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WILLS, TRUSTS, AND ESTATES

J. William Gray, Jr. *
Katherine E. Ramsey **

INTRODUCTION

The inactivity of Virginia's General Assembly and state courts in the area of wills, trusts, and estates, noted in this summary in 2014,¹ continued this year. Legislation was generally limited to clarifications and technical corrections to existing laws on such subjects as creditor protection for certain trust assets, access to digital assets, qualification of personal representatives, and disposition of dead bodies. Three cases dealt with the doctrine of survivorship for administrators, interpretation of shareholder agreements, and the period for seeking removal of an executor.

I. LEGISLATION²

A. Creditor Protection for Former Entireties Property Held in Trust

Property held by a husband and wife as tenants by the entireties has long enjoyed protection against the claims of one spouse's creditors.³ In 2000, the General Assembly extended that creditor protection to a principal family residence that a husband and wife held as tenants by the entireties and subsequently transferred into their joint or separate trusts:

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1. J. William Gray, Jr. & Katherine E. Ramsey, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 49 U. RICH. L. REV. 211, 211 (2014).

2. All 2015 legislation summarized in this article became effective July 1, 2015.

3. See, e.g., *Ford v. Poston (In re Ford)*, 53 B.R. 444, 447-48 (Bankr. W.D. Va. 1984), *aff'd*, 773 F.2d 52 (4th Cir. 1985).

The principal family residence of a husband and wife that is held by them as tenants by the entireties and conveyed to their joint revocable or irrevocable trust, or in equal shares to their separate revocable or irrevocable trusts, shall have the same immunity from the claims of their separate creditors as it would if it had remained a tenancy by the entirety, so long as (i) they remain husband and wife, (ii) it continues to be held in the trust or trusts, and (iii) it continues to be their principal family residence.⁴

This legislation was intended to help Virginia couples plan their estates without fear of exposing their home to the claims of their separate creditors.⁵ In 2006, the General Assembly sought to give married couples even more flexibility in their planning by extending the new exemption to any type of property held as tenants by the entireties and eliminating the requirement that, if conveyed to separate trusts, it must be divided equally.⁶ Unfortunately, the amendments created significant uncertainty. For example, the revised statute protected the couple's property after its transfer into trust so long as it "continues to be their property."⁷ Since legal title vested in the trustee or trustees after the transfer, this language seems to have referred to the spouses' beneficial interests in the property.⁸ Even if that were the case, it was unclear whether the trust could have beneficiaries other than the spouses; it was also unclear whether the proceeds would be protected from creditors if a trustee later sold the property, or whether the trustee could waive the creditor protection.⁹ Despite this confusion, some practitioners were quick to take advantage of the new exemption. Others, however, feared risking their clients' creditor protection if a court were to interpret the statute in an unexpected manner.¹⁰

Following nine years of uncertainty, the General Assembly significantly rewrote the statute in 2015.¹¹ It clarified that the spe-

4. Act of Apr. 3, 2000, ch. 331, 2000 Va. Acts 473, 474 (codified as amended at VA. CODE ANN. § 55-20.1 (Cum. Supp. 2000)).

5. J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 41 U. RICH. L. REV. 321, 324 (2006).

6. Act of Mar. 30, 2006, ch. 281, 2006 Va. Acts 356, 356 (codified as amended at VA. CODE ANN. § 55-20.2(B) (Cum. Supp. 2006)).

7. See VA. CODE ANN. § 55-20.2(B) (Cum. Supp. 2006).

8. See, e.g., Johnson, *supra* note 5, at 325.

9. *Id.* at 325-26.

10. *Id.* at 326 ("[I]t is doubtful whether the prudent estate planner will act upon this new provision until its operation has been clarified by further legislation.").

11. See Act of Mar. 23, 2015, ch. 424, 2015 Va. Acts __, __ (codified at VA. CODE ANN.

cial creditor protection (i) existed notwithstanding the general rule that trust assets remain subject to the claims of the settlor's creditors and (ii) extended to proceeds from the sale or disposition of the former entireties property.¹² A new safe harbor ensures protection if:

[B]oth spouses are current beneficiaries of one trust that holds the entire property or each spouse is a current beneficiary of a separate trust and the two separate trusts together hold the entire property, whether or not other persons are also current or future beneficiaries of the trust or trusts.¹³

The trustee may waive the statutory immunity as to any specific creditor, including a separate creditor of either spouse, or as to any specifically described property if the trust instrument expressly grants the power or both spouses consent in writing.¹⁴

To avoid a possible cloud on prior transfers, the 2015 amendments also apply to tenancy by the entireties' property that a husband and wife¹⁵ transferred into trust under the prior statute.¹⁶

B. *Digital Assets*

As recently as twenty years ago, a decedent's intangible personal property was almost always limited to bank accounts, stocks, insurance, royalties, contract rights, and other assets that were evidenced through written statements, agreements, certificates, and the like. The personal representative had only to search through the decedent's possessions and mail and then present a valid qualification letter to third parties in order to obtain

§ 55-20.2(B) (Supp. 2015)).

