this article assumes that the identity of the decisionmaker is not relevant to the choice of the standard used. The Virginia Statute lists the order of priority of those who may authorize the withholding or withdrawal of treatment: (1) anyone given such authority in a writing pursuant to Virginia Code Section 54.1-2984; (2) an authorized guardian; (3) anyone appointed under a durable power of attorney that grants such authority to decide,

different means for the purpose of supplanting the spontaneous function of breathing; similarly, a different result would undoubtedly follow if intravenous feeding was not for the purpose of providing comfort against dehydration but was mainly for the purpose of supplanting the spontaneous functions of receiving necessary nourishment into the body in amounts adequate to maintain life. In both situations, of course, before terminating the procedure, it would be necessary for the physician first to find that the patient was in a terminal condition and that the process served only to prolong the dying process.

⁶ See *Critical Analysis*, *supra* note 5, at 870-71.

⁷ See *Matter of Storar and Eichner*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981); *Superintendent of Belchertown v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977).

⁸ See 42 U.S.C. §§ 5106a-5106h (1988) (The Child Abuse Prevention and Treatment Act requires that states, in order to receive certain federal funds, meet certain legal and administrative standards ensuring that the state's protective services respond to "medical neglect" cases).

provided that they are not employed by the doctor or anyone employing the doctor; (4) a husband or wife; (5) an adult child; (6) parent(s); (7) an adult sibling; or (8) any other relative, to be decided in descending order of blood relationship.⁹ Any of these individuals should come to the same conclusions when applying the standards set forth in this article.

Section 37.1-134.4 of the Virginia Code¹⁰ specifies procedures available for surrogate treatment decisionmaking.¹¹ While the statute mandates that the surrogate base his decision on the "best interests" of the person, the statute contains language that requires the surrogate to consider factors that are clearly part of the "substituted intent" standard. The statute provides, for example, that it does "not authorize providing, continuing to provide, withholding or withdrawing treatment if the [person providing] the treatment knows or upon reasonable inquiry ought to know that such an action is protested by the person."¹² Also, no person can authorize treatment that he knows, or ought to know, "is contrary to the religious beliefs or basic values of the person unable

⁹ VA. CODE ANN. § 37.1-134.4(B) (Supp. 1990); *See* VA. CODE ANN. §§ 11-9.1 to - 11-9.2 (1989) (concerning durable power of attorney); *see* Appendix B. *But see* VA. CODE ANN. § 54.1-2986 (1988). The order of priority of the decision makers in Section 54.1-2986 of the Natural Death Act is as follows:

1. The judicially appointed guardian or committee of the patient if one has been appointed . . . ; or
2. The person or persons designated by the patient in writing to make the treatment decision for him should he be diagnosed as suffering from a terminal condition; or
3. The patient's spouse; or
4. An adult child of the patient or, if the patient has more than one adult child, by a majority of the children who are reasonably available for consultation; or
5. The parents of the patient; or
6. The nearest living relative of the patient.

¹⁰ VA. CODE ANN. § 37.1-134.4 (Supp. 1990).

¹¹ *Id.* at § 37.1-134.4(H).

¹² *Id.* at § 37.1-134.4(D) (Supp. 1990).

to make a decision, whether [the beliefs or values are] expressed orally or in writing."¹³ These factors require the decisionmaker to try to determine what the individual would have wanted, and not what the decisionmaker, in the first instance, believes to be in the "best interests" of the incompetent individual. Therefore, in interpreting this statute, the courts should view the statute as creating a hybrid "substitute intent" -- "best interest" standard.

THE DOCTRINE OF SUBSTITUTE JUDGMENT

To examine the standards of the doctrine of substitute judgment, the doctrine itself must be clearly defined. The law supports the idea that incompetence does not deprive an individual of the right to decide treatment questions.¹⁴ This right remains as if the patient were still competent.¹⁵ Someone else, however, must exercise this right for the incompetent individual.¹⁶ The decision is a substitute for the patient's own, and is therefore called "substitute judgment."¹⁷ The law recognizes a constitutional right to "bodily privacy, found in the penumbras of various fundamental rights"¹⁸ Along with the tort principles that prohibit nonconsensual touching,¹⁹ that right to bodily

¹³ *Id.*

¹⁴ D. MEYERS, *MEDICO-LEGAL IMPLICATIONS OF DEATH AND DYING* § 15:2, at 470 (1981).

¹⁵ *Id.* at 471 (citing *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977)); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied* 429 U.S. 922 (1976)).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Brant, *The Right To Die in Peace: Substituted Consent And The Mentally Incompetent*, 11 SUFFOLK U.L. REV. 959, 960 (1977).

¹⁹ *Id.* at 961 (citing *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972) (competent adults may determine when they will consent to treatment); *Schloendorff v. Soc. of N.Y. Hosp.*, 211 N.Y. 125, 126, 105 N.E. 92, 93 (1914) (surgeon performing operation without adult patient's consent

privacy can be extended to disallow medical care without the patient's informed consent.²⁰ The doctrine of substitute judgment extends this right to the incompetent individual who is not able to grant his/her consent by allowing another to act for the incompetent in a manner consistent with the incompetent's wishes had he/she remained competent.²¹

The number of cases discussing this doctrine has increased due to the advances in medical technology that have allowed a person with "minimal brain functioning" to be sustained without being deemed brain dead.²² Courts, however, have been grappling with the issues of whether, when and by whom medical treatment may be withdrawn from an incompetent person since Karen Quinlan lapsed into a coma on April 15, 1975.²³ The courts are still looking for answers. Most recently, with the case of Nancy

commits assault).

²⁰ *Id.* (citing *In re Quinlan*, 70 N.J. 35, ___, 355 A.2d 647, 662 (1976) (court allowed patient in vegetative state to be withdrawn from respirator)).

²¹ Weber, *Substitute Judgment Doctrine: A Critical Analysis*, 1 ISSUES IN L. & MED. 131, 135 (1985).

²² *John F. Kennedy Hosp., Inc. v. Bludworth*, 452 So. 2d 921, 923 (Fla. 1984). As the court in *Bludworth* stated:

It is now possible to hold such persons on the threshold of death for an indeterminate period of time by utilizing extraordinary mechanical or other artificial means to sustain their vital bodily functions. The procedures used can be accurately described as a means of prolonging the dying process rather than a means of continuing life.

Id.

The Florida Supreme Court held that in the case of a terminally ill and comatose patient who had executed a "living" will, "it is not necessary that a court-appointed guardian of his person obtain approval of [the] court . . . before terminating extraordinary life support systems in order for consenting family members, attending physicians, and hospital and its administrators to be relieved of civil and criminal liability" *Id.* at 926. Merely good faith is necessary. *Id.*

²³ *In re Quinlan*, 70 N.J. 10, ___, 355 A.2d 647, 653-54 (1976). On April 15, 1975, Karen Quinlan stopped breathing at least twice, for fifteen-minute periods at a time. *Id.* at ___, 355 A.2d at 653-54. She was left in a persistent vegetative state. *Id.* at ___, 355 A.2d at 654. The New Jersey Supreme Court held that the right to terminate her life by removing her life-support was incident to her right of privacy which could be asserted on her behalf by her guardian. *Id.* at ___, 355 A.2d at 664.

Cruzan, the Supreme Court essentially left the states free to determine the standards they will require before allowing the withdrawal of medical care, including food and water, from an incompetent individual.²⁴ As Harvard Law School Professor Laurence Tribe notes, however, the *Cruzan* case reveals the unprecedented recognition by eight Supreme Court justices of some degree of constitutional protection for the "right to die."²⁵ These cases continue to arise because the courts have failed to spell out standards for the substitute decisionmaker to apply in determining what the incompetent patient would decide if still competent.

MEDICAL EVIDENCE

When making a health-care decision for an incompetent, the decisionmaker must decide and carry out, to the degree possible, the care the individual, if competent, would have chosen.²⁶ The court in *In re Peter*, however, noted that before making any health-care decisions, the decisionmaker must understand the patient's medical condition and likelihood of recovery.²⁷ Therefore, "[t]he focal point of such decisions should be

²⁴ See *Cruzan ex rel. Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988) (en banc). Nancy Cruzan was left in a persistent vegetative state after an auto accident deprived her brain of oxygen for an estimated twelve to fourteen minutes (the trial judge found that deprivation of six minutes results in permanent brain damage). *Id.* at 410-11. When efforts to rehabilitate Nancy over a substantial period of time failed, her parents (acting as her guardians) sought a judicial order sanctioning their belief that Nancy would want her artificial nutrition and hydration terminated. *Id.* The Circuit Court ordered that the request be carried out, *id.* at 411, but the Missouri Supreme Court reversed this decision, noting the state policy of preserving life and finding no "legal basis which permits the coguardians in this case to choose the death of the ward." The United States Supreme Court affirmed the Missouri Supreme Court decision in *Cruzan ex rel. Cruzan v. Director, Missouri Dept. of Health*, ___ U.S. ___, 110 S. Ct. 2841 (1990).

²⁵ The Washington Post, July 2, 1990, at A5, col. 1.

²⁶ N. CANTOR, *LEGAL FRONTIERS OF DEATH AND DYING* 63 (1987) [hereinafter CANTOR] (citing *In re Conroy*, 98 N.J. 321, ___, 486 A.2d 1209, 1229 (1985)).

²⁷ *In re Peter*, 108 N.J. 365, ___, 529 A.2d 419, 428 (1987). In 1984 Hilda Peter lapsed into a persistent vegetative state. *Id.* at ___, 529 A.2d at 428. Ms. Peter had effected a power of attorney, which authorized her friend, Eberhard

whether there is a reasonable medical expectation of the patient's return to a cognitive life as distinguished from the forced continuance of a vegetative existence."²⁸ This inquiry can be made by looking for two factors set out by the court in *Foody v. Manchester Memorial Hospital*: (1) "the incapable patient's condition . . . is permanent and irreversible and there is no reasonable medical probability that the patient ever will return to a cognitive state, [and] (2) the patient's attending physician together with at least two other consulting physicians unanimously concur as to the patient's condition"²⁹ These factors insure that the patient truly requires a substitute decisionmaker to carry out his wishes regarding increased or continued medical care.

Once the decisionmaker determines that the patient has no reasonable possibility of regaining his or her cognitive abilities, the decisionmaker should begin to weigh the other medical factors. The court in the *Peter* case followed *Quinlan* concluding "that

Johanning, to make her health-care decisions. *Id.* at ___, 529 A.2d at 422. As her guardian, Johanning requested that Peter's nasogastric tube be withdrawn. *Id.* at ___, 529 A.2d at 422. The New Jersey Supreme Court set the standard of proof necessary to avoid judicial review in a substituted judgment case as clear and convincing. *Id.* at ___, 529 A.2d at 427. *See also* VA. CODE ANN. § 37.1-134.4(E) (Supp. 1990). This section provides that:

Prior to the initiation or cessation of treatment for which authorization has been obtained or will be sought pursuant to this section, and no less frequently than every 180 days while the treatment continues, the physician shall obtain a written certification that the person is incapable of making an informed decision regarding the treatment. This certification shall be made by a licensed physician or licensed clinical psychologist who is not otherwise currently involved in the treatment of the person assessed and shall be based on a personal examination of the person. The cost of the assessment shall be considered for all purposes a cost of the treatment provided.

²⁸ *John F. Kennedy Hosp., Inc. v. Blutworth*, 452 So. 2d 921, 926 (Fla. 1984).

²⁹ *Foody v. Manchester Memorial Hosp.*, 40 Conn. Supp. 127, ___, 482 A.2d 713, 721 (1984). Sandra Foody had suffered from severe multiple sclerosis for 24 years, when, at age 42, she "suffered a respiratory arrest" leaving her unable to breathe without a respirator and in a semicomatose state. *Id.* at ___, 482 A.2d at 715-16. Her family brought an action to restrain the hospital staff and doctors from using artificial means to continue Sandra's breathing and heart rate. *Id.* at ___, 482 A.2d at 713. The court ruled in favor of allowing a substitute decision to be made for Sandra because there was no state interest sufficient to override her rights. *Id.* at ___, 482 A.2d at 720.

the life-expectancy of the patient . . . is not an important criterion," especially when the patient is in a persistent vegetative state.³⁰ Nancy Cruzan, for example, could live in such a state for thirty more years.³¹

The court in *Barber v. Superior Court* stated that a determination should be made as to whether the proposed treatment will benefit or burden the patient.³² The court then explained that "the determination as to whether the burdens of treatment are worth enduring for any individual patient depends on facts unique to each case, namely, how long the treatment is likely to extend life and under what conditions."³³ The New Jersey court, however, in *In re Conroy*,³⁴ noted that the focus should be upon the patient's "experience of pain and enjoyment [and] not the type of treatment involved."³⁵ The decisionmaker should not allow a certain treatment because it appears to be only slightly invasive of the patient's body if that treatment has little probability of ultimately returning the patient to a cognitively functioning state. Conversely, a highly invasive

³⁰ *Peter*, 108 N.J. at ___, 529 A.2d at 424.

³¹ *Cruzan ex rel. Cruzan v. Harmon* 760 S.W.2d 408, 411 (Mo. 1988) (en banc), *aff'd Cruzan ex rel. Cruzan v. Director, Missouri Dept. of Health*, ___ U.S. ___, 110 S. Ct. 2841 (1990).

³² *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 1019, 195 Cal. Rptr. 484, 491 (1983). In *Barber*, two physicians were charged with murder and conspiracy to commit murder because they removed the patient's intravenous tubes and discontinued life-support pursuant to a request by the patient's family. *Id.* at 1010-11, 195 Cal. Rptr. at 486. The court found, *inter alia*, that the doctors' failure to continue life-sustaining treatment, although "intentional and with knowledge" of certain death for the patient, did not constitute "an unlawful failure to perform [their] legal duty." *Id.* at 1022, 195 Cal. Rptr. at 491-93.

³³ *Id.* at 1019, 195 Cal. Rptr. at 492.

³⁴ 98 N.J. 321, 486 A.2d 1209 (1985).

