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# Wills, Trusts and Estates (Annual Survey of Virginia Law, 1987-88)

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## Recommended Citation

J. Rodney Johnson, *Wills, Trusts and Estates*, 22 U. Rich. L. Rev. 759 (1988)

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## WILLS, TRUSTS, AND ESTATES

*J. Rodney Johnson\**

The 1988 session of the General Assembly enacted legislation dealing with wills, trusts, and estates that added, amended, or repealed a number of sections of the Code of Virginia (the Code). In addition to this legislation, there were six cases from the Virginia Supreme Court, and one case from the Fourth Circuit Court of Appeals, in the year ending June 1, 1988, that involved issues of interest to both the general practitioner and the specialist in wills, trusts, and estates. This article analyzes each of these legislative and judicial developments.<sup>1</sup>

### I. 1988 LEGISLATION

#### A. *Illegitimate Persons Taking by Intestacy, Will, or Trust*

In 1978, the General Assembly rewrote the succession laws relating to illegitimate persons.<sup>2</sup> This amendment provided that no intestate succession claim based on the relationship between a person born out of wedlock and a parent would be recognized unless certain steps were taken within one year of the parent's death.<sup>3</sup> There are three exceptions to this relatively short, one-year limitations period. The third exception applies when the relationship between the child and its parent is established "by a previously concluded proceeding pursuant to the provisions of § 20-61.1."<sup>4</sup> Section 20-61.1, of the Code dealt with the support, maintenance and education of illegitimate children by their father. The 1988

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1. In order to facilitate the discussion of numerous Code of Virginia sections, they will be referred to in the text by their section numbers only. Unless otherwise stated, those section numbers will refer to the latest printing of the old sections and to the 1988 supplement for the new sections.

2. Act of Apr. 8, 1978, ch. 647, 1978 Va. Acts 1046. The background of this legislation is discussed in Johnson, *Inheritance Rights of Children in Virginia*, 12 U. RICH. L. REV. 275 (1978).

3. VA. CODE ANN. § 64.1-5.1(3) (Repl. Vol. 1987).

4. *Id.* § 64.1-5.1(3)(iii).

Session repealed section 20-61.1 and replaced it with new provisions governing proceedings to determine parentage.<sup>5</sup> However, no corresponding amendment was made to section 64.1-5.1(3), which continues to refer to non-existent section 20-61.1 instead of to the new parentage provisions.

In addition to imposing the short statute of limitations on illegitimate persons, the 1978 session of the General Assembly limited the evidence that illegitimate persons could use to establish paternity in intestate succession cases to the six specific categories set forth in section 64.1-5.2.<sup>6</sup> In order to eliminate the need for an illegitimate person to prove paternity twice in some cases—once for support and once for intestate succession—the final sentence of this evidence-limiting section provides:

If a proceeding has been initiated and concluded pursuant to § 20-61.1 and the court enters a judgment against a man for the support, maintenance and education of a child as if the child were born in lawful wedlock to the man, that judgment shall be sufficient evidence of paternity for the purposes of this section.<sup>7</sup>

Again, the reference to non-existent section 20-61.1 in the evidence-limiting section has not been replaced by a reference to the corresponding section in the new support provisions.

Lastly, relating to the interpretation of wills and trusts, section 64.1-71.1 provides that “persons born out of wedlock are included in class gift terminology or terms of relationship in accordance with rules for determining relationships for purposes of intestate succession” unless a contrary intent appears on the face of the document involved.<sup>8</sup> The reference in section 64.1-71.1 to “rules for determining relationships for purposes of intestate succession”<sup>9</sup> demonstrates that this particular problem of establishing parent-child relationships is not confined to intestate succession cases, but also extends to wills and inter vivos trusts.

The foregoing appears to represent a simple oversight which will undoubtedly be corrected in the 1989 session. In the interim, the

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5. Act of Apr. 20, 1988, chs. 866, 878, 1988 Va. Acts 1789, 1811 (enacting Ch. 3.1, tit. 20, Proceedings to Determine Parentage, codified at VA. CODE ANN. §§ 20-49.1 to -49.8; repealing VA. CODE ANN. §§ 20-61.1, .2).

6. VA. CODE ANN. § 64.1-5.2 (Repl. Vol. 1987).

7. *Id.*

8. *Id.* § 64.1-71.1.

9. *Id.*

fact that sections 64.1-5.1(3) and 64.1-5.2 still refer to non-existent section 20-61.1 may be sufficient evidence, not only of an obvious oversight, but also of a legislative intent that a successfully concluded support proceeding under the successor provisions to section 20-61.1 be given the same weight as a proceeding under the original section.

### B. Clerks' Fees and Probate Tax—Threshold Amounts

In 1987, section 26-12.3 was amended to provide that when an estate does not exceed \$5,000 and an heir, beneficiary, or creditor whose claim exceeds the value of the estate seeks to qualify as personal representative, the clerk shall waive (i) payment of tax or court costs upon such qualification, (ii) inventory under section 26-12, and (iii) settlement under section 26-17.<sup>10</sup> Prior to the 1987 amendment, the threshold amount was \$500.<sup>11</sup>

Continuing this movement in 1988, the General Assembly amended section 14.1-112 which formerly provided that a clerk of circuit court shall not charge any fee for appointing and qualifying any personal representative, committee, trustee, guardian, or other fiduciary for estates of \$500 or less.<sup>12</sup> This amendment increased the threshold amount to \$5,000.<sup>13</sup>

Similarly, the General Assembly amended section 58.1-1712 to raise the threshold amount of tax imposed on the probate of every will or grant of administration not exempt by law from \$1,000 to \$5,000.<sup>14</sup> Section 58.1-1712 formerly provided for the imposition of a tax in the amount of (i) \$1.00 on the first \$1,000 of estate assets, and (ii) \$.10 on each additional \$100 of estate assets.<sup>15</sup>

### C. Clerks' Fees and Probate Tax—Delayed Payment for Corporate Fiduciaries

As previously noted, a fiduciary must normally pay certain fees, costs, and taxes in order to qualify.<sup>16</sup> The mandatory payment of these charges as a part of the fiduciary's qualification creates a cer-

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10. VA. CODE ANN. § 26-12.3 (Cum. Supp. 1988).

