University of Richmond Law Review

Volume 20 | Issue 4 Article 13

1986

Annual Survey of Virginia Law: Wills, Trusts, and Estates

J. Rodney Johnson
University of Richmond

WILLS, TRUSTS, AND ESTATES

*J. Rodney Johnson**

The 1986 session of the General Assembly passed eight bills dealing with wills, trusts, and estates. In addition to this legislation, there were four cases from the Virginia Supreme Court and one case from the Fourth Circuit Court of Appeals during the past year that involved issues of interest to both the general practitioner and the specialist in wills, trusts, and estates. This article reviews all of these legislative and judicial developments. In order to facilitate the discussion of numerous Virginia Code sections they will be referred to in the text by their section numbers only. These section numbers will refer to the latest printing of the old sections and to the 1986 supplement for the new sections.

I. 1986 LEGISLATION

A. *Intestate Succession by Kindred of the Half Blood*[1]

Prior to 1922, the first three steps under the Virginia statute of descent provided for an intestate's real estate to descend "First, To his children and their descendants; Second, If there be no child, nor the descendant of any child, then to his father; Third, If there be no father, then to his mother, brothers, and sisters, and their descendants."[2] If some of the brothers and sisters in the third class were collaterals of the half blood another statute provided that they would take only half as much as those of the full blood but, "if all the collaterals be of the half blood, the ascending kindred, if any, shall have double portions."[3] Accordingly, upon the death of an intestate survived only by a mother and three half brothers, each of the half brothers would inherit a one-fifth interest in the intestate's realty and the mother would inherit a two-fifths

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

1. VA. CODE ANN. § 64.1-2 (Cum. Supp. 1986).
2. *Id.* § 5264 (1919). This is the same language found in Virginia's original statute of descent, *mutatis mutandis*. 12 HEN. STAT. ch. 60 (1785).
3. VA. CODE ANN. § 5265 (1919).

interest.[4]

In 1922, Virginia's statute of descent was amended to provide, among other things, for the elimination of the preference to males in the ascension.[5] Following this amendment, an intestate's mother was included in the second class along with the intestate's father, and the third class now provided: "If there be no father nor mother, then to his or her brothers and sisters, and their descendants."[6] This amendment made it impossible for there to be any further application of that portion of the half blood statute set forth at note three in this article, because there could no longer be any instances where an ascendant would be taking along with collaterals. However, this language was allowed to remain in the statute by the 1922 session and all succeeding sessions of the General Assembly. The 1986 amendment finally strikes this meaningless language from the statute.

B. *Rights Upon Renunciation of Spouse's Will*[7]

Section 64.1-13 attempts to provide a measure of protection for a testate decedent's surviving spouse by giving the spouse an absolute right to renounce the decedent's will and take a share of the decedent's net probate personal estate, regardless of what the decedent's will might provide.[8] Section 64.1-16, which quantifies the share a renouncing spouse will receive, (i) begins with the words "[i]f renunciation be made" and goes on to provide for a one-third share if the decedent left surviving children or their descendants, or a one-half share if no children or their descendants survive, and then (ii) concludes with the words "otherwise the surviving spouse shall have no more of the surplus than is given him or her by the will."

The correct result under section 64.1-16 has always been clear when one dies completely testate, but the result has not been clear

4. The statute would operate in the same fashion in any of the higher classes of descent that included collaterals and an ascendant, such as class six, which included "the grandmother, uncles, and aunts, on the same side, and their descendants." *Id.* § 5264.

5. 1922 Va. Acts 492 (amending VA. CODE ANN. § 5264 (1919)).

6. *Id.* In order to totally eliminate the preference for males in the ascension, corresponding changes were also made at the level of grandparents, great grandparents, etc.

