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Inheritance Rights of Children in Virginia

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INHERITANCE RIGHTS OF CHILDREN IN VIRGINIA

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The rights of children to succeed to a deceased ancestor's property interests in Virginia are treated in some fifteen separate sections of the Virgina Code. The first of these sections was contained in Virginia's original code of descent and distribution which was enacted in October, 1785, and the last of these sections was enacted by the 1974 session of the General Assembly. When one considers that these fifteen sections were enacted over a period of 189 years, as the result of legislation introduced by various individuals who were at any given time focusing on a particular portion of this larger problem area without always taking into account the "spin-off" effect that their particular legislation might have on all of the other sections dealing with the succession rights of children, it is not surprising to find that there is a certain amount of gap, overlap, inconsistency and ambiguity that plagues today's practitioner who is trying to determine the rights of a specific child in a number of instances, and that consequences generally regarded as improper and unjust, from the child's standpoint, are too often required by the present state of the law. Moreover, a recent decision from the United States Supreme Court has made it quite clear that at least two of these fifteen sections are unconstitutional and this, of course, creates an even larger gap in Virginia law than existed before.

Accordingly, it is the intent of this article: (1) to state the present

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Virginia statutory law dealing with the succession rights of children; (2) to note the problems raised by these statutes in their present form; and (3) to offer draft language for legislation which would (i) remove the constitutionally offensive statutes and replace them with alternative statutes more responsive to the solution of the problems therein presented, (ii) eliminate the present problems of gap and overlap by consolidating a number of like statutes into one, (iii) alleviate the present interpretative problems in those remaining statutes by having one statute serve as a definitional section tying together all other sections that deal with the succession rights of children, and (iv) make Virginia law more uniform with that of our sister states and more compatible with the Uniform Parentage Act.

In order to facilitate the discussion of this matter, the footnotes will contain a reproduction of each of the fifteen sections of the Code of Virginia[1] previously alluded to, even though some of these sections are seen as quite unobjectionable and no suggestions are made concerning their repeal or redraft. Thus the reader will have the entirety of Virginia's statutory law dealing with the succession rights of children at his fingertips as he assesses the individual sections that do have problems. Each of these problem sections will be dealt with separately, in the following manner: (1) a summary of the statute; (2) comments on the statute describing the problems presented therein; and (3) a statement of what steps are necessary to correct the problems presented. Lastly, in the Appendix to this article, the reader will find draft language for such new statutes as may be required to bring this area of the law more into order, as well as a listing of present Virginia Code sections that would be repealed or modified.

Course of Descents Generally[2]

At common law real estate and personal property were treated

1. In order to further facilitate the discussion of these code sections, which are referred to extensively, a form of citation has been adopted that is more informal than one might expect to find in the pages of a law review. Thus, for example, VA. CODE ANN. § 64.1-1 (Cum. Supp. 1977) will appear in the text simply as section 64.1-1, which will be understood as always referring to the latest printing of the section involved.

2. VA. CODE ANN. § 64.1-1 (Cum. Supp. 1977) provides:

> **Course of descents generally.**—When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary

separately for a variety of purposes, and this distinction is still preserved in Virginia for matters of intestate succession, among others. Accordingly, when one dies without a will in Virginia, section 64.1-1 determines the descent of one's real estate only, leaving the personal estate to be distributed by another section to be discussed in more detail later.[3] It should be noted at the outset, however, that this other code section, dealing with the distribution of an intestate's personal property, operates in large part by incorporating section 64.1-1 by reference (i.e., stating that personal property is to be disposed of in the same way as real property except for two enumerated cases). Accordingly, section 64.1-1 takes on added importance because, while in terms it disposes of real property only, in fact its pattern of disposition effectively controls the distribution of most personal property as well.

The major interpretative problem presented by section 64.1-1 is the use of such words as "children," "descendants," "brother," "sister," etc., without having a definitional section to indicate what qualifies one to be legally identified as a member of any one of these

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to such of his kindred, male and female, in the following course:

First. To the intestate's children and their descendants subject to the provisions of § 64.1-19.

Second. If there be no child, nor the descendant of any child, then the whole shall go to the surviving spouse of the intestate.

Third. If there be none such, then to his or her father and mother or the survivor.

Fourth. If there be none such, then to his or her brothers and sisters, and their descendants.

Fifth. If there be none such, then one moiety shall go to the paternal, the other to the maternal kindred, of the intestate, in the following course:

Sixth. First to the grandfather and grandmother or the survivor.

Seventh. If there be none, then to the uncles and aunts, and their descendants.

Eighth. If there be none such, then to the great grandfathers or great grandfather, and great grandmothers or great grandmother.

Ninth. If there be none, then to the brothers and sisters of the grandfathers and grandmothers, and their descendants.

Tenth. And so on, in other cases, without end, passing to the nearest lineal ancestors, and the descendants of such ancestors.

Eleventh. If there be no paternal kindred the whole shall go to the maternal kindred; and if there be no maternal kindred, the whole shall go to the paternal kindred. If there be neither maternal nor paternal kindred, the whole shall go to the kindred of the husband or wife, in the like course as if such husband or wife had died entitled to the estate.

