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## Wills, Trusts and Estates (Annual Survey of Virginia Law, 2004-05)

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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 or amended a number of sections of the Virginia Code in its 2005 Session. In addition, there were two opinions from the Supreme Court of Virginia that presented issues of interest to the general practitioner as well as to 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.<sup>1</sup>

## II. LEGISLATION

### A. *Trusts—Uniform Trust Code (2000)*

The Uniform Trust Code (“UTC”),<sup>2</sup> which was introduced and carried over in the 2004 Session,<sup>3</sup> was enacted in a modified form in the 2005 Session,<sup>4</sup> to be effective July 1, 2006.<sup>5</sup> With Virginia’s

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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 most recent version of the section to which reference is being made.

2. UNIF. TRUST CODE (amended 2005), 7C U.L.A. 177 (Supp. 2005). Copies of the Act, containing the Commissioners’ Official Comments, which will be indispensable in seeking to completely understand the Act’s operation, may be obtained from the National Conference of Commissioners on Uniform State Laws, 211 East Ontario Street, Suite 1300, Chicago, IL 50511.

3. S.B. 506, Va. Gen. Assembly (Reg. Sess. 2004).

4. Act of Apr. 6, 2005, ch. 935, 2005 Va. Acts 1793 (codified as amended at VA. CODE ANN. §§ 55-541.01 to -551.06 (Cum. Supp. 2005)).

5. *Id.* As introduced, the Virginia UTC stated that “[t]his chapter applies to express

passage, the UTC has now been enacted by fifteen jurisdictions.<sup>6</sup> This project of the National Conference of Commissioners on Uniform State Laws, which is described by that body as “the first national codification of the law of trusts,” also “contains a number of innovative provisions.”<sup>7</sup> One of the UTC’s goals is to “provide States with precise, comprehensive, and easily accessible guidance on trust law questions. On issues on which States diverge or on which the law is unclear or unknown, the Code will for the first time provide a uniform rule.”<sup>8</sup> Consistent with its further goal of enhancing flexibility, “[m]ost of the Uniform Trust Code consists of default rules that apply only if the terms of the trust fail to address or insufficiently cover a particular issue.”<sup>9</sup>

During the carryover period between the 2004 and 2005 Sessions, the UTC was subjected to an exhaustive study by the Wills, Trusts, and Estates Section of the Virginia Bar Association, led by a subcommittee chaired by John E. Donaldson, *Emeritus* Professor of Law, at the College of William and Mary’s Marshall-Wythe School of Law. This study led to the amendment of many, and the elimination of some, UTC provisions, along with the amendment of nine<sup>10</sup> and the repeal of twenty-nine<sup>11</sup> sections of the Virginia Code. Although a detailed comparison of the UTC to prior Virginia law is not feasible within the confines of this arti-

trusts.” S.B. 891, Va. Gen. Assembly (Reg. Sess. 2005). During the legislative process, it was amended to read that “[t]his chapter applies to express inter vivos trusts [and it] also applies to testamentary trusts, except to the extent . . . it is clearly inapplicable to them.” VA. CODE ANN. § 55-541.02(A) (Cum. Supp. 2005).

6. The other fourteen jurisdictions are Arkansas, District of Columbia, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, and Wyoming. See UTCproject.org Home Page, <http://www.UTCproject.org> (last visited Oct. 1, 2005).

7. UNIF. TRUST CODE (amended 2005), 7C U.L.A. 177, 178 (Supp. 2005).

Among the more significant [of these innovative provisions] are specification of the rules of trust law that are not subject to override in the trust’s terms . . . , the inclusion of a comprehensive article on representation of beneficiaries . . . , rules on trust modification and termination that will enhance flexibility . . . , and the inclusion of an article collecting the special rules pertaining to revocable trusts.

*Id.*

8. *Id.*

9. *Id.*

10. The following sections of the Virginia Code were amended and reenacted: §§ 26-5.2, -30, -51, -66, 37.1-110, 55-7, -60, -277.4, and 64.1-73. See Act of Apr. 6, 2005, ch. 935, 2005 Va. Acts 1793.