7. VA. CODE ANN. § 64.1-16 (Cum. Supp. 1986).

8. The surviving spouse's rights in the decedent's real estate are determined under the laws of dower and curtesy found in chapter 2 of Title 64.1. For a discussion focusing on how easily these "rights" of a surviving spouse in real and personal property can be avoided, see Johnson, *Interspousal Property Rights at Death*, 10 VA. B.A.J. 10 (Summer 1984).

in cases of partial intestacy. Suppose a childless testator bequeaths a portion of the personal property to the surviving spouse and dies intestate as to the remainder of the personal property. Although it might seem that this would not involve the renunciation statute at all, and that the surviving spouse would simply take the bequest under the terms of the will and the intestate personal property as sole distributee under section 64.1-11, a 1958 decision of the Virginia Supreme Court indicates a contrary result.[9] The court concluded that in cases of partial intestacy, there was a conflict between the results called for by section 64.1-11 and section 64.1-16, that section 64.16 controlled, and that the peculiar wording of section 64.1-16 requires the surviving spouse (i) to renounce and receive the appropriate fractional share of the decedent's net probate personal estate (the testate and intestate portions), or (ii) to accept whatever is left to the surviving spouse under the will, if anything, to the complete exclusion of any intestate succession rights.[10] The 1986 amendment reverses the result called for by this decision by deleting the words "otherwise the surviving spouse shall have no more of the surplus than is given him or her by the will" from section 64.1-16.[11] Thus it is now clear that a survivng spouse who takes under the will is also entitled to succession rights under section 64.1-11 in any intestate personal property.

The 1986 amendment also adds a sentence to section 64.1-16 providing that: "Nothing in this section shall prevent a surviving spouse who renounces a decedent's will from receiving a portion of the decedent's intestate estate under Chapters 1 and 2 of Title 64.1 of this Code."[12] In a case of partial intestacy, this added language will allow a renouncing spouse to receive a renunciative share in the entirety of the decedent's net probate personal estate (the testate and intestate portions) and then also be entitled to succession rights under section 64.1-11 in any intestate personal property.

9. Newton v. Newton, 199 Va. 785, 102 S.E.2d 312 (1958).

10. For a discussion of how the *Newton* rule can operate to the estate tax disadvantage of a family unit, by preventing the decedent's children from disclaiming property under the decedent's will in order that it might pass to the surviving spouse by intestate succession estate tax-free due to the unlimited marital deduction, see Clement, *Using Disclaimers to Increase Marital Deductions in Virginia*, 34 VA. B. NEWS 9 (Feb. 1986).

11. 1986 Va. Acts 526.

12. VA. CODE ANN. § 64.1-16 (Cum. Supp. 1986).

C. *Self-Proving Affidavits*[13]

Section 64.1-87.1, which sets forth the requirements of an affidavit used to make a will self-proving, was amended in 1985 in order to eliminate a problem that arose when out-of-state self-proving wills were offered for probate in Virginia.[14] The problem was not completely solved, however, because although the 1985 amendment was applicable to all wills made self-proved after July 1, 1985, the statute as amended in 1985 was applicable to existing wills only if the existing wills were made self-proved prior to June 1, 1977. There was no coverage for foreign wills that were made self-proved between June 1, 1977, and July 1, 1985. The 1986 amendment eliminates this problem by adding language to make the statute applicable to affidavits whenever taken, "whether before, on or after July 1, 1986."[15]

D. *Payment of Debts in Insolvent Estates*[16]

Section 64.1-157, dealing with the order in which debts of insolvent decedents are to be paid, has been rewritten in order to eliminate several gaps and ambiguities in the previous version. The new language, which is an adaptation of the corresponding section of the Uniform Probate Code,[17] establishes eight classes of debts to be satisfied, in order, without any intra-class preferences or any preferences for matured over non-matured debts. The eight classes, in the order of their priority, are: (1) estate administration expenses; (2) family allowance, exempt articles' allowance, and homestead allowance; (3) the first $500 of funeral expenses; (4) debts and taxes with preference under federal law; (5) last-illness debts, limited to $400 for each hospital and $150 for each person furnishing services or goods; (6) debts and taxes due the Commonwealth of Virginia; (7) debts incurred in a fiduciary capacity; and (8) all other claims.[18]

---

13. VA. CODE ANN. § 64.1-87.1 (Cum. Supp. 1986).

14. 1985 Va. Acts 429. For a discussion of this problem and the 1985 amendment, see Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 19 U. RICH. L. REV. 779, 788 (1985).