3. *See* notes 23-26 *infra*, and accompanying text. The section referred to is VA. CODE ANN. § 64.1-11 (Repl. Vol. 1973).

classes when dealing with adopted children and illegitimate children. The present code attempts to fill this vacuum by a number of separate sections, each of which attempts to give a portion of the answer and all of which, when added together, fail to give a complete response to this definitional question. Each of these "partial-solution" sections will now be reviewed, in the order in which they appear in the code, in order to more specifically point out the problem areas.

Adopted Children[4]

Before one can analyze the operation of section 63.1-234, dealing with matters of descent and distribution as they relate to adopted persons, it is necessary first to focus on the two operative words contained therein—"from" and "through"—and make sure their technical meaning is clearly understood. When it is said that a child can inherit "from" a particular parent, this of course means that on the death of that parent intestate, the child can take that parent's property, as heir, directly from that parent. On the other hand, when it is said that a child can inherit "through" a particular parent, this means that the parent in question, if dead, can nevertheless serve as a medium or conduit through whom an inheritance from a more distant relative (brother, sister, grandparent, uncle, aunt, cousin, etc.) can be taken by the child. Thus on turning to the specific language of section 63.1-234, where it is provided that an adopted child shall inherit "from and through the parents by adoption," it is clear that the adopted child has been completely assimilated into the adoptive family for purposes of intestate succession and has all of the inheritance rights therein that a biological child of that family would have.

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4. VA. CODE ANN. § 63.1-234 (Repl. Vol. 1973) provides:

> **Descent and distribution.**—For the purpose of descent and distribution, a legally adopted child shall inherit, according to the statutes of descent and distribution, *from and through the parents by adoption* from the time of entry of an interlocutory order or the final order if there is no interlocutory order and *shall not inherit from the natural parents, except that a child adopted by a stepparent shall inherit from the natural* parent or parents as well as from his parents by adoption. If an adopted child shall die intestate, without issue surviving him, his property shall pass, according to the statutes of descent and distribution, to those persons who would have taken had the decedent been the natural child of the adopting parents. (Emphasis added).

The first problem with section 63.1-234 occurs in the next phrase, "and shall not inherit from the natural parents." This phrase makes it quite clear that an adopted child is no longer entitled to take an inheritance directly from his biological parents, but the statute fails to say anything in regard to the adopted child's right to inherit "through" the biological parents after the adoption. The modern solution to this problem, which is a logical extension of the concept of completely assimilating the adopted child into the adoptive family, is to eliminate all inheritance rights "from" and "through" the biological parents.[5] It is believed that this suggested approach would also accord with the personal wishes of most of the parties concerned in the typical two-parent adoption case. This is due to the fact that the majority of these two-parent adoptions deal with illegitimate children whose biological parents are doing their best to prevent the rest of the world from having any knowledge of their biological connection with the child in question, and the general public policy of shielding such children's connection with their biological parents from the prying eyes of the public.[6]

The next phrase in section 63.1-234, "except that a child adopted by a stepparent shall inherit from the natural parent or parents as well as from his parents by adoption," is intended as an exception to the general rule that an adopted child cannot inherit from its biological parents and raises a second problem in the interpretation of this statute. The exception provided for in this phrase addresses itself to the frequently recurring case in which parents become divorced and, later, the custodian-parent remarries. It is not at all unusual in such cases for the one whom the custodian-parent has married, called the stepparent, to later adopt the custodian-parent's children as his or her own legal children. These instances of adoption by a stepparent typically involve a climate of "openness" con-

5. UNIFORM PROBATE CODE, Commissioners' General Comment to Article II, Part 1, at subparagraph (4).

6. This general public policy of confidentiality is illustrated by VA. CODE ANN. § 63.1-236, (Cum. Supp. 1977), which provides in part:

> No information with respect to the identity of the biological family of the adopted child shall be disclosed, opened to inspection or made available to be copied except (i) upon application of the adopted child, which child is eighteen or more years of age, (ii) upon the order of a circuit court entered upon good cause shown, and (iii) after notice to and opportunity for hearing by the applicant for such order, the child-placing agency involved in the adoptive placement.

cerning all aspects of the adoption as contrasted with the air of confidentiality that regularly attends a two-parent adoption as previously described. In these adoption by stepparent cases, present public policy in Virginia believes it desirable to recognize some continuing connection between the child in question and the noncustodial biological parent (the parent who is not married to the adopting stepparent). Again, however, the fatal flaw is the failure of the statute to specify whether or not the child in question can inherit "through" the noncustodial biological parent as well as "from" such parent. The modern solution to this problem, taking into account the greatly different circumstances between this type of adoption and the typical two-parent adoption, including the facts that bonds of affection with and knowledge of relation to those with whom the child is connected "through" the noncustodial biological parent do exist in many such cases, would permit the child in question to inherit not only "from" its noncustodial biological parent, but "through" such parent as well.[7]

For the foregoing reasons, Draft Statute #1 provides for (1) the adopted child in a two-parent adoption to take "from" and "through" its adoptive parents and not "from" nor "through" its biological parents, and (2) the adopted child in an adoption by stepparent case to continue to inherit "from" and "through" the biological parents as well as "from" and "through" the adoptive stepparent. The draft statute would retain the present practice of recognizing that when the adopted child dies without any children or spouse, the property of the adopted child will be inherited by the adoptive relations instead of the biological relations in the case of a two-parent adoption. Lastly, the draft statute would provide that, in the case of adoption by a stepparent, when the adopted child dies without any children or spouse, its property will be inherited by the biological relations and the adoptive relations, which is a matter not dealt with at all by the present statute.