12. *Id.*

13. *Id.*

14. *Id.*

15. In an opinion to the Clerk of the Fairfax County Circuit Court, the Attorney General of Virginia concluded that the decision in *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014), *aff'd sub nom.* *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014), requires clerks of court to interpret the term "husband and wife" in Virginia Code section 58.1-810.3, relating to recordation tax exemptions, to include spouses of the same sex. 2014 Op. Va. Att'y Gen. 199, 199. A footnote in that opinion declares further that the terms "husband and wife," "man and wife," "wife," and "husband," wherever used in the Virginia Code, must be read to apply equally to all legal marriages. *Id.* at 202 n.14.

16. Act of Mar. 23, 2015, ch. 424, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 55-20.2(B) (Supp. 2015)).

the necessary information to gain control over and administer the estate. Today, however, these methods can be insufficient. Many decedents maintain at least some online presence, using cloud storage for their photographs and important documents and conducting many types of business exclusively in electronic, rather than paper, form. Unless the personal representative has access to these documents, accounts, and records after the decedent's death, sentimental or valuable information could be lost and it may be difficult to administer the decedent's estate completely and efficiently.¹⁷

To address this problem, at least in part, the 2013 General Assembly enacted a bill that allowed the personal representative of a deceased minor domiciled in Virginia to assume the minor's terms of service agreement for any digital account for purposes of consenting to and obtaining disclosure of the contents of communications and subscriber records.¹⁸ The National Conference of Commissioners on Uniform State Laws also promulgated the broader Uniform Fiduciary Access to Digital Assets Act in 2014.¹⁹ This model act would grant personal representatives of estates and other fiduciaries the same access to digital assets as they have always had to more traditional assets, unless the account holder instructs otherwise.²⁰ Unfortunately, the act faced stiff opposition from various digital-industry players who primarily cited privacy concerns.²¹

In the face of the industry's objections, the 2015 General Assembly declined to adopt the model act and instead supplemented the limited 2013 statute with the industry-approved "Privacy Expectation Afterlife and Choices Act" ("PEAC").²² This act provides

17. See, e.g., J. William Gray, Jr. & Katherine E. Ramsey, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 48 U. RICH. L. REV. 189, 198 (2013); UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT (UNIF. LAW COMM'N 2014), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf (last visited Oct. 1, 2015) [hereinafter ACCESS TO DIG. ASSETS ACT].

18. Act of Mar. 14, 2013, ch. 369, 2013 Va. Acts 615, 615 (codified at VA. CODE ANN. §§ 64.2-109 to -110 (Supp. 2014)); see also Gray & Ramsey, *supra* note 17, at 198.

19. See ACCESS TO DIG. ASSETS ACT, *supra* note 17.

20. See *id.*

21. See Letter from Tammy Cota, Exec. Dir. of the Internet Coal., to the Hon. Eric Coleman and the Hon. William Tong, Co-Chairs of the Joint Judiciary Comm., Conn. Gen. Assembly (Mar. 2, 2015), <http://www.cga.ct.gov/2015/JUDdata/Tmy/2015SB-00979-R000306-Cota,%20Tammy-TMY.PDF> (last visited on Oct. 1, 2015).

22. See Act of Mar. 26, 2015, ch. 657, 2015 Va. Acts __, __ (codified at VA. CODE ANN.

a set of rules that apply only to personal representatives of decedents' estates and not to trustees, guardians, committees, or other types of fiduciaries.²³ It establishes a procedure by which a personal representative may request records pertaining to the decedent's use of a digital account or the actual contents of that account.²⁴ The act applies to all forms of digital accounts, including blogs, email, multimedia, personal and social networking accounts, and comparable items "as technology develops."²⁵

To gain access to the decedent's user records with respect to any digital account, the personal representative must first file a motion asking the court in which he or she is qualified to order the service provider to disclose such records for the eighteen-month period ending on the decedent's date of death.²⁶ The court's order may go further back than eighteen months if necessary for the proper administration of the decedent's estate.²⁷ The decedent's heirs or beneficiaries and the service provider are not entitled to notice of the motion.²⁸

The personal representative's motion must include an affidavit attesting, upon information and belief, that:

§§ 64.2-109 to -115 (Cum. Supp. 2015)); Letter from Tammy Cota, *supra* note 21 (urging the adoption of the Privacy Expectation Afterlife and Choices Act in lieu of the Uniform Fiduciary Access to Digital Assets Act); UNIF. LAW COMM'N, UNIFORM TRUST AND ESTATE ACTS: REPORT TO NATIONAL CONFERENCE OF LAWYERS AND CORPORATE FIDUCIARIES 2-3 (2015), http://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/nclcf/2015_06/nclcf_2015_06_02_uniform_trust_and_estate_acts_june_2015_report_to_nclcf_authcheckdam.pdf (noting that the Uniform Fiduciary Access to Digital Assets Act died in committee in Virginia) (last visited Oct. 1, 2015).

