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Wills, Trusts, and Estates

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WILLS, TRUSTS, AND ESTATES

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INTRODUCTION

The 2016 General Assembly of Virginia made substantial changes in the augmented estate rights of surviving spouses. It also modified and codified the rules governing powers of appointment. Other legislation affecting wills, trusts, and estates included clarifications and technical corrections relating to such subjects as creditors' claims to life insurance and annuities, court-created trusts, protection of adults from exploitation, creditor protection for residential property, unclaimed assets, guardianships, and nonstock corporation procedure.[1] Five decisions of the Supreme Court of Virginia addressed fiduciary conflicts, tenancies by the entirety, lost wills, contract rights in residences, and no-contest clauses.

I. LEGISLATION

A. *Revised Augmented Estate System*

Virginia's augmented estate rules, enacted a quarter-century ago to protect surviving spouses against disinheritance, have been revised to conform more closely to the Uniform Probate Code for decedents dying after 2016.[2] Current law entitles a spouse to a

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1. All 2016 legislation summarized in this article became effective July 1, 2016, except the augmented estate legislation described in Part I.A, which takes effect January 1, 2017.

2. *Compare* UNIF. PROBATE CODE §§ 2-201–214 (amended 2010), 8 U.L.A. 140, 140–

minimum share of not only the decedent's probate estate but also most nonprobate assets and certain assets the decedent transferred to third parties during life.[3] Like the dower, curtesy, and elective share provisions it replaced, the current augmented estate system grew out of a legislative determination that every Virginia decedent should make a certain portion of his[4] estate available to support his surviving spouse (the "spousal support theory").[5] The 2017 revisions, however, are premised on the idea that each spouse should be entitled to up to half of the collective assets they have brought to, or accumulated during, the marriage (the "economic partnership theory"), with the surviving spouse's right vesting gradually over the course of the marriage.[6]

Under the new augmented estate rules, a determination of the surviving spouse's property rights begins with the value of the decedent's probate estate; net of funeral and administration expenses (other than transfer taxes); the homestead, family, and exempt property allowances; and enforceable claims.[7] The net probate estate value then is augmented by the value of assets the decedent transferred to the surviving spouse and, in most cases, to third parties.[8] The following are some of the important additions.

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191 (2013), *with* Act of Mar. 1, 2016, ch. 187, 2016 Va. Acts __, __ (codified at VA. CODE ANN. §§ 64.2-300 to -308.17 (Cum. Supp. 2016)).

3. *See* VA. CODE ANN. §§ 64.2-300 to -308 (Cum. Supp. 2015).

4. To avoid syntactic awkwardness or ambiguity and to recognize actuarial reality, this discussion of spousal rights uses masculine pronouns to refer to the first spouse to die and feminine pronouns to refer to the surviving spouse.

5. *See generally* J. William Gray, Jr., *Annual Survey of Viginia Law: Virginia's Augmented Estate System*, 24 U. RICH. L. REV. 513, 514–15 (1990) (discussing the "spousal support theory" and the augmented estate system).

6. *See* UNIF. PROBATE CODE, Art. II, pt. 2, general cmt., 8 U.L.A. 140 (2013).

7. Act of Mar. 1, 2016, ch. 187, 2016 Va. Acts __, __ (codified at VA. CODE ANN. § 64.2-308.5 (Cum. Supp. 2016)). The current terms and amounts of the family, exempt property, and homestead allowances remain in effect. *See* VA. CODE ANN. §§ 64.2-309–311 (Repl. Vol. 2012 & Cum. Supp. 2016). While the new augmented estate statute allows the surviving spouse to receive all three allowances in addition to her elective share amount, the homestead allowance statute continues to provide that the surviving spouse may not claim both a homestead allowance and an elective share. *Compare* VA. CODE ANN. § 64.2-308.3(B) (Cum. Supp. 2016), *with id.* § 64.2-311(D) (Cum. Supp. 2016).

8. *See* Act of Mar. 1, 2016, ch. 187, 2016 Va. Acts __, __ (codified at VA. CODE ANN. §§ 64.2-308.6, -308.7 (Cum. Supp. 2016)). The value of the decedent's non-probate transfers to third parties is not included in the augmented estate if the surviving spouse does not file a complaint to determine the elective share within the prescribed statutory period. *See* VA. CODE ANN. § 64.2-308.12(B) (Cum. Supp. 2016); *see also infra* notes 27–28 and accompanying text. This offers repose to third party donees, who may not be in a position to

(1) Property over which the decedent alone held a presently exercisable power to appoint to himself, his estate, his creditors, or the creditors of his estate.[9]

(2) The decedent's interest in property owned with another as joint tenants with right of survivorship.[10]

(3) The decedent's interest in assets held with pay-on-death or transfer-on-death designations or in co-ownership registration with another with the right of survivorship.[11]

(4) Proceeds of insurance on the decedent's life to the extent he owned the policy or held a presently exercisable general power of appointment over it.[12]

(5) Property the decedent irrevocably transferred during his lifetime but in which he retained rights to income or possession that continued until his death.[13]

(6) Property the decedent transferred while retaining a power to appoint income or principal for the benefit of himself, his creditors, his estate, or the creditors of his estate, whether exercisable alone, in conjunction with another, or solely by a non-adverse party.[14]

(7) Property the decedent transferred to someone other than the surviving spouse during the marriage and within two years of his death, to the extent the property would have been included in his augmented estate if he had retained it, or his rights over it, until his death.[15]

(8) Other property the decedent transferred to someone other than the surviving spouse during the marriage and within two years before his death, to the extent the transfers to any one re-

know if the surviving spouse has filed a claim for the elective share.

9. Act of Mar. 1, 2016, ch. 187, 2016 Va. Acts __, __ (codified at VA. CODE ANN. §§ 64.2-308.6(1)(a) (Cum. Supp. 2016) (property passing to third parties); codified at *id.* § 64.2-308.7(3) (Cum. Supp. 2016) (property passing to surviving spouse)).

10. VA. CODE ANN. §§ 64.2-308.6(1)(b), -308.7(1) (Cum. Supp. 2016).

11. *Id.* §§ 64.2-308.6(1)(c), -308.7(2) (Cum. Supp. 2016).