A final concern in this matter of the inheritance rights of adopted children is the problem of double shares. This problem is encountered in some cases due to a child being able to trace an inheritance from an ancestor via two separate routes—one biological and one

7. UNIFORM PROBATE CODE, § 2-109(1).

adoptive. Assume, for instance, that *H* and *W* marry and have two children, *A* and *B*. *H* dies and later *H*'s brother, *X*, marries *H*'s widow, *W*, and adopts *A* and *B* as his own children. Under these circumstances *A* and *B* can trace both a biological and an adoptive line of relationship back to their paternal grandparents and all of their other kindred who are related to them through the paternal grandparents. No Virginia statute contains a response to this type of problem. Draft Statute #2 would respond to this problem by providing that a person who is related to a decedent through two lines of inheritance is entitled to only a single share based on the relationship which would entitle him to the larger share.

Illegitimate Children[8]

At common law, an illegitimate child was known as *nullius filius*, "the son of nobody," and such a child could not inherit either from or through its father or its mother.[9] Virginia was among the first American states to ameliorate the harshness of this common law rule, and section 64.1-5 allows illegitimate children to take and transmit an inheritance "on the part of their mothers as if lawfully begotten." However, no corresponding rights were recognized on the paternal side for reasons primarily evidentiary in nature. That is, while the fact of maternity was typically rather obvious during the later months of pregnancy, difficult questions of proof arose when the matter of paternity was in dispute; questions that the state of the art in both the field of law as well as medicine were unable to respond to in a satisfactory manner almost two hundred years ago. Thus, the problem now presented by this statute is that instead of establishing a rule requiring a certain degree of proof before recog-

8. Three sections deal with the inheritance rights of illegitimate children.

VA. CODE ANN. § 64.1-5 (Repl. Vol. 1973) provides:

> **When illegitimate children take.**—Illegitimate children shall be capable of inheriting and transmitting inheritance on the part of their mothers as if lawfully begotten.

VA. CODE ANN. § 64.1-6 (Repl. Vol. 1973) provides:

> **When marriage legitimates children.**—If a man, having had a child or children by a woman, shall afterwards intermarry with her, such child or children, or their descendants, if recognized by him as his own child or children before or after marriage, shall be deemed legitimate.

VA. CODE ANN. § 64.1-7 (Repl. Vol. 1973) provides:

> **Issue legitimate though marriage null.**—The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate.

9. *See* ATKINSON, LAW OF WILLS, at 40 (2d ed. 1953) [hereinafter ATKINSON].

nizing inheritance rights on the paternal side, it continues the absolute common law rule that paternity would never be recognized against the father's wishes no matter how much proof might be available.[10]

When such a statute[11] was before the United States Supreme Court in the recent case of *Trimble v. Gordon*,[12] the Court recognized that "[t]he more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally."[13] However, the Court went on to say that "[d]ifficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate."[14] Thus the Court concluded that the statute before it was void because it violated the Equal Protection Clause of the fourteenth amendment.

It is clear that Virginia's section 64.1-5, which is functionally identical to the statute before the Supreme Court in *Trimble,* has the same constitutional defect condemned by the Court in that case. Accordingly, Draft Statute #1 would eliminate this defect by recognizing rights of inheritance on the paternal side if the fact of paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof.[15] In order to infuse an additional degree of equity into this matter, the draft statute goes on to provide that paternity thus established is ineffective to qualify the father or his kindred to inherit from or through such a child unless the father has openly treated the child as his and has not refused to support the child.

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10. Those who might think that this problem of illegitimacy is of no great consequence today should be aware that of the 70,032 births in Virginia in 1975 (the latest year for which the Virginia Bureau of Vital Records and Health Statistics has complete figures) 10,220, or 14.6% of the total, were illegitimate.

11. ILL. REV. STAT. c. 3, § 12 (1961), which provides in relevant part: "An illegitimate child is heir of its mother and of any maternal ancestor, and of any person from whom its mother might have inherited, if living."

12. Trimble v. Gordon, ___ U.S. ___, 97 S. Ct. 1459 (1977).

13. *Id.* at 1465.

14. *Id.* at 1466.

