

1991

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

J. Rodney Johnson  
*University of Richmond*

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

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

---

### Recommended Citation

J. R. Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 25 U. Rich. L. Rev. 925 (1991).  
Available at: <http://scholarship.richmond.edu/lawreview/vol25/iss4/16>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

# WILLS, TRUSTS, AND ESTATES

*J. Rodney Johnson\**

## I. INTRODUCTION

The 1991 session of the General Assembly enacted legislation dealing with wills, trusts, and estates that added, amended, or repealed a number of sections of the Code of Virginia ("Code"). In addition to this legislation, there were six cases from the Supreme Court of Virginia and one from the Virginia Court of Appeals, in the year ending June 1, 1991, which involve 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>

## II. 1991 LEGISLATION

### A. *Illegitimacy — Evidence of Paternity*

As a consequence of *Trimble v. Gordon*,<sup>2</sup> Virginia law was amended in 1978 to permit an illegitimate child to inherit from the father, a right already existing on the maternal side.<sup>3</sup> However, a concern about encouraging possible unfounded claims of paternity led the legislature to restrict the evidence that might be used in such cases<sup>4</sup> to the same six categories of proof then allowable to determine paternity<sup>5</sup> in support proceedings brought against an alleged father on behalf of an illegitimate child.<sup>6</sup> This restrictive

---

\* Professor of Law, The T. C. Williams School of Law, University of Richmond; B.A., 1965, College of William and Mary; J.D., 1967, Marshall-Wythe School of Law, College of William and Mary; LL.M., 1970, New York University.

1. In order to facilitate the discussion of numerous Code of Virginia sections, they will be 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 1991 supplement for the new sections.

2. 430 U.S. 762 (1977) (inheritance rights of illegitimate children).

3. VA. CODE ANN. § 64.1-5.1 (Cum. Supp. 1991). The background of this development is discussed in Johnson, *Inheritance Rights of Children in Virginia*, 12 U. RICH. L. REV. 275 (1978).

4. VA. CODE ANN. § 64.1-5.2 (Repl. Vol. 1987).

5. *Id.* § 20-61.1 (repealed & amended 1988); see *id.* § 20-49.1 to -49.8 (Repl. Vol. 1990).

6. *Trimble* recognized that "(t)he more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' es-

support statute was declared unconstitutional in 1985 because "[s]uch restrictions on the available methods of proof imposed an impenetrable barrier resulting in the kind of invidious discrimination contemplated by *Gomez*."<sup>7</sup>

This ruling of unconstitutionality of the source for section 64.1-5.2 of the Code naturally raised the question of the latter section's constitutionality.<sup>8</sup> The legislature appears to have concluded that the section was unconstitutional, as evidenced by the nature of its 1991 amendments to section 64.1-5.2. In addition to expanding the categories of admissible evidence from six to eight,<sup>9</sup> the introduction to this list was changed from "shall be limited to the following" to "may include but shall *not* be limited to the following" and, most importantly, this enactment was passed as emergency legislation,<sup>10</sup> with a proviso that "the provisions of this act are declaratory of existing law."<sup>11</sup> It seems rather obvious that the only way the "shall not be limited to" language of the amendment could be declaratory of existing law would be if the prior statutory language of "shall be limited to" was unconstitutional.

The 1991 legislation effectively eliminates the evidentiary limitation faced by illegitimates in succession litigation since 1978.<sup>12</sup> However, illegitimate persons, or those claiming through them, still

tates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally." 430 U.S. at 770.

7. *Jones v. Robinson*, 229 Va. 276, 287, 329 S.E.2d 794, 801 (1985) (consolidating *sub. nom. Jones v. Robinson*, *Whiteman v. Kelley*, and *Vivier v. Page*) (referring to *Gomez v. Perez*, 409 U.S. 535 (1983)). The court's decision applied only to § 20-61.1 as it existed prior to its expansion in 1982, which was the same language it contained in 1978 when it served as the basis for § 64.1-5.2.

8. See *Johnson, Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 19 U. RICH. L. REV. 779, 792-94 (1985).

9. The added categories are as follows:

7. The results of medically reliable genetic blood grouping tests weighted with all the evidence; or

8. Medical or anthropological evidence relating to the alleged parentage of the child based on tests performed by experts.

VA. CODE ANN. § 64.1-5.2 (Cum Supp. 1991).

10. Act of March 22, 1991, ch. 479, 1991 Va. Acts, cl. 3 (to be codified at VA. CODE ANN. § 64.1-5.2) (emphasis added). Emergency legislation becomes effective immediately upon being signed by the governor. Thus, instead of becoming effective on July 1, this legislation was effective when signed by the governor on March 22, 1991.

11. *Id.* cl. 2.

12. Although § 64.1-5.2 of the Code is located in that portion of the Code relating to intestate succession, its language expressly provides that it is applicable "[f]or purposes of this title," thereby making it applicable to cases involving testate succession as well.

face a time restriction not applicable to legitimate persons<sup>13</sup> which may be unconstitutionally discriminatory.<sup>14</sup>

### B. *Legitimation of Children — Reproductive Technology*

Section 64.1-7.1 of the Code, previously dealing with the legitimation of children conceived by means of the artificial insemination of a married woman, is extended to also cover children conceived by in vitro fertilization or other reproductive technology which uses the sperm of a donor, other than her husband, or an ovum from another woman, or both. In all of these cases, if the woman and her husband consent in writing to the reproductive technology and to accept parentage of any resulting child, such child "shall be, for all purposes, the legitimate natural child of such woman and her husband."<sup>15</sup> This legislation, intended in part to confine the impact of erroneous statements of law in *Welborn v. Commonwealth*<sup>16</sup> to the parties of that case, also provides that neither sperm nor ova donors have either parental rights or duties in regard to such a child, and that its provisions are declaratory of existing law.<sup>17</sup>

### C. *Power to Invade Principal — Constructional Rule*

Section 64.1-67.2 was added to the Code in 1988 in order to eliminate any estate,<sup>18</sup> gift,<sup>19</sup> or income tax<sup>20</sup> exposure in trusts

---

13. Section 64.1-5.1.3 of the Code provides 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 an action seeking a circuit court proceeding to determine parenthood are filed "within one year of the date of the death of such parent."