23. See VA. CODE ANN. § 64.2-100 (Repl. Vol. 2012 & Cum. Supp. 2015) (elaborating on what constitutes a personal representative); Act of Mar. 26, 2015, ch. 657, 2015 Va. Acts __, __ (codified at VA. CODE ANN. §§ 64.2-109 to -115 (Cum. Supp. 2015)) (noting that the definition of personal representative mirrors the definition found in section 64.2-100).

24. Act of Mar. 26, 2015, ch. 657, 2015 Va. Acts __, __ (codified at VA. CODE ANN. §§ 64.2-109 to -115 (Cum. Supp. 2015)). The General Assembly instructed the Joint Commission on Technology and Science to "develop legislative recommendations to address access to electronic communication records and digital account content by guardians ad litem, conservators, and other fiduciaries." *Id.*

25. VA. CODE ANN. § 64.2-109 (Cum. Supp. 2015).

26. *Id.* § 64.2-111(A) (Cum. Supp. 2015).

27. *Id.* § 64.2-111(C) (Cum. Supp. 2015).

28. *Id.* § 64.2-111(D) (Cum. Supp. 2015).

- The user is deceased;
- The user was a subscriber or customer of the service provider;
- The account has been reasonably identified so as to enable the service provider to definitively identify the user;
- All other authorized users, if any, have expressly consented in written or electronic form to the disclosure;
- The request is “tailored to effectuate the purpose of” the estate’s administration; and
- The request does not conflict with the decedent’s will, if any.²⁹

If the personal representative wishes to obtain the actual contents of the decedent’s electronic communications or records, the affidavit must also include an attestation that the decedent affirmatively consented to their disclosure through a provision in his or her will or an account setting or election with the provider.³⁰ It seems unlikely that many wills drafted before 2015 will contain this consent, and therefore PEAC effectively forecloses the possibility of accessing the contents of a decedent’s electronic communications or records in such cases.

Whether seeking the decedent’s account records or actual contents, the personal representative must send the court’s order to the provider, along with a copy of the consent of any joint owners, the death certificate and, if applicable, the provision in the will consenting to the disclosure of the electronic communications or account contents.³¹ This additional documentation requirement seems unnecessary, since the same documentation will have been filed with the court in support of the personal representative’s original motion seeking the order. Even if not, the personal representative will have filed, under penalty of perjury, his or her affidavit that such documentation exists. On the other hand, if the service provider is allowed to make its own determination as to whether the documentation is sufficient before complying with

29. *Id.* § 64.2-111(A) (Cum. Supp. 2015).

30. *Id.* § 64.2-111(B) (Cum. Supp. 2015). “Contents” is defined to mean any information concerning the substance, purport or meaning, including its subject line, of a communication. *Id.* § 64.2-109 (Cum. Supp. 2015).

31. *Id.* § 64.2-111(A), (B) (Cum. Supp. 2015).

the order, then the delay and cost of the court proceeding hardly seems necessary other than as additional protection for the service provider, and possibly as a deterrent to de minimis requests.

Even when presented with the requisite court order and supporting documentation, the service provider must disclose the contents of electronic communications or records only “to the extent reasonably available.”³² The service provider may also refuse to provide the decedent’s user records or to disclose the contents of any account if doing so would violate any applicable state or federal law.³³ In addition, a provider may file a motion to quash within sixty days after receiving the order if the deceased user affirmatively elected not to disclose the records or content or deleted them during his or her lifetime, if any of the facts in the affidavit regarding the decedent-user are not true, or if the provider can show by clear and convincing evidence that complying with the order would “create an undue burden upon the provider.”³⁴

Upon receiving an order directing the release of the user’s records or the contents of any account, the service provider may notify the account of the request and provide any authorized users a “reasonable time” to object to the disclosure.³⁵ This appears to be true even if those users gave their consent to the personal representative before the original motion and affidavit were filed. If an authorized user objects to the disclosure, it will then be up to the personal representative to apply to the court for “appropriate relief.”³⁶

The hurdles PEAC places in the path of personal representatives presume that the right to privacy is somehow greater with respect to digital assets than to non-digital communications and records or other intangible assets. There is no question that a personal representative may take possession and review the decedent’s diary, old love letters, legal file, medical records, and other potentially sensitive information in hard-copy form. Although an individual may reasonably expect that his or her privacy will be preserved during lifetime, the individual also knows

32. *Id.* § 64.2-111(B) (Cum. Supp. 2015).