15. *See* note 37 *infra.*

The next statute that deals with the inheritance rights of illegitimate children is section 64.1-6, which deals with the frequently occurring case in which the parents of a child born out of wedlock later intermarry. In such a case the child is deemed the legitimate child of both the father and the mother "if recognized by him as his own child." When it is noted that the "recognition" that has the effect of making such a child the legitimate child of both the father and mother is the sole act of the father, in which the mother is not required to join, and which act she can neither prevent nor initiate on her own (even as to her own relation to the child), it is possible that yet another constitutional defect may be presented in the present American atmosphere that is particularly sensitive to matters involving sexually-based discrimination. Moreover, even though there be no constitutionally sustainable argument, the wisdom of continuing such a one-sided statute seems dubious at best, at least in matters of intestate succession. Accordingly, Draft Statute #1 would allow reciprocal rights of inheritance on both the maternal and paternal side where the parents of an illegitimate child later intermarry, without the need for a "recognition" on the part of either parent.

The final statute to be dealt with in this context is section 64.1-7, which deals with those cases where an illegitimacy would result even though the parents of the child in question "married," because the marriage in issue is either void ab initio (e.g., a bigamous marriage or a common law marriage) or the marriage is dissolved by a court. Draft Statute #1 would continue the present Virginia rule in force under section 64.1-7 and recognize reciprocal rights of inheritance on both the maternal and the paternal sides in all instances where the biological parents participated in a marriage ceremony before the birth of the child in question, even though the attempted marriage is void ab initio or later declared void by a court.

Before leaving the subject matter of illegitimate children it should be noted that the operation of section 64.1-6 and section 64.1-7 has been interpreted as extending beyond the matter of intestate succession. Although the Virginia Supreme Court has characterized both of these statutes as statutes of inheritance,[16] the court has also

16. Withrow v. Edwards, 181 Va. 344, 25 S.E.2d 343 (1943).

stated that the right to inherit is only one of the rights conferred upon children by these sections. Thus, it has been stated that children legitimated by these sections thereby obtain the same rights as legitimate children, such as the right to support from their father,[17] the right to participate in a recovery under the Wrongful Death Act,[18] and the right to proceeds of an insurance policy payable to a "lawful child" under the Federal Employees Group Life Insurance Act.[19] However, the language of Draft Statute #1 defines the rights of such children for purposes of Title 64.1 only, i.e., for matters of succession. This is not meant to suggest that the present humanitarian policy of removing the stigma of bastardy from the shoulders of the affected children should be abandoned. What is suggested is that the matters of succession and matters of legitimation, which can involve quite different considerations, should be severed from each other, and that the definitional statute in Title 64.1 should deal only with matters of succession. A statute dealing with the remaining areas to be affected by legitimation could most appropriately be placed in Title 20.1, Domestic Relations, which has such matters more directly in its purview.[20]

Artificial Insemination[21]

Section 64.1-7.1, which provides for the legitimation of children conceived by artificial insemination, responds to a very obvious

17. Brown v. Commonwealth *ex rel.* Custis, 218 Va. 40, 235 S.E.2d 325 (1977).

18. Grove v. United States, 170 F. Supp. 176 (E.D. Va.), *aff'd sub nom.* Grove v. Metropolitan Life Ins. Co., 271 F.2d 918 (4th Cir. 1959).

19. *Id.*

20. The present incompleteness of VA. CODE ANN. § 20-38.1(b) could be eliminated by a statute drafted along the following lines:

> WHEN MARRIAGE LEGITIMATES CHILDREN.
>
> (1) If a person, having had a child or children, shall afterwards intermarry with the mother, or father, such child or children if recognized by them as their own child or children, jointly or separately, before or after marriage, shall be deemed legitimate.
>
> (2) The issue of marriages prohibited by law, deemed null or void in law, or dissolved by a court, shall nevertheless be legitimate.

21. VA. CODE ANN. § 64.1-7.1 (Cum. Supp. 1977) provides:

> **Children conceived by artificial insemination presumed legitimate.**—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.

need in today's modern world. This particular statute, which is drafted in terms requiring the consent of both the husband and the wife as a condition of legitimation, is not seen as presenting any problems. It is included herein for the sole purpose of reporting the entirety of the succession laws affecting children, and to note, in closing, that since this statute deals with the entirety of legitimation, it would be more appropriate to place it in Title 20.1, Domestic Relations, than in Title 64.1, Wills and Decedent's Estates.

Posthumous Chidren[22]

The problem that is foreseen in the operation of section 64.1-8 arises in connection with the ten-month period that it provides for. While ten months seems very generous when measured against the anticipated nine-month duration of the typical pregnancy, it is believed that there are some instances where a term of pregnancy does exceed ten months. A rule that cuts off an inheritance in such a case, absolutely as opposed to presumptively, seems quite harsh and arbitrary. It is suggested, then, that a statute which focuses on conception during the life of the intestate, rather than birth within a certain period of time after the intestate's death, would be a more just and equitable response to the needs of this situation. Draft Statute #3 seeks to accomplish this result and also to make section 64.1-8 speak in more contemporary language by eliminating such archaic language as "en ventre sa mere."

Distribution of Personal Estate[23]

As earlier explained,[24] Virginia still follows the common law prin-

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22. VA. CODE ANN. § 64.1-8 (Repl. Vol. 1973) provides:

How posthumous children take.—Any person en ventre sa mere, who may be born in ten months after the death of the intestate, shall be capable of taking by inheritance in the same manner as if he were in being at the time of such death.

