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Wills, Trusts and Estates (Annual Survey of Virginia Law, 1995-97)

J. Rodney Johnson

University of Richmond, rjohnson@richmond.edu

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WILLS, TRUSTS, AND ESTATES

*J. Rodney Johnson**

I. INTRODUCTION

The General Assembly enacted legislation dealing with wills, trusts, and estates that added, amended, or repealed a number of sections of the Code of Virginia in the 1996 and 1997 sessions. In addition, there were eleven Supreme Court of Virginia opinions in the two-year period ending April 18, 1997, that involved issues of interest to the general practitioner as well as the specialist in wills, trusts, and estates. This article reports on all of these legislative and judicial developments.¹

II. 1996 LEGISLATION

A. *Nonresident Fiduciaries—Prohibitions Eliminated*

Virginia's policy regarding a nonresident individual² serving as a sole fiduciary for an estate, testamentary trust, or an incapacitated person has evolved from a pre-1983 xenophobia to a 1996 open door policy in a series of legislative enactments³

* Professor of Law, University of Richmond School of Law. 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 often be referred to in the text by their section numbers only.

2. The prohibition against a foreign corporation serving as a fiduciary continues in existence. See VA. CODE ANN. § 26-59(B) (Repl. Vol. 1997).

3. For the history of this movement as it relates to: (i) personal representatives, testamentary trustees, and guardians, committees and trustees of incompetent or incapacitated persons, see J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts and Estates*, 29 U. RICH. L. REV. 1175, 1182-85 (1995) [hereinafter *1995 Annual Survey*]; (ii) guardians of the person of infants, see J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 23 U. RICH. L. REV. 859, 860 (1989); and (iii) trustees of inter vivos trusts receiving pour-overs from wills, see J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates* 25 U.

culminating in the 1996 amendments to sections 26-59 and 64.1-73.⁴ The privilege extended to nonresidents is, however, subject to certain qualifications as follows:

(1) *Personal Representative, Testamentary Trustee, Guardian of an Infant's Estate, Guardian of the Person or Property of an Incapacitated Person, and Committee of a Person Non Compos Mentis*. As amended, subsection A of section 26-59 now provides that any nonresident individual may serve as sole fiduciary in any of the listed capacities if the fiduciary (i) consents to service of process in matters related to the fiduciary office being made either on a person designated by the fiduciary or on the clerk of court in which the fiduciary qualified, and (ii) posts bond with surety, unless surety is waived by the court pursuant to section 26-4.⁵

(2) *Guardian of the Person of an Infant*. The 1989 provision repealing the residency requirement applicable to a guardian of the person of an infant⁶ is continued in the 1996 legislation with a slightly different citation.⁷

(3) *Trustee of an Inter Vivos Trust Receiving a Pour-Over from a Will*. Whereas traditional estate planning has been will-based, a number of today's estate planners favor a plan based upon an inter vivos trust in some instances. In these inter vivos trust-based plans, the desire to integrate all of the client's

RICH. L. REV. 925, 930 (1991) [hereinafter *1991 Annual Survey*].

4. VA. CODE ANN. § 26-59 (Repl. Vol. 1997); VA. CODE ANN. § 64.1-73 (Cum. Supp. 1997).

5. VA. CODE ANN. § 26-59(A) (Repl. Vol. 1997). Section 26-4 allows the court and its clerk to waive surety in cases involving personal representatives, guardians, and committees [but makes no reference to testamentary trustees] when the amount under the control of the fiduciary does not exceed \$5000. *Id.* § 26-4 (Repl. Vol. 1997). Other than this exception, however, section 26-59(A) clearly provides that surety must be given, "[n]otwithstanding §§ 37.1-135 [which allows the court to waive surety upon the official bonds of committees for incompetent persons, guardians for incapacitated persons, and trustees for incompetent ex-service persons] and 64.1-121 [which eliminates the need for surety upon the official bonds of personal representatives of a decedent's estate in certain cases]." *Id.* § 26-59(A) (Repl. Vol. 1997). Note that neither of the references in the preceding sentence includes a trustee of a testamentary trust. This omission, however, should not present a problem because the section authorizing clerks to appoint and qualify testamentary trustees calls for them to act "pursuant to the provisions of § 26-59." *Id.* § 26-46.1 (Repl. Vol. 1997).

6. See Act of March 23, 1989, ch. 535, 1989 Va. Acts 787 (codified at VA. CODE ANN. § 26-59(D) (Repl. Vol. 1992)).

7. See VA. CODE ANN. § 26-59(C) (Repl. Vol. 1997).

assets into one vehicle following the client's death is accomplished by making a testamentary pour-over gift of the net residue of the client's probate estate to the inter vivos trust. In order to close an obvious loophole, section 64.1-73 has imposed residency requirements on the trustee of an inter vivos trust receiving such a pour-over that were, from time to time, similar to those imposed on a trustee of a testamentary trust by section 26-59. Thus, the 1996 amendments to section 64.1-73 follow the pattern of those made to section 26-59, described above, with the result that any nonresident individual may serve as sole trustee of an inter vivos trust receiving a testamentary pour-over if the trustee (i) consents to service of process in trust-related matters being made either on a person designated by the trustee or on the clerk of court in which the trustee qualified, and (ii) posts bond with surety unless surety is waived by the court pursuant to section 26-4.⁸ The surety-related problems that were noted in these pages following the 1991 amendments to this section have not yet been addressed and thus remain unresolved.⁹

8. VA. CODE ANN. § 64.1-73(A) (Cum. Supp. 1997). Section 26-4 allows the court and its clerk to waive surety in cases involving personal representatives, guardians, and committees when the amount under the control of the fiduciary does not exceed \$5000. This section, however, makes no reference to trustees of an inter vivos trust. See VA. CODE ANN. § 26-4 (Repl. Vol. 1997).

9. See Johnson, 1991 *Annual Survey*, *supra* note 3, at 930 which reads as follows:

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

Johnson, 1991 *Annual Survey*, *supra* note 3, at 930.

B. *Trust Termination—Settlor's Intent*

Section 55-19.4, entitled, "Petition for reformation of a trust," was added to the Code in 1991.¹⁰ A concern quickly developed that this section's exceptionally liberal trust termination procedure could "be used to destroy much of what estate planning is all about . . . [and might mean that] the prudent Virginia attorney will be forced to create trusts under the laws of other jurisdictions in order to insure that a client's legitimate purposes will not be frustrated."¹¹ An article published in 1995 spelled out the deficiencies of section 55-19.4 in detail and suggested mandatory language for their correction.¹² These suggested changes were enacted, *mutatis mutandis*, by the 1996 session.¹³

C. *Durable Powers of Attorney—Judicial Discovery*

The 1995 Session enacted far reaching reform measures relating to non-judicial accountings¹⁴ and judicial discovery¹⁵ in connection with durable powers of attorney.¹⁶ The judicial discovery provision was amended in 1996 to require that a request for disclosure pursuant to the non-judicial accounting procedure must be made before the judicial discovery remedy is available. The 1996 amendment also restrictively clarifies the definition of the phrase "person interested in the welfare of a principal," by changing the operative verb from "includes" [certain persons] to

10. Act of March 20, 1991, ch. 415, 1991 Va. Acts 621 (codified at VA. CODE ANN. § 55-19.4 (Repl. Vol. 1995)).

11. Johnson, *1991 Annual Survey*, *supra* note 3, at 932-33.

12. See J. Rodney Johnson, *Trustor's Intent in Termination Cases: An Endangered Species in Virginia—or Extinct?*, VA. ST. B. TR. AND EST. NEWSL. Fall 1995, at 3.

13. See VA. CODE ANN. § 55-19.4 (Cum. Supp. 1997).

14. See Act of March 18, 1995, ch. 369, 1995 Va. Acts 522 (codified at VA. CODE ANN. § 11-9.6 (Cum. Supp. 1997)).

15. See *id.* (codified at VA. CODE ANN. § 37.1-132.1 (Cum. Supp. 1997)).

16. See generally Johnson, *1995 Annual Survey*, *supra* note 3, at 1175-79 (discussing the relevant 1995 legislation).

“is” [those same persons], and slightly enlarges this class by including “niece or nephew” therein.¹⁷

D. *Joint Bank*¹⁸ *Accounts—Financial Exploitation—Remedy*

The concern for certain victims of financial exploitation expressed by the 1994 Session,¹⁹ which led to the 1995 enactment of the durable power of attorney reforms mentioned in the preceding paragraph of this article,²⁰ resulted in further recommendations being made to the 1996 Session by House Document No. 24.²¹ One of these recommendations focused on the ubiquitous joint bank account which, because of its survivorship feature, the Supreme Court of Virginia once referred to as “the poor man’s will.”²² Another feature of a joint bank account is the opportunity it presents for a sole depositor to insure continuing access to the depositor’s funds by adding a trusted person’s name to the account who will be able to access the depositor’s funds for the depositor’s convenience during times of illness, etc. Accordingly, House Document No. 24 further recognizes that “[t]o a certain extent, very familiar to those who work with persons of modest means, the joint account might also be referred to as ‘the poor man’s durable power of attorney.’”²³ Not only does this de facto durable power of attorney present the same opportunities for financial exploitation as a de jure power, House Document No. 24 reports that “more cases of financial exploitation of the elderly occur through the abuse of a joint account than through a [formal] power of attorney.”²⁴

To provide relief in these joint account cases, the General Assembly accepted the specific recommendation of House Docu-

17. VA. CODE ANN. § 37.1-132.1 (Cum. Supp. 1997).

18. Although the text will refer to “bank” accounts for purposes of convenience, the legislation and the following discussion is applicable to joint accounts in any “financial institution” as that term is defined in VA. CODE ANN. § 6.1-125.1(3) (Repl. Vol. 1993).

