Winter 1984

# Interspousal Property Rights At Death (You can't take it with you, but you can prevent your spouse from getting any of it.)

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## Introduction

ONE of the major issues in Virginia law during the past decade has been the matter of property rights upon the termination of a marriage by divorce. Now that the concept of equitable distribution has been introduced into Virginia law in order to bring about a greater degree of fairness into this area, it is time to direct the focus of law reform to a parallel issue—interspousal property rights when a marriage is terminated by death. The importance of this issue to large numbers of Virginians is obvious when one stops to realize that, notwithstanding the dismal statistics on the increasing incidence of divorce, the typical Virginia marriage still continues until it is dissolved by the death of one of the parties. The exposure of this majority of married persons to potential economic problems is also obvious when one stops to realize that, under Virginia law, a surviving spouse has absolutely no rights in the deceased spouse's estate (except as the deceased spouse has allowed them to be created).[1] The purposes of this article are (i) to demonstrate the accuracy of this assertion concerning the lack of rights of a surviving spouse under Virginia law, (ii) to call attention to a serious internal conflict between this Virginia law and Virginia's announced public policy concerning the institution of marriage, and (iii) to urge that the recently aborted legislative study dealing with interspousal property rights at death be resurrected in the 1985 session of the General Assembly.

## Intestate Succession

Nowhere in the law of intestate succession has the change from the common law to the present law been more dramatic than in the case of a surviving spouse. Under the common law canons of descent a surviving spouse was never an heir; an intestate's real estate would escheat to his feudaul overlord before it would pass to his widow. This common law prohibition was eliminated in Virginia's first statute of descent, effective January 1, 1787, which made the surviving spouse an heir in step ten. From this meager beginning, the General Assembly subsequently moved the surviving spouse's position in intestate succession of real property up to step four in 1922, to step two in 1956, and finally to step one in 1982.[2] This latter position, step one, is also the position that the surviving spouse occupies in the distribution of personal property in intestate succession.[3] Notwithstanding this dramatic improvement of the surviving spouse's position in intestate succession, the fact remains that this position continues to be classified as an "expectancy", as opposed to a "right", and a person can easily prevent the operation of these intestate succession laws by simply writing a will or, as will be explained later, by causing his property to pass by way of various probate avoidance devices. Thus it is clear that a surviving spouse has absolutely no rights in the deceased spouse's estate under the laws of intestate succession, except as the deceased spouse has allowed such rights to be created by (i) dying without a will and (ii) leaving assets that pass by intestate succession.

## Rights Upon Renunciation of A Will

It is common knowledge that when a married person dies testate the surviving spouse has a statutory right to renounce the will and take a forced share of the decedent's personal property. The issue to be addressed, however, is not the surviving spouse's right to renounce the decedent's will but, instead, what rights does the surviving spouse thereby acquire in the decedent's personal property? Code 64.1-16 sets forth the rights that accrue to the surviving spouse as follows:

> If renunciation be made, the surviving spouse shall, if the decedent left surviving children or their descendants, have one third of the decedent's personal estate mentioned in §64.1-11; or if no children or their descendants survive, the surviving spouse shall have one half of such surplus; otherwise the surviving spouse shall have no more of the surplus than is given him or her by the will.

Although the fractional share of the renouncing spouse varies according to whether or not the decedent left surviving children or their descendants, the base against which that fraction is to be applied is always the same. The statute very clearly identifies this base as the decedent's net probate personal estate, i.e., that part of the decedent's personal property that passes to his personal representative and which remains after all debts, taxes and expenses have been paid. To state the rather obvious then, if there is no net probate estate the net "rights" of the surviving spouse amount to nothing. And therein lies the problem because, as even the neophyte estate planner can testify, it is possible to have the benefit of and control over any amount of personal property for the entirety of one's life and still prevent any of it from being included in one's probate estate following his death. Witness all of the popular literature dealing with how to avoid probate.

