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

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## WILLS, TRUSTS, AND ESTATES

*J. Rodney Johnson\**

The 1990 session of the General Assembly enacted legislation dealing with wills, trusts, and estates that added, amended, or repealed a number of sections of the Code of Virginia (the "Code").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 fifteen cases from the Supreme Court of Virginia, in the year ending June 1, 1990, which 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.<sup>1</sup>

### I. 1990 LEGISLATION

#### A. *Dower and Curtesy Repealed—Augmented Estate*

Effective January 1, 1991, the interests of dower and curtesy are abolished and a surviving spouse will acquire new elective rights, based upon the augmented estate concept found in the Uniform Probate Code,<sup>2</sup> in both the real and personal estate of the deceased spouse.<sup>3</sup> This new legislation is discussed at length elsewhere in this annual survey.<sup>4</sup>

#### B. *Statutory Rights Barred by Desertion*

Section 64.1-23 of the Code has provided that the penalty for willfully deserting or abandoning a spouse is forfeiture of all rights

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1. In order to facilitate the discussion of numerous Code of Virginia sections, they will be generally 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 1990 supplement for the new sections.

2. UNIF. PROB. CODE §§ 2-201 to -207, 8 U.L.A. 74-87 (Repl. Vol. 1983).

3. VA. CODE ANN. § 64.1-19.2 (Cum. Supp. 1990).

4. See, Gray, *Virginia's Augmented Estate System: Annual Survey of Virginia Law*, 24 U. RICH. L. REV. 513 (1990). For background, see Johnson, *Abolition of Dower in Virginia: The Uniform Probate Code as an Alternative to Proposed Legislation*, 7 U. RICH. L. REV. 99 (1972); and Johnson, *Interspousal Property Rights at Death*, 10 VA. B.A.J. 10 (Summer 1984).

in such spouse's estate by way of dower, curtesy or intestate succession, if the desertion or abandonment continues until the spouse's death.<sup>5</sup> This section was repealed as a part of the "augmented estate legislation,"<sup>6</sup> and replaced with a new section<sup>7</sup> which, under these same circumstances, (i) continues to provide for a forfeiture of intestate succession rights, (ii) provides for a forfeiture of one's elective share under the new concept of the augmented estate, and (iii) extends this forfeiture provision to the deserting spouse's interest by way of exempt property,<sup>8</sup> family allowance,<sup>9</sup> and homestead allowance.<sup>10</sup>

### C. *Homestead Allowance—Increase*

A further provision of the "augmented estate legislation,"<sup>11</sup> effective January 1, 1991, is the increase of the homestead exemption from its present amount of \$5,000<sup>12</sup> to \$10,000.<sup>13</sup>

### D. *Waiver—Homestead, Exempt Property and Family Allowances*

Another provision of the "augmented estate legislation"<sup>14</sup> provides that the right to the family and exempt articles allowances may be waived during the deceased spouse's lifetime only by a pre-marital or marital agreement. However, the right to a homestead exemption may be waived during the deceased spouses's lifetime either (a) in this same way or (b) by the execution of a waiver to a creditor if, in this latter case, "(i) the waiver is in writing, (ii) the language of the waiver mentions homestead allowance in conspicuous language, and (iii) the waiver has been signed by the surviving spouse."<sup>15</sup>

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5. VA. CODE ANN. § 64.1-23 (Repl. Vol. 1987).

6. 1990 Va. Acts 1354.

7. VA. CODE ANN. § 64.1-16.3 (Cum. Supp. 1990) (effective Jan. 1, 1991).

8. This is a right to "value not exceeding \$3,500 in . . . household furniture, automobiles, furnishings, appliances and personal effects." *Id.* § 64.1-151.2 (Repl. Vol. 1987).

9. This is a right to "a reasonable allowance in money out of the estate for . . . maintenance during the period of administration." *Id.* § 64.1-151.1.

10. This has been a right to an allowance in the amount of \$5,000. *Id.* § 64.1-151.3. This amount will increase to \$10,000, effective January 1, 1991. *Id.* (Cum. Supp. 1990).

11. 1990 Va. Acts 1354.

12. VA. CODE ANN. § 64.1-151.3 (Repl. Vol. 1987).

13. *Id.* (Cum. Supp. 1990).

14. 1990 Va. Acts 1354.

15. VA. CODE ANN. § 64.1-151.6 (Cum. Supp. 1990).

### E. *Uniform Custodial Trust Act*

In 1987, the National Conference of Commissioners on Uniform State Laws approved and recommended the Uniform Custodial Trust Act ("UCTA") for enactment in all jurisdictions.<sup>16</sup> With Virginia's enactment in 1990,<sup>17</sup> a total of five jurisdictions have now enacted this legislation.<sup>18</sup> UCTA "is designed to provide a statutory standby inter vivos trust for individuals who typically are not very affluent or sophisticated."<sup>19</sup> Though UCTA's potential as a trust substitute is extensive, its drafters anticipate it will be most frequently used as a "response to the commonly occurring need of elderly individuals to provide for the future management of assets in the event of incapacity."<sup>20</sup>

Although a detailed examination of UCTA is not feasible within the confines of this survey article,<sup>21</sup> it may be helpful to the reader to point out the changes made to the Act in Virginia. The Virginia version of UCTA appears as chapter 2.1 of title 55 of the Code (section 55-34.1 through section 55-34.19). The portion of the Virginia section number following the decimal point corresponds to the section number of UCTA (for example, section 55-34.4 corresponds to Section 4 of UCTA). The Virginia version generally tracks the recommended language, *mutatis mutandis*, with only six changes that might be regarded as significant. The Virginia changes to UCTA are:

1. Section 2, subsections (d) and (e) are combined and rewritten (as section 55-34.2(D)) to read as follows:

The beneficiary, if not incapacitated, may terminate a custodial trust by delivering to the custodial trustee a writing signed by the beneficiary declaring the termination. The conservator of an inca-

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16. UNIF. CUSTODIAL TRUST ACT historical note, 7A U.L.A. 6 (Cum. Supp. 1990).

17. 1990 Va. Acts 360 (codified at VA. CODE ANN. §§ 55-34.1 .19 (Cum. Supp. 1990)).

18. The other enacting jurisdictions are Hawaii, Idaho, Missouri, and Rhode Island. UNIF. CUSTODIAL TRUST ACT, 7A U.L.A. 6, table of jurisdictions (Cum. Supp. 1990).