15. VA. CODE ANN. § 64.1-87.1 (Cum. Supp. 1986).

16. VA. CODE ANN. § 64.1-157 (Cum. Supp. 1986).

17. UNIFORM PROBATE CODE § 3-805 (6th ed. 1982).

18. VA. CODE ANN. § 64.1-157 (Cum. Supp. 1986).

E. *Non-Resident Personal Representatives*[19]

Prior to 1983, section 26-59 prohibited all non-resident natural persons from serving in a court-appointed fiduciary capacity unless a Virginia resident or corporation qualified along with them as co-fiduciary.[20] This absolute prohibition was relaxed by a 1983 amendment, insofar as executors or administrators are concerned, in favor of "a parent of a decedent, a child or other descendant of a decedent, the spouse of a child of a decedent, the surviving spouse of a decedent, or a person or all such persons otherwise eligible to file a statement in lieu of an accounting pursuant to § 26-20.1, or any combination of them."[21] The 1986 amendment further enlarges this class by adding thereto the decedent's brothers and sisters.

F. *Non-Resident Testamentary Trustees*[22]

Section 26-59 has been amended to provide that the same non-resident persons who may qualify as personal representative of a decedent's estate, without the appointment of a Virginia resident or corporation to serve with them as a co-fiduciary, may also qualify as trustee of a testamentary trust without a Virginia co-fiduciary. Such sole qualification is subject to the same bonding requirement and consent to service of process requirement imposed on a non-resident individual qualifying as an executor or administrator.[23]

Note, however, that this relaxation does not extend to a testamentary pourover into another trust, regardless of whether the recipient trust is testamentary or inter vivos. Section 64.1-73(a)(3), which deals with a devise or bequest to a trustee of an established trust, requires that "at the testator's death at least one trustee of such trust is an individual resident of this Commonwealth or is a corporation or association authorized to do a trust business in this

19. VA. CODE ANN. § 26-59 (Cum. Supp. 1986).

20. 1962 Va. Acts 576 (current version at VA. CODE ANN. § 26-59 (Cum. Supp. 1982)).

21. 1983 Va. Acts 467. In order for such non-residents to qualify as sole executor or administrator, the statute further requires that they must (i) always post bond with surety, notwithstanding the provisions of § 64.1-121, and (ii) appoint a Virginia resident as agent to receive service of process or any notice with respect to the administration of the probate estate in the personal representative's charge in Virginia. VA. CODE ANN. § 26-59 (Cum. Supp. 1986).

22. VA. CODE ANN. § 26-59 (Cum. Supp. 1986).

23. *See supra* note 21.

Commonwealth." Accordingly, the interaction of sections 26-59 and 64.1-73(a)(3) leaves a gap in cases where a non-resident individual is serving as a sole trustee. This gap prevents a testator from making a testamentary addition to an inter vivos trust created by the testator or by the testator's spouse, and also prevents a husband and wife from making a testamentary pourover to a trust created in the other's will. This problem will undoubtedly be remedied in the future. Until a statutory remedy is provided, a merger clause would seem to be an appropriate drafting solution to this pourover problem.[24]

G. *Payment of Small Accounts in Banks and Trust Companies*[25]

Section 6.1-71 is a probate avoidance statute that allows a bank or trust company to pay out the balance of a decedent's account to certain persons if (i) the account does not exceed $5,000, (ii) sixty days have passed since the account owner's death, and (iii) there has been no qualification on the decedent's estate. The permissible payees under this statute have been the spouse or, if none, the decedent's next of kin. The 1986 amendment strikes the words "to his or her next of kin" from the statute and inserts in their place, following the provision for a spouse, "to the distributees of the decedent or other persons entitled thereto under the laws of this Commonwealth." Although the words "next of kin" are most commonly used to refer to a person's successors under a statute governing the distribution of an intestate's personal estate, the word "distributees" is the more specific term used to describe these persons. Thus this language change will not affect the historic operation of the statute. However, the addition of the further words "or other persons entitled thereto" obviously seeks to put a bank or trust company that is willing to exercise this permissive authority in a position to make payments to others, such as creditors of the decedent, without requiring any employment of the probate process. The provision in section 6.1-71 which allows the permissible payees to authorize a bank or trust company to make a direct pay-

24. An excellent merger clause, taken from D. Belcher, J. Carr, R. Curran & D. Smith, Tax Planning Forms For Businesses and Individuals 17-12 (1985), reads as follows: "My Trustee may merge or consolidate for administrative purposes any trust under my will with any other trust made by me or my spouse having the same Trustee and substantially the same dispositive provisions."

