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WILLS, TRUSTS, AND ESTATES

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

INTRODUCTION

The 2020 Virginia General Assembly¹ addressed a wide variety of matters affecting wills, trusts, and estates, ranging from a new article of the Virginia Uniform Trust Code and an expanded partition procedure to a \$2 increase in the circuit court clerk's recordation fees. Among the most helpful were new rules that clarify and expand the powers and responsibilities of non-trustees who may direct the trustee on certain issues and a revised procedure for partitioning real property while protecting the rights and interests of co-owners. The legislature also dealt with fiduciary issues, including express authorization for multiple-party bank accounts, additional duties for children's guardians ad litem, relationships that may disqualify a lawyer as guardian or conservator, protections against suspected financial abuse of adults, reliance on qualification certificates, and requirements for certain fiduciaries' accounts. The General Assembly also authorized beneficiary designations for ABLE savings accounts, allowed the substitution of a bank for a related trust company in multiple fiduciary roles, broadened disclosure rules for certain gifts to state colleges and universities, expanded the list of documents a notary may accept as identification, and allowed transfer on death ("T.O.D.") designations for motor vehicles with multiple owners.

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1. Except where specifically noted, all legislation summarized in this Article became effective July 1, 2020.

I. LEGISLATION

A. *Uniform Directed Trust Act*

When Virginia adopted the Uniform Trust Code in 2005, trust directors were still a relatively rare tool in the practitioner's toolbox.² A few years later, as the use of trust protectors became more common, Virginia Code section 64.2-770 was amended to clarify the trustee's fiduciary duties when following the trust director's direction.³ Generally speaking, the trustee was protected from liability when following instructions only if the trust instrument expressly provided for it.⁴

In 2017, the Uniform Law Commission promulgated the Uniform Directed Trust Act, which was quickly adopted by several states.⁵ With the support of the Virginia estate planning bar, the 2020 General Assembly followed suit, amending several provisions of the Virginia Uniform Trust Code and replacing section 64.2-700 with the uniform act (Article 8.2 of Title 64.2).⁶

Virginia's new Uniform Directed Trust Act (the "UDTA") sets forth the general powers and duties of a "trust director," defined as someone other than a trustee, including a settlor or beneficiary, who has the power under the trust instrument to direct the trustee as to the investment, management, or distribution of trust property or other matters of trust administration.⁷ Of course, the settlor of a revocable trust may give the trustee directions that are contrary to the trust terms without being deemed a trust director.⁸ Similarly, anyone who holds a power of appointment, a power to

2. Act of Apr. 6, 2005, ch. 935, 2005 Va. Acts 1793, 1816 (codified as amended at VA. CODE ANN. §§ 55-541.06 to -551.03 (Cum. Supp. 2005), and recodified at VA. CODE ANN. §§ 64.2-700 to -808 (Repl. Vol. 2017)).

3. Act of Apr. 4, 2012, ch. 562, 2012 Va. Acts 1098, 1098 (codified as amended at VA. CODE ANN. § 55-548.08(E) (Interim Supp. 2012), and recodified at VA. CODE ANN. § 64.2-770(E) (Repl. Vol. 2012)).

4. *See id.* For a more detailed discussion of VA. CODE ANN. § 64.2-770(E), see J. William Gray, Jr. & Katherine E. Ramsey, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 47 U. RICH. L. REV. 343, 346-49 (2012).

5. *See* UNIF. DIRECTED TR. ACT (UNIF. LAW COMM'N 2017).

6. Act of Apr. 7, 2020, ch. 768, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 64.2-701, -703, -706, -752, -756, -779.26 to -779.38 (Cum. Supp. 2020)).

7. *See* VA. CODE ANN. § 64.2-701 (Cum. Supp. 2020).

8. *See id.* §§ 64.2-752(B), -779.28(A)(3) (Cum. Supp. 2020).

appoint or remove a trustee or trust director, or any power that is expressly held in a nonfiduciary capacity for federal tax purposes is not treated as a trust director.⁹ A beneficiary's right of withdrawal or to exercise any other powers that would affect his or her beneficial interest (or the beneficial interest of another beneficiary under the virtual representation rules) is also not considered a power to direct the trustee.¹⁰

As under prior law, a trust director is presumptively a fiduciary, who must act in good faith with regard to the trust's purposes and the beneficiaries' interests and who is liable for any loss that results from a breach of his or her fiduciary duty.¹¹ However, unlike prior Virginia Code section 64.2-700, the fiduciary presumption may be overcome only by express language in the instrument providing that the UDTA does not apply, in which case rules similar to section 64.2-700 will govern the relationship.¹² Other than this important change, the UDTA rules are consistent with former section 64.2-700, while they also add much-needed clarity regarding the trustee's and trust director's respective roles.

Under the UDTA, a direction from a trust director generally overrides the trustee's obligation to act in good faith and in keeping with the trust terms, as well as any fiduciary duty the trustee may owe to the settlor or the beneficiaries.¹³ The trustee must follow the director's directions unless it would involve willful misconduct on the part of the trustee.¹⁴

The UDTA also confirms that, unless the trust instrument provides otherwise, most provisions of the Uniform Trust Code previously applicable only to trustees now also apply to trust directors:

(a) A trust director has the same fiduciary duty and liability in the exercise or non-exercise of his or her powers as a similarly situated trustee.¹⁵

9. *See id.* § 64.2-779.28(A)(1)–(2), (5) (Cum. Supp. 2020).

10. *See id.* § 64.2-779.28(A)(4) (Cum. Supp. 2020).

11. *See id.* § 64.2-779.27(C)(3) (Cum. Supp. 2020).

12. *See id.* §§ 64.2-779.27(C), -799.28(A)(6) (Cum. Supp. 2020).