11. *Id.* § 26-12.3 (Repl. Vol. 1985).

12. *Id.* § 14.1-112(4).

13. *Id.* § 14.1-112(4) (Cum. Supp. 1988).

14. *Id.* § 58.1-1712.

15. *Id.* § 58.1-1712 (Repl. Vol. 1984).

16. See *supra* notes 10-15 and accompanying text.

tain awkwardness from the standpoint of the prospective fiduciary. Although these charges are properly payable from estate assets, there are no such assets available to the fiduciary at the time of qualification. The fiduciary controls these assets only after the fiduciary has qualified in the clerk's office. Thus, the prospective fiduciary must normally pay these charges personally and then obtain reimbursement from estate assets after qualification. In some estates, this can be a significant amount. In every estate, this arrangement prevents the fiduciary from having a complete register of estate checks made out to original payees, which is desirable for record-keeping and accounting purposes.

This problem has now been addressed, insofar as corporate fiduciaries are concerned, by an amendment to section 6.1-18. This section now provides that when corporate fiduciaries "qualify on any office of trust, the clerk in lieu of collecting the fees under Title 14.1 and probate taxes may render a bill or statement to such bank or trust company to be paid within five business days."<sup>17</sup> Clearly, problems could arise if delayed billing was available to everyone seeking to qualify as a fiduciary. It is submitted, however, that this professional courtesy might also be extended to attorneys qualifying as fiduciaries without creating any undue risk.

#### D. *Trustee Powers—Judicial Granting*

Section 64.1-57.1 permits the circuit court, upon petition of a personal representative, to grant any of the boilerplate fiduciary powers found in section 64.1-57 to the personal representative.<sup>18</sup> The 1988 amendment to this section allows the circuit court to grant such powers to trustees of inter vivos or testamentary trusts as well.<sup>19</sup>

#### E. *Nonresident Decedents—Tangible Personal Property*

Section 64.1-130 provides that when a person not domiciled in Virginia dies entitled to intangible personal property in Virginia, the one holding or owing such property (i) shall retain the possession thereof for ninety days following the decedent's death, and (ii) thereafter shall, in the absence of legal notice of any lien or encum-

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17. VA. CODE ANN. § 6.1-18 (Repl. Vol. 1988).

18. VA. CODE ANN. § 64.1-57.1 (Cum. Supp. 1988).

19. *Id.*

brance thereon, or the appointment of a personal representative in Virginia, pay the same over to the decedent's domiciliary personal representative if its value is less than \$2,500. If the intangible personal property's value is \$2,500 or more, the one holding or owing such property must also give notification by newspaper of their intent to pay. This notice must be given once a week for four successive weeks. In addition, payment must not be made until thirty days following the completion of this publication.<sup>20</sup>

The 1988 amendment to section 64.1-130 extends this optional method of procedure to tangible personal property.<sup>21</sup> This optional method will eliminate the need to qualify an ancillary personal representative in Virginia for the sole purpose of having someone with the power to give a Virginian in possession of a nonresident decedent's tangible personal property a legally effective receipt for the transfer of this property.

#### F. *Totten Trust—Clarification*

The common law "Totten Trust,"<sup>22</sup> typically created by one depositing funds in a bank in the depositor's name "in trust for" another, was somewhat vaguely addressed in 1972 by the enactment of section 6.1-73.1.<sup>23</sup> This form of account, along with other forms of multiple party accounts in all financial institutions, was the subject of a comprehensive enactment by the 1979 session of the General Assembly.<sup>24</sup> Section 6.1-73.1, which should have been repealed as surplusage as a part of this 1979 enactment, was repealed in 1988.<sup>25</sup> This repeal does not eliminate the Totten Trust in Virginia. The Totten Trust, along with the P.O.D. account and the several forms of joint accounts, continues to be comprehensively governed by sections 6.1-125.1 through 6.1-125.16.<sup>26</sup>

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20. VA. CODE ANN. § 64.1-130 (Cum. Supp. 1988).

21. *Id.*

22. This bank account trust concept was created by the court in *In re Totten*, 179 N.Y. 112, 71 N.E. 748 (1904).

23. VA. CODE ANN. § 6.1-73.1 (repealed 1988).

24. For a discussion of the background of this legislation, see Johnson, *Joint, Totten Trust, and P.O.D. Bank Accounts; Virginia Law Compared to the Uniform Probate Code*, 8 U. RICH. L. REV. 41 (1973).

25. See VA. CODE ANN. § 6.1-73.1 (Repl. Vol. 1988).

26. *Id.* §§ 6.1-125.1 to .16.

### G. *Investments—Corporate Fiduciaries*

New section 26-40.2 provides that a corporate fiduciary may purchase any state or municipal government security otherwise authorized by title 26 during the existence of any underwriting or selling syndicate. The purchase is authorized even though the fiduciary, or an affiliate under common ownership, is participating or has participated as a member of the syndicate underwriting the security in question (i) if the fiduciary does not purchase the security from itself or any of its affiliates, (ii) if the governing instrument or a court order does not specifically direct otherwise, and (iii) subject to section 26-45.1 and the common law duties of a fiduciary.<sup>27</sup>

### H. *Power to Invade Principal—Constructional Rule*

Generally, a decedent's gross estate for federal estate tax purposes includes the value of property over which the decedent had a general power of appointment at the time of his death.<sup>28</sup> One who exercises or releases a general power of appointment over property during his lifetime is treated as a transferor of the property in question for federal gift tax purposes.<sup>29</sup> A person given a general power of appointment over property is treated as the owner of that property for income tax purposes.<sup>30</sup> To avoid this potential tax exposure, an attorney naming a beneficiary as a trustee, absent some overriding reason to the contrary, would typically confer invasion powers for the benefit of this trustee/beneficiary upon someone other than the trustee/beneficiary.