19. See H.J. Res. 84, Va. Gen. Assembly, (Reg. Sess. 1994).

20. See generally Johnson, 1995 Annual Survey, *supra* note 3, at 1175-79.

21. See REPORT OF THE VIRGINIA BAR ASSOCIATION ON CIVIL REMEDIES TO ENHANCE PROTECTION OF VULNERABLE ADULTS FROM FINANCIAL EXPLOITATION, H. Doc. No. 24 (1996) [hereinafter H. DOC. NO. 24].

22. King v. Merryman, 196 Va. 844, 849, 86 S.E.2d 141, 143 (1955).

23. H. Doc. No. 24, *supra* note 21, at 4.

24. *Id.*

ment No. 24 that the non-judicial accounting and the judicial discovery remedies enacted in 1995 vis-a-vis the standard durable power of attorney be extended to joint bank accounts. The General Assembly accepted this recommendation by adding new section 6.1-125.15:1 to the Virginia Code, which recognizes that: (i) "[p]arties to a joint account in a financial institution occupy the relation of principal and agent as to each other, with each standing as a principal in regard to his ownership interest in the joint account²⁵ and as agent in regard to the ownership interest of the other party";²⁶ and (ii) "[t]he provisions of §§ 11-9.6 [non-judicial accounting] and 37.1-132.1 [judicial discovery] shall apply to such principal agent relationships."²⁷

E. *Inflationary Adjustments*

Over the years, the General Assembly has enacted numerous probate related statutes that contain references to specific dollar amounts. It is the destiny of any such statute to decline in significance as inflation decreases the actual value of the specified amount. Responding to this problem, the 1996 Session increased the amounts in a number of these statutes as follows:

(1) *Probate Avoidance—Small Estates.* The Virginia Code contains a number of statutes designed to facilitate the transfer of specific kinds of property from the dead to the living without requiring the recipients to go through the probate process. These statutes are permissive in nature and, although they fully protect the transferor who elects to rely upon them, a potential transferee cannot force their use. A further common denominator in most of these statutes has been a requirement

25. Notwithstanding the popular misconception that a joint bank account is a joint tenancy with the parties thereto owning the deposit equally, the Virginia Code provides that "[a] joint account belongs, during the lifetimes of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, except that a joint account between persons married to each other shall belong to them equally, and unless, in either case, there is clear and convincing evidence of a different intent." VA. CODE ANN. § 6.1-125.3(A) (Repl. Vol. 1993).

26. *Id.* § 6.1-125.15(1) (Cum. Supp. 1997).

27. *Id.* Section 6.1-125.15(1) concludes by providing that "[f]or the purposes of this section, the definition of a joint account in a financial institution, and the ownership interest of the parties therein, are determined in accordance with the provisions of this Chapter [Chapter 2.1 of Title 6.1]." *Id.*

that the value of the property in question not exceed \$5,000. This ceiling has been increased to \$10,000 in the following instances: (i) certain sums due decedents from the Commonwealth, the United States, labor unions or employers;²⁸ (ii) corporate securities owned by the decedent;²⁹ (iii) sums due deceased trust or estate beneficiaries;³⁰ (iv) sums due a "deceased inmate of state mental institution";³¹ (v) sums due a "deceased patient of municipally operated health care facility";³² and (vi) "personal property belonging to nonresident decedents."³³

(2) *Small Estates Act.* The Virginia Small Estate Act has provided for an affidavit-based personal property collection process in estates where the value of the entire personal probate estate does not exceed \$5000.³⁴ The 1996 legislation increased this ceiling to \$10000.³⁵

(3) *Exempt Property and Living Allowance.* The 1981 Session enacted comprehensive legislation governing the rights of a decedent's spouse and children to exempt property and allowances.³⁶ The 1996 amendments increased the exempt property allowance from \$3500 to \$10,000,³⁷ and also increased the personal representative's authority to award a living allowance from \$6000 to \$12,000 if payment is made as a lump sum, and from \$500 to \$1000 monthly for one year if payment is made on a periodic basis.³⁸ It should be noted that these living allowance amounts are not limitations upon the entitlement

28. See VA. CODE ANN. § 64.1-123 (Cum. Supp. 1997).

29. See *id.* § 64.1-123.1 (Cum. Supp. 1997).

30. See *id.* § 64.1-123.3 (Cum. Supp. 1997).

31. *Id.* § 64.1-124 (Cum. Supp. 1997).

32. *Id.* § 64.1-124.1 (Cum. Supp. 1997).

33. *Id.* § 64.1-130 (Cum. Supp. 1997).

34. See §§ 64.1-132.1 to -132.4 (Repl. Vol. 1995). For a discussion of this Act, see J. Rodney Johnson, *Wills, Trusts, and Estates*, 68 VA. L. REV. 521, 529-30 (1982).

35. See VA. CODE ANN. § 64.1-132.2 (Cum. Supp. 1997).

36. See Act of March 22, 1981, ch. 580, 1981 Va. Acts 897 (codified at VA. CODE ANN. §§ 64.1-151.1 to -151.6 (Repl. Vol. 1995)). For a discussion of this Act and its background, see J. Rodney Johnson, *Support of the Surviving Spouse and Minor Children in Virginia: Proposed Legislation v. Present Law*, 14 U. RICH. L. REV. 639 (1980), and Johnson, *Wills, Trusts, and Estates*, *supra* note 34, at 521-25.

37. See VA. CODE ANN. § 64.1-151.2 (Cum. Supp. 1997).

38. See *id.* § 64.1-151.4 (Cum. Supp. 1997).

amount, which remains a "reasonable allowance,"³⁹ but only a limitation upon what can be disbursed without court approval.⁴⁰

(4) *Spendthrift Trusts*. The \$500,000 ceiling on spendthrift trusts that was established in 1980⁴¹ has been increased to \$600,000.⁴²

(5) *Abatement—Funeral Expenses*. When a decedent's probate personal property is not sufficient to pay all claims against the decedent's estate, section 64.1-157 establishes an eight-step order of priority in which they must be satisfied which, in some cases, also includes a limitation on the amount of a claim's priority.⁴³ Funeral expenses remain in step three under the 1996 legislation, but their priority amount increases from \$500 to \$2000.⁴⁴

F. *Will Contest—Nonresident—Limitation Period*

The general limitation period on bringing a plenary proceeding in circuit court to impeach or establish a will that has been admitted to, or denied, probate in an ex parte proceeding before the court or its clerk is one year from the time the order or decree was entered.⁴⁵ Section 64.1-90, however, provides for extensions of this one-year period to certain categories of persons.⁴⁶ The 1996 amendment to this section eliminates the provision establishing a two-year period for persons who reside outside the Commonwealth at the time the initial order or decree is entered in the ex parte proceedings, and thereby puts nonresidents on the same footing as residents.⁴⁷

39. *Id.* § 64.1-151.1 (Repl. Vol. 1995).

40. *See id.* § 64.1-151.4 (Cum. Supp. 1997).

41. *See Act of March 22, 1980, ch. 267, 1980 Va. Acts 288.*

42. *See VA. CODE ANN.* § 55-19 (Cum. Supp. 1997).

43. *VA. CODE ANN.* § 64.1-157 (Cum. Supp. 1997).

44. *See id.*

45. *See id.* § 64.1-89 (Repl. Vol. 1995).

46. *See id.* § 64.1-90 (Cum. Supp. 1997). Those who were entitled to an enlarged period before the 1996 amendment were minors, incapacitated persons, nonresidents who have made no personal appearance, and persons who "have been proceeded against by order of publication" who have made no personal appearance. *Id.* § 64.1-90 (Repl. Vol. 1995).

47. *See id.* § 64.1-90 (Cum. Supp. 1997).