12. *Id.* §§ 64.2-308.6(1)(d), -308.7(3) (Cum. Supp. 2016).

13. *Id.* §§ 64.2-308.6(2)(a), -308.7(3) (Cum. Supp. 2016).

14. *Id.* §§ 64.2-308.6(2)(b), -308.7(3) (Cum. Supp. 2016).

15. *Id.* § 64.2-308.6(3)(a)–(b) (Cum. Supp. 2016).

cipient in either year exceeded the applicable federal gift tax exclusion amount for annual gifts of present interests.[16]

(9) To the extent not already included under the preceding rules, the net value of the surviving spouse's other property also is added to the augmented estate, along with the net value of the surviving spouse's lifetime transfers to third parties that would have been included in her augmented estate if she had died first.[17]

Despite these general rules of inclusion, a lifetime transfer by the decedent is not pulled back into the augmented estate to the extent it was transferred for adequate consideration or with the surviving spouse's written consent or joinder.[18] Perhaps most significantly, the statute also continues the Virginia exclusion, not found in the Uniform Probate Code, for the value of property the decedent or the surviving spouse received from third parties to the extent it was received without full consideration and maintained as separate property.[19]

The statute helpfully sets forth specific rules for valuing life estates, remainders, and partial and contingent interests, as well as protections against double-counting.[20] It also adopts a rule by which a surviving spouse's interest in a trust may be valued without any discount.[21]

Consistent with the partnership theory of marriage, the statute entitles the surviving spouse to up to half of the augmented estate value.[22] The actual amount depends on the duration of the

16. *Id.* § 64.2-308.6(3)(c) (Cum. Supp. 2016). The applicable federal gift tax exclusion for 2015 and 2016 is $14,000 per donee per year. *See* 26 U.S.C. § 2503(b) (2012).

17. Act of Mar. 1, 2016, ch. 187, 2016 Va. Acts __, __ (codified at VA. CODE ANN. § 64.2-308.8 (Cum. Supp. 2016)).

18. VA. CODE ANN. § 64.2-308.9(A) (Cum. Supp. 2016).

19. *Id.* § 64.2-308.9(B) (Cum. Supp. 2016).

20. *See id.* § 64.2-308.9(C)–(D) (Cum. Supp. 2016). The value of includable assets is reduced by enforceable claims against them. *Id.* § 64.2-308.9(C)(1) (Cum. Supp. 2016). Life estate, remainder, and other partial interests are to be valued as provided in Virginia Code sections 55-269.1 through -277. *Id.* § 55-269.1 to -277 (Cum. Supp. 2016). However, the value of such an interest passing to the surviving spouse is determined under special rules that take into account her rights and applicable contingencies and that assign to her an actuarial life expectancy of at least ten years. *See* Act of Mar. 1, 2016, ch. 187, 2016 Va. Acts __, __ (codified at VA. CODE ANN. § 64.2-308.9(C)(2)(b)–(c) (Cum. Supp. 2016)).

21. *See* VA. CODE ANN. § 64.2-308.9(C)(2)(a) (Cum. Supp. 2016).

22. *Id.* § 64.2-308.3(A) (Cum. Supp. 2016). In addition, the surviving spouse may be separately entitled to homestead, exempt property, and family allowances. *Id.* § 64.2-308.3(B) (Cum. Supp. 2016). *But see supra* note 7 and accompanying text (discussing the

parties' marriage, varying from 1.5% of the total augmented estate for a marriage of less than a year to a full 50 percent for a marriage of fifteen years or more.[23]

The value of the surviving spouse's assets included in the augmented estate and the value of assets she is entitled to receive in accordance with the decedent's estate plan (whether or not such assets are included in the augmented estate) are applied first toward satisfying the spouse's elective share.[24] Liability for any remaining balance of the elective share is apportioned among recipients of the decedent's net probate estate and non-probate transfers to others.[25] The spouse may continue to occupy the principal family residence and curtilage without charge for rent, repairs, taxes, or insurance until her rights in the residence have been finally determined and satisfied by agreement of the parties or by court decree.[26]

The spouse must file a written claim for an elective share with the court or clerk within six months after the decedent's will is

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apparent conflict between augmented estate and homestead allowance statutes as to spouse's eligibility).

23. *Id.* §§ 64.2-308.4(B), -308.10(B) (Cum. Supp. 2016). This result is derived from a two-step process: after determining the composition and value of the augmented estate, one first calculates the value of the marital-property portion, which ranges from 3 percent for a marriage of less than one year to 100 percent for a marriage of fifteen years or more. *Id.* § 64.2-308.4(B) (Cum. Supp. 2016). One then determines the "elective share amount," which is always 50 percent of the value of the marital-property portion. *Id.* §64.2-308.3(A) (Cum. Supp. 2016).

24. As with Virginia's current augmented estate system, the surviving spouse cannot choose which assets will be used to satisfy her claim; assets that pass or have passed to the spouse from the deceased spouse are charged against her elective share even if she disclaims them. *Compare id.* § 64.2-306(A) (Cum. Supp. 2015), *with* Act of March 1, 2016, ch. 187, 2016 Va. Acts __, __ (codified at VA. CODE ANN. § 64.2-308.3(B) (Cum. Supp. 2016)). Thus, a decedent may choose the means by which he will provide for his surviving spouse, including through the use of excluded property received by gift or inheritance from a third party and maintained as separate property. *See* VA. CODE ANN. § 64.2-308.10(A) (Cum. Supp. 2016).

25. *Id.* § 64.2-308.10(C)–(D) (Cum. Supp. 2016). Recipients of transfers resulting from a lifetime termination of a right, interest, or power, and donees of gifts made within two years of death that exceed the federal gift tax exclusion, share in liability only if the value of all other recipients' interests is not sufficient to make up any shortfall. *Id.* In all events, third parties who receive a non-probate transfer from the decedent, and their donees, are personally liable for contribution only to the extent they still possess the property so received or the proceeds therefrom. *Id.* § 64.2-308.11 (Cum. Supp. 2016). They are not liable for having transferred it or taken other action in good faith reliance on the governing instrument and before receiving written notice that the surviving spouse has filed a complaint for an elective share. *Id.* § 64.2-308.15(A) (Cum. Supp. 2016).