³⁵ *Id.* at ___, 486 A.2d at 1233. The patient, an eighty-four-year-old woman with a limited time to live, confined to bed and living in a nursing home, was both physically and mentally impaired. Her nephew, acting as guardian, sought to have her feeding tube removed. *Id.* at ___, 486 A.2d at 1216. The court continued to review the case even though Claire Conroy died before it reached the New Jersey Appellate Division. *Id.* at ___, 486 A.2d at 1219.

treatment should not be denied if it has a strong probability of aiding the patient.³⁶

Because the goal of a substitute decisionmaker is to give effect to the patient's rights, the *Conroy* court stated that the decisionmaker must base his or her decision on "at least as much medical information" as a competent person would have.³⁷ The court then suggested an extensive list of medical evidence upon which to base this decision, including:

evidence about the patient's present level of physical, sensory, emotional, and cognitive functioning; the degree of physical pain resulting from the medical condition, treatment, and termination of treatment, respectively; the degree of humiliation, dependence, and loss of dignity probably resulting from the condition and treatment; . . . the various treatment options; and the risks, side effects, and benefits of each of these options.³⁸

The court concluded that by considering these factors the decisionmaker avoids the error of basing his conclusions on a hastily made diagnosis or prognosis.³⁹ This information will also help the decisionmaker decide whether the treatment benefits or burdens the patient and whether the patient's condition is clearly irreversible.

STANDARDS FOR APPLYING SUBSTITUTE JUDGMENT DECISIONMAKING

Substitute-Intent Standard

The substitute intent standard is the strictest of the substitute judgment standards of decisionmaking. Once the decisionmaker has examined all aspects of the patient's proposed and current medical care, he then must decide what the patient's preferences would be in the present situation.⁴⁰ In order to determine a patient's preference, the

³⁶ *Barber*, 147 Cal. App. 3d at 1019, 195 Cal. Rptr. at 491.

³⁷ *Conroy*, 98 N.J. at ___, 486 A.2d at 1231.

³⁸ *Id.* at ___, 486 A.2d at 1231.

³⁹ *Id.* at ___, 486 A.2d at 1231.

⁴⁰ *In re Conroy*, 98 N.J. 321, ___, 486 A.2d 1209, 1229 (1985).

decisionmaker must determine, as accurately as possible, the wants and needs of the incompetent individual.⁴¹ As noted by the court in *Foody*, this is an individual standard, and may not necessarily "conform to what the majority deems wise or prudent."⁴² The patient's previous statements provide the best way to judge what he would choose. The clearest evidence of this is usually a "living will" that clearly specifies the patient's wishes regarding life-sustaining treatment.⁴³ Since Virginia recognizes living wills as legally binding, such advance directives are relevant evidence of the patient's intent.⁴⁴ The New Jersey court in the case of *In re Peter* noted that the patient had executed a power of attorney authorizing a friend to make all of her health-care decisions.⁴⁵ A writing is very suggestive of an individual's "seriousness of purpose."⁴⁶ Also, a person who takes the time to set out his wishes in writing will more likely ensure that any changes are subsequently recorded.⁴⁷ According to Virginia law, however, the absence of a "living will" does not raise a presumption regarding a patient's intention with

⁴¹ *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 1019, 195 Cal. Rptr. 484, 492 (1983).

⁴² *Foody*, 40 Conn. Supp. at ___, 482 A.2d at 720.

⁴³ *In re Peter*, 108 N.J. 365, ___, 529 A.2d 419, 426 (1987). A Living Will is defined as "[a] written directive by an adult patient authorizing the withholding or withdrawal of extraordinary life-sustaining procedures in the situation of terminal illness." I. SLOAN, *THE RIGHT TO DIE: LEGAL AND ETHICAL PROBLEMS* 142 (1988).

⁴⁴ *See* VA. CODE ANN. § 54.1-2984 (1988 & Supp. 1990); Appendix B.

⁴⁵ *Peter*, 108 N.J. at ___, 529 A.2d at 422.

⁴⁶ *In re Westchester County Medical Center, ex rel. Mary O'Connor*, 72 N.Y.2d 517, 531, 531 N.E.2d 607, 613, 534 N.Y.S.2d 886, 892 (1988). Mary O'Connor was an elderly, hospitalized individual, had suffered several strokes, and, as a result, was mentally incompetent and incapable of receiving nourishment without medical assistance. The hospital sought a court order permitting them to insert a nasogastric tube that was objected to by Mrs. O'Connor's daughters. *Id.* at 523-34, 531 N.E.2d at 608, 534 N.Y.S.2d at 887-88. The court ruled in favor of the hospital because there was no clear and convincing evidence that she would not want the tube inserted. *Id.* at 530-34, 531 N.E.2d at 613-15, 534 N.Y.S.2d at 892.

⁴⁷ *Id.*, 531 N.E.2d at 613-14, 534 N.Y.S.2d at 892-93.

regard to life-sustaining procedures.⁴⁸

The decisionmaker may also be guided by statements made by the patient before he became incompetent. For example, a decisionmaker may consider a patient's verbalized response to medical treatment previously administered to another.⁴⁹ In the case of *In re Jobes*,⁵⁰ the court observed that the incompetent's husband remembered his wife stating that "she would not want to be kept alive under Karen Quinlan's circumstances." She made these comments frequently in 1976 and 1977, when the Quinlan case was making news.⁵¹ However, as *Conroy* stated, "the probative value of such evidence [demonstrating intent] may vary depending on the remoteness, consistency, and thoughtfulness of the prior statements or actions and the maturity of the person at the time of the statements or acts."⁵² The court in *Cruzan v. Harmon* was reluctant to accept statements that Nancy had made to friends that if she were "sick or injured she would not want to continue [living] unless she could live 'halfway normal.'"⁵³ Regardless of the problems with a patient's prior statements, respect for patient autonomy requires that every effort be made to carry out the patient's own preferences as previously communicated.⁵⁴

⁴⁸ VA. CODE ANN. § 54.1-2986 (1988).

⁴⁹ *In re Conroy*, 98 N.J. 321, ___, 486 A.2d 1209, 1229-30 (1985).

⁵⁰ 108 N.J. 394, 529 A.2d 434 (1987).

⁵¹ *Id.* at ___, 529 A.2d at 442. Nancy Jobes was thirty-one years old and four and one-half months pregnant when she was admitted to the hospital for treatment of injuries received in a car accident. Physicians determined that the fetus had been killed. During an operation to remove the fetus, she suffered brain damage due to the loss of blood and oxygen flow to her brain. *Id.* at ___, 529 A.2d at 437. She never regained consciousness, *Id.* at ___, 529 A.2d at 438. Her husband brought an action seeking removal of the hydration and nutrition that was keeping his wife alive. *Id.* at ___, 529 A.2d at 437.

⁵² *Conroy*, 98 N.J. at ___, 486 A.2d at 1230.

⁵³ *Cruzan*, 760 S.W.2d at 411.

⁵⁴ CANTOR, *supra* note 26, at 64.

Less direct evidence of intent may also be examined, including the patient's religious beliefs, or a "consistent pattern of conduct" regarding prior medical treatment.⁵⁵

The court in *Jobes* explained that:

The surrogate considers the patient's prior statements about and reactions to medical issues, and all the facets of the patient's personality that the surrogate is familiar with - with, of course, particular reference to his or her relevant philosophical, theological, and ethical values - in order to extrapolate what course of medical treatment the patient would choose.⁵⁶

The court in *In re Quinlan* noted that Karen's father consulted with his parish priest and the hospital chaplain in order "[t]o confirm the moral rightness of the decision he was about to make" ⁵⁷ Karen's father testified that he would not have sought termination of the life support if the act conflicted with the tenets of his religion.⁵⁸ The New York court in *O'Connor* explained that the persistence, seriousness and context of the individual's statements regarding the termination of life-supports are among those factors which help convince the decisionmaker that the strength and durability of the patient's "beliefs makes a recent change of heart unlikely."⁵⁹ In this way, the decisionmaker effectively carries out the patient's wishes about medical care.

Limited-Objective Standard

The court in *Conroy* established two alternative tests under which treatment might be withheld or terminated when the medical information is insufficient or the

⁵⁵ *In re Conroy*, 98 N.J. 321, ___, 486 A.2d 1233, 1230 (1985).

⁵⁶ *Jobes*, 108 N.J. at ___, 529 A.2d at 444.

⁵⁷ *Quinlan*, 70 N.J. at ___, 355 A.2d at 658.

⁵⁸ *Id.* at ___, 355 A.2d at 658.

⁵⁹ *O'Connor*, 72 N.Y.2d at 517, 531, 531 N.E.2d at 607, 613, 534 N.Y.S.2d at 886, 892.

patient's intention is unknown: a limited-objective test and a pure-objective test.⁶⁰ The *Conroy* court characterized these tests as "best interest" tests.⁶¹ In order to withhold treatment the limited-objective test requires (1) that the decisionmaker find some "reasonably reliable evidence that [indicates] the patient would have refused the treatment if competent"⁶² . . . and (2) "that the burdens of administering the treatment outweigh the benefits of" living in the patient's present condition.⁶³ The court in *Conroy* "defined these burdens as [the] unavoidable pain and suffering that would be present throughout the remainder of the patient's life."⁶⁴

The limited-objective test requires some evidence that the patient would not have wanted the treatment or "would have wanted the treatment terminated." The criteria set out above for the subjective intent test, however, need not be satisfied.⁶⁵ That is, "[e]vidence that, taken as a whole, would be too vague, casual, or remote to constitute the clear proof of the patient's subjective intent . . . might be sufficient to satisfy [the prong] of the limited objective test" requiring evidence that the patient would have desired termination of treatment.⁶⁶ The court in *O'Connor* noted the testimony of Mrs. O'Connor's daughter that her mother told her several times "that if she became ill and

⁶⁰ Note, *Barber v. Superior Court: Removing Food And Water From A Terminally Ill, Comatose Patient -- Who Decides?* 17 Sw. U.L. REV. 109, 126 (1987-88) [hereinafter *Who Decides*] (citing *Conroy*, 98 N.J. at ___, 486 A.2d at 1231-32).

⁶¹ *Conroy*, 98 N.J. at ___, 486 A.2d at 1231-32.

⁶² *Who Decides*, *supra* note 60, at 127.

⁶³ *Id.* at 127 (citing *In re Conroy*, 98 N.J. 321, ___, 486 A.2d 1209, 1232 (1985)).

⁶⁴ *Id.*

⁶⁵ *Conroy*, 98 N.J. at ___, 486 A.2d at 1232.

⁶⁶ *Id.* at ___, 486 A.2d at 1232.

[could not] care for herself she would not want to be sustained" by life-support.⁶⁷ This is an example of the evidence that the decisionmaker should use when applying this standard. The limited-objective standard allows for withdrawing or withholding treatment from an individual who has not sufficiently expressed any intention regarding the type of treatment to be administered when suffering would only be prolonged by the administration of such treatment.⁶⁸

Pure-Objective Standard

Conroy provided, finally, that where there is no "trustworthy evidence," or even evidence at all, that the patient would not have wanted the treatment offered, life-sustaining care may be terminated or withheld if a "pure-objective test" is met.⁶⁹ Under the pure-objective test, the burdens of the individual's life if treatment is given should "clearly and markedly" override the benefits an individual derives from living.⁷⁰ Also, where the "recurring, unavoidable and severe pain" of living with the life-sustaining treatment makes that type of treatment inhumane, it should be discontinued or withheld from the patient.⁷¹ No subjective evidence is necessary under this standard. However, if the patient had previously stated any desire to remain alive despite any suffering or pain, the treatment should continue.⁷² Because there was little or no evidence as to the pain the patient was experiencing, or would experience, or her ability to feel pleasure,

⁶⁷ *O'Connor*, 72 N.Y.2d 517, 527, 531 N.E.2d 607, 611, 534 N.Y.S.2d 886, 890.

⁶⁸ *Who Decides*, *supra* note 60, at 127.

⁶⁹ *Conroy*, 98 N.J. at ___, 486 A.2d at 1232.

⁷⁰ *Id.* at ___, 486 A.2d at 1232.

⁷¹ *Id.* at ___, 486 A.2d at 1232.

⁷² *Id.* at ___, 486 A.2d at 1232.

the court in *Conroy* refused to apply even this standard.⁷³

SUMMARY OF EVIDENTIARY REQUIREMENTS

In summarizing the evidence that requires consideration in determining whether one of the three standards -- substitute-intent, limited-objective or pure-objective -- may be utilized by a substitute decisionmaker, the concurring opinion in *O'Connor* provided the seven most significant factors:

(1) the intention of the patient under the existing circumstances, to whatever extent it can be ascertained from past expressions; (2) any moral, ethical, religious or other deeply held belief, insofar as it might bear on the patient's probable inclinations in the matter; (3) the medical condition of the patient, including the level of mental and physical functioning and the degree of pain and discomfort; (4) the nature of the prescribed medical assistance, including its benefits, risks, invasiveness, painfulness, and side effects; (5) the prognoses with and without the medical assistance, including life expectancy, suffering and possibility of recovery; (6) the sentiments of the family or intimate friend; and (7) the professional judgment of the involved physicians.⁷⁴

When the decisionmaker has applied the above standards, he must then be "manifestly satisfied" that the facts support the use of one of the substitute intent/best interest tests.⁷⁵ However, if a petition is brought to a Virginia Circuit Court regarding the decision that has been reached, the court may "enjoin such action upon finding by a preponderance of the evidence that the action is not lawfully authorized by this section and that the action is not otherwise authorized by state or federal law."⁷⁶ Therefore, the decision is not free of judicial review if there is disagreement over a choice of

⁷³ *Conroy*, 98 N.J. at ___, 486 A.2d at 1243.

⁷⁴ *O'Connor*, 72 N.Y.2d 517, 537, 531 N.E.2d 607, 617, 534 N.Y.S.2d 886, 896 (1988) (emphasis in original).

⁷⁵ *In re Conroy*, 98 N.J. 321, ___, 486 A.2d 1209, 1233 (1985). The *Conroy* court analogized to *In re Grady*, 85 N.J. 235, ___, 426 A.2d 467, 483 (1981), where the court required a clear and convincing standard before approval for the sterilization of a mentally retarded, incompetent adult.

