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Wills, Trusts and Estates (Annual Survey of Virginia Law, 1999-2000)

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WILLS, TRUSTS, AND ESTATES

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I. INTRODUCTION

In its 2000 Session, the General Assembly enacted legislation dealing with wills, trusts, and estates that added, amended, or repealed a number of sections of the Virginia Code. It also carried over one significant bill to the 2001 Session. In addition, there were nine Supreme Court of Virginia opinions, one United States District Court opinion, two Virginia Circuit Court opinions, and one Attorney General's opinion raising issues of interest to the general practitioner as well as the specialist in wills, trusts, and estates during the period covered by this review. This article reports on all of these legislative and judicial developments.[1]

II. LEGISLATION

A. *The Rule Against Perpetuities—Uniform Statutory Act*

The 1982 Session of the General Assembly abandoned the common law Rule Against Perpetuities in favor of the Restatement's combination "wait and see" and "cy pres" model[2] that it amended to provide rules for both donative and nondonative transfers.[3] The 2000 Session, responding to a request from the

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1. In order to facilitate the discussion of numerous Virginia Code sections, they will often be referred to in the text by their section numbers only. Unless otherwise stated, those section numbers will refer to the latest printing of the old sections and to the 2000 supplement for the new sections.

2. Virginia enacted the Restatement rule prior to its official promulgation by the American Law Institute. For the source used by Virginia, see RESTATEMENT (SECOND) OF PROP. §§ 1.4–1.6 (Tentative Draft No. 2, 1979).

3. *See* Act of Apr. 7, 1982, ch. 249, 1982 Va. Acts 399 (codified at VA. CODE ANN. § 55-13.3 (Repl. Vol. 1995)). The source and operation of this new rule is discussed in J.

Virginia Bar Association, largely abandoned the Restatement rule and effective July 1, 2000, made Virginia the twenty-sixth state to adopt the Uniform Statutory Rule Against Perpetuities Act[4] which, for the most part, applies only to interests arising out of donative transfers.[5] The Act was adopted intact, mutatis mutandis, except for deletion of the provision authorizing limited retroactivity.[6] Generally speaking—which is a dangerous way to speak of perpetuities matters—the Act validates nonvested interests that either (i) satisfy the common law rule applied at the time the interest is created, or (ii) vest or terminate within ninety years after the interest's creation.[7] Nonvested interests that are not validated do not automatically fail, but may instead be reformed by a circuit court "in the manner that most closely approximates the transferor's manifested plan of distribution and is within [ninety years]."[8] Although a more detailed explanation of the Act is not feasible within the confines of this annual review, it

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Rodney Johnson, *The Transformation of the Rule Against Perpetuities in Virginia*, NEWSLETTER, (T.C. Williams Sch. of Law, Univ. of Richmond, Va.) Oct. 1982, at 10. Although the General Assembly's attempt to make the Restatement rule retroactive was declared unconstitutional seven years after its enactment, in *Lake of the Woods Ass'n v. McHugh*, 238 Va. 1, 9, 380 S.E.2d 872, 876 (1989), the statute was not amended to reflect this decision until the 2000 Session.

4. UNIF. STATUTORY RULE AGAINST PERPETUITIES ACT 8B U.L.A. 321 (1993 & Supp. 2000). For a listing of the other 25 enacting jurisdictions, see *id.* at 61 (Supp. 2000). Copies of the Act, which contain the Commissioners' official comments and are indispensable to an understanding of the Act's operation, may be obtained from the National Conference of Commissioners on Uniform State Laws, 211 East Ontario Street, Suite 1300, Chicago, Illinois 60611.

5. Act of Apr. 8, 2000, ch. 714, 2000 Va. Acts 386 (codified as amended at VA. CODE ANN. § 55-12.1 to -12.6 (Cum. Supp. 2000)). The Act, however, is made expressly applicable to nonvested interests arising out of the following nondonative transfers:

> (i) a premarital or postmarital agreement; (ii) a separation or divorce settlement; (iii) a spouse's election; (iv) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties; (v) a contract to make or not to revoke a will or trust; (vi) a contract to exercise or not to exercise a power of appointment; (vii) a transfer in satisfaction of a duty of support; or (viii) a reciprocal transfer.

VA. CODE ANN. § 55-12.4(1) (Cum. Supp. 2000).

6. Notwithstanding the desirability of such a provision, it was believed to be unacceptable to the Supreme Court of Virginia in the light of its decision in *McHugh*, 238 Va. at 1, 380 S.E.2d at 872. Although Virginia adopted the language of the Act, it rejected the Act's philosophy that the Rule Against Perpetuities should not apply to nondonative transactions other than those listed in section 55-12.4(1) For the list of nondonative transfers, see *supra* note 5. The Virginia legislation retains the "wait and see" Restatement provision of section 55-13 as the rule governing all other nondonative transfers. *See* VA. CODE ANN. § 55-13 (Cum. Supp. 2000).

7. VA. CODE ANN. § 55-12.1(A) (Cum. Supp. 2000).

8. *Id.* § 55-12.3 (Cum. Supp. 2000).

may be helpful to restate which version of the Rule Against Perpetuities will apply to various transactions at different points in time. For nondonative transfers, (i) the common law rule will govern all nonvested interests created prior to July 1, 1982,[9] and (ii) the Restatement rule will govern those interests created any time after June 30, 1982,[10] except that (iii) those listed in section 55-12.4(1) that are created after June 30, 2000, will be governed by the Uniform Act.[11] For donative transfers, (i) the common law rule will govern all nonvested interests created prior to July 1, 1982,[12] (ii) the Restatement rule will govern those created after June 30, 1982, but before July 1, 2000,[13] and (iii) the Uniform Act will govern those created after June 30, 2000.[14] However, both of the preceding statements are subject to the perpetuities' "opt-out" legislation enacted by the 2000 Session.[15]

B. *The Rule Against Perpetuities—"Opt-Out" Provision*

Regretfully, the 2000 Session enacted a perpetuities "opt-out" provision[16] at the request of the Virginia Bankers Association, thereby placing Virginia in the line of lemmings leaping into a "perpetuities unknown" in order to obtain a perceived tax benefit[17] for a favored few[18] more than ninety years in the future[19] un-

9. *McHugh*, 238 Va. at 4-5, 380 S.E.2d at 873.
10. VA. CODE ANN. § 55-13.3(B)(ii) (Cum. Supp. 2000).
11. *Id.* §§ 55-13.3(A), 55-12.5 (Cum. Supp. 2000).
12. *McHugh*, 238 Va. at 4-5, 380 S.E.2d at 873.
13. VA. CODE ANN. § 55-13.3(B)(ii) (Cum. Supp. 2000).
14. *Id.* § 55-12.5 (Cum. Supp. 2000).
15. *See* discussion *infra* Part II.B.
16. VA. CODE ANN. § 55-13.3(E) (Cum. Supp. 2000).
17. Although federal law generally seeks to impose a transfer tax on all covered generational transfers, section 2631 was added to the Internal Revenue Code to give each taxpayer a one million dollar exemption from the taxation of generation-skipping transfers ("GST") in trust for the maximum period permitted by local law which, at that time, was the period of the Rule Against Perpetuities. I.R.C. § 2631 (1986). The existence of this GST exemption stimulated (i) the development of the so-called "dynasty trust," which refers to a trust whose assets theoretically can escape transfer taxation forever if there are no limits placed upon the trust's duration by local law, and (ii) the movement to abolish the Rule Against Perpetuities as a limiting local law factor in the creation of such trusts. For an excellent discussion of dynasty trusts in the perpetuities context, see R. Zebulon et al., *The Rule Against Perpetuities: An Update*, 24 TAX MGMT. EST., GIFTS AND TR. J. 222 (1999).
18. According to the Associated Press, "[o]nly about two percent of Americans pay estate taxes." *GOP Gains Support for Repealing Estate Tax*, RICH. TIMES DISPATCH, May 19, 2000, at A12. The opt-out legislation is designed for that portion of this two percent who (i)

der federal law that appears destined for repeal or significant relaxation in the reasonably near future.[20] The proponents' primary argument was that major banks in Virginia were already able to obtain the desired tax result for their customers by using one of their affiliates located in an "opt-out" state; thus, this legislation was necessary to level the playing field for the small in-state banks. The rejected counterargument was that the major banks' out-of-state actions had no impact on Virginia law or property, whereas the myopic opt-out proposal would adversely affect the entirety of Virginia law and property because it would enable everyone (not just the favored few) to tie up the title to any real or personal property in perpetuity.[21] It is submitted that the nega-

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possess the extra wealth of those thought to be candidates for creating dynasty trusts, (ii) have the inclination to tie up property in perpetuity to the detriment of their known descendants for the benefit of unknown descendants in the distant future, and (iii) will use an in-state bank as trustee of their dynasty trust.