23. VA. CODE ANN. § 64.1-11 (Repl. Vol. 1973) provides:

Distribution of personal estate.—When any person shall die intestate as to his personal estate or any part thereof, the surplus (subject to the provisions of Title 34) after payment of funeral expenses, charges of administration and debts, shall pass and be distributed to and among the same persons, and in the same proportions, to whom and in which real estate is directed to descend, except as follows:

(1) *Infants.*—The personal estate of an infant shall be distributed as if he were an adult.

(2) *Married Persons.*—If the intestate was married, the surviving husband or wife

ciple of treating realty and personalty differently for purposes of intestate succession. However, this difference is not only of less consequence today than it was at common law, it is of less consequence than one would think upon first reading section 64.1-11. This discrepancy between appearance and reality is due to the fact that subparagrah (1) of section 64.1-11 has been wholly inoperative since 1970. Prior to that time Virginia had a special statute that dealt with the descent of an infant's land in certain cases.[25] However, while this special rule was prescribed for such an infant's real estate, it was never intended that there be any such special treatment given to an infant's personal property. Accordingly, an exception was built into section 64.1-11 to insure that an infant's personal property passed normally, i.e., the same as if the infant were an adult. This exception became surplusage when the special statute dealing with descent of an infant's land in certain cases was repealed in 1970, because thereafter both the infant's realty and his personalty were disposed of as if he were an adult by force of the general rules of section 64.1-1 and section 64.1-11. Accordingly, Draft Statute #4 would remedy this legislative oversight by eliminating subparagraph (1) of section 64.1-11.

Although the remainder of section 64.1-11 deals with determining the share of married persons in the personal estate left by a deceased intestate spouse, it is thought proper to focus on its operation because this subparagraph (2) determines the surviving spouse's share as a function of the children, or their descendants, left by the decedent. This subparagraph, as it relates to children, has more definition than any other section in Title 64.1, and thus far it has been quite simple to interpret and apply. However, it will be noted that clause (d) of this subparagraph is now unconstitutional under the Supreme Court's decision in the *Trimble* case.[26] Moreover, assuming that Draft Statute #1, or some substitute thereof, is enacted by

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shall be entitled to one-third of such surplus, if the intestate left surviving children or their descendents (a) of the marriage which was dissolved by the death of the intestate, (b) of a former marriage, (c) by legal adoption, or (d) though such children were illegitimate, if the intestate was a wife; but if no such children or their descendants survive, the surviving husband or wife shall be entitled to the whole of such surplus.

24. *See* note 3 *supra*, and accompanying text.

25. VA. CODE ANN. § 64.1-9 (repealed 1970).

26. *See* notes 11-15 *supra*, and accompanying text.

the Virginia General Assembly, the remaining definitional clauses in subparagraph (2) of section 64.1-11 would become surplusage. Accordingly, Draft Statute #4 deletes the unconstitutional and the surplus portions from this statute and retains the remainder of its original language.

Rights Upon Renunciation[27]

This section deals with the statutory forced share of a married person in the personal estate of a deceased spouse in those instances where the surviving spouse renounces the will of the deceased spouse. In Virginia, this statutory forced share of a surviving spouse is either one-third or one-half of the deceased spouse's net personal estate, depending upon whether or not the deceased spouse left any surviving children or their descendants. Again it is thought proper to deal with such a section here because of its involvement of children as factors even though the children themselves take nothing thereunder. This statute is defective because of its failure to deal with the problems presented by illegitimate children, and the fact that, although it is the spiritual twin of section 64.1-11, it is not drafted in language that parallels that latter section. Accordingly, Draft Statute #5 represents a redraft of section 64.1-16 in language that: (1) is parallel to section 64.1-11; (2) focuses on Draft Section #1 for its definitions; and thus (3) makes appropriate provision for the possibility of illegitimate children.

Advancements of Children[28]

The purpose of section 64.1-17 is to equalize the shares of a dece-

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27. VA. CODE ANN. § 64.1-16 (Repl. Vol. 1973) provides:

Rights upon renunciation.—If renunciation be made, the surviving consort shall, if the decedent left surviving any direct descendants or a legally adopted child, or descendants of any deceased adopted child, have one-third of the surplus of the decedent's personal estate mentioned in § 64.1-11; or if no direct descendants or adopted child of the testator, or descendants of a deceased adopted child, survive, the surviving consort shall have one-half of such surplus; otherwise the surviving consort shall have no more of the surplus than is given him or her by the will.

28. VA. CODE ANN. § 64.1-17 (Repl. Vol. 1973) provides:

In division of estate of intestate, advancements to be brought into hotchpot.—When any descendant of a person dying intestate as to his estate, or any part thereof, shall have received from such intestate in his lifetime, or under his will, any estate, real or personal, by way of advancement, and he, or any descendant of his, shall

dent's estate taken by his children or their descendants by requiring those who have received an advancement of their share to submit to an adjustment of their distributive share of the deceased ancestor's intestate estate. No problems are seen in the interpretation or application of section 64.1-17 except that it uses the word "descendant" without containing any definition of this term which would indicate how an adopted child or an illegitimate child would or would not fit within the operation of this section, and, as has been seen previously, such definitional sections as do exist elsewhere fail to make a complete response to this need. The enactment of Draft Statute #1, which is a definitional section for all of Title 64.1, would eliminate this problem.