⁷⁶ VA. CODE ANN. § 37.1-134.4(F) (Supp. 1990).

treatment. This should ease the minds of those who fear unfettered decisionmaking resulting in active or passive euthanasia.⁷⁷

In closing, the court in *Conroy* issued a cautionary note to those trying to implement one of the three standards:

it will frequently be difficult to conclude that the evidence is sufficient to justify termination of treatment under either of the "best interests" tests. . . . Often, it is unclear whether and to what extent a patient . . . is capable of, or is in fact, experiencing pain. Similarly, medical experts are often unable to determine with any degree of certainty the extent of a nonverbal person's intellectual functioning or the depth of his emotional life. When the evidence is insufficient to satisfy either the limited-objective or pure-objective standard, however, we cannot justify the termination of life-sustaining treatment as clearly furthering the best interests of . . . [the] patient.⁷⁸

The court based this final conclusion on the presumption that, "[w]hen evidence of a person's wishes or physical or mental condition is equivocal, it is best to err, if at all, in favor of preserving life."⁷⁹ This statement of public policy ties into the state interests discussed in the following section. The line between the three tests is not always clear, nor is the line between the interests of the individuals and those of the state. However, this may be advantageous because the lines change as the facts change, therefore providing for specific decisions for specific individuals rather than static rules.

STATE INTERESTS

The three standards providing guidance to a health-care decisionmaker for an incompetent adult focus almost entirely on the individual. These standards must therefore be balanced against five state interests: (1) preserving life, (2) protecting innocent third parties, (3) preventing suicide, (4) maintaining the "ethical integrity" of

⁷⁷ B. HASFORD, *MAKING YOUR MEDICAL DECISIONS* 17-18 (1982).

⁷⁸ *Conroy*, 98 N.J. at ___, 486 A.2d at 1233.

⁷⁹ *Id.* at ___, 486 A.2d at 1233.

the medical profession,⁸⁰ and (5) the costs of medical care. As the *Conroy* court recognized, the state's interest in preserving life is often considered the most significant of the five interests.⁸¹ This interest embraces two separate but related concerns: an interest in preserving the patient's life and an interest in preserving the sanctity of all life.⁸² However, as the dissent in *Cruzan* noted, the state recognizes a "relativity of values" concerning life because it often carries out capital punishment and it often recognizes the "[l]iving [w]ill" which "allows and encourages the pre-planned termination of life"⁸³ Also, as the court in *Quinlan* observed, the state's interest in preserving life is neither static nor absolute. The state interest "weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims."⁸⁴ Ultimately there is a point where the privacy right of the individual overcomes the interest of the state.⁸⁵ The state interest in preserving life extends to the protection of innocent third parties.⁸⁶ The patient's rights "must frequently give way," as noted in *Conroy*, where the exercise of "his choice could adversely and directly affect the health, safety, or security of others"⁸⁷

Third, the state has an interest in preventing suicide. However, as the court in

⁸⁰ Buchanan, *The Limits of Proxy Decisionmaking For Incompetents*, 29 UCLA L. REV. 390-91 (1981). See also *Foody v. Manchester Memorial Hosp.*, 40 Conn. Supp. 127, ___, 482 A.2d 713, 718 (1984); *In re Conroy*, 98 N.J. 321, ___, 486 A.2d 1209, 1233 (1985).

⁸¹ *Conroy*, 98 N.J. at ___, 486 A.2d at 1233.

⁸² *Cruzan, ex rel. Cruzan by Harmon*, 760 S.W.2d 408, 419 (Mo. 1988) (en banc), *aff'd Cruzan ex rel. Cruzan v. Director, Missouri Dept. of Health*, ___ U.S. ___, 110 S. Ct. 2841 (1990).

⁸³ *Id.* at 428-29 (Blackmar, J., dissenting).

⁸⁴ *In re Quinlan*, 70 N.J. 10, ___, 355 A.2d 647, 664 (1976).

⁸⁵ *Id.* at ___, 355 A.2d at 664.

⁸⁶ *In re Conroy*, 98 N.J. 321, ___, 486 A.2d 1209, 1225 (1985).

⁸⁷ *Id.* at ___, 486 A.2d at 1225.

Foody explained, the cessation of medical treatment does not constitute suicide because "(1) in refusing treatment the patient may not have the specific intent to die and (2) even if he did, to the extent that death resulted from natural causes, the patient did not set the death producing agent in motion with intent to cause his own death."⁸⁸ The traditional definition of suicide is "self-destruction" or "the deliberate termination of one's own life."⁸⁹ The actions in these cases clearly do not fall within this definition.

The fourth state interest concerns safeguarding the integrity of the medical profession. However, as the *Conroy* court noted, medical ethics have never required "medical intervention in disease at all costs."⁹⁰ The terms "ordinary" and "extraordinary" care have previously been used in deciding whether to terminate "life-sustaining" treatment.⁹¹ Under this distinction, ordinary care is obligatory and extraordinary care is optional. The court in *Foody* defined these terms:

Ordinary means are all medicines, treatments and operations which offer a reasonable hope of benefit and which can be obtained and used without excessive expense, pain or other inconvenience. Extraordinary means are all medicines, treatments and operations which cannot be obtained or used without excessive expense, pain or other inconvenience, or if used, would not offer a reasonable hope of benefit.⁹²

Therefore, the court concluded that the right to refuse treatment in appropriate circumstances is consistent with existing medical mores.⁹³ In fact, surveys have recently noted that the majority of physicians approve of "passive euthanasia" and believe that

⁸⁸ *Foody*, 40 Conn. Supp. at ___, 482 A.2d at 720.

⁸⁹ BLACK'S LAW DICTIONARY 1434 (6th ed. 1990).

⁹⁰ *Conroy*, 98 N.J. at ___, 486 A.2d at 1224.

⁹¹ *Foody v. Manchester Memorial Hosp.*, 40 Conn. Supp. 127, ___, 482 A.2d 713, 719 (1984).

⁹² *Id.* at ___, 482 A.2d at 719 (quoting KELLY, MEDICO-MORAL PROBLEMS 129 (1959)).

⁹³ *Id.* at ___, 482 A.2d at 720.

their colleagues are practicing it.⁹⁴ As noted in several decisions, where there is no "bad faith," doctors will not be held criminally or civilly liable for carrying out the decision of a substitute decisionmaker.⁹⁵

One additional societal interest, the cost of medical care, actually supports withholding treatment. Today, some ten-thousand people remain in a persistent vegetative state. A million and a half more suffer from "severe dementia," and, by the year 2000, the number of those with the disease is expected to rise by sixty percent.⁹⁶ Also, a Harvard Medical School report found that there are close to four million more suffering from Alzheimer's disease.⁹⁷ The money that it costs this country to care for the ten thousand patients in a vegetative state could be used for patients who have some hope of improving.

The care for Nancy Cruzan alone costs a hundred and thirty thousand dollars a year. Her family doesn't pay; the State of Missouri and social security cover her bills.⁹⁸ Her own medical insurance has been exhausted since 1986.⁹⁹ The dissent in *Cruzan* noted that many people die because they cannot afford medical care, and the state has no desire to help them pay.¹⁰⁰ And yet, the State of Missouri appears

⁹⁴ *In re Conroy*, 98 N.J. 321, ___, 486 A.2d 1209, 1225 (1985).

⁹⁵ *Id.* at ___, 486 A.2d at 1242. *See also* *John F. Kennedy Hosp. v. Bludworth*, 452 So. 2d 921, 926 (Fla. 1984); *In re Quinlan*, 70 N.J. 10, ___, 355 A.2d 647, 666-669 (1976). *See generally* *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983).

⁹⁶ Hentoff, *Does a Loving Family Have the Right to Kill?*, *VILLAGE VOICE*, Dec. 26, 1989, at 20, col. 2.

⁹⁷ *Id.*

⁹⁸ *Id.* at 20, col. 1. *See also* *Cruzan*, 760 S.W.2d 408, 427, 429 (Mo. 1988) (en banc) (Blackmar, J., dissenting); *id.* at 432 (Higgins, J., dissenting).

⁹⁹ *Cruzan*, 760 S.W.2d at 432 (Higgins, J., dissenting).

¹⁰⁰ *Id.* at 429 (Blackmar, J., dissenting).

determined to keep Nancy Cruzan alive for as long as thirty years.¹⁰¹ No wonder Joyce Cruzan, Nancy's mother, remains bewildered by the State's unbending position. Joyce Cruzan recently said: "She [Nancy] would not want that, and yet somebody out there says, 'It doesn't matter what she wants. It doesn't matter what you want as her family. The state says life is precious. Therefore, it doesn't matter what you want. It doesn't matter at all. Nancy doesn't matter.'"¹⁰² However, what Virginia must recognize is that valuable medical resources are dwindling and difficult choices about who should receive what care must be made.

CONCLUSION

The standards of substitute judgment set forth above should help to balance the competing interests of individual privacy rights, state interests, and health care costs. The decisions of other state courts provide the support necessary to fully implement the Virginia statute approving surrogate decisionmaking. These decisions also give credence to the fact that Virginia has provided a workable set of standards. Although the decisions about medical care for incompetents will continue to be difficult at best, the Virginia legislature has removed a substantial amount of the uncertainty about who should make treatment decisions in the case of formerly competent adults.

In the end, the *Quinlan* court gave perhaps the best reason for implementing the doctrine of substitute judgment: "We have no doubt, in these unhappy circumstances, that if Karen were herself miraculously lucid for an interval (not altering the existing prognosis of the condition to which she would soon return) and perceptive of her irreversible condition, she could effectively decide upon discontinuance of the life-

¹⁰¹ *Id.* at 411.

¹⁰² Hentoff, *supra* note 96 at 20, col. 1.

support apparatus, even if it meant the prospect of natural death."¹⁰³

¹⁰³ *Quinlan*, 70 N.J. at ___, 355 A.2d at 663.

APPENDIX A

VA. CODE ANN. § 37.1-134.4 (Supp. 1990) provides:

§ 37.1-134.4. Authorization for providing, withholding, or withdrawing treatment for certain persons; persons who may authorize exclusions; applicability restricted to nonprotesting patients. --- A. The procedures for surrogate treatment decision-making specified in this section shall be available as an alternative to other statutory and common law authority for making medical decisions on behalf of adult persons unable to make informed decisions, and health care providers may, but need not, invoke the procedures authorized herein. This section shall not affect the law defining the conditions under which consent must be obtained for medical treatment, or the nature of the consent required.

B. Whenever a licensed physician determines after personal examination that an adult person, because of mental illness, mental retardation, or any other mental disorder, or a physical disorder which precludes communication or impairs judgment, is incapable of making an informed decision about providing, withholding or withdrawing a specific medical treatment or course of treatment, the physician may, upon compliance with the provisions of the section, provide to, withhold, or withdraw from the person that treatment upon the authorization of any of the following persons, in the specified order of priority, if the physician is not aware of any available person in a higher class: (i) a person designated in a writing executed pursuant to § 54.1-2984, if given such authority in the writing; (ii) a guardian or committee currently authorized to make such decisions; (iii) an attorney-in-fact appointed under a durable power of attorney, to the extent the power grants the authority to make such a decision, provided that the attorney-in-fact is not employed by the physician or the organization employing the physician; (iv) the spouse; (v) an adult son or daughter; (vi) a parent; (vii) an adult brother or sister; or (viii) any other relative of the person in the descending order of blood relationship. For the purposes of the section, the durable power of attorney may provide that it is effective during or only during a period in which the principal, because of a physical or mental disability, as determined by the provider of that treatment. For purposes of this section, "incapable of making an informed decision" means unable to understand the nature, extent or probable consequences of a proposed medical decision, or unable to make a rational evaluation of the risks and benefits of the proposed decision as compared with the risks and benefits of alternatives to that decision. For purposes of this section, persons who are deaf, dysphasic or have other communication disorders but who are otherwise mentally competent and able to communicate by means other than speech shall not be considered incapable of giving informed consent.

C. The provisions of this section shall not apply to authorize nontherapeutic sterilization, abortion, psychosurgery, or admission to a mental retardation facility or psychiatric hospital, as defined in § 37.1-1; however, the provisions of this section, if otherwise applicable, may be employed to authorize a specific treatment or course of treatment for a person who has been lawfully admitted to such a facility.

D. The provisions of the section shall not authorize providing, continuing to provide, withholding or withdrawing of treatment if the provider of the treatment knows or upon reasonable inquiry ought to know that such an action is protested by the person. No person enumerated in subsection B of this section shall authorize, pursuant to this section, treatment, or a course of treatment, that such person knows, or upon reasonable inquiry ought to know, is contrary to the religious beliefs or basic values of the person unable to make

a decision, whether expressed orally or in writing.

E. Prior to the initiation or cessation of treatment for which authorization has been obtained or will be sought pursuant to this section, and no less frequently than every 180 days while the treatment continues, the physician shall obtain a written certification that the person is incapable of making an informed decision regarding the treatment. This certification shall be made by a licensed physician or licensed clinical psychologist who is not otherwise currently involved in the treatment of the person assessed and shall be based on a personal examination of the person. The cost of the assessment shall be considered for all purposes a cost of the treatment provided.

F. On petition of any person to the circuit court of the county or city in which resides or is located any person for whom treatment will be or is currently being provided, withheld or withdrawn under the purported authority of this section, the court may enjoin such action upon finding by a preponderance of the evidence that the action is not lawfully authorized by this section and that the action is not otherwise authorized by state or federal law.

G. No person or facility providing, withholding or withdrawing treatment pursuant to the authorization obtained pursuant to this section shall incur liability arising out of a claim to the extent the claim is based on lack of consent or authorization for such action.

H. No person authorizing treatment pursuant to this section shall be liable for the cost of treatment solely on the basis of that authorization. No person giving authorization pursuant to this section shall incur liability arising out of a claim of breach of duty to the person receiving treatment, provided that the person giving consent (i) prior to giving consent, makes a good faith effort to ascertain the risks and benefits of and alternatives to the treatment and the religious beliefs and basic values of the person receiving treatment, and to inform the person, to the extent possible, of the proposed treatment and the fact that someone else is authorized to make a decision regarding that treatment; and (ii) bases his decision on the best interest of the person, taking into account the person's religious beliefs and basic values and any preferences previously expressed by the person regarding such treatment.

I. Nothing in this section shall be deemed to affect the right to use, and the authority conferred by, any other applicable statutory or regulatory procedure relating to the authorization of providing, withholding or withdrawing treatment, or to diminish any common law authority of a physician to provide, withhold, or withdraw treatment to a person unable to make an informed decision about the providing, withholding or withdrawing of that treatment, with or without the consent of the person's relative.

APPENDIX B

Virginia does not provide a form for executing a Durable Power of Attorney For Health Care. However, D.C. CODE ANN. §§ 21-2205 to -2209 (1989) provides a sample draft of a Health Care Power of Attorney.