*Dillon* v. *Gow*[4] is a highly instructive trial court decision showing the application of the foregoing principle to this matter of interspousal property rights at death. In this case Mr. Dillon suffered a coronary thrombosis on Saturday, August 20, 1955, and was immediately admitted to the Medical College of Virginia. The following Monday, August 22, he summoned his attorney to his bedside and thereupon executed a previously prepared inter-vivos trust of $250,000.00 (book value) worth of stock in a close corporation. Under the terms of this trust, Mr. Dillion retained (i) the right to all income from the trust fund for life, and (ii) the right to appoint the corpus of the trust to anyone in the world except to himself, his estate, or his creditors (the corpus would go to his daughter and her family if this power was not exercised). Mr. Dillon died on September 3, 1955, twelve days after he created this trust. Suit was thereafter initiated to determine, among other things, whether Mrs. Dillon would receive any portion of this trust fund if she should renounce her husband's will and demand her statutory forced share in his personal estate. The court held that Mrs. Dillon had no rights in this trust fund. True she would be entitled to one-third of Mr. Dillon's net probate personal estate upon the renunciation of his will. However, the court concluded that Mr. Dillon had parted irrevocably with all but a life estate at the time he executed the trust, and his retained life estate expired with him leaving no vestige of this stock in his probate estate. In coming to his judgment in this case, Judge Lamb found the Virginia law to have been settled, since 1813, that "as to his personal property, a man could waste it, destroy it or give it away; that during the continuance of the marriage the wife had no interest in the property such as would entitle her to claim a fraud if the husband should in his lifetime divest himself of title, put it beyond his reach so that he could not recover it himself."[5] Judge Lamb went on to note that "I have no doubt that the first statement of that principle of law comes as a surprise, if not a shock, to the general run of the thoughts of the community, but our laws have always recognized what has been spoken of as the sacredness of (personal) property and the complete dominion of the owner."[6]

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The issue in *Dillon* that appeared to worry the court the most was the effect, if any, to be given to Code 55-80 which voids transfers made ". . . *with intent to delay, hinder or defraud* creditors, purchasers or *other persons* of or *from what they* are or *may be lawfully entitled to* (emphasis added) . . ." Judge Lamb concluded that existing precedents prevented him, at the trial court level, from making an in depth

review of this issue. However, this troublesome point was laid to rest four years later by the Virginia Supreme Court, in *Freed* v. *Judith Realty Corp.*,[7] wherein the court held as follows:

> The fact that Freed's purpose in executing the trust . . . may have been to prevent his wife from obtaining any part of the trust property at his death through operation of the statute of descent and distribution if he died intestate or through renunciation of his will if he died testate, does not render the trust invalid.[8]

In *Freed*, the court also reaffirmed its earlier holdings that "a married man enjoyed during his lifetime the unqualified privilege to dispose of his personal estate whatever be his purpose in doing so, *provided that he so dispossess himself of it as to put it beyond his power to reclaim* (emphasis added),"[9] Thus the emphasized proviso in the preceding sentence represents the only restriction upon the married person who wishes to eliminate the forced statutory share of his surviving spouse by reducing his probate personal estate to zero through the use of various probate avoidance devices—the probate avoidance device that is chosen may not be one that leaves it within the power of the transferor to recover the property. It is permissible to retain (i) a life estate in the property, (ii) a degree of administrative control over the property, and (iii) a non-general power of appointment over the property which will enable the transferor to change the identity of the ultimate owner of the property up to the moment of the transferor's death, but the transferor may not reserve the right to recover the property himself.

It is clear from the emphasized language in *Freed*, above, that where one has made gratuitous lifetime transfers of personal property that are not "beyond his power to reclaim" at the time of his death such personal property will be treated as if it is still the transferor's for the purpose of determining the surviving spouse's forced statutory share. The term "augmented estate" has been coined to identify this concept wherein personal property that is clearly not in the probate estate is nevertheless treated as being in the probate estate for the purpose of computing the forced statutory share of a renouncing spouse. Illustrative transfers that would be included in a decedent's augmented estate under present Virginia law are revocable trusts, "joint" bank accounts (to the extent of the decedent's deposits), joint and survivorship property (insofar as the half that could be recovered is concerned), P.O.D. bank accounts, Totten Trust bank accounts, causa mortis gifts, and any other revocable, inter-vivos transfer of personal property.