11. The following sections of the Virginia Code were repealed: §§ 26-5.1, -49, -53, -54, -55, -64, -65, 38.2-3120, 55-7.1, -7.2, -19, -19.3, -19.4, -27 to -34, and 64.1-67.2. See Act of Apr. 6, 2005, ch. 935, 2005 Va. Acts 1793.

cle, there are several excellent sources to which the practitioner may refer for a Virginia-specific and for a general explanation of the UTC. Professor Donaldson, and Robert T. Danforth, Associate Professor of Law at the Washington and Lee University School of Law, also a member of the Virginia Bar Association study committee, have co-authored a comprehensive, Virginia-oriented article for this issue of the *Annual Survey of Virginia Law*, to which the reader is referred for a discussion of Virginia's new trust code.<sup>12</sup> The general resource would be the Official Comments to the UTC prepared by the Commissioners on Uniform State Laws, in which the Commissioners explain what they meant by what they said and which also serves as the legislative history for the "uniform" portion of Virginia's modified UTC.<sup>13</sup>

### B. *Fiduciary Investments*—"Mini" Legal List

In response to a joint study of fiduciary investments by the Virginia Bar Association and the Virginia Bankers Association that was requested by the 1991 Session, the 1992 Session replaced Virginia's traditional prudent man rule with a portfolio-oriented prudent investor rule, and replaced Virginia's nine-page, twenty-seven-category legal list<sup>14</sup> with a one-page, three-category "mini" legal list.<sup>15</sup> Following a later study by the Virginia Bar Association, the 1999 Session replaced Virginia's 1992 prudent investor rule with the Uniform Prudent Investor Act and made conforming changes to the mini legal list.<sup>16</sup>

The mini legal list, which is found in Virginia Code section 26-40.01, identifies a number of investments within the three follow-

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12. See generally John E. Donaldson & Robert T. Danforth, *Annual Survey of Virginia Law: The Virginia Uniform Code*, 40 U. RICH. L. REV. 325 (2005).

13. In this connection, see *Lumbermen's Mutual Casualty Co. v. Indemnity Insurance Co.*, 186 Va. 204, 209, 42 S.E.2d 298, 301 (1947), wherein the Supreme Court of Virginia stated that "[w]hen the legislature of one State adopts a statute of another State, such legislature is presumed to have adopted the construction placed upon it by the courts of that State." For ordering information for the Official Comments, see *supra* note 2.

14. Although the original legal list was replaced for most purposes, it was not repealed but, instead, was restricted to investments made by the Virginia Housing Development Authority and the Virginia Resources Authority. See VA. CODE ANN. § 26-40 (Repl. Vol. 2004).

15. These developments are discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 26 U. RICH. L. REV. 873, 890-91 (1992).

16. These developments are discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 33 U. RICH. L. REV. 1075, 1075-76 (1999).

ing broad categories: (1) "Obligations of the Commonwealth, its agencies and political subdivisions;"<sup>17</sup> (2) "Obligations of the United States;"<sup>18</sup> and (3) "Savings accounts, time deposits or certificates of deposit."<sup>19</sup> Most importantly, Virginia Code section 26-40.01 provides that a fiduciary investing in these categories "shall be conclusively presumed to have been prudent in investing the funds."<sup>20</sup> When this section came before the United States District Court for the Eastern District of Virginia in *Scott v. United States*,<sup>21</sup> the court focused on this language and concluded that "[a]s unfair as it may prove to be to the beneficiaries, a trustee in Virginia may arbitrarily decide to invest one hundred percent of the assets of a trust in United States Savings Bonds and he will be deemed to have met the 'prudent investor' standard."<sup>22</sup>

In this regard, it should be noted that when the 1999 Session adopted the Uniform Prudent Investor Act, it knowingly re-enacted the mini legal list and its immunity provision in order to provide a safe haven for the layperson who agrees to be a fiduciary as an accommodation to a friend or family member, and who may not have the education or the sophistication to understand the intricacies of the Uniform Prudent Investor Act or the need to retain a professional investment advisor who does.<sup>23</sup> In this context, and in the belief that the immunity of the mini legal list should be confined to fiduciaries of smaller trust estates that one might expect to be administered by a layperson, legislation seeking to limit the protection of the mini legal list to \$100,000 was introduced in the 2003 Session, but it failed.<sup>24</sup> Similar legislation that would have restricted this limitation on protection to \$1,000,000 was introduced in the 2004 Session, but it also

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17. VA. CODE ANN. § 26-40.01(B)(1) (Cum. Supp. 2005).