§ 21-2205. Durable power of attorney for health care.

(a) A competent adult may designate, in writing, an individual who shall be empowered to make health-care decisions on behalf of the competent adult, if the competent adult becomes incapable, by reason of mental disability, of making or communicating a choice regarding a particular health-care decision.

(b) A durable power of attorney for health care shall include language which clearly communicates that the principal intends the attorney in fact to have the authority to make health-care decisions on behalf of the principal and shall include language identical or substantially similar to the following:

- (1) "This power of attorney shall not be affected by the subsequent incapacity of the principal."; or
- (2) "This power of attorney becomes effective upon the incapacity of the principal."

(c) A durable power of attorney for health care shall be dated and signed by the principal and 2 adult witnesses who affirm that the principal was of sound mind and free from duress at the time of signing. The 2 adult witnesses shall not include the principal, the health-care provider of the principal or an employee of the health-care provider of the principal.

(d) Of the 2 adult witnesses referred to in § 21-2204(c), at least 1 shall not be related to the principal by blood, marriage or adoption and shall not be entitled to any part of the estate of the principal by a current will or operation of law.

(e) Any durable power of attorney executed . . . and specifically written to include health-care decision making after incompetency shall be effective, if the execution of the prior document meets the requirements of this chapter.

§ 21-2206. Rights and duties of attorney in fact.

(a) Subject to any express limitations in the durable power of attorney for health care, an attorney in fact shall have all the rights, powers and authority related to health-care decisions that the principal would have under District and federal law. This authority shall include, at a minimum:

- (1) The authority to grant, refuse or withdraw consent to the provision of any health-care service, treatment, or procedure;
- (2) The right to review the health care records of the principal;
- (3) The right to be provided with all information necessary to make informed health-care decisions;

(4) The authority to select and discharge health-care professionals;
and

(5) The authority to make decisions regarding admission to or discharge from health-care facilities and to take any lawful actions that may be necessary to carry out these decisions.

(b) (1) Except as provided in paragraph (2) of this subsection and unless a durable power of attorney for health care provides otherwise, the designated attorney in fact, if known to a health-care provider to be available and willing to make a particular health-care decision, shall have priority over any other person to act for the principal in all matters regarding health care.

(2) A designated attorney in fact shall not have the authority to make a particular health-care decision, if the principal is able to give or withhold informed consent with respect to that decision.

(c) In exercising authority under a durable power of attorney for health care, the attorney in fact shall have a duty to act in accordance with:

(1) The wishes of the principal as expressed in the durable power of attorney for health care; or

(2) The good faith belief of the attorney in fact as to the best interests of the principal, if the wishes of the principal are unknown and cannot be ascertained.

(d) Nothing in this chapter shall affect any right that an attorney in fact may have, independent of the designation in a durable power of attorney for health care, to make or otherwise participate in health-care decisions on behalf of the principal.

§ 21-2207. Forms for creating a durable power of attorney for health care.

Any written form meeting the requirements of § 21-2205 may be used to create a durable power of attorney for health care. The following is offered as a sample form only and its inclusion in this section shall not be construed to preclude the use of alternative language:

INFORMATION ABOUT THIS DOCUMENT

THIS IS AN IMPORTANT LEGAL DOCUMENT. BEFORE SIGNING THIS DOCUMENT, IT IS VITAL FOR YOU TO KNOW AND UNDERSTAND THESE FACTS:

THIS DOCUMENT GIVES THE PERSON YOU NAME AS YOUR ATTORNEY IN FACT THE POWER TO MAKE HEALTH-CARE DECISIONS FOR YOU IF YOU CANNOT MAKE THE DECISIONS FOR YOURSELF.

AFTER YOU HAVE SIGNED THIS DOCUMENT, YOU HAVE THE RIGHT TO MAKE HEALTH-CARE DECISIONS FOR YOURSELF IF YOU ARE MENTALLY COMPETENT TO DO SO. IN ADDITION, AFTER YOU HAVE SIGNED THIS DOCUMENT, NO TREATMENT MAY BE GIVEN TO YOU OR STOPPED OVER YOUR OBJECTION IF YOU ARE MENTALLY COMPETENT TO MAKE THAT DECISION.

YOU MAY STATE IN THIS DOCUMENT ANY TYPE OF TREATMENT THAT YOU DO NOT DESIRE AND ANY THAT YOU WANT TO MAKE SURE YOU RECEIVE.

YOU HAVE THE RIGHT TO TAKE AWAY THE AUTHORITY OF YOUR ATTORNEY IN FACT, UNLESS YOU HAVE BEEN ADJUDICATED INCOMPETENT, BY NOTIFYING YOUR ATTORNEY IN FACT OR HEALTH-CARE PROVIDER EITHER ORALLY OR IN WRITING. SHOULD YOU REVOKE THE AUTHORITY OF YOUR ATTORNEY IN FACT, IT IS ADVISABLE TO REVOKE IN WRITING AND TO PLACE COPIES OF THE REVOCATION WHEREVER THIS DOCUMENT IS LOCATED.

IF THERE IS ANYTHING IN THIS DOCUMENT THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A SOCIAL WORKER, LAWYER, OR OTHER PERSON TO EXPLAIN IT TO YOU.

* * * * *

YOU SHOULD KEEP A COPY OF THIS DOCUMENT AFTER YOU HAVE SIGNED IT. GIVE A COPY TO THE PERSON YOU NAME AS YOUR ATTORNEY IN FACT. IF YOU ARE IN A HEALTH-CARE FACILITY, A COPY OF THIS DOCUMENT SHOULD BE INCLUDED IN YOUR MEDICAL RECORD.

POWER OF ATTORNEY FOR HEALTH CARE

I, _____, hereby appoint:

_____ name home address

_____ home telephone number

_____ work telephone number

as my attorney in fact to make health-care decisions for me if I become unable to make my own health-care decisions. This gives my attorney in fact the power to grant, refuse, or withdraw consent on my behalf for any health-care service, treatment or procedure. My attorney in fact also has the authority to talk to health-care personnel, get information and sign forms necessary to carry out these decisions.

If the person named as my attorney in fact is not available or is unable to act as my attorney in fact, I appoint the following person to serve in the order listed below:

1. _____
name home address

home telephone number

work telephone number

2. _____
name home address

home telephone number

work telephone number

With this document, I intend to create a power of attorney for health care, which shall take effect if I become incapable of making my own health-care decisions and shall continue during that incapacity.

My attorney in fact shall make health-care decisions as I direct below or as I make known to my attorney in fact in some other way.

(a) STATEMENT OF DIRECTIVES CONCERNING LIFE-PROLONGING CARE, TREATMENT, SERVICES, AND PROCEDURES:

(b) SPECIAL PROVISIONS AND LIMITATIONS:

BY MY SIGNATURE I INDICATE THAT I UNDERSTAND THE PURPOSE AND EFFECT OF THIS DOCUMENT.

I sign my name to this form on _____
(date)

at: _____
_____ (address).

(Signature)

WITNESSES

I declare that the person who signed or acknowledged this document is personally known to me, that the person signed or acknowledged this durable power of attorney for health care in my presence, and that the person appears to be of sound mind and under no duress, fraud, or undue influence. I am not the person appointed as the attorney in fact by this document, nor am I the health-care provider of the principal or an employee of the health-care provider of the principal.

First Witness

Signature: _____
Home Address: _____
Print Name: _____
Date: _____

Second Witness

Signature: _____
Home Address: _____
Print Name: _____
Date: _____

(AT LEAST 1 OF THE WITNESSES LISTED ABOVE SHALL ALSO SIGN THE FOLLOWING DECLARATION.)

I further declare that I am not related to the principal by blood, marriage or adoption, and, to the best of my knowledge, I am not entitled to any part of the estate of the principal under a currently existing will or by operation of law.

Signature: _____
Signature: _____

§ 21-2208. Revocation.

(a) At any time that the principal has the capacity to create a durable power of attorney for health care, the principal may:

- (1) Revoke the appointment of the attorney in fact under a durable power of attorney for health care by notifying the attorney in fact orally or in writing; or
- (2) Revoke the authority to make health-care decisions granted to the attorney in fact under a durable power of attorney for health care by notifying the health-care provider orally or in writing.

(b) If a health-care provider is notified of a revocation pursuant to subsection (a)(2) of this section, the health-care provider shall document this fact in the patient-care records of the principal and make a reasonable effort to notify the attorney in fact of the revocation.

(c) There shall be a rebuttable presumption, affecting the burden of proof, that a principal has the capacity to revoke a durable power of attorney for health care.

(d) Unless it expressly provides otherwise, a valid durable power of attorney for health care revokes any prior durable power of attorney for health-care decisions only.

(e) Unless a durable power of attorney for health care expressly provides otherwise, and after its execution the marriage of the principal is dissolved or annulled, the dissolution or annulment shall automatically revoke a designation of the former spouse as an attorney in fact to make health-care decisions for the principal. If a designation is revoked solely on account of this subsection, it shall be revived by the remarriage of the principal to the former spouse but may be subsequently revoked by an act of the principal.

§ 21-2209. Health-care provider limitation.

(a) No health-care provider may require an individual to execute a durable power of attorney for health care as a condition for the provision of health-care services or admission to a health-care facility, as defined in Statute 32-1301.

(b) After an individual has spent at least 48 hours in a health care facility, a health care provider may request the individual to execute a durable power of attorney for health care subject to the limitations set forth in this chapter. The health care provider may not be named as the attorney in fact.

APPENDIX C

VIRGINIA LIVING WILL STATUTE

VA. CODE ANN. § 54.1-2984 (Supp. 1990).

Suggested form of written declaration. -- A declaration executed pursuant to this article may, but need not, be in one of the following forms, and may include other specific directions including, but not limited to, a designation of another person to make the treatment decision for the declarant should he be (i) diagnosed as suffering from a terminal condition and (ii) comatose, incompetent or otherwise mentally or physically incapable of communication. Should any other specific directions be held to be invalid, such invalidity shall not affect the declaration.

Declaration made this ____ day of _____ (month, year). I, _____, willfully and voluntarily make known my desire and do hereby declare:

CHOOSE ONLY ONE OF THE NEXT TWO PARAGRAPHS AND CROSS THROUGH THE OTHER

If at any time I should have a terminal condition and my attending physician has determined that there can be no recovery from such condition, my death is imminent, and I am comatose, incompetent or otherwise mentally or physically incapable of communication, I designate _____ to make a decision on my behalf as to whether life prolonging procedures shall be withheld or withdrawn. In the event that my designee decides that such procedures should be withheld or withdrawn, I wish to be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide me with comfort care or to alleviate pain.

OR

If at any time I should have a terminal condition and my attending physician has determined that there can be no recovery from such condition and my death is imminent, where the application of life-prolonging procedures would serve only to artificially prolong the dying process, I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide me with comfort care or to alleviate pain.

In the absence of my ability to give directions regarding the use of such life-prolonging procedures, it is my intention that this declaration shall be honored by my family and physician as the final expression of my legal right to refuse medical or surgical treatment and accept the consequences of such refusal.

I understand the full import of this declaration and I am emotionally and mentally competent to make this declaration.

(Signed)

The declarant is known to me and I believe him or her to be of sound mind.

RACIALLY DISCRIMINATORY TRUSTS AND THE CY PRES DOCTRINE IN VIRGINIA

James W. Reynolds

INTRODUCTION

The recent Virginia Supreme Court decision, *Hermitage Methodist Homes of Virginia v. Dominion Trust Company*,¹ has again focused attention on the cy pres doctrine and its ability to reform charitable trusts that discriminate. Charitable trusts, like all trusts, are "administered according to the trustor's intent as expressed in the trust instrument or will."² One danger that exists in charitable trusts, however, which does not exist in private trusts, is that charitable trusts have a potentially infinite life because they are exempt from the Rule Against Perpetuities.³ Because society and laws can change over a period of years, a formally "non-discriminatory" charitable trust can lose its specific purpose or become obsolete.⁴ Cy pres, which literally means "as near," allows a court to revise a charitable trust, as long as the settlor has a general charitable

¹ *Hermitage Methodist Homes of Virginia v. Dominion Trust Co.*, 239 Va. 46, 387 S.E.2d 740 (1990), *cert. denied sub nom. Prince Edward School Foundation v. Hermitage Methodist Homes of Virginia*, ___ U.S. ___, 111 S. Ct. 277 (1990).

² Comment, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635, 635 (1988) [hereinafter *Charitable Efficiency*].

³ *Id.* at 635.

⁴ See *Campbell v. Board of Trustees of the James Barry-Robinson Home for Boys*, 220 Va. 516, 260 S.E.2d 204 (1979) (testamentary trust creating a "Home and School of Arts and Trades for Orphan Boys" was altered to allow the school to become a private preparatory school and later a residential treatment center because, among other reasons, so few boys could meet the orphan, religious, and residency requirements).

intent, in order to "meet unforeseen emergencies or changed circumstances that threaten the trust's existence."⁵

This article will examine how the cy pres doctrine is applied to Virginia trusts that contain racially-discriminatory provisions. First, it gives a brief account of the cy pres doctrine's history and then focuses on how cy pres generally works. The article then examines the application of cy pres to Virginia trusts containing racially-discriminatory provisions.⁶ Finally, it concludes with the general formalities to be observed when using the cy pres doctrine.

BRIEF HISTORY OF THE CY PRES DOCTRINE

The English common law provided for prerogative and judicial cy pres doctrines.⁷ Under the judicial doctrine of cy pres, the courts attempt to fulfill the settlor's intentions "as nearly" as practicable.⁸ The judicial cy pres doctrine is generally accepted, though

⁵ *In Re Estate of Wilson: Judicial Reformation of Discriminatory Charitable Trusts*, 5 PACE L. REV. 433, 442 (1985) [hereinafter *Judicial Reformation*]; see also RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impractical or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.

Id.

⁶ Courts are more reluctant to use the cy pres doctrine to reform gender and religious discrimination in charitable trusts. In these instances, the courts may refuse to find state action though the state has some involvement in the trust, or the courts will reform the trust by removing the state action instead of excising the discriminatory restriction. See generally Luria, *Prying Loose the Dead Hand of the Past: How Courts Apply Cy Pres to Race, Gender, and Religiously Restricted Trusts*, 21 U.S.F. L. REV. 41, 54 (1986).

⁷ SCOTT, ABRIDGEMENT OF THE LAW OF TRUSTS § 399.1 (1960).