13. *See id.* § 64.2-779.32(A) (Cum. Supp. 2020).

14. *See id.* § 64.2-779.32(B)–(C) (Cum. Supp. 2020).

15. *Id.* §§ 64.2-779.30 to -779.31(A)(1) (Cum. Supp. 2020).

(b) The trust terms may vary a trust director's duty or liability to the same extent as a similarly situated trustee.¹⁶

(c) The trust director and trustee have no duty to provide information to each other, to monitor each other's actions, or to advise a settlor, beneficiary, trustee, or director that they might have acted differently.¹⁷ Doing so voluntarily in one instance does not impose any such duty in the future.¹⁸

(d) The same limitations period applies to actions against a trust director or a trustee for breach of trust, and the filing of a report or accounting has the same effect on the statute of limitations for each.¹⁹

(e) Trust directors and trustees may assert the same defenses in actions against them for breach of trust.²⁰

(f) The same rules apply to both trust directors and trustees as to acceptance, giving bond, reasonable compensation, resignation, removal, vacancy, and appointment of successors.²¹

The UDTA and conforming changes to the Uniform Trust Code apply to any trust that has its principal place of administration in Virginia and that (1) was created on or after July 1, 2020; (2) was amended on or after that date, whether by the settlor, by a nonjudicial settlement agreement, by decanting, or by the court; or (3) expressly incorporated the provisions of former Virginia Code section 64.2-770(E) by specific reference.²² However, in the case of trusts described in clause (2), the UDTA applies only to decisions or actions taken on or after the date of amendment.²³

B. *Multiple-Party Financial Accounts*

Many practitioners can attest to the difficulties faced by multiple fiduciaries wishing to open a bank or brokerage account and

16. *Id.* § 64.2-779.31(A)(2) (Cum. Supp. 2020).

17. *Id.* § 64.2-779.34(A)(1), (B)(1) (Cum. Supp. 2020).

18. *Id.* § 64.2-779.34(A)(2), (B)(2) (Cum. Supp. 2020).

19. *Id.* § 64.2-779.35 (Cum. Supp. 2020).

20. *Id.* § 64.2-779.36 (Cum. Supp. 2020).

21. *Id.* § 64.2-779.38 (Cum. Supp. 2020).

22. *Id.* § 64.2-779.27(A)(1)–(4) (Cum. Supp. 2020).

23. *Id.* § 64.2-779.27(B) (Cum. Supp. 2020).

delegate signature authority to one of their number. The institution may insist that all parties act together, or refuse to open the account entirely, unless the authorizing instrument expressly authorizes each fiduciary to act alone. The result has often been frustration, at a minimum. Fortunately, the 2020 General Assembly addressed the problem by expressly authorizing a bank or other financial institution to open and deal with multiple-fiduciary accounts in the same manner as single-fiduciary accounts.²⁴

For purposes of the statute, a “multiple-fiduciary account” is a fiduciary account where more than one fiduciary is authorized to act.²⁵ A “fiduciary” includes a guardian, committee, trustee, executor, administrator, administrator *c.t.a.*, curator under a will, conservator, agent under a power of attorney, or attorney acting under an attorney-client relationship.²⁶ A “fiduciary account” is an estate account, an account established by one or more agents under a power of attorney, an individual’s existing account to which one or more agents under the individual’s power of attorney are added, an account established by one or more conservators or committees, an account under a testamentary trust or another trust instrument with independent significance, or an account arising from another fiduciary relationship such as an attorney-client relationship.²⁷

A multiple-fiduciary account may be paid upon request to, or at the direction of, any one or more of the fiduciaries, including a successor fiduciary who is duly authorized to act.²⁸ The payment has no effect on the rights of the beneficiaries or the fiduciaries’ duties under the governing instrument.²⁹ However, the financial institution is discharged from liability when making the payment, whether or not it is consistent with the underlying fiduciary relationship.³⁰

24. See Act of Mar. 10, 2020, ch. 259, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 6.2-604, -605(B), -612(B), -615.1, -616 (Cum. Supp. 2020)).

25. VA. CODE ANN. § 6.2-604 (Cum. Supp. 2020).

26. *Id.*

27. *Id.* The term does not include an account held by one or more parties as trustee if the trust relationship is established by the form of the account and deposit agreement and there is no trust corpus other than the account. *Id.*

28. *Id.* § 6.2-615.1 (Cum. Supp. 2020).

29. See *id.* § 6.2-605(B) (Cum. Supp. 2020).

30. See *id.* § 6.2-616(A) (Cum. Supp. 2020).

C. *ABLE Savings Trust Accounts*

The 2020 General Assembly made two useful changes to the rules governing ABLE savings trust accounts.³¹ First, the beneficiary of an ABLE account may designate a survivor who will become the beneficiary of the account when the former beneficiary dies or, if not eligible to become a beneficiary, will then receive the balance of the account.³² In addition, neither the account balance nor the beneficiary's estate is subject to clawback by the Commonwealth or its agencies for any benefits previously provided.³³ However, these favorable rules may be preempted by contrary federal law.³⁴

D. *Partition of Real Property*

As real property passes from generation to generation, title often becomes vested in many individuals who are only distantly related to one another. In such circumstances, an unscrupulous buyer may seek to acquire the property cheaply by buying one owner's small fractional interest and then forcing a partition sale whereby he or she can purchase the property for less than fair market value. This problem is particularly acute for low- to middle-income families.³⁵ The 2020 Virginia General Assembly amended the procedures for partitioning property to avoid this outcome when possible.³⁶

In any partition action filed on or after July 1, 2020, the court must order partition in kind if practicable.³⁷ In such cases, two or more owners may elect to have their shares laid off together if partition can be conveniently made in that way, and the court may require one or more owners to pay amounts to one or more other

31. Act of Apr. 9, 2020, ch. 923, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 23.1-707(G) (Cum. Supp. 2020)).

32. VA. CODE ANN. § 23.1-707(G)(2) (Cum. Supp. 2020).

33. *See id.* § 23.1-707(G)(1) (Cum. Supp. 2020).