19. UNIF. CUSTODIAL TRUST ACT Commissioner's Prefatory Note, 7A U.L.A. 6.

20. *Id.*

21. For a Virginia analysis and discussion of UCTA, see Mezzullo, Roach, *The Uniform Custodial Trust Act: An Alternative to Adult Guardianship*, 24 U. RICH. L. REV. 65 (1989); for a more general, national discussion, see Wade, *Uniform Custodial Trust Act*, PROB. & PROP. 37 (1987). Those wishing a complete and authoritative explanation of UCTA may write the National Conference of Commissioners on Uniform State Laws, 676 N. St. Clair St., Chicago, IL 60611, for a copy of the Act, which contains a prefatory note and the official comments to each of its sections, explaining their operation.

pacitated beneficiary may similarly terminate the custodial trust in this manner but only if granted the power by the circuit court that appointed him in a proceeding in which the custodial trustee is made a party.<sup>22</sup> If not previously terminated, the custodial trust terminates on the death of the beneficiary. A transferor may not terminate a custodial trust except as provided in this subsection.<sup>23</sup>

2. Section 5, subsection (a)'s bracketed amount of "\$20,000" is changed to "\$10,000."<sup>24</sup>

3. Section 7, subsection (b)'s definition of the standard of care as that observed by a prudent person dealing with "property of another" is changed to "such person's own property."<sup>25</sup>

4. Section 8, subsection (a)'s grant of fiduciary powers to the custodial trustee is expanded by adding the language "which shall include but not be limited to those powers set forth in § 64.1-57 as of the date the custodian acts."<sup>26</sup>

5. Section 18, subsection (a) is amended by adding a final sentence reading "Either form may be modified by the owner to include, for example, a designation of an alternate or successor trustee or the recipient of the custodial property upon termination of the trust."<sup>27</sup>

6. Sections 20 (Uniformity of Application and Construction), 21 (Short Title), 22 (Severability) and 23 (Effective Date) were not enacted.

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22. VA. CODE ANN. § 55-34.2(D) (Cum. Supp. 1990) (paralleling the requirements for a guardian to revoke a durable power of appointment). See VA. CODE ANN. § 11-9.1 (Repl. Vol. 1989).

23. *Id.* § 55-34.2(D) (Cum. Supp. 1990).

24. *Id.* § 55-34.5. This corresponds to the amount in the parallel provisions of Virginia's version of the Uniform Transfers to Minors Act. See VA. CODE ANN. §§ 31-42, -43 (Cum. Supp. 1990).

25. *Id.* § 55-34.7 (corresponding to the general statement of the Virginia prudent man rule found in VA. CODE ANN. § 26-45 (Repl. Vol. 1985), and the specific statement of the rule contained in the parallel section of the Virginia version of the Uniform Transfers to Minors Act, found at VA. CODE ANN. § 31-48(B) (Cum. Supp. 1990)).

26. *Id.* § 55-34.8 (paralleling the corresponding provision of the Virginia version of the Uniform Transfers to Minors Act). See *id.* § 31-49.

27. *Id.* § 55-34.18(A).

## F. Spendthrift Trusts

### 1. Governmental Rights

The general rule that spendthrift trusts are immune from the claims of a beneficiary's creditors is subject to various public policy exceptions in favor of particular classes of claimants in a number of jurisdictions.<sup>28</sup> Virginia's spendthrift trust statute, section 55-19, was amended to recognize one of these classes by providing, with one exception,<sup>29</sup> that "no such trust condition shall operate to the prejudice of the United States or this Commonwealth or any county, city or town."<sup>30</sup>

### 2. Settlor's Creditors

Section 55-19 was also amended to codify the general rule that, although one might create a trust for himself, any spendthrift provision in such a trust is "invalid against creditors and transferees of the creator."<sup>31</sup> Following the general American rule,<sup>32</sup> the amended section expressly provides that creditors and transferees may reach any amounts which (i) are required to be or, (ii) in the exercise of the trustee's discretion might be, paid to or for the benefit of the creator.<sup>33</sup>

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28. The most widely recognized exceptions are in favor of claims:

(a) by the wife or child of the beneficiary for support, or by the wife for alimony; (b) for necessary services rendered to the beneficiary or necessary supplies rendered to him; (c) for services rendered and materials furnished which preserve or benefit the interest of the beneficiary; [and] (d) by the United States or a State to satisfy a claim against the beneficiary.

RESTATEMENT (SECOND) OF TRUSTS § 157 (1959).

29. The exception, which relates to governmental claims against disabled persons, is discussed *infra* notes 34-38 and accompanying text.

30. VA. CODE ANN. § 55-19(B) (Cum. Supp. 1990). The new rule is applicable to "any claim first accruing after the effective date of the 1990 amendments to this section." *Id.* This bill was passed as emergency legislation, and thus it became effective on April 18, 1990, the date it was signed by the Governor. *See* 1990 Va. Acts 1759 (codified at VA. CODE ANN. 55-19 (Cum. Supp. 1990)).

31. VA. CODE ANN. § 55-19(C) (Cum. Supp. 1990). In this connection it is further provided that "[w]hen a trust is funded by amounts attributable to any claim possessed by a beneficiary, whether paid pursuant to a structured settlement or otherwise, the beneficiary shall be considered a creator of the trust to the extent so funded." *Id.*

32. *See* RESTATEMENT (SECOND) OF TRUSTS § 156 (1959).

33. If the trust has been funded by the creator and another, the amounts reachable by the creator's creditors "shall not exceed the amount of the creator's proportionate contribution to the trust." VA. CODE ANN. § 55-19(C).

### 3. Public Assistance—Disabled Beneficiaries

Section 55-19 was further amended to provide a mechanism for the Commonwealth's recovery of public assistance furnished to a trust beneficiary if the beneficiary is liable for reimbursement under state or federal law. However, it expressly provides that no order shall be made pursuant to this mechanism "if the beneficiary is an individual who has a medically determined physical or mental disability that substantially impairs his ability to provide for this care or custody and constitutes a substantial handicap."<sup>34</sup> In addition, section 37.1-110, dealing with the liability of a patient in a state institution for payment of his expenses, was amended to provide that "principal or income or both from a trust created for the benefit of the patient shall be liable for payment only as provided in section 55-19."<sup>35</sup> Finally, section 55-19.1, which was enacted to enable the Commonwealth to seek reformation of a discretionary trust in order to recover public assistance benefits paid to a beneficiary,<sup>36</sup> was repealed.<sup>37</sup> These changes will enable one to create a discretionary/spendthrift trust for another who fits within the definition of "disabled" which (i) if it is a true discretionary trust,<sup>38</sup> will not prevent the beneficiary from qualifying for federal programs such as Medicaid or Supplemental Security Income, and which (ii) as it is a spendthrift trust, will be immune from the reach of creditors, including claims by the Commonwealth for reimbursement of any form of public assistance benefits.

#### G. *Trustee's Authority to Divide Trusts*

Section 55-19.3 was enacted in 1988<sup>39</sup> to enable a circuit court to divide a trust into two or more separate trusts in order to obtain

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34. VA. CODE ANN. § 55-19(D)(1) (Cum. Supp. 1990). Similar provisions are found in CAL. PROB. CODE § 15306(b) (West Supp. 1990), and in WISC. STAT. ANN. § 701.06(5m) (West 1981 & Cum. Supp. 1989).