26. *Id.* § 64.2-308.16 (Cum. Supp. 2016).

probated or an administrator qualifies on an intestate estate.[27] The spouse must then ask the court to determine the elective share by filing a complaint within six months after filing the election.[28] This two-step process gives the parties an opportunity to agree on the calculation outside of a formal court proceeding.

Spouses may waive their elective share rights wholly or partially in a valid marital or premarital agreement or other written contract or waiver.[29] A surviving spouse who has filed an elective share claim may withdraw it at any time before the court enters a final determination.[30] A spouse who has willfully deserted or abandoned the decedent is barred from claiming any interest in the decedent's estate, including an elective share, if the desertion or abandonment continues until the decedent's death.[31]

B. *Uniform Powers of Appointment Act*

With the exception of a few statutes scattered throughout the Virginia Code, the interpretation and effect of powers of appointment in Virginia, like in most states, have been governed by common law.[32] This has left gaps and uncertainty for planners advising clients on their use. To address these issues and make powers of appointment more predictable when used across state lines, the 2016 General Assembly enacted a comprehensive statute to govern powers of appointment.[33] Closely modeled after the Uniform Powers of Appointment Act, revised Chapter 27 of Title 64.2 of the Virginia Code provides default rules for the creation, interpretation, and exercise of powers of appointment in any in-

27. *Id.* § 64.2-308.12(A) (Cum. Supp. 2016).

28. *Id.* § 64.2-308.12(B) (Cum. Supp. 2016).

29. *Id.* § 64.2-308.14(A)–(D) (Cum. Supp. 2016).

30. *Id.* § 64.2-308.12(C) (Cum. Supp. 2016).

31. *Id.* § 64.2-308.14(E) (Cum. Supp. 2016).

32. *See, e.g.*, *id.* § 64.2-406 (Cum. Supp. 2015) (formalities required for exercise of power by will); *id.* § 64.2-423 (Cum. Supp. 2015) (exercise of power by residuary clause in will); *id.* §§ 64.2-2700–2704 (Cum. Supp. 2015) (release of powers); *see also, e.g.*, Leach v. Hyatt, 244 Va. 566, 570, 423 S.E.2d 165, 168–69 (1992) (powers must be expressly created); Holzbach v. United Virginia Bank, 216 Va. 482, 485, 219 S.E.2d 868, 871 (1975) (requiring strict compliance with donor's requirements); Christian v. Wilson's Ex'rs, 153 Va. 614, 628, 151 S.E. 300, 304 (1930) (noting property subject to general power of appointment may be reached by powerholder's creditors).

33. Act of Mar. 7, 2016, ch. 266, 2016 Va. Acts __, __ (codified at VA. CODE ANN. §§ 64.2-2700 to -2741 (Cum. Supp. 2016)).

strument to which Virginia law applies.[34] The statutory rules yield to manifestations of contrary intent in the applicable document.[35] Issues that the statute does not address continue to be governed by the common law and principles of equity.[36]

A donor can create a power of appointment over property in any living, unborn, or unascertained person by an instrument valid under applicable state law that manifests the donor's intent to do so, transfers the appointive property or creates a further power of appointment over that property, and specifies the permissible appointees.[37] The power is not transferable;[38] it may be amended or revoked only if the donor reserves that right at the time of creation or if the instrument creating the power is revocable or amendable.[39] Unless the instrument provides otherwise, the power is presumed to be presently exercisable in favor of one or more, but not necessarily all, of the permissible appointees, including the holder, his estate, his creditors, or the creditors of his estate.[40]

The holder can exercise a power of appointment by an instrument that is valid under applicable state law and that shows the holder's intent to exercise the power, substantially complies with any requirements of exercise, and designates appointees that are permissible under its terms.[41] A clause that exercises all powers a

34. By default, the creation or revision of a power of appointment is governed by the law of the donor's domicile at the relevant time; the exercise, release, or disclaimer of the power is governed by the law of the powerholder's domicile at the relevant time. *See* VA. CODE ANN. § 64.2-2705 (Cum. Supp. 2016). For the full text of the Uniform Powers of Appointment Act, see UNIF. POWERS OF APPOINTMENT ACT, (UNIF. LAW COMM'N 2013), http://www.uniformlaws.org/Act.aspx?title=PowersofAppointment (last visited Oct. 3, 2016).

35. *See* Act of Mar. 7, 2016, ch. 266, 2016 Va. Acts __, __ (codified at VA. CODE ANN. § 64.2-2705 (Cum. Supp. 2016) (governing law); codified at *id.* § 64.2-2710 (Cum. Supp. 2016) (presumption of unlimited authority in holder); codified at *id.* §§ 64.2-2713 to -2715, -2717 (scope of exercise); codified at *id.* §§ 64.2-2723 to -2724 (Cum. Supp. 2016) (disposition of unappointed property); codified at *id.* § 64.2-2726 (Cum. Supp. 2016) (revocation or amendment of exercise); codified at *id.* § 64.2-2726 (Cum. Supp. 2016) (release of power); codified at *id.* § 64.2-2741 (Cum. Supp. 2016) (application to existing instruments)).

36. VA. CODE ANN. § 64.2-2706 (Cum. Supp. 2016).

37. *Id.* § 64.2-2707(A)–(C) (Cum. Supp. 2016). A power created in any unborn or unascertained person is subject to the applicable rule against perpetuities. *Id.* § 64.2-2707(D) (Cum. Supp. 2016).

38. *Id.* § 64.2-2708 (Cum. Supp. 2016).

39. *Id.* § 64.2-2712 (Cum. Supp. 2016).

40. *Id.* § 64.2-2709 (Cum. Supp. 2016).