34. *See id.* § 23.1-707(G) (Cum. Supp. 2020).

35. *See generally* UNIF. PARTITION OF HEIRS PROP. ACT prefatory note (UNIF. LAW COMM'N 2010).

36. Act of Mar. 6, 2020, ch. 193, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 8.01-81 to -81.1, -83 to -83.3 (Cum. Supp. 2020)); Act of Mar. 3, 2020, ch. 115, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 8.01-81 to -81.1, -83 to -83.3 (Cum. Supp. 2020)).

37. *See* VA. CODE ANN. §§ 8.01-81, -83(B) (Cum. Supp. 2020).

owners so that the total value received by each party in cash and property will be just and proportionate to their respective fractional interests.³⁸ Also, if the court orders partition in kind, it must allocate a single undivided share to all owners who are unknown, unlocatable, or the subject of a default judgment.³⁹

Only if a partition in kind is not practicable may the court consider allotting the entire property to one or more parties who are willing to pay a price equal to its fair market value as determined by the court.⁴⁰ If the property is to be allotted, the court will require those seeking allotment to notify all other parties that allotment is possible and of the required price.⁴¹ If more than one party seeks allotment and they cannot come to an agreement, the court must decide which of them will have the property after considering a number of factors set forth in the statute, including the parties' history with and sentimental attachment to the property.⁴² The court also may order an allotment of part of the property and a sale of the rest.⁴³ The statute sets forth detailed procedures for carrying out the allotment.⁴⁴

The court may order a partition sale only as a last resort, if neither partition in kind nor allotment is practicable or equitable.⁴⁵ It must be an open-market sale unless the court finds that sealed bids or an auction "would be more economically advantageous and in the best interests of the parties as a group."⁴⁶ Sealed bids or an auction also may be options if the open-market sale fails to produce an offer at the court-determined property value or a reasonable lower figure.⁴⁷ The statute sets forth detailed procedures for the conduct of the open-market sale.⁴⁸

Regardless of whether the property is to be partitioned in kind, allotted, or sold, its value must be determined. Unless all owners agree on the value or a valuation method, the court must appoint

38. *Id.* § 8.01-81 (Cum. Supp. 2020).

39. *Id.*

40. *See id.* § 8.01-83(B) (Cum. Supp. 2020).

41. *See id.* § 8.01-83(B)(1) (Cum. Supp. 2020).

42. *See id.* § 8.01-83(B)(2) (Cum. Supp. 2020).

43. *See id.* § 8.01-83(C) (Cum. Supp. 2020).

44. *See id.* § 8.01-83(B)(3) (Cum. Supp. 2020).

45. *See id.* § 8.01-83(B), (D) (Cum. Supp. 2020).

46. *Id.* § 8.01-83.1(A) (Cum. Supp. 2020).

47. *See id.* § 8.01-83.1(D) (Cum. Supp. 2020).

48. *See id.* § 8.01-83.1(B)-(C) (Cum. Supp. 2020).

a disinterested appraiser to value the property assuming sole ownership of a fee simple estate.⁴⁹ After submitting a report to the court, the appraiser must mail a notice of filing within three business days to all parties stating the appraised fair market value of the property and other relevant information.⁵⁰ A party then has thirty days in which to object to the appraisal.⁵¹ Thereafter, the court will hold a hearing to determine the fair market value of the property, at which time it may consider any other evidence of value offered by a party.⁵² The court will then enter an order determining the property's fair market value.⁵³

A plaintiff who wishes to serve notice of the partition action by publication must post a conspicuous sign on the subject property announcing the action, identifying the court and the common designation by which the property is known, and including any other information the court may require.⁵⁴

E. *Reliance on Fiduciary's Qualification Certificate*

The Virginia Uniform Power of Attorney Act protects third parties who rely in good faith on an acknowledged power of attorney, and imposes liability on those who refuse to do so.⁵⁵ The 2020 General Assembly has added Virginia Code section 64.2-520.2 and amended section 64.2-2011 to provide comparable rules for persons dealing with personal representatives of estates, guardians, and conservators who present a currently effective certificate of

49. *See id.* § 8.01-81.1 (Cum. Supp. 2020).

50. *See id.* § 8.01-81.1(D) (Cum. Supp. 2020).

51. *See id.* § 8.01-81.1(D)(3) (Cum. Supp. 2020).

52. *See id.* § 8.01-81.1(E) (Cum. Supp. 2020).

53. *See id.* § 8.01-81.1(F) (Cum. Supp. 2020).

54. *See id.* § 8.01-83.2 (Cum. Supp. 2020). The statute sets a posting deadline of "10 days after the court's determination," but it is not clear to which court determination this refers. *See id.* Under the Uniform Partition of Heirs Property Act (on which the Virginia statute is largely based), the court must make an initial determination that the property involved is "heirs property" to which the Act applies. *See* UNIF. PARTITION OF HEIRS PROP. ACT § 4(b) (UNIF. LAW COMM'N 2010). However, the General Assembly did not limit Virginia's partition protections to "heirs property," so no such determination is required. *Cf.* VA. CODE ANN. § 8.01-81 (Cum. Supp. 2020). Presumably, therefore, Virginia's ten-day deadline will begin to run upon the commencement of the partition action.

