

1989

Wills, Trusts and Estates (Annual Survey of Virginia Law, 1988-89)

J. Rodney Johnson

University of Richmond, rjohnson@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>



Part of the [Estates and Trusts Commons](#)

Recommended Citation

J. Rodney Johnson, *Wills, Trusts, and Estates*, 23 U. Rich. L. Rev. 849 (1989).

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

WILLS, TRUSTS, AND ESTATES

*J. Rodney Johnson**

The 1989 session of the General Assembly enacted legislation dealing with wills, trusts, and estates that added, amended, or repealed a number of sections of the Code of Virginia (the "Code"). In addition to this legislation, there were twelve cases from the Supreme Court of Virginia, one case from Virginia's intermediate court of appeals, and one federal case in the year ending June 1, 1989, that involved issues of interest to both the general practitioner and the specialist in wills, trusts, and estates. This article analyzes each of these legislative and judicial developments.¹

I. 1989 LEGISLATION

A. *Professional Law Corporations May Qualify as Fiduciary*

New section 13.1-546.1 provides that professional law corporations may, as a part of the practice of law, act as an executor, trustee or administrator of an estate, or guardian for an infant, or in any other fiduciary capacity. This section also provides that, where there is such a qualification, all necessary fiduciary responsibilities to be performed on behalf of the law corporation must be performed by an officer, employee or agent who is a licensed Virginia attorney.² Virginia law does not impose a corresponding requirement upon banking corporations serving in a fiduciary capacity.

This section may create an ethical problem because it is unlikely that a client will know that the attorney's professional corporation can serve in this capacity unless the attorney so advises the client, and such a communication might easily be interpreted as an invitation to name the corporation. If so, what is the impact of the

* Professor of Law, T.C. Williams School of Law, University of Richmond; Member of the Virginia Bar; B.A., 1965, College of Williams and Mary; J.D., 1967, College of William and Mary; LL.M., 1970, New York University.

1. In order to facilitate the discussion of numerous Code of Virginia sections, they will be referred to in the text by their section numbers only. Unless otherwise stated, those section numbers will refer to the latest printing of the old sections and to the 1989 supplement for the new sections.

2. VA. CODE ANN. § 13.1-546.1 (Repl. Vol. 1989).

Ethical Consideration that states, "A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument"³ An advisory opinion from the Virginia Bar's standing committee on legal ethics, clarifying the application of this ethical consideration to these new circumstances, would be helpful to the bar.

B. *Guardian of the Person of a Minor*

One of the reasons why parents of minor children are encouraged to write wills is to provide for a guardian of the person, or substitute parent, to raise their children if both parents should die prematurely. This important area of the law is clarified and expanded by the amendment of four Code sections as follows: (i) to codify the separate office of guardian of the person of a minor and to authorize a parent to make such a testamentary appointment;⁴ (ii) to provide that a guardian of a minor's estate will have custody of the person of a parentless ward unless a guardian of the person has been appointed by a parent or the court;⁵ (iii) to provide that nonresidence of an individual shall not prevent the qualification of the individual to serve as the sole guardian of the person of a minor;⁶ and (iv) to eliminate language relating to certain courts in the City of Richmond that no longer exist.⁷

C. *Uniform Transfers to Minors Act*

This extensive revision and restatement of the former Uniform Gifts to Minors Act⁸ was enacted by the 1988 session of the General Assembly. As enacted, section 31-45(D) authorized certain transfers of property⁹ to a "minor" to contain language expressly

3. VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-6 (1983). The remainder of this ethical consideration provides that "[i]n those cases where a client wishes to name his lawyer as such, care should be taken to avoid even the appearance of impropriety." *Id.*

4. VA. CODE ANN. § 31-2 (Cum. Supp. 1989). This section further provides that the nominated guardian is not entitled to the custody of a minor child so long as either parent is surviving and is a "fit and proper person to have the custody of such child." *Id.*

5. *Id.* § 31-8.

6. *Id.* § 26-59(D).

7. *Id.* § 31-4.

8. VA. CODE ANN. §§ 31-26 to -36 (Repl. Vol. 1985). The revised sections are entitled the Virginia Uniform Transfers to Minors Act. *Id.* §§ 31-37 to -59 (Cum. Supp. 1989). For a brief introduction to the 1988 legislation, and the Virginia variations to the official text, see Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 22 U. RICH. L. REV. 759, 768-71 (1988).

9. The transfers in question are transfers by gift or exercise of power of appointment (§

providing for the age of majority to be twenty-one instead of eighteen. As thus written, the use of this vehicle was precluded for prospective donees between the ages of eighteen and twenty-one. To remedy this problem, section 31-45(D) is amended by substituting "individual under the age of twenty-one" in place of "minor" at this point. This section is further amended to provide that, when one chooses the age twenty-one option, the word "minor" throughout the act will mean a person under age twenty-one.¹⁰ Technical amendments are also made to sections 64.1-57(1) and 64.1-57(4) to provide for references to the Uniform *Gifts to Minors Act* to be construed as references to the Uniform *Transfers to Minors Act*.¹¹

D. *Fiduciary Powers: Incorporation by Reference*

Section 64.1-57 was originally enacted in 1966 to provide a listing of various administrative powers, all or any of which might be incorporated by reference into a will or trust instrument.¹² In 1976, this section was amended to authorize the incorporation of the powers existing (i) on the date of the document's execution or (ii) on the date of death. The 1976 amendment further provided that, unless the document expressed a contrary intention, the incorporation would be of those powers existing at the time the instrument was executed rather than at the time of death.¹³ The 1989 amendment reverses this rule and provides that, absent a contrary intent expressed in the document, "the incorporation by reference of powers enumerated by this statute shall refer to those powers existing at the time of death."¹⁴ This may create a pitfall for the unwary lawyer drafting an irrevocable *inter vivos* trust, after July 1, 1989 which purports to incorporate this statutory boilerplate but which does not expressly state "as existing at the time this document is executed." In such a case the trustee would have the powers that exist on the settlor's death, but there will be uncertainty concerning what powers, if any, the trustee has prior to that time.

31-40), and transfers authorized by will or trust (§ 31-41).

10. VA. CODE ANN. § 31-45(D) (Cum. Supp. 1989).

11. *Id.* §§ 64.1-57(1), -57(4). Section 64.1-57 is the section that allows a variety of "boilerplate" administrative powers to be incorporated by reference into a will or trust.

12. 1966 Va. Acts 425 (codified at VA. CODE ANN. § 64-57.2 (Cum. Supp. 1966)).

13. 1976 Va. Acts 419 (codified at VA. CODE ANN. § 64.1-57 (Cum. Supp. 1976)).

14. VA. CODE ANN. § 64.1-57(4) (Cum. Supp. 1989).

E. *Natural Death Act: Form of Declaration*

Section 54.1-2984 of the Natural Death Act of Virginia¹⁵ provides a suggested form of a written declaration for one's use to direct that life prolonging procedures be withheld or withdrawn under certain circumstances.¹⁶ The 1989 amendment provides for an additional option whereby the declarant may designate another to make the decision about the use of life prolonging procedures if the declarant is comatose, incompetent or otherwise mentally or physically incapable of communication at the time in question.¹⁷

F. *Health Care Decisions: Power of Attorney*

New section 37.1-134.4 establishes additional procedures for surrogate treatment decision making on behalf of adult persons who, due to illness or injury which precludes communication or impairs judgement, are unable to make informed medical decisions.¹⁸ The priorities of those authorized to give consent to the physician are as follows: (i) a person designated in a writing executed pursuant to section 54.1-2984, if given such authority in the writing;¹⁹ (ii) a guardian or committee currently authorized to make such decisions; (iii) an attorney-in-fact appointed under a durable power of attorney, to the extent the power grants the authority to make such a decision;²⁰ or (iv) five separate classes of relatives.²¹ This statutory recognition of the durable power of attorney²² as a means

15. VA. CODE ANN. §§ 54.1-2981 to -2992 (Repl. Vol. 1988 & Supp. 1989) (originally enacted as 1983 Va. Acts 532).

16. These circumstances are (i) a terminal condition, (ii) the attending physician has determined that there can be no recovery from such condition, (iii) death is imminent, and (iv) the application of life-prolonging procedures would serve only to artificially prolong the dying process. *Id.* § 54.1-2984.