19. The Uniform Statutory Rule Against Perpetuities enacted by the 2000 Session can be used to guarantee the GST tax benefit for ninety years or longer. UNIF. STATUTORY RULE AGAINST PERPETUITIES ACT 8B U.L.A. 321 (1993 & Supp. 2000); discussion *supra* Part II.A.

20. "In August, 1999, both the United States House of Representatives and Senate passed the Taxpayer Refund and Relief Bill of 1999 [that was vetoed by the President, one provision of which was a] phased-in repeal of the estate, gift and generation-skipping taxes." Charles D. Fox, IV, *Repeal of Estate and Gift Tax: Rising Tide or High-Water Mark?*, 139 TR. & EST. 56, 56 (2000). This article, which appears in the journal of the trust banking industry, contains an excellent analysis of all aspects of the repeal issue.
Similar legislation was passed by the House and Senate in 2000, but, again, was vetoed by the President. Richard W. Stevenson, *Veto of Estate Tax Repeal Survives Vote in the House*, N.Y. TIMES (National), Sept. 8, 2000, at A14. In response to the President's veto, the press secretary for the Republican presidential candidate issued a statement that Bush "would have signed it into law." *Statement by Bush/Cheney Press Secretary Mindy Tucker Regarding President Clinton's Veto of Estate Tax Relief*, Aug. 31, 2000, *available at* http://www.georgewbush.com/News.asp?FormMode=NR&ID=1154. Estate tax repeal is a part of the 2000 Republican Platform. *Issues*, *at* http://www.georgewbush.com/Issues.asp (last visited Oct. 20, 2000). Although the Democratic presidential nominee is against repeal, he is in favor of estate tax relief and "Gore's plan would eliminate estate taxes for more than 90 percent of family farms that currently do pay estate taxes, and more than 70 percent of small businesses that currently pay estate taxes, and provide some estate tax relief for all small businesses and family farms." *Gore 2000: Gore Offers Estate Tax Relief for Working Families*, *at* http://www.algore.com. . .ngroom/releases/pr_0621_nat_1html (last visited Oct. 20, 2000).

21. The proponents' secondary argument, that enactment of an opt-out provision was necessary to prevent the capital flight and loss of banking business that would otherwise be caused by Virginians going to other jurisdictions to create dynasty trusts, is clearly unsound when one considers the small numbers represented by the favored few. Moreover, even if the numbers were larger, the fact that Virginians creating corporations have not been flocking to Delaware, long recognized as the most corporate-friendly jurisdiction, to obtain a *definite present benefit for themselves*, suggests that they would not likely go elsewhere to create dynasty trusts to obtain a *possible future benefit for their descendants*. The proponents' tertiary argument that the enactment of an opt-out provision would at-

tive impact of the opt-out legislation upon Virginia law and property is too high a price to pay for the ephemeral tax benefit being sought for the favored few.[22]

Although a detailed analysis of the opt-out legislation is not feasible within the confines of this annual review, its complete text follows in order to provide the reader a context in which attention can be focused upon several concerns:

> The rule against perpetuities shall not apply to any trust or any interest created in personal property held in such trust, or to any power of appointment over personal property held in such trust, or to any power of appointment over personal property granted under such trust, when the trust instrument, by its terms, provides that the rule against perpetuities shall not apply to such trust.[23]

Notwithstanding the proponents' assurances that the opt-out provision will apply only to personal property and cannot be used to tie up the title to real estate, the reader will note that the legislation's first line refers to "any trust" without imposing any such qualification or limitation.[24] Moreover, even if the courts do interpret this legislation as applying only to personal property, it is child's play to transmute realty into personalty at will.[25] In addition, assuming the courts determine that such trusts are restricted to personal property, what will happen if a trust acquires any realty by way of gift or investment? Will the trust then become wholly or partially subject to the Rule Against Perpetuities? If so, will the Rule's application relate back to the trust's creation, will it be prospective only, and/or will the problem be "cured" by divesting the trust of the realty? Although other states have at-

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tract trust business to the Commonwealth suffers from the same favored few logical flaw as their secondary argument.

22. The legal literature is replete with discussions of the social and commercial evils that accompany the power to tie up the title to property in perpetuity. For the classic presentation of the Rule's development and operation, see JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES 126-90 (4th ed. 1942).

23. VA. CODE ANN. § 55-13.3(E) (Cum. Supp. 2000). This text was substituted for the bill's original language. *See* S.B. 502, Va. Gen. Assembly (Reg. Sess. 2000). The complete written explanation for the substitution was "[i]n response to questions, amendment clarifies that bill does not apply to real estate. Otherwise improves the language." Explanation of Substitute for S.B. No. 502, distributed in the Civil and Property Law Subcommittee of the Senate Courts of Justice Committee (Feb. 3, 2000).

24. VA. CODE ANN. § 55-13.3(E) (Cum. Supp. 2000).

25. For instance, if one wishes to place the traditional "Blackacre" in perpetual trust, one could simply incorporate Blackacre and then place the corporate stock (personal property) into the perpetual trust and thereby accomplish the desired result. If, for any reason, the corporate route is not desirable, other routes are available.

tempted to reduce the potential for a trust's settlor to tie up specific property in perpetuity by requiring that the property always be subject to someone's power to convey, there is no such requirement in the Virginia version.[26] Further, the Virginia opt-out legislation refers to "the" Rule, but Virginia has two Rules—the Uniform Act that applies to all donative and some nondonative transfers, and the Restatement rule that applies to the nondonative transfers not specifically covered by the Uniform Act. One would assume that the proponents intended the opt-out legislation to apply only to the former, and not to both, but they placed it in the section that deals only with the latter.[27] Lastly in this nonexclusive list, it should be noted that the Rule Against Perpetuities is simply a rule that deals with the remoteness of vesting of an interest in property. There is a further rule, the common law Rule Against Accumulations, that deals with the permissible *duration* of trusts. Although this latter rule is rather obviously implicated in the perpetual trusts under consideration, it is not addressed by the opt-out legislation.[28]

C. *Inter Vivos Receptacle Trusts—Nonresident Trustee—Service of Process*

Whereas traditional estate planning has been will-based, a number of today's estate planners sometimes favor a plan based upon an inter vivos trust.[29] In these inter vivos trust-based plans, the desire to integrate all of the client's assets into one manage-

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26. The Maryland opt-out provision requires that "the trustee, or other person to whom the power is properly granted or delegated, has the power under the governing instrument, applicable statute, or common law to sell, lease, or mortgage [trust] property...." MD. CODE ANN., EST. & TRUSTS § 11-102(e) (Cum. Supp. 1998). The Virginia bill's original language, which appeared to be based upon the Maryland statute, did contain such a provision. S.B. 502, Va. Gen. Assembly (Reg. Sess. 2000).