35. VA. CODE ANN. § 37.1-110 (Cum. Supp. 1990).

36. 1981 Va. Acts 836 (codified at VA. CODE ANN. § 55-19.1 (Repl. Vol: 1986)).

37. 1990 Va. Acts 1759 (effective Apr. 18, 1990).

38. In this connection, the amendment further provides that:

(a) duty in the trustee under the instrument to make disbursements in a manner or in amounts that do not cause the beneficiary to suffer a loss of eligibility for public assistance to which the beneficiary might otherwise be entitled shall not be considered a right possessed by the beneficiary to compel such payments.

VA. CODE ANN. § 55-19(D)(1) (Cum. Supp. 1990).

39. VA. CODE ANN. § 55-19.3 (Cum. Supp. 1990).

certain tax benefits.<sup>40</sup> The 1990 amendments eliminate the need for judicial action by authorizing a trustee to make a unilateral division, in the absence of a specific contrary provision in a trust, "if the trustee in his discretion determines that such division will not defeat or materially impair (i) the accomplishment of the trust purposes or (ii) the interests of any beneficiary."<sup>41</sup>

In those cases where the governing document fails to confer such a power, this amendment will enable a trustee, without court approval; (i) to segregate the qualified and the nonqualified portions of a QTIP trust into separate trusts when a partial election is made under Internal Revenue Code ("I.R.C.") section 2056(b)(7); (ii) to avoid a trust that would have a fractional inclusion ratio for Generation-Skipping tax purposes, under I.R.C section 2642, by dividing the property into two trusts (prior to the executor's allocation) with inclusion ratios of 1, and 0, respectively; and (iii) to obtain a number of single beneficiary trusts, each of which would meet the shareholder requirements of a Subchapter S "small business corporation" by virtue of I.R.C. section 1361(c)(2)(A)(i). The 1990 amendment, which is expressly made applicable to trusts without regard to when the trustee was qualified or appointed, was designated as "declaratory of existing law."<sup>42</sup>

#### H. *Disclaimers—Guardian for Ward*

Section 37.1-142 was amended in 1984<sup>43</sup> to enable the circuit court, upon petition of a ward's fiduciary, to direct the fiduciary to make gifts from income and principal, not necessary for the ward's maintenance, to those persons to whom the ward would, in the court's judgment, have made such gifts if the ward were of sound mind. The process requires that a guardian ad litem be appointed for the ward, that reasonable notice be given to the ward and parties who would be affected by the proposed gifts, and that due consideration be given by the court to a number of factors.<sup>44</sup>

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40. These benefits and the operation of the 1988 statute are discussed in Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 22 U. RICH. L. REV. 759, 766 (1988).

41. VA. CODE ANN. § 55-19.3.

42. *Id.*

43. 1984 Va. Acts 1148 (codified at VA. CODE ANN. § 37.1-142 (Cum. Supp. 1990)).

44. These factors are:

(i) the size and composition of the ward's estate, (ii) the nature and probable duration of the ward's incapacity, (iii) the effect of such gifts on the estate's financial ability to meet the ward's foreseeable maintenance needs, (iv) the ward's estate plan, (v) prior patterns of assistance or gifts to the proposed donees, (vi) the tax effect of



The 1990 amendment to section 37.1-142 provides that the circuit court may direct a guardian of a ward's estate to disclaim property on behalf of the ward under the same circumstances that the court may now direct a guardian to make a gift of property.<sup>45</sup> The 1990 amendment was passed as emergency legislation, with an effective date of April 2, 1990, and was designated as "declaratory of existing law."<sup>46</sup>

### I. *Disclaimer of Present Interest as Disclaimer of Future Interest*

Section 64.1-190 and section 64.1-193, enacted as a part of Virginia's Disclaimer Act in 1972,<sup>47</sup> have both provided that "(a) person who has a present and a future interest in property and disclaims his present interest in whole or in part, shall be deemed to have disclaimed his future interest to the same extent."<sup>48</sup> "Thus, under a trust to pay the income to A with the principal distributable to him at age 40, if A disclaims his income interest only, he will also be deemed to have disclaimed his future interest in the principal."<sup>49</sup>

The 1990 amendment will limit the application of this rule to those instances where "such disclaimer of a present interest would cause the future interest to become a present interest."<sup>50</sup> The primary purpose of this amendment is to facilitate the salvage of the marital deduction for trusts which fail to qualify therefor under I.R.C. section 2056(b)(7) because of income interests in favor of persons other than the surviving spouse, usually the decedent's children. Absent the amendment, the children (who typically are also the remaindermen of the trust) would be reluctant to disclaim their income interest because they would also thereby lose their remainder interest in the trust. The 1990 amendment was passed

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the proposed gifts, and (vii) such other factors as the court may deem relevant.

VA. CODE ANN. § 37.1-142(B) (Cum. Supp. 1990).

45. *Id.* § 37.1-142.

46. 1990 Va. Acts 591 (codified at VA. CODE ANN. 37.1-142 (Cum. Supp. 1990)).

47. VA. CODE ANN. § 64.1-188 to -196 (Repl. Vol. 1987).

48. *Id.* §§ 64.1-190, -193.

49. *Disclaimer of Testamentary and Non-Testamentary Dispositions—Suggestions for a Model Act*, 3 REAL PROP. PROB. & TR. J. 131, 137 (1968). Although there is no official statutory history for the Virginia Disclaimer Act, a comparison of it and the suggested Model Act leads one to the conclusion that the Model Act is the obvious source of the Virginia legislation.

50. VA. CODE ANN. §§ 64.1-190, -193 (Cum. Supp. 1990).

as emergency legislation, with an effective date of April 2, 1990, and was designated as "declaratory of existing law."<sup>51</sup>

#### J. Disclaimers—Survivorship and Entirety Property

Section 64.1-191, dealing with the right to disclaim succession to property passing under nontestamentary instruments, is amended to provide that "[a] surviving joint tenant or tenant by the entirety may disclaim as a separate interest any property or interest therein devolving to him by right of survivorship."<sup>52</sup> This legislation, which provides that the amendment is "declaratory of existing law,"<sup>53</sup> eliminates any uncertainty that might have existed concerning disclaimer of survivorship interests in Virginia due to the silence of the Virginia Disclaimer Act on this point.

Although the Internal Revenue Service's initial position was to the contrary, there is no longer a problem in obtaining federal recognition of a disclaimer of this accretive portion of a joint tenancy by a surviving joint tenant even though the survivor disclaims more than nine months after the creation of the tenancy, so long as the disclaimer is made within nine months after the first tenant's death.<sup>54</sup> However, as the present law appears to be premised upon a "partitionable" interest in the tenants during their lifetime, it seems unlikely that similar federal recognition will be extended to a disclaimer of the accretive portion of a tenancy by the entirety.<sup>55</sup>

The 1990 amendment to section 64.1-191 further establishes that:

[a] surviving joint tenant or tenant by the entirety may disclaim the entire interest in any property or interest therein that is the subject of a joint tenancy or tenancy by the entirety devolving to him, if the joint tenancy was created by the act of a deceased joint tenant or tenant by the entirety and if the survivor did not join in creating the joint tenancy or tenancy by the entirety.<sup>56</sup>

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51. 1990 Va. Acts 591 (codified at VA. CODE ANN. 64.1-193 (Cum. Supp. 1990)).