17. *Id.* § 54.1-2984 (Supp. 1989).

18. VA. CODE ANN. § 37.1-134.4 (Cum. Supp. 1989).

19. The reference to section 54.1-2984 is to the section containing the suggested form for a declaration under the Natural Death Act. *See* the discussion *supra* p.6, para.E. However this suggested form makes no reference to health-care decisions except for the decision concerning "whether life prolonging procedures shall be withheld or withdrawn." The suggested form does provide that it "may include other specific directions" but it is less than clear that it contemplates anything other than "final" decisions. Moreover it seems somewhat unusual to place directions concerning the care of the living into a portion of the Code designed to do with dying.

20. The use of an attorney-in-fact employed by the physician or the organization employing the physician is not permitted.

21. VA. CODE ANN. § 37.1-134.4(B) (Cum. Supp. 1989).

22. Under the common law, a power of attorney was revoked by operation of law upon the happening of certain events, one of which was the incapacity of the principal. The "durable"

of authorizing another to make medical decisions on one's behalf (priority (iii)) is a good answer to a genuine need and, as its existence becomes known, this option will probably be routinely offered to all clients as a part of the standard will interview.

However, three problems have been created by a sentence in this statute that imposes an inquiry duty upon physicians.²³ First, there is the question of a busy physician's willingness to invest the time that may be required to make the necessary factual investigation. Second, there is the problem of the physician correctly identifying the "next-of-kin" to whom the inquiry must be directed. Although the term "next-of-kin" is not defined in the statute, the Supreme Court of Virginia stated in a recent will interpretation case that it is "a nontechnical term whose commonly accepted meaning is 'nearest in blood.'"²⁴ Query: Where does this leave one's spouse, who might otherwise be considered the most appropriate person to contact? Third, there is the question of the physician's ability to make the legal judgment concerning the existence of "any ground for questioning the authority apparently conferred." It is difficult to see how this new power will be able to approach its potential so long as this sentence remains in the Code, and it is respectfully submitted that it should be eliminated by 1990-91 Session.

G. *Spendthrift Trusts*

In response to a 1988 decision from the Fourth Circuit holding that a trust cannot be a spendthrift trust under Virginia law except to the extent it is limited to the "support" of the beneficiary,²⁵ section 55-19 was amended by rewriting the phrase "ap-

power of attorney, a concept that originated in Virginia in 1954 (1954 Va. Acts 486) and has now spread to all of the other states, describes a power that is immune from this specific revocation. In Virginia, a power is made "durable" by stating, "This power of attorney (or his authority) shall not terminate on disability of the principal' or other words showing the intent of the principal that such power or authority shall not terminate upon his disability." VA. CODE ANN. § 11-9.1 (Repl. Vol. 1989).

23. "In cases where the physician intends to rely upon the authority apparently conferred by a durable power of attorney, he shall use reasonable efforts to contact the patient's next-of-kin, if known, for the purpose of ascertaining whether there is any ground for questioning the authority apparently conferred by the durable power of attorney." VA. CODE ANN. § 37.1-134.4(B) (Cum. Supp. 1989).

24. *Elmore v. Virginia Nat'l Bank*, 232 Va. 310, 314, 350 S.E.2d 603, 606 (1986).

25. *Levy v. First Va. Bank*, 845 F.2d 80 (4th Cir. 1988) (discussed in Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 22 U. RICH. L. REV. 759, 777-79 (1988)).

plied by the trustee to the *support and maintenance* of the beneficiaries" to read "paid to or applied by the trustee for the *benefit* of the beneficiaries."²⁶

While this legislation was moving through the committee process, a further concern developed based upon this section's language authorizing property to be held in spendthrift trust upon the condition that the corpus or income "*shall* be applied."²⁷ It was feared that a literal reading of this language might lead one to the conclusion that only trusts with mandatory, as contrasted with discretionary, payout provisions could qualify as a spendthrift trust under the statute. In order to prevent this result, and to insure that a discretionary trust may be a spendthrift trust if the settlor so intends, this portion of section 55-19 was rewritten to read "shall in the case of a simple trust or, in the case of a complex trust, may in the discretion of the fiduciary be . . . applied."²⁸

Lastly, in order to insure that no question will arise concerning the law applicable to trusts already in existence, this legislation also provides "[t]hat this act is declaratory of existing law."²⁹

H. *Termination of Small Trusts*

For a variety of reasons the corpus of a trust may be reduced to the point where it is no longer economically practicable to continue the trust's operation as originally designed. In recognition of this problem, and the fact that some attorneys fail to provide a solution thereto in their documents, section 55-19.2 was enacted in 1986 to authorize judicial termination of a trust that is depleted or reduced by expenditures down to a corpus of \$15,000 or less.³⁰

The 1989 amendment to section 55-19.2 eliminates the "depleted or reduced by expenditures" language in order that this judicial

26. VA. CODE ANN. § 55-19 (Cum. Supp. 1989) (emphasis added).

27. *Id.* (Repl. Vol. 1986) (emphasis added).

28. *Id.* (Cum. Supp. 1989) (emphasis added).

The term "simple trust" refers to a trust described in IRC § 651 (1986) which, in addition to other requirements, is required to distribute all of its income currently (i.e., a mandatory payout trust); the term "complex trust" refers to a trust described in IRC § 661 (1986) which, in addition to other requirements, may accumulate income (i.e., a discretionary trust). Treas. Reg. § 1.651(a)-1(b) (1989).

29. 1989 Va. Acts 600, cl. 2.

30. VA. CODE ANN. § 55-19.2 (Repl. Vol. 1986 & Cum. Supp. 1989). For a further discussion of this statute, and language that might be used in a will or trust in order to avoid any need for its use, see Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 20 U. RICH. L. REV. 955, 962-63 (1986).

termination remedy might also be applicable to a trust with a corpus below the \$15,000 threshold at the outset.³¹ In order to guarantee that this enlarged remedy will be applicable to trusts already in existence, this legislation further provides “[t]hat this act is declaratory of existing law.”³² In order to insure that this procedure is not used prematurely, further language is added to provide that this section’s remedy is available only if there is “no expectation of additions to the principal other than from interest or earnings.”³³

I. *Probate Avoidance: Transfer of Title to Stock*

The Code contains numerous probate avoidance statutes that facilitate the transfer of title to property from the dead to the living by eliminating the need to employ the traditional probate process in certain circumstances. One of these probate avoidance statutes is section 64.1-123.1, enacted in 1977,³⁴ which has provided a permissive non-probate procedure for the transfer of small amounts of corporate stock (\$5,000 or less of a particular issuer) to the decedent’s spouse or, if none, the decedent’s distributees. In the year following its enactment, this section was amended to restrict its remedy to cases where the stock was issued by a corporation “organized under the laws of Virginia.”³⁵ The 1989 amendment to section 64.1-123.1 eliminates this restrictive language and thus extends the potential of this section’s remedy.³⁶

J. *Probate Avoidance: Transfer of Title to Motor Vehicle*

Section 46.1-94 was a probate avoidance statute which provided that, if there had been no qualification upon a decedent’s estate, any legatee or distributee might transfer title to the decedent’s motor vehicle upon presenting a statement of certain facts to the Department of Motor Vehicles.³⁷ As a consequence of the 1989 re-

31. VA. CODE ANN. § 55-19.2(A) (Cum. Supp. 1989).

32. 1989 Va. Acts 166, cl. 2.

33. VA. CODE ANN. § 55-19.2(A) (Cum. Supp. 1989). The portion of the judicial termination statute applicable to cemetery trusts is also amended to provide an additional forum for the judicial proceeding beyond the circuit court of the county or city in which the cemetery or any part thereof is located, *viz.* “the county or city in which the trustee resides or has its registered office.” *Id.* § 55-19(c).

34. 1977 Va. Acts 148 (codified at VA. CODE ANN. § 64.1-123.1 (Cum. Supp. 1977)).

35. 1979 Va. Acts 281 (codified at VA. CODE ANN. § 64.1-123.1 (Cum. Supp. 1979)).