25. Va. Code Ann. § 6.1-71 (Cum. Supp. 1986).

ment[26] from the decedent's account to the entity handling the decedent's funeral is continued in favor of the permissible payees as newly described.[27]

H. *Payment of Small Accounts in Credit Unions*[28]

Section 6.1-208.4 provides a procedure for the payment of a decedent's small share balance in a credit union that is the same, *mutatis mutandis*, as that described in section G of this article for small accounts in banks and trust companies. The 1986 amendment makes the same modifications to section 6.1-208.4 as are made to section 6.1-71 described in section G of this article.

I. *Payment of Small Accounts in Savings and Loan Associations*[29]

Section 6.1-194.58 provides a procedure for the payment of a decedent's small account balance in a savings and loan association that is the same, *mutatis mutandis*, as that described in section G of this article for small accounts in banks and trust companies. The 1986 amendment surely intended to make the same modifications to section 6.1-194.58 as are made to section 6.1-71. However, the 1986 amendment to the savings and loan section, in addition to striking the words of the secondary provision "to his or her next of kin" from the statute, also strikes the primary provision in favor of the decedent's "spouse." This omission means that the surviving spouse, as a distributee, will be entitled to only one-third of such a small account in a savings and loan association if the decedent "left surviving children or their descendants, one or more of whom are not children or their descendants of the surviving spouse."[30] Although an argument can be made that this is a fair disposition,

---

26. This payment, which cannot be made until thirty days have passed from the account owner's death, is limited to the amount given priority by VA. CODE ANN. § 64.1-157 (Cum. Supp. 1986) (which is currently $500).

27. Note that this direct payment can be made regardless of the amount in the decedent's account. Thus, in a case where the decedent's account balance lies between $5,000 and $5,500, the latter portion of § 6.1-71 can be utilized to reduce the balance below $5,000, and the first portion of § 6.1-71 can be used to pay out this reduced balance to the appropriate payee.

28. VA. CODE ANN. § 6.1-208.4 (Cum. Supp. 1986).

29. VA. CODE ANN. § 6.1-194.58 (Cum. Supp. 1986).

30. *Id.* § 64.1-11. If the surviving spouse is the parent of all the decedent's surviving children and deceased children who have living descendants, the surviving spouse is the sole distributee and the omission of "spouse" from § 6.1-194.58 will have no significance.

it is not believed that the General Assembly would provide for one result in banks and credit unions and intentionally provide a different result for savings and loan associations. Nevertheless, such is the law at this time.

J. *Termination of Small Trusts*[31]

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 some attorneys include clauses in their documents authorizing the trustee of an irrevocable testamentary or inter vivos trust to terminate the trust prematurely under such circumstances.[32]

Section 55-19.2 creates a statutory procedure for the termination of certain small trusts where the drafting attorney failed to anticipate this need. The statute authorizes a trustee holding a corpus of $15,000 or less to petition the appropriate circuit court for permission to terminate the trust and pay the remaining trust assets "to the appropriate beneficiaries, legal representative thereof, or other appropriate persons or institutions responsible for the object of the trust." The statute goes on to provide that the payee of such assets "shall be under a duty to use the assets for the purpose of the trust and shall be deemed capable and willing by the court to accomplish such trust purposes" and that the "court shall be satisfied that the termination of the trust will not cause the purposes of the trust to fail so far as these can be achieved with the limited funds." The procedure provided by the new statute, which is expressly declared to be cumulative with any other available remedy, is also expressly made applicable to the termination of a cemetary trust under chapter 3 (sections 57-22 to -39.10).

Although the new statute will be of assistance in this troubled area, it is regrettable that it does not respond to a number of issues that were noted during the national study of this matter made in

---

31. VA. CODE ANN. § 55-19.2 (Repl. Vol. 1986).

32. An illustrative clause designed for inclusion in a will, taken from the formbook of a major Virginia bank, reads as follows:

> If at any time the size of any trust under my will is so small that, in the opinion of my Trustee, the trust is uneconomical to administer, my Trustee may terminate the trust and distribute the assets to the person then authorized to receive trust income, or if more than one person is authorized to receive trust income, to the one or ones of them my Trustee may deem appropriate and in such shares as it may deem appropriate.

