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

J. Rodney Johnson  
*University of Richmond*

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# WILLS, TRUSTS, AND ESTATES

*J. Rodney Johnson\**

## I. INTRODUCTION

The 1992 session of the General Assembly enacted legislation dealing with wills, trusts, and estates that added, amended, or repealed a number of sections of the Code of Virginia (the Code).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, in the year ending June 1, 1992, there were five cases from the Supreme Court of Virginia and two from the Fourth Circuit Court of Appeals 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. 1992 LEGISLATION

### A. *Augmented Estate*

The 1990 session of the General Assembly abolished the interests of dower and curtesy in realty and the surviving spouse's forced statutory share in personalty, effective January 1, 1991, and replaced them with a surviving spouse's elective right in an augmented estate composed of realty and personalty.<sup>2</sup> Following a year of silence, the 1992 legislation makes a number of clarifying and substantive amendments to the original that are intended to make this a better law, as well as one that is easier to understand

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\* Professor of Law, 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 1992 supplement for the new sections.

2. Act of Apr. 9, 1990, ch. 831, 1990 Va. Acts 1354 (codified as amended at scattered sections of VA. CODE. ANN.). An excellent analysis of this comprehensive legislation will be found in J. William Gray, Jr., *Virginia's Augmented Estate System: An Overview*, 24 U. RICH. L. REV. 513 (1990). For background, see J. Rodney Johnson, *Abolition of Dower in Virginia: The Uniform Probate Code as an Alternative to Proposed Legislation*, 7 U. RICH. L. REV. 99 (1972); and J. Rodney Johnson, *Interspousal Property Rights at Death*, VA. B. ASS'N J., Summer 1984, at 10.

and apply. Instead of attempting to present these amendments in any priority order, they are considered in the order that they appear in the Code.

## 1. The Probate Estate

The original opening sentence of section 64.1-16.1 begins a lengthy definition by stating "[t]he augmented estate means the estate, real and personal, . . . ."<sup>3</sup> The use of the unmodified word "estate" at this point caused some lawyers to worry about the potential for double inclusion of some assets in the computation of the augmented estate. This concern was caused by certain language found in the closing sentence of this section giving further definition to the word estate.<sup>4</sup> By way of illustration, it was noted that life insurance payable to a third party clearly would be included in the decedent's augmented estate by section 64.1-16.1(3)(b),<sup>5</sup> and perhaps also by the word "estate," in this section's opening sentence.<sup>6</sup> The inclusion in the latter case would be due to the definition of the word "estate" in the section's last sentence, i.e., "the terms 'estate' and 'property' shall include insurance policies. . . ."<sup>7</sup> Although such a possibility would appear to be quite remote, it is completely eliminated by a 1992 amendment that causes the opening sentence to now read "[t]he augmented estate means the estate *passing by testate or intestate succession*, real and personal, . . . ."<sup>8</sup> The additional words added by this amendment clarify that the word "estate" is being used in the section's opening sentence to identify what is customarily thought of as the "probate estate." This clarification will preclude any pickup of life insurance or any of the other items enumerated in the section's closing sentence that are payable to third parties.

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3. VA. CODE ANN. § 64.1-16.1 (Repl. Vol. 1991) (emphasis added).

4. The last sentence of VA. CODE ANN. § 64.1-16.1 reads as follows:

As used in this section the terms "estate" and "property" shall include insurance policies, retirement benefits exclusive of federal social security benefits, annuities, pension plans, deferred compensation arrangements, and employee benefit plans to the extent owned by, vested in, or subject to the control of the decedent on the date of his death or the date of an irrevocable transfer by him during his lifetime.

*Id.*

5. Section 64.1-16.1(3)(b) brings property transfers over which the transferor retains a right of revocation into the augmented estate. *Id.* § 64.1-16.1(3)(b).

6. VA. CODE ANN. § 64.1-16.1 (Repl. Vol. 1991).

7. *Id.*

8. Acts of Apr. 3, 1992, chs. 617 & 647, 1992 Va. Acts 897, 953 (codified at VA. CODE ANN. § 64.1-16.1 (Cum. Supp. 1992)) (emphasis added).

## 2. Death Taxes

As originally written, the lengthy definition of the augmented estate that begins in the opening sentence of section 64.1-16.1 provided for a deduction of all "charges of administration" of a decedent's estate.<sup>9</sup> However, the statute made no express statement concerning the inclusion or exclusion of death taxes in charges of administration because it was believed they were already excluded by Virginia's estate and inheritance tax apportionment rules.<sup>10</sup> However, a 1990 decision by a three-judge panel of the Fourth Circuit Court of Appeals cast some doubt on this assumption and, although this panel decision was later reversed by the full court,<sup>11</sup> this experience suggested that a legislative response was desirable. To this end, a 1992 amendment makes this portion of the definition now read "charges of administration *which shall not include federal or state transfer taxes. . . .*"<sup>12</sup> This amendment, combined with the death tax apportionment rules, will prevent the property passing to the surviving spouse from being reduced by any federal or state death taxes to the extent that the property qualifies for the federal estate tax marital deduction. It should also be noted that, although this discussion has focused upon death taxes only, the amending language is given broader scope by its use of the term "transfer taxes."<sup>13</sup> This broader term includes not only traditional death taxes but also generation-skipping transfer taxes as well.<sup>14</sup>

## 3. Spousal Transfers

Paragraphs 1 and 2 of section 64.1-16.1, which bring certain spousal transfers into the computation of the augmented estate, both include "[t]he value of property, other than tangible personal

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9. VA. CODE ANN. § 64.1-16.1 (Repl. Vol. 1991).

10. See *id.*, which provides in part that, in making the proration of death taxes among persons interested in a decedent's estate, "each such person shall have the benefit of any exemptions, deductions and exclusions allowed by such law in respect of such person or the property passing to him. . . ." *Id.*

11. *Estate of Reno v. Commissioner*, 916 F.2d 955 (4th Cir. 1990), *rev'd*, 945 F.2d 733 (4th Cir. 1991) (en banc). This case is discussed *infra* at notes 153-56 and accompanying text.

12. VA. CODE ANN. § 64.1-16.1 (Cum. Supp. 1992)(emphasis added).

13. See *id.*

14. The federal generation-skipping transfer tax is found at I.R.C. §§ 2601-2663 (West 1988). The Virginia generation skipping transfer tax is found at VA. CODE ANN. §§ 58.1-935 to -938 (Repl. Vol. 1991).

property.”<sup>15</sup> The express exclusion of tangible personal property was designed to eliminate the need for the surviving spouse to account for typical spousal gifts that might be made on the occasion of a birthday, anniversary or religious holiday, which ordinarily would not be economically significant.<sup>16</sup> The quoted language has given rise to the three following questions: (1) Is a gift of realty that is subsequently exchanged for tangible personalty that is owned at death excluded? (2) What about the reverse? (3) What about proceeds? These questions are answered by a 1992 amendment that changes the quoted language to now read: “[t]he value of property, other than tangible personal property *received by gift and the proceeds thereof . . .*.”<sup>17</sup> This amendment provides a specific answer to the question concerning proceeds. It also insures that the inclusion/exclusion decision will be based upon the character of the property at the time of the gift and will not be affected by subsequent exchanges.

Paragraphs 1 and 2 of section 64.1-16.1 appeared as a single paragraph in the Uniform Probate Code provision from which they were taken.<sup>18</sup> When this single paragraph was divided in the Virginia version, the drafters failed to include some of the qualifying language from the original into both of the new paragraphs.<sup>19</sup> To remedy this problem, a 1992 amendment adds the language “without a full consideration in money or money’s worth” to paragraph 2.<sup>20</sup> This amendment gives expression to the original intent that only gifts are to be brought back into the computation of the augmented estate.<sup>21</sup>

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15. VA. CODE ANN. § 64.1-16.1 (Repl. Vol. 1991).

16. Though this was the intent of the exception, the language thereof admits of no such restriction. Thus the potential consequences attached to gifts of tangible personal property such as jewelry, artwork, and automobiles, when contrasted with gifts of such as cash, securities, and real estate, is not to be ignored.

17. VA. CODE ANN. § 64.1-16.1 (Cum. Supp. 1992).

18. PRE-1990 UNIF. PROB. CODE § 2-202(2), 8 U.L.A. 76 (1983).

19. Section 64.1-16.1 did not include the words “without a full consideration in money or money’s worth.” Compare VA. CODE ANN. § 54.1-16.1(1), (2) (Repl. Vol. 1991) with PRE-1990 UNIF. PROB. CODE § 2-202(2), 8 U.L.A. 76 (1983).