52. VA. CODE ANN. § 64.1-191 (Cum. Supp. 1990).

53. 1990 VA. ACTS 591 (codified at VA. CODE ANN. 64.1-191 (Cum. Supp. 1990)).

54. *Estate of Dancy v. Commissioner*, 872 F.2d 84 (4th Cir. 1989); *McDonald v. Commissioner*, 56 T.C.M. 1598 (1989), *acq. in result* 1990-06 (Feb. 17, 1990).

55. Nevertheless, one recent writer has suggested that this is a possibility. See Mills, *To Disclaim or Not to Disclaim: Disclaimers of Survivorship Interests in Jointly-Held Spousal and Tenancy by the Entirety Property in Virginia*, 7 TR. & EST. NEWSL. No. 2, at 1 (Va. St. B., Spring 1990).

56. VA. CODE ANN. § 64.1-191. This language was taken from the UNIFORM DISCLAIMER OF

Notwithstanding any doubts that may exist in the federal tax area, it is clear that for state law purposes this legislation will not only allow (i) a disclaimer of the accretive half by a surviving tenant by the entirety as well as by a surviving joint tenant, but also (ii) a disclaimer of the entire interest in both tenancies if the survivor did not join in its creation. One obvious area of utility will be in creditors' rights cases when the choice is presented of accepting property with the knowledge that it will be lost to creditors, or disclaiming the property (or the accretive portion) so that it might pass instead to others. The 1990 amendment was passed as emergency legislation, with an effective date of April 2, 1990, and was designated as "declaratory of existing law."<sup>57</sup>

#### K. *Power of Attorney in Fact to Sell Stock*

Section 13.1-425(d), a part of Virginia's Uniform Act for the Simplification of Fiduciary Security Transfers,<sup>58</sup> was amended to include within the definition of "fiduciary" an "attorney-in-fact pursuant to a power of attorney which authorizes the attorney-in-fact to sell the personal property of the principal."<sup>59</sup> This amendment was designed to facilitate the transfer of corporate stock by an agent pursuant to a power of attorney. Corporations and transfer agents dealing with an agent under a power of attorney will now be able to obtain the same degree of protection as they presently have when dealing with a personal representative or trustee.<sup>60</sup>

#### L. *Health Care Power of Attorney—Physician's Duty of Inquiry*

Section 37.1-134.4 was added to the Code in 1989 to provide additional procedures for surrogate treatment decision making on behalf of adult persons who, due to illness or injury which precludes communication or impairs judgment, are unable to make informed medical decisions.<sup>61</sup> The 1990 amendment eliminates from this sec-

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TRANSFERS UNDER NONTESTAMENTARY INSTRUMENTS ACT § 1, 8A U.L.A. 112 (1983).

57. See 1990 Va. Acts 591.

58. VA. CODE ANN. §§ 13.1-424 to -433 (Repl. Vol. 1989)

59. *Id.* § 13.1-425(d) (Cum. Supp. 1990).

60. "A corporation or transfer agent incurs no liability to any person by making a transfer or otherwise acting in a manner authorized by this chapter." *Id.* § 13.1-430 (Repl. Vol. 1989).

61. VA. CODE ANN. § 37.1-134.4 (Cum. Supp. 1990); see Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 23 U. RICH. L. REV. 859, 862-63 (1989).

tion the following language:

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.<sup>62</sup>

### M. *Self-Proved Wills*

Sections 64.1-87.1 and -87.2 were amended to permit the requisite acts for making a will self-proving to also be accomplished before "an officer of the foreign service of the United States, a consular agent, or any other person authorized by regulation of the United States Department of State to perform notarial acts in the place in which the act is performed."<sup>63</sup>

### N. *Statutory Boilerplate—Environmental Concerns—Resignation*

Section 64.1-57, authorizing the incorporation by reference of certain powers of fiduciaries into a will or trust instrument, was amended by adding to section (1) a new subsection (t). This new subsection provides for extensive powers relating to environmental concerns.<sup>64</sup>

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62. VA. CODE ANN. § 37.1-134.4(B).

63. VA. CODE ANN. §§ 64.1-87.1, -87.2 (Cum. Supp. 1990).

64. (t) To comply with environmental law:

1. To inspect property held by the fiduciary, including interest in sole proprietorships, partnerships, or corporations and any assets owned by any such business enterprise, for the purpose of determining compliance with environmental law affecting such property and to respond to a change in, or any actual or threatened violation of, any environmental law affecting property held by the fiduciary;
2. To take, on behalf of the estate or trust, any action necessary to respond to a change in, or prevent, abate, or otherwise remedy any actual or threatened violation of, any environmental law affecting property held by the fiduciary, either before or after the initiation of an enforcement action by any governmental body;
3. To refuse to accept property in trust if the fiduciary determines that any property to be transferred to the trust either is contaminated by any hazardous substance or is being used or has been used for any activity directly or indirectly involving any hazardous substance which could result in liability to the trust or otherwise impair the value of the assets held therein;
4. To disclaim any power granted by any document, statute, or rule of law which, in the sole discretion of the fiduciary, may cause the fiduciary to incur personal liability

Section 64.1-57 was further amended by adding to section (1), a new subsection (u) as follows:

To resign as a fiduciary if the fiduciary reasonably believes that there is or may be a conflict of interest between it in its fiduciary capacity and in its individual capacity because of potential claims or liabilities which may be asserted against it on behalf of the trust or estate because of the type or condition of assets held therein.<sup>65</sup>

O. *Payments to the IRS by Wire Transfer—Voucher for Accountings*

Personal representatives and testamentary trustees are required to make annual accountings before the commissioner of accounts in which each disbursement must be supported by a "voucher."<sup>66</sup> New section 26-17.1 provides that "[i]n the case of payments to the Internal Revenue Service for income tax estimates or any other payments required or permitted to be made by wire transfer or similar mechanism, the fiduciary shall not be required to exhibit a receipt for such payment."<sup>67</sup> For purposes of accounting to the commissioner of accounts, it is further provided that "[a] record or statement of the bank making such payment shall be a sufficient voucher."<sup>68</sup>

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under any environmental law;

5. For purposes of this subdivision, "environmental law" means any federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment or human health and 'hazardous substances' means any substances defined as hazardous or toxic or otherwise regulated by any environmental law. The fiduciary shall be entitled to charge the cost of any inspection, review, abatement, response, cleanup, or remedial action authorized herein against the income or principal of the trust or estate. A fiduciary shall not be personally liable to any beneficiary or other party for any decrease in value of assets in trust or in an estate by reason of the fiduciary's compliance with any environmental law, specifically including any reporting requirement under such law. Neither the acceptance by the fiduciary of property or a failure by the fiduciary to inspect property shall be deemed to create any inference as to whether or not there is or may be any liability under any environmental law with respect to such property.