G. *Personal Representative's Bond—Reduction*

In the typical *ex parte* probate proceeding, the clerk of court sets the amount of the personal representative's bond based upon the personal representative's estimate of the value of the decedent's estate under the personal representative's control. Although the Virginia Code contains a provision for increasing the amount of this bond at a later date if it is found to be insufficient,⁴⁸ there has been no corresponding provision providing for a reduction thereof if the bond is later found to be too large, whether as an original proposition or due to changing facts. The 1996 legislation now requires the clerk to redetermine the amount of a personal representative's bond, upon the personal representative's request, following a reduction of the estate's value that occurs because of disbursements, distributions, or valuation of assets.⁴⁹ The authorized bond reductions are limited to bonds initially set by the clerk, as opposed to the court, and the claimed reduction in value must be supported by a commissioner approved inventory or a court confirmed accounting.⁵⁰

H. *Personal Representative's Bond—Surety*

Section 64.1-121 eliminates the requirement of a surety upon the bonds of executors and administrators if they (or a portion of them) take the entirety of a decedent's estate.⁵¹ The 1996 amendment extends the spirit of this rule to include cases where the executors (or a portion of them) take the entirety of a decedent's residuary estate. Although the executor's bond will still be based upon the value of the decedent's estate under the executor's control, surety will now have to be given only on that portion of the bond that corresponds to the portion of the

48. See VA. CODE ANN. § 26-3 (Repl. Vol. 1992).

49. See VA. CODE ANN. § 64.1-120 (Cum. Supp. 1997).

50. See *id.*

51. See *id.* § 64.1-121 (Cum. Supp. 1997). This waiver does not extend to cases where all of the fiduciaries are nonresidents. See VA. CODE ANN. § 26-59 (Repl. Vol. 1997).

decedent's estate that is passing to the non-executor beneficiaries.⁵²

I. *Personal Representative—No Incumbent*

The general rule of section 64.1-131 provides that if a two-month period elapses without a personal representative in office, the court or clerk "shall, on the motion of any person, order any person of the county or city" to serve as personal representative.⁵³ The 1996 amendment to this section provides that "any sheriff so ordered may decline the appointment if the appointment interferes with his current duties or obligations."⁵⁴

J. *Presumption of Death—Disappearance*

Section 64.1-105 of the Virginia Code, dealing with the presumed death of a person who has not been heard from for a period of seven years, requires an unnecessarily long wait in some instances where it is reasonable to assume that one has in fact died at an earlier time.⁵⁵ Thus, this section was amended in 1996 to cover one such case by providing that a person who

disappears in a foreign country, whose body has not been found and who is not known to be alive, upon issuance of a report of presumptive death by the Department of State of the United States *following an investigation by a competent local authority*, shall be presumed to be dead.⁵⁶

This legislation, which is specifically applicable to State Department certificates issued before or after its effective date,⁵⁷ was

52. See VA. CODE ANN. § 64.1-121 (Cum. Supp. 1997).

53. *Id.* § 64.1-131 (Repl. Vol. 1995). Exceptions are made for those cases where the vacancy in office is due to a will contest, the infancy of the executor, and the absence of the executor. See *id.*

54. *Id.* § 64.1-131 (Cum. Supp. 1997).

55. See *id.* § 64.1-105 (Repl. Vol. 1995).

56. *Id.* § 64.1-105 (Cum. Supp. 1997) (emphasis added). Conforming amendments are also made to Virginia Code §§ 26-68.1 (Repl. Vol. 1997), 64.1-106 to -110, -112 (Cum. Supp. 1997).

57. See Act of April 6, 1996, ch. 675, 1996 Va. Acts 1168 (enacting S.B. 266, Va.

enacted on an emergency basis, thus becoming effective on April 6, 1996.⁵⁸ The possible problem with this legislation relates to the emphasized language. Read literally, there are two conditions precedent that must be satisfied before the presumption of death arises. They are (i) issuance of a State Department report, following (ii) an investigation by a competent local authority. Query: how does the Virginia trial court determine (a) the identity of "a competent local authority" in Libya, Iraq, Haiti, etc., and (b) that this authority has conducted an investigation? It would appear that the statute would be made far more effective by the deletion of the second condition precedent. And, if this language does not represent an intended condition precedent then a fortiori it should be deleted.

K. Clerk's Office—Recordation of Writings

Section 17-59 of the Virginia Code, which relates to "[e]very writing authorized by law to be recorded," provides that the clerk may refuse to record any document that fails to contain certain information.⁵⁹ The 1996 amendment adds to these informational requirements the fact that "the first page of the document bears an entry showing the name of either the person or entity who drafted the instrument."⁶⁰ Although this section is generally regarded as relating primarily to deeds of real estate and related papers, its language refers to "[e]very writing authorized by law to be recorded"⁶¹ and there is anecdotal evidence that some clerks are applying the new requirement to powers of attorney.

Gen. Assembly, (Reg. Sess. 1996)); Act of April 6, 1996, ch. 684, 1996 Va. Acts 1187 (enacting H.B. 424, Va. Gen. Assembly, (Reg. Sess. 1996)).

58. See Act of April 6, 1996, ch. 675, 1996 Va. Acts 1168 (enacting S.B. 266, Va. Gen. Assembly, (Reg. Sess. 1996)); Act of April 16, 1996, ch. 684, 1996 Va. Acts 1187 (enacting H.B. 424, Va. Gen. Assembly, (Reg. Sess. 1996)).

59. VA. CODE ANN. § 17-59 (Repl. Vol. 1996).

60. *Id.* The amendment contains an exception for writings prepared outside the Commonwealth.

61. *Id.*

L. *Judicial Sale of Decedent's Realty—Proceeds*

Section 64.1-184 of the Virginia Code deals with the distribution of proceeds from the sale of a decedent's real estate by the special commissioner appointed to hold them, where the sale occurs within one year of the decedent's death.⁶² Prior to amendment, this section has required the commissioner to hold the proceeds for the remainder of the year in question before making any distribution.⁶³ The 1996 amendment authorizes the commissioner to make an earlier distribution "upon the posting of a bond with such surety as may be prescribed by the court to secure any claims against the property or proceeds."⁶⁴

M. *Fiduciaries for Incapacitated Persons—Surety*

Section 37.1-135 of the Virginia Code, dealing with judicial appointment of guardians for incapacitated persons, committees for incompetent persons, and trustees for incompetent ex-service persons, has mandated that the court require surety upon the fiduciary's official bond.⁶⁵ The 1996 amendment grants the court discretion to waive this surety requirement.⁶⁶

N. *Charitable Gift Annuities*

Section 38.2-106 defines the term "annuities" for all purposes of Title 38 of the Virginia Code, the insurance title.⁶⁷ The 1996 amendment to this section excludes from its definition "qualified charitable gift annuities as defined in § 38.2-106.1."⁶⁸ Two new sections provide, among others things, (i) a definition of a charitable gift annuity,⁶⁹ and (ii) that the issuance of qualified

62. VA. CODE ANN. § 64.1-184 (Repl. Vol. 1995).

63. *See id.*

64. *Id.* § 64.1-184 (Cum. Supp. 1997).

65. VA. CODE ANN. § 37.1-135 (Repl. Vol. 1990).

66. *See* VA. CODE ANN. § 37.1-135 (Repl. Vol. 1996). Note that this waiver provision will not be applicable if the only (or all of the) fiduciary is a nonresident. *See* discussion *supra* Part II.A.

67. VA. CODE ANN. § 38.2-106 (Repl. Vol. 1994).

68. *Id.* § 38.2-106 (Cum. Supp. 1997).

69. *See id.* § 38.2-106.1 (Cum. Supp. 1997).

charitable annuities is not engaging in the business of insurance.⁷⁰ This legislation eliminates a problem for charitable organizations that had been utilizing charitable gift annuities as a part of their fund raising operations.⁷¹

O. *Conveyances of Virginia Realty by Foreign Executors*

Section 64.1-149 has validated pre-June 30, 1960 conveyances made by an executor under a will containing a power of sale that was admitted to probate elsewhere, if the will is also probated in Virginia, even though the foreign executor did not also qualify in Virginia. Section 64.1-150 has validated post-May 31, 1960 conveyances made under these same circumstances where, in addition, a local ancillary administrator also executes the deed in question. The 1996 amendments change the dates in both of these statutes from 1960 to 1986.⁷²

III. 1997 LEGISLATION EFFECTIVE JULY 1, 1997

A. *Assisted Conception—Mother's Husband as Donor*

The 1991 Session passed legislation based on the Uniform Status of Children of Assisted Conception Act, which became effective July 1, 1993.⁷³ This legislation, which required significant estates-related clarification in the 1994 Session,⁷⁴ was further amended in 1997 to clarify that, notwithstanding the general rule that a sperm donor is not the parent of a child conceived by artificial conception, a donor married to the gestational mother is the father of the resulting child.⁷⁵

70. See *id.* § 38.2-3113.2 (Cum. Supp. 1997).

71. A portion of this enactment that will not be published in the Code reads as follows: "That the provisions of this act, amending § 38.2-106, the definition of 'charitable gift annuity' as added by this act in § 38.2-106.1, and subsections A and C in § 38.2-3113.2 as added by this act are declarative of existing law." Act of March 31, 1996, ch. 425, cl. 2, 1996 Va. Acts 717.

72. See VA. CODE ANN. §§ 64.1-149, -150 (Cum. Supp. 1997).

73. Act of March 25, 1991, ch. 600, 1991 Va. Acts 1104-11.

74. For a discussion of the 1994 legislation, see J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 28 U. RICH. L. REV. 1145-48 (1994).