36. VA. CODE ANN. § 64.1-123.1 (Repl. Vol. 1987 & Cum. Supp. 1989).

37. VA. CODE ANN. § 46.1-94 (Repl. Vol. 1986).

vision of title 46.1, this statute now appears as section 46.2-634, and "the language in this section has been simplified, but no significant changes have been made."³⁸

One might suggest, however, that some changes are in order for the official form that is used to implement this remedy. According to section 46.2-634, the statement filed with the Department of Motor Vehicles must list everyone having an interest in the motor vehicle, but it need only be signed by such of them as are of legal age. However, the official form³⁹ used for this purpose provides for the listing of only "adult legal heirs"⁴⁰ and their signatures; and the instructions on the back of the form state that if an intestate decedent leaves a spouse and children by a previous marriage "the surviving spouse and all heirs or their legal guardians must complete this form."⁴¹

K. *Transfer of Title to Watercraft*

New section 29.1-717.2⁴² applies to transfers by operation of law of watercraft titled under section 29.1-713.⁴³ For purposes of this section, a transfer to anyone as legatee or distributee is a transfer by operation of law. Although the language of this section is somewhat ambiguous, it appears to contemplate only a probate transfer as contrasted with the probate-avoidance procedure available for motor vehicles.

L. *Presumption of Death from Absence or Disappearance*

Section 64.1-105, dealing with the presumption of death that arises from a person's absence or disappearance for a period of time, has been applicable to non-residents only insofar as any real estate located in Virginia is concerned. The amendment extends

38. 1989 Va. Acts 727 (Revisors' Note to Section 46.2-634).

39. VSA 24 (Rev. 6/83).

40. When a decedent leaves surviving children or their descendants, one or more of whom are not children or descendants of the surviving spouse, the surviving spouse is a distributee of one-third of the decedent's personal property which would include the decedent's motor vehicle; however such a spouse is not an "heir" of the decedent. *Carter v. King*, 233 Va. 60, 353 S.E.2d 738 (1987).

41. VSA 24 (Rev. 6/83), Instruction 2.B.

42. VA. CODE ANN. § 29.1-717.2 (Cum. Supp. 1989).

43. *Id.* § 29.1-713.

the application of this statute to non-residents "owning . . . personal property herein."⁴⁴

M. *Statute of Limitations*

When a person entitled to bring a cause of action dies (with no action pending and before the statute has run) section 8.01-229(B)(1) provides that the decedent's personal representative may bring the action (i) within the period of time remaining in the original limitation period, or (ii) within one year from the personal representative's qualification, whichever is the longer. The amendment provides that the period of time remaining in the original limitation period will be computed by "including the limitation period as provided by subdivision (E)(3)."⁴⁵

N. *Illegitimate Persons: Determination of Parentage*

In 1988, the General Assembly repealed section 20-61.1, entitled "Support of children of unwed parents by father; evidence of paternity,"⁴⁶ and added Chapter 3.1 to Title 20, entitled "Proceedings to Determine Parentage."⁴⁷ However, corresponding amendments reflecting this change were not made (i) to section 64.1-5.1.3(iii),⁴⁸ relating to the time within which an illegitimate's claim of succession must be filed, or (ii) to section 64.1-5.2,⁴⁹ relating to the limitation on evidence admissible to show paternity for purposes of succession.⁵⁰ The 1989 amendments to these code sections eliminate this problem by making the relevant portion of each section read "former § 20-61.1 or Chapter 3.1 of Title 20 (§ 20-49.1 et seq.)."⁵¹

44. VA. CODE ANN. § 64.1-105 (Cum. Supp. 1989).

45. VA. CODE ANN. § 8.01-229(B)(1) (Cum. Supp. 1989). Subdivision (E)(3) reads as follows:

If a plaintiff suffers a voluntary nonsuit as prescribed in § 8.01-380, the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, and the plaintiff may recommence his action within six months from the date of the order entered by the court, or within the original period of limitation, or within the limitation period as provided by subdivision B 1, whichever period is longer. This tolling provision shall apply irrespective of whether the action is originally filed in a federal or a state court and recommenced in any other court.

Id. § 8.01-229(E)(3).

46. VA. CODE ANN. § 20-61.1 (Repl. Vol. 1983) (repealed 1988).

47. *Id.* § 20-49.1 to -49.8 (Cum. Supp. 1989).

48. *Id.* § 64.1-5.1(3)(iii) (Repl. Vol. 1987 & Cum. Supp. 1989).

49. *Id.* § 64.1-5.2.

50. This problem is discussed in Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 22 U. RICH. L. REV. 759-61 (1988).

51. VA. CODE ANN. §§ 64.1-5.1(3)(iii), -5.2 (Cum. Supp. 1989).

O. *Determination of Parentage: Jurisdiction*

Section 20-49.2 is amended to provide that circuit courts and juvenile and domestic relations district courts have concurrent original jurisdiction in cases arising under Chapter 3.1 of Title 20, entitled "Proceedings to Determine Parentage."⁵²

However, an interpretative problem has been created by the amendment's last sentence which reads as follows: "The determination of parentage, when raised in any proceeding, shall be governed by this chapter."⁵³ Query: If the determination of parentage is raised in a succession proceeding, will it be governed by Title 20⁵⁴ or by Title 64.1?⁵⁵

P. *Probate Tax: Rate*

The probate tax imposed by section 58.1-1712 has been (i) \$0, if an estate did not exceed \$500, (ii) \$1.00, if an estate exceeded \$500 but did not exceed \$5,000, and (iii) \$0.10 for each \$100 in value, or fraction thereof, in excess of \$5,000. The amendment changes this to a tax of \$0.10 for each \$100 in value, or fraction thereof, with no tax to be imposed on an estate of \$5,000 or less.⁵⁶

Q. *Probate Tax Return*

Section 58.1-1714 formerly required a probate tax return to be filed when the value of an estate exceeded \$1,000. The amendment changes this filing level to \$5,000.⁵⁷

52. VA. CODE ANN. § 20-49.2 (Cum. Supp. 1989).

53. *Id.*

54. *Id.* § 20-49.1 to -49.8 (Cum. Supp. 1989).

55. *Id.* §§ 64.1-5.1, -5.2.

Section 64.1-5.1 establishes a procedure for the determination of parentage "[i]f, for purposes of this title, a relationship of parent and child must be established to determine succession by, through or from a person." *Id.* § 64.1-5.1.

Section 64.1-5.2 provides that "[f]or the purposes of this title, evidence that a man is the father of a child born out of wedlock shall be clear and convincing and shall be limited to the following [an enumeration, in seven paragraphs, of certain evidences]." *Id.* § 64.1-5.2.

56. VA. CODE ANN. § 58.1-1712 (Cum. Supp. 1989).

57. VA. CODE ANN. § 58.1-1714 (Cum. Supp. 1989).

R. *Inaccurate Probate Tax Payment*

Section 58.1-1717 formerly provided that no additional probate tax had to be paid, and no refund would be made, if the amount of the payment or refund would be less than \$5.00. The amendment changes this amount to \$25.00.⁵⁸

S. *Small Estates: Waiver of Tax and Court Costs*

The language in section 26-12.3 providing that the clerk of court shall waive the payment of tax or court costs when an estate does not exceed \$5,000 in value, and an heir, beneficiary or creditor whose claim exceeds the value of the estate seeks qualification, is deleted.⁵⁹ Note, however, that (i) section 14.1-112(4) continues to provide that no clerk's fee shall be charged upon the qualification of a personal representative on an estate of \$5,000 or less,⁶⁰ and (ii) effective July 1, 1989, section 58.1-1712 provides that no probate tax is imposed on an estate of \$5,000 or less.⁶¹

T. *Disposal of Dower and Curtesy*

Section 55-40, dealing with how a married woman may dispose of her contingent right of dower in her husband's realty,⁶² was held to be unconstitutional gender-based legislation in a 1988 trial court decision.⁶³ The amendment rewrites the language of this section to make its provisions also apply to a married man disposing of his contingent right of curtesy in his wife's realty.⁶⁴

58. VA. CODE ANN. § 58.1-1717 (Cum. Supp. 1989).

59. VA. CODE ANN. § 26.1-12.3 (Cum. Supp. 1989).

60. *Id.* § 14.1-112(4) (Repl. Vol. 1989).