41. *Id.* §§ 64.2-2713, -2716 (Cum. Supp. 2016). Substantial compliance with any re-

holder may possess (a "blanket-exercise clause") is effective, and includes any powers the holder may acquire after executing the instrument containing the clause unless (i) the holder is also the donor of the after-acquired power and (ii) the document granting the power contains an effective gift-in-default clause.[42]

A residuary clause of a powerholder's will (or a comparable provision in the powerholder's revocable trust) that does not expressly exercise a power of appointment is nevertheless deemed to exercise the power if the document does not manifest a contrary intent, the power is exercisable in favor of the holder's estate, there is no effective gift-in-default clause, and the holder did not release the power.[43] If a holder exercises a power in a disposition that also disposes of property the holder owns, the combined assets "shall be allocated in the permissible manner that best carries out the powerholder's intent."[44]

If the powerholder may appoint to himself or his estate, he may make any appointment that would be permissible in disposing of his own property, including an appointment in trust or the creation of a new power.[45] However, if the powerholder may appoint only to his estate or its creditors, he may appoint only to those creditors.[46] A powerholder who may not appoint to himself, his estate, his creditors, or the creditors of his estate may appoint outright or in trust to permissible appointees specified in the instrument creating the power, create a power of appointment in them, or empower another person to appoint to one or more of them.[47]

If the powerholder releases the power or fails to exercise it effectively, the appointive property will pass to the persons designated as takers in default in the instrument that created the power.[48] If no one is effectively designated, the appointive proper-

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quirements for exercise imposed by the donor is sufficient if the powerholder knows of and intends to exercise the power and the attempted manner of exercise "does not impair a material purpose of the donor in imposing the requirement." *Id.* § 64.2-2716 (Cum. Supp. 2016).

42. *Id.* § 64.2-2715 (Cum. Supp. 2016).
43. *Id.* § 64.2-2714(B) (Cum. Supp. 2016).
44. *Id.* § 64.2-2720 (Cum. Supp. 2016).
45. *Id.* § 64.2-2717(A) (Cum. Supp. 2016).
46. *Id.* § 64.2-2717(B) (Cum. Supp. 2016).
47. *Id.* § 64.2-2717(C) (Cum. Supp. 2016).
48. *Id.* §§ 64.2-2721–2722 (Cum. Supp. 2016).

ty may pass to the powerholder, to the permissible appointees or back to the donor, depending on the nature of the power.[49]

The powerholder may disclaim or release a power of appointment in whole or in part, and an appointee or taker in default may disclaim all or part of an interest in any appointive property.[50] The powerholder may contract to exercise or not to exercise a power, but only if it is currently exercisable or becomes exercisable immediately upon the occurrence of a specified event (other than the powerholder's death), the satisfaction of an ascertainable standard, or the passage of a specified time.[51]

If a donor retains a presently exercisable general power of appointment, his creditors can reach the appointive property to the same extent as if it were his own property, unless the original conveyance was not fraudulent and the donor/powerholder has irrevocably appointed the property to a third party.[52] If the donor retains a testamentary general power of appointment, the appointive property is subject to the claims of creditors of his estate.[53]

If a third party gives the powerholder a power to appoint to himself, his estate, his creditors, or the creditors of his estate, the appointive property will be subject to the claims of the powerholder's creditors unless the power is subject to an ascertainable standard as defined in section 2041(b)(1)(A) of the Internal Revenue Code.[54] Property that the powerholder cannot appoint to him-

49. *Id.* § 64.2-2723 (Cum. Supp. 2016). If the holder could have appointed the property to himself, his estate, his creditors, or the creditors of his estate, the unappointed property will pass to the powerholder or, if he is not living or is not a permissible appointee, to his estate, if it is a permissible appointee; if neither the powerholder nor his estate is a permissible appointee, the unappointed property will revert to the donor of the power or the donor's successor in interest. *Id.* If the powerholder could not appoint to himself, his estate, his creditors, or the creditors of his estate, the unappointed property will pass to the permissible appointees if they are defined and limited; otherwise, it will revert to the donor or the donor's successors. *Id.*

50. *Id.* §§ 64.2-2727–2728 (Cum. Supp. 2016).

51. *Id.* §§ 64.2-2732–2733 (Cum. Supp. 2016). No other powerholder may contract to exercise or not to exercise a power unless the holder is also the donor of the power and has reserved the power in a revocable trust. *Id.*

52. *Id.* § 64.2-2735 (Cum. Supp. 2016).

53. *Id.* These rules apply regardless of when the claim arose and regardless of the presence of a spendthrift provision; but, the donor retains the right to specify the sources from which the estate liabilities are to be paid. *Id.* § 64.2-2735(D) (Cum. Supp. 2016).

54. *See* 26 U.S.C. § 2041(b)(1)(A) (2012) (stating that an ascertainable standard relates to the individual's "health, education, support, or maintenance"). Where the appoin-

self, his estate, his creditors, or the creditors of his estate is exempt from creditor claims unless the original property transfer was a fraudulent conveyance or unless the powerholder or his estate is the initial taker in default.[55]

The new statutory provisions apply to all powers of appointment, whenever created, and to all judicial proceedings relating to powers of appointment except to the extent a court, hearing a proceeding that commenced before July 1, 2016, finds that its application "would interfere substantially with the effective conduct of the judicial proceeding or prejudice a right of a party."[56] Statutory rules and presumptions apply to preexisting instruments that do not clearly indicate a contrary intent.[57] Prior law continues to apply, however, to a right acquired, extinguished, or barred on the expiration of a statutory period that began before that date.[58]

C. *Protection of Insurance and Annuity Proceeds from Creditors*

For the last thirty years, the value of any benefit under a life insurance or annuity contract was generally subject to claims by the insured's or the owner's creditors; only actual proceeds paid to an assignee or lawful beneficiary were protected from the insured's or owner's creditors, and even then only in certain circumstances.[59] However, in a move that caught many trust and estate practitioners by surprise, the 2016 Virginia legislature departed significantly from this conservative policy by amending the statute to be much more favorable to those seeking to protect assets from possible future creditors.[60]

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tive property is subject to claims by the powerholder's creditors, it may be reached only to the extent the powerholder's own property or his estate, as the case may be, is insufficient to satisfy the claims and, in the case of estate creditors, only to the extent the powerholder has not effectively directed that the liabilities be paid from other sources. *See* Act of Mar. 7, 2016, ch. 266, 2016 Va. Acts __, __ (codified at VA. CODE ANN. § 64.2-2736 (Cum. Supp. 2016)).