33. *Id.* § 64.2-111(E) (Cum. Supp. 2015).

34. *Id.* § 64.2-112(A) (Cum. Supp. 2015).

35. *Id.* § 64.2-113 (Cum. Supp. 2015).

36. *Id.*

that he or she must take additional steps to destroy or secure any items he or she does not wish for others to view after death. This is the approach taken by the Uniform Fiduciary Access to Digital Assets Act, but rejected by Virginia's legislature in the face of industry opposition.³⁷ One can only hope that in time the public will demand a better alternative than PEAC. Until then, the administration of estates that include digital assets will require more time and expense in nearly every case, and some assets may never be available to executors.

C. *Liability of Real Estate for Decedent's Debts and Expenses*

If a decedent's personal property is insufficient to pay the decedent's debts and lawful demands against the estate, the decedent's real estate becomes liable for any remaining debts and demands.³⁸ An heir or devisee who has sold the real estate is still liable for its value, with interest, to persons entitled to be paid out of the real estate.³⁹ The real estate itself is exonerated, however, if (i) more than one year has passed since the decedent's death, (ii) the conveyance was bona fide, and (iii) no action has been commenced for administration of the real estate and no report of debts and demands has been filed at the time of sale.⁴⁰ If the conveyance takes place within one year after the decedent's death, it will be invalid against the decedent's creditors if an administration action is commenced or a report of debts and demands is filed within that one-year period, unless the conveyance is pursuant to a court decree and the net proceeds are paid to a special commissioner to be held until the one-year period expires, or unless the heir or devisee posts bond with surety.⁴¹

Prior to the 2015 change, the statute appeared to exempt not only the real estate conveyed but also the heir or devisee personally from liability for the decedent's unpaid debts and demands against the estate.⁴²

37. See *supra* notes 14–16 and accompanying text.

38. VA. CODE ANN. § 64.2-532 (Repl. Vol. 2012).

39. *Id.* § 64.2-534 (Cum. Supp. 2015).

40. *Id.*

41. *Id.* § 64.2-534(C) (Cum. Supp. 2015).

42. Compare *id.* § 64.2-534 (Repl. Vol. 2012), with *id.* (Cum. Supp. 2015).

D. *Suitability for Service as Estate Administrator*

A court or clerk may not grant administration over an estate in Virginia to any person unless satisfied that the person is suitable and competent to perform the duties of the office.⁴³ To that end, a new statute requires anyone seeking to qualify as administrator of an intestate estate to sign under oath that he or she is not under a disability and “has not been convicted of a felony offense of (i) fraud or misrepresentation or (ii) robbery, extortion, burglary, larceny, embezzlement, fraudulent conversion, perjury, bribery, treason, or racketeering.”⁴⁴ Although the implication is that a felony conviction disqualifies an individual from serving as an administrator, the statute does not expressly make felons ineligible; rather, it expressly allows a felon who is the sole distributee of an estate to serve as administrator if the court or clerk determines that the felon is “otherwise suitable and competent to perform the duties of his office.”⁴⁵ A similar affidavit is not required for any individual seeking to qualify as executor or administrator with the will annexed under Virginia Code section 64.2-500.⁴⁶

E. *Administrator for Personal Injury or Wrongful Death Action*

In cases where an individual seeks qualification only for the purpose of prosecuting or defending a personal injury or wrongful death action involving the decedent, the appointment cannot be made until at least sixty days after the decedent’s death, and then only if no other personal representative has been appointed for the estate.⁴⁷ The court or the commissioner of accounts may exempt any such administrator from the duty to file accountings, so long as he or she is not administering funds and has no power of sale over any real estate.⁴⁸

43. VA. CODE ANN. §§ 64.2-500(B), -502(D) (Repl. Vol. 2012 & Cum. Supp. 2015).

44. Act of Mar. 23, 2015, ch. 551, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 64.2-502(D) (Cum. Supp. 2015)).

45. *Id.*

46. VA. CODE ANN. § 64.2-500 (Repl. Vol. 2012 & Cum. Supp. 2015).

47. Act of Mar. 16, 2015, chs. 124, 129 & 130, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 64.2-454 (Cum. Supp. 2015)).

48. Act of Mar. 16, 2015, chs. 129 & 130, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-606(G) (Repl. Vol. 2015)).