New section 64.1-67.2 creates several constructional rules designed to reduce or avoid a tax exposure in those instances where the drafting attorney has mistakenly provided for a beneficiary to have the power to invade principal for the beneficiary's own benefit. These rules apply "[i]n the absence of an express provision in the will or trust instrument to the contrary or a construction to the contrary by a court."<sup>31</sup> First, if there is more than one trustee, the power of invasion for the benefit of each trustee/beneficiary (or anyone whom the trustee/beneficiary as an individual

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27. VA. CODE ANN. § 26-40.2 (Cum. Supp. 1988).

28. I.R.C. § 2041 (1982).

29. *Id.* § 2514.

30. *Id.* § 678 (West 1967 & Supp. 1988).

31. VA. CODE ANN. § 64.1-67.2 (Cum. Supp. 1988).

has a duty to support) must be construed as conferred only upon the other trustees. Second, if the trustee/beneficiary is the sole trustee, the power is exercisable only for the trustee/beneficiary's health, education and support, or any combination thereof. This restriction will prevent the power from being treated as a general power of appointment for estate tax<sup>32</sup> or gift tax<sup>33</sup> purposes.<sup>34</sup>

While this legislation will be beneficial, it will also create problems in connection with certain areas of drafting for the marital deduction. To qualify a transfer of property for the estate tax marital deduction, the drafter may give the surviving spouse all of the income from the property for life, plus a power of appointment over the property "exercisable in favor of such surviving spouse."<sup>35</sup>

In those cases where the spouse is not a trustee, or where the power of appointment is a testamentary power, there will not be any problem. There will be a problem, however, in those cases where the spouse is a fiduciary and is also given such a power, exercisable inter vivos, in order to qualify for the marital deduction. If the spouse is the sole trustee, section 64.1-67.2 reduces the power from a general to a non-general power, and the marital deduction is lost. If the spouse is one of several trustees, section 64.1-67.2 takes the power completely away from the surviving spouse, and the marital deduction is again lost. If the drafter has provided for the surviving spouse to have both an inter vivos and a testamentary general power, the loss of the inter vivos power will not result in a loss of the marital deduction. The loss of the inter vivos power will eliminate, however, the lifetime control that the parties intended the surviving spouse to have and the tax advantage sought by section 64.1-67.2 because the spouse will still have the income from, and a general testamentary power over, the property.

Although this section creates only a constructional rule to apply "[i]n the absence of an express provision in the will or trust instru-

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32. I.R.C. § 2041(b)(1)(A) (1982).

33. *Id.* § 2514(c)(1).

34. For income tax purposes, "[s]ubsection (a) [the general rule providing for inclusion] shall not apply with respect to a power which has been renounced or disclaimed within a reasonable time after the holder of the power first became aware of its existence." *Id.* § 678(d).

35. *Id.* § 2056(b)(5). In addition to qualifying for the marital deduction by making the spouse's power exercisable in favor of the spouse, this section goes on to provide "or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others." *Id.* The corresponding gift tax provision is found in I.R.C. § 2523(e) (West Supp. 1988).



ment to the contrary or a construction to the contrary by a court,"<sup>36</sup> no pre-existing documents can have such a provision. Moreover, a requirement that courts construe *all* affected documents would be undesirable. Accordingly, this section should be corrected or repealed in the 1989 session.

### I. *Power to Divide Trusts*

An attorney might empower a fiduciary to divide one trust into two or more separate trusts for three reasons. First, in the area of marital deduction QTIP trusts, the power to divide allows a fiduciary to segregate the qualified and the nonqualified portions of a trust when a partial election is made under the Internal Revenue Code section 2056(b)(7).<sup>37</sup> Second, in the area of generation-skipping trusts, the power to divide permits a fiduciary to obtain one trust with an inclusion ratio of zero and another trust with an inclusion ratio of one. This avoids creating just one trust with a fractional inclusion ratio under Internal Revenue Code section 2642.<sup>38</sup> Third, in the area of Subchapter S corporations, the power to divide permits a fiduciary to obtain a number of single beneficiary trusts, each of which would meet the shareholder requirement of a "small business corporation" by virtue of Internal Revenue Code section 1361(c)(2)(A)(i).<sup>39</sup>

New Virginia Code section 55-19.3<sup>40</sup> provides a remedy for cases where the drafter has not given the fiduciary a power to divide. Section 55-19.3 confers authority upon the circuit court to make such a division if the court determines that dividing the trust will not defeat or materially impair the accomplishment of trust purposes or the interests of the beneficiaries. This section further provides (i) that a trustee, beneficiary or remainderman may request the division, (ii) that the section's provisions are declaratory of existing law,<sup>41</sup> and (iii) that in those cases where the trust instrument permits division, the section does not prevent such trust division without judicial approval.

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36. VA. CODE ANN. § 64.1-67.2 (Cum. Supp. 1988).

37. I.R.C. § 2056(b)(7) (West Supp. 1988).

38. *Id.* § 2642.

39. *Id.* § 1361(c)(2)(A)(i).