18. *Id.* § 26-40.01(B)(2) (Cum. Supp. 2005).

19. *Id.* § 26-40.01(B)(3) (Cum. Supp. 2005).

20. *Id.* § 26-40.01(B) (Cum. Supp. 2005).

21. 186 F. Supp. 2d 664 (E.D. Va. 2002), *aff'd*, 328 F.3d 132 (4th Cir. 2003). The district court opinion is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 37 U. RICH. L. REV. 357, 384-85 (2002).

22. *Scott*, 186 F. Supp. 2d at 668.

23. See H.B. 841, Va. Gen. Assembly (Reg. Sess. 1999) (enacted as Act of Mar. 28, 1999, ch. 772, 1999 Va. Acts 1356) (codified as amended at VA. CODE ANN. § 26-40 (Repl. Vol. 2004)).

24. H.B. 1979, Va. Gen. Assembly (Reg. Sess. 2003). It is not clear whether the \$100,000 amount related to the overall size of the trust fund or to the amount of the trust fund invested under the mini legal list.

failed.<sup>25</sup> When similar legislation was introduced in the 2005 Session, again with a \$1,000,000 limitation on protection, the limitation provision in the bill was deleted in favor of the following new subsection that was enacted: "Nothing in this section shall relieve a fiduciary of his obligation, pursuant to § 26-45.3, to comply with the provisions of the prudent investor rule."<sup>26</sup> Although this subsection was enacted, it is not believed that its language accomplishes the goal of making fiduciaries who invest pursuant to the mini legal list subject to the prudent investor rule. To say that it does would be to ignore the language contained in the mini legal list clearly stating that fiduciaries investing thereunder "shall be conclusively presumed to have been prudent in investing the funds."<sup>27</sup> Moreover, and perhaps more importantly, the Prudent Investor Act itself provides that "[e]xcept as otherwise provided in . . . [§] 26-40.01, a trustee<sup>28</sup> who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this Act."<sup>29</sup> Lastly, interpreting the 2005 legislation as making fiduciaries who invest pursuant to the mini legal list subject to the prudent investor rule would have the practical effect of repealing Virginia Code section 26-40.01 because it would no longer have any reason to exist. And, surely, had the General Assembly intended to repeal Virginia Code section 26-40.01 it would have done so directly, instead of gelding it by the addition of the 2005 amendment.

In the event that the mini legal list does return to the General Assembly for further tinkering which, considering its history, seems likely, it is submitted that consideration should be given to extending its immunity provisions to custodians under the Virginia Uniform Transfers to Minors Act<sup>30</sup> and custodial trustees under the Virginia Uniform Custodial Trust Act.<sup>31</sup> The typical fiduciaries serving for minors and incapacitated persons under these acts would clearly fit within the category of persons the

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25. H.B. 140, Va. Gen. Assembly (Reg. Sess. 2004).

26. VA. CODE ANN. § 26-40.01(E) (Cum. Supp. 2005).

27. *Id.* § 26-40.01(B) (Cum. Supp. 2005).

28. Virginia Code section 26-45.13 provides, in part, that "[a]s used in this article, the term 'trustee' includes any fiduciary as defined in § 8.01-2 and any attorney in fact or agent acting for a principal under a written power of attorney." *Id.* § 26-45.13 (Repl. Vol. 2004).

29. *Id.* § 26-45.3(A) (Repl. Vol. 2004) (emphasis added).

30. *Id.* §§ 31-37 to -59 (Repl. Vol. 2004).