75. See VA. CODE ANN. §§ 20-156, -158(A)(3) (Cum. Supp. 1997).

B. Succession—Illegitimacy—Exhumation

Section 64.1-5.1 of the Code contains the general rules governing the existence of a parent-child relationship for succession purposes,⁷⁶ and section 64.1-5.2 of the Code contains certain evidentiary provisions that are applicable when the relationship sought to be established is based upon a man being the illegitimate father of a child.⁷⁷ In addition to all relevant evidence, this latter section specifically authorizes the introduction of “medically reliable genetic blood grouping tests,”⁷⁸ and “medical or anthropological evidence relating to the alleged parentage of the child based on tests performed by experts.”⁷⁹ A 1996 decision of the Supreme Court of Virginia, however, held that Virginia’s exhumation statute⁸⁰ “does not authorize an exhumation order for the purpose of establishing paternity.”⁸¹ The 1997 Session amended the exhumation statute to provide that the trial court may order disinterment in such cases “for the conduct of scientifically reliable genetic tests, including blood tests, to prove a biological relationship” if the moving party presents substantial evidence that he will prevail under sections 64.1-5.1 and -5.2.⁸² The importance of this amendment is evidenced by the fact that “[i]n Virginia, approximately one out of three children is born out of wedlock.”⁸³ And, even if a decedent leaves no estate or it goes to another, an illegitimate child who is entitled to inherit under state law is also a child of the

76. VA. CODE ANN. § 64.1-5.1 (Repl. Vol. 1995).

77. *Id.* § 64.1-5.2 (Repl. Vol. 1995); see generally J. Rodney Johnson, *Inheritance Rights of Children in Virginia*, 12 U. RICH. L. REV. 275 (1978); Johnson, *1991 Annual Survey*, *supra* note 3, at 925-27 (discussing the background of sections 64.1-5.1 and 64.1-5.2).

78. VA. CODE ANN. § 64.1-5.2(7) (Repl. Vol. 1995).

79. *Id.* § 64.1-5.2(8) (Repl. Vol. 1995).

80. See VA. CODE ANN. § 32.1-286 (Repl. Vol. 1992).

81. *Garrett v. Majied*, 252 Va. 46, 49, 471 S.E.2d 479, 480 (1996).

82. VA. CODE ANN. § 32.1-286(C) (Repl. Vol. 1997). The amendment further provides that “[t]he costs of exhumation and testing shall be paid by the moving party unless, for good cause shown, the court orders such costs paid from the estate of the exhumed deceased.” *Id.*

83. Gary Robertson, *Areas Join to Cut Illegitimacy While Vying for Federal Funds*, RICH. TIMES-DISPATCH, July 15, 1997, at B1. “And in some cities—Richmond (62 percent), Petersburg (69 percent) and Emporia (61 percent)—about two-thirds of the births from 1991 to 1995 were illegitimate.” *Id.*

decedent for the purpose of Social Security survivor's benefits.⁸⁴

C. *Accounts in Financial Institutions—Probate Avoidance—Ceiling*

Continuing the work initiated by the 1996 Session in making inflationary adjustments to the Virginia Code's probate avoidance statutes,⁸⁵ the 1997 Session increased the ceiling applicable to deposits in banks,⁸⁶ savings and loan associations,⁸⁷ and credit unions from \$5000 to \$10,000.⁸⁸

D. *Nonresident Testamentary Trustee—Qualification*

The 1996 Session amended section 26-59 of the Virginia Code to allow a nonresident individual to serve as the sole trustee of a testamentary trust.⁸⁹ As no corresponding change was made, however, to section 26-46.1 of the Virginia Code, dealing with the clerk's appointive powers, such a nonresident could only qualify before the court. The 1997 amendment eliminates this problem by authorizing the clerk to qualify nonresident individuals as testamentary trustees in accordance with the provisions of section 26-59.⁹⁰

E. *Principal and Income Act—Authorized Deviation*

Virginia's version of the Uniform Principal and Income Act provides, among other things, default rules for determining the character of receipts and disbursements, i.e., whether they are

84. See 20 C.F.R. §§ 404.350(a)(1), 404.354(b) (1997).

85. See discussion of the 1996 inflationary amendments to probate avoidance statutes *supra* Part II.E.

86. See VA. CODE ANN. § 6.1-71 (Cum. Supp. 1997).

87. See *id.* § 6.1-194.58 (Cum. Supp. 1997).

88. See *id.* § 6.1-225.49 (Cum. Supp. 1997).

89. See discussion *supra* Part II.A.

90. See VA. CODE ANN. § 26-46.1 (Cum. Supp. 1997). The referenced section (section 26-59) requires a nonresident individual serving as a sole fiduciary to post surety on the fiduciary bond and to have a local agent for service of process. See *id.* § 26-59 (Repl. Vol. 1997).

income or principal.⁹¹ Document drafters frequently give a fiduciary the discretion to make such allocations in a different manner for several reasons.⁹² The 1997 amendment provides that making an allocation contrary to the default rules does not raise a presumption of imprudence or impartiality if the governing document specifically grants an allocation power.⁹³

F. *Trusts—Lists of Tangible Personal Property*

The 1995 Session enacted legislation authorizing a testator to make gifts of tangible personal property after the will's execution by way of a writing or list not executed in accordance with the formalities required for wills.⁹⁴ In recognition of the growing popularity of the revocable inter vivos trust as a will substitute,⁹⁵ the 1997 Session extended the tangible personal property list concept to trusts.⁹⁶ Unlike the will provision, however, which can dispose of any of the testator's tangible personal property, the trust provision can only dispose of tangible personal property contained in the trust.⁹⁷ Although applicable only to "revocable inter vivos" trusts when introduced, this legislation was amended in committee by striking the words "revocable inter vivos" from its opening sentence, thereby making it applicable to any trust.⁹⁸ Nevertheless, the prudent attorney will typically use this option only in connection with revocable inter vivos trusts. The use of this option in connection with an irrevocable trust will clearly be a reservation of power to alter or amend the trust's disposition of its tangible personal

91. See VA. CODE ANN. §§ 55-253 to -268 (Repl. Vol. 1995).

92. See, e.g., VA. CODE ANN. § 64.1-57(1)(i) (Repl. Vol. 1995) (creating a discretionary allocation power designed to be incorporated by reference into a will or trust).

93. See VA. CODE ANN. § 55-254 (Cum. Supp. 1997).

94. See VA. CODE ANN. § 64.1-45.1 (Repl. Vol. 1996); see also Johnson, 1995 Annual Survey, *supra* note 3, at 1185-86.

95. See J. Rodney Johnson, *The Living Trust vs. The Will: Which is Best for the Typical Virginian?*, 42 VA. LAW., January 1994 at 37 (suggesting that this popularity may not be deserved in the ordinary case).

96. See VA. CODE ANN. § 55-7.2 (Cum. Supp. 1997).

97. See *id.*

98. See H.B. 2713, Va. Gen. Assembly, (Reg. Sess. 1997). The words "revocable inter vivos," however, were not also deleted from the third sentence of the bill and thus they were enacted as a part of section 55-7.2. Such an obvious oversight should not create a problem for the courts construing this section in light of the legislative history.

property for federal estate tax purposes,⁹⁹ and it may be construed to have a broader effect in creditors' rights cases.

G. Marital Deduction—Terminable Interest Rule

Federal estate tax law allows a deduction to the estate of a married person for estate property that "passes or has passed" to a surviving spouse.¹⁰⁰ This marital deduction is subject to certain limitations, one of which disallows the deduction for a spousal gift that is a "terminable interest."¹⁰¹ Internal Revenue Code § 2056(b)(3) provides an exception to this terminable interest rule for gifts that require spousal survival for no more than six months and death does not in fact occur. The problem foreseen in this connection relates to hypothetical marital gifts payable upon "distribution" or "final settlement" of the decedent's estate "if" the spouse is then surviving. As the condition in these cases "is one which may occur either within the 6-month period or thereafter, the exception provided by section 2056(b)(3) will not apply."¹⁰²

A similar problem arises when the marital gift is conditioned upon the spouse surviving to the time of the gift's distribution as opposed to the estate's settlement or distribution. The 1997 legislation adds a new constructional rule to the Virginia Code providing that, in a case requiring survival to gift distribution,¹⁰³ the decedent's language will be construed to require "that the spouse survive until the earlier of the date on which the distribution occurs or the date six months after the date of the death of the testator or decedent."¹⁰⁴ Although this provision is designed to preserve the marital deduction, it could also operate to the prejudice of the beneficiaries who would take if

99. The reservation of this right will cause the property subject to the power to be included in the decedent's gross estate under I.R.C. § 2038. Query: If the settlor is serving as trustee, and thus could convert trust assets to tangible personal property, would not this indirect reservation of power over the entire trust cause complete inclusion in the gross estate?

100. I.R.C. § 2056(a) (1997).

101. *Id.* § 2056(b)(1) (1997).

102. Treas. Reg. § 20.2056(b)-3(b) (1997).

103. It is unclear why the statute's presumption is limited to "gift distribution" and thus is not applicable to "estate settlement" or "estate distribution" cases.