55. *See* VA. CODE ANN. §§ 64.2-1617, -1618 (Cum. Supp. 2020).

qualification.⁵⁶ Specifically, any third party conducting business in good faith with a personal representative, guardian, or conservator who presents a currently effective certificate of qualification may presume that the person is properly authorized to act (except to the extent a guardian's or conservator's powers may be limited by the court's order of appointment).⁵⁷

When presented with a personal representative's, guardian's, or conservator's currently effective qualification certificate, the third party must either accept or reject it within seven business days.⁵⁸ The third party may reject the certificate only if (1) engaging in the transaction would be illegal, (2) the person has actual knowledge that the fiduciary's authority or the certificate has terminated, (3) the person believes in good faith that the certificate is invalid or that the fiduciary does not have the authority asserted, or (4) the person believes in good faith the transaction may be financially exploitive.⁵⁹ Otherwise, if the third party refuses to accept the certificate, the fiduciary may seek a court order, in which case the third party may be held liable for the fiduciary's reasonable attorney fees and costs.⁶⁰

F. *Report of Suspected Financial Abuse*

In an effort to protect vulnerable adults from financial abuse, Virginia Code section 63.2-1606(L) was enacted in 2019 to authorize financial institutions to delay or refuse to execute a transaction, or to refuse to disburse funds, if their staff believed in good faith that an adult was being exploited.⁶¹ The statute was amended this year to require the financial institution to report any

56. Act of Apr. 6, 2020, ch. 702, 2020 Va. Acts __, __ (codified at VA. CODE ANN. § 64.2-520.2 (Cum. Supp. 2020), and codified as amended at VA. CODE ANN. § 64.2-2011(D) (Cum. Supp. 2020)).

57. See VA. CODE ANN. §§ 64.2-520.2(A), -2011(D) (Cum. Supp. 2020).

58. See *id.* §§ 64.2-520.2(B), -2011(D)(2) (Cum. Supp. 2020).

59. *Id.*

60. See *id.* §§ 64.2-520.2(A), -2011(D)(1) (Cum. Supp. 2020).

61. Acts of Mar. 18, 2019, chs. 420 & 421, 2019 Va. Acts __, __ & __, __ (codified as amended at VA. CODE ANN. § 63.2-1606(C), (L) (Cum. Supp. 2019)). For a discussion of the 2019 legislation, see J. William Gray, Jr. & Katherine E. Ramsey, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 54 U. RICH. L. REV. 183, 190–91 (2019).

such refusal or delay within five business days to the local social services department or adult protective services hotline.⁶²

G. *Clerk's Fees for Lodging Wills and Recording Documents*

The 2020 General Assembly approved a nominal fee increase for clerks, raising the charge for lodging, indexing, and preserving a will from \$2 to \$5.⁶³ Similarly, the various fees a clerk may charge for recording and indexing writings and related matters have been increased by \$2 each.⁶⁴

H. *Probate Tax—Virginia Beach Mass Shooting Victims*

State and local probate taxes are waived for the estates of individuals who died as a result of the Virginia Beach mass shooting on May 31, 2019.⁶⁵ If the clerk's office has already collected such taxes, they are to be refunded.⁶⁶

I. *Homestead Exemptions from Garnishment and Lien*

In addition to the existing \$5000 (or \$10,000, if the debtor is sixty-five or older) homestead exemption, a debtor may exempt from creditor process up to \$25,000 of real or personal property used as the principal residence of the householder or the householder's dependents.⁶⁷ If the debtor claims this homestead exemption, the amount so claimed reduces his or her remaining available exemption for eight years from the date of the claim.⁶⁸ Previously, the exemption, once used, was lost.⁶⁹

62. Act of Apr. 9, 2020, ch. 931, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 63.2-1606(L) (Cum. Supp. 2020)).

63. Act of Mar. 2, 2020, ch. 68, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 17.1-275(A)(39), 64.2-409(E) (Cum. Supp. 2020)).

64. Act of Mar. 2, 2020, ch. 69, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 17.1-275(A)(2) (Cum. Supp. 2020)).

65. Acts of Mar. 10 & 11, 2020, chs. 249 & 278, 2020 Va. Acts __, __ & __, __ (codified at VA. CODE ANN. § 58.1-1718.01 (Cum. Supp. 2020)).

66. *See id.* at __, __.

67. Act of Mar. 12, 2020, ch. 328, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 8.01-512.4, 34-4 (Cum. Supp. 2020)).

68. *Id.* at __ (codified as amended at VA. CODE ANN. § 34-21 (Cum. Supp. 2020)).

69. *See* VA. CODE ANN. § 34-21 (Repl. Vol. 2019).

J. *T.O.D. Designation for Motor Vehicles*

Beginning in 2013, the sole individual owner of a motor vehicle, trailer, or semitrailer could obtain a certificate of title that designated a beneficiary to whom the vehicle, trailer, or semitrailer would pass at the owner's death, provided there was no lien against it.⁷⁰ As of July 1, 2020, the same may be done for vehicles owned by more than one individual, to be effective upon the death of the last surviving owner.⁷¹

K. *Acceptable Identification for Notarization*

A Virginia notary public must exercise a high degree of care in confirming the identity of the person whose signature is being notarized.⁷² If the notary does not know the individual personally, he or she must ascertain the signer's identity through satisfactory evidence as defined by Virginia Code section 47.1-2.⁷³ This statute has been amended to include additional means by which a notary can confirm the identity of an individual who resides in an assisted living facility or nursing home.⁷⁴ Given that many such residents no longer travel or drive a car, a notary may now accept as proof of their identity an expired U.S. passport book or card, an expired foreign passport, an expired state driver's license, or an expired state identification card, provided in each case that the document expired within five years of the time it is presented to the notary.⁷⁵

L. *Reports and Accounts of Certain Fiduciaries*

All annual accounts and reports filed with the Commissioner of Accounts on or after July 1, 2020, by a conservator, guardian of a minor's estate, committee, trustee for an incapacitated veteran, or

70. Act of Mar. 13, 2013, ch. 318, 2013 Va. Acts 537, 537 (codified as amended at VA. CODE ANN. §§ 46.2-615, -633.2 (Cum. Supp. 2013)).