20. VA. CODE ANN. § 64.1-16.1(2)(Cum. Supp. 1992).

21. See *id.* § 64.1-16.1 (Repl. Vol. 1991).

#### 4. The Pull-Back

The goal of section 64.1-16.1(3) is to include certain inter vivos gifts of the decedent in the computation of the augmented estate.<sup>22</sup> The specific goal of this provision's subparagraph (d) is to bring back certain outright transfers,<sup>23</sup> as contrasted with transfers in which the decedent retained some control or connection, which are the subject of subparagraphs (a), (b), and (c).<sup>24</sup> As the former law of dower and curtesy had applied to transfers of real estate that were made at any time during the marriage to the surviving spouse, so also the primary focus of the original pull-back provision of subparagraph (d) was upon outright gifts of realty or personalty made at any time during the marriage.<sup>25</sup> Opponents of this unlimited pull-back claimed it was unworkable and would result in confusion in titles to property, notwithstanding the fact that unlimited pull-back was a part of the dower and curtesy laws that "worked" from the founding of the Commonwealth until their repeal in 1991. As introduced, the 1992 amendment would have reduced the scope of the pull-back provision to gifts made during the calendar year of the decedent's death and the two preceding calendar years.<sup>26</sup> Lobbying efforts, emphasizing the ease with which such a severely limited (i.e., two-year) pull-back would enable one to seriously damage the "fair-share" rights of a surviving spouse, resulted in the final version of the pull-back period being the calendar year of the decedent's death and the preceding five calendar years.<sup>27</sup> Although the five-year rule is obviously preferable to the originally proposed two-year rule, it nevertheless represents a significant weakening of the protection originally granted a surviving

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22. *Id.*

23. *See id.* § 64.1-16.1(3)(d).

24. *See id.* § 64.1-16.1(3)(a)-(c).

25. *See id.* § 64.1-16.1(3)(d). Prior to the 1992 amendment, § 64.1-16.1(3)(d) read as follows: "Any transfer made to or for the benefit of a donee to the extent that (i) the transfer was made causa mortis or (ii) the aggregate transfers to any donee exceed \$10,000 in a calendar year." VA. CODE ANN. § 64.1-16.1(3)(d) (Repl. Vol. 1991). The qualifying language, "at any time during the marriage to the surviving spouse," is found in the introductory language of § 64.1-16.1(3) and is applicable to each of its four subparagraphs. *Id.* § 64.1-16.1(3).

26. H.B. 590, Va. Gen. Assembly, (Reg. Sess. 1991) (as introduced); S.B. 137, Va. Gen. Assembly, (Reg. Sess. 1992)(as introduced).

27. Section 64.1-16.1(3)(d) now reads as follows: "Any transfer made to or for the benefit of a donee within the calendar year of the decedent's death or any of the five preceding calendar years to the extent that the aggregate value of the transfers to the donee exceeds \$10,000 in that calendar year." VA. CODE ANN. § 64.1-16.1(3)(d)(Cum. Supp. 1992).

spouse. In effect, this amendment provides a statutorily guaranteed loophole which enables a person to deplete the estate to the detriment of the surviving spouse by making one or a series of significant gifts, unlimited in amount, so long as they are made more than five calendar years before the year of death.

A comparison of the text of original section 64.1-16.1(3)(d)<sup>28</sup> and 1992 section 64.1-16.1(3)(d)<sup>29</sup> discloses a further difference in wording, but not necessarily result, due to the language of another provision. Original section 64.1-16.1(3)(d) expressly provided for the pull-back of every *causa mortis* gift, including those under the \$10,000.00 threshold otherwise applicable to outright gifts.<sup>30</sup> New section 64.1-16.1(3)(d) contains no such language.<sup>31</sup> However, a gift *causa mortis* is by definition a revocable gift<sup>32</sup> and section 64.1-16.1(3)(b) includes in the computation of the augmented estate all revocable gifts made during the marriage.<sup>33</sup> Accordingly, the conclusion that the decedent's *causa mortis* gifts are still included in the computation of the augmented estate appears inescapable.

## 5. Separate Property

In addition to the provisions of section 64.1-16.1 that cause certain property to be included in the computation of a decedent's augmented estate, there is one paragraph that provides for certain property to be excluded from this computation. This unnumbered paragraph, which comes immediately after section 64.1-16.1(3)(d), is divided into three clauses.<sup>34</sup> The original language of clause (ii) provides for the exclusion of "property, its income or proceeds, received by the decedent by gift, will, or intestate succession during

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28. See *supra* note 25.

29. See *supra* note 27.

30. See *supra* note 25.

31. See *supra* note 27.

32. There is a "condition attached by implication of law to every gift *causa mortis* — that it does not take effect absolutely and irrevocably except in case of the death of the donor." *Thomas v. First Nat'l Bank*, 166 Va. 497, 509, 186 S.E. 77, 82-83 (1936) (quoting *Johnson v. Colley*, 101 Va. 414, 418, 44 S.E. 721, 722 (1903)).

33. Section 64.1-16.1(3)(b) reads as follows:

b. Any transfer to the extent that the decedent retained for his life, for any period not ascertainable without reference to his death or for any period which does not in fact end before his death, a power, either alone or in conjunction with any other person, to revoke or to consume, invade, or dispose of the principal for his own benefit;

VA. CODE ANN. § 64.1-16.1(3)(b) (Repl. Vol. 1991 & Cum. Supp. 1992).

34. See *id.* § 64.1-16.1 (Repl. Vol. 1991 & Cum. Supp. 1992).

the marriage to the surviving spouse" so long as it is maintained as separate property.<sup>35</sup> The idea behind this exclusion was that persons who were going to marry could contract however they wished (if they wished) with regard to property they had already inherited; but married persons who inherited property did not enjoy an equivalent bargaining position. A 1992 amendment extends this "separate property" exclusion to such property acquired "*before or during the marriage to the surviving spouse . . .*"<sup>36</sup>

Accordingly, if *H* (who has \$100,000 of previously-inherited property) marries *W* (who has \$100,000 of previously-earned property), *H* will have augmented estate rights in *W*'s \$100,000 but *W* will not have any such rights in *H*'s \$100,000. Query the fairness of such a provision when, in the ordinary case, neither of the parties will have any idea that such a disparity exists. Although one might initially think that this amendment merely parallels a rule already in force in divorce law, it should be noted that the referenced aspect of divorce law is focusing upon a restoration of the status quo in a failed marriage, whereas the augmented estate law is concerned with fairness in a marriage that has continued until its natural termination.

## 6. Third Party Contribution

The concept of recognizing certain property transfers made to third parties as still in the augmented estate raises the obvious issue of the liability of the recipients thereof to make contribution towards the payment of the surviving spouse's share. The original language of section 64.1-16.2(C) makes it clear that the contribution liability being imposed is not a personal liability of the recipient but instead is a property liability because it is limited "to the extent such persons have the property or its proceeds."<sup>37</sup> However, this limiting language does not address the time at which such possession is relevant. It leaves open the further question of whether or not a recipient can avoid liability by consuming or gifting the recoverable property following the decedent's death. A 1992 amendment answers this question in the negative by amending the above quoted language to read "to the extent such persons have

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35. *Id.*

36. *Id.* § 64.1-16.1 (Cum. Supp. 1992) (emphasis added).

37. *Id.* § 64.1-16.2(C)(Repl. Vol. 1991).



the property or its proceeds *on or after the date of the decedent's death*."<sup>38</sup>

Another interpretation problem was raised by the original opening words of section 64.1-16.2(C), which restrict any contribution liability to "original transferees from or appointees of the decedent, and subsequent gratuitous inter vivos donees or persons claiming by testate or intestate succession. . . ."<sup>39</sup> It was uncertain whether this language imposed contribution liability regarding assets in a decedent's estate upon the estate's personal representative or upon each of its beneficiaries. In response to this problem, a 1992 amendment imposes the contribution liability upon "a fiduciary, as to the property under the fiduciary's control at or after the time a fiduciary receives notice that a surviving spouse has claimed an elective share in the decedent's estate."<sup>40</sup> The 1992 amendment clearly imposes contribution liability upon a personal representative of a decedent's estate insofar as the decedent's probate personal property is concerned.<sup>41</sup> But what about the decedent's real estate passing by intestate or testate succession? As a decedent's intestate real estate is not "property under the fiduciary's control,"<sup>42</sup> any contribution liability imposed upon such property must be sought from the heirs. Regarding real estate passing by testate succession, the rule is that "(e)xecutors, by virtue of their office as such, have no power over the real estate. Any power which they have must be conferred by the will itself, either in terms or by implication."<sup>43</sup> Although the testate cases will pose no problem when realty is devised to the executor, or the will directs the sale of the realty, the answer is unclear in other cases. Query: Does the

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38. Acts of Apr. 3, 1992, chs. 617 & 647, 1992 Va. Acts 897, 953 (codified at VA. CODE ANN. § 64.1-16.2 (Cum. Supp. 1992)) (emphasis added).

39. VA. CODE ANN. § 64.1-16.2(C)(Repl. Vol. 1991).

40. *Id.* This amendment continues with another sentence that reads as follows:

A corporate fiduciary shall not be considered to have notice until it receives notice at its address as shown in the decedent's estate papers in the clerk's office or, if there are no such papers or no address is shown therein, at the office of its registered agent.