VA. CODE ANN. § 64.1-57(1)(t) (Cum. Supp. 1990).

65. *Id.* § 64.1-57(1)(u).

66. VA. CODE ANN. § 26-17 (Repl. Vol. 1985).

67. *Id.* § 26-17.1 (Cum. Supp. 1990).

68. *Id.*

*P. Direct Payments to Beneficiary's Account—Voucher for Accountings*

New section 26-17.2 provides that “[a] fiduciary may make payment to a beneficiary by transfer to his bank account with the fiduciary or by payment to an account with another bank through an automated clearinghouse, wire transfer or similar mechanism if the beneficiary has consented in writing to such method of payment.”<sup>69</sup> For purposes of accounting to the commissioner of accounts, it is further provided that “[a] record or statement of the bank making the payment shall be a sufficient voucher.”<sup>70</sup>

*Q. Virginia Estate Tax—Payment Extension—Federal Conformity*

Section 58.1-905 was amended to provide that if a personal representative has obtained an extension of time for paying the federal estate tax, or any portion thereof, the payment of any Virginia estate tax will be extended for the same period. Upon receiving a federal extension the personal representative must provide the Department of Taxation with a true copy thereof. Notwithstanding the extension, interest pursuant to section 58.1-15 is added for the period past the normal due date.<sup>71</sup>

*R. Investment in Fiduciary's Affiliated Mutual Fund*

New section 26-44.1 provides that, absent language to the contrary in the governing instrument, a fiduciary may invest in an affiliated mutual fund, if the investment is otherwise appropriate. However, such a fiduciary is not entitled to a commission as fiduciary to the extent it or its affiliates receive compensation for services to the affiliated fund unless otherwise expressly agreed to in writing by the creator of the trust or affected beneficiary.<sup>72</sup>

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69. VA. CODE ANN. § 26-17.2 (Cum. Supp. 1990).

70. *Id.*

71. VA. CODE ANN. § 58.1-905 (Cum. Supp. 1990).

72. VA. CODE ANN. § 26-44.1 (Cum. Supp. 1990).

## II. 1989-90 JUDICIAL DECISIONS

### A. *Rule Against Perpetuities—Application—Retroactivity*

The first issue in *Lake of the Woods Association v. McHugh*<sup>73</sup> was whether the rule against perpetuities applies to a right of first refusal.<sup>74</sup> The Supreme Court of Virginia answered this question of first impression in the affirmative, based upon a determination that such a right is an interest in property and that this particular right was of unlimited duration.<sup>75</sup> The other issue was whether the retroactive application of a 1982 statute to a 1975 transaction would be constitutional. In 1982 the General Assembly replaced the "might have been" aspect of the common law rule against perpetuities with a statutory combination of "wait and see" and *cy pres*.<sup>76</sup> In addition, it was expressly provided that the new law would apply "to all interests heretofore created except insofar as any conveyance or distribution of the affected property has been made, or any detrimental action has been taken, in reliance on the common law rule against perpetuities."<sup>77</sup> Noting that the right of first refusal in *McHugh* was void at the time of its creation under the then existing rule against perpetuities, the court concluded that it was "unwilling to agree to a rule that would permit the destruction of vested or substantive rights by retroactive application of legislation."<sup>78</sup>

73. 238 Va. 1, 380 S.E.2d 872 (1989). This case was combined with *James v. Burt* (Record No. 870694) which raised the same issues.

74. The provision before the court provided that:

[w]henever the owner of any lot . . . shall receive a bona fide offer to purchase said lot, which offer is acceptable to said owner, . . . said owner shall offer to sell said lot, at the price and on the same terms contained in said bona fide offer . . . first to the owner of the lot on the right of the prospective seller's lot, next to the owner of the lot on the left of the prospective seller's lot, and finally, to the [corporation developing the subdivision], its successors or assigns.

238 Va. at 3, 380 S.E.2d at 872-73.

75. *Id.* at 7, 380 S.E.2d at 874-75.

76. 1982 Va. Acts 399 (codified at VA. CODE ANN. § 55-13.3 (Repl. Vol. 1986)). This legislation, based on RESTATEMENT (SECOND) OF PROPERTY (Tentative Draft No. 2, §§ 1.4 -6, March 15, 1979), is discussed briefly in Johnson, *Transformation of the Rule Against Perpetuities in Virginia*, U. RICH. LAW SCH. NEWSL. at 10 (Oct. 1982).

77. VA. CODE ANN. § 55-13.3(D) (Repl. Vol. 1986).

78. 238 Va. at 9, 380 S.E.2d at 876. The opinion refers to the fact that two of the approximately fifteen jurisdictions that have adopted the "wait and see" rule have specifically provided for its retroactive application, and that this retroactivity has been upheld in both instances. For an excellent discussion of this issue, and retroactivity of probate legislation in general, see Levin, *Section 6104(d) of the Pennsylvania Rule Against Perpetuities: The Validity and Effect of the Retroactive Application of Property and Probate Law Reform*, 25 VILL. L. REV. 213 (1980).

B. *Undue Influence—Commissioner's Ruling Presumptively Correct*

The sole issue in *Jarvis v. Tonkin*,<sup>79</sup> was whether testatrix' will was procured by undue influence.<sup>80</sup> On this issue the commissioner in chancery, to whom the case was referred by the trial court, reported that plaintiffs had failed to carry their burden of proof.<sup>81</sup> However, the chancellor sustained exceptions to the commissioner's report and ruled that the will had been procured by undue influence. Nevertheless the supreme court ruled that testatrix' will was not the product of undue influence, and "[b]ecause the commissioner's report was supported by the evidence, the chancellor erred in setting it aside."<sup>82</sup>

C. *Legal Malpractice—Beneficiaries v. Testators' Attorneys*

The dispositive issue in *Copenhaver v. Rogers*,<sup>83</sup> was whether plaintiffs "made sufficient allegations of legal malpractice against their grandparents' lawyers to survive challenge by demurrer."<sup>84</sup> The trial court's ruling that there was no cause of action in tort, due to a lack of privity, was affirmed.<sup>85</sup> In order to reach the question of plaintiffs' cause of action in contract as third party beneficiaries, the court first "assume[d] without deciding that Code § 55-22 applies to oral contracts."<sup>86</sup> Although plaintiffs' pleadings al-

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79. 238 Va. 115, 380 S.E.2d 900 (1989).