F. *Qualification Certificate for Small Asset Estate*

When any personal representative, guardian, or other fiduciary seeks to qualify to administer a small estate, the court or clerk has long been authorized to permit the fiduciary to qualify without surety.⁴⁹ This privilege currently is available to estates valued at \$25,000 or less.⁵⁰ Now, though, the court or clerk in such cases must also issue a special certificate of qualification, titled "Qualification Certificate for Small Asset Estate," which states on its face that the maximum amount of assets that may be collected pursuant to the certificate is \$25,000.⁵¹

The certificate must bear the impression seal of the court clerk⁵² and state in a prominent position on the front that anyone may deliver to the named fiduciary assets that are valued at no more than \$25,000 on the date of delivery.⁵³ The certificate also must state that it "(i) may be used only once, (ii) is not effective if it does not have impression seal of the court clerk and therefore photocopies . . . are not effective, and (iii) must be retained by the payor."⁵⁴

When presented with a Qualification Certificate for Small Asset Estate, the person holding the asset may deliver it to the named fiduciary if the asset has a value on the date of delivery of no more than \$25,000.⁵⁵ The holder will not be liable for turning over assets that he or she believes in good faith to be valued at \$25,000 or less, or for refusing to turn over assets he or she believes in good faith to have a value of more than \$25,000.⁵⁶ Assets held in a safe deposit box are not counted toward the \$25,000 limit; the lessor of the box is not deemed to know of, and has no obligation to determine, the contents of the box or their value.⁵⁷

49. See VA. CODE ANN. § 64.2-1411(A) (Repl. Vol. 2012) (permitting administration without surety for amounts of \$15,000 or less); *id.* (Cum. Supp. 2014) (raising the maximum amount permitted to be administered without surety to \$25,000).

50. See *id.* (Cum. Supp. 2015).

51. *Id.* § 64.2-1411(C) (Cum. Supp. 2015).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* § 64.2-1411(D) (Cum. Supp. 2015).

56. *Id.*

57. *Id.*

Following delivery, the holder of the assets will be discharged and released from all claims or liabilities for the delivery and need not see to the fiduciary's use of the assets or ask what assets the fiduciary may have received from other sources.⁵⁸ However, the holder must retain the original certificate of qualification from the fiduciary, which will prevent the fiduciary from using it again to obtain possession of additional assets without the clerk's knowledge.⁵⁹ Accordingly, if the fiduciary needs to collect assets from more than one source, he or she will have to request additional certificates.

The clerk will not be liable for any misrepresentations made by the person or persons seeking to qualify under the small asset estate exemption or for the performance of any of the clerk's duties relating to it, unless the clerk was grossly negligent or engaged in intentional misconduct.⁶⁰

This new procedure should offer additional protection to beneficiaries by preventing individuals from qualifying without surety on the basis of a false representation of the estate's value.

G. *Expansion of Small Estate Act*

Frequently, a decedent's estate becomes entitled to payments such as a partial refund of a health insurance premium, a federal or state tax refund, or a small debt owed to the decedent. If the payor is aware that the decedent has died, he or she will almost always insist on making the refund payable to the decedent's estate. In the past, this situation would have required the beneficiaries to choose between undertaking a formal administration and forgoing collection of the amount due. Fortunately, the 2015 General Assembly amended the Small Estate Act to cover these situations.⁶¹ Now, a designated successor who presents an affida-

58. *Id.*

59. *See id.*

60. *Id.* § 64.2-1411(E) (Cum. Supp. 2015).

61. Act of Mar. 26, 2015, ch. 617, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 64.2-601 (Cum. Supp. 2015)). Note that this new provision applies only to assets claimed under Virginia Code section 64.2-601, which requires the entire personal probate estate to be \$50,000 or less, and not to individual assets of \$25,000 or less claimed under the small asset provision of Virginia Code section 64.2-602. *See supra* Part I.F. Compare VA. CODE ANN. § 64.2-601 (Cum. Supp. 2015), *with id.* § 64.2-602 (Cum. Supp. 2015).

vit under the Small Estate Act may endorse or negotiate a small asset that is a check, draft, or other negotiable instrument payable to the decedent's estate, just as the successor can already do with an instrument payable to the decedent.⁶² This change will be a great help to the beneficiaries of small estates.

H. *Payment of Funds into Court*

The General Assembly amended Virginia Code sections 8.01-600 and 8.01-606, relating to court orders directing the clerk to hold funds.⁶³ Where judgment is taken in the circuit court, the amendment simply confirms that the court, upon motion of a party for good cause shown, may enter an order directing the clerk to hold related monies.⁶⁴ Where judgment is taken in the general district court, the court, upon motion of a party for good cause shown, may order its clerk to hold funds in escrow for up to 180 days to enable the party to request that the circuit court clerk receive and hold the funds.⁶⁵ If the requesting party does not furnish a copy of a circuit court order to the general district court clerk within the 180-day period, the latter clerk must notify the parties that the funds will be disbursed to the prevailing general district court party within thirty days after the notice.⁶⁶

I. *Revisiting the Disposition of Dead Bodies*

Few estate-related subjects have received more attention from the General Assembly in recent years than the proper disposition of dead bodies.⁶⁷ 2015 was no different; the General Assembly clarified or expanded several relevant statutory provisions.⁶⁸

62. VA. CODE ANN. § 64.2-601 (Cum. Supp. 2015).

63. Act of Mar. 26, 2015, ch. 633, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 8.01-600, -606(C) (Repl. Vol. 2015)).