*Id.*

41. The amendment also determines the identity of the one with the contribution liability when dealing with other fiduciaries such as, for example, the trustee of an inter vivos trust, the custodian under the Virginia Uniform Transfers to Minors Act (VA. CODE ANN. §§ 31-37 to -59 (Cum. Supp. 1992)), and the custodial trustee under the Virginia Uniform Custodial Trust Act (VA. CODE ANN. §§ 55-34.1 to .19 (Cum. Supp. 1992)).

42. VA. CODE ANN. § 64.1-16.2(C) (Cum. Supp. 1992). "An administrator of an intestate decedent has nothing whatever to do with the administration or management of his decedent's real property." BROCKENBROUGH LAMB, VIRGINIA PROBATE PRACTICE § 6 (1957).

43. *Neblett v. Smith*, 142 Va. 840, 855, 128 S.E. 247, 251-52 (1925).

standard will-writing practice of conferring upon the executor a power of sale over the decedent's real estate<sup>44</sup> cause such real estate to be "property under the fiduciary's control"<sup>45</sup> within the meaning of the 1992 amendment quoted above? There is no clear answer. However, it is the normal practice of clerks of court (in determining the amount of bond), commissioners of account (in determining inventory placement and fees), and corporate executors (in determining fees) to take the position that an executor's power of sale over realty brings that realty "under the fiduciary's control," and such will be the argument for purposes of the augmented estate.

There is one final amendment to section 64.1-16.2(C)<sup>46</sup> that further clarifies the contribution liability of third parties. As the original language began by stating that "[o]nly original transferees from or appointees of the decedent, and subsequent gratuitous inter vivos donees or persons claiming by testate or intestate succession are subject to any contribution to make up the elective share of the surviving spouse,"<sup>47</sup> it was clear that no other parties could be liable. However, a concern subsequently arose about the potential ability of an electing surviving spouse's attorney to wrongfully, but effectively, freeze assets held by third party payors by (i) placing them upon notice of the election, and (ii) informing them of an intent to hold them personally liable for payments to a beneficiary who subsequently avoided contribution liability.

To prevent such conduct, and to assure insurance companies, financial institutions, transfer agents, etc., that they may pay or deliver money or property to whomever may be entitled delivery by the terms of their contract without having to worry about claims of wrongful payment because of an election under the augmented estate laws, the final 1992 amendment to section 64.1-16.2(C) clarified the original intent by providing as follows:

No other party is subject to contribution to make up the elective share even though the party makes a payment or transfers an item of property or other benefit to any person with actual knowledge

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44. Conferring a power of sale is sometimes done expressly, but most often by incorporating by reference the boilerplate administrative powers found in VA. CODE ANN. § 64.1-57 (Cum. Supp. 1992).

45. *Id.* § 64.1-16.2(C) (Cum. Supp. 1992).

46. *Id.*

47. VA. CODE ANN. § 64.1-16.2(C) (Repl. Vol. 1991) (emphasis added).

that a surviving spouse has claimed an elective share in the decedent's estate.<sup>48</sup>

## B. *Augmented Estate-Related*

In addition to the foregoing amendments made to the statutes directly comprising the augmented estate, the 1992 General Assembly amended one code section and added three new ones dealing with other matters as well as the augmented estate.

### 1. Spousal Consent

Under the prior law of dower and curtesy, a person's spouse was required to join in any conveyance of the person's real estate, even though it was individually owned, in order to release the spouse's inchoate dower or curtesy claim.<sup>49</sup> When one spouse joined in a deed conveying property owned by the other, section 55-41 provided that the deed would be effective to convey the spouse's inchoate dower or curtesy in the subject real estate but the spouse would not be bound by any warranty or covenant contained in the deed unless expressly stated.<sup>50</sup> This rule is maintained as to deeds delivered prior to the repeal of dower and curtesy on January 1, 1991.<sup>51</sup> As to deeds delivered after December 31, 1990, the 1992 amendment to section 55-41 provides that it will "operate to manifest the spouse's written consent or joinder, as contemplated in § 64.1-16.1 to the transfer embraced therein."<sup>52</sup> The reference to section 64.1-16.1 is to its exclusion provision that reads "[n]othing herein shall cause to be included in the augmented estate (i) the value of any property transferred by the decedent during marriage with the written consent or joinder of the surviving spouse . . . ."<sup>53</sup>

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48. VA. CODE ANN. § 64.1-16.2(C)(Cum. Supp. 1992).

49. *Id.* § 64.1-19 (Repl. Vol. 1987), *repealed by* Act of Apr. 9, 1990, ch. 831, 1990 Va. Acts.

50. *Id.* § 55-41(Cum. Supp. 1992).

51. *See* Acts of Apr. 3, 1992, chs. 617 & 647, 1992 Va. Acts 897, 953 (codified at VA. CODE ANN. § 55-41 (Cum. Supp. 1992)).

52. *Id.*

53. VA. CODE ANN. § 64.1-16.1 (Repl. Vol. 1991 & Cum. Supp. 1992).

## 2. Infant Spouses

Section 55-42.1, a new code section added in 1992, deals with how an infant spouse may release any interests in the other spouse's property.<sup>54</sup> This section, which is of dubious need and equal wisdom, reads as follows:

Notwithstanding the disability of infancy, on or after January 1, 1991, an infant spouse, whether married before or after January 1, 1991, may release his or her marital rights in the other spouse's real or personal property by uniting in any contract, deed, or other instrument executed by the other spouse or by a commissioner of a court pursuant to a decree entered under §§ 8.01-67 through 8.01-77 or any other law with respect to the infant's property.<sup>55</sup>

Sections 16.1-331 to -333 authorize a legal proceeding for the emancipation of any minor who has reached the age of sixteen years in three circumstances, one of which is "the minor has entered into a valid marriage . . . ."<sup>56</sup> A married minor who has been emancipated may enter into a binding contract, buy and sell real property, and execute releases in his own name.<sup>57</sup> Such being the case, and neither the time nor the costs of an emancipation proceeding ordinarily being a material consideration, the primary focus of the new statute appears to be (i) married children under the age of sixteen, and (ii) married children between sixteen and eighteen whom the court might find not competent to manage financial affairs.<sup>58</sup> To grant *carte blanche* to such children, vis-a-vis releasing their augmented estate rights in the event of their spouse's death, and perhaps their equitable distribution rights in the event of a divorce, appears to put a class of unprotected persons at the mercy of those who may be most inclined to take advantage of them.<sup>59</sup>

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54. Acts of Apr. 3, 1992, chs. 617 & 647, 1992 Va. Acts 897, 953 (codified at VA. CODE ANN. § 55-42.1 (Cum. Supp. 1992)).

55. *Id.*

56. VA. CODE ANN. § 16.1-333(i) (Repl. Vol. 1988).

57. *Id.* § 16.1-334(2), (6), & (14) (Cum. Supp. 1992).

58. *Id.* § 55-42.1 (Cum. Supp. 1992).

59. Although the former law of dower and curtesy had a release provision for married infants, that law was placed on the books when the age of majority was twenty-one and when a spouse had to join in all transfers of real estate. See VA. CODE ANN. § 64.1-19 (Repl. Vol. 1987), *repealed by* Act of Apr. 9, 1990, ch. 831, 1990 Va. Acts 1354. Today, however, because of the BFP rule, the spouse only needs to join in estate-depleting gifts to third

### 3. Equitable Separate Estates

Under the prior law of dower and curtesy, a surviving spouse had no entitlement thereto in the equitable separate estate of the other.<sup>60</sup> For this reason, it became customary to automatically insert boilerplate "separate equitable estate" provisions in deeds and wills. With the elimination of dower and curtesy, effective January 1, 1991, such provisions became meaningless. However, the difficulty in proving a negative, coupled with the inadvertent failure to repeal section 55-47<sup>61</sup> in the 1990 legislation, left some lawyers wondering if there might not be some meaning left in these words — at least insofar as pre-January 1, 1991 documents are concerned. In an attempt to put this matter to rest with finality, section 55-47.1 was added in 1992 to provide that

[t]he estate known as the equitable separate estate no longer exists and any language in any writing, whenever executed, which purports to convey real property to a person as an equitable separate estate has no legal or equitable significance after January 1, 1991, except as provided in § 64.1-19.2.<sup>62</sup>

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parties that would operate to the spouse's disadvantage. VA. CODE ANN. §§ 64.1-16.1(3) (Repl. Vol. 1991) (BFP rule); 64.1-16.2(C) (Cum. Supp. 1992).

60. Former § 64.1-21 provided as follows:

A surviving spouse shall not be entitled to dower or curtesy in the equitable separate estate of the deceased spouse if such right thereto has been expressly excluded by the instrument creating the same, or if the instrument, executed heretofore or hereafter, describes the estate as his or her sole and separate equitable estate.

VA. CODE ANN. § 64.1-21 (Repl. Vol. 1987), *repealed* by Act of Apr. 9, 1990, ch. 831, 1990 Va. Acts 1354.