14. This issue was raised in *Johnson, Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 20 U. RICH. L. REV. 955, 964-66 (1986). Since that time, the decision in *Tulsa Professional Collection Serv. Inc. v. Pope*, 485 U.S. 478 (1988), has raised another possible ground of constitutional challenge. In broad scope, *Pope* held that when state action has an adverse effect upon a person's property right, it violates the due process clause of the fourteenth amendment unless it is accompanied by reasonable notice. An illegitimate's claim of succession is clearly a property right. Note also the Code's provision that the one-year provision of § 64.1-5.1.3 of the Code, quoted in *supra* note 13, "shall run notwithstanding the minority of such child."

15. VA. CODE ANN. § 64.1-7.1 (Cum. Supp. 1991).

16. 10 Va. App. 631, 394 S.E.2d 732 (Va. Ct. App. 1990); see *infra* note 100 and accompanying text.

17. Act of Mar. 6, 1991, ch. 89, 1 1991 Va. Acts 119, cl. 2.

18. I.R.C. § 2041 provides, for estate tax purposes, that a decedent's gross estate includes the value of property over which the decedent had a general power of appointment at death.

19. I.R.C. § 2514 provides, for gift tax purposes, that a person who makes a lifetime exer-

where the drafter mistakenly gave a fiduciary, who was also a beneficiary, a power to invade principal for the fiduciary/beneficiary's benefit.<sup>21</sup> The thrust of the statute is to either reduce the power from a general to a special, or to take the power away from the fiduciary/beneficiary entirely. The 1991 amendments to section 64.1-67.2 of the Code are intended to clarify the original enactment<sup>22</sup> and, to that end, they are stated to be declaratory of existing law.<sup>23</sup> Note that the remedy of this section is applicable only to powers over the principal of a trust.<sup>24</sup> However, the problem this statute seeks to eliminate can also arise when the fiduciary/beneficiary has a comparable power over trust income. Thus, further amendment of the statute to provide a similar remedy for such income powers is desirable.

#### D. *Pretermitted Spouse*

Section 64.1-69.1 was added to the Code in 1985<sup>25</sup> to provide another remedy for a surviving spouse for whom no provision was made in a deceased spouse's premarital will, if such nonprovision was unintentional.<sup>26</sup> Accordingly, the section expressly provided

cise or release of a general power of appointment is treated as a transferor of the property subject to the power.

20. I.R.C. § 678 provides, for income tax purposes, that one holding a general power of appointment over property is treated as the owner of that property.

21. For background and discussion, see Johnson, *Wills, Trusts, and Estates: Annual Review of Virginia Law*, 22 U. RICH. L. REV. 759, 764-66 (1988).

22. These clarifications are intended to rebut a possible IRS challenge. As one writer has noted:

The IRS had challenged comparable rules of construction in other jurisdictions on two opposing theories: that the statutes are ineffective because their sole purpose was tax avoidance, see *Sheedy v. U.S.*, 63 AFTR 2d ¶ 148,958 (E.D. Wis. 1988); or that they are inapplicable whenever the governing instrument states any standard, regardless of how broad or limited. See Priv. Ltr. Rul. 8912014 (12/12/88). To avoid these extreme positions, the amendment attempts to define (and thereby limit) the situations in which the statutory rule of construction will not apply. It makes the rule applicable unless:

a. The testator or settlor expressly manifests a contrary intention by referring to a fiduciary's invasion or use of trust funds 'for the fiduciary's own benefit' or 'without regard to the fiduciary's personal benefit' or words of similar import or by referring to VA. CODE § 64.1-67.2 specifically; or

b. A court construes the document to the contrary.

Gray, *Selected Virginia Legislative Developments*, 8 Va. St. Bar Tr. & Est. Newsl. No. 3, at 3 (Summer 1991).

23. Act of Mar. 20, 1991, ch. 432, 1 1991 Va. Acts 1263, cl. 2.

24. VA. CODE ANN. § 64.1-67.2 (Cum. Supp. 1991).

25. For background, see *supra* note 8, at 787.

26. At the time of the enactment, in 1985, the omitted surviving spouse's remedies were

that its remedy of an intestate share for the omitted surviving spouse would not apply if it appeared from the will that the omission was intentional. The 1991 amendment further provides for the nonavailability of this remedy if it appears "from the provisions of a premarital or marital agreement executed or validated under the Premarital Agreement Act (§ 20-147 et seq.)" that the omission of the surviving spouse was intentional.<sup>27</sup> The need for this amendment might at first seem doubtful. This is because if the right to a pretermitted spouse's share was yielded in such a contract, the spouse's claim should be offset by an equivalent claim by the estate for breach of the contract. However, the remedy of the statute is automatic and mandatory — "the omitted spouse *shall* receive . . . ."<sup>28</sup> Accordingly, as there is no need for the surviving spouse to make any claim in order to take, there is no corresponding creation of an offsetting claim in favor of the decedent's estate. Therefore, the amendment was necessary to eliminate the right to such a share in instances where it had been waived.

The 1991 amendment does not solve the problem of this section; it only remedies one of its symptoms. Although this section was based upon a concept contained in Uniform Probate Code ("UPC") section 2-301(a),<sup>29</sup> the legislature failed to include certain UPC language that (i) should have eliminated the need for the present amendment, and (ii) would have closed other loopholes still remaining. This omitted language would also deny the section's remedy if "the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence."<sup>30</sup> It would appear that further, comprehensive amendment of this statute is necessary to deal with other problems before they arise or, in light of the new protections provided for a surviving spouse in the 1990 augmented estates' legislation, perhaps it is time to repeal this section.