27. VA. CODE ANN. § 55-13.3 (Cum. Supp. 2000). Section 55-13.3 is entitled "Application of the rule against perpetuities to nondonative transfers." *Id.*

28. *See* VA. CODE ANN. § 6.1-351 (Repl. Vol. 1999). The Rule Against Accumulations is addressed in Chapter 9 of Title 6.1 of the Virginia Code, which deals with Real Estate Investment Trusts and provides that "[t]he duration of a [real estate investment] trust may be unlimited and a [real estate investment] trust shall not be deemed to violate any rule against perpetuities or accumulations or to unlawfully suspend the power of alienation." *Id.* For a recent case discussing the difference between these two separate rules, see *White v. Fleet Bank*, 1999 Me. 148, 739 A.2d 373 (1999).

29. For a discussion of the real versus the illusory benefits of trust-based estate planning, see J. Rodney Johnson, *The Living Trust vs. The Will: Which Is Best for the Typical Virginian?*, 42 VA. LAW., Jan. 1994, at 37.

ment vehicle following the client's death is accomplished by making a testamentary gift, called a "pour-over," of the client's residuary probate estate to an inter vivos "receptacle" trust. The 1999 Session replaced Virginia's aging pour-over statute with the more modern Uniform Testamentary Additions to Trusts Act (1991), to which it added provisions (i) permitting any nonresident individual or entity to serve as the sole trustee of a receptacle trust receiving a pour-over from a Virginia estate, and (ii) eliminating the mandatory surety bond requirement formerly imposed upon such a trustee.[30] However, in order to retain a measure of control over receptacle trusts which have no resident co-trustee, the 1999 legislation continued the prohibition against any distributions to such a trust until its nonresident sole trustee files a written consent in the appropriate clerk's office appointing a Virginia resident as agent for the receipt of process in any trust-related matter.[31]

The possible problem not resolved by the 1999 legislation concerns service of process in trust-related matters following the death, incapacity, etc. of the Virginia resident who was appointed to serve as agent for its receipt. This problem does not arise when dealing with the agent of a nonresident personal representative, testamentary trustee, or any other fiduciary who qualifies in the clerk's office, because section 26-7.1 deems such fiduciaries to have appointed the clerk of court as a successor agent for service of process in these cases.[32] However, this procedural remedy is not applicable to the trustee of an inter vivos receptacle trust because there is no requirement that such a trustee "qualify" in the clerk's office. Thus, the 2000 Session amended section 26-7.1 to provide that a nonresident trustee of a receptacle trust who files the required consent in the clerk's office is deemed to have also appointed the clerk as a successor agent "whenever the resident appointed to receive service cannot be found and served within the Commonwealth after the exercise of due diligence."[33]

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30. Act of Mar. 18, 1999, ch. 252, Va. Acts 267 (codified at VA. CODE ANN. § 64.1-73.1 (Cum. Supp. 1999)). For a discussion of this legislation, see J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 33 U. RICH. L. REV. 1075, 1078-79 (1999).

31. VA. CODE ANN. § 64.1-73.1(D) (Cum. Supp. 1999).

32. *Id.* § 26-7.1(A) (Cum. Supp. 2000).

33. *Id.* § 26-7.1(B) (Cum. Supp. 2000). This procedural remedy is also made applicable to trustees who filed a consent under section 64.1-73, the prior pour-over statute that con-

D. *Inter Vivos Trusts—Tenancy by the Entirety—Principal Family Residence*

The form of concurrent ownership known as the tenancy by the entirety, which can exist only between a husband and wife, is the most popular form of real estate ownership for married couples in Virginia. The primary reason for this popularity is the common law immunity of such property from the claims of the individual (but not the joint) creditors of the husband and the wife.[34] However, married couples who decided to base their estate planning upon an inter vivos trust have been unable to obtain any benefit from this common law immunity because realty owned by a trust is not owned by a husband and wife, even if the husband and wife are the trustees and the beneficiaries of the trust. Responding to this perceived inequity, the 2000 Session broke new ground by amending section 55-20.1 to enable a husband and wife to convey certain tenancy by the entirety real estate to "their joint revocable or irrevocable trust, or in equal shares to their separate revocable or irrevocable trusts" without losing its tenancy by the entirety status.[35] However, the only real estate that may be so protected is their "principal family residence"[36] that was held by them as tenants by the entireties prior to its conveyance to the trust, and this protection lasts only "so long as (i) they remain husband and wife, (ii) it continues to be held in the trust or trusts, and (iii) it continues to be their principal family residence."[37]

E. *Inter Vivos Trusts—Transfer Costs—Funding, Revocation, and Distribution*

Among the many factors that must be taken into account in de-

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tinues to govern pour-overs made under the wills of decedents who died prior to July 1, 1999. *Id.* § 64.1-73 (Cum. Supp. 1999).

34. This point was reaffirmed by the Supreme Court of Virginia in the recent case of *Rogers v. Rogers*, 257 Va. 323, 512 S.E.2d 821 (1999). The 1999 Session resolved a lingering uncertainty in this area by providing that a husband and wife might also hold personal property as tenants by the entireties. VA. CODE ANN. § 55-20.1 (Cum. Supp. 1999). For a discussion of section 55-20.1, see Johnson, *supra* note 30, at 1081-82.

35. VA. CODE ANN. § 55-20.1 (Cum. Supp. 2000).

36. *Id.* The term "principal family residence" was taken from section 64.1-16.4. *Id.* § 64.1-16.4 (Repl. Vol. 1995).

37. *Id.* § 55-20.1 (Cum. Supp. 2000).

termining whether to base an estate plan upon a will or a revocable inter vivos trust is a calculation of the transfer costs that will be incurred when assets are (i) transferred to the trust by the settlor, (ii) returned to the settlor upon partial or total termination of the trust, or (iii) distributed to beneficiaries of the trust. Recognizing the increasing role that revocable inter vivos trusts are playing in estate planning, and desiring to place their users on a more equal footing with persons who use will-based plans, the 2000 Session amended a number of code sections as follows: (i) the recordation tax imposed by section 58.1-801 upon deeds conveying real estate is not applicable to transfers to trust beneficiaries following the settlor's death;[38] (ii) the watercraft sales and use tax imposed by section 58.1-1402 is not applicable upon (a) funding the trust when the grantor is among its beneficiaries, or (b) distribution to beneficiaries following the grantor's death;[39] (iii) the aircraft sales and use tax imposed by section 58.1-1502 is not applicable upon (a) funding the trust when the grantor is among its beneficiaries, or (b) distribution to beneficiaries following the grantor's death;[40] and (iv) the motor vehicle sales and use tax imposed by section 58.1-2402 is not applicable (a) upon funding the trust when the grantor is among its beneficiaries, (b) distribution to beneficiaries following the grantor's death, or (c) return to the grantor.[41] Note that the broader exemption from

38. *Id.* § 58.1-811(A)(13) (Cum. Supp. 2000). Prior to the amendment, this nonapplicability applied only when the post-death beneficiaries were the decedent's spouse, or the kindred of the decedent or the decedent's spouse. As this portion of the 2000 amendment is not restricted to revocable trusts, it is also applicable to irrevocable ones. Unlike the transactions that follow in (ii), (iii), and (iv) in the text, funding, return, and some lifetime transfers of real estate were already exempted from transfer (recordation) taxes. *Id.* § 58.1-811(A)(12) (Cum. Supp. 2000).

39. *Id.* § 58.1-1404(F) (Cum. Supp. 2000). This amendment also requires for its operation that "no consideration has passed between the grantor and the beneficiaries in either case." *Id.* It is difficult, however, to see consideration ever being a factor in what, by definition, is normally a donative transaction.

40. *Id.* § 58.1-1501(iv) (Cum. Supp. 2000). This amendment also requires for its operation that "no consideration has passed between the grantor and the beneficiaries in either case." *Id.* It is, however, difficult to see consideration ever being a factor in what, by definition, is normally a donative transaction.