61. VA. CODE ANN. § 55-47 now reads as follows:

Nothing contained in the preceding sections of this chapter shall be construed to prevent the creation of equitable separate estates. They may be created as heretofore and shall be held in all respects according to the provisions of the instrument by which they are created and with all the powers conferred by such instrument.

VA. CODE ANN. § 55-47 (Repl. Vol. 1986).

It should be noted that this section appeared in the Married Women's Property Act, VA. CODE ANN. §§ 55-35 to -47.1 (Repl. Vol. 1986) and, as its reference to separate equitable estates related only to women, it would be unconstitutional as gender-based legislation following the elimination of such estates for men by the 1990 legislation. It was repealed by Acts of Apr. 3, 1992, chs. 617 & 647, 1992 Va. Acts 897, 953.

62. Acts of Apr. 3, 1992, chs. 617 & 647, 1992 Va. Acts 897, 953 (codified at VA. CODE ANN. § 55-47.01 (Cum. Supp. 1992)). The reference to § 64.1-19.2 is to the provision providing for the retention of all laws relating to dower and curtesy insofar as rights thereunder had vested prior to January 1, 1991. VA. CODE ANN. § 64.1-19.2 (Repl. Vol. 1986).

#### 4. Bona Fide Purchaser

As noted above in part II.A.4. of this article, the goal of section 64.1-16.1(3) is to include certain of the decedent's inter vivos gifts in computing the augmented estate.<sup>63</sup> Because that section is concerned only with gifts, it includes only "(t)he value of property transferred to anyone *other than a bona fide purchaser* by the decedent . . . ."<sup>64</sup> The bona fide purchaser (BFP) exclusion was not in the Uniform Probate Code as originally promulgated.<sup>65</sup> It was added in 1975, due to the objections of real property experts in Colorado, in order to eliminate any need for a spousal joinder in the deed of a married person to a BFP.<sup>66</sup> This BFP language was adopted as a part of the Virginia augmented estate legislation for the same reason. Nevertheless, as soon as the new law became effective, Virginia title companies began to routinely require spousal joinder to most deeds of married persons on the ground that, absent a statutory definition of a bona fide purchaser, they did not know what one was.<sup>67</sup> This was surprising to a number of Virginia attorneys because the title companies had not previously evidenced any difficulty with the interpretation and application of sections 64.1-95,<sup>68</sup> 64.1-96,<sup>69</sup> and 64.1-113<sup>70</sup> of the Code, each of which deals with bona fide purchasers. Nevertheless, to pacify title insurers, section 64.1-01<sup>71</sup> was added to the Code in 1992 to provide a defini-

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63. See *supra* notes 22-33 and accompanying text.

64. VA. CODE ANN. § 64.1-16.1(3) (Repl. Vol. 1991 & Cum. Supp. 1992) (emphasis added).

65. See PRE-1990 UNIF. PROB. CODE § 2-202, 8 U.L.A. 80 cmt. (1983).

66. *Id.*

67. Section 2-202(3) of the PRE-1990 Uniform Probate Code contained a definition of bona fide purchaser which provided as follows:

For purposes of this section a bona fide purchaser is a purchaser for value in good faith and without notice of any adverse claim. Any recorded instrument on which a state documentary fee is noted pursuant to [insert appropriate reference] is prima facie evidence that the transfer described therein was made to a bona fide purchaser.

PRE-1990 UNIF. PROB. CODE § 202(3), 8 U.L.A. 77 (1983). This definition was not used in the original Virginia enactment because the first sentence would have added nothing to existing law, and the second sentence (which only created a prima facie case) had no meaning in Virginia's conveyancing process.

68. VA. CODE ANN. § 64.1-95 (Repl. Vol. 1991) (entitled "Bona fide purchaser of real estate without notice of devise protected.").

69. *Id.* § 64.1-96 (Repl. Vol. 1991) (entitled "Same; later will.").

70. *Id.* § 64.1-113 (Repl. Vol. 1991) (dealing with the title of "bona fide purchasers" from a presumed decedent's personal representative, spouse, heir or devisee when it is later discovered that the supposed decedent is alive).

71. Acts of Apr. 3, 1992, chs. 617 & 647, 1992 Va. Acts 897, 953 (codified at VA. CODE ANN. § 64.1-01(Cum. Supp. 1992)).

tion of bona fide purchaser<sup>72</sup> that will apply not only to the augmented estate but to the entirety of Title 64.1.<sup>73</sup> A casual inspection of the definition will show that it contains nothing that would be novel to a first year law student, except possibly for its second sentence, providing that "[n]otice of a seller's marital status, or notice of the existence of a premarital or marital agreement, does not affect the status of a bona fide purchaser."<sup>74</sup> As this definition is the same as that proposed in the 1991 session, it is expected to eliminate the joinder problem when it becomes effective on July 1, 1992.<sup>75</sup>

### C. *Durable Powers of Attorney — Gifts*

An increasingly frequent question following the incapacity of a person concerns the possibility of gifts being made on that person's behalf. In a small number of cases, the issue arises in an estate planning context, with the goal of reducing a future death tax burden through a reduction in the incapacitated person's estate by means of inter vivos gifts to those who would ultimately take the estate anyway. However, the question most often arises in the context of a desire to pauperize an incapacitated person in order to qualify that person for Medicaid benefits, and thereby preserve for others, through inter vivos gifts to them, property that might otherwise be consumed in the care of the incapacitated person. Regardless of how the issue arises, the fundamental legal question is

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72. The inspiration for this definition was § 9 of the Uniform Marital Property Act, which was entitled "Protection of Bona Fide Purchasers Dealing With Spouses," UNIF. MARITAL PROP. ACT § 9, 9A U.L.A. 120 (1987).

73. The definition of "bona fide purchaser" reads in full as follows:

As used in this title, "bona fide purchaser" means a purchaser of property for value who has acted in the transaction in good faith. Notice of a seller's marital status, or notice of the existence of a premarital or marital agreement, does not affect the status of a bona fide purchaser. A "purchaser" is one who acquires property by sale, lease, discount, negotiation, mortgage, pledge, or lien or who otherwise deals with property in a voluntary transaction, other than a gift. A purchaser gives "value" for property acquired in return for a binding commitment to extend credit to the transferor or another as security for or in total or partial satisfaction of a pre-existing claim, or in return for any other consideration sufficient to support a simple contract.

VA. CODE ANN. § 64.1-.01 (Cum. Supp. 1992).

74. *Id.*

75. This conclusion is based on the report that "[r]epresentatives of Virginia title insurance companies had given the sponsor [of the 1991 legislation] written assurances that, if the definition were added to the statute, they would no longer require the spouse to sign every deed." J. William Gray, Jr., *Administering the "Augmented" Estate*, VA. B. ASS'N J., Summer 1991, at 9, 11.

the same: "Can the agent make gifts on behalf of the incapacitated principal?" In the absence of any Virginia rule, the Fourth Circuit Court of Appeals recently concluded in *Estate of Casey v. Commissioner*<sup>76</sup> that the Virginia courts would probably not recognize an agent's authority to make gifts in the absence of express language to that effect in the power of attorney.<sup>77</sup>

In response to the *Casey* decision, the 1992 General Assembly enacted section 11-9.5,<sup>78</sup> a three-part statute. The first part recognizes an agent's implied power to make gifts "in accordance with the principal's personal history of making or joining in the making of lifetime gifts," if the power (i) provides that an agent can "do, execute, or perform any act that the principal might or could do," or (ii) "evidences the principal's intent to give the attorney-in-fact or agent full power to handle the principal's affairs or deal with the principal's property."<sup>79</sup> As the writer has never seen a professionally prepared general power of attorney that did not contain the "do all acts" language of clause (i), the only issue under the new statute, and the only protection that an incapacitated principal will have against a predatory agent, will be the "personal history" qualification. The importance of this matter cannot be exaggerated because, if this "personal history" test is met, the statute expressly provides that the "agent shall have the power and authority to make gifts in any amount of any of the principal's property to any individuals" or federally recognized charities.<sup>80</sup>

The second part of section 11-9.5 provides that the first part "shall not in any way impair the right or power of any principal, by express words in the power of attorney or other writing, to authorize, or limit the authority of, any attorney-in-fact or other agent to make gifts of the principal's property."<sup>81</sup>

The third part of section 11-9.5 enables the circuit court to authorize an agent to make gifts "to the extent not inconsistent with

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76. *Estate of Casey v. Commissioner*, 58 T.C.M. (CCH) 176 (1989), *rev'd* 948 F.2d 895 (4th Cir. 1991), *reh'g denied* \_\_\_ F.2d \_\_\_ (12/4/91). For a brief discussion of this case, see *infra* notes 168-72 and accompanying text.

77. For a complete discussion of this case, see H. Michael Deneka, *Estate of Casey v. Commissioner, Revisited and Reversed*, VA. ST. B. TR. & EST. SEC. NEWSL., Spring 1992, at 23.