80. "Before a will may be set aside on the ground of undue influence, that influence 'must be sufficient to destroy free agency on the part of the . . . testator.' . . . It must be of such character as to control the testator's mind and actions. *It must amount to coercion or duress.*" *Id.* at 120, 380 S.E.2d at 903 (quoting *Wood v. Wood*, 109 Va. 470, 472, 63 S.E. 994, 995 (1909)) (citation omitted).

81. The commissioner in chancery "heard the testimony of numerous witnesses, read depositions, and examined the exhibits." *Id.* at 119, 380 S.E.2d at 903 (1989).

82. *Id.* at 122, 380 S.E.2d at 904. "While the report of a commissioner in chancery does not carry the weight of a jury verdict, Code § 8.01-610, *it should be sustained unless the trial court concludes that the commissioner's findings are not supported by the evidence.*" *Id.* at 1221, 380 S.E. at 904 (quoting *Morris v. United Virginia Bank*, 237 Va. 331, 337, 377 S.E.2d 611, 614 (1989)).

83. 238 Va. 361, 384 S.E.2d 593 (1989).

84. *Id.* at 363, 384 S.E.2d at 593.

85. This is not a case involving personal injury or property damage, areas in which the common-law privity rules have been modified by statute. *See, e.g.*, Code §§ 8.01-223 and § 8.2-318. Instead, this is a case involving a claim solely for economic losses. It is settled in the Commonwealth that no cause of action exists in such cases absent privity of contract.

*Id.* at 366, 384 S.E.2d at 595.

86. *Id.* at 367, 384 S.E.2d at 596. VA. CODE ANN. § 55-22 (Repl. Vol. 1986), Virginia's third



leged that “‘defendants owed plaintiffs, as *intended third-party beneficiaries of the estate* of [the grandparents] or otherwise, a duty of reasonable care;’”<sup>87</sup> [the plaintiff’s] “never alleged that their grandparents and [the grandparents’ attorney] entered a contract of which they were intended beneficiaries. Thus, the motion for judgment utterly fails to allege a third-party beneficiary contract claim.”<sup>88</sup> This case is the subject of an article found in an earlier issue of this review.<sup>89</sup>

#### D. *Will Construction—Vesting—Defeasance*

In *Clark v. Strother*,<sup>90</sup> Item 2 of testator’s will devised property to his son, Charley, “to have and to hold during his life and to be left to his children under the same conditions as those specified in Item 1.”<sup>91</sup> This reference to Item 1 incorporated into Item 2 the condition that “if Charley ‘leave’ no child, then the property shall go to his brother or sister or to their children.”<sup>92</sup> Testator was survived by Charley and Charley’s only child, Edith. At Charley’s subsequent death, his only surviving descendant was Edith’s son (Charley’s grandson), William. The court “accord[ed] the verb ‘leave’ its commonly accepted meaning: ‘to have remaining after one’s death or extinction,’”<sup>93</sup> and concluded that Charley did not “leave” a child. Accordingly, the court held that the remainder “vested at the time of the testator’s death in any child or children of Charley, subject to being divested out of each vested remainderman by his or her death before the life tenant and vested in the testator’s other child or children.”<sup>94</sup>

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party beneficiary statute, refers to claims of such persons under an “instrument,” thus leaving its applicability to oral contracts in doubt.

87. 238 Va. at 368, 384 S.E.2d at 596.

88. *Id.* at 369, 384 S.E.2d at 597 (footnote omitted). The court further noted that “[t]here is a critical difference between being the intended beneficiary of an estate and being the intended beneficiary of a contract between a lawyer and his client.” *Id.* at 368, 384 S.E.2d at 596.

89. Note, *Whose Beneficiaries are They Anyway?* Copenhaver v. Rogers and the Attorney’s Contract to Prepare a Will in Virginia, 24 U. RICH. L. REV. 415 (1990).

90. 238 Va. 533, 385 S.E.2d 578 (1989).

91. *Id.* at 536, 385 S.E.2d at 579.

92. *Id.* at 540, 385 S.E.2d at 582.

93. *Id.* at 541, 385 S.E.2d at 582 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1287 (1981)).

94. 238 Va. at 541, 385 S.E.2d at 582 (1989). As the facts of the case indicate that the testator’s other children predeceased both Charley and Edith, the court may have meant to refer to testator’s “grandchildren.”

### E. *Inter Vivos Trusts—Right to Accounting*

In *Shriners Hospitals v. Smith*,<sup>95</sup> the sole issue was “whether a vested remainderman has the right to an accounting from the trustee [of an inter vivos trust] when the terms of the trust do not specifically provide for such an accounting.”<sup>96</sup> Noting that prior case law has established that a current beneficiary is entitled to an accounting, and that a vested remainderman has a present interest, the court stated that “such a present right supports a present interest in the administration of the trust assets.”<sup>97</sup> Accordingly, the court held that “under general equity principles, a vested remainderman has the right to an accounting from the trustee, even though the terms of the trust do not provide for such an accounting.”<sup>98</sup>

### F. *Holographic Will—Signature*

The issue in *Slate v. Titmus*<sup>99</sup> was whether a holographic writing that had its author’s name written in the opening paragraph, but not anywhere else, met the execution requirements of a holographic will.<sup>100</sup> Although the Virginia statute does not provide a specific place for a testator’s signature, it does require that “[n]o will shall be valid unless it be . . . signed by the testator . . . in such manner as to make it manifest that the name is intended as a signature.”<sup>101</sup> By a five to two decision, the court held that “[f]rom a reading of the instrument as a whole, and paying particular attention to the phrase, ‘Given under my hand,’<sup>102</sup> we conclude that

95. 238 Va. 708, 385 S.E.2d 617 (1989).

96. *Id.* at 709, 385 S.E.2d at 617.

97. *Id.* at 710, 385 S.E.2d at 618.

98. *Id.* at 711, 385 S.E.2d at 619.

99. 238 Va. 557, 385 S.E.2d 590 (1989).

100. This entire writing read as follows:

I, Garland B. Slate, Route 3-Box 456 Petersburg, Va., do hereby declare this to be my last will and testament.

I. I give and devise and bequeath to Edward B. Titmus all of my estate, both real and personal where ever situated.

II. I appoint Edward B. Titmus the executor of this my last will and testament, and desire that no security be required of him as such.

Given under my hand this 25th day of October 1986.

*Id.* at 558-59, 385 S.E.2d at 591.