Collusive Dower[29]

The purpose of section 64.1-27 is to protect a minor heir from the loss of a portion of the real estate descended to him from an ancestor through a wrongful assignment of dower to the ancestor's widow. No problems are seen in the interpretation or application of section 64.1-27 except that it uses the word "heir" without containing any definition of this term which would indicate how an adopted child or an illegitimate child would or would not fit within the operation of this section and, as has been seen previously, such definitional sections as do exist elsewhere fail to make a complete response to this need. The enactment of Draft Statute #1, which is a definitional section for all of Title 64.1-1, would eliminate this problem.

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come into the partition and distribution of the estate with the other parceners and distributees, such advancement shall be brought into hotchpot with the whole estate, real and personal, descended or distributable, and thereupon such party shall be entitled to his proper portion of the estate, real and personal.

29. VA. CODE ANN. § 64.1-27 (Repl. Vol. 1973) provides:

Widow, or infant heirs, not affected by judgment by default or collusion.—No widow shall be precluded from her dower by reason of the real estate whereof she claims dower having been recovered from her husband by a judgment rendered by default or collusion, if she would have been entitled to dower therein had there been no such judgment; nor shall any heir who was under the age of eighteen years at the time dower was assigned to the widow out of the lands of his ancestor by his guardian, or by judgment by default or collusion against such guardian, be precluded from recovering the seisin of his ancestor from such widow, unless she show herself entitled to such dower.

Lapsed Bequests and Devises[30]

At common law, if a beneficiary named in a will should die before the testator, the gift to that beneficiary was said to "lapse" or fail, and the property involved would pass to the residuary beneficiaries of the testator's estate.[31] Virginia changes this common law rule in section 64.1-64 by providing for a possible alternative disposition. If such predeceasing beneficiary leaves issue that are surviving up to the time of the testator's death, Virginia's "anti-lapse" statute provides that those issue shall take the deceased beneficiary's gift as substitute beneficiaries unless a different disposition be made or required by the will. The problem presented by section 64.1-64 is that its operative word, "issue," has the absolute biological meaning, "issue of the body" of the deceased beneficiary. It is a matter of settled law and biology that while an adopted person can become one's child, he can never become one's issue, and thus an adopted child is precluded from taking under section 64.1-64.[32] To illustrate how the present operation of this statute causes clear cases of injustice, take the case of a parent who has one biological child and one adopted child. The parent in question predeceases an ancestor in whose will he is named as a beneficiary. Absent some other provision in the will, the biological child of this hypothetical parent will take the entirety of the deceased parent's gift under the ancestor's will and the adopted child, not being "issue," will take nothing. Draft Statute #6 seeks to remove this inequity in the present operation of section 64.1-64 by replacing the word "issue" with the phrase "children or descendants" which would take its definition from Draft Statute #1 and thus make provision for adopted children and illegitimate children.

30. VA. CODE ANN. § 64.1-64 (Repl. Vol. 1973) provides:

When issue of devisee or legatee to take estate.—If a devisee or legatee die before the testator, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof be made or required by the will. This rule shall also apply to a devise or bequest to several jointly, one or more of whom die in the lifetime of the testator.

31. *See* ATKINSON, *supra* note 9, at 777.

32. MINOR ON REAL PROPERTY, § 1185, n.5 (2d ed. Ribble, 1928).

Pretermitted Children[33]

While Virginia law, consistent with the law of all other American states, permits a person to wholly disinherit his children if he so chooses, Virginia law also recognizes that this is not the desire in the typical case, and thus there are two pretermitted heir statutes to prevent one from inadvertently disinheriting his offspring as a result of simple procrastination that causes him to fail to keep his will up to date. Section 64.1-70 deals with those cases in which the parent had no children alive when his will was made but later dies with children. Section 64.1-71 deals with those cases in which a parent had a child or children at the time of writing his will but has had more children thereafter. The problem presented here is the failure of section 64.1-71 to take into account the possibility of after-adopted children as well as after-born children. The present language of section 64.1-70, which speaks in terms of "leaving a child," is broad enough to include the case of an adopted child if Draft

33. There are two statutes dealing with pretermitted heirs.

VA. CODE ANN. § 64.1-70 (Repl. Vol. 1973) provides:

> **Provision for pretermitted children when no child living when will made.**—If any person die leaving a child, or his wife with child, which shall be born alive, and leaving a will made when such person had no child living, wherein any child he might have is not provided for or mentioned, such child, or any descendant of his, shall succeed to such portion of the testator's estate as he would have been entitled to if the testator had died intestate; towards raising which portion the devisees and legatees shall, out of what is devised and bequeathed to them, contribute ratably, either in kind or in money, as a court of equity, in the particular case, may deem most proper. But if any such child, or descendant, die under the age of eighteen years, unmarried, and without issue, his portion of the estate or so much thereof as may remain unexpended in his support and education, shall revert to the person or persons to whom it was given by the will.