---

(i) to claim dower or curtesy in the decedent's realty under §§ 64.1-19 to -44, and (ii) to claim a statutory forced share in the decedent's personalty under §§ 64.1-13 to -16. Since January 1, 1991, these remedies have been replaced by one remedy: an elective share in realty and personalty in the decedent's augmented estate. For background and discussion of this development, see Gray, *Virginia's Augmented Estate System: Annual Survey of Virginia Law*, 24 U. RICH. L. REV. 513 (1990).

27. VA. CODE ANN. § 64.1-69.1 (Interim Supp. 1991).

28. *Id.* (emphasis added).

29. UNIF. PROB. CODE § 2-301(a), 8 U.L.A. 88 (1983).

30. This section of the UPC was itself amended in 1990 to further restrict the availability of its remedy.

### E. *Pour Over Trust — Residency of Trustee*

Section 64.1-73 of the Code is amended to provide that certain nonresidents may serve as the sole trustee of an inter vivos trust without thereby disqualifying the trust from receiving testamentary additions.<sup>31</sup> The listing of authorized nonresidents conforms with the listing found in a similar statute applicable to personal representatives and testamentary trustees.<sup>32</sup> Again paralleling this latter statute, section 64.1-73 of the Code requires that, prior to any distribution to the trustee of a pour over trust that has no Virginia cotrustee, (i) the nonresident must appoint a resident agent for receipt of process in trust related matters, and (ii) "bond with surety shall be required in every case."<sup>33</sup>

One question left unanswered by the new amendment is whether the amount of the bond and surety must correspond to the value of the entire inter vivos trust, or only to the testamentary addition thereto. From both a logical and a policy analysis it would appear that the latter possibility is the correct answer. A second unanswered question is what mechanism, if any, insures the continuing sufficiency of this bond and surety? This question is not so easily answered. In the case of a testamentary trustee, section 26-2 of the Code requires the commissioner of accounts to examine the sufficiency of the bond and surety of a testamentary trustee as part of the commissioner's inspection of the testamentary trustee's annual accounting. However, as the trustee of an inter vivos trust is not required to make such an accounting, and as section 64.1-73(d)(1) of the Code provides that a testamentary pour over to such a trust "shall not be deemed held under a testamentary trust of the testator," there appears to be no procedure under existing law to insure the continuing sufficiency of the bond and surety.

---

31. The listing includes:

a parent, brother, or sister of the testator, a child or other descendant of the testator, the spouse of a child of the testator, the surviving spouse of the testator, or a person or all such persons otherwise eligible to file a statement in lieu of an accounting pursuant of § 26-20.1, or any combination of them.

VA. CODE ANN. § 64.1-73(3)(iii) (Cum. Supp. 1991).

32. *Id.* § 26-59(B).

33. *Id.* § 64.1-73(A)(2)(iii).

## F. *Trust Reformation, Consolidation and Termination*

The new section 55-19.4 of the Code authorizes the judicial reformation of any trust, upon petition by a beneficiary or fiduciary and a finding of good cause,<sup>34</sup> "in any manner,"<sup>35</sup> including, without limitation, dividing a trust into two or more separate trusts,<sup>36</sup> consolidating two or more separate trusts into a single trust,<sup>37</sup> or terminating the trust<sup>38</sup> and ordering distribution of the trust property regardless of any spendthrift or similar protective provision." In addition to finding "good cause"<sup>39</sup> for any reformation, the court must generally also find that any proposed reformation "will neither materially impair the accomplishment of the trust purposes nor . . . adversely affect the interests of any beneficiary." These additional findings, however, are not required in termination cases.<sup>40</sup> This enactment was passed as emergency legislation<sup>41</sup> and

---

34. According to the Code:

For purposes of any reformation of a trust, good cause may be shown by evidence of (i) changes in any federal or Virginia tax laws, or the construction of such laws, whether by statute, court decision, regulation, ruling or otherwise which, in the absence of reformation, would materially impair the purposes of the trust or adversely affect the interests of the trustor or any beneficiary, or which, if reformation were made, would materially benefit the trust or the interests of the trustor or any beneficiary or (ii) existing circumstances such that the purposes of the trust will be impaired or the interests of the trustor or any beneficiary adversely affected if the reformation is not made or that reformation if made would benefit the trust or interests of the trustor or any beneficiary.

VA. CODE ANN. § 55-19.4D(1) (Cum. Supp. 1991).

35. The potential scope of permissible reformation is further evidenced by the provision that "[t]he court may order that the reformation be effective prospectively only or be retroactive to the date of the trust's creation, the date of death of the trustor or testator or such other date as the court may direct." *Id.* § 55-19.4(C).

36. This enactment repeals the provision for judicial division of a trust formerly found in § 55-19.3(B); the provision for nonjudicial division, formerly designated as subsection A of that section, is now the only subject of § 55-19.3. *See id.* § 55-19.3.

37. The court must find that the dispositive provisions of trusts are substantially similar before ordering their consolidation. *Id.* § 55-19.4(B)(1).

38. According to the Code:

For purposes of termination of a trust, good cause may be shown as set forth in subdivision 1 of this subsection [the "good cause" required for reformation, set out in note 39, *infra*] or by evidence that (i) the costs of administration are such that the establishment or the continuance of the trust would impair the purposes of the trust, or (ii) the value of the trust principal is \$25,000 or less, with no expectation of additions to the principal other than from interest or other earnings.

*Id.* § 55-19.4(D)(2).