It may be argued that this augmented estate concept operates as a significant impediment to one who wishes to prevent his surviving spouse from receiving any of his personal property at death because it effectively limits the probate avoidance devices that he may safely use to only two, absolute gifts and irrevocable trusts, neither of which is particularly desirable. Assuming for the sake of argument that there is any undesirability associated with these two probate avoidance devices, nevertheless that does not in any way help to establish the proposition that the present augmented estate concept is a significant impediment to the scheming spouse. It must be remembered that the augmented estate concept comes into operation only when one is determining the forced share of a surviving spouse who has renounced the decedent's will and, to again state the obvious, if the decedent dies intestate there is no right to a statutory forced share. Accordingly, one may place his personal property in any one or more of the revocable probate avoidance devices mentioned above and then, by simply dying intestate, thereby prevent the surviving spouse from claiming any portion of this property under the augmented estate concept. Although the spouse may now be in position number one under intestate succession, if there will not be any property passing by intestate succession (because it is all passing by various probate avoidance devices) she will still receive nothing. Thus, notwithstanding the existence of the forced statutory share legislation and the judicially created concept of the augmented estate, the fact remains that the surviving spouse thereby obtains absolutely no rights in the deceased spouse's personal property except as the deceased spouse has allowed such rights to be created by (i) dying with a will, and (ii) leaving personal property that is either in his probate estate or is treated as being in his probate estate under the augmented estate concept.

### Dower & Curtesy

Although, as noted earlier, a decedent's spouse was never an heir at common law, the common law did provide for a husband to have a curtesy interest in his wife's real property and for a wife to have a dower interest in her husband's real property. Though changed in form and content since the common law, the institutions of dower and curtesy are continued in Virginia today by Code 64.1-19, which reads in relevant part as follows:

> A surviving spouse shall be entitled to a dower or curtesy interest in fee simple of one

> third of all the *real estate* whereof the deceased spouse or any other to his use was at any time seized during coverature of an *estate of interitance*, unless such right shall have been lawfully barred or relinquished (emphasis added).

It must be admitted that if a man is seized of an "estate of inheritance" in "real estate" while he is married, there is no way that he can prevent his wife's inchoate dower interest therein from becoming a possessory estate upon his death. However, it is quite simple to acquire, use, and be able to convey any quantity of real property during marriage without being seized of an "estate of inheritance" in "real estate." The essential element of most such schemes is either (i) to acquire the real estate through a corporation or a partnership (instead of acquiring the real estate in one's own name) which will result in one owning personal property instead of "real estate," or (ii) to acquire the real estate as joint tenants with the right of survivorship with another which will prevent one from being seized of an "estate of inheritance" (during the joint tenancy).

Linking this discussion with the preceding one, it is easy to see how one can form a corporation through which he can acquire whatever real estate he might wish and then place the corporate stock in an appropriate probate avoidance device, thereby being able to acquire, use and convey the real estate in question as freely as a fee simple owner and yet prevent his surviving spouse from having any dower therein (because the stock is personal property) or any forced statutory share therein (because of the probate avoidance device). Thus the validity of the statement that the surviving spouse has absolutely no rights in the deceased spouse's real estate under the laws of dower and curtesy, except as the deceased spouse has allowed such rights to be created by acquiring real estate as such, as opposed to acquiring the same real estate in a manner that will result in his ownership being characterized as personal property.

In addition to the foregoing, it has been possible since common law times to create a special estate in real estate in a woman, in which any surviving husband would not be entitled to curtesy. This estate, usually referred to as the "equitable separate estate," is provided for in Virginia today by Code 64.1-21, which reads as follows:

> A surviving husband shall not be entitled to curtesy in the equitable separate estate of the deceased wife if such right thereto has been expressly excluded by the instrument creating the same, or if such instrument, executed heretofore or hereafter, describes the estate as her sole and separate equitable estate.

In *Jacobs* v. *Meade*, decided by the Virginia Supreme Court on April 27, 1984, it was claimed that this statute "is unconstitutional on equal protection grounds because the statute fails to grant husbands the same rights granted wives."[10] The court did not reach the constitutional issue in this case, however, due to the existence of Code 64.1-19.1, enacted by the General Assembly in 1977 apparently as a response to various decisions of the United States Supreme Court involving gender-based classifications. Code 64.1-19.1 provides:

> Where the word "curtesy" appears in this chapter of the Code, it shall be taken to be synonymous with the word "dower" as the same appears in this chapter or this Code, and shall be so construed for all purposes.