55. *See* Act of Mar. 7, 2016, ch. 266, 2016 Va. Acts __, __ (codified at VA. CODE ANN. § 64.2-2738 (Cum. Supp. 2016)).

56. *Id.* § 64.2-2741(A)(3) (Cum. Supp. 2016).

57. *Id.* § 64.2-2741(A)(4) (Cum. Supp. 2016).

58. *Id.* § 64.2-2741(B) (Cum. Supp. 2016).

59. *See id.* § 38.2-3122 (Cum. Supp. 2015).

60. *See* Act of Mar. 7, 2016, ch. 274, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 38.2-3122 (Cum. Supp. 2016)).

Under the new law, the value of any benefit derived from a life insurance or annuity policy is generally exempt not only from the claims of creditors of the person who effected the policy, the insured, and the policy owner, but also from the creditors of anyone who is dependent on the insured or the owner, including a spouse or intended spouse.[61] In other words, even a beneficiary's own creditors apparently may not reach the proceeds in most cases. Protected benefits include, without limitation, policy proceeds, cash surrender value, and the withdrawal value of a settlement or deposit.[62] This statutory protection can be waived as to any policy "taken out, made, or assigned in writing for the benefit of the creditor."[63]

D. *Creation of Trust by Court*

An amendment to the Virginia Uniform Trust Code confirms that a circuit court may create a trust upon any interested person's petition and may specify the trustee and terms, including whether the trustee must qualify in the clerk's office, post bond, and report to the Commissioner of Accounts.[64]

E. *Exploitation of Vulnerable Adults*

In recent years, the legislature has shown an increasing awareness of the potential vulnerability of elderly and incapacitated individuals to financial abuse.[65] Two amendments enacted in 2016 address additional situations that might lead to such exploitation.

First, the guardian of an incapacitated adult may not unreasonably restrict the adult's ability to communicate with, visit, or interact with others who have an established relationship with

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61. VA. CODE ANN. § 38.2-3122(B) (Cum. Supp. 2016). No protection is available with respect to a benefit issued or effected within six months of the time the person claiming exemption files a voluntary bankruptcy petition, is declared bankrupt or insolvent, or otherwise seeks debt relief. *See id.* § 38.2-3122(E) (Cum. Supp. 2016).

62. *Id.* § 38.2-3122(A) (Cum. Supp. 2016).

63. *Id.* § 38.2-3122(C) (Cum. Supp. 2016).

64. Act of Mar. 1, 2016, ch. 186, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 64.2-719 (Cum. Supp. 2016)).

65. *See, e.g.*, Act of Mar. 16, 2013, ch. 452, 2013 Va. Acts 729, 729 (codified at VA. CODE ANN. § 18.2-178.1 (Cum. Supp. 2013) (financial exploitation of mentally incapacitated persons)).

the adult.[66] Second, if the local department of social services or the adult protective services hotline learns of possible financial exploitation of an adult who is at least sixty years of age or is incapacitated, and if suspected losses from the exploitation are more than $50,000, it must immediately refer the matter and all relevant documents to the local law enforcement agency where the adult resides or where the alleged exploitation occurred.[67] If those places are unknown, then the referral must be made to the law enforcement agency where the alleged exploitation was discovered.[68]

F. *Payment of Unclaimed Property*

To facilitate estate administration, there is now a procedure by which someone may seek unclaimed personal property held by the State Treasurer for a reported owner who is deceased.[69] The claimant must submit evidence of entitlement such as, in order of preference, an appointment as fiduciary of the owner's estate, an affidavit under the Small Estate Act, or a distribution order or final accounting showing that the claimant is entitled to part or all of the property.[70] Absent such evidence, if the decedent has been dead for at least a year and the property value (excluding interest) does not exceed $15,000, the claimant may receive the property by submitting a personal affidavit that closely resembles the small asset affidavit authorized by the Small Estate Act.[71]

G. *Liability for Spouse's Medical Expenses*

Spouses are jointly and severally liable for the cost of emergency medical and follow-up care provided to either of them.[72] However, as of July 1, 2016, their principal residence will be shielded

66. Act of Mar. 11, 2016, ch. 404, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 64.2-2019 (Cum. Supp. 2016)).

67. Act of Mar. 11, 2016, ch. 408, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 63.2-1605 (Cum. Supp. 2016)).

68. *Id.*

69. *See* Act of Mar. 11, 2016, ch. 350, 2016 Va. Acts __, __ (codified at VA. CODE ANN. § 55-210.20(B)–(C) (Cum. Supp. 2016)). The State Treasurer must develop and post on its website a plain English explanation of a person's right to claim such property. VA. CODE ANN. § 55-210.20(D) (Cum. Supp. 2016).

70. VA. CODE ANN. § 55-210.20(B) (Cum. Supp. 2016).

71. *Id.*

72. *See id.* § 8.01-220.2 (Repl. Vol. 2015 & Cum. Supp. 2016).

from such liability for as long as they hold it as tenants by the entireties and do not refinance it or transfer it to a new owner.[73] Unfortunately, unlike other creditor protection provisions for entireties property, this protection does not apply to an interest in a principal residence held in the spouses' joint trust or in their separate revocable trusts.[74] It also does not appear to apply after either spouse's death.[75]

H. *Guardianship Procedures*

Two 2016 amendments slightly alter the procedural rules for guardianships.[76] First, when a guardianship is modified or terminated, the clerk must give notice of the change to the Department of Medical Assistance Services, as well as the local social services department if different from the one that received initial notice of the guardianship.[77] This may help the state recover amounts due it from any special needs trust held for the benefit of an incapacitated person. Second, if a petition is filed to appoint an adult guardian or conservator for a minor who is nearing age eighteen, the court does not need to wait until the child's eighteenth birthday before entering the order so long as it specifies when the order is to become effective.[78] This amendment will help parents and guardians avoid any period during which no one has authority to act on behalf of the child.

I. *Action by Board of Nonstock Corporation*

Traditionally, the board of directors of a Virginia nonstock corporation has been able to act only at a duly called meeting at which a quorum of directors is present or by unanimous written

73. Act of Mar. 4, 2016, ch. 240, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-220.2 (Cum. Supp. 2016)).

74. *Cf.* VA. CODE ANN. § 55-20.2 (Cum. Supp. 2016).