61. *Id.* § 58.1-1712 (Cum. Supp. 1989).

62. VA. CODE ANN. § 55-40 (Repl. Vol. 1986). Prior to the 1989 amendment, this section reads as follows:

A married woman may, by uniting with her husband in a deed or contract, dispose of her contingent right of dower in his real estate; or, if the husband has previously disposed of his interest in real estate in which she is entitled to a contingent right of dower, she may thereafter, but not before, dispose of her contingent right of dower in the same by her sole act as if she were unmarried.

Id.

63. *Baker v. Baker*, 14 Va. Cir. 99 (1988).

64. VA. CODE ANN. § 55-40 (Cum. Supp. 1989).

U. *Dower and Curtesy Synonymous*

Section 64.1-19.1 was added to the Code in 1977⁶⁵ to provide that "[w]here the word 'curtesy' appears in this *chapter*, it shall be taken to be synonymous with the word 'dower' as the same appears in this *chapter*, and shall be so construed for all purposes."⁶⁶ Although the primary treatment of dower and curtesy is found in Chapter 2, of Title 64.1,⁶⁷ these concepts are also dealt with in a number of other Code sections outside of Chapter 2. This was the source of the problem leading to a 1988 trial court decision that section 55-40 was unconstitutional.⁶⁸ The amendment seeks to prevent further occurrence of this problem by replacing the word "*chapter*" with the word "*Code*" in both places in section 64.1-19.1.⁶⁹ This extension of the "synonymous" rule of section 64.1-19.1 will solve the problem when husbands *or* wives are given rights, or subjected to liabilities, outside of Chapter 2. However, interpretive problems will continue to exist, within and beyond Chapter 2, when husbands and wives are given conflicting rights.⁷⁰

V. *Debts and Demands Procedure: Notice*

One of the optional steps that may be taken by a personal representative settling a decedent's estate is a proceeding before the commissioner of accounts for receiving proof of debts and demands claimed against the decedent or the decedent's estate. In such a proceeding, the only notice that has been required by section 64.1-171 was newspaper publication and posting at the courthouse door, both of which were accomplished by the commissioner. The basic thrust of the 1989 amendment to section 64.1-171 is to impose a

65. 1977 Va. Acts 657 (codified at VA. CODE ANN. § 64.1-19.1 (Cum. Supp. 1977)).

66. *Id.*

67. VA. CODE ANN. §§ 64.1-19 to -44 (Repl. Vol. 1987 & Cum. Supp. 1989).

68. *See supra* para. T.

69. VA. CODE ANN. § 64.1-19.1 (Cum. Supp. 1989).

70. For example, one can create jointure which will eliminate a surviving wife's right to dower if the requirements of sections 64.1-29 and -30 are met. However, even though these same requirements are met, section 64.1-22 allows a surviving husband to renounce and take curtesy. Query: If 'dower' and 'curtesy' are synonymous, does this mean (i) that a surviving wife can renounce jointure, (ii) that a surviving husband can no longer renounce jointure, (iii) that these code sections are void because of their irreconcilable conflict, or (iv) none of the above? It is submitted that none of the above is the correct answer and that, if the concept of dower and curtesy is to be retained, a legislative overhaul of this chapter is the answer.

Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 19 U. RICH. L. REV. 779, 795 (1985).

duty upon the personal representative to give written notice to any known claimant of a disputed claim at least ten days prior to the date set for the debts and demands hearing.⁷¹ An interpretive problem is raised by certain language that this amendment requires to be placed in the notice to a claimant, *viz.*, "and of the fact that he will be bound by any adverse ruling." Query: Does this language mean that the claimant will be bound (i) whether or not he appears and participates in the debts and demands hearing, or (ii) only if he appears and participates? It appearing that the purpose of this legislation was merely to provide for actual notice to certain claimants, rather than to effect a fundamental change in Virginia law, it is believed that the latter interpretation is the better. Nevertheless this matter should be clarified by the General Assembly to eliminate any doubt.

W. Debts and Demands: Tolling of Limitations

Prior to the 1989 amendment, section 64.1-173 provided that when a person having a debt or demand against a decedent or a decedent's estate files a claim before the commissioner, the time that elapses between this filing and the termination of the debts and demands proceeding will not be deducted from the limitations period otherwise applicable to the claim. The 1989 amendment restricts this tolling to instances in which further action to enforce a claim is "recommended in writing by the commissioner."⁷²

71. VA. CODE ANN. § 64.1-171 (Repl. Vol. 1987 & Cum. Supp. 1989). The entire text of the paragraphs added by the 1989 amendment reads as follows:

The fiduciary shall give notice, in writing, to any claimant of a disputed claim known to the fiduciary at the last address of the claimant known to the fiduciary. The notice may be by regular, certified or registered mail, or by personal service at least ten days prior to the date set for hearing. The notice shall inform the claimant of his right to attend and present his case, of his right to obtain another date if the commissioner of accounts finds the initial date inappropriate, and of the fact that he will be bound by any adverse ruling. The fiduciary shall also inform the claimant of his right to file exceptions with the judge in the event of an adverse ruling.

Evidence of any mailing of notice by the fiduciary shall be filed with the commissioner. The commissioner may in a case deemed appropriate to him direct the fiduciary or the claimant or either of them to institute a proceeding at law or in equity to establish the validity or invalidity of any claim or demand, which he deems not otherwise sufficiently proved.

Id. (Cum. Supp. 1989).

If the personal representative becomes aware of a disputed claim after the notice of debts and demands, but prior to the entry of an order of distribution, a 1989 amendment to VA. CODE ANN. § 64.1-179 (Cum. Supp. 1989) creates a requirement for notice at that time. See *infra* note 77.

72. VA. CODE ANN. § 64.1-173 (Cum. Supp. 1989). A portion of the language added to §

X. *Debts and Demands: Commissioner's Reports*

Section 26-31 requires every account stated under Chapter 2,⁷³ of Title 26, to be reported by the commissioner of accounts. The amendment adds the following language to section 26-31: "and, where applicable, reports of debts and demands under § 64.1-172."⁷⁴ It is unclear why language requiring the reporting of a procedure arising under Title 64.1 was placed in Title 26. It would appear that the more appropriate place for language dealing with the commissioners' reporting of debts and demands would be section 64.1-172, entitled "Reports of debts, when and how made."⁷⁵ In addition, the words "where applicable" cause one to speculate about the circumstances in which it would not be appropriate for the commissioners' debts and demands report to be filed in the clerk's office.

Y. *Order of Distribution: Beneficiary Liability*

Among other things, section 64.1-179 has provided that, even though the personal representative has made final distribution of an estate pursuant to the court's order of distribution:

[E]very legatee or distributee to whom any such payment or delivery is made, and his representatives, may, in a suit brought against him within five years afterward, be adjudged to refund a due proportion of any claims enforceable against the decedent or his estate and the costs attending their recovery.⁷⁶

The amendment to section 64.1-179 limits this beneficiary exposure to claims "which have been finally allowed by the commissioner of accounts or the court, or which were not presented to the commissioner of accounts."⁷⁷

64.1-171 reproduced at *supra* note 35, reads as follows: "The commissioner may in a case deemed appropriate to him direct the fiduciary or the claimant or either of them to institute a proceeding at law or in equity to establish the validity or invalidity of any claim or demand, which he deems not otherwise sufficiently proved." *Id.* § 64.1-171 (Cum. Supp. 1989).

73. VA. CODE ANN. §§ 26-8 to -37 (Repl. Vol. 1985 & Cum. Supp. 1989).

74. *Id.* § 26-31 (Cum. Supp. 1989).

75. *Id.* § 64.1-172 (Repl. Vol. 1987). By way of illustration, § 64.1-174 dealing with when the court orders payment of debts, refers to the debts and demands report having been "confirmed as provided in Chapter 2 (§ 26-8 et seq.) of Title 26." *Id.* § 64.1-174.