40. VA. CODE ANN. § 55-19.3 (Cum. Supp. 1988).

41. While providing that its provisions are declaratory of existing law, section 55-19.3 also provides that "however, this declaration shall not be construed so as to affect the rights of the parties to any action, litigation, or proceeding commenced by filing prior to July 1, 1988." *Id.*

### J. *Powers of Attorney—“Staleness”*

When an executor or administrator of a decedent's estate seeks to sell or transfer stock that is registered in the decedent's name, transfer agents regularly require an official copy of the fiduciary's letter of appointment, dated within the preceding ninety days. If the clerk of court issued this document more than ninety days prior to the transaction, the letter of appointment is deemed “stale,” and therefore not acceptable to the transfer agent. This staleness problem in decedent's estates is a minor nuisance that can be cured simply by obtaining a new certificate of appointment from the clerk of court. This new certificate will bear the date of its issuance instead of the date of the original certificate's issuance.

A similar problem can appear when agents, acting under a durable power of attorney, seek to sell property or take other action on behalf of an incompetent principal. Not infrequently, the principal has executed the power of attorney a number of years previously. Not surprisingly, transfer agents, title insurance companies, and others have begun to question the continuing authority of the agent under these old documents. This issue represented a major problem. Unlike the clerk's certificate, the execution of a new power of attorney is not possible due to the principal's lack of capacity.

To eliminate the staleness issue in power of attorney cases, section 11-9.2 was amended to provide that “[u]nless a power of attorney provides for a termination date which has occurred, the lapse of time since its execution shall not affect its validity or any actions taken thereunder.”<sup>42</sup>

### K. *Power of Attorney—Funeral Instructions*

In a traditional sense, there are no property rights in a decedent's body, although the Virginia Supreme Court recognizes that the decedent's survivors have the right to possess and make final disposition of the body.<sup>43</sup> In a case focusing on the right to choose the place of a decedent's burial, the court concluded that this right “rests with his personal representatives, his widow, or his next of kin. Ordinarily, personal representatives are not appointed until later and so this choice usually is made by the family. As between

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42. VA. CODE ANN. § 11-9.2(d) (Cum. Supp. 1988).

43. *Goldman v. Mollen*, 168 Va. 345, 191 S.E. 627 (1937).

them, the wishes of the widow should prevail."<sup>44</sup> This statement, focusing only on the rights of the survivors, is easily interpreted to mean that one does not have the authority to control the incidents of his own funeral. Absent a clear statement of law, the only way a person might insure that his wishes be respected would be to communicate those wishes to the appropriate family member and then provide in his will for the disinheritance of that person if those wishes were ignored.

New section 11-24.1 of the Virginia Code resolves the problems in this area by providing that "[a]ny person may designate in writing, signed and notarized and accepted in writing by the person so designated the individual who shall make arrangements for his burial or the disposing of his remains upon his death."<sup>45</sup>

#### L. *The Uniform Transfers to Minors Act*

The Uniform Transfers to Minors Act (UTMA)<sup>46</sup> is an extensive revision and restatement of the Uniform Gift to Minors Act (UGMA).<sup>47</sup> In 1983, the National Conference of Commissioners on Uniform State Laws approved and recommended the UTMA for enactment in all jurisdictions.<sup>48</sup> Some version of UGMA had been enacted by every state.<sup>49</sup> With Virginia's enactment of UTMA in 1988,<sup>50</sup> at least 29 jurisdictions now have replaced UGMA with UTMA.<sup>51</sup>

A detailed examination of UTMA or a comparison with UGMA is not feasible within the confines of this annual review.<sup>52</sup> However, to whet the reader's interest, two differences are noted. First, whereas UGMA can be used to hold only certain kinds of intangible personal property, UTMA can be used to hold any kind of

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44. *Id.* at 354, 191 S.E.2d at 631 (citation omitted).

45. VA. CODE ANN. § 11-24.1 (Cum. Supp. 1988).

46. UNIF. TRANSFERS TO MINORS ACT, 8A U.L.A. 176 (Supp. 1988).

47. UNIF. GIFTS TO MINORS ACT, 8A U.L.A. 317 (1983).

48. UNIF. TRANSFERS TO MINORS ACT, 8A U.L.A. at 176 (Supp. 1988).

49. UNIF. GIFTS TO MINORS ACT, 8A U.L.A. 317 (1983).

50. Act of Apr. 4, 1988, ch. 516, 1988 Va. Acts 626 (codified at Va. Code Ann. §§ 31-37 to -59 (Cum. Supp. 1988)).

51. See UNIF. TRANSFERS TO MINORS ACT, 8A U.L.A. at 176 (Supp. 1988).

52. Those wishing an authoritative explanation of UTMA may write the National Conference of Commissioners on Uniform State Laws, 676 N. St. Clair St., 1700, Chicago, Ill. 60611, for a copy of the Act, which contains a prefatory note and the official comments to each of its sections, explaining their operation.

property, real or personal, tangible or intangible.<sup>53</sup> Second, UGMA could be used only for lifetime gifts by a donor, or transfers by a fiduciary when so authorized by the governing document. UTMA not only continues these usages, but provides for transfers by fiduciaries when the governing document is silent, when there is no document, or when a third party either holds a minor's property or owes a liquidated debt to a minor, and the minor does not have a conservator.<sup>54</sup> Because of this latter expansion, the name of the UTMA includes the word "transfers" instead of "gifts."

The new law provides for its applicability to prospective transfers where documents make reference to UGMA.<sup>55</sup> Thus, it will not be necessary to revise existing wills or amend trust documents solely for this purpose. Except to the extent that any constitutionally vested rights are impaired, the new law provides for its applicability to existing custodianships created under UGMA.<sup>56</sup> Although the states are encouraged to adopt uniform laws with little or no amendment, the Virginia General Assembly made several significant changes to UTMA.<sup>57</sup>

53. VA. CODE ANN. § 31-37 (Cum. Supp. 1988) (definition of "custodial property").

54. *Id.* §§ 31-40 to -43. Transfers not authorized by a governing document and transfers made by third party obligors must have court approval if the amount exceeds \$10,000.