The court held that "when construed with § 64.1-19.1, § 64.1-21 provides that a surviving *wife* shall not be entitled to *dower* in the equitable separate estate of the deceased *husband* if such right thereto has been expressly excluded by the instrument creating the same, or if such instrument describes the estate as *his* sole and separate equitable estate (emphasis in original)."[11]

As a result of the *Jacobs* decision, it is no longer necessary for a married person who wishes to defeat any dower or curtesy rights of the surviving spouse in real estate to go through the somewhat cumbersome process of converting the real estate to personal property prior to acquisition and then holding such personal property in a probate avoidance device at the time of death. Now it is possible for a married person, male or female, to acquire real estate directly as an equitable separate estate and thereby prevent the surviving spouse from having any dower or curtesy rights therein. *A fortiori*, then, the validity of the statement that the surviving spouse has absolutely no rights in the deceased spouse's real property under the laws of dower and curtesy, except as the deceased spouse has allowed such rights to be created by acquiring real property as a legal estate, as opposed to an equitable separate estate.

### Public Policy Regarding Marriage

The Virginia Supreme Court has declared that "it is the policy of the law to foster and protect marriage, to encourage the parties to live together and to prevent separation, marriage being the foundation of the family and of society, without which there would be neither civilization nor progress."[12] Acting pursuant

to this policy, the court has declared that agreements between husbands and wives are "void when they tend to encourage or facilitate separation or divorce."[13] With this as a background, and without going through the exercise of creating an elaborate hypothetical fact situation, let the reader simply assume an older, female client whose marriage is effectively dead but who is hesistant about seeking a no-fault divorce for family reasons, religious reasons, etc. Before responding to her request for advice you determine that her husband has been the sole or primary wage-earner during their marriage and that almost all of "their" property, acquired during the mariage, is in his name. How do you advise her? Do you explain that if she does go forward with the divorce she will be able to obtain monetary compensation for her share of the marital property under Virginia's equitable distribution law but that, if she decides to honor her marriage vows "until death do us part," she may receive none of this marital property upon her husband's death except as he so wishes? Will this knowledge of the present state of the law tend to encourage your client to seek the divorce? Is the present state of the law consistent with the declaration of Virginia's public policy regarding marriage that is contained in the first sentence of this paragraph?

## Law Reform

By way of response to concerns similar to those raised in this article, the 1983 Session of the General Assembly passed Senate Joint Resolution No. 51,[14] which created a joint subcommittee

> . . . to study the body of present Virginia law as it affects the transfer of property at death, whether by will or intestacy, to determine whether the rights of a surviving spouse are adequately protected, to study the effect during lifetime and at death of the present dower and curtesy provisions, and to study the concept of an elective share and an augmented estate as a means to protect a surviving spouse from disinheritance by will or by elimination of property from the probate estate . . .

The subcommittee created by SJR No. 51 reported back to the 1984 Session of the General Assembly that a majority of its members "agreed that there were problems with existing law, but could not agree on the best method to correct them."[15] Therefore, "(r)ecognizing that the substantial work done during the course of this study had not resulted in a concrete legislative proposal for protecting the surviving spouse, on a 6-4 vote of the members present, the joint subcommittee recommend(ed) that the study continue."[16] House Joint Resolution No. 54[17] was accordingly introduced into the 1984 Session of The General Assembly to provide for a one-year extension. HJR No. 54 passed the House of Delegates by a vote of 95-1, and then died in the Senate Rules Committee.

## Conclusion

Although this article has been written from the standpoint of illustrating how easily a married person can prevent his surviving spouse from receiving any portion of his estate, it must not be assumed that the problem is confined to cases of intentional schemers. The problem is much broader than that and consequently affects far more persons. As reported by the SJR 51 Subcommittee, "changes in the tax laws and the ways in which people hold the majority of their wealth have made it easier to intentionally or *unintentionally* disinherit one's spouse (emphasis added)."[18]

For all of the foregoing reasons, it is respectfully submitted (i) that for far to long an intolerable situation has existed in the area of interspousal property rights at death, (ii) that this situation has now been made even worse by the recent decision in *Jacobs* v. *Meade*, and (iii) that it is incumbent upon the 1985 Session of the General Assembly to take positive action towards protecting the legitimate expectations of a surviving spouse under Virginia law.

FOOTNOTES

1. For convenience throughout this article, the surviving spouse will be assumed to be the wife and the first to die will be assumed to be the husband. Except as specifically noted, however, the laws in this area are gender neutral today and thus what is said about the position of one is also true of the other, if the order of their deaths be reversed.