⁸ *Id.*

sometimes reluctantly, in the United States.⁹ Conflicting with the desire to fulfill the testator's wishes, the prerogative doctrine of cy pres enabled the king, in his role as *parens patriae*, to deliver, in certain cases, the "property for any charitable purpose" he desired.¹⁰ In exercising his prerogative, the king had no duty to consider the testator's wishes;¹¹ he would merely indicate to the Chancellor how he desired the property to be disposed.¹² The king's prerogative powers under the cy pres doctrine could sometimes lead to grave abuses of the testator's intentions.¹³ Because of such abuses, the prerogative cy pres doctrine is not recognized in the United States.¹⁴ Despite American courts' disapproval of the prerogative cy pres doctrine, as American philanthropy increased at the end of the 1800's, the courts were less reluctant to use the judicial cy pres doctrine, especially as some "charitable donors" left their gifts to select groups in society.¹⁵

⁹ Luria, *supra* note 6, at 45.

¹⁰ SCOTT, *supra* note 7, at 714.

¹¹ *Id.* at 715.

¹² *Id.*

¹³ *Da Costa v. De Pas*, 1 Amb. 228 (1754) (Jewish testator left sum of money in trust for the establishment of an assembly "for reading the Jewish law and instructing people in the Jewish religion." The trust was held unlawful) (*cited in* SCOTT, *supra* note 7, at 715). During this period in England, such a gift was illegal because it promoted a religion contrary to the established religion. The king, using his prerogative powers, directed the fund be used to support a preacher in the Foundling Hospital and to "instruct the children in that institution in the Christian religion." SCOTT, *supra*, at 715.

¹⁴ SCOTT, *supra* note 7, at 715.

¹⁵ Luria, *supra* note 6, at 45.

GENERAL APPLICATION OF THE CY PRES DOCTRINE

The cy pres doctrine cannot be used to change the settlor's bequest merely to suit the "desires or convenience of the trustee."¹⁶ Under the cy pres doctrine, courts can revise charitable trusts when social or legal changes threaten the trust with nullification.¹⁷ Courts will delete the offending provisions of the threatened trust, however, only when they can find a general charitable intent within the trust, showing that the settlor's "primary purpose was to aid humanity as a whole."¹⁸ If the settlor depicts no general charitable intent and the trust's original purpose becomes illegal, impossible, or impracticable, then the trust will fail.¹⁹

In applying the cy pres doctrine, most courts use a "standard three-part analysis."²⁰ First, the trust must be a valid charitable trust,²¹ meaning that it has met the formalities for creating a charitable trust. Second, the court must find that the intent of the trustor is hindered to such an extent that cy pres modification is justified.²² Finally, the court must find a manifestation of the settlor's general charitable intent

¹⁶ *Judicial Reformation*, *supra* note 5, at 444.

¹⁷ *Luria*, *supra* note 6, at 41. *See also* *Smith v. Moore* 225 F. Supp. 434 (E.D. Va. 1963) (The court concluded that because there was no forfeiture provision for non-compliance with the directions of the trust then the settlor did not intend explicit directions), *modified*, 343 F.2d 594 (4th Cir. 1965).

¹⁸ *Luria*, *supra* note 6, at 41.

¹⁹ *Id.*

²⁰ *See Charitable Efficiency*, *supra* note 2, at 642.

²¹ *See id.*; *see also* RESTATEMENT (SECOND) OF TRUSTS § 399 comment a (1959).

²² *See Charitable Efficiency*, *supra* note 2, at 642.

within the trust.²³ The court in *Smith v. Moore*²⁴ interpreted Virginia's cy pres statute, enacted in 1946, as adopting this three-part analysis.

Before invoking the cy pres doctrine, whether by statute or through the medium known as judicial power, it is necessary that there be (1) a *valid charitable trust* without a gift over, (2) an existing *general charitable intent*, and (3) the beneficiaries must be indefinite or uncertain, or (4) the purpose of the trust must be *indefinite, impossible to perform, or so impracticable of performance as to characterize the fulfillment of the purpose as "impossible."*²⁵

Section § 55-31 of the Virginia Code²⁶ is designed to enforce charitable trusts and to prevent their failure if specific performance is impossible.²⁷

"General charitable intent" is the element in this three-part analysis that creates the most cy pres litigation.²⁸ In Virginia, charitable gifts are "viewed with peculiar favor by the courts, and every presumption consistent with the language contained in the instruments of gift will be employed in order to sustain them."²⁹ In determining

²³ *Id.*; see also RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

²⁴ 225 F. Supp. 434 (E.D. Va. 1963) (The sum of money provided in the trust was inadequate to fulfill the specific intention of the trust, the construction of a free hospital. The cy pres doctrine was used to fulfill the testators' intentions "as nearly as" possible by using the trust to build a wing onto an existing hospital and using this wing as a free clinic), *modified*, 343 F.2d 594 (4th Cir. 1965).

²⁵ *Id.* at 441 (emphasis added).

²⁶ VA. CODE ANN. § 55-31 (1950):

When any . . . person gives . . . any real or personal property in trust to or for any educational, charitable, or eleemosynary purpose, the indefiniteness . . . of the beneficiaries named . . . or the indefiniteness of the purpose of the trust itself, shall not defeat any such trust and, if the trust is in other respects valid under the laws of this State, it shall be administered to conform as near as may be to the purpose for which created or, if impossible of performance for this purpose, for some other educational, charitable, benevolent or eleemosynary purpose.

²⁷ *Smith*, 224 F. Supp. at 447.

²⁸ *Charitable Efficiency*, *supra* note 2, at 642.

²⁹ *Thomas v. Bryant*, 185 Va. 845, 852, 40 S.E.2d 487, 490 (1946), (citing *Hinsdale v. Chicago City Missionary Society*, 375 Ill. 220, ___, 30 N.E.2d 657, 663 (1940)).

whether the settlor has a general charitable intent, Virginia law has accepted many of the positions in Section 399 of the Second Restatement of Trusts.³⁰ *Smith*³¹ embraces the Restatement's position that terms like "property shall be devoted 'forever' to a particular purpose, or . . . shall be devoted to that purpose 'and no other purpose,' or that the property is given 'upon condition' that it be applied to that purpose, does not necessarily indicate the absence of a more general charitable intention of the settlor . . ."³² Such terms can act merely as an emphasis that the settlor wants the property to be applied for no other purposes "as long as it is possible and practicable and legal to apply it to the specified purpose"³³ These terms do not necessarily indicate that the trust should end if it becomes impossible, impracticable, or illegal to achieve the trust's particular purpose.³⁴

*Smith*³⁵ also accepts the Restatement's position that it is easier to establish a general charitable intention when the trust is possible and legal at the outset and becomes impossible or illegal at a later date, than it is when the trust fails at the outset.³⁶ With this former circumstance, the courts can fairly infer that the settlor must have expected circumstances to change over a period of time and that his particular purpose may not be achieved.³⁷ The courts presume that a settlor would want his trust

³⁰ *Smith*, 225 F. Supp. at 441-42.

³¹ *Id.* at 441.

³² RESTATEMENT (SECOND) OF TRUSTS § 399 comment c (1959).

³³ *Id.*

³⁴ *Id.*

³⁵ 225 F. Supp. at 442.

³⁶ RESTATEMENT (SECOND) OF TRUSTS § 399 comment i (1959).

³⁷ *Id.*

to be modified, rather than fail and possibly be distributed among heirs he may not know.³⁸

Finally, *Smith*³⁹ accepts the Restatement's position that the trust will be modified to achieve its purpose, as nearly as possible, when the amount provided for the charitable purpose is too small, making it impossible for the trust to accomplish its goal.⁴⁰ The court will do this only if there is first a general charitable intent in the trust. In *Smith*, the court, in determining whether the settlor had a general charitable intent, stated that "the background of the testator, his interest and spirit in community projects, his education and business acumen, may all be considered," unless forbidden by the explicit terms in the trust.⁴¹

THE CY PRES DOCTRINE AND RACIALLY-DISCRIMINATORY TRUSTS

State Action

In order to apply the cy pres doctrine, a court must determine that the following conditions have been met: (1) the settlor has made a valid charitable trust, (2) the terms of the charitable trust are not "impossible to perform" or so impracticable as to make the trust impossible to perform or illegal, and (3) the settlor had a general charitable intent.⁴² The Fourteenth Amendment of the United States Constitution provides that: "No State shall make or enforce any law which shall abridge the privileges or immunities of a citizen of the United States; nor shall any State . . . deny

³⁸ *Id.*

³⁹ 225 F. Supp. at 442.

⁴⁰ RESTATEMENT (SECOND) OF TRUSTS § 399 comment j (1959).

⁴¹ *Smith*, 225 F. Supp. at 442.

⁴² *Smith v. Moore*, 225 F. Supp. 434, 441 (E.D. Va. 1963), *modified*, 343 F.2d 594 (4th Cir. 1965).

to any person within its jurisdiction the equal protection of the laws."⁴³ A private trust is illegal when it violates the equal protection clause of the Fourteenth Amendment because either "the institution administering the trust is itself a state agency,"⁴⁴ or because the trust is intertwined with the state."⁴⁵

In *Shelley v. Kraemer*,⁴⁶ the Court held that section one of the Fourteenth Amendment does not apply to private conduct even if the conduct is discriminatory or wrongful.⁴⁷ Thus, restrictive agreements between private parties do not violate any rights guaranteed under the Fourteenth Amendment.⁴⁸ The Fourteenth Amendment applies solely to actions taken by a state.⁴⁹ However, the Court in *Shelley* found that actions taken by a state court and its judicial officers, in their official capacities, are state actions within the scope of the Fourteenth Amendment.⁵⁰ Therefore, any acts performed by a state's legislative, judicial, or executive branches will be considered state actions governed by the Fourteenth Amendment. "It is doubtless true that a State may act through different agencies, either by its legislative, its executive, or its judicial authorities; and the prohibitions of the [Fourteenth] amendment extend to all actions of

⁴³ U.S. Const. amend. XIV, § 1.

⁴⁴ Luria, *supra* note 6, at 51.

⁴⁵ *Id.* at 52.

⁴⁶ 334 U.S. 1, 8-23 (1948) (Private agreements, based on race, to exclude persons from use or occupancy of real estate for residential purposes do not violate the Fourteenth Amendment. However, the equal protection clause of the Fourteenth Amendment is violated if state courts enforce these agreements).

⁴⁷ *Id.* at 13.

⁴⁸ *Id.*

⁴⁹ *Id.* at 8.

⁵⁰ *Id.* at 14.

the State denying equal protection of the laws, whether it be action by one of these agencies or by another."⁵¹

In *Evans v. Newton*,⁵² a tract of land was bequeathed to the city of Macon, Georgia, as a park for white persons only. When the city desegregated the park, the all-white Board of Managers for the park brought suit against the city, asking for the removal of the city as trustee. The Georgia trial court accepted the city's resignation as trustee for the park and appointed three "private" trustees, who contended that they could enforce the racial restrictions of the trust. On appeal, the United States Supreme Court decided, however, that services which are "municipal in nature," such as those rendered by a park, are subject to the Fourteenth Amendment's equal protection clause.⁵³ The key factor in this case was the fact that "municipal control and maintenance" had been provided for so long that merely replacing the city as trustee was insufficient to rid the park of its public character.⁵⁴ In its decision, the court recognized that "conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."⁵⁵

Racially Discriminatory Trusts

The cy pres doctrine allows courts to modify trusts that have become illegal, unless the settlor intended that the trust property be used solely towards that illegal purpose.⁵⁶ In *Hermitage Methodist Homes of Virginia v. Dominion Trust Company*,⁵⁷

⁵¹ *Virginia v. Rives*, 100 U.S. 313, 318 (1880).

⁵² 382 U.S. 296 (1966).

⁵³ *Id.* at 301-02.

⁵⁴ *Id.* at 301.

⁵⁵ *Id.* at 299.

⁵⁶ RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

the settlor had provided in his will that his estate would be held in trust and that the income from his estate would go to a private school, as long as the school admitted white students only.⁵⁸ The trust contained successive "gift overs," so that if the first school admitted any non-white students, the trust's income would go to a second private school. If the second private school admitted any non-white students, the trust income would go to a third private school.⁵⁹ The final beneficiary of the trust was a nursing home, and no racial restriction was attached to that gift provision.⁶⁰

In *Hermitage Homes*, the court found without discussion that the racial restriction was unenforceable because state courts, under the Fourteenth Amendment, cannot enforce racial restrictions.⁶¹ The court, however, did not use the cy pres doctrine to revise the trust, which would have allowed the first school designated to take the income, because-^{*} due to the "gift over" provision, there was no uncertainty in deciding who benefitted, and the need to find a general charitable intent was thus eliminated.⁶² Furthermore, because the offending language could not be excised from the trust without changing its essential nature and quality, the gift to the educational charities failed completely.⁶³ The "gift over" to the nursing home, which did not contain a racial

⁵⁷ 239 Va. 46, 387 S.E.2d 740 (1990), *cert denied sub nom.*, Prince Edward School Foundation v. Hermitage Methodist Homes of Virginia, ___ U.S. ___, 111 S. Ct. 277 (1990).

⁵⁸ *Id.* at 49-50, 387 S.E.2d at 741-42.

⁵⁹ *Id.* at 50, 387 S.E.2d at 742.

⁶⁰ *Id.*

⁶¹ *Id.* at 54-55, 387 S.E.2d at 744. The court found that the purpose of the trust was to educate white children only and not children generally.

⁶² *Id.* at 58, 387 S.E.2d at 747.

⁶³ *Id.* at 57, 387 S.E.2d at 746.

restriction, was valid and ensured that there was no indefiniteness as to the trust's purpose.⁶⁴

In *United States v. Hughes Memorial Home*,⁶⁵ the cy pres doctrine was applied to revise a trust. The Hughes Memorial Home was a private non-sectarian home for children. The home was established by a trust which provided that the home was for white children in Virginia and North Carolina. The district court found that the home, due to its discrimination against black children, violated the Fair Housing Act.⁶⁶ The court further held that the racial restriction was merely incidental to the main purpose of the trust, which was to provide shelter for orphaned children.⁶⁷ Finding that Virginia state law favored the use of cy pres "to permit continuation of charitable trusts in the face of changed conditions . . . ," the court decided that the home was entitled to continue its operation, as long as it ignored the racial restrictions in the trust.⁶⁸

GENERAL FORMALITIES FOR USING THE CY PRES DOCTRINE

There is a general procedure for employing the cy pres doctrine when it has been determined that a settlor has a general charitable intent but that some of the trust's provisions are illegal, impracticable, or impossible.⁶⁹ First, the party seeking to amend the trust should ask the court to determine whether the settlor had a general charitable intent.⁷⁰ The court may then "refer the matter to a master," who will devise a scheme

⁶⁴ *Id.* at 58, 387 S.E.2d at 747.