55. *Id.* § 31-57(1).

56. *Id.* § 31-58.

57. The following are amendments to UTMA that were proposed by the Virginia Bar Association section on Wills, Trusts, and Estates, and which were accepted, *mutatis mutandis*, by the General Assembly. The Section on Wills, Trusts, and Estates operated under the leadership of a Committee consisting of Dennis I. Belcher, Dexter C. Rumsey, III, Jane L. Schwarzschild and David D. Addison, Chairman. The language that follows is taken from this Committee's report.

#### VIRGINIA AMENDMENTS TO UTMA

##### Section 1

After the word [Act] omit colon and add the words "unless the context otherwise requires:"

##### Section 1(1)

Substitute the age "18" for the age "21."

*Explanation*—The Committee recommends retaining age 18 as the age of termination of a custodianship and giving the transferor the option of extending the custodianship to age 21 as may be done under existing law.

##### Section 1(5)

Change to read as follows: "Court" means the circuit court having appropriate jurisdiction.

##### Section 1(11)

Substitute the age "18" for the age "21."

##### Section 6(a)

Substitute the word "an" for the word "another" before the word "adult."

*Explanation*—The Committee sees no reason to prohibit a fiduciary from making a transfer to himself as custodian.

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**Section 6(b)**

Same change as in § 6(a).

**Section 6(c)**

Add the words "or is made by a conservator" at end of sentence.

*Explanation*—The Committee approves of the \$10,000 ceiling suggested in the Act as the amount above which court approval should be required. The Committee also recognizes that any transfer made by a guardian will require advance court approval pursuant to Code § 31-10.

**Section 7(c)**

Add the words "in which event such transfer may be made if authorized by the court." at end of sentence.

*Explanation*—The Committee recommends that transfers from obligors which exceed \$10,000 in value should be allowed, provided court authorization is obtained.

**Section 9(a)(8)**

Add the following as new paragraph (8):

Nothing in this paragraph (a) shall be deemed to prohibit the creation or transfer of custodial property from a personal representative, trustee or conservator to itself as custodian pursuant to Sections 5, 6 and 7.

*Explanation*—The Committee recognizes that with respect to certain types of property, transfer of possession and control is necessary in order to make a completed gift. Thus the Act does not allow the transferor to designate himself as custodian with respect to those types of property. However, this reasoning would not apply to a transfer from a fiduciary to himself as custodian. Thus the Committee recommends adding the foregoing exception.

**Section 9(d)**

Add the following as new paragraph (d):

A transferor who transfers property to a minor under Section 4 or 5 may expressly provide that the custodian shall deliver, convey or pay it over to the minor on his attaining the age of 21 years by inclusion of the parenthetical "(21)" after the words "Virginia Uniform Transfers to Minors Act" or substantially similar language.

*Explanation*—This provision is substantially identical to § 31-27(e) in our existing law, and is consistent with the Committee's recommendation that age 18 should be the age of termination unless the transferor provides that the custodianship shall continue until age 21.

**Section 9(e)**

Add the following as new paragraph (e): [Note—This amendment was instead made at § 9(a)(5).]

A transfer of real property to a minor pursuant to paragraph (5) of subsection (a) may be made as his or her equitable separate estate in accordance with § 64.1-21.

*Explanation*—This additional paragraph is intended to enable a transferor to transfer real property to a minor as his or her equitable separate estate, thereby excluding any rights to dower or curtesy in such property.

**Section 12(b)**

In the second line before the word "property" insert the words "such person's own" and omit the words "of another" after the word "property."

*Explanation*—This change is suggested to coincide with Virginia's prudent man standard set forth in § 26-45.1.

**Section 12(c)**

In the last line omit the word "irrevocable" and add the words "during the period of the custodianship" at the end of the sentence.

*Explanation*—The Committee sees no reason to require that the beneficiary designation be irrevocable, so long as the minor is beneficiary during the period of the

custodianship.

Section 13(a)

In the third line after the word "property," insert the following:

. . . which shall be deemed to include but not be limited to, those powers set forth in § 64.1-57 as of the date the Custodian acts, . . .

*Explanation*—The Committee believes the custodian's powers should be defined to include those powers set forth in § 64.1-57.

Section 18(a)

In the second line omit the words "a valid disclaimer [under the Uniform Disclaimer of Property Interests Act of the Enacting State]" and substitute the words "written notice."

*Explanation*—Virginia's disclaimer law does not provide for a disclaimer of a custodianship. The Committee believes that written notice should be sufficient for this purpose.

Section 18(b)

In the last line inert the word "or" before the word "becomes," insert a period after the word "incapacitated" and omit the words "or is removed."

*Explanation*—The Committee does not believe a custodian who has been removed should appoint his successor.

Section 19(a)

Omit all wording through the word "representative" in the third line and substitute the following:

A transferor, the legal representative of a transferor, an adult member of the minor's family, a guardian of the person of the minor, the conservator of the minor, or the minor if the minor has attained the age of 14 years . . .

*Explanation*—This wording is suggested in order to be consistent with the working of § 18(f).

Section 20(1)

Substitute the age "18" for the age "21," omit all wording following the word "age" and substitute the following:

. . . or if the transfer was made in the manner prescribed in Section 9(d), the minor's attainment of 21 years of age; or . . .

*Explanation*—This change is consistent with earlier changes providing for termination of a custodianship at age 18 unless 21 was specified at the time of a transfer under Section 4 or 5.