1984 by the Committee on Formation, Administration and Distribution of Trusts of the Section of Real Property, Probate and Trust Law of the American Bar Association.[33] The model statute drafted by this Committee is reproduced in the footnotes for purposes of comparison with the Virginia statute, and with the hope that it might encourage the 1987 session to consider the possibility of amending the Virginia statute to incorporate some of the broader provisions found in the model statute.[34]

K. *Apportionment of Estate Taxes*[35]

Section 64.1-161 requires that the state and federal estate tax burden occasioned by the inclusion of property in a decedent's estate "be prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit . . . accrues," unless the testator provides to the contrary in the governing document. The intended fairness of this apportionment rule has not been realized for Virginia estate tax purposes in those cases where a predeceasing spouse took advantage of the marital deduction by way of a qualified terminal interest property (QTIP) transfer.[36] In such a case, the QTIP assets are included in the surviving spouse's taxable estate even though the surviving spouse has only a life right in the estate with no control over the

---

33. *Procedures for Terminating Small Trusts*, 19 REAL PROP., PROB. & TR. J. 988 (1984).

34. If upon petition of the trustee, personal representative of the decedent's estate, or any beneficiary, the court having jurisdiction over such trust, regardless of any spendthrift or similar protective provisions, finds that the costs of administration thereof are such that the continuance of the trust, or the establishment of the trust if it is to be established, or distribution from a probate estate, would defeat or substantially impair the purposes of the trust, the court, after due notice to all persons then having an interest in the trust, may order distribution of the trust property. The order shall specify the appropriate share of each beneficiary who is to share in the proceeds of the trust, taking into account the interests of income beneficiaries and remaindermen so as to conform as nearly as possible to the intention of the trustor or testator. The order may direct that the interest of a minor beneficiary, or any portion thereof, be converted into qualifying property and distributed to a custodian pursuant to the Uniform Gifts to Minors Act of [sic] the Uniform Transfers to Minors Act. The court, in addition, may make such other and further orders as it deems proper or necessary to protect the interests of the beneficiaries and of the trustee.

This section shall not limit the right of a trustee, acting alone, to terminate a small trust without order of court in accordance with applicable provisions of the governing instrument.

Id. at 996-97 (citations omitted).

35. VA. CODE ANN. § 64.1-161 (Cum. Supp. 1986).

36. I.R.C. § 2056(b)(7) (1986).

ultimate takers.[37] To insure that those receiving the surviving spouse's own property do not pay a higher rate of tax as a consequence of the QTIP inclusion, the federal rule provides for the estate to recover the additional taxes attributable to the QTIP inclusion from those receiving the QTIP assets.[38]

The 1986 amendment conforms the Virginia rule to the federal rule for estates of decedents dying on or after July 1, 1986, by requiring that the QTIP estate tax burden on the surviving spouse's estate be separately determined and apportioned. This result is accomplished by determining the amount of the estate tax attributable to the QTIP inclusion (total taxes minus taxes that would have been imposed if there was no QTIP inclusion) and prorating this among those who receive the QTIP assets. The remainder of the estate taxes (those determined without the QTIP inclusion) are prorated among those who succeed to the surviving spouse's own property.

II. 1985-86 Judicial Decisions

A. *Claim of Parenthood by Illegitimate—Statute of Limitations*

In *Marshall v. Bird*,[39] the following facts were assumed to be true for the purpose of testing respondents' demurrer. Vance fathered an illegitimate child, Peggy, prior to his marriage to Marguerite. Vance died on July 8, 1977, without having fathered any other children. Marguerite died testate on June 23, 1981, leaving her residuary estate to Vance. Peggy claimed Marguerite's residuary estate under Virginia's anti-lapse statute[40] as Vance's child.

Respondents' first defense to Peggy's claim was that she had no inheritance rights from her father at the time of his death because

---

37. *Id.* § 2044.

38. *Id.* § 2207(A).

39. 230 Va. 89, 334 S.E.2d 573 (1985).

40. The relevant portion of the anti-lapse statute that applied in this case read as follows:

> If a devisee or legatee dies before the testator, leaving children or their descendants who survive the testator, such children or their descendants shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof be made or required by the will.

VA. CODE ANN. § 64.1-64 (Repl. Vol. 1980) (repealed by 1985 Va. Acts 592).