41. *Id.* § 58.1-2403(24) (Cum. Supp. 2000). This amendment also requires for its operation that "no consideration has passed between the grantor and the beneficiaries in either case." *Id.* It is difficult, however, to see consideration ever being a factor in what, by definition, is normally a donative transaction. Interestingly, further "ground-leveling" legislation that would have allowed certain motor vehicles "held in a private trust for personal use by an individual beneficiary" to be a "qualifying vehicle" for purposes of the Personal Property Tax Relief Act of 1998, *see id.* §§ 58.1-3523 to -3536 (Cum. Supp. 1999), popularly known as "No Car Tax," was defeated by the Senate Finance Committee. *See*

sales and use tax for motor vehicles than that for watercraft or aircraft is due to the passage of two different bills dealing with motor vehicles,[42] and that neither (ii), (iii), nor (iv) exempts transfers to the trust's third-party beneficiaries from the applicable sales or use tax if they are made during the settlor's lifetime.

F. *Wills—Capacity—Emancipated Minor*

The general rule of section 64.1-47, dealing with who may not make a will, prohibits persons "under the age of eighteen years" from making a testamentary disposition of property.[43] However, section 16.1-334, dealing with the effects of a court order emancipating a minor, specifically provides that "[t]he minor may . . . execute a will."[44] To "correct the conflict between the two sections,"[45] the 2000 Session amended section 64.1-47 to prohibit the will-writing of persons "under the age of eighteen years, unless emancipated pursuant to Article 15 (§ 16.1-331 et seq.) of Chapter 11 of title 16.1."[46]

G. *Spousal or Parental Desertion or Abandonment—Qualification As Administrator*

Subsection A of section 64.1-16.3 provides that a married person whose desertion or abandonment continues until the deserted spouse's death is barred from receiving the statutory rights of "intestate succession, elective share, exempt property, family allowance, and homestead allowance" in the latter's estate.[47] Subsection B further provides that a parent whose desertion or abandonment continues until the deserted child's death is barred

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H.B. 591, Va. Gen. Assembly (Reg. Sess. 2000).

42. H.B. 527, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 7, 2000, ch. 602, 2000 Va. Acts 943) (applying to watercraft, aircraft, and motor vehicles and deals with funding the trust and post-death distributions to the beneficiaries); H.B. 360, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 7, 2000, ch. 576, 2000 Va. Acts 1044) (applying only to motor vehicles and deals with funding the trust and the return to the grantor).

43. VA. CODE ANN. § 64.1-47 (Repl. Vol. 1995).

44. *Id.* § 16.1-334 (Repl. Vol. 1999).

45. Virginia General Assembly Bill Tracking 2000 Session, H.B. 394, Summary as introduced, *available at* http://legl.state.va.us.

46. VA. CODE ANN. § 64.1-47 (Cum. Supp. 2000).

47. *Id.* § 64.1-16.3(A) (Repl. Vol. 1995).

from receiving the statutory right of intestate succession in the child's estate.[48] The 2000 Session extended these substantive rules into the procedural area by amending section 64.1-118 to provide that "[i]f any beneficiary of the estate objects, no [person so barred] shall be suitable to serve as an administrator of the estate of the deceased spouse or child . . . ."[49] Section 64.1-116, dealing with the appointment of an administrator, c.t.a., received an identical amendment.[50]

H. *Fiduciary Accounts—Permissible Depositories*

The 2000 Session added credit unions to the list of financial institutions that may operate fiduciary accounts for an "administrator, executor, custodian, conservator, guardian, trustee or other fiduciary for a named beneficiary or beneficiaries."[51] It also provided them with the same authorizations and protections presently enjoyed by banks[52] and savings institutions[53] in the operation of these accounts.[54]

I. *Fiduciary Accountings—Surety Bond Premiums*

Section 26-17.3, which states the general rule regarding a court or clerk-appointed fiduciary's duty to account for all receipts and disbursements before a commissioner of accounts, is immediately followed by other statutes that deal with the specific accounting rules applicable to each such fiduciary.[55] A further general rule, found in section 26-17.9, requires all of these fiduciaries to provide the commissioner with vouchers supporting all disbursements during the accounting period.[56] But no statute requires or authorizes a commissioner to inquire about an estate or fiduciary obligation where there is no disbursement, and testimony before

48. *Id.* § 64.1-16.3(B) (Repl. Vol. 1995).
49. *Id.* § 64.1-118 (Cum. Supp. 2000).
50. *Id.* § 64.1-116 (Cum. Supp. 2000).
51. *Id.* § 6.1-225.50:1 (Cum. Supp. 2000).
52. *Id.* § 6.1-75 (Repl. Vol. 1999).
53. *Id.* § 6.1-194.60 (Repl. Vol. 1999).
54. *Id.* § 6.1-225.50:2 (Cum. Supp. 2000) (using the language of that applicable to banks and savings institutions, mutatis mutandis).
55. *Id.* § 26-17.3 (Repl. Vol. 1997).
56. *Id.* § 26-17.9 (Cum. Supp. 1999).

the 2000 Session indicated that a problem had developed regarding the payment of premiums on surety bonds. Accordingly, section 26-17.10, which deals with miscellaneous accounting matters, was amended to empower a commissioner to require "proof that all premiums due upon any required surety bond have been paid."[57]

J. *Income Tax—Estates and Trusts—Estimated Payments*

The 2000 Session amended section 58.1-492 to provide a new way to annualize the income of estates and trusts to determine whether or not they have paid the correct amount of estimated taxes, or whether they should be assessed penalties and interest for underpayment.[58] The amendment seeks to accomplish its goal by requiring estates and trusts to "annualize taxable income through the month which is two months before the month in which an estimated tax payment is required."[59]

III. CARRYOVER LEGISLATION

House Bill No. 1195, carried over to the 2001 Session, would amend Virginia Code section 64.1-122.2, which deals with written notice of probate and qualification being provided to certain parties, to require that these parties be sent a copy of the decedent's will.[60] In addition, this bill would amend section 26-27 by changing the present rule which prohibits a commissioner of accounts from completing a fiduciary's account until ten days after the commissioner has posted a list of existing accounts on the front door of the courthouse, to a rule prohibiting the commissioner from completing a fiduciary's account until ten days after the fiduciary has sent notice to certain persons that the fiduciary's account is before the commissioner for settlement.[61] Although there are technical problems with the language of the bill as introduced, it is difficult to overstate the importance of this proposal

57. *Id.* § 26-17.10(A) (Cum. Supp. 2000).

58. *Id.* § 58.1-492 (Cum. Supp. 2000).

59. S.B. 537, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 4, 2000, ch. 388, 2000 Va. Acts 585).

60. H.B. 1195, Va. Gen. Assembly (Reg. Sess. 2000).

61. *Id.*

because it addresses an aspect of Virginia probate law that is patently unconstitutional.[62]

IV. DECISIONS OF THE SUPREME COURT OF VIRGINIA

A. *Wills—Life Estate or Precatory Language—Mortgage Liability—Jurisdiction*

In *Gaymon v. Gaymon*,[63] the first paragraph in Article 5 of *T*'s typed will devised his home to his children by a prior marriage, "'subject to any encumbrances upon the same upon the date of transfer.'"[64] Prior to the will's execution,[65] *T* added a holographic interlineation to this sentence, stating "'and the mortgage remaining shall be paid by the remainder persons.'"[66] The second paragraph of Article 5 further provided that: "'It is understood that in the case that [Widow] and I have residence at [home] at the time of my demise, she would have a life estate in the same for the remainder of her life.'"[67]

In a suit brought by *T*'s executor seeking the court's aid and direction in the administration of *T*'s estate, the primary issue was whether the language of the second paragraph (i) created a life estate in Widow, or (ii) was merely precatory, with the children taking an immediate fee simple estate under the first paragraph.[68] Affirming the trial court, the Supreme Court of Virginia held that the reference to "remainder persons" in the first paragraph's holographic addendum "is consistent only with the conclusion that a life estate was created."[69] The trial court also inter-

62. For a discussion of the issues involved and a suggested resolution, see J. Rodney Johnson, *The Absence of Due Process in Fiduciary Accounting: A Constitutional Concern*, 23 VA. BAR ASS'N J., Fall 1997, at 11.