39. *See supra* note 38. As the elements of this definition are stated in the alternative, the requirement of "good cause" reduces to no more than a finding "that reformation if made would benefit . . . the trustor or any beneficiary." *Id.* § 55-19.4(D)(1).

40. In exempting termination from the immediately preceding requirements in the text, the statute parts company with the *Clafin* Rule [so named because derived from *Clafin v.*



as declaratory of existing law.<sup>42</sup>

In the hands of a judge who is a literalist, or who is untutored in this area of the law, this new termination procedure can be used to destroy much of what estate planning is all about. Look, for example, at what can happen in the ordinary case of a parent who provides a trust for the lifetime of a child — or one spouse for another — and the beneficiary seeks termination thereof. As “good cause” can be established by showing that termination would benefit the life tenant,<sup>43</sup> and as “materially impair[ing] the accomplishment of the trust purposes” is of no concern in termination cases,<sup>44</sup> it is clear that such a trust could be terminated. And it is equally clear that this possibility is a reversal of existing Virginia law confirmed by the Virginia Supreme Court as recently as 1990.<sup>45</sup>

What does this new provision do to the heretofore hallowed concept of testator's, or settlor's, intent? How does an attorney protect a client's intent from such mischief, particularly as the statute specifically authorizes “terminating the trust and ordering distribution of the trust property regardless of any spendthrift or similar protective provision?”<sup>46</sup> Absent remedial action to restrict the scope of this statute, it may be that the prudent Virginia attorney will be forced to create trusts under the laws of other jurisdictions in order to insure that a client's legitimate purposes will not be

---

Claffin, 149 Mass. 19, 20 N.E. 454 (1889)] which precludes termination that would (i) defeat a testator's (settlor's) material purpose, or (ii) adversely affect the interests of any non-consenting beneficiary. See RESTATEMENT (SECOND) OF TRUSTS § 337 (1959). The Supreme Court of Virginia recently applied the *Claffin* Rule in *Landmark Communications v. Sovran Bank*, 239 Va. 158, 387 S.E.2d 484 (1990). This enactment also repeals the former provision for termination of small trusts, which required that “[t]he 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.” VA. CODE ANN. § 55-19.2, *repealed by* Act of Mar. 20, 1991, ch. 415, 1 1991 Va. Acts 621, cl. 3.

41. Act of March 20, 1991, ch. 415, 1 1991 Va. Acts 621, cl. 4. Because the legislation was designated as emergency legislation, the enactment became law upon being signed by the governor on March 20, 1991. Regular legislation is effective on July 1 of the year of enactment.

42. *Id.* at 622, cl. 2 (which also provides “however, this declaration shall not be construed so as to affect the rights of the parties to any action, litigation, or proceeding commenced by filing prior to July 1, 1991.”).

43. “[G]ood cause may be shown by evidence that reformation [termination] . . . would benefit . . . any beneficiary.” VA. CODE ANN. § 55-19.4(D)(1) (Cum. Supp. 1991).

44. *Id.* § 55-19.4(B)(2)(i).

45. See *Landmark Communications v. Sovran Bank*, 239 Va. 158, 387 S.E.2d 484 (1990), and cases therein cited.

46. VA. CODE ANN. § 55-19.4(A) (Cum. Supp. 1991).

frustrated.<sup>47</sup>

### G. *Creation of Trust — Structured Settlements*

Section 8.01-424 of the Code provides for court approval of compromises on behalf of persons under disability in suits or actions to which they are parties. The 1991 amendment grants the court authority to approve a minor's settlement in trust, with the minor's guardian or parent serving as trustee.<sup>48</sup> An interesting clause reads that "the court may provide for the termination of such trust at any time following attainment of majority which the court deems to be in the best interest of the minor."<sup>49</sup> There should be no problem with extending such a trust beyond the age of majority for an incapacitated beneficiary. However, the authority for withholding a competent trust beneficiary's property after the beneficiary reaches the age of majority appears dubious and any such attempt would seem to invite legal challenge.

### H. *Bona Fide Purchasers of Decedents' Realty*

The Code contains several statutes designed to protect bona fide purchasers of a decedent's realty from claims made under after discovered wills unless they are probated within one year of the decedent's death.<sup>50</sup> A new provision, section 64.1-96.1 of the Code, protects bona fide purchasers of a decedent's realty from a devisee or personal representative under a will which is subsequently impeached, against claims made by the decedent's heirs, unless the heirs file a bill in equity for that purpose within one year after testator's death. The statute provides no remedy for the parallel case where the impeachment of a will results in the establishment

---

47. "Reformation" is defined as an "[e]quitable remedy used to reframe written contracts to reflect accurately real agreement between contracting parties when, either through mutual mistake or unilateral mistake coupled with actual or equitable fraud by other party, the writing does not embody the contract as actually made." BLACKS LAW DICTIONARY 1152 (5th ed. 1979).

Ironically, the destruction of testator's (settlor's) original purpose that is authorized by this unfortunate provision is to be accomplished pursuant to a procedure labeled "reformation," which is the name of a well-recognized common law remedy for accomplishing original intent.

48. Note that under express language added to § 55-19(C) in 1990, such a trust could not be a spendthrift trust preventing the minor beneficiary's creditors from having access thereto. VA. CODE ANN. § 55-19(C) (Cum. Supp. 1990).

49. *Id.* § 8.01-424(D)(4).

50. *Id.* § 64.1-95 (Repl. Vol. 1987) (protects purchasers from the heirs); *Id.* § 64.1-96 (protecting purchasers from devisees or appropriately empowered personal representatives).

of a prior will, instead of intestacy, and the statute's language — "impeachment . . . which results in intestacy" will apparently negate any possible intent-oriented construction of the statute to that end.