Peggy would have no claim under Virginia's present anti-lapse statute, VA. CODE ANN. § 64.1-64.1 (Cum. Supp. 1986), which applies only if the predeceased beneficiary is "a grandparent or a descendant of a grandparent of the testator." For a discussion of this new statute, see Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 19 U. RICH. L. REV. 779, 785 (1985).

of her illegitimacy.[41] The court held that although the General Assembly did not repeal the statute prohibiting illegitimates from inheriting on the paternal side until July 1, 1978, the Virginia statute "had been [implicitly] declared unconstitutional prior to Vance's death"[42] by the ruling of the Supreme Court of the United States in *Trimble v. Gordon*.[43] In *Trimble*, the Court held that a virtually identical Illinois statute was unconstitutional.[44]

Respondents' second defense to Peggy's claim was a special plea based on the requirement of section 64.1-5.1(3) that "[n]o claim of succession based on the relationship between a child born out of wedlock and a parent of such child shall be recognized in the settlement of any decedent's estate unless [an affidavit alleging parenthood and a circuit court proceeding to determine parenthood are filed] within one year of the date of the death of such parent." As more than one year had already elapsed from the time of Vance's death before this statute became effective (July 1, 1978), the trial court ruled that the one-year period did not begin to run until the statute's effective date. However, under this ruling, the statutory period still had expired almost two years before Marguerite died. Citing a prior case for the proposition that "a statute of limitations cannot begin to run until a cause of action accrues,"[45] and noting that Peggy had no derivative right through Vance in Marguerite's estate until Marguerite's death, the court held that under these facts the one-year limitation period did not begin until Marguerite's death. To hold otherwise, the court concluded, "would be a statutory taking of [Peggy's] property without due process of law in violation of both the Federal and Virginia constitutions."[46] The case was remanded for an adjudication of parenthood under sections 64.1-5.1 and -5.2.[47]

---

41. At the time of Vance's death, VA. CODE ANN. § 64.1-5 (repealed by 1978 Va. Acts 647), read as follows: "Illegitimate children shall be capable of inheriting and transmitting inheritance on the part of their mothers as if lawfully begotten."

42. *Marshall*, 230 Va. at 92, 334 S.E.2d at 575.

43. 430 U.S. 762 (1977).

44. The background of the Virginia changes in light of *Trimble* is discussed in Johnson, *Inheritance Rights of Children in Virginia*, 12 U. RICH. L. REV. 275 (1978).

45. *Marshall*, 230 Va. 89, 93, 334 S.E.2d 573, 575 (1985) (citing Boykins Corp. v. Weldon, Inc., 221 Va. 81, 85, 266 S.E.2d 887, 889 (1980)).

46. *Marshall*, 230 Va. at 93, 334 S.E.2d at 575 (citing U.S. CONST. amend. XIV, § 1; VA. CONST. art. I, § 11).

47. For a discussion focusing on the most recent case involving an adjudication of paternity under § 64.1-5.2 and questioning the constitutionality of the evidentiary limitations of this section, see Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 19 U. RICH. L. REV. 779, 792-94 (1985).

Yet to be litigated is the fundamental issue of the constitutionality of the one-year statute of limitations imposed on illegitimates by section 64.1-5.1(3) (even though they may be incompetent by reason of minority) when similarly situated legitimates have an unlimited period of time within which to make a claim.

B. *Revocation of Will by Physical Act—Presumption*

In *Etgen v. Corboy*,[48] the parties stipulated that a will bearing marks of partial physical revocation "was in the custody of the testator, Frank I. Whitten, Jr., after its execution until it was found among his personal effects after his death."[49] Ordinarily such a stipulation would raise the presumption that

> [w]here a will is shown to have been in the custody of the testator after its excecution and is found among his effects after his death mutilated, obliterated, cancelled or otherwise altered as provided by statute then, in the absence of evidence to the contrary, it will be presumed that such act or acts were performed by the testator with the intent to revoke.[50]

No evidence explaining the marks on testator's will was offered to the trial court and, relying on this presumption, the trial court held that the marked-up provisions of testator's will were revoked.[51] Several months after this holding, the personal representative discovered a safe deposit box belonging to testator which contained an unmarked, executed, duplicate original of the will in question. In a further proceeding before the trial court, in which no evidence was offered except the unmarked will, the trial court adhered to its earlier ruling.

The supreme court concluded that, as nothing in these circumstances would enable a court to determine, with any confidence, that either will was more meritorious than the other, it would be

---

48. 230 Va. 413, 337 S.E.2d 286 (1985).