⁶⁵ 396 F. Supp. 544 (W.D. Va. 1975).

⁶⁶ *Id.* at 549.

⁶⁷ *Id.* at 552.

⁶⁸ *Id.* at 552-53.

⁶⁹ SCOTT, ABRIDGEMENT OF THE LAW OF TRUSTS § 399 (1960).

⁷⁰ *Id.* at 714.

for applying the property, which the court can accept, reject, or modify.⁷¹ If the problem is relatively simple, the court may devise its own scheme or adopt one of the trustee's suggested schemes.⁷² A trustee should not try to apply the cy pres doctrine without first seeking the court's instructions.⁷³ If, however, the trustee does employ his own scheme before asking the court for directions, the court may let it stand if the court approves of the scheme as implemented.⁷⁴ Additionally, the state's attorney-general is required to be a party to any determination on how cy pres will be applied; the court, however, will always determine the proper scheme to be employed.⁷⁵

CONCLUSION

Section 55-31 of the Virginia Code⁷⁶ provides that when a charitable trust has an uncertain beneficiary or purpose, or is impossible, the cy pres doctrine can be employed to make the trust conform "as near as may be to the purpose for which it was created."⁷⁷ Generally, when a charitable trust contains a racial restriction, the court will determine that the trust is invalid because enforcing such a restriction would violate the Fourteenth Amendment of the United States Constitution. If, however, the court finds that the testator had a general charitable intent, which is not limited by the racial restriction, the court will revise the charitable trust by removing the racial restriction. This will ensure that the testator's general charitable intentions will be carried out.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ VA. CODE ANN. § 55-31 (1950).

⁷⁷ *Id.*; see *supra* note 26.

However, if the settlor does not have a general charitable intent and includes a racial restriction in a charitable trust, the trust will fail.

**THE DIVISION OF CHILD SUPPORT ENFORCEMENT:
VIRGINIA'S RESPONSE TO FEDERAL CHILD SUPPORT REFORM**

Anne D. Bowling

**INTRODUCTION: THE NEED FOR FEDERAL INTERVENTION
IN CHILD SUPPORT LAW**

One criticism of the United States' traditional societal treatment of children's issues is that it focuses upon specific perceived problems of individual groups of children, rather than a "comprehensive family social policy which truly promotes the well-being of all children or attempts to guarantee that all children receive consistent nurture and adequate financial support."¹ Through the last half of the twentieth century, issues of support and welfare for all children have grown significantly in importance.

As recognition of the need for child support grew, it did so exclusively at the state level, with the federal government adopting a policy of abstention from the entire realm of domestic relations. This precluded the federal court system from interfering with state courts' imposition of child support awards.²

Although federal courts had not historically played a part in developing the field of family law, Congress began legislating in order to remedy inadequacies in the states' systems of governing family relations.³ Escalating costs in the federal Aid to Families with Dependent Children (AFDC) program focused Congress' attention on child support

¹ Howe, *Who Speaketh for the Child?*, 23 N. ENG. L. REV. 421, 422 (1988).

² Note, *Bankruptcy: Including a Child Support Arrearage in a Chapter 13 Plan*, 43 WASH. & LEE L. REV. 477, 483 (1986) [hereinafter *Chapter 13 Plan*]. This abstention has constitutional foundations. Since the Tenth Amendment reserves for the states "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States," U.S. CONST. amend. X, and the powers to legislate in the areas of family and domestic matters are not specifically granted to Congress by Article 1, § 8 of the Constitution (enumerating Congress' powers), the jurisdiction to control domestic relations lies with the states. *Chapter 13 Plan, supra*, at 483 n.34.

³ Krause, *Reflections on Child Support*, 1983 U. ILL. L. REV. 99, 99 (1983) [hereinafter *Reflections*].

enforcement problems at the state level.⁴ By 1975, Congress had enacted laws which would effectively override state laws in the domestic relations field.⁵

The federal government entered the area of child support both because of recognition of the subject's importance,⁶ and because of the states' failure to provide for the needs of children.⁷ A major problem with the states' systems was the inadequacy of the support orders issued by the state courts.⁸ As a result, custodial parents, usually mothers of the children needing support, were faced with a grossly disproportionate share of child-raising expenses, creating a "feminization and cradlization of poverty."⁹

Another problem with the state courts' exclusive jurisdiction over child support matters was the inconsistency with which child support orders were determined. State statutes governing child support provided little guidance to judges determining levels of support that were fair to all concerned parties.¹⁰ The resulting support awards could

⁴ *Id.* The AFDC program is a federally-funded means of support for families with dependent children. *See infra* note 23 and accompanying text.

⁵ *Reflections, supra* note 3, at 99 (citing Pub. L. No. 93-647, 88 Stat. 2337 (codified at 42 U.S.C. §§ 651-60 (1976))). The laws of the United States are the "supreme Law of the Land," *see* U.S. CONST. art. VI, cl. 2, and a federal law preempts state law if the state law's effect is to interfere with Congress' purpose in legislating in a particular area. *Chapter 13 Plan, supra* note 2, at 483 n.34.

⁶ Historically, children are one of the groups with the most need for support, as well as the most deserving. Of those individuals living below standards of poverty, children are, clearly, the least responsible for their situation. Giampetro, *Mathematical Approaches to Calculating Child Support Payments: Stated Objectives, Practical Results, and Hidden Policies*, 20 FAM. L.Q. 373, 373 n.1 (1986).

⁷ *See Reflections, supra* note 3, at 99.

⁸ Woods, *Child Support: A National Disgrace*, 17 CLEARINGHOUSE REV. 538, 538 (Oct. 1983); Brackney, *Battling Inconsistency and Inadequacy: Child Support Guidelines in the States*, 11 HARV. WOMEN'S L.J. 197, 213 (1988).

⁹ Brackney, *supra* note 8, at 199.

¹⁰ Giampetro, *supra* note 6, at 377.

easily reflect judges' own policy preferences¹¹ more than the needs of the children involved and their parents' ability to provide for them. The inconsistency of this "case-by-case method" had the potential to contribute to the tensions and hostility already present in a divorce situation.¹² As a result, non-custodial parents, feeling that they had received unfair treatment by the court system, were less likely to comply with the order.¹³

Parental noncompliance was the third major difficulty with the state courts' child support systems.¹⁴ Census bureau reports from 1984 (when Congress increased the strength of states' powers to enforce child support)¹⁵ estimated the amount of overdue child support payments at forty billion dollars annually.¹⁶ In fact, almost a third of the ordered support was never received by the custodial parents.¹⁷ One commentator has suggested that the federal government's AFDC system was viewed as an alternative to parents providing support.¹⁸ The skyrocketing costs of this system, however, finally brought home to Congress the need for the government to take a more active role in the process of determining and enforcing non-custodial parents' duties to take financial responsibility for their children.¹⁹

¹¹ *Id.*

¹² Brackney, *supra* note 8, at 200.

¹³ *Id.*

¹⁴ Howe, *supra* note 1, at 423; Woods, *supra* note 8, at 538.

¹⁵ *See infra* notes 50 to 53 and accompanying text.

¹⁶ Note, *Constitutional Implications of the Child Support Enforcement Amendments of 1984*, 24 J. FAM. L. 301, 301 (1986) [hereinafter *Implications*] (citing *The Courier-Journal*, Sept. 15, 1984, at A16, col. 1).

¹⁷ Woods, *supra* note 8, at 538.

¹⁸ Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 1, 4 (Spring 1990) [hereinafter *Private Responsibility*].

¹⁹ *Reflections*, *supra* note 3, at 99.

Another commentator has drawn an illustrative parallel between the need for governmental coordination of child support enforcement programs and the centralization of workers' compensation laws.²⁰ Before the current worker's compensation system, employees seeking recoupment for job-related injuries often faced obstacles similar to custodial parents seeking child support through the courts. Insufficient funds to hire legal assistance and prepare cases adequately, lengthy court delays restricting the availability of much-needed funds, and widely varying awards for similar cases were complaints common to both sets of plaintiffs. Also inherent to both situations were bogged-down court systems struggling to manage exploding caseloads.²¹ The solution for injured employees was a federal worker's compensation program. A similarly centralized federal program for child support would not only coordinate and establish state enforcement programs, but would also oversee their operation to ensure that the programs are implemented in accordance with the law.²²

FEDERAL LEGISLATIVE CHILD SUPPORT INITIATIVES

The Social Security Act of 1935

Federal statutory intervention in the child support area began as early as the Depression, though in a limited manner. The Social Security Act of 1935 included a section that established the provision of funds to impoverished mothers to help them care for their dependent children. This was the birth of AFDC.²³ The Act also required

²⁰ Henry & Swartz, *Expedited Processes For Child Support Enforcement*, 36 JUV. & FAM. CT. J. 77, 81 (Fall 1985).

²¹ *Id.*

²² Note, *Child Support Enforcement: Balancing Increased Federal Involvement with Procedural Due Process*, 19 SUFFOLK U.L. REV. 687, 688 (1985) [hereinafter *Increased Federal Involvement*].

²³ *Id.* at 691-92; Baker & Stuff, *The Costs and Benefits of Child Support Enforcement*, 18 PROSECUTOR, J. NAT'L DIST. ATT'YS A. 27, 27 (Winter 1984).

non-custodial parents to contribute child support payments on behalf of their children, but provided no effective means to enforce this obligation.²⁴

URESAs: Interstate Enforcement of Support Orders

In 1950, the National Conference of Commissioners on Uniform State Laws gave state courts more power to enforce support orders from other states through the approval of the Uniform Reciprocal Enforcement of Support Act (URESAs).²⁵ Every state has adopted a form of this model statute,²⁶ and most states have since adopted the Revised Uniform Reciprocal Enforcement of Support Act (RURESAs).²⁷ Under these laws, support enforcement begins with the custodial parent bringing a support enforcement action in state court.²⁸ The court where the action is brought (the "initiating state") directs the petition to the jurisdiction where it is believed that the non-custodial parent is located.²⁹ The court in this jurisdiction (the "responding state") attempts to enforce the order by obtaining jurisdiction over non-custodial parents and requiring them to remit their support obligations either to the responding court or to an appropriate state agency.³⁰ These funds are sent to the initiating court which distributes the money to the party that brought the action.³¹

²⁴ Baker & Stuff, *supra* note 23, at 27.

²⁵ *Increased Federal Involvement*, *supra* note 22, at 690.

²⁶ *Id.*

²⁷ Atkinson, *The Child's Need Versus the Parent's Ability to Pay*, 12 FAM. ADVOC. 26, 28 (Winter 1990).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

Though URESA removed the previous barrier to collecting court-ordered support from out-of-state non-custodial parents,³² the Act is criticized for the lengthy time periods required for enforcement by the two jurisdictions, the costs involved for the responding state, the low priority responding states give URESA cases, and the difficulty in locating non-custodial parents.³³

States' Enforcement Agencies

In 1967, Congress amended the Social Security Act, and, for the first time, mandated the development and implementation of state-run child support enforcement programs.³⁴ These amendments, however, did little to help custodial parents receive more of the support due them, because many states failed to comply with the revised law.³⁵ The federal government was required to provide only fifty percent of the administrative costs of enacting the states' programs, and it did nothing to enforce the state programs' implementation.³⁶

Title IV-D: Addressing a Growing Problem

By 1974, seventy-eight percent of the children eligible for AFDC funding, approximately 6,062,000 children, were so situated because of the absence of a parent.³⁷ Only about a fourth of these children were provided for by court-ordered or voluntary arrangements to provide child support.³⁸ Of this group, only about twenty-one percent

³² *Increased Federal Involvement*, *supra* note 22, at 689-91.

³³ *Id.* at 691.

³⁴ *Id.* at 692.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Baker & Stuff, *supra* note 23, at 27.

³⁸ *Id.*

actually received the full amount of the money owed them.³⁹ As a result of this growing need, Congress, in 1975, added Title IV-D to the Social Security Act to address child support issues.⁴⁰ The federal and state programs envisioned by the amendments were to provide four basic areas of service: locating absent parents responsible for providing child support, establishing paternity, establishing appropriate amounts of support, and enforcing support obligations.⁴¹ The Congressional intent in passing the amendments goes well beyond the objective of merely recouping disbursed AFDC funds from legally responsible parents:

The committee believes that all children have the right to receive support from their fathers. The committee bill is designed to help children attain this right, including the right to have their fathers identified so that support can be obtained. The immediate result will be a lower welfare cost to the taxpayer but, more importantly, as an effective support collection system is established fathers will be deterred from deserting their families to welfare and the children will be spared the effects of family break-up.⁴²

The government also demonstrated an intent to enforce the new amendment by providing guidelines that state programs must meet in order to qualify for federal reimbursement of seventy-five percent of the state's administrative costs.⁴³ Finally, the amendments created the federal Parent Locator Service, which provides state agencies with data from the Social Security Administration, Internal Revenue Service, and Department of Defense, which would otherwise be unavailable to the states' own locator services.⁴⁴ The federal Parent Locator Service was designed to complement and enhance

³⁹ *Id.*

⁴⁰ 42 U.S.C. §§ 651-62 (1988); *see Increased Federal Involvement, supra* note 22, at 692-93.

⁴¹ Haynes, *Legislative Update: More IV-D Follow-Up*, 10 FAM. ADVOC. 11, 11 (Spring 1988).

⁴² Hearings on Senate Bills 1842 and 2081 before the Senate Committee on Finance, 93rd Cong., 1st Sess. (1973), *cited in Baker & Stuff, supra* note 23, at 27.

⁴³ 42 U.S.C. § 652(a) (1988).