31. *Id.* §§ 55-34.1 to -34.19 (Repl. Vol. 2003).

mini legal list was designed to protect, i.e., laypersons administering a modest fund as an accommodation to a friend or family member. However, the investment standard under both of these acts at present is that which “would be observed by a prudent person dealing with such person’s own property.”<sup>32</sup> This standard, which is a Virginia variation in both acts, is more relaxed than the one recommended by the National Conference of Commissioners on Uniform State Laws which, instead of focusing on what a prudent person “dealing with such person’s own property” would do, states the investment standard for these fiduciaries as what a prudent person “dealing with property of another” would do.<sup>33</sup> Nevertheless, this relaxed Virginia rule for these fiduciaries dates to a bygone era, and their original Virginia treatment would be better replicated in present law by including them in the list of fiduciaries who are entitled to the protection of the mini legal list.<sup>34</sup>

### C. Testamentary Trustee—Waiver of Accounting

Notwithstanding the general rule of Virginia Code section 26-17.3 requiring all court-qualified fiduciaries to account before a commissioner of accounts,<sup>35</sup> Virginia Code section 26-17.7 creates an exception for trustees of testamentary trusts wherein the testator expressly waives this obligation.<sup>36</sup> The 2005 Session amended this statute to extend its waiver of accounting provision to cases where a “sole beneficiary” is also a trustee.<sup>37</sup> For the pur-

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32. *Id.* § 31-48(B) (Repl. Vol. 2004); *see id.* § 55-34.7 (Repl. Vol. 2003).

33. UNIF. TRANSFERS TO MINORS ACT, § 12(b), 8C U.L.A. 49-50 (2001); UNIF. CUSTODIAL TRUST ACT, § 7, 7A U.L.A. 117 (2002). The rather obvious theory is that a prudent person would take a greater degree of risk in personal investing than when investing for another.

34. As presently used in the mini legal list, the term “fiduciary” includes only those listed in Virginia Code section 8.01-2 and agents under a written power of attorney. *See* VA. CODE ANN. § 26-40.01(A) (Cum. Supp. 2005). This same language, defining “trustee,” identifies those fiduciaries subject to Virginia’s Prudent Investor Act. *See id.* § 26-45.13 (Repl. Vol. 2004).

35. *Id.* § 26-17.3 (Repl. Vol. 2004).

36. *Id.* § 26-17.7(A) (Cum. Supp. 2005). If the will in question was probated prior to July 1, 1993, it is also necessary for the trustee to obtain beneficiary consent as outlined in Virginia Code section 26-17.7(D). *See id.* § 26-17.7(D) (Cum. Supp. 2005); J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 35 U. RICH. L. REV. 895, 851-52 (2001).

37. Act of Mar. 26, 2005, ch. 821, 2005 Va. Acts 1355 (codified as amended at VA. CODE ANN. § 26-17.7(A) (Cum. Supp. 2005)). Note that the sole beneficiary does not have

pose of this new rule, the term “sole beneficiary” is defined as meaning

a person who is (i) the only income beneficiary who is entitled to the principal, or the remaining principal goes to the trustee’s [sic] estate or (ii) the only income beneficiary and has either a general power of appointment over the principal or has a special power of appointment that is not limited to a particular class of persons.<sup>38</sup>

As beneficiary protection is the primary justification for the statutory accounting requirement, it appears to make sense to eliminate this requirement where the only beneficiary also serves as trustee, whether acting alone or with others, on the theory that the law does not need to protect one from oneself. Indeed, this same theory is embodied in a somewhat similar provision that waives the default surety requirement applicable to personal representatives if all of the intestate distributees or testate beneficiaries are also personal representatives.<sup>39</sup> However, there is a difference between these two cases when the sole beneficiary is only one of the fiduciaries. The life-long duration of a trusteeship, and the decline that naturally accompanies increasing age, suggests that a beneficiary/trustee may ultimately drop “out of the loop,” vis-à-vis the trust’s active administration, and the trust will then be under the de facto sole stewardship of the nonbeneficiary/trustee who will nevertheless not have a duty to account because of the continuing technical presence of the beneficiary/trustee. In addition, the need for the present provision, as measured by its likely rate of incidence, seems doubtful, and its language creates several interpretation problems.