49. *Id.* at 414-15, 337 S.E.2d at 287.

50. *Id.* at 419, 337 S.E.2d at 290.

51. A further question in this appeal was the trial court's holding that the revocation statute allowed a formally attested will to be partially revoked by a physical act. The Virginia Supreme Court's affirmance of this holding is not of major significance because the controlling statute, § 64.1-58, was repealed by 1985 Va. Acts 431, and the new revocation statute, § 64.1-58.1, expressly permits partial revocation of a "provision" in a will by a physical act. For a discussion of the new revocation statute, see Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 19 U. RICH. L. REV. 779, 781 (1985).

illogical to give deference to either of these wills. Accordingly, the court held that:

> where duplicate originals of a formally attested will are in the possession of the testator from the time of execution until discovery among his effects after death and one version is altered while the other is in its original condition, then neither will is entitled to a presumption that it is the true will of the testator. In such a situation, the proponents of the different versions of the will must prove their version is the true will.[52]

C. *Interpretations of Wills—Extrinsic Evidence*

In *Baliles v. Miller*,[53] Husband (H) and Wife (W), who died simultaneously, left wills in which each was the other's primary beneficiary. H's will further provided that, if he and W died at the same time:

> The balance of my estate is to be divided between the canser [sic] and heart funds of Virginia.[54]

W's will further provided that, if H was not living at the time of her death:

> All of the rest and residue of my estate I wish to be divided equally into two parts. One part I wish and direct go to the Virginia Division of the American Cancer Society; the other part I wish and direct to go to the State of Virginia Organization or Foundation engaged in research concerning ailments of the Heart and Heart Trouble.[55]

In a consolidated suit seeking the court's advice and guidance in the administration of these estates, the chancellor rejected the proffered testimony of a witness concerning (i) declarations made by H in W's presence as to W's intent, (ii) declarations made by H as to their joint intent, and (iii) declarations made by W as to her own intent, and ruled that the provision in W's will "to the State of Virginia Organization or Foundation engaged in research con-

52. *Etgen*, 230 Va. at 420, 337 S.E.2d at 291.
53. 231 Va. 48, 340 S.E.2d 805 (1986).
54. *Id.* at 52, 340 S.E.2d at 807.
55. *Id.* at 53, 340 S.E.2d at 808.

cerning ailments of the Heart and Heart Trouble" was void for indefiniteness.

Prior to reviewing the correctness of the chancellor's holding, the supreme court restated three rules governing the admissibility of extrinsic evidence in proceedings to ascertain testamentary intent and then "endorse[d] them as the law of this Commonwealth."[56] Because of their importance to the practitioner, these rules are set forth *in hac verba*:

> (1) If the language of a will is plain and unambiguous, extrinsic evidence is never admissible to contradict or alter its meaning.
>
> (2) Extrinsic evidence of facts and circumstances, such as the state of [the testator's] family and property; his relations to persons and things; his opinions and beliefs; his hopes and fears; his habits of thought and of language . . . are always admissible in aid of the interpretation of the will—*i.e.*, as explanatory of the meaning of the words as used by the testator, . . . and the same doctrines should apply to all ambiguities, whether patent or latent, admitting evidence of the facts and circumstances in all cases, and of declarations of intention in the one case of equivocation.
>
> (3) An equivocation exists where the words in the will describe well, but equally well, two or more persons, or two or more things, . . . and 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.[57]

Applying these rules, the court disagreed with the chancellor's conclusion that the descriptive language in question could not be an equivocation because it was generic in nature and held that "the words of her will describe a particular, concrete object, *viz.*, the organization or foundation engaged in cardiovascular research."[58] Although convinced that this case presented a latent, as

56. *Id.* at 58, 340 S.E.2d at 811.

57. *Id.* at 57-58, 340 S.E.2d at 810-11 (citations omitted). These rules were distilled from a paper presented by Professor Charles A. Graves at the annual meeting of the Virginia Bar Association in 1893; thereafter published in Graves, *Extrinsic Evidence in Respect to Written Instruments*, 14 VA. L. REG. 913 (1909), and quoted from extensively in Coffman's Adm'r v. Coffman, 131 Va. 456, 109 S.E. 454 (1921).