63. 258 Va. 225, 519 S.E.2d 142 (1999).

64. *Id.* at 228, 519 S.E.2d at 143.

65. This critical fact is not mentioned in the opinion but it is documented in the record. *See* Record at 46-7, *Gaymon* (No. 982483). Although the handwritten interlineation was initialed by *T*, which would satisfy *T*'s signature requirement, the absence of attesting witnesses would have rendered the interlineation wholly ineffective because it was not sufficient, standing alone, to qualify as a holographic codicil. VA. CODE ANN. § 64.1-49 (Repl. Vol. 1995); Triplett v. Triplett, 161 Va. 906, 172 S.E. 162 (1934).

66. *Gaymon*, 258 Va. at 228, 519 S.E.2d at 143.

67. *Id.* 519 S.E.2d at 144.

68. *Id.* at 230-31, 519 S.E.2d at 145.

69. *Id.* at 231, 519 S.E.2d at 145 (1999) (distinguishing Carson v. Simmons, 198 Va. 854, 856, 96 S.E.2d 800, 804 (1957), where the substantially similar language, i.e., "with

preted the holographic interlineation as expressing *T*'s intent that all principal and interest expense on the home's mortgage be paid by the remainder persons.[70] The supreme court, while agreeing on the principal issue,[71] did not agree "that by using the word 'mortgage,' the testator intended to deviate from the well-established common law principle" imposing the interest liability upon the life tenant.[72] Notwithstanding its conclusion that *T*'s will imposed liability for payment of the mortgage principal upon the remainder persons if they accepted the devise,[73] the supreme court reversed that portion of the trial court's decision subjecting the devised property to a lien for the principal payments made by Widow because "the remainder persons are not parties to this action."[74] Query: If the remainder persons were not parties to the action, how could the supreme court determine that they took only a remainder, and not a fee simple, under *T*'s will?[75]

B. *Will Construction— "Personal Property" —Ejusdem Generis*

In *Turner v. Reed*,[76] *T*'s will left to two friends "'my residence . . . and *all* of the furniture and *personal property located in and about said residence*, along with any automobile which I may

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the understanding," was held to be precatory in one paragraph of a will and mandatory in another).

70. *Id.* at 232, 519 S.E.2d at 146.

71. The supreme court further noted that, although the common law doctrine of exoneration would ordinarily make *T*'s personal estate the primary fund for payment of mortgage principal, the "subject to any encumbrances" language of the first paragraph would have shifted this liability to the encumbered property–but for the holographic interlineation which shifted it to the remainder persons. *Id.* at 233, 519 S.E.2d at 146-47.

72. *Id.*, 519 S.E.2d at 146.

73. The acceptance issue was not before the supreme court, and thus not decided. *Id.* at 234, 519 S.E.2d at 147.

74. *Id.*

75. In a previous decision, the Supreme Court of Virginia stated the following:

> It is necessary for the validity of its judgment that a court must have jurisdiction over the subject matter and over the necessary parties. It has no jurisdiction to act outside the limits of the law or mode of procedure, or beyond the issues in the pleadings. No judicial proceeding can deprive a man of his property without giving him an opportunity to be heard in accordance with the provisions of the law, and if a judgment is rendered against him without such opportunity to be heard, it is absolutely void. A void judgement is in legal effect no judgment. By it no rights are divested and from it no rights are obtained. All claims flowing out of it are void. It may be attacked in any proceeding by any person whose rights are affected.

Harris v. Deal, 189 Va. 675, 686-87, 54 S.E.2d 161, 166 (1949).

76. 258 Va. 406, 518 S.E.2d 832 (1999).

own at the time of my death.'"[77] *T*'s executor (who also drafted *T*'s will) sought a construction of *T*'s will to determine whether approximately 135,000 dollars worth of stock and travelers checks located at *T*'s residence upon her death passed to the friends under the emphasized words of this gift.[78] Affirming the trial court's negative answer, the Supreme Court of Virginia confirmed the general rule that "'[s]ince the term 'personal property' is a technical term, the testatrix is *generally* presumed to have used that term in its technical sense.'"[79] However, the court went on to hold that, under the facts of this case, *T*'s intent "was to limit her bequest to tangible personal property."[80] The court also agreed with the trial court's application of the doctrine of ejusdem generis in reaching its conclusion.[81]

C. *Trusts—Creation*

A primary issue in *Rivera v. Nedrick*,[82] where the only evidence of a possible trust was *S*'s execution of a $10,000 promissory note

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77. *Id.* at 408, 518 S.E.2d at 833 (emphasis added).

78. *Id.*

79. *Id.* at 409, 518 S.E.2d at 834 (quoting Bowles v. Kinsey, 246 Va. 298, 301, 435 S.E.2d 129, 130 (1993)).

80. *Id.* at 410, 518 S.E.2d at 834. The court stated:

> In *Bowles*, the word "all" defined the entire corpus of the testatrix's personal property, unqualified by kind or situs. Here, that adjective defines only a select portion of the testatrix's personal property, that is, "furniture and personal property" and only such property as was "located in and about [her] residence."

Id. at 409, 518 S.E.2d at 834.

81. *Id.* at 410, 518 S.E.2d at 834.

> As we define that doctrine, in the construction of legal instruments, when the listing of an item with a specific meaning is followed by a word of general import, the general word will not be construed to include things in its widest scope but only those things of the same import as that of the specific item listed.
>
> . . .
>
> Here, the specific items listed are "furniture" and "automobile;" the general term listed is "personal property." The widest scope of that term includes intangible as well as tangible personal property. But under the doctrine in issue, the general term applies only to things of the same import as that of the specific items listed, *i.e.*, tangible personal property.

Id. (citations omitted).

82. 259 Va. 1, 529 S.E.2d 310 (1999). Further issues dealing with suits brought on behalf of minors by next friends, and the tolling of the statutes of limitations in such cases, are covered in this Survey's article focusing on legal rights of children. *See* Robert E. Shepherd, Jr., *Annual Survey of Virginia Law: Legal Issues Involving Children*, 34 U. RICH. L. REV. 939 (2000).

payable to *T*, Trustee for two minor children,[83] was whether a trust did in fact exist.[84] Reaffirming the general rule that the presence or absence of the technical term "trustee" is not controlling, the court noted the absence of any stated trust purpose, trust terms, or trust powers, and concluded that no trust had been created in this case.[85]

D. *P.O.D. Accounts—Change of Beneficiaries*

In *Jampol v. Farmer*,[86] *D* named certain persons as P.O.D. payees[87] on four certificates of deposit ("CDs") at the time of acquisition, but no such designation appeared on replacement CDs that were issued on two occasions during the following year when *D* lost or misplaced the originals and the first replacements.[88] Although *D* executed certain affidavits in connection with these replacements, "the record contains no document signed by *D* directing the bank to remove the P.O.D. beneficiaries from the certificates."[89] Thus the P.O.D. payees claimed ownership of the replacement CDs based upon Virginia Code section 6.1-125.6, which states that ownership rights "are determined by the form of the account at the death of a party," and that this "[f]orm may be altered by written order given by a party . . . [that] must be signed by a party."[90] However, the Supreme Court of Virginia held that because section 6.1-125.6 states that the form of an account "may," instead of "must," be altered by a writing, the statute does not prevent a financial institution from making such a change based upon a CD owner's in-person oral request.[91] Thus, as "the record is devoid of evidence that [*D*] intended to leave the

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83. *Rivera*, 259 Va. at 3, 529 S.E.2d at 310.