76. VA. CODE ANN. § 64.1-179 (Repl. Vol. 1987).

77. *Id.* (Cum. Supp. 1989). This section is further amended to provide that:

In the event any claim shall become known to the fiduciary after the notice for debts

Z. *Distribution Within One Year: Fiduciary Protection*

Among other things, section 64.1-179 has provided for the protection of a personal representative who makes distribution before the expiration of the one year period provided in section 64.1-13,⁷⁸ section 64.1-89,⁷⁹ or section 64.1-96,⁸⁰ provided certain notice requirements are met. The 1989 amendment to section 64.1-179 adds section 64.1-151.5⁸¹ to this listing, without the imposition of any such notice requirement.⁸²

II. 1988-89 JUDICIAL DECISIONS

A. *Issue of Void Marriages Are Legitimate*

In *Murphy v. Holland*,⁸³ R.P.H., Jr., was born in 1961 to parents who were living together as common law husband and wife. This relationship continued until the death of R.P.H., Sr., in 1968. At this time, Sr.'s mother qualified as his administratrix and listed herself and her husband as Sr.'s sole heirs. Twenty-three years later, in 1984, Jr. filed suit seeking to have himself declared to be the legitimate and sole heir⁸⁴ of Sr., who had died intestate owning a 77.25 acre parcel of land. In this suit, Jr. testified that he did not discover the existence of this land, or the fact that his parents were never married, until he was twenty-one, in mid-1983.⁸⁵

Jr.'s mother filed a suit seeking to assert his heirship in 1969,

and demands but prior to the entry of an order of distribution, the claimant, if the claim is disputed, shall be given notice in the form provided in § 64.1-171 [see *supra* note 68 and the order of distribution shall not be entered until after the expiration of ten days from the giving of such notice. If the claimant shall, within such ten-day period, indicate his desire to pursue the claim, the commissioner shall schedule a date for hearing the claim and for reporting thereon if action thereon is contemplated under § 64.1-171.

Id.

78. VA. CODE ANN. § 64.1-13 (Repl. Vol. 1987) (this section is entitled "When and how will may be renounced").

79. *Id.* § 64.1-89 (this section is entitled "When bill [to impeach or establish a will] must be filed and where").

80. *Id.* § 64.1-96 (this section is entitled "Same [Bona fide purchaser of real estate without notice of devise protected]; later will").

81. *Id.* § 64.1-151.5 (this section is entitled "When and how exempt property and allowances may be claimed").

82. *Id.* § 64.1-179 (Cum. Supp. 1989).

83. 237 Va. 212, 377 S.E.2d 363 (1989).

84. Jr.'s parents had one other child, but this child quitclaimed all of his interest in Sr.'s realty to Jr. in 1983.

85. *Murphy*, 237 Va. at 213-14, 377 S.E.2d at 364.

however this suit was dismissed for failure to take any action for a period in excess of three years. Despite the filing of the suit in 1969, the Supreme Court of Virginia concluded that “[a]t the earliest, time began to run against the claim when [Jr.] became eighteen and, even then, he had a reasonable time within which to bring the claim.”⁸⁶ Measuring from this point, the supreme court found no evidence in the record that Jr. “intended ‘to abandon the [claim]’ or that the delay involved was ‘unreasonable and injurious to the other party’ ”⁸⁷ and therefore held “that the trial court did not abuse its discretion in overruling Murphy’s plea of laches.”⁸⁸

At both the time of Jr.’s birth and Sr.’s death, section 64-7 of the Code provided that “[t]he issue of marriages deemed null in law . . . shall nevertheless be legitimate.”⁸⁹ After examining affirmative precedent, and agreeing that “‘the object and purpose of . . . [the statute] was to remove the stain and disabilities of bastardy from all ‘innocent and unoffending children’ who for any cause might be classed as illegitimate,’ ”⁹⁰ the supreme court concluded that “[w]hile common law marriages are not recognized in Virginia, they are marriages ‘null in law’ under Code § 64-7.”⁹¹ Accordingly, the trial court’s determination of Jr.’s legitimacy was affirmed.⁹²

Query: When a child is born to persons who are “living together,” is the child legitimate? The relationship between such persons would not appear to fit within the definition of a common law marriage used by the supreme court,⁹³ because of the absence of “an agreement to marry.” Yet such an arrangement would appear to be recognized today as something more than a mere meretricious relationship, and the announced object and purpose of the statute is “‘to remove the stain and disabilities of bastardy from

86. *Id.* at 216, 377 S.E.2d at 365.

87. *Id.* at 216, 377 S.E.2d at 366 (quoting *Hamilton v. Newbold*, 154 Va. 345, 351, 153 S.E. 681, 682 (1930)).

88. *Id.*

89. VA. CODE ANN. § 64.1-7, (Repl. Vol. 1968) (current version, with changes in wording, at VA. CODE ANN. § 20-31.1 (Repl. Vol. 1983)).

90. *Murphy*, 237 Va. at 219, 377 S.E.2d 367 (quoting *Goodman v. Goodman*, 150 Va. 42, 45, 142 S.E. 412, 413 (1928)).

91. *Id.* at 220, 377 S.E.2d at 368.

92. For a discussion of the rights of illegitimate children to inherit from their parents, see *Johnson, Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 19 U. RICH. L. REV. 779, 792-94 (1985).

93. “A common law marriage is ‘[o]ne not solemnized in the ordinary way (i.e. non-ceremonial) but created by an agreement to marry, followed by cohabitation.’ ” *Murphy*, 237 Va. at 217 n.1, 377 S.E.2d at 366 n.1 (quoting BLACK’S LAW DICTIONARY 251 (5th ed. 1979)).

all "innocent and unoffending" children who for any cause might be classed as illegitimate.'"⁹⁴

B. *Commissioner's Ruling Presumptively Correct*

In *Morris v. United Virginia Bank, Executor*,⁹⁵ following a debts and demands hearing wherein the evidence was in sharp conflict, the commissioner of accounts ruled that the claimant had established his claim against decedent's estate.⁹⁶ Contestants filed exceptions and "the court treated the hearing on exceptions to the commissioner's report as a trial *de novo*, at which the burden was again upon the claimant to establish his claim, with sufficient corroboration, by a preponderance of the evidence."⁹⁷

This was error. Although a commissioner's report does not have the same weight as the verdict of a jury, "it should be sustained unless the trial court concludes that the commissioner's findings are not supported by the evidence."⁹⁸ Although it was proper for the court to take additional evidence at the hearing, the court "made no finding that the commissioner's report was unsupported by the evidence."⁹⁹ Accordingly, the trial court's ruling in favor of contestants was reversed and final judgment was entered for claimant.¹⁰⁰

C. *Competency to Execute Deed of Gift*

In *Nelms v. Nelms*,¹⁰¹ grantee filed a bill in equity seeking a declaration of grantor's competency at the time he executed a certain deed of gift to grantee, to which respondents filed a cross bill alleging that the deed resulted from undue influence.¹⁰² After the presentation of all evidence, the chancellor ruled that the respondents

94. *Id.* at 219, 377 S.E.2d at 367 (quoting *Goodman v. Goodman*, 150 Va. 42, 45, 142 S.E. 412, 413 (1928)).

95. 237 Va. 331, 377 S.E.2d 611 (1989).

96. *Id.* at 335, 377 S.E.2d at 613.

97. *Id.* at 337, 377 S.E.2d at 614.

98. *Id.* (quoting from *Hill v. Hill*, 227 Va. 569, 576-77, 318 S.E.2d 292, 296 (1984)). This quotation continues by stating that "[t]his rule applies with particular force to a commissioner's findings of fact based upon evidence taken in his presence . . . but is not applicable to pure conclusions of law contained in the report." *Id.* at 337-38, 377 S.E.2d at 614.

99. *Id.* at 338, 377 S.E.2d at 614.

100. *Id.* at 339, 377 S.E.2d at 615.

101. 236 Va. 281, 374 S.E.2d 4 (1988).