75. *Cf. id.* § 55-37 (Repl. Vol. 2012 & Cum. Supp. 2016).

76. Act of Feb. 25, 2016, ch. 30, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 64.2-2011, -2014 (Cum. Supp. 2016)); Act of Feb. 25, 2016, ch. 31, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 64.2-2001, -2009 (Cum. Supp. 2016)).

77. Act of Feb. 25, 2016, ch. 30, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 64.2-2011, -2014 (Cum. Supp. 2016)).

78. Act of Feb. 25, 2016, ch. 31, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 64.2-2001, -2009 (Cum. Supp. 2016)).

consent without a meeting.[79] Now directors of a nonstock corporation may also act without a meeting pursuant to a written consent signed by fewer than all of the directors in office, as long as the action does not also require adoption by or approval of the members of the corporation.[80] That method of acting must be expressly authorized by the articles of incorporation, the board must have received at least ten days' notice of the proposed action, and no director must have objected to the action.[81]

II. CASES

A. *Effect of Fiduciary Conflicts*

In *Birchwood-Manassas Associates v. Birchwood at Oak Knoll Farm*, the Supreme Court of Virginia considered whether conflicts of interest and breaches of fiduciary duty by limited liability company managers could be considered special circumstances that equitably toll the statute of limitations on contract claims.[82] A liquidating trustee appointed to wind up the affairs of an LLC sued to collect outstanding loans from two other LLCs managed by the same individuals who had managed the liquidating LLC.[83] The circuit court held, however, that the statute of limitations on the loan claims had run and that alleged conflicts of interest of the managers and breaches of their fiduciary duties did not equitably toll the statute.[84]

On appeal, the trustee argued that the LLC managers' conflicts and breaches of duty constituted extraordinary circumstances that should toll the statute because they had made it impossible for the liquidating LLC to assert its rights within the statutory period.[85] The supreme court noted that a statute of limitations may be tolled only pursuant to a clear statutory exception, which was not present here, or pursuant to two types of extraordinary

79. *See* VA. CODE ANN. § 13.1-868 (Repl. Vol. 2016) (action by vote at a meeting); *id.* § 13.1-865 (Repl. Vol. 2016) (action by unanimous written consent without a meeting).

80. *See* Act of Mar. 11, 2016, ch. 382, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 13.1-865 (Repl. Vol. 2016)).

81. *Id.* § 13.1-865(A) (Repl. Vol. 2016).

82. 290 Va. 5, 5–7, 773 S.E.2d 162, 162–63 (2015).

83. *Id.* at 5, 773 S.E.2d at 163.

84. *Id.*

85. *Id.* at 6–7, 773 S.E.2d at 163–64.

circumstances—a defendant's fraud or an affirmative act that prevented the plaintiff from asserting a timely claim.[86]

The trustee contended that the managers' dual roles with the liquidating LLC and its borrowers made it impossible for the former to assert its rights.[87] The supreme court observed, however, that the alleged conflicts and breaches were known to the LLC members and that any of the LLC's other members could have brought a timely action against the borrowers even if the managers did not.[88] Because a timely action could have been filed as a matter of law, extraordinary circumstances sufficient to toll the statute did not exist.[89]

B. *Severance of Tenancy by the Entirety*

Most Virginia attorneys remember from law school that a tenancy by the entirety requires the five unities of time, title, interest, possession, and marriage.[90] The source of the special creditor protection provided to property held as tenants by the entirety arises from the fact that the spouses own the property "as one," so neither spouse may unilaterally terminate the tenancy.[91]

Against this backdrop, *Evans v. Evans* presented an issue of first impression in Virginia: whether a deed executed by a husband purporting to convey to his wife his interest in property held by the entirety created a fee simple estate in her.[92] Mr. Evans, as sole grantee, originally executed a deed conveying to his wife "all of his interest" in a residence they held as tenants by the entirety.[93] More than two years passed before the deed was recorded, and the record did not show whether Mrs. Evans accepted physical delivery in the meantime.[94] Years later, she conveyed "all of her interest" in the residence to a trust, which did not provide for her children equally.[95] In settlement of a subsequent dispute after

86. *Id.* at 7, 773 S.E.2d at 163–64.
87. *Id.* at 7–8, 773 S.E.2d at 164.
88. *Id.* at 8, 773 S.E.2d at 164.
89. *Id.*
90. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 326–27 (3d ed. 1993).
91. *See id.* at 327.
92. 290 Va. 176, 179, 772 S.E.2d 576, 577 (2015).
93. *Id.* at 179, 772 S.E.2d at 577–78.
94. *Id.* at 179, 772 S.E.2d at 578.
95. *Id.* at 179–80, 772 S.E.2d at 578.

her death, Mr. Evans waived any right to the residence except for a life estate pursuant to her will and trust.[96]

In a quiet-title action after Mr. Evans's death, the circuit court found the original deed ineffective to sever the tenancy because it failed to show that the parties intended to transfer the residence jointly to Mrs. Evans in fee simple.[97] Consequently, Mrs. Evans's subsequent attempt to convey it to her trust was deemed ineffective, and the circuit court ruled the property had become Mr. Evans's in fee simple at his wife's death.[98]

On appeal by Mrs. Evans's trustee, the supreme court announced a general rule that where there is sufficient evidence that one spouse intended to convey the property to the other spouse, and that the grantee-spouse voluntarily accepted it, the requirement of mutual conveyance is met.[99] While the record did not show when or even if the deed had been delivered to Mrs. Evans, the supreme court found clear evidence that she had affirmatively accepted the conveyance by her later execution of a deed, trust, and will, which all treated the residence as her separate property.[100] It therefore reversed the lower court's holding and held that Mr. Evans's deed was valid and effective and that Mrs. Evans's subsequent deed conveyed the residence to her trust.[101]

Three justices concurred in the result but expressed grave concerns about the majority's analysis, based on longstanding principles of property law.[102] The concurrence correctly observed that, because the rules governing tenancies by the entirety treat a husband and wife as one, neither has an interest that can be separately conveyed and that the "mutual consent" analysis on which the majority relied had never before been recognized.[103] Even if

96. *Id.* at 181, 772 S.E.2d at 579.