Section 20(2)

Omit this paragraph and change paragraph (3) to (2).

*Explanation*—Paragraph (2) is not necessary since age 18 is retained as the age of termination and will therefore be applicable to any transfers under Sections 6 or 7.

Section 22(b)

Omit the words "or extends the duration of custodianships in existence on the effective date of this Act."

*Explanation*—The Committee believes this wording is unnecessary in view of our proposal to substitute age 18 for age 21 as the normal termination date as under existing law.

Section 22(c)

Omit this paragraph.

*Explanation*—The Committee believes this wording is unnecessary in view of our proposal to substitute age 18 for age 21 as the normal termination date as under existing law.

Section 27

Refer to Sections 31-26 through 31-36 of the Virginia Code.

## II. JUDICIAL DECISIONS

A. *Wills—Formalities of Execution*

In *Martin v. Coleman*,<sup>58</sup> the question before the Supreme Court of Virginia was whether a typed writing, purporting to be the joint will of Jake Coleman and Maudie Coleman, had been executed with the formalities required under Virginia law. Both attesting witnesses testified at the trial. In summing up their testimony, the court concluded that "each and every statutory requirement was fully and completely established by Hurt's testimony,"<sup>59</sup> and that "Whitt's testimony did not contradict Hurt's testimony; it simply did not cover every aspect of the execution of the paper."<sup>60</sup>

Relying on a Virginia case with similar facts decided over a century ago, the court reaffirmed that "the proper rule is that any one subscribing witness can prove the execution and attestation of the will by himself and the others, and if his testimony is satisfactory that will suffice."<sup>61</sup> In addition, the court also noted that (i) "when a person who has signed a will as a witness 'undertakes to invalidate the will his testimony is to be received with suspicion,'"<sup>62</sup> and (ii) "[i]t has long been the rule in Virginia that courts lean strongly in favor of upholding the validity of wills fairly made, where there is no imputation of fraud. Toward that end, every reasonable presumption ought to be made in favor of finding proper execution of a will."<sup>63</sup> Accordingly, as Hurt's credibility as a witness was not at issue, the case was remanded to the trial court with instructions to admit the writing to probate.

B. *Wills—Testamentary Intent*

In *Thomas v. Copenhaver*,<sup>64</sup> a sheet of paper found lying loose in the decedent's chest of drawers "among bank books, insurance policies, savings bonds, and 'quite a bit of correspondence'"<sup>65</sup> was admitted to probate as the decedent's will. The paper, which was entirely in the decedent's handwriting, reads in full as follows:

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58. 234 Va. 509, 362 S.E.2d 732 (1987).

59. *Id.* at 513, 362 S.E.2d at 735.

60. *Id.*

61. *Id.* at 512-13, 362 S.E.2d at 735.

62. *Id.* at 513, 362 S.E.2d at 735 (quoting *Cheatam v. Hatcher*, 71 Va. 56, 64 (1878)).

63. *Id.* (citation omitted).

64. 235 Va. 124, 365 S.E.2d 760 (1988).

65. *Id.* at 127, 365 S.E.2d at 762.

Will

- 3 Rag Doll in Attic—(Note pinned on her.)  
1 Diamond ring to Frances C. Lowe (my boss at N & W Ry.)  
2 If my brother does not want the car, I give it to Hazel F. Maultsby. 1846 Belleville Rd., S.W.

DIVIDE EVENLY

Grace Pearson ) 305 Preston Bluefield, W.Va.

Virginia Pearson)

Barbara J. Brown, Box 774, Spring Lake, N.C.

Mrs. Maryann Durham, Warsaw, Va. 22572

Mr. and Mrs. H.B. Bock, Blacksburg, Va.

Sara Hall—1709 Arlington Rd., S.W.

Hazel F. Maultsby

/s/Helen L. Thomas

August 13, 1972<sup>66</sup>

The first issue on appeal was whether or not this writing was executed with testamentary intent, *i.e.*, intent that this specific sheet of paper serve as the decedent's will, as opposed to a memorandum noting things to be put into the will when it is ultimately written. In this regard, Virginia follows the common law rule that "although no particular form is necessary, testamentary intent must be ascertained from the face of the document, not from extrinsic evidence."<sup>67</sup> Looking at the face of this document, the court determined that testamentary intent was evidenced by (i) the document being titled as a "*Will*," (ii) the dispositive language used in connection with the ring and car, as well as the phrase "*DIVIDE EVENLY*," and (iii) the fact that the decedent dated and signed the document at the bottom.<sup>68</sup>

The second issue was whether the words "*DIVIDE EVENLY*," followed by the names of eight persons, constituted a residuary clause leaving the residue of decedent's estate to the named persons, in equal shares. The heirs contended that the language "*DIVIDE EVENLY*" was "meaningless and ineffective because it failed to identify the property that was to be divided evenly."<sup>69</sup> Applying the settled legal principles of (i) testamentary intent be-

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66. *Id.* at 125-26, 365 S.E.2d at 761.

67. *Id.* at 127, 365 S.E.2d at 762.

68. *Id.* at 128, 365 S.E.2d at 762-63.

69. *Id.* at 128, 365 S.E.2d at 763.



ing paramount, (ii) the effectuation of all parts of a will, so far as possible, and (iii) the presumption against intestacy, the court concluded that "when the will is read as a whole, the only rational and sensible construction to be necessarily implied from the words 'divide evenly' " is that the decedent intended to make a disposition of her entire residuary estate.<sup>70</sup> Accordingly, the trial court's decision was affirmed, in favor of the will's validity and in favor of the eight named persons as residuary beneficiaries of the decedent's estate.