104. VA. CODE ANN. § 64.1-66.2(A) (Cum. Supp. 1997).

the condition is not construed out of existence by the statute and the spouse actually dies more than six months after the decedent but before the date the gift is actually distributed. To help reduce such a possibility, the new legislation provides that its constructional rule will not apply if the court, in a proceeding brought within twelve months of the decedent's death, finds that the decedent intended a contrary result.¹⁰⁵

H. *Estate Taxes—Interest and Penalties—Apportionment*

Prior to 1997, the default rule regarding the ultimate burden of estate taxes in Virginia provided for apportionment of the "taxes" among the beneficiaries in proportion to their interest in the decedent's estate.¹⁰⁶ The first 1997 amendment makes this default rule also applicable to any "interest and penalty" assessed in connection with such taxes.¹⁰⁷ The former default rule also provided for taxes to be paid out of corpus, without apportionment, in cases where a beneficiary received a temporary interest (in trust for life, term of years, etc.).¹⁰⁸ The second 1997 amendment allows the fiduciary paying the tax in such cases to allocate any interest¹⁰⁹ thereon wholly or partially to the temporary interest, corpus or trust account, so long as this determination is made "so as to fairly balance all interests in the property or fund."¹¹⁰

I. *Commissioners of Accounts—Medicaid—Fees*

Section 26-17.4 of the Virginia Code, which was enacted as part of a 1993 revision of the laws relating to the settlement of fiduciary accounts, establishes the accounting requirements

105. See *id.* § 64.1-66.2(B) (Cum. Supp. 1997). The proceeding can be filed by the decedent's personal representative or by "any affected beneficiary" (who might, in some circumstances, not even become aware of the provision's existence during this twelve-month period).

106. See *id.* § 64.1-161.1 (Rep. Vol. 1995).

107. *Id.* § 64.1-161.1 (Cum. Supp. 1997).

108. See *id.* § 64.1-161.1 (Rep. Vol. 1995).

109. Unlike the first amendment, the second amendment does not deal with the allocation of any "penalties" imposed in connection with the tax, only with the "interest."

110. VA. CODE ANN. § 64.1-161.1 (Cum. Supp. 1997).

applicable to guardians, curators, committees, trustees for ex-service persons and their beneficiaries, and receivers for minor married women.¹¹¹ The 1997 Session amendment to this section provides that a commissioner of accounts' fee for settling the account of any such fiduciary acting on behalf of a Medicaid recipient may not exceed twenty-five dollars.¹¹²

J. *Management of Institutional Funds—Definition*

Prior to the 1997 Session, the definition of "institutional fund" in the Uniform Management of Institutional Funds Act¹¹³ excluded "a fund held for an institution by a trustee which is not an institution."¹¹⁴ The 1997 amendment includes such a fund if it "is held by the trustee as a component trust of a community trust or foundation."¹¹⁵

IV. 1997 LEGISLATION EFFECTIVE JANUARY 1, 1998

Guardianship Reform. A long perceived need for the reform of Virginia's adult guardianship laws¹¹⁶ culminated with the 1997 Session's passage of Senate Bill No. 408, a comprehensive reform of both the personal and the property aspects of the governing law.¹¹⁷ Because of the number and the far-reaching nature of the changes that have been made, this legislation has a delayed effective date of January 1, 1998.¹¹⁸ The nature of

111. VA. CODE ANN. § 26-17.4 (Repl. Vol. 1995); see also J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 27 U. RICH. L. REV. 833, 838-42 (1993) (discussing this revision).

112. See VA. CODE ANN. § 26-17.4 (Repl. Vol. 1997). The same bill made a conforming amendment to section 26-24 dealing generally with fees of commissioners of accounts. *Id.* § 26-24 (Cum. Supp. 1997).

113. VA. CODE ANN. §§ 55-268.1-.10 (Repl. Vol. 1995).

114. *Id.* § 55-268.1 (Repl. Vol. 1995).

115. *Id.* § 55-268.1 (Cum. Supp. 1997).

116. See Harriett H. Shivers, *Guardianship Laws: Reform Efforts in Virginia*, 26 U. RICH. L. REV. 325, 325-65 (1992) (discussing the need for reform of Virginia's adult guardianship laws and the history of reform efforts to 1992).

117. Act of April 28, 1997, ch. 921, 1997 Va. Acts 2503 technically amended by S.B. 1038, Va. Gen. Assembly, (Reg. Sess. 1997) (enacted as Act of April 12, 1997, ch. 801, 1997 Va. Acts 1973).

118. Act of April 28, 1997, ch. 921, 1997 Va. Acts 2536; Act of April 2, 1997, ch. 801, 1997 Va. Acts 2036.

this survey and space limitations preclude any meaningful analysis of this extensive legislation in these materials.

V. 1997 LEGISLATION EFFECTIVE JULY 1, 1998

In 1993, the Judicial Council of Virginia created a Standing Committee on Commissioners of Accounts (the public officials charged with the primary responsibility for overseeing fiduciary administration in the Commonwealth), and gave it six charges. Three of those charges were (i) "to promote uniformity of practice in the filing and auditing of accounts," (ii) "to provide uniform instructions to persons who qualify as fiduciaries," and (iii) "to make a continuous review of the statutes relating to fiduciaries."¹¹⁹ The Committee's first legislative response to these charges resulted in the submission of eleven proposals to the 1997 Session which, for purposes of convenience, were included in one omnibus bill.¹²⁰ This legislation, which is noted in the following paragraphs,¹²¹ has a delayed effective date of July 1, 1998¹²² in order to give the Supreme Court of Virginia sufficient time to prepare certain mandated probate forms and for all affected parties to become familiar with the new forms and other changes.

A. *Uniform Probate Forms*

Although the same basic fiduciary administration forms are used in all Virginia jurisdictions, many of the forms used for the same purpose differ in varying degree from one clerk's office

119. Letter from the Honorable Harry L. Carrico, Chief Justice of the Supreme Court of Virginia to J. Rodney Johnson (Mar. 10, 1993) (on file with the author). The other three charges were (i) "to improve the oversight by the courts of Commissioners of Accounts," (ii) "to develop training programs and materials," and (iii) "to consider the need for uniform fee schedules for Commissioners of Accounts." *Id.*

120. H.B. 2085, Va. Gen. Assembly, (Reg. Sess. 1997) (enacted as Act of April 2, 1997, ch. 842, 1997 Va. Acts 2185).

121. Two parts of this legislation relate to the commissioner of accounts vis-a-vis deeds of trust used as security instruments and thus they are mentioned only in this note. The first amends section 26-15 to define "date of sale" for fiduciary accounting purposes, and the second amends section 55-59.4 to change the trustee's compensation from five percent of gross proceeds to a "reasonable" commission. *See* VA. CODE ANN. § 26-15 (Repl. Vol. 1997); VA. CODE ANN. § 55-59.4 (Cum. Supp. 1997).

122. Act of April 2, 1997, ch. 842, 1997 Va. Acts 2193.

to another. The resulting plethora of same-purpose forms is a hindrance to professional fiduciaries and attorneys who practice in multiple jurisdictions; it means that some desirable information is not always available from the record, and its duplication of effort in the preparation and printing of multiple forms is wasteful. Thus, the new legislation provides for certain uniform forms, and mandates their use.

(1) *Fiduciary Qualification—Memorandum of Facts.* The clerk of court's need for a convenient way to obtain necessary information from a person seeking to qualify as a fiduciary has resulted in the creation of various ad hoc forms, all of which appear to be derived from a dated, but still authoritative, practice manual in wide circulation.¹²³ New section 26-1.2 of the Code calls for the Supreme Court of Virginia to develop uniform fiduciary qualification forms, with instructions, and mandates their use in all cases.¹²⁴

(2) *Inventory.* Present law requires every "personal representative, guardian, curator or committee" to file an inventory under oath with the commissioner of accounts disclosing (i) personalty under supervision or control, (ii) realty with power of sale, and (iii) other known realty.¹²⁵ Present law also provides a permissive form that the fiduciary may use in making this inventory.¹²⁶ The present inventory statute, however, fails to recognize that different considerations are sometimes applicable to different fiduciaries, and the present permissive forms' statute, which focuses on personal representatives, doesn't serve the complete needs of any fiduciary. As recast by the 1997 Session, the inventory statute's oath requirement is eliminated and its reporting requirement is divided into two parts, (i) one part applying to personal representatives and curators,¹²⁷ and (ii)

123. See BROKENBROUGH LAMB, VIRGINIA PROBATE PRACTICE (1957). Form one in Judge Lamb's book, entitled "Memorandum of Counsel," is designed to obtain the necessary information for the clerk's qualification of an administrator on an intestate estate. See *id.* at 1. Forms for all other fiduciary offices are found in other parts of his book.

124. VA. CODE ANN. § 26-1.1 (Repl. Vol. 1997) (effective July 1, 1998). In recognition of the increasing use of computer technology, the section also provides that "[i]n lieu of any form, a computer-generated facsimile of the form may be used by the person seeking to qualify." *Id.*

125. *Id.* § 26-12 (Repl. Vol. 1995).