VA. CODE ANN. § 64.1-71 (Repl. Vol. 1973) provides:

> **Provision when child living when will made.**—If a will be made when a testator has a child living, and that child is provided for in the will, and a child be born afterwards, such afterborn child if not provided for by any settlement and neither provided for nor expressly excluded by the will, but only pretermitted, shall succeed to the lesser of (a) such portion of the testator's estate as he would have been entitled to if the testator had died intestate or (b) the equivalent in amount to any bequests and devises to any child named in the will, and if there be bequests or devises to more than one child, then to the larger or largest of such total bequests and devises towards raising which portion the devisees and legatees shall, out of what is devised and bequeathed to them, contribute either in kind or in money, as a court of equity may deem proper. But if such afterborn child die under the age of eighteen years, unmarried and without issue, his portion of the estate, or so much thereof as may remain unexpended shall revert to the person to whom it was given by the will.

Statute #1 is enacted to give the word "child" the necessary definition. Thus Draft Statute #7 seeks to eliminate the problem presented by section 64.1-71 by retaining the present language of the statute and simply inserting "after-adopted" at the appropriate points.

Exempt Articles[34]

The purpose of section 64.1-127 is to insure that those articles of personal property generally considered as necessary to the maintenance of a normal household will pass to the surviving spouse and minor children free from claims for administrative expenses of the estate or from general creditors of the decedent. The only problem that is presented by the wording of this statute is in its use of the word "children." The question naturally arises, as it has so often before: How do adopted children and illegitimate children fit into the operation of this statute? This problem would be eliminated by the adoption of the general definitional section, Draft Statute #1.

Stranger to the Adoption Rule

One final matter that deserves attention at this time is not in reference to a Virginia statute, but to a common law decisional rule recognized by the Virginia Supreme Court as still applicable today in the interpretation of wills in which gifts are made to "children," "heirs," "descendants," etc. This rule, or "canon of construction," called the "stranger to the adoption" rule, is best explained by example. Where one makes a gift in his will to his own "children" he is presumed to be intending this word "children" to include all of his children, whether biological or adopted. Where, on the other hand, one makes a gift in his will to the "children," "heirs," "descendants," etc., of another, it is presumed that the testator did

34. VA. CODE ANN. § 64.1-127 (Cum. Supp. 1977) provides:

What articles vest absolutely in surviving spouse and minor children.—Upon the death of a householder leaving a spouse or minor children, there shall be vested in them, absolutely and exempt from sale for funeral expenses, debts of the decedent or charges of administration of his estate, such of his property as would, if he were alive and a householder, be exempted under § 34-26 from levy or distress for his debts, and also, if he be at the time of his death actually engaged in the business of agriculture, such of his property as would, were he alive and a householder, be exempt under § 34-27 from levy or distress for his debts.

not intend to include within those designations individuals in the positions in question as the result of adoption,[35] but that he intended only "blood" children, heirs, descendants, etc., to take. Why? Because the testator was a stranger to the adoptions in question and presumably did not wish to be bound thereby. It is believed that this rule is no longer representative of what the majority of Virginians would wish, and thus Draft Statute #8 is included herein to provide that, in the interpretation of wills, adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with the rules for determining relationships for purposes of intestate succession unless the contrary intention shall appear in the will.

Conclusion

This article began by alleging (1) the existence of much gap, overlap, inconsistency and ambiguity among the various Virginia Code sections dealing with succession rights of children, and (2) that consequences generally regarded as improper and unjust, from the child's standpoint, are too often required by the present state of the law. It is believed that the truth of these allegations has been amply documented in the foregoing discussion, and it is thus incumbent upon the General Assembly of Virginia to take appropriate remedial action during its 1978 session. To this end the draft language in the Appendix, which is based in large part on parallel provisions of the Uniform Probate Code (U.P.C.),[36] is offered to the General Assembly for its consideration. It is of course recognized that the solutions submitted in the Appendix to this article are not the only possible solutions for the many problems presented in this area of the law. However, it is submitted that the problems identified herein have existed long enough, and if the solutions offered thereto are not seen as acceptable, then it is the responsibility of

35. Langhorne v. Langhorne, 212 Va. 577, 186 S.E.2d 50, *cert. denied*, 406 U.S. 946 (1972).

36. The U.P.C. was approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association in August, 1969. The U.P.C., which represents six years of work by a group composed of judges, lawyers, and academicians has been adopted virtually intact in Alaska, Arizona, Colorado, Florida, Idaho, Minnesota, Montana, Nebraska, New Mexico, North Dakota and Utah. In addition, the U.P.C. has greatly influenced recent legislation in Maryland, Oregon and Wisconsin. *See* 8 U.P.C. NOTES 1 (July, 1974).

those objecting to these solutions to come forward with acceptable alternatives.