71. Act of Apr. 9, 2020, ch. 974, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 46.2-633.2 (Cum. Supp. 2020)).

72. See VA. CODE ANN. § 47.1-14(A) (Cum. Supp. 2020).

73. See *id.* §§ 47.1-2, -14(B) (Cum. Supp. 2020).

74. Act of Apr. 9, 2020, ch. 902, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 47.1-2 (Cum. Supp. 2020)).

75. See *id.* at __.

guardian of an incapacitated person must be signed under oath.⁷⁶ If the fiduciary makes a false entry or statement in such a filing, he or she will be subject to a fine of up to \$500.⁷⁷ Curiously, the same oath requirement was not imposed on accountings filed by personal representatives and testamentary trustees.⁷⁸

M. *Acceptance Policies and Disclosure of Charitable Gifts*

Beginning July 1, 2020, each state college and university must have a policy and process for reviewing, accepting, and documenting any terms and conditions associated with (1) gifts that direct academic decision-making and (2) gifts of \$1,000,000 or more that impose a new obligation on the institution (other than gifts for scholarships or other financial aid).⁷⁹ Any such commitments, including the amount, date, purpose, and terms of the gift, must be documented and made available to the public under the Virginia Freedom of Information Act.⁸⁰ The donor's identity must also be made public, unless he or she has requested anonymity and the gift does not impose any terms or conditions directing academic decision-making.⁸¹

N. *Indexing of Wills*

Henceforth, when an executor qualifies, the will is to be indexed in the names of both the decedent and the qualifying executor(s).⁸² It is not clear how a will put to record without qualification will be indexed. Similarly, all wills lodged for safekeeping in the clerk's

76. Acts of Mar. 6 & 18, 2020, chs. 190 & 372, 2020 Va. Acts __, __ & __, __ (codified as amended at VA. CODE ANN. §§ 64.2-1305(D), -2020(B) (Cum. Supp. 2020)).

77. VA. CODE ANN. §§ 64.2-1305(D), -2020(B) (Cum. Supp. 2020).

78. *See id.* §§ 64.2-1304, -1306 (Cum. Supp. 2020).

79. Act of Apr. 6, 2020, ch. 691, 2020 Va. Acts __, __ (codified at VA. CODE ANN. § 23.1-1304.1 (Cum. Supp. 2020)).

80. VA. CODE ANN. § 23.1-1304.1 (Cum. Supp. 2020); Acts of Mar. 2, 2020, chs. 71 & 78, 2020 Va. Acts __, __ & __, __ (codified as amended at VA. CODE ANN. § 2.2-3705.4(A)(7) (Cum. Supp. 2020)).

81. VA. CODE ANN. § 2.2-3705.4(A)(7) (Cum. Supp. 2020).

82. Act of Apr. 10, 2020, ch. 1063, 2020 Va. Acts __, __ (codified at VA. CODE ANN. § 17.1-249(F) (Cum. Supp. 2020)).

office by the testator must be indexed by both the name of the testator and “the executor then qualified.”⁸³ Of course, there will be no qualified executor until after the testator’s death, so it is not known how clerks will carry out this directive. It is possible they will index a will probated without qualification and a will lodged for safekeeping by the names of the testator and the executor nominated in the will, if any.

O. *Substitution of Bank Subsidiary as Trustee*

Under current law, a Virginia subsidiary bank may be substituted in every fiduciary capacity for another bank that is under common ownership by filing an application with the circuit court in which its main office is located.⁸⁴ The same procedure may now be followed to substitute the subsidiary bank in place of a trust subsidiary under common ownership.⁸⁵ To qualify, at least 80% of both the substituted bank and the bank or trust subsidiary must be owned by the same Virginia bank holding company.⁸⁶

The application may be made *ex parte* and must specify any fiduciary role that the applicant bank is not assuming.⁸⁷ As with substitutions under the current statute, the bank and the outgoing trust subsidiary must file a joint account for the year of the substitution.⁸⁸ Any designation of the trust subsidiary in a will or other instrument will be deemed a designation of the substituted bank unless the instrument expressly provides to the contrary.⁸⁹

P. *Duties of Child’s Guardian Ad Litem*

Beginning July 1, 2020, the guardian ad litem of a child must conduct an investigation in accordance with standards established

83. Act of Apr. 10, 2020, ch. 1063, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 64.2-409(A) (Cum. Supp. 2020)).

84. VA. CODE ANN. § 6.2-1059(A) (Cum. Supp. 2020).

85. See Act of Mar. 10, 2020, ch. 239, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 6.2-1047, -1059(A)–(C), (E)–(F) (Cum. Supp. 2020)).

86. See VA. CODE ANN. § 6.2-1047 (Cum. Supp. 2020).

87. *Id.* § 6.2-1059(A), (C) (Cum. Supp. 2020).

88. *Id.* § 6.2-1059(F) (Cum. Supp. 2020).