126. *Id.* § 26-12.1 (Repl. Vol. 1995).

127. These fiduciaries are required to report (i) personalty under supervision and

the other part applying to guardians of an estate, conservators, and committees.¹²⁸ And, paralleling the procedure adopted for the qualification forms, the inventory form's statute calls for the Supreme Court of Virginia to develop uniform inventory forms, with instructions, and mandates their use in all cases.¹²⁹ Lastly, the inventory statute's present rule mandating a further inventory of after-discovered property within four months is replaced with a more flexible rule that permits the fiduciary to (i) file an additional inventory showing only the after-discovered assets, (ii) file an amended inventory showing all the assets of the estate or, (iii) with the commissioners consent, show the after-discovered property on fiduciary's next accounting.¹³⁰

(3) *Fiduciary Accounting*. The Virginia Code presently contains one general-purpose permissive form for "[a]ny accounting by a fiduciary,"¹³¹ and one optional form for use by testamentary trustees.¹³² These forms have not proven to be very helpful. Attorneys have access to better forms, and consumers, who administer most estates without the assistance of an attorney, typically are unaware of their existence. Indeed, anecdotal evidence indicates that the consumer-fiduciary's failure to understand how to satisfy the accounting requirement is one of the

control, (ii) decedent's interest in any multiple party account, (iii) real estate with power of sale, and (iv) other realty in decedent's estate, whether in or out of Virginia. *See id.* § 26-12(A) (Repl. Vol. 1997) (effective July 1, 1998).

128. These fiduciaries are required to report: (i) ward's personalty under supervision and control; (ii) ward's realty; (iii) ward's legal or equitable ownership interest in realty or personalty that will pass to another at ward's death, other than by succession from the ward; and (iv) any periodic payments of money to which the ward is entitled. *See id.* § 26-12(B) (Repl. Vol. 1997) (effective July 1, 1998). Note: When this law becomes effective, as a consequence of the reform of guardianship laws mentioned in Part IV of this article, the term "guardian of an estate" will apply only to a guardian of a minor, the term "conservator" will apply to the fiduciary responsible for the property of an adult incapacitated person, and the term "committee" will apply only to the fiduciary for an incarcerated person.

129. *See id.* § 26-12.1 (Repl. Vol. 1997) (effective July 1, 1998). In recognition of the increasing use of computer technology, the section also permits the fiduciary to file an inventory "on a computer-generated facsimile of the appropriate form." *Id.*

130. *See id.* § 26-12(D) (Repl. Vol. 1997) (effective July 1, 1998). This section further provides that "[t]he filing must be made or the permission granted within four months after the discovery of the assets." *Id.*

131. *Id.* § 26-36.1 (Repl. Vol. 1992), *repealed* by Act of April 2, 1997, ch. 842, 1997 Va. Acts 2193 (effective July 1, 1998).

132. *See id.* § 26-17.8 (Repl. Vol. 1992), *repealed* by Act of April 2, 1997, ch. 842, 1997 Va. Acts 2193 (effective July 1, 1998).

commissioner of accounts' biggest problems. The 1997 legislation attempts to ameliorate these problems by mandating that (i) the Supreme Court of Virginia develop appropriate fiduciary accounting forms, with instructions concerning their use, and (ii) clerks of court provide every fiduciary with the appropriate form.¹³³ Unlike inventories, however, accountings can and sometimes must be made in different formats in order to correctly report the fiduciary's activity and the status of the assets under the fiduciary's control. Therefore, the 1997 amendment provides that a fiduciary may make an accounting on the appropriate supreme court form, on a computer-generated facsimile of that form, "or in any other clear format."¹³⁴ Lastly, the 1997 amendment clarifies that, in cases of multiple fiduciaries, each fiduciary must sign the accounting.¹³⁵

B. *Fiduciary's Bond—Increase—Clerk's Authority*

The court or its clerk appointing a fiduciary determines the amount of that fiduciary's bond based upon an estimate, provided by the fiduciary, of the value of the property believed to be coming under the fiduciary's control. Though made in good faith, this estimate may prove to be less than the amount actually involved. Thus, section 26-2 requires the commissioner of accounts to determine the sufficiency of the bond, based upon the assets disclosed in the fiduciary's inventory or account, and report the findings to the court,¹³⁶ and section 26-3 authorizes the court to increase the fiduciary's bond to a proper amount.¹³⁷ The 1997 legislation requires that the sufficiency report under section 26-2 be made to the clerk as well as the court,¹³⁸ and it amends section 26-3 to confer upon the clerk the same authority the court possesses to increase the amount

133. *See id.* § 26-17.3 (Repl. Vol. 1997) (effective July 1, 1998).

134. *Id.*

135. *See id.* In this regard, the amendment further provides that "[a] statement in a separate document attached to an account that a fiduciary has received, read and agrees with the account shall, if signed by the fiduciary, be treated as a signature to the account." *Id.*

136. *Id.* § 26-2 (Repl. Vol. 1992).

137. *Id.* § 26-3 (Repl. Vol. 1992).

138. *See id.* § 26-2 (Repl. Vol. 1997) (effective July 1, 1998).

of the fiduciary's bond, except in those cases where the amount of the bond was originally established by the court.¹³⁹

C. *Subpoena Duces Tecum—Commissioner's Power to Issue*

Section 26-8.1 of the Virginia Code confers upon commissioners of accounts the power to issue subpoenas to require persons to appear before them.¹⁴⁰ The 1997 legislation further confers upon commissioners the power to issue subpoenas duces tecum to require the production of documents before them.¹⁴¹ Following the rule presently applicable to appearance subpoenas, the commissioner does not have the power to punish for contempt when a subpoena duces tecum is not honored, but can only certify such fact to the court which may punish on the same basis as if the court had issued the subpoena.¹⁴²

D. *Commissioner's Fees*

The Virginia Code presently provides for the fees of commissioners of accounts to be set by reference to the fees allowed to commissioners in chancery.¹⁴³ The 1997 legislation provides for the fees of commissioners of accounts to be set by the appointing court.¹⁴⁴ Present law has been obsolete for some time and the new language actually reflects the current practice.

E. *Commissioner's Working Papers—Destruction*

All inventories and accounts that are filed with, or made to, the commissioner of accounts are, at some point in the settlement process, transmitted by the commissioner to the clerk's office where they are duly recorded. In this context, a question troubling commissioners around the state is how long should they retain their working papers relevant to the transmitted

139. *See id.* § 26-3 (Repl. Vol. 1997) (effective July 1, 1998).

140. *Id.* § 26-8.1 (Repl. Vol. 1992).

141. *See id.* § 26-8.1 (Cum. Supp. 1997) (effective July 1, 1998).

142. *See id.*

143. *See id.* § 26-24 (Repl. Vol. 1992).

144. *See id.* § 26-24 (Repl. Vol. 1997) (effective July 1, 1998).

matter. An informal survey disclosed a variety of practices spanning the possible spectrum.

The 1997 legislation eliminates the uncertainty by authorizing commissioners to destroy all estate related papers remaining in their possession "when the matter has been closed with a confirmed final accounting for more than one year."¹⁴⁵ And, in order to keep like matters together, the 1997 legislation also adds to the section containing the new file destruction rule¹⁴⁶ the present provision relating to the return of vouchers to a fiduciary when the commissioner's report on an account is filed with the court.¹⁴⁷

F. *Fiduciary Accounting Requirement—Enforcement*

Present law contains (i) a general provision requiring every court appointed fiduciary to account,¹⁴⁸ and (ii) separate provisions dealing with the specific accounting requirements applicable to the various fiduciaries.¹⁴⁹ A companion code provision, section 26-18, requires the commissioner of accounts to make semi-annual reports to the court identifying those fiduciaries who are in default in their accounting responsibility, and states the court's required action concerning these defaulting fiduciaries.¹⁵⁰ The 1997 amendments to section 26-18 give the commissioner the option, in lieu of reporting to the court, to "proceed against each such fiduciary by summons and report to the court as provided by § 26-13."¹⁵¹ This desirable change gives the commissioner the power to proceed against a defaulting fiduciary immediately instead of the fiduciary having a de facto immunity until the time of the commissioner's next semi-annual report. A further amendment to section 26-18 clarifies that its remedies are available when a fiduciary fails "to make a com-

145. *Id.* § 26-37 (Repl. Vol. 1997) (effective July 1, 1998).

146. *See id.*

147. *See id.* § 26-32 (Repl. Vol. 1992).

148. *See id.* § 26-17.3 (Repl. Vol. 1992).

149. *See id.* §§ 26-17.3 to -17.7 (Repl. Vol. 1992).

150. *Id.* § 26-18 (Repl. Vol. 1997).

151. *Id.* § 26-18 (Repl. Vol. 1997) (effective July 1, 1998). The referenced Virginia Code section 26-13 sets forth the procedure used by the commissioner to enforce the filing of inventories.

plete and proper account,"¹⁵² as opposed to the present "to make any such exhibit."¹⁵³ The present "exhibit" language has been interpreted by some as making the remedy of section 26-18 unavailable if a fiduciary has made any form of account, no matter how incomplete. The new "complete and proper" language is designed to guarantee the availability of a remedy under section 26-18 in such cases.

