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Recent Legislation

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RECENT LEGISLATION

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The 1972 session of the General Assembly was especially active in the areas of wills, trusts, and estates. Much of this legislation deals with fine points not affecting the average lawyer in his practice. However, the following items of legislation should be of general interest to the attorney whose practice involves probate work or estate planning, even though he does not hold himself out as a specialist in these areas.

THE DISCLAIMER ACT

First, one should note a very valuable post-mortem estate planning tool now available—the Disclaimer Act, which will appear as Sections 64.1-188 through 64.1-196 of the Code. Though this act is technical, mastery of it will not require an inordinate amount of time, and potential benefits can accrue in the form of substantial gift tax savings. Although the federal estate and gift taxes are excise taxes imposed on the transfer of property, one can now, in certain cases, make what for all practical purposes is a transfer of property but which will not be construed as a "transfer" for federal estate or gift tax purposes. The key language, found in Internal Revenue Regulation 25.2511-1(c), provides:

> [w]here the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent, a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time.

Presently, the law in every state permits a beneficiary under a will to renounce his gift. However, the common law did not recognize the possibility of renouncing an intestate share in a decedent's estate, since the inheritance was seen to vest by operation of law immediately upon the death of the ancestor. Thus a purported "renunciation" would take effect as a transfer from the one renouncing to the ultimate taker. While this two-stage transfer has caused no real problems in the actual passage of the property, it has resulted in the payment of an extra tax. This problem is now a matter of

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history because the Act provides for renunciation of testate, intestate, and inter vivos gifts.

How can one make practical use of the Disclaimer Act? First, one should note that the Act takes the lapse approach, treating a disclaimer as if the disclaimant had predeceased the decedent. Thus, in cases of intestacy the ultimate takers will be determined by general intestate succession law, Code § 64.1-1. In testate cases, one would look first to any controlling provision in the will, then the anti-lapse statute, Code § 64.1-65, then the residuary clause, and finally back to Code § 64.1-1.

Case 1. Suppose a beneficiary decides that he has no need for a bequest and gives it to his children. He has made a taxable gift, and should he die within three years thereafter it will be presumed to have been a gift in contemplation of death, includible in his gross estate for estate tax purposes unless the presumption can be rebutted. If, instead of accepting the bequest and giving it to his children, he disclaims it, the bequest would pass to his issue as intended with no possible gift or estate tax consequences on his part. Similarly, if there should be an inheritance instead of a bequest, the disclaimed inheritance would pass to the disclaimant's descendants with no tax consequences on his part.

Case 2. Suppose that a husband, mindful of his obligation to his wife, and desiring to aid his alma mater, leaves half of his adjusted gross estate to his wife outright, gives her a life estate in the other half, and leaves the remainder to the school on her death. The husband's estate will not pay any tax on the half given outright to the wife because of the marital deduction, but it will pay a tax in connection with the other half. However, due to the altered circumstances existing at the time of the husband's death (age of the wife, size of estate, etc.), perhaps the wife does not need the life estate in the second half. If she disclaims the life estate, then the entire second half will go to charity and no taxes will be payable by the husband's estate.

Case 3. The husband dies intestate survived by his wife and two adult children who have no children. Assume that the husband leaves a $300,000 estate equally consisting of realty and personalty, and that his wife is 60 years old at his death. The wife will receive one-third of the personalty and dower in the realty. This is substantially less than the maximum marital deduction. However the two adult children can disclaim a part of their inheritance, which will then pass to the deceased's wife, with a consequent swelling of the marital deduction and lowering of the tax burden on the estate by approximately $22,500. Were the estate half this size, the estate tax savings would remain in excess of $6,500.

While space limitations prevent a discussion of the many possible uses of this act, one should realize that it permits the personal representative of a decedent to disclaim, and that it requires that the disclaimer be made within ten months of death (delivery in inter vivos cases), or vesting, if that be later. Draftsmen of spendthrift trusts should be aware of one caveat. As the beneficiary of a spendthrift provision expressly has the right to disclaim, one must provide for some kind of gift over on disclaiming to prevent the spendthrift beneficiary from defeating the intention of the transferor.

UNIFORM GIFT TO MINORS ACT

Many attorneys often provide for contingent trusts in wills when in fact they do not desire to do so. For instance, assume a young married couple with several children and an estate of $20,000. They want a typical disposition—all to the surviving spouse then all to the children. What happens if both parents die before the children attain the age of majority? Who will manage the children's property for them? If no provision has been made, the court will appoint a guardian, the worst possible manner in most cases to manage a minor's property. Thus, one has no alternative but to provide a contingent testamentary trust for the minor children. While this is preferable to a guardianship, it can involve annual accountings, filing of fiduciary tax returns, court approval of termination, possible construction proceedings, fiduciary bonds, and the unlimited throwback rule of the Tax Reform Act of 1969. Although the expense of these incidents isn't grossly oppressive, relative to a large trust, such fixed expenses can be extremely burdensome to a small trust, because they consume a disproportionate amount of the income.