64. VA. CODE ANN. § 8.01-600(A) (Repl. Vol. 2015).

65. *Id.* § 8.01-606(C) (Repl. Vol. 2015).

66. *Id.*

67. Act of Mar. 27, 2014, ch. 355, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 54.1-2818.1 (Cum. Supp. 2014); codified at *id.* § 54.1-2807.02 (Cum. Supp. 2014)); Act of Mar. 7, 2014, ch. 228, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 32.1-298 (Cum. Supp. 2014), 54.1-2807, -2818.1 (Cum. Supp. 2014); codified at *id.* §§ 32.1-309.1 to -309.4 (Cum. Supp. 2014)); Act of Mar. 14, 2013, 2013 Va. Acts 620, 620-21 (codified as amended at VA. CODE ANN. § 32.1-288(B), (F) (Cum. Supp. 2013)).

68. See Act of Mar. 27, 2015, ch. 670, 2015 Va. Acts __, __ (codified as amended at VA.

The revisions clarified that the statutory provisions for the disposition of dead bodies apply to burials, interments, entombments, cremations, and any other “authorized disposition of a dead body permitted by law.”⁶⁹ The term “next of kin” now specifically includes certain individuals “aged 18 years or older” rather than only those “over 18 years of age.”⁷⁰ If the deceased cannot be identified or the next of kin notified, the revisions expressly permit notification of any other person authorized by law to make arrangements for disposition of the decedent’s remains, and they authorize that person to claim the body.⁷¹ If the next of kin or his representative fails or refuses to provide visual identification of a decedent whose remains are to be cremated, any other adult may do so.⁷² If the decedent’s identity and last residence are known, responsibility for notifying the next of kin shifts from the primary law enforcement agency for the locality in which the person or institution having initial custody of the body is located to the corresponding agency in the jurisdiction where the decedent resided.⁷³ Subsequent responsibility for disposing of an unclaimed body likewise depends on whether the decedent’s identity and last residence are known.⁷⁴

II. CASES AND OPINIONS

A. Authority of Surviving Co-Administrator

In *Bartee v. Vitocruz*, the Supreme Court of Virginia considered whether an estate administrator had authority to file a wrongful death suit after the death of his co-administrator.⁷⁵ The facts were simple: two administrators qualified on an estate, but one died before they could file a wrongful death action on behalf of the estate.⁷⁶ The other proceeded to file the suit, but the trial court

CODE ANN. §§ 32.1-309.1, -309.2 (Cum. Supp. 2015), 54.1-2800, -2818.1 (Cum. Supp. 2015); Act of Mar. 26, 2015, ch. 658, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 32.1-309.1, -309.2 (Cum. Supp. 2015)).

69. VA. CODE ANN. § 32.1-309.1(A) (Cum. Supp. 2015).

70. See *id.* Compare *id.* § 54.1-2800 (Cum. Supp. 2015), with *id.* (Repl. Vol. 2013).

71. *Id.* § 32.1-309.1(C), (D) (Cum. Supp. 2015).

72. *Id.* § 54.1-2818.1 (Cum. Supp. 2015).

73. *Id.* § 32.1-309.1(D) (Cum. Supp. 2015).

74. *Id.* § 32.1-309.2(A) (Cum. Supp. 2015).

75. 288 Va. 106, 108, 758 S.E.2d 549, 549 (2014).

76. *Id.* at 108–09, 758 S.E.2d at 549–50.

ruled that he lacked standing to sue without his co-administrator—even though the court clerk had refused his request to requalify as sole administrator, saying he had the authority, as the surviving administrator, to act alone.⁷⁷

Faced with this “Catch-22,” the administrator appealed, arguing that the doctrine of survivorship authorized him to maintain the wrongful death action as sole remaining co-administrator.⁷⁸ Finding no Virginia authority on point, the court applied a three-part analysis based on Virginia statutes and case law.⁷⁹ First, it noted that the co-administrator was deceased and that his personal representative did not succeed to his authority as administrator, so there was no other party who could be joined as a party plaintiff.⁸⁰ Second, the court noted that the office of administrator was not vacant, so no other appointment could be made until a vacancy existed.⁸¹ Third, the court found that Virginia Code section 64.2-517, which expressly applies the survivorship doctrine to co-executors and co-administrators *c.t.a.*, does not limit application of the doctrine to those specific fiduciaries, but instead exists only for the purpose of alerting testators of the doctrine so that they may provide otherwise in their wills if they do not wish it to apply to their chosen personal representatives.⁸² The court therefore concluded that the sole remaining administrator was empowered to file the wrongful death suit.⁸³