89. *Id.* § 6.2-1059(E) (Cum. Supp. 2020).

by the Judicial Council of Virginia and file a report before the hearing with the court and parties, certifying compliance with those standards, including the face-to-face contact requirement.⁹⁰

Q. *Ineligible Guardians and Conservators*

Except for good cause shown, a court may not appoint any lawyer who has represented the petitioner in the past three years to serve as guardian or conservator for an adult respondent.⁹¹ The prohibition also extends to any other lawyer or employee of the law firm with which the representing attorney is associated.⁹² However, an attorney is not disqualified from serving as guardian or conservator solely because the petitioner has compensated the attorney or his or her firm for doing so.⁹³ If the petitioner is a healthcare facility, the court, for good cause, may order it to pay the reasonable costs for the guardian or conservator while the respondent is under the care of the facility.⁹⁴

R. *Federal Income Tax Conformity*

The 2020 General Assembly adjusted Virginia income tax law to reflect additional changes made in the Internal Revenue Code through December 31, 2019, except for the temporary reduction in the threshold for deducting medical expenses from 10% to 7.5% of adjusted gross income.⁹⁵ An emergency clause applies these rules to taxable years beginning on and after January 1, 2018 and makes it effective from February 17, 2020, the date the Governor signed it.⁹⁶

90. Act of Mar. 2, 2020, ch. 21, 2020 Va. Acts __, __ (codified at VA. CODE ANN. § 16.1-274(D) (Cum. Supp. 2020)).

91. Act of Apr. 2, 2020, ch. 649, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 64.2-2007(D) (Cum. Supp. 2020)).

92. *Id.* at __.

93. *See id.* at __.

94. *Id.* at __.

95. Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, 133 Stat. 2534; Acts of Feb. 17 & Mar. 10, 2020, chs. 1 & 255, 2020 Va. Acts __, __ & __, __ (codified as amended at VA. CODE ANN. § 58.1-301(B) (Cum. Supp. 2020)).

96. *See* chs. 1 & 255, 2020 Va. Acts at __, __.

II. CASES

A. *Commissioner of Accounts' Authority to Approve Final Accounting*

Henderson v. Cook considered, among other issues, whether a circuit court may delegate to the Commissioner of Accounts its authority to approve or deny final accountings.⁹⁷ The matter concerned a trust and conservatorship for an incapacitated adult.⁹⁸ Following the conclusion of a suit for aid and guidance with respect to the administration of the trust, the trustee/guardian, Ms. Cook, asked the circuit court directly to approve her final accountings.⁹⁹ The judge, perhaps anticipating imminent retirement, issued an order pre-approving the accountings, subject to the Commissioner's final review and approval.¹⁰⁰ Ms. Henderson, a beneficiary, objected to the procedure because it bypassed the Commissioner's initial review of the accountings.¹⁰¹ The Commissioner approved the accounting, at which time the court order became final despite the beneficiary's objections.¹⁰²

Ms. Henderson appealed the lower court's order, arguing, *inter alia*, that the process used was incorrect as a matter of law and that it deprived the beneficiaries of any meaningful opportunity and due process to review and challenge the accountings.¹⁰³ The trustee argued in turn that the beneficiary's objections had been considered and rejected by the Commissioner and that any procedural error was harmless because it simply allowed the retiring judge to conclude the matter without having to bring in a new judge.¹⁰⁴

Citing case law and the statute governing the role of Commissioners of Account (Virginia Code sections 64.2-1200 *et seq.*) for the principle that the Commissioner's work is subject to circuit

97. 297 Va. 699, 702, 831 S.E.2d 717, 719 (2019).

98. *Id.*

99. *See id.*

100. *See id.* at 702–03, 703 n.1, 831 S.E.2d at 719 & n.1.

101. *Id.* at 702–03, 831 S.E.2d at 719.

102. *Id.* at 703, 831 S.E.2d at 720.

103. *Id.* at 704–05, 711, 831 S.E.2d at 720, 724.

104. *Id.* at 711, 831 S.E.2d at 724.

court review and that proceedings should begin with the Commissioner and end with the court, the Supreme Court of Virginia found that the circuit court had improperly delegated the final approval of the accountings to the Commissioner.¹⁰⁵ Because the order did not include a certification that the circuit court had made a personal examination of the beneficiary's exceptions as required by law, the court's erroneous delegation of its final approval to the Commissioner was not harmless.¹⁰⁶

B. *Alternative Pleading Under Trust No-Contest Clause*

Hunter v. Hunter is a notable case for Virginia practitioners.¹⁰⁷ The Supreme Court of Virginia's opinion expressly approves pleading in the alternative as a means for determining whether or not a particular complaint will trigger a no-contest clause in a trust agreement.¹⁰⁸

The case involved a brother (Chip) and sister (Eleanor), both of whom were beneficiaries of a trust created by their mother.¹⁰⁹ Eleanor also served as co-trustee of the trust with her mother until the latter's death, at which time she became the sole trustee.¹¹⁰ After their mother's death, Chip became alarmed when he learned the value of the trust had declined by more than 50% at a time when stocks in general had appreciated steadily.¹¹¹ He asked his sister to provide additional information about the trust's activities, which she refused to do, citing a trust provision that waived the trustee's statutory duties to inform and report under what is now Virginia Code section 64.2-775.¹¹²

In an attempt to avoid triggering a no-contest clause, which defined "contest" as "any action seeking to invalidate, nullify, set aside, render unenforceable, or otherwise avoid the effect of" any provision of the agreement (in this case, the waiver language),

105. *Id.* at 711–12, 831 S.E.2d at 724–25.

106. *Id.* at 712–13, 831 S.E.2d at 725 (citing VA. CODE § 64.2-1212(B) (Repl. Vol. 2017)).

107. 298 Va. 414, 838 S.E.2d 721 (2020).

108. *See id.* at 428–29, 838 S.E.2d at 727.

109. *See id.* at 419–20, 838 S.E.2d at 722.

110. *See id.* at 420, 838 S.E.2d at 722–23.

111. *See id.* at 420, 838 S.E.2d at 723.

112. *See id.* at 420, 420 n.1, 838 S.E.2d at 723, 723 n.1.