Looking at the first part of the definition of “sole beneficiary” in clause (i), where the only income beneficiary is also “entitled” to the principal, it would be most unusual for a will to say “income to X, and principal to X.”<sup>40</sup> And, if one did, it would appear that any court would simply terminate the trust and give all of its assets to X via a functional application of the doctrine of merger. Looking at the second part of the definition of “sole beneficiary” in

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to be the “sole” trustee, only “a” trustee, for the waiver provision to apply. *See id.*

38. VA. CODE ANN. § 26-17.7(A) (Cum. Supp. 2005).

39. *See id.* § 64.1-121 (Repl. Vol. 2002).

40. Although one also might think of the case where a will says “to X for life with X to have a general power of appointment over principal,” such a power could not have been intended to be covered by the “entitled” language of clause (i), because it is specifically included as a part of the definition in clause (ii). *See id.* § 26-17.7(A) (Cum. Supp. 2005).



clause (i), one wonders when a prudent attorney would draft a trust providing for the income to go *X* for life with the remainder to go to *X*'s estate.<sup>41</sup> By providing for the property to go to *X*'s estate upon *X*'s death, the property in question would, for example, (1) have to be administered as a part of *X*'s estate and thus be subjected to unnecessary administrative expenses, (2) be liable to the claims of *X*'s creditors (after *X*'s death) and the creditors of *X*'s estate, and (3) be subjected to unnecessary taxation if *X*'s estate is (or because of this addition becomes) subject to federal and Virginia estate taxes.<sup>42</sup> As all of the foregoing problems could be eliminated, while still achieving the testator's presumed goals, by simply providing for the income to go to *X* for life with the remainder to go to the same persons who succeed to *X*'s estate, it seems unlikely that the language of clause (i)'s second part (to *X* for life, remainder to *X*'s estate) will ever be used.

The problem with the alternative definition of "sole beneficiary" in clause (ii) lies in the language "a special power of appointment that is not limited to a particular class of persons."<sup>43</sup> This language is inconsistent with established property law, which defines a special power of appointment as one wherein "the appointment is restricted to *particular persons* or a particular class of persons."<sup>44</sup> It is possible that this provision was meant to identify the broadest possible power of appointment that is excluded from the definition of a general power of appointment for federal estate tax purposes, i.e., one that is not "exercisable in favor of the decedent, his estate, his creditors, or the creditors of his es-

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41. Estate planners know that one way to qualify for the federal estate tax marital deduction is via the "estate trust" which does require the principal to pass to the surviving spouse's estate. However, this "is the only form of trust qualifying for the federal estate tax marital deduction under § 2056 that does not require annual payment of all trust income to the surviving spouse for life." See Jeffrey N. Pennell, *Estate Tax Marital Deduction*, 843-2d Tax Mgmt. (BNA) A-69. Such a trust would typically be used when income is to be accumulated, instead of distributed, or when there is likely to be little or no income because the trust's assets will be underproductive or unproductive property. Thus, this form of trust is inconsistent with the definition's requirement that, in addition to principal going to *X*'s estate at death, *X* be entitled to all income for life.

42. In some cases, it might be preferable to expose assets to an estate tax in *X*'s estate in order to avoid the imposition of a generation-skipping transfer tax at a higher rate upon *X*'s death. However, in such a case, instead of giving the assets to *X*'s estate, one would typically just give *X* the power to appoint the assets to the creditors of *X*'s estate. This would accomplish the estate-tax exposure goal without also exposing *X*'s estate to the administrative expenses and creditors' claims described in (1) and (2) of the text.

43. VA. CODE ANN. § 26-17.7(A) (Cum. Supp. 2005).

44. 2 MINOR ON REAL PROPERTY § 1224 (Frederick Deane Goodwin Ribble ed., 2d ed. 1928) (emphasis in original).

tate.”<sup>45</sup> But, although such a power is sometimes casually referred to in conversation as a special power, it is not—it is, properly speaking, a “non-general” power of appointment.<sup>46</sup> If a non-general power is what was intended, it would have been better to have eliminated any uncertainty by using the federal language, i.e., “a power exercisable in favor of anyone other than the decedent, his estate, his creditors, or the creditors of his estate,”<sup>47</sup> instead of “a special power of appointment that is not limited to a particular class of persons.”<sup>48</sup> Based upon the preceding discussion, it would appear that this legislation is flawed. It does not respond to a significant problem of general application and, if it is to be retained, it should be revised.