G. *Fiduciary Investment Requirements*

Present law provides that a fiduciary charged with the investment of funds who lends them at less than a six percent annual rate without prior court approval has the burden of establishing (i) an inability to obtain a six percent return on good security after the exercise of due diligence, and (ii) the reasonableness of the rate actually obtained under the circumstances and its fairness to the beneficiary.¹⁵⁴ Since time has shown that establishing a presumptive percentage return in a changing economy is unwise, the 1997 legislation replaces the six percent rule with a requirement that the fiduciary "invest in accordance with the provisions of §§ 26-40.01, 26-40.1, 26-40.2, 26-44, 26-44.1, and 26-45.1"¹⁵⁵

VI. 1995-97 JUDICIAL OPINIONS

A. *Irrevocable Inter Vivos Trust—Administrative Amendability*

Grantor's irrevocable inter vivos trust in *Little v. Ward*¹⁵⁶ contained the usual language providing "Grantor does hereby expressly relinquish all right, whether acting individually or in conjunction with others, to alter, amend, revoke, or terminate

152. *Id.*

153. *Id.* § 26-18 (Cum. Supp. 1997) (effective until July 1, 1998).

154. *See id.* § 26-39 (Repl. Vol. 1992).

155. *Id.* § 26-39 (Repl. Vol. 1997) (effective July 1, 1998). The sections cited in the quoted language identify Virginia's reconfigured "legal list" and its new "prudent investor rule," both of which are discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 26 U. RICH. L. REV. 873, 890-91 (1992), and other fiduciary investment statutes.

156. 250 Va. 3, 458 S.E.2d 536 (1995).

this Agreement.¹⁵⁷ The unusual feature of Grantor's trust was the existence of a blank space following the name of the trustee throughout the document, originally intended to be used for naming a co-trustee and, consistently therewith, a third signature line and notarial certificate at the document's end.¹⁵⁸ More than ten years following the trust's creation, Grantor, who "understood she had 'the ability to fill in that blank,'"¹⁵⁹ attempted to make an oral appointment of a co-trustee.¹⁶⁰ The trial court's decision allowing the modification on the theory that it was merely administrative and not substantive was reversed by the Supreme Court of Virginia.¹⁶¹ Noting that the irrevocability "language is all encompassing, prohibitive of *any* alteration or amendment of the agreement, substantive or administrative,"¹⁶² the supreme court held that "once the trust became operative, the blank spaces became surplusage and, thereafter, should have been ignored."¹⁶³

B. *Fiduciary Accounting—Commissioner's Report—Due Process*

The complainant in *Law v. Law*,¹⁶⁴ a resident of Michigan who served as the legal representative of two minors interested in a Virginia decedent's estate, maintained that the "limited notice afforded by posting (on the courthouse door) as provided in Code § 26-27 denied Clayton Law's heirs the opportunity to contest the report of the commissioner of accounts in violation of the due process clause."¹⁶⁵ The Supreme Court of Virginia, however, did not reach this constitutional argument because, although the statutory fifteen-day period for filing objections had run prior to complainant's filing, the record showed that

157. *Id.* at 5, 458 S.E.2d at 587.

158. *See id.*

159. *Id.* at 6, 458 S.E.2d at 588.

160. *See id.* at 6 n.1, 458 S.E.2d at 588 n.1.

161. *See id.* at 9, 458 S.E.2d at 589.

162. *Id.* at 9, 458 S.E.2d at 590 (emphasis added).

163. *Id.* at 9-10, 458 S.E.2d at 590.

164. No. 941673, (Va. June 23, 1995). The constitutional issue raised by the complainant in this case is advocated in J. Rodney Johnson, *The Absence of Due Process in Fiduciary Accounting: A Constitutional Concern*, VA. BAR ASSN J. Fall, 1997 at 11-15.

165. *Law*, No. 941673, at 2.

the trial court did in fact hear and reject complainant's substantive arguments.¹⁶⁶

C. Release of Expectancy in Decedent's Estate

The issue before the Supreme Court of Virginia in *Ware v. Crowell*¹⁶⁷ was "whether a written release of an expectancy interest in an ancestor's estate bars the releasing party from taking property under the terms of the ancestor's will."¹⁶⁸ The supreme court answered this issue of "first impression"¹⁶⁹ in the affirmative, thereby aligning Virginia with "[a]t least twenty-two of the twenty-five jurisdictions that have addressed the issue."¹⁷⁰

D. Joint Accounts—Closure—Survivorship Presumption

The issue before the Supreme Court of Virginia in *Craver-Farrell v. Anderson*¹⁷¹ was whether the statutory presumption of survivorship between parties to a joint account in a financial institution¹⁷² continues to apply to the funds from a joint account following their deposit in a new account when the name of the party depositing all of the "joint" funds is not shown on the new account at that party's request. Notwithstanding the survivor's belief that the funds in the new account continued to be the depositor's funds for the depositor's lifetime, and the survivor's testimony that title was intended to pass at

166. See *id.*

167. 251 Va. 116, 465 S.E.2d 809 (1996).

168. *Id.* at 118, 465 S.E.2d at 810.

169. The Court distinguished this case from *Headrick v. McDowell*, 102 Va. 124, 45 S.E. 804 (1903). "There, we held that covenants with an ancestor to relinquish an interest in the ancestor's estate cannot affect application of the statutes governing descent and distribution. . . . However, since Buric died testate, *Headrick* is inapplicable to the present case." *Ware*, 251 Va. at 120, 465 S.E.2d at 812. Query: If the substance of these two cases is the same, is it good policy for their outcome to differ based upon the fortuity of the ancestor dying testate or intestate?

170. *Ware*, 251 Va. at 119, 465 S.E.2d at 811.

171. 251 Va. 369, 467 S.E.2d 770 (1996).

172. See VA. CODE ANN. § 6.1-125.5(A) (Repl. Vol. 1993 & Cum. Supp. 1997). Surprisingly, it appears that neither party made any reference to Code § 6.1-125.15, titled "Identification of joint accounts," which requires that financial institutions offering joint accounts obtain a signed declaration on the account card stating the parties' actual intent regarding survivorship. VA. CODE ANN. § 6.1-125.15 (Repl. Vol. 1993).

depositor's death, the supreme court held that the trial court erred in applying the joint account presumption of survivorship to the funds after the joint account was closed.¹⁷³

E. *Intestate Succession—Illegitimacy—Exhumation*

In *Garrett v. Majied*,¹⁷⁴ involving the claimed existence of a illegitimate parent-child relationship for purposes of intestate succession, the Supreme Court of Virginia held that Virginia's exhumation statute "does not authorize an exhumation order for the purpose of establishing paternity."¹⁷⁵ In response to this case, the 1997 General Assembly amended the exhumation statute to provide that the trial court may order disinterment in such cases "for the conduct of scientifically reliable genetic tests, including blood tests, to prove a biological relationship" if the moving party presents substantial evidence that he will prevail under §§ 64.1-5.1 and -5.2 of the Virginia Code.¹⁷⁶

F. *Inter Vivos Trust—Power of Appointment—Interpretation*

Reversing the trial court's conclusion to the contrary, the Supreme Court of Virginia, in *Frazer v. Millington*¹⁷⁷ concluded that certain language in Grantor's trust relating to the exercise of a special power of appointment was not ambiguous.¹⁷⁸

G. *Inter Vivos Trust—Beneficiary's Right to Copy of Entire Document*

Following the death of the grantor in *Fletcher v. Fletcher*,¹⁷⁹

173. See *Craver-Farrell*, 251 Va. at 373, 467 S.E.2d at 772, (citing *Bennet v. First & Merchants Nat'l Bank*, 233 Va. 355, 360, 355 S.E.2d 888, 890-91 (1987)).

174. 252 Va. 46, 471 S.E.2d 479 (1996).

175. *Id.* at 49, 471 S.E.2d at 480.

176. VA. CODE ANN. § 32.1-286(C) (Repl. Vol. 1997). This legislation is discussed in Part III.B. of this article.

177. 252 Va. 195, 475 S.E.2d 811 (1996).

178. See *id.* at 199, 475 S.E.2d at 814. Although agreeing with the supreme court regarding both the grantor's intent and the outcome in this case, one wonders if the fact that two courts came to opposite conclusions concerning the proper interpretation of the grantor's language doesn't suggest that an ambiguity really did exist.