### I. *Estate Mismanagement — Prior Personal Representative*

Section 64.1-166 of the Code is amended to repeal the rule of *Coleman v. M'Murdo*<sup>51</sup> which states that an administrator *de bonis non* does not have standing to bring suit against a former personal representative for mismanagement of estate assets.<sup>52</sup> The language of the statute that appears to be consistent with *Coleman* is eliminated and further language is added providing that an administrator *de bonis non* "shall" be entitled to bring such a suit.

### J. *Estate Distribution — Show Cause Order*

Section 64.1-179 of the Code authorizes the issuance of a "show cause against distribution" order after six months have passed from the qualification of the personal representative. The section had provided that the motion might be made by the personal representative, a legatee or a distributee. The 1991 amendment adds to this group "a successor or substitute personal representative" in such a way as to indicate that the six-month waiting period will be computed from the qualification date of the original personal representative and not from that of the successor or substitute.<sup>53</sup>

### K. *Fiduciary Investments — Legal List*

Virginia fiduciaries seeking guidance in the fulfillment of their investment duty may elect to follow the statutory prudent man rule or the statutory legal list. This latter concept, codified in section 26-40 of the Code, identifies specific investments and provides that they "are and shall be considered lawful investments." In recognition of the breakup of American Telephone and Telegraph Company ("A.T.&T.") into the "baby bells," section 26-40(16) of the Code, a subsection previously occupied only by A.T.&T., is amended to also include Bell Atlantic, Bell South, Southwestern

---

51. 26 Va. (5 Rand.) 51 (1827).

52. According to *Coleman*, only creditors or beneficiaries have the requisite standing to bring such an action. *Id.*

53. VA. CODE ANN. § 64.1-179 (Cum. Supp. 1991).

Bell, Pacific Telesis, Nynex, American Information Technologies, and U. S. West.<sup>54</sup>

In addition to this amendment to the legal list, the legislature also passed a resolution requesting the Wills, Trusts and Estates Section of the Virginia Bar Association and the Virginia Bankers' Association to "study the status of Virginia's lawful fiduciary investments, to recommend amendments, deletions and additions to the list and to make other recommendations as deemed appropriate."<sup>55</sup> This study request was premised upon findings that (i) there are extremely safe and valuable investments not on the list, (ii) there are investments presently on the list not as safe or valuable as when placed thereon, (iii) there has been no substantial modification of the list for many years, and (iv) "the current limits upon fiduciaries may hamper reasonable investment."<sup>56</sup>

#### L. *Commissioners of Accounts — Posting*

Section 26-27 of the Code requires commissioners of accounts to post a list of accounts before them for settlement, along with certain information regarding these accounts,<sup>57</sup> at the front door of the relevant courthouse. The 1991 amendment changes the date for such postings from the first Monday in any month to any day "during the first week of each month."<sup>58</sup>

#### M. *Self Dealing — Banks and Trust Companies*

Section 6.1-24 of the Code, which governs self-dealing by trust companies, trust subsidiaries, and banks when serving as a trustee, has been expanded. It now encompasses self-dealing by these institutions when serving as a personal representative, applies to transactions with directors thereof, and is declared to be permissible in limited instances.<sup>59</sup> The rule relating to transfers from one estate to another where both have the same fiduciary, formerly judged by

---

54. *Id.* § 26-40.

55. HJR No. 395, 2 1991 Va. Acts 1928.

56. *Id.*

57. This information must include the names of the fiduciaries, the nature of their accounts, and the name of the persons or entities represented in the accounts.

58. VA. CODE ANN. § 26-27 (Cum. Supp. 1991).

59. The section declares self-dealing transactions to be voidable unless "(i) approved by an appropriate court, (ii) consented to by all beneficiaries after full and fair disclosure, (iii) authorized by the instrument creating the fiduciary relationship or (iv) permitted by ruling of the Commissioner of financial institutions." *Id.* § 6.1-24.

satisfying the requirements of section 26-40 (the legal list), will now be judged by being a permissible fiduciary investment under any of the provisions found in Title 26 of the Code.<sup>60</sup>

#### N. *Health Care Decisions — Power of Attorney*

Section 37.1-134.4 was added to the Code in 1989 to establish 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 1991 amendments (i) elevate an authorized agent under a durable power of attorney from priority number three under the statute to priority number one,<sup>62</sup> and (ii) eliminate the need for a provider of treatment to make a reasonable inquiry to determine if action authorized by a surrogate would be protested by the patient.<sup>63</sup>

This section of the Code was also the subject of a 1990 Attorney General's opinion which concluded that a surrogate decision maker "is authorized to consent to the withholding or withdrawal of medical treatment, including nutrition and hydration, from an individual in a persistent vegetative state or irreversible coma, provided all statutory requirements of § 37.1-134.4 are met."<sup>64</sup>

#### O. *Natural Death Act — Persistent Vegetative State — Nutrition and Hydration — Statutory Form*

Section 54.1-2982 of the Code, the definitional section of Virginia's Natural Death Act, is amended to change (A) the definition of "terminal condition" by (i) replacing "medical certainty" with "medical probability," (ii) including "persistent vegetative state," and (iii) providing a definition for this latter term;<sup>65</sup> and (B) the

---

60. *Id.*

61. For background and discussion, see Johnson, *Wills, Trusts, and Estates: Annual Review of Virginia Law*, 23 U. RICH. L. REV. 859, 862-63 (1989).

62. VA. CODE ANN. § 37.1-134.4(B) (Cum. Supp. 1991).

63. *Id.* at § 37.1-134.4(D).

64. 1990 Op. Va. Att'y Gen. 205 (Sept. 18, 1990).