78. Act of Mar. 30, 1992, ch. 544, 1992 Va. Acts 708 (codified at VA. CODE ANN. § 11-9.5 (Cum. Supp. 1992)).

79. VA. CODE ANN. § 11-9.5(A) (Cum. Supp. 1992).

80. *Id.*

81. *Id.* § 11-9.5(B) (Cum. Supp. 1992).



the express terms of the power of attorney," under appropriate circumstances.<sup>82</sup>

Because of the uncertainty surrounding the "personal history" rule and its potential for abuse,<sup>83</sup> as well as the possible adverse estate and gift tax consequences that might attach to such an implied power,<sup>84</sup> attorneys will need to consider the desirability of including gift-negating language as the default option in their standard powers of attorney in the future. There is no protection for past clients however because, instead of this rule being prospective only, the legislation expressly provides that "the provisions of subsections A and B of § 11-9.5 of this act are declaratory of existing law."<sup>85</sup> It is respectfully submitted that the precipitous response to the *Casey* decision contained in section 11-9.5(A), i.e., the implied power, is bad law and should be repealed or severely limited during the 1993 session. An increasing number of cases are being discovered where agents are making abusive and fraudulent use of

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82. *Id.* § 11-9.5(C). This section reads:

The court shall determine the amounts, recipients and proportions of any gifts of the principal's property after considering all relevant factors including, without limitation, (i) the size of the principal's estate, (ii) the principal's foreseeable obligations and maintenance needs, (iii) the principal's personal history of making, or joining in the making of, lifetime gifts, (iv) the principal's estate plan, and (v) the tax effects of the gifts.

*Id.*

83. By way of illustration, suppose an elderly person remarries following the death of a spouse, gives a power of attorney (containing the standard "do all acts" language) to the new spouse, and also makes some valuable gifts to the new spouse during the first two or three years of their marriage, at which time the elderly person becomes incapacitated. What will be the response of the principal's children of the first marriage as the new spouse uses the implied power of § 11-9.5(A) to transfer significant wealth from principal to agent during the period of the principal's incapacity?

84. The author has not found an authoritative solution to these problems, but one can easily see the possibility of the government's claim that an agent who has the power to appoint either (i) to himself, or (ii) to anyone dependent upon him for support, has a general power of appointment under I.R.C. § 2514, (West 1989) for gift tax purposes, and I.R.C. § 2041 (West 1989), for estate tax purposes.

The rebutting proposition is that the language of I.R.C. §§ 2514(c)(3)(A) and 2041(b)(1)(C)(i) both exclude from the definition of a general power any power that is "not exercisable by the "possessor" (§ 2514(c)(3)(A)) or "decendent" (§ 2041(b)(1)(C)(i)) except in conjunction with the creator of the power. . . ." I.R.C. §§ 2041(b)(1)(C)(i), 2514(c)(3)(A) (West 1989). And, it is argued, this definition prevents a revocable power of attorney to make gifts from being classified as a general power of appointment because the agent's power is subject to the principal's control during the principal's lifetime.

The possible federal estate and gift tax consequences will be largely a moot issue for the great majority of clients, and their agents, whose estates will be below the federal exemption equivalent of \$600,000.00.

85. Act of Mar. 30, 1992, ch. 544, 1992 Va. Acts 687, cl.2 (codified at VA. CODE ANN. § 11-9.5 (Cum. Supp. 1992) (editor's note)).

general powers of attorney after a principal becomes incapacitated, and this "implied power" rule will make it significantly more difficult, if not impossible, to rectify their actions in a number of cases.

#### D. *Health Care Decisions*

Virginia's statutory authority for a medical power of attorney was enacted in 1989 and has been the subject of modification and comment each year thereafter.<sup>86</sup> Virginia's Natural Death Act was enacted in 1983 and has been the subject of several amendments and comments in the intervening years.<sup>87</sup> The 1992 session repealed the prior statutory basis for the medical power of attorney,<sup>88</sup> and significantly amended the Natural Death Act, which now becomes the Health Care Decisions Act,<sup>89</sup> to provide (among other things) for a combined form, referred to as an "Advance Medical Directive," that will encompass both the living will and the medical power.<sup>90</sup> This action does not endanger documents executed under the old laws because a grandfather provision continues their validity indefinitely.<sup>91</sup> The new legislation<sup>92</sup> mirrors the old<sup>93</sup> in scope and spirit but there is significant change in detail.

86. See J. Rodney Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 23 U. RICH. L. REV. 859, 862-63 (1989); J. Rodney Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 24 U. RICH. L. REV. 827, 836-37 (1990); and J. Rodney Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 25 U. RICH. L. REV. 925, 936 (1991).

87. J. Rodney Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 25 U. RICH. L. REV. 925, 936-37 (1991); and J. Rodney Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 23 U. RICH. L. REV. 859, 862 (1989); Dayna B. Matthew, Note, *The 'Terminal Condition' Condition in Virginia's Natural Death Act*, 73 VA. L. REV. 749 (1987); Janice G. Murphy, Comment, *The Virginia Natural Death Act — A Critical Analysis*, 17 U. RICH. L. REV. 863 (1983).

88. Acts of Apr. 5, 1992, chs. 748 & 772, 1992 Va. Acts 1144, 1200, cl. 2, (repealing VA. CODE ANN. § 37.1-134.4).

89. Acts of Apr. 5, 1992, chs. 748 & 772, 1992 Va. Acts 1144, 1200 (codified at VA. CODE ANN. §§ 54.1-2981 to -2993 (Cum. Supp. 1992)).

90. See *id.*

91. Acts of Apr. 5, 1992, chs. 748 & 772, 1992 Va. Acts 1144, 1200 (codified at VA. CODE ANN. §§ 54.1-2981 to 2993 editor's note (Cum. Supp. 1992)). The act provides as follows:

That whenever the conditions, requirements, provisions or contents of Article 8 (§ 54.1-2981 et seq.) of Title 54.1 or § 37.1-134.4 were relied upon, prior to the effective date of this act, in the execution of any declaration or the taking of any action which was in compliance with such laws as they were then in effect, such declaration or action shall remain valid and the provisions of this act shall not be construed to invalidate, revoke, render illegal, or to be applicable to any such declaration or action.

*Id.*

92. See *supra* notes 89-90 & accompanying text.

93. See *supra* notes 87-88 & accompanying text.

Notwithstanding the importance of this subject, space limitations preclude complete treatment of these details in this review.

### E. *Fiduciary Investments*

During the 1991 session the General Assembly requested 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>94</sup> This joint study recommended to the 1992 session

a total revision of Virginia's legal list (Virginia Code § 26-40) in order to increase investment safety and to make the list more readily usable by the individual consumer . . . [and] a revision to Virginia's prudent man rule to insure investment flexibility, to the advantage of both Virginia beneficiaries and Virginia fiduciaries.<sup>95</sup>

In response to specific recommendations, the 1992 session, among other things, replaced Virginia's traditional prudent man rule<sup>96</sup> with a portfolio-oriented prudent investor rule,<sup>97</sup> and replaced Virginia's nine-page and twenty-seven-category legal list

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94. H.J. Res. 395, Va. Gen. Assembly (Reg. Sess. 1991), 1991 Va. Acts 1928.

95. REPORT OF THE WILLS, TRUSTS AND ESTATES SECTION OF THE VIRGINIA BAR ASSOCIATION AND THE VIRGINIA BANKERS ASSOCIATION ON FIDUCIARY INVESTMENTS, H. Doc. No. 40, 19 Va. Gen. Assembly (Reg. Sess. 1992).

96. Prior to the 1992 amendment, Va. Code § 26-45.1 stated this rule as:

[T]he judgment of care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

VA. CODE ANN. § 26-45.1 (Cum. Supp. 1991).

97. See Act of Apr. 6, 1992, ch. 810, 1992 Va. Acts 1278 (codified at VA. CODE ANN. § 26-45.1(A) (Repl. Vol. 1992)). The section now provides:

[T]he judgment of care, skill, prudence and diligence under the circumstances prevailing from time to time, (including, but not limited to, general economic conditions, anticipated tax consequences, the duties of the fiduciary and the interests of all beneficiaries) that a prudent person familiar with such matters and acting in his own behalf would exercise under the circumstances in order to accomplish the purposes set forth in the controlling document. In investing pursuant to this standard, a fiduciary shall consider individual investments in the context of the investment portfolio as a whole and as part of the fiduciary's overall investment plan and shall have a duty to diversify investments unless, under the circumstances, it is prudent not to do so. Any determination of liability for investment performance shall consider not only the performance of a particular investment, but also the performance of the portfolio as a whole.

*Id.*

with a one-page and three-category version.<sup>98</sup> Space limitations of this annual review preclude detailed treatment of this legislation, but the reader should find the several sources cited in the footnotes very helpful in gaining an understanding of these new laws.