179. 253 Va. 30, 480 S.E.2d 488 (1997).

her inter vivos trust remained in effect but was divided into various subtrusts, one of which was for the benefit of her son, James, and his two children. Upon James' request for a copy of the entire trust agreement, the trustees gave him only what they claimed were the pages relevant to his interest.¹⁸⁰ Upon James's suit to obtain all of the pages, the trustees advanced various reasons why he was not so entitled, and they furnished the trial court a complete copy of the trust agreement so it could see that they had in fact shared all relevant pages with James.¹⁸¹ Affirming the trial court's decision that James was entitled to a complete copy, the Supreme Court of Virginia found that the trustees "place too much emphasis upon the duties of trustees while neglecting the rights of beneficiaries."¹⁸² Relying upon the *Restatement (Second) of Trusts* and the works of Professors Scott¹⁸³ and Bogert¹⁸⁴ "in this case of first impression in Virginia,"¹⁸⁵ the supreme court also provided an excellent discussion of a trust beneficiary's right to information from the trustee.¹⁸⁶

H. *Inter Vivos Trust—Time for Distribution*

Grantor's inter vivos trust in *Cooper v. Brodie*¹⁸⁷ called for post-death distribution among her beneficiaries following "the payment or provision for the payment of . . . [death] taxes."¹⁸⁸ Grantor's estate made an election under I.R.C. § 6166A to pay estate taxes on an installment basis which, a beneficiary claimed, was a "provision for the payment" within the language of Grantor's trust, thereby making the trust distributable.¹⁸⁹

180. *See id.* at 33, 480 S.E.2d at 490.

181. *See id.*

182. *Id.* at 35, 480 S.E.2d at 491.

183. AUSTIN WAKEMAN SCOTT, *THE LAW OF TRUSTS* (4th ed. 1987).

184. GEORGE GLEASON BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* (Rev. 2d ed. 1983).

185. *Fletcher*, 253 Va. at 35, 480 S.E.2d at 491.

186. In this connection, the court further noted that, as the record contained no finding concerning the existence of an alleged request from Grantor to Trustees to not disclose, "we express no opinion on what effect any directive of secrecy by the Grantor would have on the outcome of this case." *Id.* at 36, 480 S.E.2d at 492.

187. 253 Va. 38, 480 S.E.2d 101 (1997).

188. *Id.* at 41, 480 S.E.2d at 102-03.

189. *Id.* at 42, 480 S.E.2d at 103.

The Supreme Court of Virginia reversed the trial court's acceptance of this argument because, notwithstanding the election, the amount of the estate liability had not yet been determined and "[t]hus, there was no way for [the trustee] to provide for the payment of the tax."¹⁹⁰ In addition, the supreme court (i) upheld the trial court's disallowance of the trustee's claim for an additional \$500,000 as compensation, where the trustee had earlier represented that total compensation as executor and trustee would be \$120,000 and had claimed that amount as a deduction on the estate tax return,¹⁹¹ and (ii) reversed the trial court's refusal to allow the recovery all of the trustee's legal fees from trust assets when the trustee had a good faith basis for defending the suit.¹⁹²

I. *Will Execution—Substantial Compliance*

In *Draper v. Pauley*,¹⁹³ a notary public who was called to Draper's hospital room wrote at the top of two otherwise blank sheets of paper the following: "This is to verify that the signature below is the true signature of Irene Draper."¹⁹⁴ Draper's signature and the notary's attestation appeared after this statement, and then followed Draper's purported will in the handwriting of Pauley, a beneficiary, to whom Draper dictated it.¹⁹⁵ "When Pauley finished writing, she read the document back to Draper, who stated that the document was exactly as she wanted it. Then Darlene Butler signed the document beside [the notary's] name."¹⁹⁶ The Supreme Court of Virginia affirmed the trial court's admission of Draper's will to probate because (i) Draper acknowledged the writing as her will in the presence to two witnesses (Butler and Pauley), and (ii) the required two witnesses (Butler and Pauley) subscribed in Draper's presence because, under the principles of *Robinson v. Ward*,¹⁹⁷ Pauley's writing of her own name as a beneficiary in

190. *Id.* at 43, 480 S.E.2d at 103.

191. *See id.* at 43, 480 S.E.2d at 104.

192. *See id.* at 44, 480 S.E.2d at 104.

193. 253 Va. 78, 480 S.E.2d 495 (1997).

194. *Id.* at 79, 480 S.E.2d at 496.

195. *See id.* at 80, 480 S.E.2d at 496.

196. *Id.*

197. 239 Va. 36, 387 S.E.2d 7358 (1990); *see also* J. Rodney Johnson, *Dispensing*

the text of Draper's will also served as Pauley's witnessing signature to the will itself.¹⁹⁸

J. Disclaimer—Life Insurance Proceeds—Creditors' Rights

*Lanasa v. Willey*¹⁹⁹ was an action against an attorney's widow on a promissory note executed by the attorney and his wife in connection with the attorney's misappropriation of client funds. In that case, where the attorney committed suicide several weeks after the note's execution, the Supreme Court of Virginia held that the co-signing widow was liable for the full amount of the note, \$274,495.22, plus interest.²⁰⁰ The later, connected case of *Abbott v. Willey*,²⁰¹ involves the successful plaintiffs in the first case who claim that the widow's purported disclaimer of insurance proceeds of \$350,845.92, plus interest, due her on account of her husband's death, was a fraudulent conveyance. The supreme court, however, concluded that the widow had an absolute statutory right to make such a disclaimer of the proceeds, and that "Code § 64.1-193 makes it perfectly clear that the disclaimer relates back 'for all purposes' to the effective date of the life insurance policy."²⁰² Thus, because of the widow's disclaimer, the proceeds were payable to the attorney's secondary beneficiaries (the children) as if the widow had died before the insurance policy's effective date.²⁰³

A pregnant sentence in the Court's opinion reads as follows: "Kathleen Willey's children received the death benefits and used those funds to support their mother."²⁰⁴ The use of these funds for the disclaimant's support invites a claim of a possible agreement to this effect prior to Kathleen's disclaimer. If such an antecedent agreement did exist, then Kathleen was statuto-

with *Wills' Act Formalities for Substantively Valid Wills*, 18 VA. BAR ASS'N J. Winter, 1992, at 10.

198. See *Draper*, 253 Va. at 81, 480 S.E.2d at 496-97.

199. 251 Va. 231, 467 S.E.2d 786 (1996).

200. See *id.* at 234, 467 S.E.2d at 787.

201. 253 Va. 88, 479 S.E.2d 528 (1997).

202. *Id.* at 91, 479 S.E.2d at 530.

203. See *id.* at 92, 479 S.E.2d at 530.

204. *Id.* at 90, 479 S.E.2d at 529.

rily barred from making a disclaimer.²⁰⁵ This issue is not discussed in the supreme court's opinion.

K. *Inter Vivos Gift—Capacity—Evidence*

The day before his remarriage, seventy-seven year old Father executed a deed of gift conveying certain real estate to Daughter and himself as joint tenants with survivorship.²⁰⁶ Ten years later, Father sought to set this deed aside on the ground that, on the date of the deed's purported execution, "he was 'infirm and of enfeebled mind [and] ignorant of the meaning of the Deed.'"²⁰⁷ Following a lengthy review of the facts, the Supreme Court of Virginia reversed the trial court's decision in Father's favor, emphasizing that in capacity cases "*the testimony of witnesses who were present when the instrument was executed is entitled to greater weight than the testimony of those witnesses not present.*"²⁰⁸

VII. CONCLUSION

The increased volume of estate-related legislation noted in the 1995 review has continued unabated through the past two sessions. The Virginia Bar Association, always a significant source for the suggestion of estate-related legislation, was joined in this regard by the Standing Committee on Commis-

205. See VA. CODE ANN. § 64.1-194 (Repl. Vol. 1995); see also *Niklason v. Ramsey*, 233 Va. 161, 353 S.E.2d 783 (1987).

206. See *Hill v. Brooks*, 253 Va. 168, 170, 482 S.E.2d 816, 817 (1997).

207. *Id.* at 170, 482 S.E.2d at 817-18. In addition, Father alleged that "if he did in fact sign the . . . instrument," [Daughter] "fraudulently procured his signature." *Id.* at 170, 482 S.E.2d at 818.

208. *Id.* at 175, 482 S.E.2d at 821 (quoting *Brown v. Resort Devs.*, 238 Va. 527, 529, 385 S.E.2d 575, 576 (1989) (emphasis added)).

Father also argued that his unilateral mistake regarding his "understanding of the deed of gift's [e]ffect . . . makes the deed voidable." *Id.* at 178, 482 S.E.2d at 823. The supreme court dismissed this argument, relying on precedent that "a unilateral mistake may provide a ground of relief only when 'there is a mistake on the part of . . . one party, . . . but it is accompanied by 'misrepresentation and fraud by the other.'" *Id.*, (quoting *Ward v. Ward*, 239 Va. 1, 5, 387 S.E.2d 460, 462 (1990)). Although the requested cancellation of the deed was unavailable in this case, the Restatement does recognize the possibility of reformation of a deed solely on the basis of unilateral mistake. RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 34.7 cmt. d (1992).

sioners of Accounts in 1997,²⁰⁹ and it appears that this latter group may be expected to continue in these efforts. As these two groups develop a working relationship with each other, the Commonwealth can expect to see a continued increase in the quality of their submissions to the General Assembly.

209. See *supra* Part V (discussing the legislation suggested by the Standing Committee on Commissioners of Accounts).