B. *Effect of Shareholder Agreement on Estate Plan*

Sometimes courts reach the right decision but raise unwelcome questions in the process. Such is the case with *Jimenez v. Corr.*⁸⁴ This appeal considered whether a deceased shareholder’s bequest of stock to her revocable trust was a permitted transfer under the shareholders’ agreement, or whether the stock was subject to a mandatory sale provision contained in that same agreement.⁸⁵

77. *Id.* at 109, 758 S.E.2d at 550.

78. *Id.* at 110, 758 S.E.2d at 550.

79. *Id.* at 110–13, 758 S.E.2d at 551–52.

80. *Id.* at 111, 758 S.E.2d at 551.

81. *Id.* at 112, 758 S.E.2d at 551–52.

82. *Id.* at 112–13, 758 S.E.2d at 552.

83. *Id.* at 113, 758 S.E.2d at 552.

84. 288 Va. 395, 764 S.E.2d 115 (2014).

85. *Id.* at 402, 764 S.E.2d at 117.

Mrs. Corr's will poured her residuary estate, including shares in a closely held corporation, over to a trust for her three children.⁸⁶ The will authorized the executors to distribute directly to a trust beneficiary any property that otherwise would pass into the trust and then immediately from the trust to that beneficiary.⁸⁷ The trust instrument created three separate, equal shares which Mrs. Corr's children could withdraw at any time, but it gave her son a ninety-day option to purchase all of the shares from the trust.⁸⁸ The son and a son-in-law served as co-trustees.⁸⁹

Several years after executing her will and revocable trust, Mrs. Corr, her son, and her daughter entered into a shareholder agreement that generally obligated a shareholder's personal representative to sell her shares to the company or to the remaining shareholders upon the death of the shareholder.⁹⁰ An exception allowed a shareholder to "convey or bequeath" shares during lifetime or at death to "immediate family," defined as the shareholder's spouse, children, parents, and siblings.⁹¹ Trusts were not included among the permitted transferees.⁹²

When Mrs. Corr's son purported to exercise his purchase option under the trust instrument, her daughter sought a judgment declaring that the shareholder agreement did not permit the shares to be transferred to a trust and therefore that the mandatory purchase provision of the agreement—and not the son's purchase option under the trust—should apply.⁹³ The circuit court held, however, that the shareholder agreement did not prevent the shares from passing according to the will and trust and that the son had properly exercised his purchase option.⁹⁴

Considering the daughter's appeal and the effect of the transfer restrictions in the shareholders' agreement, the court observed that a trust is not a separate legal entity like a corporation, but instead is "a fiduciary relationship between already existing par-

86. *Id.* at 405–06, 764 S.E.2d at 118–19.

87. *Id.* at 405, 764 S.E.2d at 119.

88. *Id.* at 406–07, 764 S.E.2d at 119–20.

89. *See id.* at 402, 406, 764 S.E.2d at 117, 119.

90. *Id.* at 408–09, 764 S.E.2d at 120–21.

91. *Id.* at 409–10, 764 S.E.2d at 121.

92. *See id.* at 412, 764 S.E.2d at 123.

93. *See id.* at 403, 764 S.E.2d at 117.

94. *Id.* at 403, 764 S.E.2d at 118.

ties," each of whom has certain legal rights, and is "simply a method to transfer property to another party."⁹⁵ It then looked through the trust to determine whether the parties who had interests in the decedent's trust were members of her immediate family.⁹⁶

The Supreme Court of Virginia noted that, while a beneficiary has equitable title, "a trustee's legal interest is more than nominal," citing a trustee's broad powers under the Virginia Uniform Trust Code.⁹⁷ It concluded that the pourover of shares from Mrs. Corr's estate to her trust would comply with the shareholders' agreement only if the trustees and the trust beneficiaries all qualified as members of her immediate family, since "both a trustee and a beneficiary have a substantial ownership interest in trust property."⁹⁸ Under that standard, the pourover violated the terms of the shareholders' agreement; while all of the trust beneficiaries were the decedent's children, one of the trustees was a son-in-law, who was not included in the shareholders' definition of "immediate family."⁹⁹

The son argued that the executor's ability to distribute property directly to the children, bypassing the trust, meant that the trustee's relationship to the decedent should not be a factor in the court's analysis.¹⁰⁰ The court, however, noted that the executor was authorized to distribute only assets that otherwise would pass "immediately" to a trust beneficiary.¹⁰¹ It held that the shares could not pass immediately to the trust beneficiaries due to the son's ninety-day purchase option, and therefore the executor could not distribute them directly to the beneficiaries.¹⁰²

The son next argued that the restriction in the shareholder agreement was unenforceable because it did not specify who would purchase the shares or how many each party would purchase.¹⁰³ The court acknowledged that the agreement provided for

95. *Id.* at 410-11, 764 S.E.2d at 122.