Chip sought declaratory judgment in two steps.¹¹³ First, he asked the court whether a beneficiary's demand for an accounting notwithstanding the trust waiver would constitute a "contest" within the meaning of the no-contest clause.¹¹⁴ Second, he asked, "if, and only if" the answer to the first question was "no," whether in fact the waiver language relieved Eleanor of all statutory, common law, and equitable obligations to inform and report.¹¹⁵ The trial court agreed with Eleanor that this two-step pleading, when read as a whole, was an attempt to require the trustee to provide an accounting in violation of the trust waiver, and therefore it amounted to a contest, which triggered the forfeiture clause.¹¹⁶

On appeal, Chip argued that he had sought merely to construe his mother's trust, not to contest it.¹¹⁷ He maintained that the trial court had ignored his request to interpret the waiver language only if it first concluded that such a request would not constitute a contest that would cause him to forfeit his trust interest.¹¹⁸ The supreme court agreed, reversing the lower court's decision and remanding the case for further proceedings.¹¹⁹ In so doing, it expressly approved the alternative-pleading model whereby a trust beneficiary may seek a declaratory judgment to interpret a no-contest clause in the instrument without putting the beneficiary's interest directly at risk.¹²⁰

Attorneys should note, however, that the supreme court specifically remarked that trusts differed from wills in that the former depended upon a fiduciary relationship between trustee and beneficiary that required at least some degree of oversight.¹²¹ This suggests that the court's analysis might not be the same if a similar "two-step" pleading model were employed in a will contest.

113. *See id.* at 420–21, 431, 838 S.E.2d at 723, 729.

114. *See id.* at 421, 838 S.E.2d at 723.

115. *See id.*

116. *See id.* at 422, 426, 838 S.E.2d at 724, 726.

117. *See id.* at 426, 838 S.E.2d at 726.

118. *See id.* at 426–27, 838 S.E.2d at 726.

119. *Id.* at 436–37, 838 S.E.2d at 732.

120. *Id.* at 428–29, 838 S.E.2d at 727.

121. *See id.* at 425, 838 S.E.2d at 725.

C. *Required Elements of a Gift*

Under Virginia law, an inter vivos gift requires both (1) donative intent at the time of the gift and (2) such actual or constructive delivery as divests the donor of all dominion and control over the property and invests it in the donee.¹²² *Knop v. Knop* serves as a reminder that donative intent without delivery is insufficient to complete a gift.¹²³

Knop involved a majority owner of a closely-held corporation, who had previously given each of his three children 9.08% of the outstanding shares in the company.¹²⁴ These gifted shares were evidenced by certificates and recorded in the company's stock book.¹²⁵ By all accounts, the father later gave (or rather, intended to give) each child another 5.6% of stock.¹²⁶ However, while the parties gave these additional gifts effect for federal and state tax purposes and otherwise acknowledged them in various internal documents, the company's stock ledger was never updated and no new stock certificates were ever issued to the shareholders.¹²⁷

After a disagreement arose over certain corporate actions, the father took steps to regain control over the corporation by asserting that the second round of gifts were never completed because no stock certificates were ever delivered to the children.¹²⁸ The trial court agreed.¹²⁹

On the children's appeal, the Supreme Court of Virginia noted that delivery of certificated shares occurs only when the donee (or the donee's designee) acquires possession of the certificate, regardless of the donor's intent.¹³⁰ The court rejected the children's argument that the company's tax returns and other records should be

122. *Knop v. Knop*, 297 Va. 553, 559, 830 S.E.2d 723, 726 (2019).

123. *Id.* at 560, 830 S.E.2d at 726.

124. *See id.* at 556, 830 S.E.2d at 724.

125. *See id.*

126. *See id.* at 556–57, 830 S.E.2d at 724–25. Although not specifically stated by the court, 5.6% is the difference between the 14.68% total claimed by the children and the 9.08% acknowledged by the father. *See id.*

127. *See id.* at 557, 830 S.E.2d at 725.

128. *See id.* at 558, 830 S.E.2d at 725.

129. *See id.* at 558–59, 830 S.E.2d at 725–26.

130. *Id.* at 560, 830 S.E.2d at 726.

taken as conclusive evidence of constructive delivery.¹³¹ It agreed that a gift could be completed via constructive delivery, but only where the donor has surrendered dominion and control over the property.¹³² Statements on tax returns, while made under penalty of perjury, do not constitute a relinquishment of control.¹³³

The children also argued that their father should be estopped from denying their increased ownership, but they failed to offer evidence of any detriment suffered as a result of his actions.¹³⁴ Without such evidence, the supreme court could not act.¹³⁵

Lastly, the children attempted to invoke the doctrine of “quasi-estoppel,” which could have allowed them to prevail without a showing of specific detrimental reliance.¹³⁶ Declaring quasi-estoppel an “amorphous, nebulous theory” not recognized by Virginia law, the supreme court flatly rejected the argument without discussion and affirmed the trial court’s ruling.¹³⁷

D. *Power to Make Gifts Under Durable Power of Attorney*

Davis v. Davis considered the extent to which a durable general power of attorney authorized the named agent to make gifts of the principal’s property.¹³⁸ It concerned a decedent, Mr. Davis, who gave his mother a durable general power of attorney that, among other things, authorized her to “sell and convey any and all” of his property and to “perform all and every act . . . [he] might or could do if acting personally.”¹³⁹ However, the instrument did not specifically authorize her to make gifts.¹⁴⁰

131. *See id.* at 563, 830 S.E.2d at 728.

132. *See id.* at 561–62, 830 S.E.2d at 727–28.

133. *See id.* at 562, 830 S.E.2d at 728.

134. *See id.* at 563–64, 830 S.E.2d at 728.

135. *Id.* at 564, 830 S.E.2d at 729. It appears to the authors that the court might have reached a different result had the children offered their tax returns into evidence to show any additional taxes they may have paid over the years with respect to the shares. *See id.* at 563–64, 830 S.E.2d at 728–29.

136. *Id.* at 564–65, 830 S.E.2d at 729.