2. This is true "unless the intestate is survived by children or their descendants, one or more of whom are not children or their descendants of the surviving spouse, in which case such estate shall pass to the intestate's children and their descendants subject to the provisions of § 64.1-19." Code 64.1-1.

3. This is true unless the intestate is survived by children or their descendants, one or more of whom are not children or their descendants of the surviving spouse, in which case the surviving spouse is entitled to only one-third. Code 64.1-11.

4. 2 Opinions of Brockenbrough Lamb 78 (Richmond Ch. 1956).

5. *Id.*, at 83.

6. *Id.*

7. 201 Va. 791 (1960).

8. *Id.*, at 795-6.

*(continued on page 19)*

trate such disputes as may later arise are a bargained-for, integral part of the entire agreement. In the absence of a compelling reason to the contrary, they should be performed. The perceived cost containment and speed of arbitration, as compared to litigation, should not be lost by allowing litigation of the condition-precedent issue. Delay in enforcement of the intent to arbitrate perverts the goals of arbitration.

It is time for legislative review of the venerable laws of Virginia used to determine the enforceability of future-dispute agreements. Section 8.01-577 and the common-law, condition-precedent concept may no longer meet the needs of the business community in its quest for a viable alternative to litigation. Legal scholars should contemplate these laws and share their observations with those who seek to appreciate the parameters of enforcement given the present state of the law. Legislators should deliberate before amending the existing law in order to make sure that future amendments accord with the need to know with reasonable certainty whether or not specific promises to arbitrate future disputes will be enforced. In this connection, the Uniform Arbitration Act deserves special attention.[21] Its provisions do not differentiate in enforcement policy between existing—and future—dispute agreements.[22] As mentioned, it has already been adopted by over half of the fifty states.

FOOTNOTES

1. Acts of 1789 of the General Assembly of Va. ch. 46, as found in 1 Rev. Code of 1803 (Va.) ch. LII, at 49-50; (As pointed out in Preface to the 1803 Code, the 1792 Revised Code was fraught with "augmenting imperfection" and ill indexed; therefore, the 1803 Code is relied on for the text of the Act.)
2. 55 Va. (14 Gratt.) 484 (1858).
3. Note, *supra*, note 1.
4. Note, *supra*, note 1.
5. Va. Code, § 8.01-577 (Repl. Vol. 1977) (Cum. Supp. 1983).
6. *Supra*, note 2.
7. 137 Va. 34, 120 S.E. 247 (1923).
8. 156 Va. 476, 159 S.E. 82 (1931).
9. 271 F.2d 904 (4th Cir. 1959).
10. 213 Va. 489, 193 S.E.2d 662 (1973).
11. C.A. 79-333-A (E.D. Va., August 1, 1979).
12. Id. at 2.
13. 9 U.S.C. § 1-14 (West Supp. 1983).
14. *Supra*, note 5, Paragraph B.
15. *Supra*, note 5, last Paragraph.
16. 30 No. 8 *Va.B.News* 37 (February 1982).
17. *See* Cannon, Mark W., *Contentious and Burdensome Litigation: A Need for Alternatives*, LXIII No. 4 Nat'l Forum 10 (Fall 1983).
18. *Supra*, note 5, Paragraph A.
19. H.B. 960 (1984 Session), continued to the 1985 Session in committee.
20 *See* Stern, Stewart A., *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 Cardoza L. Rev. 481 (1981); *see* also Wehringer, Cameron K., *Arbitration Precepts and Principles* at 22-30 (1969).
21. Uniform Arbitration Act (1956).
22. Id. § 1.

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9. *Id.*, at 796.
10. ___ Va. ___, 227 VRR 304, at 306 (1984).
11. *Id.*, at 308-9.
12. *Capps* v. *Capps*, 216 Va. 378, at 380 (1975).
13. *Id.*
14. SJR No. 51 (1983) is reproduced as APPENDIX A to Senate Document No. 9 (1984), *Interim Report of the Joint Subcommittee Studying Virginia Laws as it Affects Transfers of Property Upon Death*. C. Daniel Stevens, Esquire, and the author represented The Virginia Bar Association's Committee on Wills, Trusts and Estates at all meetings of the Subcommittee. They also served, along with three members of the Subcommittee, as a drafting group generating background materials and legislative proposals for the Subcommittee.
15. *Id.*, at 7.
16. *Id.*
17. *Id.*, APPENDIX E.
18. *Id.*