97. *Id.* at 181–82, 772 S.E.2d at 579; *see also* Sundin v. Klein, 221 Va. 232, 269 S.E.2d 787 (1980), *cert. denied*, 452 U.S. 911 (1981) (noting tenancy by the entirety can be terminated only by the voluntary action of both tenants or the death of one).

98. *Evans*, 290 Va. at 182–83, 772 S.E.2d at 579–80.

99. *Id.* at 185, 772 S.E.2d at 581.

100. *Id.* at 186–87, 772 S.E.2d at 581–82.

101. *Id.*

102. *Id.* at 187–90, 772 S.E.2d at 582–84. The concurrence would have held that the various deeds were invalid, but that Mr. Evans, as sole owner of the residence after his wife's death, was free to alienate his interest and that he did so in a subsequent agreement that acknowledged his wife's trust as owner of the residence. *Id.*

103. *Id.*

unilateral conveyance is possible, the concurrence pointed out that the majority's approach left it unclear whether the tenancy by entireties (and therefore the accompanying creditor protection) actually terminates on the date of initial conveyance, the date of recordation, or the date of actual acceptance.[104]

C. *Probate of Photocopy of Will*

In *Edmonds v. Edmonds*, the Supreme Court of Virginia examined what the proponent of a lost will must show in order to overcome the presumption of revocation so that a copy of the will can be admitted to probate.[105] After Mr. Edmonds's death, his will could not be located, but it was traced to his possession.[106] The court clerk nevertheless admitted a photocopy to probate.[107] A disappointed heir appealed, claiming that the proponent of the missing will had not presented clear and convincing evidence to overcome the presumption that Mr. Edmonds had destroyed his will with the intent to revoke it and thus had died intestate.[108]

After hearing ample evidence of the decedent's long marriage, his wife's complementary estate plan, his repeated and consistent statements to others about his goals, his prior practice of executing a new will whenever he changed his plans, his failure to remove the will copy from his files, and the inconsistency of intestacy with his estate plan, the court held that a proponent need not specifically prove what happened to a missing will; instead, the proponent must only present clear and convincing evidence that the testator did not destroy it with intent to revoke.[109] Since it may be impossible for the proponent to explain what happened to a will, the testator's statements and other circumstances showing his consistent testamentary intentions may be the best evidence to rebut the presumption.[110] Affirming the circuit court's order admitting the copy to probate, the supreme court found the aggregate effect of the evidence was sufficient to prove clearly and

104. *Id.*
105. 290 Va. 10, 13, 17–18, 772 S.E.2d 898, 900, 902 (2015).
106. *Id.* at 14, 772 S.E.2d at 900.
107. *Id.* at 17, 772 S.E.2d at 902.
108. *Id.* at 17–18, 772 S.E.2d at 902.
109. *Id.* at 23–26, 772 S.E.2d at 905–07.
110. *Id.* at 20–23, 772 S.E.2d at 903–05.

convincingly that Mr. Edmonds had not intended to revoke his will.[111]

D. *Nature of Lifetime Rights in Residence*

The unpublished decision in *Vance v. Beeman* examined the nature of a couple's rights under a contract for the construction and occupancy of a residence on another couple's property.[112] The Beemans agreed to pay for an addition to the Vances' residence in return for the right to live there rent-free and tax-free for life.[113] If the Vances sold the property before the Beemans' deaths, their agreement obligated the Vances to reimburse the Beemans or else provide them with comparable housing.[114] When relations subsequently grew strained, the Beemans sought a declaratory judgment as to their rights under the agreement.[115]

Finding that the Beemans had fully performed their payment obligations under the agreement and had begun to reside in the addition, the circuit court held that they had acquired a life estate in the property and that the Vances retained ownership subject to the Beemans' rights, including rights to reasonable and exclusive use and to ingress and egress.[116] On appeal, the Supreme Court of Virginia affirmed the enforceability of the parties' agreement, but reversed the lower court's conclusion that the Beemans had a life estate, finding that their contractual rights did not constitute an interest in the underlying land.[117]

E. *Interpretation of No-Contest Clause*

In *Rafalko v. Georgiadis*, the Supreme Court of Virginia considered the extent to which a no-contest clause contained in a trust amendment was enforceable against beneficiaries who had signaled their intent to challenge the trust before learning the

111. *Id.* at 26, 772 S.E.2d at 906–07.
112. No. 141567, 2015 LEXIS 9, at *1, *3 (Va. Aug. 14, 2015) (unpublished decision).
113. *Id.* at *1–2.
114. *Id.* at *2.
115. *Id.* at *2–3.
116. *Id.* at *8.
117. *Id.* at *3.

amendment existed.[118] Shortly before Mr. Georgiadis died, he amended his long-standing trust to increase the provisions for his second wife at the expense of his sons' interests and to appoint his financial advisor, who was his wife's friend, as trustee in place of his sons.[119] In the face of his sons' rancorous objections to these changes, Mr. Georgiadis subsequently amended the trust to add a no-contest clause that prohibited any beneficiary from "directly or indirectly, by legal proceedings or otherwise" challenging or contesting "this trust agreement" or from "attempt[ing] in any way to interfere with the administration of this trust according to its express terms," absent proof of fraud, dishonesty, or bad faith on the part of the trustee.[120] Also absent proof of fraud, dishonesty, or bad faith, the trustee's decision that a beneficiary had violated the clause, and thereby forfeited his interest in the trust, was to be final.[121] The no-contest clause also directed the trustee to obtain from each beneficiary a written release of all legal claims relating to the trust.[122]

Unaware of the amendment adding the no-contest clause, one son, with the other son's knowledge and apparent consent, wrote to their father's lawyer almost immediately after his death, asking the lawyer to preserve the file in anticipation of a contest.[123] The same son also wrote to his step-mother threatening litigation if she did not agree to terminate the trust and divide the assets between herself and the sons via a nonjudicial settlement agreement.[124]

As soon as the sons learned of the amendment's existence, they withdrew their demands and released all claims relating to the terms and administration of the will and trust.[125] Nevertheless, after consulting with counsel, the trustee notified the sons several months later that they had violated the no-contest provision by their actions, and therefore they and their descendants were not