One unsettling concern under the new prudent investor rule relates to the division of investment return between the principal and income accounts. This division is currently determined under Virginia's Uniform Principal and Income Act<sup>99</sup> which, in turn, bases its allocation rules on the assumption that investment decisions are being guided by a traditional prudent man rule. Query: Is a fiduciary investing under the new rule who is nevertheless required to distribute under the old rule being fair to both income beneficiaries and remainder beneficiaries? What personal liability, if any, does such a fiduciary have?<sup>100</sup>

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For helpful background and analysis, see Thomas S. Word, Jr., and Wendy B. Gayle, *The Proposed Virginia Prudent Investor Statute: Is It Time for Virginia to Change?*, VA. ST. B. TR. AND EST. SEC. NEWSL., Spring 1992, at 7.

98. Act of Apr. 6, 1992, ch. 810, 1992 Va. Acts 1278 (codified at VA. CODE ANN. § 26-40 (Repl. Vol. 1992)). Note that § 26-40 continues to apply to investments of the Virginia Housing Development Authority and the Virginia Resources Authority. Section 26-40.01(C) currently provides that:

any reference to the Virginia "legal list" or to § 26-40 or any predecessor statute contained in a will, trust, or other instrument that was irrevocable on June 30, 1992, shall be construed to refer to such section as in effect on June 30, 1992, or at such earlier time as may be specified in the controlling document, absent an expression of intent to the contrary contained in such document.

VA. CODE ANN. § 26-40.01(C) (Repl. Vol. 1992).

The three categories are (i) obligations of the Commonwealth, its agencies and political subdivisions, (ii) obligations of the United States, and (iii) deposits in Virginia financial institutions that are insured by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund. VA. CODE ANN. § 26-40.01(B) (Repl. Vol. 1992).

99. VA. CODE ANN. §§ 55-253 to -268 (Repl. Vol. 1986).

100. The most important aspect of trust law cast into doubt by the acceptance of an unconstrained [Prudent Man] Rule on portfolio theory grounds is the traditional allocation of investment returns. No principle in the law of trusts seems more settled than the rule that income beneficiaries receive ordinary cash dividends from common stock ownership and remaindermen receive capital gains if the stock is sold. . . . Acceptance of portfolio theory, however, would undermine the traditional rule.

Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52, 99 (1987) (footnotes omitted). This author discusses a variety of possible ways to allocate receipts under the new rule but notes that "the revision of the Uniform Principal and Income Act to work out the practical details of a total return allocation scheme would be particularly helpful in making a portfolio theory approach readily available to private trusts." *Id.* at 101.

## F. *Incorporation of Fiduciary Powers — Uniform Custodial Trust Act*

Code section 64.1-57 contains a rather exhaustive enumeration of fiduciary powers that may be incorporated by reference into a will or trust, individually or as a group. It is the custom of Virginia lawyers to make regular use of this provision. Section 64.1-57(1)¶, which confers upon a fiduciary the power to make distributions to a minor or disabled beneficiary in four separate ways, was amended in 1992 by the addition of a power to make distributions to an incapacitated<sup>101</sup> beneficiary under the recently enacted Uniform Custodial Trust Act.<sup>102</sup> The new language reads as follows: “(5) to an adult person or bank authorized to exercise trust powers as custodial trustee for an incapacitated beneficiary under the Uniform Custodial Trust Act . . . to be held as custodial trustee under the terms of such act.”<sup>103</sup> This very helpful provision will not only be available in documents executed after its effective date but, due to a 1989 amendment to section 64.1-57,<sup>104</sup> to existing documents as well. The 1989 amendment provided that, absent the expression of a contrary intent in a document, “the incorporation by reference of powers enumerated by this statute shall refer to those powers existing at the time of death.”<sup>105</sup>

## G. *Self-Proving Affidavit — Notarization*

Sections 64.1-87.1<sup>106</sup> and 64.1-87.2<sup>107</sup> establish procedures for making wills self-proved, i.e., eliminating the need for attesting

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101. “Incapacitated,” for purposes of the Uniform Custodial Trust Act, “means lacking the ability to manage property and business affairs effectively by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, disappearance, minority, or other disabling cause.” VA. CODE ANN. § 55-34.1 (Cum. Supp. 1992).

102. Act of Mar. 24, 1990, ch. 264, 1990 Va. Acts 360 (codified at VA. CODE ANN. §§ 55-34.1 to .19 (Cum. Supp. 1992)), discussed in J. Rodney Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 24 U. RICH. L. REV. 827, 829-30 (1990). For a pre-enactment Virginia analysis and discussion, see Louis A. Mezzullo & Michael C. Roach, *The Uniform Custodial Trust Act: An Alternative to Adult Guardianship*, 24 U. RICH. L. REV. 65 (1989).

103. Act of Mar. 31, 1992, ch. 584, 1992 Va. Acts 780 (codified at VA. CODE ANN. § 64.1-57(1)¶(5) (Cum. Supp. 1992)).

104. Act of Apr. 5, 1989, ch. 736, 1989 Va. Acts 1988, 1992 (codified at VA. CODE ANN. § 64.1-57(4) (Repl. Vol. 1991)), discussed in J. Rodney Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 23 U. RICH. L. REV. 859, 861 (1989).

105. 1989 Va. Acts 1988, 1992, VA. CODE ANN. § 64.1-57(4) (Repl. Vol. 1991).

106. VA. CODE ANN. § 64.1-87.1 (Repl. Vol. 1991).

107. *Id.* § 64.1-87.2 (Repl. Vol. 1991).

witnesses to appear and testify at probate in the ordinary case. The procedure requires a notary public<sup>108</sup> to place the testator and witness under oath and then ask them questions similar to those typically asked by the clerk at probate, the answers to which are then embodied in the notarized affidavit.<sup>109</sup>

Within the past year the Attorney General was asked about the propriety of one who was named in the will as executor or trustee also serving as the notary on the self-proving affidavit. Under Virginia law a notary that performs a notarial act with respect to which "the notary or his spouse shall be a party, or in which either of them shall have a direct beneficial interest" is "guilty of official misconduct."<sup>110</sup> The Attorney General concluded that such a person would have "a direct beneficial interest" in the will and thus was prohibited from serving as notary on the self-proving affidavit.<sup>111</sup> It was believed that this result might create an unreasonable hardship in a number of cases when wills were executed in rural areas, homes, hospitals, etc., where the location of an "independent" notary might be a problem. Accordingly, a 1992 amendment eliminates this problem by providing that "[a] notary nominated as a fiduciary in a will shall not, for that reason alone, be deemed a party to the will or to have a direct beneficial interest therein."<sup>112</sup>

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

The 1991 session amended section 64.1-73 by authorizing certain nonresident persons to serve as "sole trustee of an inter vivos trust

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108. Although the text of this article speaks only of notaries, and the 1992 amendment, discussed *infra* at note 112 and accompanying text, is restricted to the same, the self-proving affidavits may be executed before certain other public officials. VA. CODE ANN. §§ 64.1-87.1, -87.2 (Repl. Vol. 1991).

109. *See id.*

110. *Id.* § 47.1-30 (Cum. Supp. 1992).

111. 1991-92 Va. Att'y Gen. Ann. Rep. 208-09 (Aug. 14, 1991). A portion of this opinion reads as follows:

A prior Opinion of this Office concludes, however, that the General Assembly intended a "direct beneficial interest," as used in § 47.1-30, to mean profit, value, worth, advantage or use resulting from a transaction or derived from a writing. 1984-85 Va. Att'y Gen. Ann. Rep. [ ] 229. As executor of the will, the notary will receive compensation for his services, pursuant to § 26-30, if it is admitted to probate. It is my opinion, therefore, that a notary has a "direct beneficial interest" in a will naming him as its executor, and that § 47.1-30 prohibits him from notarizing the self-proving certificate in such circumstances.

*Id.*

112. Act of Mar. 5, 1992, ch. 194, 1992 Va. Acts 242 (codified at VA. CODE ANN. § 47.1-30 (Cum. Supp. 1992)).

without thereby disqualifying the trust from receiving testamentary additions."<sup>113</sup> The 1992 amendment to this section changes the requisite point in time for determining the required residency of a trustee from the "testator's death"<sup>114</sup> to the "time the devise or bequest is to be distributed to the trustee or trustees."<sup>115</sup> This change will allow time for corrective action to be taken in those cases where a nonpermissible person or corporation is named at the time of the testator's death.

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

Section 64.1-67.2 was enacted in 1988<sup>116</sup> to eliminate certain tax exposures in trusts where a fiduciary/beneficiary had a power to invade principal for his own benefit.<sup>117</sup> This section was further amended in 1991 to clarify the original intent, however the language of the clarified original dealt only with troublesome powers over the principal of a trust.<sup>118</sup> The 1992 amendment further clarifies the meaning of this section by declaring that it applies to a power to "*distribute the income, principal or corpus, or any combination thereof . . .*"<sup>119</sup> The emphasized language is that added in 1992.<sup>120</sup>

### J. *Charitable Gifts — Life Insurance*

A recent private letter ruling issued by the Internal Revenue Service concluded that a New York donor would not be entitled to any income, gift, or estate tax deduction for a gift of a life insurance policy to a charity because, under applicable state law, the charity did not have an insurable interest in the donor's life.<sup>121</sup> A

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113. VA. CODE ANN. § 64.1-73 (Repl. Vol. 1991); see J. Rodney Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 25 U. RICH. L. REV. 925, 930 (1991).