102. *Id.* at 283, 374 S.E.2d 5-6.

had produced no evidence of undue influence,¹⁰³ instructed the jury on the competency issue, and submitted the case to the jury on the following interrogatory: "Did [grantor] possess mental capacity on February 2, 1981, to execute his deed dated January 12, 1981, conveying his home to his son, [grantee], reserving unto himself a life estate in said real estate?"¹⁰⁴ The jury returned a negative answer to this interrogatory and the chancellor "found that 'the verdict is amply sustained by the evidence,' ruled that the verdict should be 'confirmed,' " and declared the deed void.¹⁰⁵

The chancellor's ruling showed that he "treated the jury's response to the interrogatory as a conventional jury verdict."¹⁰⁶ This was error because the respondent's pleadings "were not pleas in equity within the intendment of Code § 8.01-336(D)." Although the chancellor was authorized to submit an interrogatory to a jury on his own motion, under section 8.01-336(E), the jury's response in such a case is advisory only.¹⁰⁷

It was not error for the chancellor to delete language from an instruction that " 'the time in which a deed is executed is the vital time for mental capacity to exist.' "¹⁰⁸ The amended instruction informed the jury that " 'the testimony of those present when the deed in this case was executed is entitled to great weight.' "¹⁰⁹ This is an accurate statement of Virginia law, whereas the original instruction "could have led the jury to believe that the testimony of witnesses present at the execution of the deed was conclusively dispositive."¹¹⁰

Although the presumption of sanity¹¹¹ is rebuttable, " 'where the evidence of equally credible witnesses is equally balanced . . . the

103. A footnote to this opinion states that "[w]e also are of opinion that the chancellor's refusal to advise the jury of his ruling that the evidence of undue influence was insufficient to support the respondents' allegation in their cross-bill could have influenced the jury's answer to the interrogatory." *Id.* at 288 n.2, 374 S.E.2d at 8 n.2.

104. *Id.* at 285, 374 S.E.2d at 7.

105. *Id.*

106. *Id.* at 287, 374 S.E.2d at 8.

107. *Id.* at 290, 374 S.E.2d at 9.

108. *Id.* at 286, 374 S.E.2d at 7.

109. *Id.* at 287, 374 S.E.2d at 8.

110. *Id.* at 286, 374 S.E.2d at 7.

111. " 'There is . . . a presumption in favor of the sanity of every man until evidence that he is of unsound mind is introduced; and this presumption of sanity applies in all cases, criminal as well as civil.' " *Id.* at 287, 374 S.E.2d at 8 (quoting *Wallen v. Wallen*, 107 Va. 131, 150, 57 S.E. 596, 598-99 (1907)).

presumption will prevail.’”¹¹² However, instead of being instructed to this effect, the jury was told that the evidence of grantor’s competency had to be “clear and convincing” instead of “by the greater weight of the evidence.”¹¹³ The case was sent back for a new trial because of this error, and the supreme court’s assumption that the verdict upon which the chancellor relied was influenced thereby.¹¹⁴

D. *Executor’s Standing to Sue*

In *Andrews v. American Health and Life Insurance Co.*,¹¹⁵ decedent purchased credit life insurance providing for payments pursuant to a policy schedule to be made to lender, with any excess over the amount required to satisfy the debt owed lender to be paid to decedent’s designated beneficiary or, if none, to decedent’s personal representative.¹¹⁶ The insurance company denied liability following decedent’s death and, after paying the debt in full, decedent’s executor filed suit for the scheduled amount of insurance. The supreme court concluded that the policy gave decedent contractual rights independent of lender, and decedent not having designated a beneficiary, his executor had standing to enforce these rights.¹¹⁷

E. *Undue Influence*

In *Martin v. Phillips*,¹¹⁸ four separate suits brought to set aside a will, a lease, and two deeds were consolidated for a trial without a jury, at the conclusion of which the chancellor set all of these documents aside on the ground of undue influence.¹¹⁹

After reviewing a number of cases, the supreme court concluded that:

112. *Id.*

113. *Id.* at 288, 374 S.E.2d at 8.

114. *Id.* at 291, 374 S.E.2d at 10.

115. 236 Va. 221, 372 S.E.2d 399 (1988).

116. *Id.* at 223-24, 372 S.E.2d at 401.

117. *Id.* at 226, 372 S.E.2d at 402.

118. 235 Va. 523, 369 S.E.2d 397 (1988).

119. *Id.* at 525, 369 S.E.2d at 398. The supreme court defines this as influence “sufficient to destroy free agency on the part of the grantor or testator; it must amount to coercion-practically duress.” *Id.* at 527, 369 S.E.2d at 399 (quoting *Wood v. Wood*, 109 Va. 470, 472, 63 S.E. 994, 995 (1909)).

[T]o raise a presumption of undue influence in the execution of a will, the evidence must show that (1) the testator was enfeebled in mind when the will was executed, (2) the requisite confidential or fiduciary relationship was accompanied by activity in procuring or preparing the favorable will, and (3) the testator previously had expressed a contrary intention to dispose of his property. Similarly, to raise a presumption of undue influence in the execution of a deed or lease, the evidence must show that (1) the grantor (lessor) had great weakness of mind when the document was executed, (2) the grantee (lessee) stood in a confidential or fiduciary relationship to the grantor (lessor), either in a formal relationship, or in a less formal relationship involving matters of a business nature, and (3) the consideration was grossly inadequate or the transaction occurred amidst "circumstances of suspicion."¹²⁰

The supreme court emphasized that:

[A] presumption is a rule of law that compels the fact finder to draw a certain conclusion or a certain inference from a given set of facts. The primary significance of a presumption is that it operates to shift to the opposing party the burden of producing evidence tending to rebut the presumption.¹²¹

Accordingly, "in applying the presumption so that the burden of persuasion, rather than the burden of production, was placed upon the proponents," the chancellor erred.¹²²

The chancellor also erred when he held that the elements of the presumption of undue influence had been "proven by a preponderance of the evidence."¹²³ In order "[t]o raise a presumption of undue influence, each element must be established by clear and convincing evidence."¹²⁴ For these reasons, the chancellor's decision was reversed, and the case remanded for further proceedings.

120. *Id.* at 528, 369 S.E.2d at 400.

121. *Id.* at 526, 369 S.E.2d at 399 (citation omitted). A footnote after the first sentence notes that "[i]n contrast, an inference, sometimes loosely referred to as a presumption of fact, does not compel a specific conclusion. An inference merely applies to the rational potency or probative value of an evidentiary fact to which the fact finder may attach whatever force or weight it deems best." *Id.* at 526 n.1, 369 S.E.2d at 399 n.1.

In a further footnote, following the second sentence, the court goes on to say that "[a]n inference, on the other hand, does not invoke this procedural consequence of shifting the burden of production." *Id.* at 526 n.2, 369 S.E.2d at 399 n.2.

122. *Id.* at 530, 369 S.E.2d at 401.

123. *Id.* at 526, 369 S.E.2d at 399.

124. *Id.* at 528, 369 S.E.2d at 400. Clear and convincing evidence is defined as:

'that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermedi-

F. Attorney Fees in Estate Litigation

In *duPont v. Shackelford*,¹²⁵ following the settlement of litigation brought to overthrow decedent's will, counsel for plaintiffs applied to the trial court for an award of attorney fees and expenses of "at least \$1,410,197" from the estate.¹²⁶ In affirming the trial court's denial of any attorney fees, the supreme court addressed several other matters of interest. First, the purpose of the common fund doctrine¹²⁷ is to eliminate the unfairness that would otherwise result when the recovery obtained by one party's attorney benefits another party which is not represented by counsel. In this case, however, all parties had counsel, all of whom participated in making the settlement, and thus no one received a "free ride". The court concluded that "[i]n Virginia, we have never permitted a common fund recovery where to do so would require a party who was represented by counsel to contribute to the counsel fees of another."¹²⁸

Second, without resolving the question whether or not the doctrine of judicial instructions exists in Virginia, the supreme court concluded that complainants were not seeking judicial instructions but instead were seeking to overthrow decedent's will.¹²⁹

ate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and *unequivocal*.'

Id. at 529, 369 S.E.2d at 400 (quoting *Gifford v. Dennis*, 230 Va. 193, 198 n.1, 335 S.E.2d 371, 373 n.1 (1985)).

125. 235 Va. 588, 369 S.E.2d 673 (1988).

126. *Id.* at 593, 369 S.E.2d at 676.