⁴⁴ *Id.*

the resources of each state's parent locator service,⁴⁵ and to fit in with the federal government's new role, under Title IV-D, as an overseer of the states' support enforcement programs.⁴⁶

IRS Cooperation in Enforcement

In 1981, Congress brought the Internal Revenue Service into child support enforcement by allowing overdue support payments to be collected through the interception of non-custodial parents' federal income tax refunds.⁴⁷ This streamlined the tax-intercept procedures previously provided for in the 1975 amendments.⁴⁸

The 1975 law instructed the IRS to provide "full collection" of delinquent debts.⁴⁹ Under the 1975 act, the IRS could garnish the wages of AFDC or non-AFDC delinquent parents, attach and sell their property, or intercept their federal tax refund and forward it to the state requesting collection of the support obligation.⁵⁰ In order to receive this service, the debt needed to be delinquent in the amount of at least \$750 and established by an administrative or court order.⁵¹ Further, the state child support enforcement agency had to describe to the IRS the "collection actions" it had taken,

⁴⁵ *Increased Federal Involvement*, *supra* note 22, at 693 n.29.

⁴⁶ *Id.* at 694.

⁴⁷ 42 U.S.C. § 644 (1988); *see Roberts, In the Frying Pan and In the Fire: AFDC Custodial Parents and the IV-D System*, 18 CLEARINGHOUSE REV. 1407, 1408 (Apr. 1985) [hereinafter *Custodial Parents*].

⁴⁸ *See Increased Federal Involvement*, *supra* note 22, at 697; Note, *In Support of Support: The Federal Tax Refund Offset Program*, 37 TAX LAW. 719, 723-24 (1984) [hereinafter *In Support*].

⁴⁹ *In Support*, *supra* note 48, at 723.

⁵⁰ *Id.*

⁵¹ *Id.*

why they were not effective, and why further state actions would not be successful in collecting the debt.⁵²

Under the 1981 Amendments, the Internal Revenue Service can become involved in the collection of AFDC arrearages of just \$150, if the debt is at least three months old, and if the state child support enforcement agency demonstrates to the Department of Health and Human Services that the state has taken reasonable measures to collect the overdue support.⁵³ The only collection method available under this "streamlined procedure" is to reduce the responsible parent's federal income tax refund by the amount of ordered support.⁵⁴

Expanding the System: The 1984 Child Support Enforcement Amendments

In 1984, Congress further amended the Social Security Act to enhance the states' powers to enforce child support obligations and to make the services of state support enforcement agencies available to all custodial parents, regardless of their eligibility for AFDC benefits.⁵⁵ A major effect of this set of amendments was its impact upon the substance of state laws; the 1984 amendments required that each state legislatively

⁵² *Id.* at 724 n.34.

⁵³ *Id.* at 724.

⁵⁴ *Id.*

⁵⁵ The 1974 amendments only provided these services to custodial parents who were AFDC recipients. *Implications, supra* note 16, at 302 n.10.

The major objectives of the 1984 amendments are: to encourage states to aggressively seek child support collection for children not receiving welfare benefits; to mandate nationwide enforcement techniques that have already been proven successful; to provide financial rewards to states that improve enforcement programs; to audit all state programs; and to strengthen interstate enforcement techniques.

Increased Federal Involvement, supra note 22, at 700.

provide for certain techniques of support collection.⁵⁶ Among these techniques are mandatory withholding of the income of the non-custodial parent, interception of federal and state income tax refunds, liens, bonds to guarantee support payments, a mandatory report of the non-custodial parent's support obligation sent to credit agencies, guidelines for child support awards, and expedited proceedings to handle child support cases.⁵⁷ The 1984 amendments clearly announce the intention of Congress to rule on the adequacy of state child support laws.⁵⁸

Still Stronger Enforcement Powers

In the 1988 Family Support Act,⁵⁹ Congress made the states' new child support enforcement powers still stronger by providing stricter wage withholding of child support payments, rebuttable support guidelines for ascertaining support obligations, review of child support orders at least every three years, and federal standards for establishing paternity.⁶⁰

The Current Federal IV-D System

With the successive changes in the welfare law (particularly with the 1984 Social Security Act amendments), applicants for AFDC programs must assign their rights to

⁵⁶ Dodson & Horowitz, *What to Do About the Growing Problem of Child Support*, 71 A.B.A. J. 133, 133 (Sept. 1985); *Private Responsibility*, *supra* note 18, at 8.

⁵⁷ *Private Responsibility*, *supra* note 18, at 8-9. Federal regulations define "expedited processes" as "any administrative or expedited judicial processes in which the presiding officer is not a judge of court, which increase the effectiveness of the establishment and enforcement process, and which meet specific processing time frames."; 45 C.F.R. § 303.101 (1990); Henry & Swartz, *supra* note 20, at 77.

⁵⁸ *Private Responsibility*, *supra* note 18, at 8.

⁵⁹ Pub. L. No. 100-485, 102 Stat. 2343 (1988).

⁶⁰ *Private Responsibility*, *supra* note 18, at 11; Roberts, *Tenth Annual Review of Poverty Law: Child Support Enforcement in 1989*, 23 CLEARINGHOUSE REV. 1101, 1104-05 (Jan. 1990) [hereinafter *Tenth Annual Review*].

receive child support to the IV-D agency and agree to cooperate with the agency in locating the non-custodial parents, establishing paternity and support orders against them, and enforcing the orders.⁶¹ Through the custodial parents' assignments, the state acquires a financial interest, equal to the total AFDC payments, against the responsible parents. The state is in a better position than custodial parents to recover these funds, as it has the resources of the federal government and the reciprocal cooperation of the other states behind it.⁶² Implementation of a program this wide-spread is inevitably difficult and has resulted in various criticisms,⁶³ but the federal government's attempt to unify and coordinate states' child support programs unquestionably provides a greater opportunity for fair resolutions of children's needs and parents' obligations.⁶⁴

THE DIVISION OF CHILD SUPPORT ENFORCEMENT: VIRGINIA'S IV-D PROGRAM

Virginia's response to the Congressional initiatives on child support enforcement was the creation of the Division of Child Support Enforcement (DCSE or Division), a subdivision of the Commonwealth's Department of Social Services.⁶⁵ The functions of

⁶¹ *Private Responsibility*, *supra* note 18, at 7.

⁶² *Id.* at 7-8.

⁶³ *Id.* at 12 (still "wide variations" in different states' collection performance and enforcement of child support laws); *Custodial Parents*, *supra* note 47, at 1410 (states benefitting from support collection causes indifference or hostility towards the IV-D agency); *Tenth Annual Review*, *supra* note 60, at 1109 (complaints about the timeliness and adequacy of service by the agency involved); *Implications*, *supra* note 16, at 304, 307 (constitutional concerns regarding wage withholding and the tax refund intercept program).

⁶⁴ Baker & Stuff, *supra* note 23, at 29 (the benefits of a child support enforcement program are not to be measured solely by the funds collected to reimburse state and federal AFDC disbursements; the "indirect cost evidence" achieved by keeping other custodial parents "off AFDC" must also be taken into account).

⁶⁵ Acts 1974, Session 1974, enacted April 5, 1974, amending Virginia Code to add Sections 63.1-249 through 63.1-290.

the Division are governed by Title 63, Chapters 13 and 14 of the Virginia Code.⁶⁶ DCSE operates through sixteen offices located throughout the Commonwealth, and is staffed with program support personnel and Support Enforcement Specialists.⁶⁷ Although the Policy Manual for the Division is careful to point out that DCSE staff may not take any attorney-like role in the agency's cases,⁶⁸ agency personnel perform many of the pre-trial tasks required in enforcement proceedings.⁶⁹ Legal counsel for the Division is provided by a Special Counsel in the Attorney General's office, specifically assigned to child support enforcement matters, or representation may be obtained through cooperative agreements with Commonwealth Attorneys, city or county attorneys, or members of the private bar.⁷⁰

The services available from the DCSE are those mandated by Title IV-D: (1) Locating responsible parents and putative fathers in order to establish their child support obligation; (2) establishing putative fathers' paternity; (3) establishing and modifying orders for child support payments; (4) administratively and judicially enforcing spousal support if such support is ordered as part of the child support order; and (5) collecting and disbursing child support payments.⁷¹ In addition, the Division provides information about its functions and parental rights and responsibilities through brochures available at its offices.

⁶⁶ VA. CODE ANN. §§ 63.1-249 to -274.9 (Supp. 1990).

⁶⁷ Commonwealth of Virginia, *Department of Social Services, Division of Child Support Enforcement Policy Manual*, ch. A, 1 (1990) [hereinafter *Policy Manual*]; Commonwealth of Virginia, *Department of Social Services, Pub. No. 032-01-935, Facts About Child Support Enforcement For Custodial Parents* [hereinafter *Support Enforcement Pamphlet*].

⁶⁸ *Policy Manual*, *supra* note 67, at ch. A, 1.

⁶⁹ *Id.* at 2.

⁷⁰ *Id.* at 3.

⁷¹ *Id.* at ch. C, 1.

The Parent Locator Service

The parent locator service offered by the Division is the State Parent Locator Service, which searches the Commonwealth for the absent parent, coordinates with other states' locator services to find responsible parents who have left Virginia, and uses the federal Parent Locator Service to search for responsible parents on a national level.⁷² On the federal level, new regulations that are applicable to the states and designed to improve the quality of parent locator services became effective October 1, 1990.⁷³

Establishing Paternity

The Division of Child Support Enforcement uses both administrative means and the court system to establish paternity. Administratively, in a situation where the putative father is willing to admit paternity of the child for whom support is sought, the Support Enforcement Specialist informs the putative father that he has been identified as the child's parent and asks him to verify the claim.⁷⁴ If the putative father does so, he is advised of his "rights and responsibilities regarding the issue of paternity."⁷⁵ The putative father then reads a Declaration of Paternity Form and signs, under oath, a Paternity Rights and Responsibilities Statement.⁷⁶ Both the custodial parent and the putative father sign the Declaration of Paternity form, and each receives a copy.⁷⁷ The

⁷² *Support Enforcement Pamphlet, supra* note 67.

⁷³ *Tenth Annual Review, supra* note 60, at 1104-05.

⁷⁴ *Policy Manual, supra* note 67, ch. D, 1 (1990). The DCSE Policy Manual uses the term "putative fater" to refer to the party whose paternity the Division is attempting to establish.

⁷⁵ *Id.* at 2.

⁷⁶ *Id.*

⁷⁷ *Id.*

Division files this document with the Juvenile and Domestic Relations District Court (J&DR Court), where the judge signs it as a court order.⁷⁸

If the putative father denies paternity but agrees to have the probability of his paternity tested, he is informed of his duties and privileges as a parent, and is asked to sign a form acknowledging these obligations.⁷⁹ In order to be voluntarily tested for paternity, the putative father must also sign the Voluntary Agreement for Genetic Blood Testing Form.⁸⁰ If the genetic test results in a finding of probability of ninety-eight percent or better that the putative father is the child's father, he is declared the legal father as of the date that the positive test results are received by the Division, and must pay DCSE for the expenses of all of the parties' blood tests (the mother's, the child's, and his own).⁸¹ The father receives a copy of the Paternity Certification Form, which is filed with the court and becomes a binding court order.⁸² If the genetic testing results show a probability of less than ninety-eight percent that the putative father is indeed the father, DCSE may pursue the paternity issue in court.⁸³ If the court excludes the possibility of the putative father's paternity, the Division pays the costs of the blood tests.⁸⁴

Finally, paternity may be established only through the J&DR Court system if the putative father does not voluntarily agree to genetic testing.⁸⁵ The child's mother completes a Mother's Affidavit of Paternity Form, and, in cases where public assistance

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 3.

⁸² *Id.* at 2-3.

⁸³ *Id.* at 3.

⁸⁴ *Id.*

⁸⁵ *Id.* at 3.

is not involved, fills out a Financial Statement.⁸⁶ If the mother is receiving Aid to Dependent Children (ADC) benefits,⁸⁷ she is presumed to have no income and does not complete a Financial Statement. Both documents are notarized.⁸⁸ The agency or the mother files a paternity petition with the J&DR court, which orders blood testing of all the parties.⁸⁹ The results of these tests are filed at DCSE.⁹⁰

Genetic testing is not the only form of evidence used in establishment of a paternal obligation. The court also considers whether the putative father and the mother were openly living together at the time that the child was probably conceived, the use of the putative father's name on the child's birth certificate, the child's use of the putative father's last name at any time since birth, and any government forms or statements signed by the putative father that declare or claim the child as his own.⁹¹

Federally, paternity testing is the area of domestic relations law that has changed the most significantly in the past decade, both because of a new, longer statute of limitations for paternity establishment⁹² and due to the technological development of more advanced means of testing for paternity.⁹³ New federal regulations demand that the state must attempt to establish paternity within ninety calendar days of locating a

⁸⁶ *Id.*

⁸⁷ Aid to Dependent Children is a public assistance grant paid by the Commonwealth to support dependent children. *See* VA. CODE ANN. § 63.1-87 (1987).

⁸⁸ *Policy Manual, supra* note 67, ch. D, 3 (1990).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Commonwealth of Virginia, *Department of Social Services, Pub. No. 032-01-932/1, Facts About Establishing Paternity in Virginia* [hereinafter *Paternity Pamphlet*].

⁹² 42 U.S.C. § 666(a)(5)(A)(i) (1988).

⁹³ *Tenth Annual Review, supra* note 60, at 1102.

putative father.⁹⁴ A putative father's paternity must be established or excluded within one year of service of process or the child's becoming six month's old, whichever is later,⁹⁵ to judicially establish paternity.

Establishing the Support Obligation

The 1984 Child Support Enforcement amendments to the Social Security Act mandated that states formulate guidelines to determine appropriate child support awards.⁹⁶ Section 20-108.2 of the Virginia Code complies with the federal law.⁹⁷ In Virginia, the methods used to set the amount of child support obligation differ depending upon whether or not the custodial parent is a recipient of public assistance (PA).⁹⁸ In a "non-PA" case, where the custodial parent is not receiving public assistance, the Support Enforcement Specialist interviews both the custodial and non-custodial parents, requires each of them to complete Financial Statements, and instructs them to report any future changes in their financial situations.⁹⁹ Child support is established by taking into account each parent's income, monetary support paid to other children for whom the parent is responsible, and each parent's earning potential.¹⁰⁰ If the responsible parent does not appear at the interview in which the Support

⁹⁴ 45 C.F.R. § 303.5(a)(1) (1990).

⁹⁵ 45 C.F.R. § 303.5(a)(2) (1990).

⁹⁶ 42 U.S.C. § 667(a) (1988).