114. See VA. CODE ANN. § 64.1-73 (Repl. Vol. 1991).

115. Act of Mar. 2, 1992, ch. 66, 1992 Va. Acts 63 (codified at VA. CODE ANN. § 64.1-73 (Cum. Supp. 1992)).

116. Act of Mar. 29, 1988, ch. 346, 1988 Va. Acts 417 (codified as amended at VA. CODE ANN. § 64.1-67.2 (Cum. Supp. 1992)).

117. See J. Rodney Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 22 U. RICH. L. REV. 759, 764-66 (1988).

118. See Act of Mar. 20, 1991, ch. 432, 1991 Va. Acts 646 (codified at VA. CODE ANN. § 64.1-67.2 (Repl. Vol. 1991)); J. Rodney Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 25 U. RICH. L. REV. 925, 927-8 (1991).

119. Act of Apr. 15, 1992, ch. 332, 1992 Va. Acts 416 (codified at VA. CODE ANN. § 64.1-67.2 (Cum. Supp. 1992)).

120. See *id.*

121. Priv. Ltr. Rul. 91-100-016 (Nov. 30, 1990).

1992 amendment to section 38.2-301, which is stated to be "declaratory of existing law,"<sup>122</sup> prevents similar problems from arising under Virginia law.<sup>123</sup>

### K. *Parental Abandonment — Forfeiture of Intestacy Rights*

Section 64.1-16.3, which deals with the forfeiture of various rights<sup>124</sup> by a deserting spouse in the estate of the deserted spouse, has been amended by the addition of a provision for the forfeiture of parental inheritance rights from the estate of a child the parent abandoned while the child was a minor or incapacitated.<sup>125</sup>

### L. *Murder — Forfeiture of Survivorship Rights*

Virginia adopted very broad legislation designed to prevent convicted murderers from succeeding to any property from their victims in 1981,<sup>126</sup> and further broadened the scope of this legislation by expanding the definition of a slayer in 1987.<sup>127</sup> Under the original version of this statute, a "slayer" of a cotenant in a tenancy involving survivorship rights was prohibited from acquiring the cotenant's half-interest by survivorship; instead the death of the co-

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122. Act of Feb. 25, 1992, ch. 8, 1992 Va. Acts 7, cl. 2.

123. The text of this amendment reads as follows:

In the case of an organization described in § 501(c) of the Internal Revenue Code, the lawful and substantial economic interest required in subdivision 2 of this subsection shall be deemed to exist where (i) the insured or proposed insured has either assigned all or part of his ownership rights in a policy or contract to such an organization or has executed a written consent to the issuance of a policy or contract to such organization and (ii) such organization is named in the policy or contract as owner or as beneficiary.

*Id.* (codified at VA. CODE ANN. § 38.2-301(B)(4) (Cum. Supp. 1992)).

124. The forfeitable rights are "intestate succession, elective share, exempt property, family allowance, and homestead allowance." VA. CODE ANN. § 64.1-16(3)(A) (Cum. Supp. 1992).

125. Act of Apr. 6, 1992, ch. 775, 1992 Va. Acts 1210 (codified at VA. CODE ANN. § 64.1-16.3(B) (Cum. Supp. 1992)). This amendment reads in full as follows:

If a parent willfully deserts or abandons his or her minor or incapacitated child and such desertion or abandonment continues until the death of the child, the parent shall be barred of all interests in the estate by intestate succession unless the parent resumes the parental relationship and duties and such parental relationship and duties continue until the death of the child.

*Id.*

126. Act of Mar. 21, 1981, ch. 469, 1981 Va. Acts 701 (codified at VA. CODE ANN. § 55-406 (Repl. Vol. 1986)). This enactment is discussed in J. Rodney Johnson, *Wills, Trusts, and Estates*, 68 VA. L. REV. 521, 525-28 (1982).

127. Act of Mar. 26, 1987, ch. 498, 1987 Va. Acts 730 (codified at VA. CODE ANN. § 55-401 (Cum. Supp. 1992)). This development is discussed in J. Rodney Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 21 U. RICH. L. REV. 855, 862-63 (1987).



tenant caused a severance of the tenancy and the slain tenant's half-interest passed with his other property by will or intestate succession (but not to the slayer).<sup>128</sup> The 1992 amendment continues this rule as to cotenancies not involving survivorship.<sup>129</sup> However, with regard to any form of survivorship tenancies, the 1992 amendment provides for the passing of the interest of the slayer "to the estate of the decedent as though the slayer had predeceased the decedent."<sup>130</sup>

#### M. *Disclaimers — Mailed Notice*

The original language of section 64.1-189, which deals with the time and place of filing disclaimers to property passing under testamentary instruments requires, among other things, that a disclaimant mail a copy of the disclaimer instrument to the decedent's personal representative or donee (if a power of appointment is involved).<sup>131</sup> The 1992 amendment dispenses with this requirement where "the person making the disclaimer is the sole personal representative of the decedent or the donee."<sup>132</sup>

The original language of section 64.1-192, which deals with the time and place of delivery or filing disclaimers to property passing under nontestamentary instruments, requires, among other things, that a copy of the disclaimer instrument be (i) personally delivered or (ii) sent by registered mail to whomever has legal title to, or possession of, the disclaimed property.<sup>133</sup> The 1992 amendment adds a third acceptable method of delivering the disclaimer instrument — by certified mail.<sup>134</sup>

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128. VA. CODE ANN. § 55-406 (Repl. Vol. 1986).

129. Act of Mar. 30, 1992, ch. 521, 1992 Va. Acts 664 (codified at VA. CODE ANN. § 55-406 (Cum. Supp. 1992)).

130. Act of Mar. 30, 1992, ch. 521, 1992 Va. Acts 664 (codified at VA. CODE ANN. § 55-405 (Cum. Supp. 1992)).

131. Act of Apr. 6, 1972, ch. 449, 1972 Va. Acts 513 (codified as amended at VA. CODE ANN. § 64.1-189 (Repl. Vol. 1991)).

132. Act of Mar. 30, 1992, ch. 514, 1992 Va. Acts 659 (codified at VA. CODE ANN. § 64.1-189 (Cum. Supp. 1992)).

133. Act of Apr. 6, 1972, ch. 449, 1972 Va. Acts 513 (codified as amended at VA. CODE ANN. § 64.1-192 (Repl. Vol. 1991)).

134. Act of Mar. 30, 1992, ch. 514, 1992 Va. Acts 659 (codified at VA. CODE ANN. § 64.1-192 (Cum. Supp. 1992)).

### N. *Corporate Fiduciary Fees — Affiliated Mutual Fund*

Among other things, section 26-44.1 prohibits a corporate fiduciary investing in an affiliated mutual fund from receiving a fiduciary commission to the extent that it or its affiliates receive compensation for services rendered to the affiliated fund absent a written agreement to the contrary with the trust's creator or affected beneficiary.<sup>135</sup> The 1992 amendment provides, as an alternative to such consent, for the allowance of such fiduciary commission if (i) the fiduciary discloses how it computes its compensation for such services rendered, and (ii) such compensation does not exceed the customary amount charged for like services to nonfiduciary accounts.<sup>136</sup>

## III. 1991-92 JUDICIAL OPINIONS

### A. *Will Construction — Precatory Language*

In *Gillespie v. Davis*,<sup>137</sup> the testator's will stated "I give and devise all of my real estate [sic] to [X, Y, and Z]. They are to share equally and the disposal will be in their hands."<sup>138</sup> The will also stated:

It is my desire that Lee Davis, the present renter of the shop area, (fenced-in compound) be allowed to purchase that area and the equipment I own in that area for the fair market value. The equipment includes [description omitted]. In the event that Lee Davis does not desire to buy the moving equipment it shall be sold at auction and the proceeds divided equally among the before-mentioned heirs.<sup>139</sup>

The issue between the beneficiaries under the third clause and the person named in the sixth clause was whether the language of the sixth clause gave the latter an enforceable right, or whether it was merely precatory.<sup>140</sup> Applying settled rules of construction, the Virginia Supreme Court agreed with the trial court's conclusion

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135. VA. CODE ANN. § 26-44.1 (Repl. Vol. 1992).

136. Act of Apr. 3, 1992, ch. 684, 1992 Va. Acts 1007 (codified at VA. CODE ANN. § 26-44.1 (Repl. Vol. 1992)).

137. 242 Va. 300, 410 S.E.2d 613 (1991).

138. *Id.* at 302, 410 S.E.2d at 615.

139. *Id.*

140. *Id.* at 303, 410 S.E.2d at 615.