101. VA. CODE ANN. § 64.1-49 (Repl. Vol. 1987).

102. The court had earlier noted that “[o]ne definition of ‘hand’ is ‘[a] person’s signature.’ Moreover, the phrase, ‘under the hand of,’ means authenticated by the . . . signature of.” *Slate*, 238 at 561, 385 S.E.2d at 592 (quoting BLACK’S LAW DICTIONARY 644 (5th ed. 1979))

Slate intended his name, as written in the exordium clause, to be his signature to the will."<sup>103</sup>

### G. *Will Execution—Witness' Signature*

In *Robinson v. Ward*,<sup>104</sup> testatrix, shortly after becoming "ill with 'a violent headache' . . . directed [Katherine D.] Ward to obtain 'a legal pad.' . . . [And] '[w]rite exactly what I say, and do not interrupt me.'"<sup>105</sup> The first sentence written by Ward, at testatrix' dictation, was "'To Katherine D. Ward I leave everything I own for her life time.'"<sup>106</sup> Following the completion of the writing, testatrix "'read it over, signed her name, dated it [May 18, 1986],' and 'handed it back' to Ward."<sup>107</sup> Shortly thereafter, and while Ward was present, testatrix informed a friend of the dictation of her will and asked him to "'please read it and witness it—which he did.'"<sup>108</sup>

The question before the court was whether Ward's name, written in her own hand in the opening sentence of the will, was sufficient to satisfy the attestation requirement for a nonholographic will.<sup>109</sup> On these facts the trial court had concluded that "'[t]he words 'Katherine D. Ward' written by her while not a signature when made were sufficient subscription under the unique facts of this case to constitute satisfactory compliance' with the statute in question."<sup>110</sup> In a four to three decision, the supreme court agreed with the trial court.

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and WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1026 (1981)).

103. *Slate*, 238 at 561, 385 S.E.2d at 592.

104. 239 Va. 36, 387 S.E.2d 735 (1990).

105. *Id.* at 39, 387 S.E.2d at 737.

106. *Id.*

107. *Id.*

108. *Id.*

109. VA. CODE ANN. § 64.1-49 (Repl. Vol. 1987) provides in part: "the [testator's] signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and each such witness shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." Although the statute uses the word "subscribe" when referring to the act required of the witnesses, "the statute mandates no specific form nor particular place on the document for the witness' signature." *Robinson*, 239 Va. at 42, 387 S.E.2d at 738 (1990) (quoting *Peake v. Jenkins*, 80 Va. 293, 296 (1885)).

110. *Robinson*, 239 Va. at 41, 387 S.E.2d at 738.

## H. Gifts Subject to Invalid Limitations

In *Heritage Methodist Homes of Virginia, Inc. v. Dominion Trust Company*,<sup>111</sup> the following provision of testator's will was before the court:

So long as Prince Edward School Foundation, Prince Edward Co., Va., admits to any school, operated or supported by it, only members of the White Race . . . my said Trustee shall pay the net income . . . to the Trustees (or other governing body) of such Foundation, to be expended by them . . . for the benefit of any of said schools.<sup>112</sup>

This provision was followed by subsequent gifts over; (i) to a second school if Prince Edward admitted a prohibited person; (ii) to a third school if the second school admitted a prohibited person; (iii) to a fourth school if the third school admitted a prohibited person; and (iv) to Hermitage Methodist Homes (without any limitation) if the fourth school admitted a prohibited person. At the outset the court "assume[d], without deciding, that the trial court correctly ruled that the racially discriminatory provisions are unconstitutional and void."<sup>113</sup> However the court pointed out that testator "repeatedly specified that each educational beneficiary's right to receive income extended only 'so long as' the beneficiary complied with the [void] restrictive provision."<sup>114</sup> The court determined that the "so long as" was a "special limitation"<sup>115</sup> and, after examining Virginia precedent, concluded that "[i]f a condition subsequent is unlawful, a court can merely excise the offending language and leave the remaining estate intact. But, where a gift or estate subject to a limitation is unlawful, in order to cure the defect the court must terminate the entire gift or estate."<sup>116</sup> Thus the court concluded it must strike the gifts to all of the educational beneficiaries and, as the special limitation was not attached to the final gift over, "Hermitage has the only valid, remaining interest."<sup>117</sup>

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111. 239 Va. 46, 387 S.E.2d 740 (1990) *cert. denied*, \_\_\_ U.S. \_\_\_ (Oct. 9, 1990). This case was combined with *Miller School of Albemarle County v. Dominion Trust Co.* (Record No. 881354), and *Seven Hills School Inc. v. Dominion Trust Co.* (Record No. 881390), involving the same parties and issues.

112. *Id.* at 49, 387 S.E.2d at 741-42.

113. *Id.* at 54-55, 387 S.E.2d at 744.

114. *Id.* at 56, 387 S.E.2d at 746.

115. *Id.* at 56, 387 S.E.2d at 745.

116. *Id.* at 57, 387 S.E.2d at 746.

117. *Id.* The court also held that the doctrine of *cy pres*, codified in VA. CODE ANN. § 55-

### I. *Remainders—Vested or Contingent*

In *Landmark Communications, Inc. v. Sovran Bank*,<sup>118</sup> a testamentary trust provided for termination upon the death of the last life beneficiary, at which time remainder interests in the trust would be payable to certain persons "or" their heirs. "If 'or' is given its ordinary disjunctive meaning, the remainder interests . . . are contingent and will not vest until the trust terminates. If 'or' is interpreted as conjunctive, the interests in the trust became indefeasibly vested at the death of the testator."<sup>119</sup> The court concluded that the will was unambiguous, that testator's intent could be found within its four corners, and that testator's intent was to use "or" in its ordinary disjunctive sense.<sup>120</sup>

### J. *Testamentary Capacity—Burden and Standard of Proof*

In *Gibbs v. Gibbs*,<sup>121</sup> the court found that a jury instruction given by the trial court was "erroneous insofar as it placed the burden of proof on contestants and required a showing of testamentary incapacity by evidence which was clear and convincing."<sup>122</sup> A second instruction<sup>123</sup> was found to have been properly refused by the trial court because "[t]his instruction, which comments on the evidence by reviewing a prior court order, implies to the jury that the testatrix was *prima facie* incompetent when she executed the

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31 (Repl. Vol 1986), was not applicable because "there is no indefiniteness or uncertainty regarding the beneficiaries or purpose of the trust. Moreover, there is a valid gift over to Hermitage as we have said, and this eliminates any need for the court to search for the testator's intent." *Id.* at 58, 387 S.E.2d at 747.

118. 239 Va. 158, 387 S.E.2d 484 (1990).

119. *Id.* at 163, 387 S.E.2d at 487.

120. *Id.* at 164, 387 S.E.2d at 487-88.

121. 239 Va. 197, 387 S.E.2d 499 (1990).

122. *Id.* at 201, 387 S.E.2d at 501.

123. While there is a presumption that every person is competent until such person has been declared incompetent, the jury should consider in determining whether [testatrix] was competent to make a will on October 14, 1978 that pending at that time was a proceeding in the Norfolk Circuit Court in which an order was entered February 2, 1979 declaring her incapacitated and appointing a guardian of her funds, along with all of the other evidence introduced in the case, and determine from all of the evidence whether [testatrix] on October 14, 1978 had testamentary capacity to execute a will.