127. The common fund doctrine, which applies in decedent's estates as well as cases involving creditors' rights, was adopted in Virginia, in 1879, as follows:

'It is a general practice to require when one creditor, suing for himself and others, who may come in and contribute to the expenses of suit, institutes proceedings for their common benefit, that those who derive a benefit shall bear their proportion of the expense and not throw the whole burden on one. This is equitable and just. But it only applies to those creditors who derive a benefit from the services of counsel in a cause in which they are not specially represented by counsel. *If a creditor has his own counsel in a cause, he cannot be required to contribute to the compensation of another.*'

Id. at 594, 369 S.E.2d at 677 (quoting *Stoval v. Hardy*, 1 Va. Dec. 342, 349 (Special Ct. App. 1879)).

128. *Id.*

129. *Id.* at 595-96, 369 S.E.2d at 678.

G. *Contract to Make a Will: Anticipatory Repudiation*

In *Story v. Hargrave*,¹³⁰ following a lengthy recitation of facts, the supreme court affirmed a trial court finding that decedent had anticipatorily repudiated her contract to leave her entire estate to X, in return for life-time care, but found no evidence in the record to support the trial court's conclusion that the anticipatory repudiation was justified.¹³¹ The opinion further noted that X should be entitled to the benefit of his bargain but that a breach of this category of contract is not truly compensable in monetary damages. Thus the court remanded the case with instructions to impose a constructive trust on decedent's entire net estate for X's benefit.¹³²

H. *Classification of Property: Statutory Interpretation*

In *Teed v. Powell*,¹³³ T's will, which contained no residuary clause, left the real estate where she resided, along with all of her livestock and farm machinery to her two sons, and left her intangible personal property to her four daughters.¹³⁴

Reversing the chancellor's ruling that 1600 bales of hay were livestock, the supreme court stated that "[w]e need cite no authority to hold, as we do, that the hay was tangible personal property."¹³⁵ Regarding the decedent's interest in certain lots of land, the supreme court reversed the chancellor's ruling that this was real estate, and held that this interest, "arising as a matter of contract right, was a chose in action. Such an interest is intangible personal property."¹³⁶

One of T's sons, living in her home, claimed that T had made an inter vivos gift to him of three shotguns and a rifle. This son defended against the argument that inter vivos gifts between persons residing together are invalid under section 55-3 of the Code,¹³⁷ un-

130. 235 Va. 563, 369 S.E.2d 669 (1988).

131. *Id.* at 568, 369 S.E.2d at 672.

132. *Id.* at 569-70, 369 S.E.2d at 673.

133. 236 Va. 36, 372 S.E.2d 131 (1988).

134. *Id.* at 37, 372 S.E.2d at 132.

135. *Id.* at 38, 372 S.E.2d at 132.

136. *Id.* at 40, 372 S.E.2d at 134.

137. VA. CODE ANN. § 55-3 (Repl. Vol. 1986), provides as follows:

No gift of any goods or chattels shall be valid unless by deed or will, or unless actual possession shall have come to and remained with the donee or some person claiming under him. If the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be a sufficient possession within the meaning

less made by a deed on the ground of the exception contained in the statute's last sentence for "personal paraphernalia used exclusively by the donee." The supreme court reversed the chancellor again and adopted a definition of "paraphernalia" that reads "'personal belongings, esp., articles of adornment or attire, trappings; also the articles that compose an apparatus, outfit or equipment; . . . appointments or appurtenances in general,'" and concluded that firearms were not included therein.¹³⁸

I. *Principal and Agent: Conversion: Jury Instructions*

In *Oden v. Salch*,¹³⁹ following his wife's death, *P* moved into the home of his daughter, *A*, where he resided until his death eleven years later, at age 91. Two months after moving into *A*'s home, and while hospitalized for treatment of a heart attack, *P* gave *A* his general power of attorney.¹⁴⁰ Whether the relationship between *P* and *A* arose because of this document or because of the conduct of the parties, it was clear that *A* acted as *P*'s "exclusive agent in handling and managing his business affairs" during this eleven year period.¹⁴¹

In an action brought by *P*'s personal representative, alleging that *A* had fraudulently converted *P*'s assets, the court upheld the correctness of the following two jury instructions:

The court instructs the jury that under the Power of Attorney, the defendant, (*A*), as agent of (*P*), Deceased, was bound to exercise the utmost good faith and loyalty to her principal and was duty-bound not to act adversely to the interest of her principal by serving or acquiring any private interest of her own in antagonism or opposition thereto.

The presumption is that people who deal with each other, grown men and women, deal with each other as such and this presumption is not destroyed by disparity in age nor by ties of blood, and this is particularly true where fraud is charged. *This presumption does not*

of this section. This section shall not apply to personal paraphernalia used exclusively by the donee.

138. *Teed*, 236 Va. at 39, 372 S.E.2d at 133 (quoting OXFORD ENGLISH DICTIONARY 2075 (1971)).

139. 237 Va. ___, 379 S.E.2d 346 (1989).

140. *Id.* at ___, 379 S.E.2d at 348.

141. *Id.* at ___, 379 S.E.2d at 352.

*apply while acting under the power of attorney.*¹⁴²

The court further held that “[t]he qualifying language added to each instruction by the court was appropriate in light of the evidence and the conflicting theories advanced by the parties.”¹⁴³

This case also contains a discussion of (i) the applicable statute of limitations, (ii) the admissibility of certain documentary evidence, and (iii) a review of the evidence which was found sufficient to support the jury’s finding of fraud and its damage award.

J. Wills: Ambiguity: Admission of Extrinsic Evidence

In *Baker v. Linsey*,¹⁴⁴ Article II of *T*’s will, executed shortly before her death and while aware that she was terminally ill, directed that her home be sold and that the net proceeds, after payment of just debts and administrative expenses, “be used to satisfy the specific cash bequests set forth below and the remainder, if any, to be passed under the residue of my estate.”¹⁴⁵ Article III, which set forth a number of bequests and cash legacies totaling \$315,000, also contained the following language:

It is my desire that the specific bequests made above be carried out by my Executor, whose decision and identification of the individual named articles to the named beneficiary shall be conclusive and final, and if there isn’t sufficient *monies* to make all the above bequests, then all the money bequest shall be proportionately reduced.¹⁴⁶

In a suit brought by *T*’s executor for advice and guidance and declaratory judgment, the evidence showed that the net proceeds available from the sale of *T*’s home would be between \$120,000 and \$150,000, and that there were other funds in *T*’s estate of approximately \$210,000. The residuary beneficiary argued that only the

142. *Id.* at ___, 379 S.E.2d at 350-51. The first paragraph was instruction number four, tendered by *P*’s personal representative. The qualifying language, added by the trial court, at *A*’s request, was “while acting under the power of attorney.” *Id.* at ___, 379 S.E.2d at 350. The scene paragraph was instruction number nine, tendered by *A*. The qualifying language, added by the trial court is the final, underlined sentence. *Id.* at ___, 379 S.E.2d at 350-51.

143. *Id.* at ___, 379 S.E.2d at 351.

144. 237 Va. ___, 379 S.E.2d 327 (1989).

145. *Id.* at ___, 379 S.E.2d at 328.

146. *Id.* at ___, 379 S.E.2d at 328-29 (emphasis added).

net proceeds from the home could be used to satisfy the bequests, as provided in Article II, and thus the legacies would have to be "proportionately reduced" as provided in Article III. *T*'s executor argued that *T* wished all of her gifts to be satisfied and that a more expansive meaning of the word "monies," in Article III, as including the other funds in *T*'s estate would allow the legacies to be satisfied in full.¹⁴⁷

The supreme court concluded that the word "monies" was an ambiguity¹⁴⁸ that, in the proper context, might include "not only debts and securities, but the whole personal estate, and even the proceeds of realty."¹⁴⁹ The court further concluded that this ambiguity was an equivocation,¹⁵⁰ which meant that "'all extrinsic statements by a testator as to his actual testamentary intentions—*i.e.*, as to what he has done, or designs to do, by his will, or as to the meaning of its words as used by him' are admissible to show which person or thing he intended and thus to resolve the equivocation."¹⁵¹ After reviewing the extrinsic evidence introduced below, the court affirmed the chancellor's conclusion that *T* had used the word "monies" in the broad sense and thus the other funds in the estate were available to satisfy the legacies bequeathed in Article III.¹⁵²

K. *Wills: Misdescription: Construction*

In *Picot v. Picot*,¹⁵³ *T* inherited the fee simple title to the Picot Farm from her husband upon his death, intestate, on September 14, 1982. *T*'s will, executed thirteen months later, reads in part as follows:

SECOND: I give and devise all of my real estate, *it being my un-*

147. *Id.* at ___, 379 S.E.2d at 329.