65. The complete definition now reads:

'Terminal condition' means a condition caused by injury, disease or illness from which, to a reasonable degree of medical probability, (i) there can be no recovery and (ii) death is imminent. The term also means a persistent vegetative state, in which a qualified patient has suffered a loss of consciousness, with no behavioral evidence of self-awareness or awareness of surroundings in a learned manner, other than reflex activity of muscles and nerves for low level conditioned response and from which, to a

definition of "life-prolonging procedure" by adding a sentence reading "[t]he term includes nutrition and hydration." Section 54.1-2984 of the Code, dealing with the suggested forms<sup>66</sup> of written declaration, is also amended (i) to eliminate certain language from both forms,<sup>67</sup> and (ii) to provide that "[t]he declarant may also include a statement directing any specific procedure or treatment to be provided, such as hydration and nutrition."

These amendments were obviously prompted by the increased public attention to living wills as a result of the United States Supreme Court decision in *Cruzan v. Director Missouri Department of Health*<sup>68</sup> and by a related Opinion of the Attorney General of Virginia.<sup>69</sup> The net effect of these amendments is to authorize the withholding or withdrawal of artificially supplied nutrition and hydration for persons in a persistent vegetative state, or an irreversible coma,<sup>70</sup> unless the patient has made an affirmation to the contrary. These amendments specifically apply to previously existing declarations.<sup>71</sup>

---

reasonable degree of medical probability, there can be no recovery.

VA. CODE ANN. § 54.1-2982 (Cum. Supp. 1991).

66. *Id.* § 54.1-2984 (Repl. Vol. 1991) provides a form for a person to make a decision, and another form for a person to appoint an agent to make a decision on the person's behalf.

67. The second paragraph of both the declaration and the agency form had provided in part as follows: "If at any time I should have a terminal condition [*and my attending physician has determined that there can be no recovery from such condition, my death is imminent*], . . ." In the 1991 version, the italicized language in brackets has been eliminated.

68. 110 S. Ct. 2841 (1990).

69. The Attorney General opined that a declaration under Virginia's Natural Death Act would not authorize the withdrawal of artificially supplied nutrition and hydration from a person in a persistent vegetative state or an irreversible coma unless the patient "has been certified in writing by his or her physician to be in a terminal condition." As terminal condition was defined at that time to require that the patient's death be "imminent," this requirement practically eliminated the possibility of any action in the case of a patient in a persistent vegetative state or irreversible coma. 1990 Op. Va. Att'y Gen. at 208.

70. The term "irreversible coma" is not included within the language of the statutory definition of "terminal condition" found in § 54.1-2982 of the Code, and this term does not have a precise meaning in the medical-legal community. See VA. CODE ANN. § 54.1-2982 (Repl. Vol. 1991). However, as this term may be most frequently used by the consumer and professional alike to mean a permanent loss of all consciousness, it would appear to be included within the statutory definition of "persistent vegetative state." This definition is found in *supra* note 65. The term "irreversible coma" would also seem to encompass the patient's condition in *Hazelton v. Powhatan Nursing Home, Inc.*, 6 Va. Cir. 414 (County of Fairfax Cir. Ct. 1986).

71. "The provisions of this act shall apply to any declaration executed pursuant to § 54.1-2983 without regard to the date on which it was executed." Act of Mar. 25, 1991, ch. 583, 1991 Va. Acts 1043, 1044, cl. 2.

## III. 1990-91 JUDICIAL DECISIONS

A. *Inter Vivos Gifts — Delivery*

In *Young v. Young*,<sup>72</sup> a father directed his sister, who held the bulk of his stock in his corporation in a trust for him, to transfer some of his stock to his daughters on six occasions over a five year period. Although new stock certificates were issued in the daughters' names on each occasion, and the corporate stock transfer ledger reflected their ownership, the daughters were only aware of the first transfer and this stock was the only stock actually delivered to them. On the other five occasions, without the daughters' knowledge or consent, the father signed the daughters' names in the stock transfer ledger, followed by the notation "[father] Atty.," to evidence their receipt.<sup>73</sup>

Although the corporate records and the certificates in the daughters' names are prima facie evidence of their ownership, the court determined that this evidence " 'possesses no such magic or sacredness as to prevent an inquiry into the facts.' "<sup>74</sup> Delivery and acceptance are common law requirements for an inter vivos gift. These requirements are not eliminated by the statutes relating to security transfers;<sup>75</sup> indeed these statutes further condition an effective transfer of securities upon the transferee (or the transferee's designee) acquiring possession thereof. The court held that "[b]ecause the disputed securities were never delivered to the daughters nor to anyone designated by the daughters to receive them, no *inter vivos* gift was ever made."<sup>76</sup>

B. *Causa Mortis Gift — Delivery*

Fourteen years before his death, the donor in *Brown v. Metz*<sup>77</sup> delivered a key to his safe deposit box to a donee. The donee testified<sup>78</sup> that, shortly prior to the donor's death, the donor told him

---

72. 240 Va. 57, 393 S.E.2d 398 (1990).

73. *Id.* at 60, 393 S.E.2d at 399.

74. *Id.* at 62, 393 S.E.2d at 400 (quoting *Swan v. Swan's Ex'r*, 136 Va. 496, 519, 117 S.E. 858, 865 (1923)).

75. The court's decision also dealt with the effectiveness of the alleged gift from the standpoint of the requirements for the transfer of securities under the Virginia Uniform Commercial Code, VA. CODE ANN. § 8.1-201(32) (Cum. Supp. 1991); *Id.* §§ 8.8-102, -309, -313 (Added Vol. 1965).

76. 240 Va. at 64, 393 S.E.2d at 401 (1990) (emphasis in original).

77. 240 Va. 127, 393 S.E.2d 402 (1990).