*Id.*

will because a competency hearing was pending at that time and a guardian was ultimately appointed for her."<sup>124</sup>

#### K. *Wills—Interpretation*

In *Haag v. Stickley*,<sup>125</sup> a five to two decision of the court applied settled principles of law in upholding the trial court's interpretation of a testamentary bequest of corporate stock.

#### L. *Attorney Trustee—Professional Misconduct*

In *Gay v. Virginia State Bar*,<sup>126</sup> the court upheld a three year suspension from the practice of law imposed upon an attorney because of his misconduct while serving as trustee for a client.<sup>127</sup> The attorney argued that his actions in regard to the trust did not involve the practice of law<sup>128</sup> and thus the Disciplinary Rules were inapplicable in this case. The court rejected this contention, noting that there had been an attorney client relationship at one time, and "no evidence [existed] that the relationship was interrupted or extinguished until 1986. Furthermore, Gay prepared legal instruments such as deeds of trust and a consent to pledge personalty in order to protect the funds in the trust account."<sup>129</sup>

#### M. *Oral Trusts—Real Estate*

In *Gibbens v. Hardin*,<sup>130</sup> the court again recognized that oral trusts in real estate are allowed in Virginia,<sup>131</sup> but concluded that

124. *Id.* at 202, 387 S.E.2d at 502. "Although evidence of such action is appropriate, it must be left to the jury, not the trial court, to assign appropriate weight to that evidence." *Id.*

125. 239 Va. 298, 389 S.E.2d 691 (1990).

126. 239 Va. 401, 389 S.E.2d 470 (1990).

127. Although the court refers to the mismanagement as involving a "client's" funds, or otherwise relating to a "client," it appears that the funds belonged to the "client's" granddaughter. The second paragraph of the opinion reads in part as follows: "In June of 1983, Gay was retained by Mary Lou Williams to recover insurance proceeds for the benefit of Williams' granddaughter, a minor. Gay did so successfully, and Williams requested Gay to invest the net proceeds of \$29,099.64." *Id.* at 403, 389 S.E.2d at 471.

128. *Id.* at 405, 389 S.E.2d at 472. "Generally, the relation of attorney and client exists, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which apply [sic] his possession and use of legal knowledge or skill." *Id.* (quoting VA. SUP. CT. R. pt. 6, § I(B) (1990)).

129. *Gay*, 239 Va. at 405, 389 S.E.2d at 472.

130. 239 Va. 425, 389 S.E.2d 478 (1990).

131. "That an express trust in land may be set up by parol is perfectly well settled in this State . . . . It is equally true, however, that in order to establish such a trust the declaration

"[t]his record is utterly devoid of any evidence capable of establishing an express trust."<sup>132</sup>

#### N. *Intestate Succession—Illegitimates—Foreign Law*

In *Hupp v. Hupp*,<sup>133</sup> Loy, an unmarried Pennsylvania resident, died intestate owning an interest in Virginia real estate, which was claimed by May and Lloyd as Loy's children. On June 24, 1953, Loy had been convicted of the nonsupport of May and Lloyd by a Pennsylvania court, and ordered to pay a weekly sum therefor. Loy did not take an appeal in this case.<sup>134</sup> The Supreme Court of Virginia found that "[i]n Pennsylvania, an order for support of an illegitimate child 'necessarily determines the issue of paternity.' . . . 'Absent any appeal, the issue of paternity is established as a matter of law.'"<sup>135</sup> The court also concluded that "[t]he United States Constitution, as well as federal and state statutes, requires the courts of this state to give full faith and credit to a judgment rendered in another state, provided the foreign court had jurisdiction over the parties and the subject matter."<sup>136</sup> Accordingly, the court held that "the Pennsylvania adjudication of paternity has established for Virginia intestate succession purposes the status of defendants as children of decedent."<sup>137</sup>

#### O. *Trustees' Attorney Fees—Recoverability from Trust*

*Wiglesworth v. Taylor*<sup>138</sup> was a proceeding brought by a trustee in bankruptcy to recover from the co-trustees of a testamentary trust certain post-bankruptcy distributions made to the bankrupt. After concluding that the co-trustees were liable for all distributions made to the bankrupt following notice of the bankruptcy trustee's claim, the court next dealt with the co-trustees' right to attorney fees incurred in defending this proceeding. Although rea-

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must be unequivocal and explicit, and the evidence thereof must be clear and convincing." *Id.* at 431, 389 S.E.2d at 481 (quoting *Brame v. Read*, 136 Va. 219, 221-22, 118 S.E. 117, 118 (1923)).

132. *Gibbens*, 239 Va. at 431, 389 S.E.2d at 481.

133. 239 Va. 494, 391 S.E.2d 329 (1990).

134. *Id.* at 496, 391 S.E.2d at 330.

135. *Id.* at 499, 391 S.E.2d at 332 (quoting *Manze v. Manze*, 523 A.2d 821, 824 (Pa. Super. 1987) (citations omitted)).

136. *Hupp*, 239 Va. at 499, 391 S.E.2d at 332 (citing U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1988); VA. CODE ANN. § 8.01-389(B) (Repl. Vol. 1984)).

137. *Hupp*, 239 Va. at 500, 391 S.E.2d at 332.

138. 239 Va. 603, 391 S.E.2d 299 (1990).

sonable legal fees expended in defending a trust are normally reimbursable, "a trustee should not receive such reimbursement when he caused the litigation."<sup>139</sup> The court held that the co-trustees could not recover attorney fees from the trust in this case, because the litigation was caused by the co-trustees' negligence in making the post-bankruptcy distributions. Furthermore, the co-trustees could not recover from the bankrupt personally.<sup>140</sup> Lastly, the court found no merit in the bankrupt's contention that he should not have to repay the amount of the improper distributions to the co-trustees because of his reliance on their "superior expertise" and concluded that he "is liable for any money paid to him by mutual mistake, even though both parties were negligent in failing to ascertain whether these payments were proper."<sup>141</sup>

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139. *Id.* at 609, 391 S.E.2d at 303. The court further quoted Professor Scott for the proposition that "[I]f the [co-trustees] negligently permitted a third person [Wiglesworth] to obtain possession of the trust property, the expenses of the litigation that resulted must be borne by the [co-trustees] personally." *Id.* at 609, 391 S.E.2d at 303-04 (quoting 3 A. SCOTT, *THE LAW OF TRUSTS* § 245 (4th ed. 1988) (brackets in original)).

140. *Wiglesworth*, 239 Va. at 609, 391 S.E.2d at 304. "A litigant cannot be required to pay another litigant's attorney's fees when they have hostile interests in the litigation . . . [B]ecause the co-trustees sought to place the burden of their improper payments upon Wiglesworth personally, or upon his interest in the trust, Wiglesworth's and the co-trustee's primary interests were hostile." *Id.* (citations omitted)

141. *Id.* at 610, 391 S.E.2d at 304.