58. *Miller*, 231 Va. at 58, 340 S.E.2d at 811.

opposed to a patent, ambiguity because the "uncertainty" did not appear until the evidence disclosed more than one such entity engaged in heart research, the court held that under the second rule "the same doctrines should apply to all ambiguities, whether patent or latent, admitting evidence of the facts and circumstances in all cases, and of declarations of intention in the one case of equivocation."[59] Thus, the court held, "that an equivocation exists; and that the chancellor erred in excluding [the proffered] testimony concerning [W's] declarations of intention."[60] As all of the evidence in this case was in the record, the court went on to examine the same and enter final judgment in favor of one of the claimants.[61]

D. *Testamentary Capacity—Undue Influence*

In *Pace v. Richmond*,[62] testator's second will, executed twenty-seven months prior to his death, left his entire estate to three friends and stated: "I make no bequest whatsoever to my nephews . . . who are able to look after themselves and who have paid little or no attention to me during the last ten years."[63] The nephews, who were the sole beneficiaries under testator's prior will, challenged testator's will on the grounds of lack of testamentary capacity and the undue influence of two of the beneficiaries. The court restated the standard test for testamentary capacity,[64] reaffirmed that the critical time for making this determination is the time of the will's execution, and concluded that "the nephews' evidence [did] not contradict the testimony of those present when the will was executed, and that their evidence was insufficient to raise a jury question."[65] After spending approximately eight pages discuss-

59. *Id.* at 59, 340 S.E.2d at 812.

60. *Id.* at 60, 340 S.E.2d at 812.

61. In a further portion of this opinion the court held that the second of two bequests to the same legatee was, under the wording of W's will, substitutional and not cumulative. *Id.* at 62, 340 S.E.2d at 813.

62. 231 Va. 216, 343 S.E.2d 59 (1986).

63. *Id.* at 217, 343 S.E.2d at 60.

64. Neither sickness nor impaired intellect is sufficient, standing alone, to render a will invalid. If at the time of its execution the testatrix was capable of recollecting her property, the natural objects of her bounty and their claims upon her, knew the business about which she was engaged and how she wished to dispose of her property, that is sufficient.

Id. at 219, 343 S.E.2d at 61 (quoting Gilmer v. Brown, 186 Va. 630, 639, 44 S.E.2d 16, 20 (1947)).

65. *Id.* at 219, 343 S.E.2d at 61.

ing the nephew's evidence on the undue influence issue, the court reaffirmed the Virginia rule on this issue[66] and concluded that "[v]iewing all the testimony and the inferences it is said to raise in the light most favorable to the nephews, and applying the evidentiary standards we have defined, we uphold the chancellor's ruling that the evidence was insufficient to submit the question of undue influence to the jury."[67]

E. *Administration of Estates—Funeral Expenses*

In *El-Meswari v. Washington Gas Light Co.*,[68] an action brought in federal court to recover damages under Virginia's wrongful death act, the question before the court was the scope of the "reasonable funeral expenses" recoverable under section 8.01-52.4. In response to a claimed cost in excess of $20,000 to bury the five-year-old decedent in her Libyan homeland, the district court allowed only $2,500 "on the premise that a tortfeasor could not foresee that the death of his victim would present such substantial transportation costs."[69] In addition to the tort law considerations, the appellate court also refers to a Virginia estate's case for the proposition that "in determining the reasonableness of funeral expenses, each case must rest on its own particular facts and circumstances."[70] The court held that the district court's award of $2,500 as the cost of "a standard local burial" improperly constricted the allowable relief and thus vacated this portion of the trial court's judgment.[71]

66. "[U]ndue influence . . . is a species of fraud, and so must be proved by clear, cogent, and convincing testimony. Influence is not undue which rests upon natural affection and desire to give property to those who are most considerate, attentive and useful to us." *Id.* at 225, 343 S.E.2d at 64 (quoting Thornton v. Thornton's Ex'rs, 141 Va. 232, 240, 126 S.E. 69, 71 (1925)).

67. *Id.* at 225, 343 S.E.2d at 64.

68. 785 F.2d 483 (4th Cir. 1986).

69. *Id.* at 485-86.

70. *Id.* at 486 (quoting Scott Funeral Home, Inc. v. First Nat'l Bank of Danville, 211 Va. 128, 130, 176 S.E.2d 335, 337 (1970)).

71. *Id.* at 492.