### C. *Oral Contract to Devise Realty*

In *Adams v. Adams*,<sup>71</sup> the complainants alleged that the decedent had orally promised to devise to them a half-interest in certain real estate in exchange for their personal services rendered to another. The complainants further alleged that they had performed in full, that the decedent had breached the contract by not devising the property to them, and that they were entitled to specific enforcement in equity. The chancellor submitted the factual issues to a jury in three interrogatories that correctly reflect Virginia law on the enforcement of oral contracts to devise realty:

[F]irst, whether "there [was] clear and convincing evidence of the existence of any oral agreement"; second, "what were the terms of any such agreement"; and third, whether the complainants had performed "so much of their part of [any such] agreement . . . that refusal of full execution of the agreement would operate as a fraud upon them."<sup>72</sup>

In answer to the first interrogatory, the jury found that there was an agreement. In answer to the second interrogatory, however, the jury found that this agreement did not contain the alleged promise to devise. Accordingly, the jury responded to the third interrogatory by reporting that to deny specific performance of the non-existent promise to devise would not be unjust or inequitable. The chancellor adopted these factual findings and dismissed the bill of complaint by way of final decree. An appeal was granted in

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70. *Id.* at 129, 365 S.E.2d at 763.

71. 233 Va. 422, 357 S.E.2d 491 (1987).

72. *Id.* at 425-26, 357 S.E.2d at 493.

this case to review certain evidentiary rulings made by the chancellor.<sup>73</sup>

#### D. *Oral Contract to Deed Realty*

*Beach v. Virginia National Bank*<sup>74</sup> is a real estate case that is significant due to dictum relating to contracts to devise real estate by will. In that case, the complainant's work was to serve as consideration for the alleged promise to convey, and the absence of any stated time period for that work was fatal to the complainant's claim. Contrasting the alleged promise to convey with a promise to devise, the court stated that in cases concerning a promise to devise, "it can be assumed that the time period of work needed to supply the requisite consideration is from the start of the agreement to the death of the landowner."<sup>75</sup>

#### E. *Deed as Will Substitute—Construction*

In *Mullins v. Simmons*,<sup>76</sup> the issue before the court was the proper construction of the following language in a 1908 deed: "to Norcia B. Wysor during her natural life, and at her death to her children, if any, and if the said Norcia B. Wysor shall die without issue, then to the next of kin on her father's side."<sup>77</sup>

Norcia B. Wysor had one child, Laura. Norcia and Laura united in several conveyances of portions of the property in question in 1956 and 1960. Laura predeceased Norcia in 1973. Laura had one child, Lynn, who was surviving at the death of her grandmother, Norcia, in 1979. Lynn died in 1983, leaving her entire estate to her husband. In this action, Lynn's husband sought to eject the 1956 and 1960 grantees or their successors in interest.

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73. On the major evidentiary issue, the court held that the chancellor did not err in admitting evidence of decedent's reputation for integrity and veracity because, by Section 8.01-397 (the "dead man's statute"), "[i]n effect, the General Assembly made a decedent a *witness* (emphasis added) in any action by or against his personal representative as to any evidence relevant to a matter in issue which he could have given had he been alive at the time of the trial." *Id.* at 428, 357 S.E.2d at 494. In addition, under the rule of *George v. Pilcher*, 69 Va. (28 Gratt.) 299, 315 (1877), "whenever the character of a *witness* (emphasis added) for truth is attacked . . . the party calling him may sustain him by evidence of his general reputation for truth." *Adams*, 233 Va. at 426-27, 357 S.E.2d at 493.

74. 235 Va. 376, 367 S.E.2d 516 (1988).

75. *Id.* at 378-79, 367 S.E.2d at 518.

76. 235 Va. 194, 365 S.E.2d 771 (1988).

77. *Id.* at 195-96, 365 S.E.2d at 772.

The question posed by the deed's language was whether Laura acquired a vested remainder upon her birth, subject to partial divestment in favor of other children born to Norcia, and subject to total divestment if Norcia died without issue. The plaintiff claimed that Laura acquired only a contingent remainder that would fail if she did not survive Norcia. Under the vested construction (Laura being Norcia's only child, and Norcia dying with issue) the grantees from Norcia and Laura would have a perfect title. Under the contingent construction, the grantees received only Norcia's life estate and, Norcia having died, the grantees would be without title and may be ejected. Virginia follows the common law that "unless a contrary intent clearly appears from the instrument under consideration, the law favors early vesting of estates."<sup>78</sup> Applying this presumption of early vesting to the language of the deed in this case, the court affirmed the trial court's decision sustaining the grantees' demurrer to the ejectment suit brought by Lynn's successor in interest.<sup>79</sup>

#### F. *Intestacy—Deeds of Gift—Computation of Shares*

*Shannon v. Hall*,<sup>80</sup> an appeal from a partition suit, presents a computational problem that could also be encountered in the distribution of a decedent's estate. The parties to this suit received their initial interests in the property as a consequence of a co-tenant's intestate death in 1976. The co-tenant was survived by a wife (the other co-tenant) and four children. The children took their father's one-half interest in the land as his heirs, subject to their mother's dower.<sup>81</sup> The children's inheritance was followed by the execution of a deed of gift. The net effect of the deed of gift was (i) to transfer the mother's one-half interest in the land to the four children in fee simple, subject to a reserved life estate in the mother, and (ii) to transfer a complete<sup>82</sup> life estate to the mother in the one-half interest that was inherited from their father by three of the four children.

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78. *Id.* at 196, 365 S.E.2d at 772.

79. The court found the alternative arguments, that Lynn took an interest under the deed as (i) "child," (ii) "issue," or (iii) "next of kin," to be without merit. *Id.* at 197, 365 S.E.2d at 773.

80. 235 Va. 360, 368 S.E.2d 695 (1988).