148. "We have defined 'ambiguity' as 'the condition of admitting of two or more meanings, of being understood in more than one way . . .'" *Id.* at ___, 379 S.E.2d at 330 (quoting *Berry v. Klinger*, 225 Va. 201, 207, 300 S.E.2d 792, 796 (1983)).

149. *Id.* at ___, 379 S.E.2d at 329 (quoting *Dillard v. Dillard*, 97 Va. 434, 438, 34 S.E. 60, 62 (1899)).

150. "An 'equivocation' exists 'where the words in the will describe well, but equally well, two or more persons, or two or more things.'" *Id.* at ___, 379 S.E.2d at 330 (quoting *Baliles v. Miller*, 231 Va. 48, 57, 340 S.E.2d 805, 811 (1986)).

151. *Id.* at ___, 379 S.E.2d at 330 (quoting *Baliles v. Miller*, 231 Va. 48, 57-58, 340 S.E.2d 805, 811 (1986)).

152. *Id.* at ___, 379 S.E.2d at 333.

153. 237 Va. ___, 379 S.E.2d 364 (1989).

divided dower interest in the Roy Picot farm to my son, (A), in fee simple and absolutely, per stirpes. It is my hope and desire that my home shall continue to be a home for all four of my children, and their descendents [sic], and I hope that they all continue to utilize the same and enjoy the same together.

THIRD: All the rest and residue of my estate of every kind and description, I give, devise and bequeath to my four children, (A, B, C and D), in fee simple and absolutely and in equal shares, share and share alike, per stirpes.¹⁵⁴

B, C and D argued that the reference to the property specifically devised to A as T's "undivided dower interest" should limit A's taking on the theory that such reference is (i) repugnant to the reference to "all of my real estate," and the latter reference should control, or is (ii) a modification of the earlier language. Although acknowledging that these rules are sometimes dispositive, the supreme court points out that they are "subordinate to the maxim we have called the 'guiding star' of construction", the testator's intention.¹⁵⁵ "When this intention . . . is ascertained and can be made effective, the quest is at an end and all other rules become immaterial."¹⁵⁶ Although none of the parties introduced any extrinsic evidence of T's intent, the majority concluded that "her 'general intent' was to devise 'all' she owned in the family farm to her favorite son and that her 'particulars of description' were 'false or mistaken.'" ¹⁵⁷ Under these circumstances, such "false or mistaken particulars of description will be rejected," and the general intent will control.¹⁵⁸ Accordingly, the chancellor's construction in favor of A taking the entirety of the farm was sustained.¹⁵⁹

L. "Tenancy by Entirety:" Unmarried Persons: Survivorship

In *Gant v. Gant*,¹⁶⁰ two years after their divorce, and while they were considering remarriage, H and W purchased a house and lot, taking title thereto as "[H] and [W], his wife . . . to be held and

154. *Id.* at ___, 379 S.E.2d at 365 (emphasis added).

155. *Id.* at ___, 379 S.E.2d at 365.

156. *Id.* at ___, 379 S.E.2d at 366 (quoting *Wornom v. Hampton N & A. Inst.*, 144 Va. 533, 541, 132 S.E. 344, 347 (1926)).

157. *Id.* at ___, 379 S.E.2d at 367 (Thomas, J., dissenting).

158. *Id.* at ___, 379 S.E.2d at 366 (quoting *Wooten v. Redd's ex'or & als*, 53 Va. (12 Gratt.) 196, 209 (1855) (emphasis added)).

159. *Id.* at ___, 379 S.E.2d at 367.

160. 237 Va. ___, 379 S.E.2d 331 (1989).

owned by them . . . as tenants by the entireties with the right of survivorship as at common law . . . ' "161 *H* and *W* lived together on this property but they never remarried and, after a period of time, *H* moved out. When *H* died, survived by his widow, three daughters, and *W*, a dispute arose concerning the ownership of this house and lot.¹⁶²

Although section 55-20 of the Code¹⁶³ abolishes survivorship in joint tenancies and tenancies by the entirety, there are exceptions to this rule in section 55-21,¹⁶⁴ one of which is applicable "when it manifestly appears from the tenor of the instrument that it was intended the part of the one dying should then belong to the others."¹⁶⁵ Although *H* and *W* could not hold this property as tenants by the entireties, because they were not married to each other, all of the requisites for joint ownership were present¹⁶⁶ and the deed expressly provided for survivorship. On these facts the supreme court affirmed the chancellor's decision that *W* acquired sole ownership, by right of survivorship, on *H*'s death.¹⁶⁷

M. *Inter-Vivos Gifts: Intent*

In *Dean v. Dean*,¹⁶⁸ *H*, while married to *W*, purchased stock with his separate property which he registered in their joint names with the right of survivorship. Following the divorce of *H* and *W*, a question arose concerning the ownership of this stock. *H* testified that he registered the stock jointly in order to provide instant liquidity for *W* upon his death, and to obtain an income tax deduction for their joint expenses incurred while attending the stockholders' annual meeting at the Greenbrier Hotel. *H* further

161. *Id.* at ___, 379 S.E.2d at 331.

162. *Id.* at ___, 379 S.E.2d at 331-32.

163. VA. CODE ANN. § 55-20 (Repl. Vol. 1986).

164. *Id.* § 55-21.

165. *Id.*

166. Tenancies by the entirety are based upon five unities: those of title, estate, time, possession, and persons. The unity of persons relates to marriage and embodies the common law fiction that husband and wife are one. A tenancy which lacks the fifth unity but is based upon the other four is a joint tenancy, for which the first four unities are prerequisite.

Gant, 237 Va. at ___, 379 S.E.2d at 332-33.

167. *Id.* at ___, 379 S.E.2d at 333. The supreme court also held that although the literal language of VA. CODE ANN. § 20-111 (Repl. Vol. 1983), which converts survivorship tenancies by entirety into non-survivorship tenancies in common upon divorce, also refers to after acquired property stating that "it has no effect upon property acquired subsequent to divorce." *Id.* at ___, 379 S.E.2d at 332.

168. 8 Va. App. ___, ___ S.E.2d ___ (1989).

testified that he maintained exclusive possession of the stock in his safe deposit box, to which *W* had no key, and that he deposited all dividend checks (issued jointly) in his personal checking account.¹⁶⁹

The court of appeals concluded that:

[R]egistration of the stock certificates in their joint names vests legal title and ownership in [*H*] and [*W*] jointly . . . establishes *prima facie* that [*H*] intended to make an *inter vivos* gift . . . constituted constructive delivery . . . gave [*W*] an irrevocable interest in the stocks, and, thus, surrendered the power of dominion and control over the stock.¹⁷⁰

The court also called attention to the inconsistency in *H*'s position that he had made his wife a legal owner by gift for income tax purposes, in order to deduct her annual meeting expenses, but not otherwise. Accordingly, the court affirmed the trial court's decision that *H* "made an *inter vivos* gift to [*W*] when he had the stock certificates registered jointly, and that the divorce severed the joint tenancy and converted ownership into a tenancy in common."¹⁷¹

N. *Extrinsic Evidence: Admissibility*

In *Wisely v. United States*,¹⁷² involving the allowability of the federal estate tax marital deduction, a question arose concerning the admissibility of extrinsic evidence to establish testamentary intent. The court held that "[w]ell-settled principles of Virginia law require that where the words of a will are 'plain, clear, and unambiguous, extrinsic evidence shall not be considered' in the interpretation of the will."¹⁷³

169. *Id.* at ____, __ S.E.2d at ____.

170. *Id.* at ____, __ S.E.2d at ____.

171. *Id.* at ____, __ S.E.2d at ____.

172. 703 F. Supp. 474 (W.D. Va. 1988)

173. *Id.* at 475-76.