84. *Id.* at 5-6, 529 S.E.2d at 312.

85. *Id.* "[W]e find no evidence of either 'explicit language' creating a trust or 'circumstances which show with reasonable certainty that a trust was intended to be created.'" *Id.* (quoting Woods v. Stull, 182 Va. 888, 902, 30 S.E.2d. 675, 682 (1944)).

86. 259 Va. 53, 524 S.E.2d 436 (2000).

87. A "P.O.D. payee" is "a person designated on a P.O.D. account as one to whom the account is payable on request after the death of one or more persons." VA. CODE ANN. § 6.1-125.1(11) (Repl. Vol. 1999).

88. *Jampol*, 259 Va. at 56, 524 S.E.2d at 438. Although the replacement CDs had different serial numbers, they "showed the same amount, the same account number, the same issue date, the same maturity date, and the same rate of interest as the originals." *Id.*

89. *Id.* at 57, 524 S.E.2d at 438.

90. *Id.*; VA. CODE ANN. § 6.1-125.6 (Repl. Vol. 1999).

91. *Jampol*, 259 Va. at 58, 524 S.E.2d at 439.

certificates unchanged, and the burden to prove this fact was upon those who challenged the form of the accounts as they existed at her death," *D*'s estate prevailed against the P.O.D. payees.[92]

The pivotal statute in this case, Virginia Code section 6.1-125.6, was enacted in 1979 as a part of Virginia's adoption of the pre-1989 Uniform Probate Code's provisions governing multiple party accounts in financial institutions.[93] Although this same statute, pre-1989 U.P.C. § 6-105,[94] has been adopted in a number of other jurisdictions, the issue in *Jampol* appears to have reached the appellate level in only one other case, *Wolfinger v. Wolfinger*,[95] wherein the Court of Appeals of Utah reached the opposite conclusion.[96] The *Wolfinger* decision is not mentioned in *Jampol*.

E. *Trusts—Recovery of Trustee's Attorney Fees and Expenses*

In *Stepp v. Foster*,[97] the Supreme Court of Virginia reaffirmed, as an exception to the general American rule requiring litigants to pay their own attorney fees, that "'[w]here a trustee has a good faith basis for defending a suit challenging his actions as trustee, attorney's fees and [expenses] incurred in the defense of the suit *should be charged against the trust*.'"[98] However, that portion of the trial court's opinion that placed this liability upon the opposing parties "because 'there is no trust fund within the control of the court but, rather, the trust is non-liquid realty'" was reversed.[99] The court reasoned that although the trust's corpus was

92. *Id.* at 59, 524 S.E.2d at 439.

93. Act of Mar. 26, 1979, ch. 407, 1979 Va. Acts 597 (codified at VA. CODE ANN. §§ 6.1-125.1 to 125.16 (Repl. Vol. 1999)). For a discussion of the background of this legislative reform, see J. Rodney Johnson, *Joint, Totten Trust, and P.O.D. Bank Accounts; Virginia Law Compared to the Uniform Probate Code*, 8 U. RICH. L. REV. 41 (1973).

94. UNIF. PROBATE CODE § 6-105 (amended 1989); 8-II U.L.A. 474 (1998).

95. 793 P.2d 393 (Utah Ct. App. 1990). This is the only case listed under pre-1989 U.P.C. § 6-105 in Uniform Laws Annotated (West) through the 1999 Supplement.

96. *See id.* at 396. "Under the Utah Uniform Probate Code, a joint or a P.O.D. account can only be modified by a written request to the bank from a party to the account." *Id.* (citing UTAH CODE ANN. § 75-6-105 (1978)). The operative language of the Utah statute is identical to pre-1989 U.P.C. § 6-105 and to VA. CODE ANN. § 6.1-125.6 (Repl. Vol. 1999).

97. 259 Va. 210, 524 S.E.2d 866 (2000).

98. *Id.* at 217, 524 S.E.2d at 870 (quoting Ward v. NationsBank, 256 Va. 427, 441, 507 S.E.2d 616, 624 (1998)).

99. *Id.* at 215, 524 S.E.2d at 869.

real estate (common ground of a subdivision) this fact "does not remove those assets from the control of the chancellor. Nor is it controlling that an award of attorney fees and expenses . . . might result in diminution of the corpus and thereby frustrate the grantor's intention."[100] Lastly, to prevent any misinterpretation of its holding, the supreme court emphasized the difference between awarding a prevailing party "costs," as contemplated by section 17.1-601,[101] and "expenses," which it defined as "any reasonable expense of the trustees beyond and above their attorney's fees, that they may have incurred as a result of being required to defend this suit."[102]

F. *Deed to Trust—No Reservation in Favor of Stranger*

In *Shirley v. Shirley*,[103] *S*'s deed conveying certain real estate to trustees also provided that "[*S*] reserves unto herself a life estate for herself and a life estate for the benefit of [*D*] in and to said real property."[104] On these facts, the Supreme Court of Virginia agreed with the trial court that *D* took no interest under the deed, holding that a common law rule that prohibits a grantor from "reserving" an interest in realty for the benefit of one not a party to a deed is a part of Virginia's received common law pursuant to Virginia Code section 1-10.[105] Notwithstanding the apparent absolute language of section 1-10, the supreme court has abolished or modified the received common law in some cases,[106] but it de-

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100. *Id.* at 217-18, 524 S.E.2d at 871.

101. VA. CODE ANN. § 17.1-601 (Repl. Vol. 1999).

102. *Stepp*, 259 Va. at 219, 524 S.E.2d at 871.

103. 259 Va. 513, 525 S.E.2d 274 (2000).

104. *Id.* at 515, 525 S.E.2d at 275.

105. *Id.* at 518, 525 S.E.2d at 276-77. Section 1-10 of the Virginia Code provides that "[t]he common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly." VA. CODE ANN. § 1-10 (Repl. Vol. 1995).

106. The principle followed by the supreme court when departing from the apparent mandate of section 1-10 is that:

> "[s]uch of [English common law] doctrines and principles as are repugnant to the nature and character of our political system, or which the different and varied circumstances of our country render inapplicable to us, are either not in force here, or must be so modified in their application as to adapt them to our condition."

Shirley, 259 Va. at 518-19, 525 S.E.2d at 277 (quoting Foster v. Commonwealth, 96 Va. 306, 310, 31 S.E. 503, 505 (1898)).

clined to do so in response to *D*'s three-part argument in this case.[107] The court reasoned "that 'a decision whether to abrogate such a fundamental rule as the one under consideration is the function of the legislative, not judicial, branch of government.'"[108] The court went on to state that "[t]his is particularly so when, as here, any change in the common law rule would affect not only inchoate but also vested property rights."[109] It is difficult to understand the court's characterization of the stranger doctrine as a "fundamental rule" when its opinion lists three ways that *S* could have avoided this technical trap and effectively transferred a life estate to *D*. This suggests that more of an emphasis is being placed upon the form of the transaction than its substance. While such was characteristic of the common law, it is not a common law attribute worthy of preservation in this case.[110]

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107. *Id.* at 519 525 S.E.2d at 277. *D*'s argument was based upon the modern trend of giving effect to a grantor's intent, the rejection of the stranger rule in numerous jurisdictions, and VA. CODE ANN. § 55-22 (Repl. Vol. 1995) (Virginia's third party beneficiary statute). *Shirley*, 259 Va. at 516-17, 525 S.E.2d at 275-76. The latter argument was not addressed by the supreme court because it was not raised in the trial court. *Id.* at 520 n.9, 525 S.E.2d at 277 n.9.

108. *Shirley*, 259 Va. at 519, 525 S.E.2d at 277 (quoting Williamson v. The Old Brother Brogue, Inc., 232 Va. 350, 354, 350 S.E.2d 621, 624 (1986)).