118. 290 Va. 384, 388, 777 S.E.2d 870, 871 (2015).
119. *Id.* at 389–90, 777 S.E.2d at 872–73.
120. *Id.*
121. *Id.* at 390, 777 S.E.2d at 873.
122. *Id.*
123. *Id.* at 391, 777 S.E.2d at 873.
124. *Id.*
125. *Id.*

beneficiaries of the trust.[126] Having nothing to lose, the sons sought a declaratory judgment that they and their descendants were rightful trust beneficiaries.[127]

In ruling in the sons' favor, the circuit court found it irrelevant that the sons were unaware of the no-contest clause; but, it held that the references in the amendment to "this trust" and "this agreement" limited the clause's reach to actions directed at the trust as it existed after the final amendment, so the son's letters, which referred to the previous version of the agreement (the only one of which he was aware at the time) did not trigger the clause.[128] The circuit court also found that the trustee's decision to exclude the sons as beneficiaries was made in bad faith and awarded attorney's fees and costs to the sons.[129]

On appeal by the trustee, the Supreme Court of Virginia declared that no-contest clauses are to be strictly construed "because the drafter chose the language and forfeiture is disfavored in the law."[130] It noted that, even if the trustee's exercise of discretion is limited only by bad faith, fraud, or dishonesty, "a court is vested with the authority to evaluate whether the trustee's actions were consistent with the terms and purposes of the trust and in the best interests of the beneficiaries."[131] Therefore, despite language to the contrary in the trust instrument, the sons did not have to show that the trustee acted in bad faith in order for the court to review her decision.[132]

The supreme court found that none of the trustee's assignments of error challenged the circuit court's narrow reading of the no-contest clause or its holding that the sons' actions did not violate the clause.[133] In dicta, the supreme court also noted that the finding of bad faith was not plainly wrong and was supported by

126. *Id.* at 391–92, 777 S.E.2d at 873.

127. *Id.* at 392, 777 S.E.2d at 874.

128. *Id.* at 392–93, 777 S.E.2d at 874.

129. *Id.* at 393–94, 777 S.E.2d at 874.

130. *Id.* at 395, 777 S.E.2d at 875.

131. *Id.* at 397, 777 S.E.2d at 876. The supreme court based this conclusion on VA. CODE ANN. § 64.2-703(B)(2) (Repl. Vol. 2012 & Cum. Supp. 2016) (noting that a trust instrument may not waive "[t]he duty of the trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries").

132. *Rafalko*, 290 Va. at 400, 777 S.E.2d at 878.

133. *Id.* at 404, 777 S.E.2d at 880.

evidence.[134] It therefore affirmed the circuit court's judgment recognizing the sons and their descendants as rightful beneficiaries of the trust and awarding fees and costs.[135]

In light of *Rafalko*, drafting attorneys should carefully review their no-contest clause form language and discuss with their clients whether a no-contest clause should be triggered only if the beneficiary is aware of the clause's existence. As this case illustrates, a no-contest clause is useful only as a deterrent, not as a punitive measure.

CONCLUSION

The 2016 session of the Virginia General Assembly saw the traditional rules protecting surviving spouses from disinheritance give way to a new augmented estate system that many believe will be more equitable. The new rules appear similar to the current system in their mechanics, but they are based on a view of marriage as an economic partnership rather than on prior notions that spouses have an ongoing duty to provide for each other's support. By taking into account the surviving spouse's separate assets and the length of the marriage, the new statute will provide protection similar to the current system for a surviving spouse in a long-term marriage where the marital assets were held disproportionately in the decedent's name. However, it will avoid creating a windfall for a surviving spouse in a marriage of relatively short duration or where the marital assets were held equally or disproportionately by the surviving spouse. Practitioners should take the time to study and understand the structure of the new system and the differing results it may produce in order to plan effectively. The Virginia legislature should also correct the

134. *Id.* at 399–400, 777 S.E.2d at 877–78 (discussing the standard for reversing a factual finding made by a circuit court). Noting that the son's letters were not sent to the trustee, constituted only "discourse related to proposed conduct," and did not interfere with trust administration or require any action by the trustee, the supreme court observed that the no-contest clause had "had its intended prophylactic effect," so that the trustee's subsequent decision to disqualify the sons as beneficiaries was "not motivated by a desire to carry out the testator's intent or to protect the beneficiaries and was therefore done in bad faith." *Id.* at 402–04, 777 S.E.2d at 878–80.

135. *Id.* at 404, 777 S.E.2d at 880. Three justices dissented, arguing either that the sons' actions violated the terms of the no-contest clause or that the trustee's determination was not subject to judicial review because the evidence did not show she had acted in bad faith. *See id.* at 404–31, 777 S.E.2d at 880–96.

homestead allowance statute to reflect that a surviving spouse may claim it in addition to the elective share.

Legislation codified the rules governing powers of appointment, which should prove helpful. Many Virginians will also benefit greatly from the expanded creditor protection for annuities and life insurance contracts, as well as for a married couple's principal residence held as tenants by the entireties in the case of joint liability for emergency medical and follow-up care. However, in the case of a couple's principal residence held as tenants by the entireties, future legislation will be needed to continue the creditor protection after the residence is transferred into trust or after one spouse's death. Other 2016 amendments and clarifications, while more narrowly focused, should prove useful in their specific areas as well.

In terms of case law, the *Evans* decision unfortunately has introduced some uncertainty into real estate transfers by approving a unilateral conveyance of entireties property without specifying the status of the property between the time one spouse conveys it and the other accepts it.[136] Legislation may be needed to clarify the applicable principles.

By contrast, *Birchwood* was a useful reminder of the need to assert rights promptly.[137] *Edmonds, Vance*, and *Rafalko* all illustrated the facts-and-circumstances analysis that applies in most cases involving wills, trusts, and estates, although *Edmonds* also gave useful guidance regarding the applicable standards for probating a lost will and a careful reading of *Rafalko* will give practitioners cause to reconsider their approach when using no-contest clauses.[138]

136. *See supra* Part II.B.
137. *See supra* Part II.A.
138. *See supra* Part II.C–E.