81. Note that dower was only a life estate in one-third at this time. VA. CODE ANN. § 64.1-19 (1973) (amended 1977).

82. Note that the mother already had a life estate in one-third of each of the daughters' one-quarter interest in their deceased father's one-half interest.

### G. Spendthrift Trusts—Support Requirement

Section 55-19 validates spendthrift trusts not exceeding \$500,000 in actual value.<sup>83</sup> The statute protects both the income and corpus of such a trust from any voluntary conveyance attempted by the beneficiary, or from any attempt by his creditors to reach the same. In *Levey v. First Virginia Bank*,<sup>84</sup> a Fourth Circuit case, the trust's income provision stated that "[u]ntil grantor's grandson shall attain 40 years of age, the trust shall pay to or apply for the benefit of grantor's grandson in quarterly or more frequent installments, all of the net income arising from said trust."<sup>85</sup> The trust's corpus provision stated that "[u]ntil Grantor's grandson attains the age of 40, the trustee shall pay to or expend for the benefit of Grantor's grandson so much of the principal hereof as the trustee, in its sole discretion, shall deem necessary for the support, maintenance, general welfare and education of the Grantor's grandson."<sup>86</sup>

In a two to one decision, the court concluded that section 55-19 protects a beneficiary's interest in a trust from his creditors "only if the monies of the trust are to be used for the support and maintenance of the beneficiary."<sup>87</sup> Accordingly, the court affirmed the trial court's holding that creditors could reach the beneficiary's income interest in this trust, but that creditors could not reach the beneficiary's corpus interest, which was limited to "support and maintenance."

The dissent maintained that the trust's language "clearly indicates the intent of the settlor to provide a spendthrift trust."<sup>88</sup> The dissent cited the Virginia Supreme Court for the proposition that section 55-19 is to be "construed liberally and not restrictively, especially if the settlor's intent can be adduced from the instrument"<sup>89</sup> and accused the majority of an "attempt to take one section of the trust agreement out of context to defeat the settlor's intentions."<sup>90</sup>

In support of its decision, the majority opinion emphasized the

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83. VA. CODE ANN. § 55-19 (Repl. Vol. 1986).

84. 845 F.2d 80 (4th Cir. 1988).

85. *Id.* at 81-82.

86. *Id.* at 82.

87. *Id.*

88. *Id.* at 83 (Hall, J., dissenting).

89. *Id.*

90. *Id.*

absolute right of the beneficiary to receive all of the net income without any discretion being exercisable by the trustee. The court stated that:

In this regard, the cases cited by the bank for the proposition that the trust is protected as a spendthrift trust are distinguishable. Each of the cases cited by the bank holds that for an entire trust to be invulnerable to creditors, both the income and the corpus of the trust can be paid to the beneficiary only for support and maintenance.<sup>91</sup>

To the extent this language from the majority opinion suggests that for a trust to be classified as a spendthrift trust, it must *expressly* refer to "support and maintenance," the opinion appears to be contradicted by three of the four cases it cites, and the fourth case is silent on the point.<sup>92</sup> To the extent this language from the majority opinion suggests that for a trust to be classified as a spendthrift trust, expenditures therefrom must be restricted to necessary support and maintenance, the opinion appears to be contradicted by both of the decisions it cites from the Virginia Supreme Court.<sup>93</sup>

Not mentioned in either opinion in *Levey*, but also of interest in this regard, is an Attorney General's Opinion<sup>94</sup> which states that the trust instrument must express the settlor's intent to provide for the support and maintenance of the beneficiary, but that the

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91. *Id.* at 82 (citing *Rountree v. Lane*, 155 F.2d 471 (4th Cir. 1946); *In re Hersch*, 57 Bankr. 667 (Bankr. E.D. Va. 1986); *Alderman v. Virginia Trust Co.*, 181 Va. 497, 25 S.E.2d 333 (1943); *Sheridan v. Krause*, 161 Va. 873, 172 S.E. 508 (1934)).

92. Neither the word "support" nor the word "maintenance" appears in the will that was before the court in *Sheridan*. In *Rountree* and *Hersch*, the trusts provided that the income be used for the support and maintenance of the beneficiary until age 21; thereafter, the income was to be paid to the beneficiary absolutely. In both cases, the courts found the beneficiary's income interest after age 21 to be subject to a spendthrift trust. In *Alderman*, the words "support and maintenance" were used. Thus, the need for an express reference to "support and maintenance" was not an issue in the case.

93. Therein [in *Sheridan v. Krause*], it was definitely held . . . that this public policy permitted "the whole of the income or the corpus of a trust estate, not exceeding \$100,000 in actual value," [the ceiling then contained in the predecessor to present § 55-19, in which the ceiling is now \$500,000] to be held in trust for the support and maintenance of a person without being subject to alienation by him or to his debts when the creator of the trust so provides, *whether such amount be reasonably necessary or proper for his support and maintenance or not.*

*Alderman*, 181 Va. at 514, 25 S.E.2d at 340 (emphasis added) (quoting *Sheridan*, 161 Va. at 903-04, 172 S.E. at 518).

94. 1982-1983 OP. ATT'Y GEN. 641 (1982).

precise language of section 55-19 does not have to be followed. However, this opinion concludes that omission of language "equivalent" to the support and maintenance condition "prevents the trust from qualifying as a 'spendthrift trust.'"<sup>95</sup>

Because of the uncertainty in this area of growing importance, further legislation should follow in order to clarify (i) what, if anything, must be expressly stated concerning support in the trust and (ii) what restrictions, if any, are placed on the use of the income and principal from such a trust. In the interim, the prudent drafter seeking to create a spendthrift trust will be sure to expressly refer to "support and maintenance" in connection with both the income and the principal portions.

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95. *Id.* at 642.