96. *Id.* at 412, 764 S.E.2d at 122.

97. *Id.* at 412, 764 S.E.2d at 123.

98. *Id.* at 412, 764 S.E.2d at 122-23.

99. *Id.* at 412-13, 764 S.E.2d at 123.

100. *Id.* at 413, 764 S.E.2d at 123.

101. *Id.*

102. *Id.* at 413-14, 764 S.E.2d at 124.

103. *Id.* at 415, 764 S.E.2d at 124-25.

many possible outcomes, but found that it nonetheless “established a mechanism to provide certainty”¹⁰⁴ The court therefore remanded the case for further proceedings consistent with its finding that the shareholder agreement, not the will and trust, governed the disposition of Mrs. Corr’s shares.¹⁰⁵

Although the Supreme Court of Virginia reached the correct result, it appears to have misconstrued the nature of the trust relationship. A testamentary pourover to the trustees of a trust is not a “conveyance or bequest” to the trust beneficiaries; rather it is a conveyance or bequest for their benefit. Mrs. Corr’s revocable trust already existed when the family entered into the shareholders’ agreement.¹⁰⁶ Had they intended to permit transfers to it or any other trust, they could have easily included language to that effect in the shareholders’ agreement. In fact, prior to *Jimenez*, the assumption of many drafters would likely have been that trusts, partnerships, or other “look through” entities are not permitted transferees unless expressly provided for in the agreement. Thus, as a result of *Jimenez*, drafters are cautioned to review existing shareholder agreements and similar agreements, and to amend them if necessary to indicate clearly whether transfers to trusts are permitted.

C. Removal of Executor

In *Pettit v. Pettit*, the Supreme Court of Virginia considered whether the two-year general statute of limitations under Virginia Code section 8.01-248, as applied to claims against an attorney-in-fact, effectively prevented the removal of an executor who had previously served as the decedent’s agent under a durable power of attorney.¹⁰⁷

In this case, two siblings brought suit to remove their brother as executor of their father’s estate, alleging that as executor he had breached his fiduciary duty to investigate certain actions that he had taken as their father’s agent.¹⁰⁸ The circuit court sustained the executor’s special plea in bar that the suit was time-barred

104. See *id.* at 415–16, 764 S.E.2d at 125.

105. *Id.* at 416, 764 S.E.2d at 125–26.

106. See *id.* at 408, 764 S.E.2d at 120.

107. No. 130508, slip op. at 1–2 (Va. Mar. 7, 2014) (unpublished decision).

108. *Id.* at 1.

under the general statute of limitations because all of the actions the plaintiffs sought to question had occurred more than two years before the suit was filed.¹⁰⁹

The siblings had argued below that the limitations period was tolled under Virginia Code section 8.01-229(D) (relating to obstructing the filing of an action) due to the brother's failure to resign or to bring a claim against himself on behalf of the estate.¹¹⁰ They also argued that an action to remove an executor is purely equitable and therefore is governed by the doctrine of laches rather than by any specific statute of limitations.¹¹¹

On appeal, the court noted that even if the removal suit were governed by laches, the parties had admitted that the specific actions the siblings challenged were governed by the two-year statute of limitations.¹¹² With no claims remaining for a successor personal representative to assert, the court found no reason to remove the executor.¹¹³ The Supreme Court of Virginia therefore affirmed the judgment of the circuit court.¹¹⁴

D. *Qualification for Inventory and Settlement Waiver*

In an opinion to the clerk of the Roanoke Circuit Court, the Attorney General of Virginia concluded that Virginia Code section 64.2-1302 allows the clerk to waive inventory and settlement for a creditor who qualifies on a decedent's personal estate valued at \$25,000 or less only if the creditor's claim exceeds the value of the estate.¹¹⁵ By contrast, heirs and beneficiaries may qualify irrespective of the value of their shares of the estate.¹¹⁶ The proof that a creditor must furnish regarding the estate's value and the value of the creditor's claim is a matter within the clerk's discretion.¹¹⁷

109. *Id.* at 2.

110. *Id.*

111. *Id.* at 3.

112. *Id.* at 3-4.

113. *Id.* at 4.

114. *Id.* at 4-5.

115. 2014 Op. Va. Att'y Gen. 173, 173-74.

116. *Id.* at 174.

117. *Id.*