⁹⁷ VA. CODE ANN. § 20-108.2 (1990). In accordance with the 1988 Child Support Enforcement Amendments, Virginia's support figures are rebuttably presumed to be a proper level of support. *Id.*

⁹⁸ *Policy Manual*, *supra* note 67, ch. E, 1-11 (1990).

⁹⁹ *Id.* at ch. D, 3-4.

¹⁰⁰ VA. CODE ANN. §§ 20-107.1, -108.1, -108.2 (1990).

Enforcement Specialist gathers this information, the agency may establish a default judgment against him.¹⁰¹

If the custodial parent receives benefits from the ADC program, he or she is considered to have no income, and is neither interviewed nor required to fill out a financial statement.¹⁰² In any case involving a custodial parent receiving public assistance, it is likewise unnecessary to attempt to interview the non-custodial parent before establishing a default obligation.¹⁰³ The amount of the default debt is set at the level of ADC benefits paid to the custodial parent.¹⁰⁴

Once the appropriate level of support is determined, DCSE must establish the debt.¹⁰⁵ In a case where ADC payments have been paid to the custodial parent, the debt is established by sending an Administrative Support Order to the responsible parent, directing him to pay the stated amount.¹⁰⁶ The Administrative Support Order serves three purposes: it notifies the responsible parent that public assistance has been

¹⁰¹ *Policy Manual, supra* note 67, at ch. E, 5. *See infra* note 105 and accompanying text.

¹⁰² *Policy Manual, supra* note 67, at ch. E, 5.

¹⁰³ *Id.*

¹⁰⁴ *Id.* If a default obligation is established for a non-custodial parent in a non-PA case, the default obligation is set at the amount of ADC benefits that *would* be paid to the custodial parent, based upon the number of children supported and the area where the custodial parent and children reside. *Policy Manual, supra* note 67, ch. E, apps. B and C (1990).

¹⁰⁵ *Id.* at 5.

¹⁰⁶ *Id.* at ch. E, 13. An Administrative Support Order is defined by the Division of Child Support Enforcement Policy Manual as

a non-court ordered legally enforceable support obligation based on the income of the Responsible Parent and Custodial Parent as applied to the Support Scale, or a non-court ordered, legally enforceable obligation based on the amount of the public assistance grant paid or that could be paid for non-PA cases. The administrative order has the same force and effect as a court order.

Id. at Glossary of Terms, 2.

or is being provided to persons to whom the responsible parent owes a legal duty of support, and that a child support debt is accordingly owed to the Commonwealth; it informs a responsible parent that, although the custodial parent may not be a recipient of public assistance, he or she has requested that child support enforcement assist him/her in collection of child support; and, finally, it advises the responsible parent that an Immediate Withholding of Earnings is about to be implemented against him or her.¹⁰⁷

The Support Enforcement Specialist must schedule an appointment with the responsible parent within thirty days of service of the Administrative Support Order, to permit the responsible parent to provide financial information to the agency. From this information, the agency may set the parent's support obligation in accordance with his or her ability to pay.¹⁰⁸ If the responsible parent does not appear for this meeting, or fails to provide a financial statement, his or her obligation remains at the amount set forth on the Administrative Support Order.¹⁰⁹

To establish the debt in a non-PA case where the responsible parent has had a default obligation entered against him or her, the agency serves an Administrative Support Order with the default amount included in it.¹¹⁰ Once the ten-day period for appeal of the Administrative Support Order has passed, the agency files a non-support petition in the J&DR Court for enforcement.¹¹¹

Collecting the Debt

Child support in Virginia is paid in one of three ways. First, a court may order the non-custodial parent to pay support directly to the custodial parent; DCSE is not

¹⁰⁷ *Id.* at ch. E, 12-13.

¹⁰⁸ *Id.* at 7.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

involved.¹¹² Alternatively, if custodial parents do not receive public assistance, they may opt to receive their child support payments through DCSE.¹¹³ Custodial parents receiving public assistance are legally required to use the Division's services.¹¹⁴ In any case where the Division provides collection service, the custodial parent must first assign to DCSE any rights to receive funds from the responsible parent. Finally, if a non-custodial parent agrees to pay child support through voluntary assignment of his or her earnings, he or she signs an Assignment of Earnings form under oath, the form is sent to his or her employer, and the employer automatically forwards a portion of each of the responsible parent's paychecks to DCSE.¹¹⁵ These funds are credited against the non-custodial parent's support obligation.¹¹⁶ If the non-custodial parent refuses to voluntarily assign his or her wages to the agency, the Support Enforcement Specialist notifies the parents that, as soon as the obligation is legally established, an Immediate Withholding of Earnings Form will be issued to his or her employer.¹¹⁷ The Immediate Withholding of Earnings Form operates in the same manner as a voluntary assignment: it is served upon the responsible parent's employer, who forwards a percentage of the responsible parent's pay each pay period to the Division.¹¹⁸

¹¹² Harman, *A System Overload*, 39 VA. LAW. 12, 15 (Sept. 1990) (referring to "direct pay" as an alternative to DCSE involvement in the enforcement of child support payments).

¹¹³ VA. CODE ANN. §§ 63.1-250.2 (Supp. 1988); *Support Enforcement Pamphlet*, *supra* note 67.

¹¹⁴ *Support Enforcement Pamphlet*, *supra* note 67.

¹¹⁵ *Policy Manual*, *supra* note 67, ch. E, 10 (1990).

¹¹⁶ VA. CODE ANN. § 63.1-250.3(A) (Supp. 1990). The employer's duty to comply with the withholding of earnings is set forth at VA. CODE ANN. § 20-79.3 (1990).

¹¹⁷ VA. CODE ANN. §§ 63.1-250.3, -258.1 (Supp. 1990).

¹¹⁸ *Policy Manual*, *supra* note 67, at ch. E, 10.

Wage assignments may only be released by the Division of Child Support Enforcement. These assignments will only be discontinued upon satisfaction of the responsible parent's current obligation and all arrearages owing for past support, or upon replacement by a Mandatory Withholding of Earnings or an Immediate Withholding of Earnings.¹¹⁹

Enforcement

Enforcement of child support orders is the aspect of federally mandated state programs that has brought about the greatest degree of change in states' child support systems.¹²⁰ Pursuant to the Title IV-D, Virginia's Division of Child Support Enforcement employs a number of child support enforcement techniques, including immediate and mandatory withholding of earnings, liens and foreclosures, reports to credit agencies, orders to "withhold and deliver" assets of the obligor, unemployment compensation benefits, and state and federal tax refund interception programs.¹²¹

1. Immediate Withholding of Earnings.

Once a support debt is established, each Administrative Support Order issued after July 1, 1988 is required to contain an Immediate Withholding of Earnings.¹²² The administrative order is issued to the responsible parent's employer, directing its payroll department to deduct a specified amount from each of the responsible parent's

¹¹⁹ *Id.* See *infra* notes 122-30 and accompanying text.

¹²⁰ *Private Responsibility*, *supra* note 18, at 8.

¹²¹ See *Policy Manual*, *supra* note 67, ch. F, 1-48 (1990). While the following does not constitute an in-depth exploration of the various means available for the Commonwealth to enforce child support orders, it is intended to provide an overview of the more frequently-utilized methods.

¹²² VA. CODE ANN. § 63.1-250.3(A) (Supp. 1990).

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paychecks.¹²³ The responsible parent may appeal the Immediate Withholding of Earnings, but must limit any objections to the issue of whether he/she actually owes a support obligation or to the accuracy of the information appearing on the Administrative Support Order.¹²⁴ In the event of an appeal, the agency may not implement any wage withholding until the Hearings Officer hearing the appeal makes a determination as to the validity of the Administrative Support Order.¹²⁵

2. Mandatory Withholding Of Earnings.

A Mandatory Withholding of Earnings (MWE) operates in a similar manner to the Immediate Withholding of Earnings. The Immediate Withholding of Earnings, an administrative enforcement technique, however, may not be used unless the responsible parent works in Virginia, holds attachable assets in the Commonwealth, or is otherwise subjected to Virginia law.¹²⁶ The MWE, though also an administrative remedy, may be used for both in-state and out-of-state cases.¹²⁷ Like an Immediate Withholding of Earnings, the Mandatory Withholding of Earnings is served upon the responsible parent's employer, and the order takes precedence over any other state law claims upon the employee's income, except for prior wage reduction orders to pay child support.¹²⁸ A responsible parent's administrative appeal rights are, as with the Immediate Withholding of Earnings, limited in scope, and may address only a mistake of fact as to the identity of the responsible parent or error in the calculation of current child

¹²³ VA. CODE ANN. § 63.1-250.3(C), (D) (1990).

¹²⁴ *Policy Manual*, *supra* note 67, at ch. F, 2a.

¹²⁵ *Id.*

¹²⁶ *Id.* at 2b.

¹²⁷ *Id.*

¹²⁸ VA. CODE ANN. § 20-79.3(A)(7) (1990).

support or arrearages owed.¹²⁹ Unlike the Immediate Withholding of Earnings, the MWE remains in effect while the responsible parent's appeal is pending. If the responsible parent is found not to be liable for all or part of the support debt being withheld from his/her wages, the agency will return any money collected during the appeal process.¹³⁰

3. Liens and Orders to Withhold and Deliver.

For the Division to establish a lien against a responsible parent's real or personal property, that parent must either reside, be employed, or hold attachable property in the Commonwealth.¹³¹ If the parent is a federal employee, a lien may be established if the responsible parent either resides or works outside of Virginia.¹³² If the responsible parent is employed outside the Commonwealth by an employer who has a registered agent in Virginia, the responsible parent's income is subject to attachment.¹³³

Orders to Withhold and Deliver also operate to attach the responsible parent's property, but where a lien serves as an encumbrance of the responsible parent's real or personal property,¹³⁴ an Order to Withhold and Deliver is generally used to collect delinquent, not current support obligations, by collecting the responsible parent's financial holdings, such as stocks, bonds, bank accounts, and trust account income.¹³⁵ Orders to Withhold may be sent to all of the holders of the responsible parent's assets

¹²⁹ *Policy Manual*, *supra* note 67, at ch. F, 6a (1990).

¹³⁰ *Id.*

¹³¹ *Id.* at 9.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *See id.*

¹³⁵ *Id.* at 10.

until the amount of debt owed by the responsible parent is collected.¹³⁶ When the agency serves the holders of the responsible parent's assets with the order to withhold, it must similarly serve the responsible parent and afford him or her the right to an administrative appeal.¹³⁷ If the Division wins the appeal, it sends an Order to Deliver to the holders of the responsible parent's assets.¹³⁸

4. Tax refund collection.

Interception of responsible parents' state and federal tax refunds operates as a form of withholding of the refunds for the satisfaction of arrearage debts.¹³⁹ Before any funds may be collected in this manner, the Internal Revenue Service Enforcement provides the responsible parent with advance notice that the support obligation had been forwarded to the agency for collection, and informs the parent of his/her right to administrative review of this decision.¹⁴⁰ The responsible parent is entitled to not only the administrative review, but also an administrative appeal and judicial review of the certification of his debt for collection.¹⁴¹ The responsible parent's tax refund is returned to him/her if DCSE had mistakenly certified the arrearage debt to the IRS, the responsible parent has fully paid his or her debt, or the total amount collected from his state and federal tax refunds exceeds the amount certified for collection.¹⁴²

As a last resort, any IV-D agency may request, through the federal Office of Child Support Enforcement, full collection services by the Internal Revenue Service of

¹³⁶ *Id.*

¹³⁷ *Id.* at 10-11.

¹³⁸ *Id.* at 10.

¹³⁹ *Implications, supra* note 16, at 310.

¹⁴⁰ *Policy Manual, supra* note 67, ch. F, 22 (1990).

¹⁴¹ *Id.* at 23.

¹⁴² *Id.*

any delinquent support.¹⁴³ To qualify for this collection assistance, the agency must "have made reasonable efforts to collect child support without success,"¹⁴⁴ the obligation must be legally enforceable (either in the form of a court order or an Administrative Support Order), and the amount certified for collection must exceed \$750.¹⁴⁵

Interaction with the Division of Child Support Enforcement

One of the objectives of the Division of Child Support Enforcement is to "maximize the use of non-attorneys to the extent permitted by law"¹⁴⁶ in providing its services to citizens of the Commonwealth. However, there is still a need for attorney interaction with the Division. Responsible parents may be injured by the expedited procedures practiced by the Division, and their due process rights may be threatened by the child support enforcement's collections procedures.¹⁴⁷ IV-D agencies may harm the custodial parents they were designed to assist,¹⁴⁸ particularly in jurisdictions where, as in Virginia, the IV-D agency is still working to establish itself. Attorneys involved with the system in those jurisdictions can help the establishment process by increasing

¹⁴³ *Id.* at 26. For a discussion of the IRS "full collection services," *see supra* notes 49-52 and accompanying text.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 27.

¹⁴⁶ *Id.* at ch. A, 3.

¹⁴⁷ *See* Cipriani, *Child Support Enforcement Curriculum: Defenses*, 36 *Juv. & Fam. Ct. J.* 115 (Fall 1985) (defenses to child support orders and actions); Barber, *Update on Title IV-D*, 1 *AM. J. FAM. L.* 383, 389 (1987) (questionable constitutional validity of wage withholding regulations that do not provide opportunities for responsible parents to challenge "the jurisdictional validity of the underlying order").

¹⁴⁸ *See Harman, supra* note 112, at 12, 12-13 (despite "good intentions," Virginia's conversion from the court collection system to a IV-D system resulted in chaotic attempts to coordinate support funds for both AFDC and non-PA custodial parents).

their awareness of the agency's status and growth and advising clients of alternative means of support enforcement.¹⁴⁹

CONCLUSION

Despite some of the difficulties of implementing a comprehensive program to effectively collect and enforce child support without infringing upon the constitutional rights of the non-custodial parent, efforts to ensure such a system are essential for the nurturing and protection of America's children. A unified national child support enforcement program affords children in all of the states an opportunity for fair and consistent child support, helps keep custodial parents from finding it necessary to turn to public assistance for support, and establishes a proportionate share of child rearing responsibility upon each parent.

Virginia's Division of Child Support Enforcement reflects the Commonwealth's concern for and commitment to this unified national system. By consolidating child support issues into a single agency, the Commonwealth relieves Virginia's court system of many enforcement and paternity issues, and ensures that the children of Virginia are at least as well cared for as children throughout the United States.

¹⁴⁹ *Id.* at 15.