Code § 31-27(d), an addition to the Uniform Gift to Minors Act (UGMA), gives relief by providing that a testator or settlor may authorize his fiduciary to make distribution for a minor to a custodian for the minor under the UGMA. The custodian will have sufficient discretion and flexibility under the UGMA to make whatever distributions are desirable for the benefit of the children during their minority, and the trust expenses mentioned above could be eliminated, leaving more funds to be used for the children's benefit. Appropriately, one should note here that while an infant attains his majority at age 18 for most purposes, he attains it at 21 for purposes of the UGMA.

INCORPORATION BY REFERENCE

In drafting a will or trust agreement, one must enumerate certain powers that he wishes his fiduciary to have. Increasingly, lawyers in Virginia are working with Code § 64.1-57 which provides for the incorporation by reference of certain powers of fiduciaries into wills or trust instruments. This section contains nineteen clauses of well-designed boilerplate waiting for incorporation. Paragraph (p) of this section has been amended by the addition of new sub-paragraph (4) that empowers the fiduciary to distribute to a minor under the UGMA. Thus it is possible to use the UGMA directly as previously mentioned, or indirectly by incorporating the statutory boilerplate that gives the fiduciary the discretion to make this form of distribution should he think it advisable.

Code § 64.1-57 has been amended also by the addition of a new paragraph (c)(1) that gives the fiduciary discretion to invest the assets in mutual funds or investment trusts, and permits him to change investments from realty to personalty and vice versa.

A final amendment to Code § 64.1-57, expressly stated to be declaratory of existing law, provides that the section may be made applicable to decedent's estates as well as trusts.

SELF-PROVING WILL

One familiar incident of probating a will is locating the attesting witnesses and arranging for them to accompany the executor to the clerk's office to prove the will. This time-consuming and cumbersome ritual can be avoided now by utilizing Code § 64.1-87.1, which provides for a self-proving will. This section sets out the form of an affidavit that contains the facts that the witnesses would be required to testify to in court to prove the will. If the testator acknowledges his will and the witnesses execute this affidavit, all before an official authorized to administer oaths, either at the time the will is executed or later, then the witnesses' statement "shall be accepted by the court as if it had been taken ore tenus before such court."

TOTTEN TRUSTS

Code § 6.1-73, a new section, authorizes any bank or trust company to pay out deposits made in trust form to the named beneficiary on the death of the trustee, without the intervention of a guardian if (1) the institution has no notice of the trust terms, (2) the deposit doesn't exceed $5,000, and (3) the beneficiary is 18 years of age or older. Those desiring to place more than $5,000 in a Totten Trust may utilize the rather obvious expedient of multiple accounts, or may establish an account in a savings and loan association, because existing Code § 6.1-149 doesn't contain any maximum balance limitation.

AGE OF MAJORITY

Code § 1-13.42(b), which best summarizes the net effect of the age of majority legislation, provides:

> [f]or the purposes of all laws of the Commonwealth including com-

> mon law, case law and statutory law, unless an exception is specifically provided in this Code, a person shall be an adult, shall be of full age and shall reach the age of majority when he becomes eighteen years of age.

As previously noted, twenty-one remains the age of majority for purposes of the Uniform Gift to Minors Act which contains its own definitions of "adult" and "minor."

SMALL FUNDS STATUTE

Code § 6.1-71, authorizing a bank or trust company to pay to the next of kin the balance a decedent had on hand at his death provided (1) 120 days have elapsed since the time of death, (2) no qualification is had on the estate, and (3) the balance in the account is $1,000 or less, has been amended to increase the amount to $2,500. A corresponding change in Code § 6.1-153 renders the same result for accounts in savings and loan associations.

MISCELLANEOUS

The filing deadline for the Virginia inheritance tax return is changed from four to nine months after the decedent's death. Code § 58-166. The time for payment of inheritance taxes is changed from twelve to nine months after the decedent's death. Code § 58-176.

The statement in lieu of settlement of accounts by a personal representative who is the sole distributee or sole beneficiary is enlarged to cover those cases where there are two personal representatives who are the only distributees or beneficiaries. Code § 26-20.1.

Stepchildren are now included in Class A for gift tax purposes. Code § 58-219.

Page two of the form required for reporting inventories to the commissioners of accounts, dealing with "other property of the estate of which the fiduciary has knowledge," has been deleted. Code § 26-12.1.