137. *Id.* at 565, 830 S.E.2d at 729.

138. 298 Va. 157, 162, 835 S.E.2d 888, 889 (2019).

139. *See id.* at 163, 835 S.E.2d at 889.

140. *Cf. id.*

Many years later, following a decline in her son's health and his secret marriage in the hospital to a long-time caregiver, Mr. Davis's then elderly mother used the power to transfer nearly all of his personal property to herself and all of his real property to her other children.¹⁴¹ She claimed she did it to protect the property for her son's benefit until he recovered his health.¹⁴² Although Mr. Davis's mother knew her son had made a will several years earlier, the lower court found she did not know its contents (which provided for part of his estate to be distributed to other beneficiaries).¹⁴³

Following the executor's request for aid and guidance, the circuit court held that the gifts were valid on the grounds that the agent's power to "sell and convey" Mr. Davis's property included the authority to give it away.¹⁴⁴ It also found that, in accordance with Virginia Code section 64.2-1622(H), the instrument's "do all acts" clause authorized the agent to make gifts in accordance with the principal's donative history, without regard to the annual exclusion limit under Virginia Code section 64.2-1638(B)(1).¹⁴⁵ The circuit court found that Mr. Davis's personal history of lifetime gifts included a long-term lease of real property to a family friend for \$1000, permission to pledge that property as collateral for a loan for lessee improvements, and a \$10,000 gift to his brother.¹⁴⁶

On appeal, the supreme court reversed the lower court.¹⁴⁷ Applying principles of strict construction, it first found that the power to "sell and convey" contained in the document must be read in the conjunctive, and therefore the mother had no express power to "convey" her son's property except as part of a sale.¹⁴⁸ In dicta, the court further concluded that even if there were an express gifting power, it would have been limited to the annual exclusion amount by Virginia Code section 64.2-1638(B)(1).¹⁴⁹

141. *See id.* at 164, 835 S.E.2d at 890.

142. *Id.* at 165, 835 S.E.2d at 890.

143. *Id.* at 163–66, 835 S.E.2d at 890–91.

144. *Id.* at 164, 166, 835 S.E.2d at 890–91.

145. *See id.* at 166, 835 S.E.2d at 891.

146. *Id.* at 165–66, 835 S.E.2d at 890–91.

147. *Id.* at 176, 835 S.E.2d at 897.

148. *Id.* at 168–71, 835 S.E.2d at 892–94.

149. *Id.* at 171, 835 S.E.2d at 894.

The supreme court then rejected the idea that the gifts were valid under the “do all acts” clause, finding that they far exceeded Mr. Davis’s personal history of making gifts.¹⁵⁰ It is perhaps interesting to note that the court also suggested that, even if the gifts had been in accordance with the principal’s past giving history, they would have still been found invalid because, in the court’s view, the power of attorney only authorized all acts that pertained to Mr. Davis’s financial and business affairs, not “all acts” in general, and therefore there was no implied power to make gifts.¹⁵¹

E. *Will Interpretation*

In *Larsen v. Stack*, the Supreme Court of Virginia was called upon to review the trial court’s interpretation of a will provision which devised the decedent’s house and farm to his two children, subject to his wife’s right to “reside in our home . . . for so long as she is physically and mentally able to do so”¹⁵² Although no specific words are needed to create a life estate, the supreme court reaffirmed the rule that the intention to create one must be plainly manifested in the will.¹⁵³

In reaching its conclusion, the supreme court agreed with the lower court that the language of the decedent’s will was ambiguous, and therefore that the drafting attorney’s testimony regarding intent was admissible.¹⁵⁴ The attorney in turn testified that his client did not intend to give the wife a life estate in the house and farm because he was afraid it could interfere with her possible qualification for Medicaid, and therefore he wanted her interest to end if she went into a nursing home.¹⁵⁵ The supreme court also found it relevant that (1) the widow’s rights ended when she was no longer physically or mentally able to live on the property, rather than at her death; (2) another provision of the will had expressly granted her a “life estate” in a different piece of property, yet the decedent chose not to use the same language when disposing of the

150. *See id.* at 175–76, 835 S.E.2d at 896–97.

151. *Id.* at 172, 835 S.E.2d at 894 n.4.

152. ___ Va. ___, ___, 842 S.E.2d 372, 373 (2020).

153. *See id.* at ___, 842 S.E.2d at 375.

154. *See id.* at ___, 842 S.E.2d at 376–77.

155. *See id.* at ___, 842 S.E.2d at 374.

house and farm; and (3) the widow was given the right to certain rental payments earned from a cell tower located on the farm, which would not have been necessary had she been given a life estate.¹⁵⁶

Additionally, because the decedent did not give his wife a life estate, the supreme court affirmed the lower court's ruling that the children were the fee simple owners of the property and, as such, had the concurrent right to access and use the property in any manner that did not interfere with the widow's rights.¹⁵⁷

CONCLUSION

Again this year the General Assembly refrained from making major changes in Virginia trust and estate law, but it provided helpful guidance to practitioners dealing with directed trusts, confronting the need to partition real estate, facing fiduciary issues, planning for disabled individuals, and encountering other issues of everyday practice.

The Supreme Court of Virginia in *Henderson* highlighted problems inherent in procedural shortcuts, even those taken in the name of judicial efficiency. Its *Hunter* decision provided a roadmap for plaintiffs seeking to avoid triggering a no-contest clause in a trust. Its *Knop* decision emphasized the role of delivery in completing a gift and rejected the idea of a quasi-estoppel doctrine in Virginia law. *Davis* and *Larsen* showed the importance of examining the actual wording of a document in light of the factual context.

156. *See id.* at ___, 842 S.E.2d at 375.

157. *See id.* at ___, 842 S.E.2d at 376.