"that the third and sixth clauses create an ambiguity in the will and that this was a proper case for the use of extrinsic evidence."<sup>141</sup> Finding that "this evidence is overwhelming that the testator intended for Davis to have the right to purchase the shop area for its fair market value,"<sup>142</sup> the court affirmed the decision below.<sup>143</sup>

### B. *Death Taxes — Apportionment*

In *Lynchburg College v. Central Fidelity Bank*,<sup>144</sup> the testator's will made forty-one separate gifts prior to leaving the residue, one half to certain charities and one half to certain relatives.<sup>145</sup> Virginia law provides generally that an estate's death tax burden is to be apportioned among all of its beneficiaries in proportion to each beneficiary's gift.<sup>146</sup> The apportionment law "expressly preserve[s], however, 'the right of a testator to designate such parts of his assets as he desires to bear the burden of all taxes.'"<sup>147</sup> Item I of the testator's will provided that "I desire my just debts and all expenses of the administration of my estate, including such taxes as may be levied against my estate, paid as soon after my death as practicable."<sup>148</sup> The question before the court was whether Item I of the testator's will manifested an intent that no taxes be apportioned against the forty pre-residuary beneficiaries and that all taxes be charged against the residuary estate.<sup>149</sup> Concluding that precedent mandated an affirmative answer to this question,<sup>150</sup> the trial court's decision was affirmed.<sup>151</sup>

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141. *Id.* at 304, 410 S.E.2d at 616.

142. *Id.* at 304-05, 410 S.E.2d at 616.

143. *Id.* at 306, 410 S.E.2d at 617.

144. 242 Va. 292, 410 S.E.2d 617 (1991).

145. *Id.* at 295, 410 S.E.2d at 618.

146. VA. CODE ANN. § 64.1-161 (Repl. Vol. 1991). This section limits this rule by providing that "in making such proration each such person shall have the benefit of any exemptions, deductions and exclusions allowed by such law in respect of such person or the property passing to him." *Id.*

147. *Lynchburg College*, 242 Va. at 296, 410 S.E.2d at 619 (quoting *Baylor v. National Bank of Commerce*, 194 Va. 1, 7, 72 S.E.2d 282, 285 (1952)).

148. 242 Va. at 294, 410 S.E.2d at 618.

149. *Id.* at 292, 410 S.E.2d at 617.

150. *Id.* at 295, 410 S.E.2d at 619 (citing *Baylor v. National Bank of Commerce*, 194 Va. 1, 72 S.E.2d 282 (1952)).

151. *Lynchburg College*, 242 Va. at 299, 410 S.E.2d at 621.

### C. Death Taxes — Charging Tenancy by Entirety Property

Virginia's death tax apportionment laws contain an "anti-apportionment" statute that preserves a testator's right to "designate the fund or funds or property out of which such payment shall be made."<sup>152</sup> In *Estate of Reno v. Commissioner*,<sup>153</sup> the question before the Fourth Circuit was whether one could direct that death taxes generated by out of state realty be paid from Virginia realty owned with a spouse as tenants by the entirety.<sup>154</sup> The majority in this 5-4 decision concluded that such action would be "impermissible under Virginia probate, property, and tax apportionment law,"<sup>155</sup> calling attention to the fact that

[t]hough a testator is unequivocally forbidden to alienate entireties property by his will, the [Commissioner]'s construction of § 64.1-165 would permit a testator to do the functional equivalent by simply designating his entireties property as the fund from which all estate taxes are to be paid.<sup>156</sup>

### D. Survivorship Tenancy — Dower

The court in *Funches v. Funches*,<sup>157</sup> following its recent decision wherein the same issue was raised,<sup>158</sup> held that a deed purporting to convey realty to persons not married to each other as tenants by the entirety with the right of survivorship, instead conveyed the same to them as joint tenants with the right of survivorship.<sup>159</sup> In addition, the court concluded that, due to the nature of a joint estate with survivorship, the spouse of the first of the joint tenants to die would not be entitled to any dower rights.<sup>160</sup>

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152. VA. CODE ANN. § 64.1-165 (Repl. Vol. 1991).

153. 945 F.2d 733 (4th Cir. 1991) (en banc).

154. *Id.* at 733-34.

155. *Id.* at 733.

156. *Id.* at 734 (quoting *Estate of Reno v. Commissioner*, 916 F.2d 955, 969-70 (4th Cir. 1990) (Hall, J., dissenting)). This case is analyzed and discussed in Nan L. Coleman, *Estate of Reno v. Commissioner: The Achilles Heel of Tax Apportionment*, 9 VA. ST. B. TR. & EST. SECT. NEWSL., Spring 1992, at 15.

157. 243 Va. 26, 413 S.E.2d 44 (1992).

158. *Gant v. Gant*, 237 Va. 588, 379 S.E.2d 331 (1989).

159. *Funches*, 243 Va. at 29-30, 413 S.E.2d at 46.

160. *Id.* at 30-31, 413 S.E.2d at 47. Note that the laws of dower and curtesy were repealed effective January 1, 1991, except as to persons who died prior to that time. Act of Apr. 9, 1990, ch. 831, 1990 Va. Acts 1354.

### E. *Acts Barring Property Rights — Non-Slayer*

The 1981 session enacted comprehensive legislation to prevent one who fit within the definition of a "slayer" of another to receive any form of benefit from the person slain.<sup>161</sup> However, this legislation failed to state whether its remedy was (i) merely cumulative with existing common law remedies, or (ii) exclusive, thereby abrogating existing common law remedies.<sup>162</sup> In *Peoples Security Life Insurance v. Arrington*,<sup>163</sup> *W* was the beneficiary of *H*'s life insurance and made claim for the proceeds after *H* "was stabbed and shot to death while [*H* and *W*] were in their automobile. No one has been prosecuted for the murder of [*H*]. However, [*W*] remains available for prosecution."<sup>164</sup> The court's examination of the 1981 statutory provisions disclosed no language or intent to abrogate the then existing common law remedies.<sup>165</sup> Thus, although *W* did not fit within the statutory definition of a slayer, the court concluded that

under these circumstances, Code § 55-401(1) does not preclude Peoples from attempting to prove that [*W*] was not entitled to the proceeds of her husband's life insurance policy if it can prove by a preponderance of the evidence that she 'procured, participated in or otherwise directed' her husband's death.<sup>166</sup>

### F. *Wills — Interpretation*

*Westmoreland County Volunteer Rescue Squad v. Melnick*<sup>167</sup> is a will interpretation case that reverses a better-reasoned trial court opinion. However, no new laws or principles are announced in this case and it will be profitless to reargue the facts.

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161. Act of Mar. 21, 1981, ch. 469, 1981 Va. Acts 701 (codified at VA. CODE ANN. §§ 55-401 to -415 (Repl. Vol. 1986 & Cum. Supp. 1992)). For background, see Sandra G. Schneider, Note, *Barring Slayers' Acquisition of Property Rights in Virginia: A Proposed Statute*, 14 U. RICH. L. REV. 251 (1979).

162. See J. Rodney Johnson, *Wills, Trusts, and Estates*, 68 VA. L. REV. 521, 528 (1982).

163. 243 Va. 89, 412 S.E.2d 705 (1992).

164. *Id.* at 90, 412 S.E.2d at 706.

165. *Id.* at 91-92, 412 S.E.2d at 707.

166. *Id.* at 92, 412 S.E.2d at 707.

167. 243 Va. 222, 414 S.E.2d 817 (1992).

### G. *Durable Power of Attorney — Agent's Power to Make Gifts*

In *Estate of Casey v. Commissioner*,<sup>168</sup> the Fourth Circuit had to determine, for federal transfer tax purposes, whether Virginia law authorized an agent under a durable power of attorney to make gifts on behalf of an incapacitated principal where the broadly-drawn power of attorney was silent on that point.<sup>169</sup> Although the principal had no history of gift making, she had joined in gifts of real estate made by her husband in order to release her inchoate rights of dower therein.<sup>170</sup> The court's conclusion that Virginia law did not authorize her agent to make such gifts<sup>171</sup> resulted in legislation in the 1992 session that is commented upon in Part II, Paragraph C, of this article.<sup>172</sup>

## IV. CONCLUSION

The 1992 session produced more than the normal volume of wills, trusts, and estates-related legislation which, overall, will work to the good of the practitioner and the Commonwealth. The infant spouse enactment is an embarrassment that will probably amount to no significant damage. The separate property amendment, however, holds the potential for discriminatory treatment and injury to a number of innocent persons and thus it, along with the too short, five-year pull-back amendment, deserves to be reexamined. Most importantly, however, because of the number of persons likely to be adversely affected thereby, the unfortunate legislation recognizing an "implied power" of an agent to make gifts on behalf of an incapacitated principal needs to be repealed or severely limited in the 1993 session.

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168. 948 F.2d 895 (4th Cir. 1991), rehearing denied, \_\_\_ F.2d \_\_\_ (12/4/91).

169. *See id.* at 896-97.

170. *Id.* at 896, 901.

171. *Id.* at 901.

172. For an analysis and discussion of this case, *see* Deneka, *supra* note 77.