109. *Id.* In response to a somewhat similar statement made by the New York Court of Appeals, one national authority commented as follows:

> That rationale suggests that there is reliance on the stranger rule by drafting attorneys and parties, an assumption which seems dubious, if not unbelievable. The common law rule serves only as a penalty for faulty lawyering at the drafting stage, with the parties paying the price. Unless some evidence from those states rejecting the stranger rule is forthcoming which shows that the abolition of the stranger rule creates title problems, there is no compelling policy reason for courts to adhere to the stranger rule.

9 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION § 82.09(c)(2) (David A. Thomas ed., 1999). This is the same national authority quoted by the supreme court in this case for the purpose of naming the rule in question. *Shirley*, 259 Va. at 517 n.4, 525 S.E.2d at 276 n.4.

110. There are two further considerations that, if argued before the supreme court, might have led it to a different conclusion in this case. First, it is not clear that the "no reservation in a stranger" rule would have been applicable to a life estate at common law. According to a source cited by the supreme court for another purpose,

> [s]trictly the term "reservation," implies a right of the nature of rent reserved to a landlord or lord of a manor; thus rent, heriots, suit of mill, and suit of court are reservations, and have been described as the only things, which, according to the legal meaning of the word, are reservations.... The term is frequently used, however, to denote some incorporeal right over a thing granted of which the grantor intends to have the benefit, such as a fishing right or sporting right or a right of way. In this case the reservation formerly operated as a regrant of the right of the grantee to the grantor, and it was not effectual unless the deed in which it was contained was executed by the grantee.

G. *Personal Representatives—Appointment—Jurisdiction*

In *Bolling v. D'Amato*,[111] two years after *D*'s widow was appointed administrator of *D*'s estate, the court appointed *D*'s son "co-administrator . . . for the *exclusive* purpose of bringing legal action on behalf of the estate."[112] Applying "an ancient and settled rule," the Supreme Court of Virginia held that the son's appointment as co-administrator was "void because, at the time the order was entered, the decedent already had a properly qualified administrator in Virginia."[113] However, notwithstanding the "settled" nature of this rule, the court specifically stated that its decision was "limited to the present case and shall operate prospectively only."[114]

H. *Wills—Construction—Conversion of Debt to Advancement*

Applying settled principles of Virginia law to the unique facts presented in *O'Brien v. O'Brien*,[115] the Supreme Court of Virginia concluded that (i) *T*'s will converted a son's debt into an advancement,[116] (ii) *T*'s executors were entitled to recover from *T*'s

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Deeds and Other Instruments, 13 Halsbury's Laws of Eng. (Butterworths) ¶ 238 (2000). Second, the literature suggests that the stranger rule came into existence in a legal environment where conveyancing was regularly accomplished by deed indented (executed by grantor and grantee), in which case any third party mentioned therein would necessarily be a stranger thereto. However, in today's typical conveyance by deed poll (executed only by the grantor), one in the position of the intended life tenant in the present case would be no more a "stranger" to the deed than the grantee of the remainder interest. For a discussion of deeds indented and poll, their effect on persons not parties thereto, and the origin of Virginia Code section 55-22, see 2 MINOR ON REAL PROPERTY §§ 1026-27 (Frederick Deane Goodwin Ribble ed., 2d ed. 1928).

111. 259 Va. 299, 526 S.E.2d 257 (2000).

112. *Id.* at 301, 526 S.E.2d at 258. The legal action in question was an action under Virginia's Death by Wrongful Act statute. VA. CODE ANN. § 8.01-50 to -56 (Repl. Vol. 1995).

113. *Bolling*, 259 Va. at 304, 526 S.E.2d at 259.

114. *Id.* The court's further statement that "this decision will not affect the validity of any orders entered in the past under circumstances similar to those underlying the order in issue here" suggests that the practice followed in this case might have occurred with some frequency in the past. *Id.*

115. 259 Va. 552, 526 S.E.2d 1 (2000).

116. The term "advancement" was used in a secondary sense. The legal concept of "advancements" relates to property passing by intestate succession. *See* VA. CODE ANN. § 64.1-17 (Repl. Vol. 1995). The significance of this holding lies in the fact that the excess of a debt over an heir's share can be recovered from the heir by the decedent's estate, but the excess of an advancement over an heir's share cannot. McCoy v. McCoy, 105 Va. 829, 54 S.E. 995 (1906).

estate their attorney's fees incurred in unsuccessfully seeking to collect the son's "debt," and (iii) the son was not entitled to recover from *T*'s estate his attorney's fees incurred in successfully defending against the executors' claim.[117]

I. *Wills—Torts—Intentional Interference with Inheritance*

The Supreme Court of Virginia again applied settled principles of Virginia law to the facts in *Economopoulos v. Kolaitis*[118] and held that, although the trial court erred in finding a confidential relationship between the decedent and his son, it correctly struck the plaintiffs' claims in constructive fraud, conversion, and unjust enrichment.[119] The troubling part of this decision is that the supreme court "agree[d] with the trial court that a cause of action for 'tortious interference with inheritance' is not recognized in Virginia."[120] The black-letter rule of this doctrine reads: "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third party an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift."[121]

Although facts justifying the application of this rule do not exist in the present case, one hopes that if the doctrine's requisites are found in a future case, the court will not hesitate to extend recognition to this remedy.

V. UNITED STATES DISTRICT COURT OPINION

A. *Will Contracts—Dead Man's Statute—Interested Party*

In *Stephens v. Caruthers*,[122] the plaintiffs sought enforcement of an alleged oral contract to make a will.[123] The strongest evi-

117. *O'Brien*, 259 Va. at 558, 526 S.E.2d at 9.
118. 259 Va. 806, 528 S.E.2d 714 (2000).
119. *Id.* at 815, 528 S.E.2d at 720.
120. *Id.*
121. RESTATEMENT (SECOND) OF TORTS § 774B (1979). For a helpful discussion of this doctrine see Nita Leford, *Intentional Interference with Inheritance*, 30 REAL PROP. PROB. & TR. J. 325 (1995).
122. 97 F. Supp. 2d 698 (E.D. Va. 2000).
123. *Id.* at 700.

dence of the alleged agreement was the testimony of a plaintiff ("*P*") and *P*'s spouse ("*S*") regarding statements made in their presence by the parties to the alleged will contract.[124] As the Virginia Dead Man's Statue provides in part that "no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony,"[125] *S*'s testimony was offered to corroborate *P*'s testimony. Although *S* was not a plaintiff, *P* "admitted in her deposition testimony that [*S*] will share in her inheritance should she prevail in this litigation."[126] The District Court for the Eastern District of Virginia recognized that "[w]hether the spousal relationship by itself renders [*S*] 'interested' is doubtful, both on principle and because authority from Virginia and elsewhere point persuasively to this result."[127] The court went on to hold, however, that "[w]here, as here, the party to the record declares that her spouse will share in the inheritance, should the will contest succeed, the spouse is an 'interested party' whose testimony may not serve as corroborating evidence under the Dead Man's Statute."[128]

In addition to any technical objections that may be raised by evidence scholars, it appears that the court's "interested party" conclusion conflicts with its expressed doubt regarding whether the spousal relationship, standing alone, makes *S* an interested party. It is believed that any but the most unusual married person would anticipate that his spouse would to some extent share any inheritance received, and that such anticipation would likely have the same tendency to influence that person's testimony as did *P*'s unenforceable statement of intention in the present case. This belief is reinforced by the Supreme Court of Virginia's 1887 holding that a gift to a married man necessarily inures to the benefit of his wife.[129] Moreover, from a public policy standpoint, is it desirable to develop a protocol that will require counsel in every such case, where one spouse's testimony is offered to corroborate the other's, to ask the latter if he anticipates sharing any recov-

124. *Id.*

125. VA. CODE ANN. § 8.01-397 (Repl. Vol. 2000).

126. *Stephens*, 97 F. Supp. 2d at 707.

127. *Id.* at 706-07.