APPENDIX

PART 1—DRAFT LANGUAGE FOR SUGGESTED STATUTES

#1. **Meaning of child and related terms**—If, for purposes of Title 64.1, a relationship of parent and child must be established to determine succession by, through, or from a person:

> (1) An adopted person is the child of an adopting parent and not of the biological parents, except that adoption of a child by the spouse of a biological parent has no effect on the relationship between the child and either biological parent;
> (2) In cases not covered by Paragraph (1), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:
>
> > (i) the biological parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or
> > (ii) the paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof[37] (but the paternity established under this subparagraph is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child).[38]

#2. **Persons related to decedent through two lines**—A person who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship which would entitle him to the larger share.[39]

#3. **Afterborn heirs**—Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.[40]

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37. I am indebted to my colleague, Professor Gary C. Leedes of the University of Richmond Law Faculty, whose special area of expertise is constitutional law, for a memorandum on the constitutionality of this draft language. Professor Leedes concludes that the draft language used to this point meets the constitutional requirements articulated in *Trimble*, but he foresees a possibility that the following parenthetical language might be held to deny to illegitimate fathers the equal protection of the laws in violation of the fourteenth amendment. Copies of this memorandum are available upon request.

38. Based on U.P.C. § 2-109.

39. Based on U.P.C. § 2-114.

40. Based on U.P.C. § 2-108.

#4. **Distribution of personal estate**—When any person shall die intestate as to his personal estate or any part thereof, the surplus (subject to the provisions of Title 34) after payment of funeral expenses, charges of administration and debts, shall pass to and be distributed to and among the same persons, and in the same proportions, to whom and in which real estate is directed to descend, except that if the intestate was married, the surviving husband or wife shall be entitled to one-third of such surplus if the intestate left surviving children or their descendants; but if no such children or their descendants survive, the surviving husband or wife shall be entitled to the whole of such surplus.[41]

#5. **Rights upon renunciation**—If renunciation be made, the surviving consort shall, if the decedent left surviving children or their descendants, have one-third of the surplus of the decedent's personal estate mentioned in § 64.1-11; or if no children or their descendants survive, the surviving consort shall have one-half of such surplus; otherwise the surviving consort shall have no more of the surplus than is given him or her by the will.[42]

#6. **When children or descendants of devisee or legatee to take estate**—If a devisee or legatee die before the testator, leaving children or their descendants who survive the testator, such children or their descendants shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof be made or required by the will. This rule shall also apply to a devise or bequest to several jointly, one or more of whom die in the lifetime of the testator.[43]

#7. **Provision when child living when will made**—If a will be made when a testator has a child living, and that child is provided for in the will, and a child be born or adopted afterwards, such afterborn or after-adopted child if not provided for by any settlement and neither provided for nor expressly excluded by the will, but only pretermitted, shall succeed to the lesser of (a) such portion of the testator's estate as he would have been entitled to if the testator had died intestate or (b) the equivalent in amount to any bequests and

41. A redraft of § 64.1-11.
42. A redraft of § 64.1-16.
43. A redraft of § 64.1-64.

devises to any child named in the will, and if there be bequests or devises to more than one child, then to the larger or largest of such total bequests and devises towards raising which portion the devisees and legatees shall, out of what is devised and bequeathed to them, contribute either in kind or in money, as a court of equity may deem proper. But if such after-born or after-adopted child die under the age of eighteen years, unmarried and without issue, his portion of the estate, or so much thereof as may remain unexpended shall revert to the person to whom it was given by the will.[44]

#8. **Construction of generic terms**—In the interpretation of wills, adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession unless a contrary intent shall appear on the face of the will.[45]

PART 2—PRESENT VIRGINIA STATUTES TO BE RETAINED

§ 64.1-1 (reproduced in note 2 *supra*).
§ 64.1-7.1 (reproduced in note 21 *supra*).
§ 64.1-17 (reproduced in note 28 *supra*).
§ 64.1-27 (reproduced in note 29 *supra*).
§ 64.1-70 (reproduced in note 33 *supra*).
§ 64.1-127 (reproduced in note 34 *supra*).

PART 3—PRESENT VIRGINIA STATUTES TO BE REPEALED

§ 63.1-234 (reproduced in note 4 *supra)*—replaced by Draft Statute #1.
§ 64.1-5 (reproduced in note 8 *supra)*—replaced by Draft Statute #1.
§ 64.1-6 (reproduced in note 8 *supra)*—replaced by Draft Statute #1.
§ 64.1-7 (reproduced in note 8 *supra)*—replaced by Draft Statute #1.
§ 64.1-8 (reproduced in note 22 *supra)*—replaced by Draft Statute #3.
§ 64.1-11 (reproduced in note 23 *supra)*—redrafted as Draft Statute #4.
§ 64.1-16 (reproduced in note 27 *supra)*—redrafted as Draft Statute #5.

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44. A redraft of § 64.1-71.
45. Based on U.P.C. § 2-611.

§ 64.1-64 (reproduced in note 30 *supra)*—redrafted as Draft Statute #6.
§ 64.1-71 (reproduced in note 33 *supra)*—redrafted as Draft Statute #7.