78. It was contended that the donee's testimony was insufficient to sustain the alleged gift

to “‘empty the contents of the box and give to [Brown] what has her name on it, and the rest was to be for my use and my family use.’”<sup>79</sup> The donee further testified that on the day following his removal of the box’s contents he informed the donor of this fact and the donor replied “‘Good.’”<sup>80</sup>

The court rejected the contention that, to make a valid delivery under these circumstances, the donee had to actually place the gifted property in the donor’s hands in order that donor might then make a manual delivery thereof to the donee. “[W]e have not retreated to such a formalistic approach and refuse to do so here. Delivery occurred when the donee, at the donor’s instruction, removed the bonds from the donor’s custody and exercised dominion and control over them.”<sup>81</sup>

### C. *Inter Vivos Gifts — Questions of Fact*

In *Stone v. Alley*,<sup>82</sup> the trial court’s grant of summary judgment for plaintiff was held to be erroneous because of three material questions of fact in dispute. These questions were (i) the existence of donative intent, (ii) whether Paine Webber Company was a “financial institution” within the meaning of that term in section 6.1-125.3(A) of the Code, and (iii) whether Paine Webber securities held as joint tenants with the right of survivorship are an “account” within the meaning of that term in section 6.1-125.3(A) of the Code.<sup>83</sup>

### D. *Holographic Will — Disinterested Witnesses*

*Bowers v. Huddleston*<sup>84</sup> arose out of an attempt to probate a holographic will which, among other matters, required the testimony of two disinterested witnesses that the putative will was wholly in

---

without corroboration under the deadman’s statute (VA. CODE ANN. § 8.01-397). The court concluded that this rule was not applicable because the donee’s testimony was given when he was called as an adverse witness and was not inherently improbable or contradicted. 240 Va. at 131-32, 393 S.E.2d at 404 (citing *Balderson v. Robertson*, 203 Va. 484, 488, 125 S.E.2d 180, 184 (1962).

79. *Id.* at 129, 393 S.E.2d at 403.

80. *Id.*

81. *Id.* at 131-32, 393 S.E.2d at 404.

82. 240 Va. 162, 392 S.E.2d 486 (1990).

83. *Id.* at 163, 392 S.E.2d at 486.

84. 241 Va. 83, 399 S.E.2d 811 (1991).



the testator's handwriting.<sup>85</sup> One of the persons who testified clearly qualified as a disinterested witness. The court held that in regard to the other person, "[t]he specific question is whether an expert's testimony, comparing the will with exemplars of the testator's handwriting, is sufficient without proof, by a disinterested witness, that the exemplars were themselves in the testator's handwriting. The chancellor held such testimony insufficient, and we agree."<sup>86</sup>

### E. Will Construction — Life Tenant's Income Right

The primary issue in *Sturgis v. Stinson*<sup>87</sup> was the life tenant's rights to income when an asset with a fair market value of \$1,500,000.00, comprising 75% of trust corpus, yielded a net income of only \$1,265.99. In a five to two decision, the court noted that "[w]e have not previously addressed the duty of a fiduciary regarding the level of productivity of trust assets in circumstances where there are successive beneficiaries and no explicit instruction by the testator concerning that duty."<sup>88</sup> To help decide this issue, the court adopted<sup>89</sup> several general principles set out in the Restatement of Trusts.<sup>90</sup> The majority concluded that these principles "define a trustee's obligations under the 'prudent man rule'<sup>91</sup> regarding productivity of trust assets,"<sup>92</sup> and remanded the case to the trial court for further proceedings consistent therewith. On a secondary issue, the majority further concluded that the principles relating to delayed income<sup>93</sup> "are also applicable here"<sup>94</sup> and

---

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

86. *Bowers*, 241 Va. at 84, 399 S.E.2d at 812.

87. 241 Va. 531, 404 S.E.2d 56 (1991).

88. *Id.* at 538, 404 S.E.2d at 60.

89. *Id.* at 538, 404 S.E.2d at 60.

90. The first principle provides as follows: "The trustee is under a duty to the beneficiary to use reasonable care and skill to make the trust property productive." RESTATEMENT (SECOND) OF TRUSTS § 181 (1959). The second principle provides as follows:

Unless it is otherwise provided by the terms of the trust, if property held in trust to pay the income to a beneficiary for a designated period and thereafter to pay the principal to another beneficiary produces no income or an income substantially less than the current rate of return on trust investments, and is likely to continue unproductive or under-productive, the trustee is under a duty to the beneficiary entitled to the income to sell such property within a reasonable time.

RESTATEMENT (SECOND) TRUSTS § 240 (1959).

91. For the prudent man rule see VA. CODE ANN. § 26-45.1 (Repl. Vol. 1985).

92. 241 Va. at 538, 404 S.E.2d at 60.

93. The principles of delayed income referred to by the court, found in Virginia's Uniform Principle and Income Act were (i) the provision entitling the income beneficiary to share in

should also be considered on remand.

#### F. *Separation Agreement — Impact on Will Provisions*

In *Blunt v. Lentz*,<sup>95</sup> a wife neglected to revoke her will in favor of her husband following their separation. Upon the wife's death the children claimed that the husband had waived his right to take under the wife's will in their separation agreement, and thus the children were her successors in interest. Although the separation agreement contained general language whereby the husband and wife released each other from all claims and demands arising from their relationship as husband and wife, "[n]othing in the agreement affects the husband's capacity to inherit as a beneficiary of the wife's will."<sup>96</sup> Accordingly, the trial court decision in favor of the children was reversed.

#### G. *Legitimacy — Artificial Insemination*

Prior to the 1978 revision of children's inheritance rights,<sup>97</sup> the intestate succession provisions of the Code contained three sections dealing with the legitimation of children. As a part of the 1978 revision, former section 64.1-6 of the Code (dealing with legitimation by marriage and recognition) and former section 64.1-7 of the Code (dealing with legitimation of issue born of illegal, void or dissolved marriages) were somewhat rewritten, combined into a new section, and relocated to the domestic relations title of the Code.<sup>98</sup> However, left untouched in the 1978 revision was section

---

delayed income during the period of delay, from § 55-263(1), (ii) the definition of delayed income, from § 55-263(2), and (iii) the calculation of the period of delay, from § 55-263(3). *Id.* at 539, 404 S.E.2d at 60-61 (citing VA. CODE ANN. §§ 55-253 to -268. (Repl. Vol. 1986)).