128. *Id.* at 707. After examining the remaining evidence, the court entered summary judgment in favor of the defendants, holding that "no reasonable factfinder" could conclude that it was sufficient to corroborate the "adverse" testimony of *P* and the "interested" testimony of *S* regarding the alleged will contract. *Id.* at 711.

129. McDearman v. Hodnett, 83 Va. 281, 283, 2 S.E. 643, 644 (1887).

ery with the corroborating spouse?[130] The pressure to give a negative answer in such a case, and the cross examination that a negative answer will engender, argue against such a protocol.

VI. VIRGINIA CIRCUIT COURT OPINIONS

A. *Legal Malpractice—Will Beneficiary—Cause of Action Stated*

In *Timmons v. J.D.*,[131] *T* retained an attorney ("*D*") to draft a will leaving *T*'s entire estate to two persons, one of whom predeceased *T*, thereby making plaintiff the sole beneficiary under *T*'s will.[132] However, *D*, who retained *T*'s will in his possession following its execution, did not notify plaintiff or any of *T*'s heirs of its existence following *T*'s death.[133] As a result, *T*'s estate was distributed to *T*'s heirs under the laws of intestate succession.[134] The plaintiff, one of the intestate takers, brought an action to recover from *D* the difference between what she received as an heir and what she was entitled to receive under *T*'s will.[135] The plaintiff's action was based upon the theory that

> an implied contract arose between [*T*] and [*D*] that [*D*] would exercise reasonable care in safeguarding the will, that [*D*] would deliver the will to a proper third party in the event of [*T*]'s death, and that [*D*] would deliver the will to Plaintiff (who was also the administrator of the estate) at [*T*]'s death.[136]

The plaintiff claimed that she was an intended third party beneficiary of this contract.[137] *D*'s demurrer, which was based upon the Supreme Court of Virginia's lamentable decision in *Copenhaver v. Rogers*,[138] was overruled by the trial judge who held *D*

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130. Or, by logical extension, to ask a widowed mother if she plans to leave any portion of her recovery to her children at death.

131. 49 Va. Cir. 201 (Cir. Ct. 1999) (Charlottesville City).

132. *Id.* at 201.

133. *Id.* at 202.

134. *Id.*

135. *Id.*

136. *Id.* at 201. The theory of this case suggests an additional liability exposure for drafting attorneys who serve as custodians of their clients' wills. For a discussion of these issues, see J. Rodney Johnson, *The Danger of Retaining a Will: A Virginia View*, 6 VA. BAR ASS'N J., Spring 1980, at 4.

137. *Timmons*, 49 Va. Cir. at 203.

138. 238 Va. 361, 384 S.E.2d 593 (1989). For an excellent critique of this case, see Brian Adams, Note, *Whose Beneficiaries Are They Anyway?* Copenhaver v. Rogers *and the*

to be "incorrect in reading *Copenhaver* as establishing a per se bar to malpractice claims brought by the beneficiaries of a will against the drafter."[139] Instead, the trial judge found the *Copenhaver* rule to require that "the Plaintiff must allege that the decedent clearly and directly intended to benefit the beneficiaries when she entered the contract for legal services with her attorney."[140] In this context, the trial court's review of the plaintiff's pleadings led it to the conclusion that "Plaintiff has adequately alleged facts sufficient to draw the inference that the decedent's overriding purpose in contracting with Defendant was to benefit the Plaintiff."[141]

B. *Trusts—Prudent Investor Rule—Trustee's Personal Liability*

In *In re Will of Somma*,[142] the issue before the Richmond Circuit Court was "whether a trustee has violated his fiduciary duty by subjecting trust funds to investment practices known as 'day trading,' 'calls,' and 'margins.'"[143] Under the facts of this case, the court answered this question in the affirmative, and held the trustee personally liable for $77,418.75 incurred in one year for brokerage commissions and the margin interest on the transactions in question.[144] The court's opinion also contains an excellent primer on these investment practices in the context of Virginia's relatively new Prudent Investor Rule.[145]

VII. VIRGINIA ATTORNEY GENERAL OPINION

The 1990 Session of the General Assembly enacted the Uniform Custodial Trust Act,[146] which "is designed to provide a statutory

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Attorney's Contract to Prepare a Will in Virginia, 24 U. RICH. L. REV. 415 (1990).

139. *Timmons*, 49 Va. Cir. at 203.

140. *Id.*

141. *Id.* at 204.

142. 49 Va. Cir. 213 (Cir. Ct. 1999) (Richmond City).

143. *Id.* at 213.

144. *Id.* at 220.

145. *Id.* at 218-20. Virginia replaced the historic Prudent Man Rule with its version of a Prudent Investor Rule in 1992, and replaced the latter with the substantially identical Uniform Prudent Investor Act in 1999, effective January 1, 2000. VA. CODE ANN. § 26-45.3 (Cum. Supp. 2000). For a discussion of this development, see Johnson, *supra* note 30 at 1075-76.

146. VA. CODE ANN. §§ 55-34.1 to .19 (Repl. Vol. 1995). For a discussion of the Act, see

standby inter vivos trust for individuals who typically are not very affluent or sophisticated."[147] Section 55-34.5 of the Act is a facility of payment clause that allows third parties owing money to, or having property of, a functionally incapacitated person to transfer the same to an adult member of the incapacitated person's family or to a trust company as custodial trustee under the Act and receive an effective discharge; but transfers in excess of $10,000 are not effective without court approval.[148] Section 64.1-57(1)(p)(5), one of the "boiler-plate" administrative powers that can be incorporated by reference into a will or trust, authorizes a fiduciary to distribute a functionally incapacitated person's entitlement "to an adult person or bank authorized to exercise trust powers as custodial trustee for a beneficiary who is incapacitated as defined in § 55-34.1,[149] under the Uniform Custodial Trust Act[150] to be held as custodial trustee under the terms of such act."[151] The question presented to the Attorney General was whether Virginia Code section 55-34.5 "require[s] a fiduciary exercising administrative powers under § 64.1-57(1)(p)(5) to obtain court approval before distributing to a custodial trustee under the Virginia Uniform Custodial Trust Act (the "Act") an amount exceeding $10,000."[152] The Attorney General responded in the negative in a well reasoned opinion that concludes by noting that while section 55-34.5 is a general provision, section 64.1-57(1)(p)(5) is a specific provision, and that the specific controls the general.[153]

J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 24 U. RICH. L. REV. 827, 829-30 (1990).

147. UNIF. CUSTODIAL TRUST ACT (Commissioners' Prefatory Note), 7A U.L.A. Part I 240 (1999).

148. VA. CODE ANN. § 55-34.5 (Repl. Vol. 1995).

149. This reference was added in 1999 to clarify that functional incapacity under the Act's definition is the required criterion, as opposed to a judicial determination pursuant to the provisions of sections 37.1-134.6 through 37.1-134.22 VA. CODE ANN. §§ 37.1-134.6 to .22 (Cum. Supp. 2000). For a discussion of this development, see *Johnson*, *supra* note 30 at 1085-86.

150. VA. CODE ANN. §§ 55-34.1 to .19 (Repl. Vol. 1995 & Cum. Supp. 2000).

151. VA. CODE ANN. § 64.1-57(1)(p)(5) (Cum. Supp. 2000).

152. *Fiduciaries: Court Approval Not Required to Disburse More Than $10,000 to a Custodial Trustee*, THE L. DIG., May 2000, at 4.

153. *Id.*

VIII. CONCLUSION

For the reasons recited herein, it is respectfully submitted that the 2001 Session should (1) repeal the ill-considered perpetuities' opt-out provision enacted by the 2000 Session,[154] (2) extend and enact the notice in probate legislation that was carried over from the 2000 Session,[155] and (3) appropriately amend the Dead Man's Statute.[156]

154. *See supra* Part II.B.
155. *See supra* Part III.
156. *See supra* Part V.