94. *Id.* at 539, 404 S.E.2d at 61.

95. 241 Va. 547, 404 S.E.2d 62 (1991).

96. *Id.* at 551, 404 S.E.2d at 64-65. The court goes on to note that it has repeatedly stated:

It is the function of the court to construe the contract made by the parties, not to make a contract for them. The question for the court is what did the parties agree to as evidenced by their contract. The guiding light in the construction of a contract is the intention of the parties as expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares.

*Id.* at 552, 404 S.E.2d at 65 (quoting *Great Falls Hardware v. South Lakes Village Center*, 238 Va. 123, 125-26, 380 S.E.2d 642, 643-44 (1989)) (emphasis in original).

97. For background and discussion, see Johnson, *supra* note 3.

98. This was accomplished as a part of 1978 General Assembly action. The new combined section, provides as follows:

64.1-7.1 of the Code, which provided as follows:

Any child born to a married woman, which was conceived by means of artificial insemination performed by a licensed physician at the request of and with the consent in writing of such woman and her husband shall be presumed, *for all purposes* the legitimate natural child of such woman and such husband the same as a natural child not conceived by means of artificial insemination.<sup>99</sup>

This statute was poorly misconstrued in *Welborn v. Commonwealth*,<sup>100</sup> where the court stated “[t]he sole issue is whether a man by proceeding in accordance with Code § 63.1-221 may adopt a child born to his wife by artificial insemination with a third party donor’s sperm.”<sup>101</sup> First, the court twice referred to section 64.1-7.1 as relating only to inheritance matters,<sup>102</sup> notwithstanding its historical context, and its express language of “for all purposes.” Secondly, the court stated twice that section 64.1-7.1 of the Code “merely establishes a presumption,”<sup>103</sup> that “a presumption may be rebutted when facts to the contrary are established,”<sup>104</sup> and that “our statutes<sup>105</sup> on the subject of artificial insemination are not so ambiguous that we could construe them as providing protections [against any claims by the sperm donor].”<sup>106</sup>

Some response needs to be made to these latter statements. Recourse to Black’s Law Dictionary indicates that the word “pre-

---

If a person, having had a child, shall afterwards intermarry with the mother or father, such child if recognized by both of them, as their own child, jointly or separately, before or after marriage, shall be deemed legitimate.

The issue of marriages prohibited by law, deemed null or void or dissolved by a court shall nevertheless be legitimate.

VA. CODE ANN. § 20-31.1 (Repl. Vol. 1990).

99. VA. CODE ANN. § 64.1-7.1 (Repl. Vol. 1987) (amended 1991)(emphasis added).

100. 10 Va. App. 631, 394 S.E.2d 732 (1990).

101. *Id.* at 632, 394 S.E.2d at 733.

102. *Id.* at 632, 394 S.E.2d at 733-34.

103. *Id.* at 633-34, 394 S.E.2d at 733.

104. *Id.* at 634, 394 S.E.2d at 733.

105. The other statute before the court provided in part as follows: “A child born of a married woman, who conceived the child by means of artificial insemination with consent of her husband, *shall be deemed* legitimate and the birth certificate of such child shall contain full information concerning the mother’s husband as the father of the child.” *Id.* at 633, 394 S.E.2d at 733 (quoting VA. CODE ANN. § 32.1-257(D) (Repl. Vol. 1985) (emphasis added). This section was amended by the 1991 session. For a discussion of the amendments, see Shepherd, *Legal Issues Involving Children: Annual Survey of Virginia Law*, 25 U. RICH. L. REV. 773 (1991).

106. *Welborn*, 10 Va. App. at 635, 394 S.E.2d at 734.

sumption" has a number of possible meanings and thus, standing alone, is inherently ambiguous. One possible meaning is "nonrebuttable;" a fair synonym for "deemed." As the language corresponding to the "*shall be presumed*" of section 64.1-7.1 of the Code is "*shall be deemed*" in pari materia section 32.1-257(D),<sup>107</sup> this gives particularly strong support for the ambiguous word "presumption" in section 64.1-7.1 to be resolved as "nonrebuttable" or "deemed." Moreover, the assertion that the legislature intended a rebuttable presumption defies all logic because in many, if not a majority, of the cases it is a given that the sperm is not that of the mother's husband.<sup>108</sup> Surely it could not have been the intention of this section to create a rebuttable presumption that the mother's husband is the father in cases where it is an admitted fact that he cannot be. Finally, from a policy standpoint, a "non-rebuttable" construction would extend protection to numerous families who, in the light of a "rebuttable" construction, may be compelled to submit to the inconvenience and expense of adoption proceedings in order to guarantee their status.

Fortunately, the 1991 session of the legislature has amended section 64.1-7.1 to eliminate the negative impact of this case not only for the future but, by providing that this amendment is "declaratory of existing law," for the past as well.<sup>109</sup>

#### IV. CONCLUSION

The 1991 session saw the introduction of several actions affecting the area of wills, trusts, and estates law. An effort to repeal the augmented estate section of the Code failed. Many other efforts, as revealed in this article, succeeded.

---

107. This statute deals with the issuance of birth certificates in cases where children are conceived by artificial insemination. See the emphasized words in this statute, partially quoted in *supra* note 105.

108. In some cases it is his sperm and other cases it is a combination of his and a donor's sperm.

109. VA. CODE ANN. § 64.7-7.1 (Repl. Vol. 1991).