#### D. *Advance Directives—Witnesses—Spouse or Blood Relative*

Article 8 of Title 54.1 is Virginia’s Health Care Decisions Act. Out of an overabundance of caution, the definition of “witness” contained in Article 8 has excluded a spouse or a blood relative from serving as a witness to a declarant’s written advance directive.<sup>49</sup> The 2005 Session recognized the hardship that these unnecessary restrictions were creating in some cases, particularly in hospital settings where non-family visitors might be rare and staff is often prohibited from witnessing documents. Accordingly, the prohibitions against spouses and blood relatives were eliminated from the definition of witness and replaced with language stating that any person over the age of eighteen years is qualified to be a witness.<sup>50</sup> The General Assembly made a corresponding change to the attestation clause appended to the suggested form

45. I.R.C. § 2041(b)(1) (2000).

46. After defining “general power” consistently with the estate tax definition found in the I.R.C. § 2041(b)(1) (i.e., a power “exercisable in favor the decedent, his estate, his creditors, or the creditors of his estate”), the Restatement provides that “[a]ny other power of appointment is a non-general one.” RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.4(2) (1986). The Restatement no longer employs the term “special power of appointment.” *Id.* cmt. b.

47. See I.R.C. § 2041(b)(1).

48. VA. CODE ANN. § 26-17.7(A) (Cum. Supp. 2005).

49. *Id.* § 54.1-2982 (Repl. Vol. 2002). Prior to the 2005 amendment, the first sentence of this definition provided that “[w]itness’ means a person who is not a spouse or blood relative of the patient.” *Id.*

50. *Id.* § 54.1-2982 (Repl. Vol. 2005). Following the amendment, the first sentence of the definition provides that “[w]itness’ means any person over the age of 18, including a spouse or blood relative of the declarant.” *Id.*

of a written advance directive contained in Virginia Code section 54.1-2984, by deleting therefrom the sentence "I am not the spouse or a blood relative of the declarant."<sup>51</sup>

### E. *Fiduciary Accounting—Vouchers*

Virginia Code section 26-17.9 provides that a fiduciary who is required to file annual accounts with a commissioner of accounts must support all disbursements with vouchers or receipts.<sup>52</sup> When the 2003 Session amended Virginia Code section 26-17.9 to authorize fiduciaries to submit front-and-back copies of checks as vouchers, it further provided that the commissioner of accounts could require fiduciaries "to exhibit the original check or proper voucher for a specific payment or for distributions to beneficiaries or distributees."<sup>53</sup> However, under the federal law known as "Check 21,"<sup>54</sup> which allows banks to process and transfer checks electronically,<sup>55</sup> original checks will no longer necessarily be returned to the drawer. In the light of this reality, the 2005 Session eliminated the "original check" language from Virginia Code section 26-17.9(E) and, for good measure, added a sentence thereto providing that "[h]owever, the commissioner of accounts shall not require a fiduciary to exhibit an original check as a voucher hereunder."<sup>56</sup>

### F. *Commissioners of Accounts—Fees*

Virginia Code section 26-24 states that "[e]xcept as otherwise provided, the fees of commissioners of accounts shall be pre-

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51. Act of Mar. 20, 2005, ch. 186, 2005 Va. Acts 282 (codified as amended at VA. CODE ANN. § 54.1-2984 (Repl. Vol. 2005)). The attestation clause now reads in full as follows: "The declarant signed the foregoing advance directive in my presence." VA. CODE ANN. § 54.1-2984 (Repl. Vol. 2005).

52. VA. CODE ANN. § 26-17.9(A) (Cum. Supp. 2005).

53. Act of Mar. 16, 2003, ch. 201, 2003 Va. Acts 215 (codified as amended at VA. CODE ANN. § 26-17.9(E) (Repl. Vol. 2004)).

54. Check Clearing for the 21st Century Act, Pub. L. No. 108-100, 117 Stat. 1177 (2003) (to be codified at 12 U.S.C. §§ 5001-5018), was signed on October 28, 2003, and became effective on October 28, 2004.

55. *Id.*

56. Act of Mar. 20, 2005, ch. 261, 2005 Va. Acts 358 (codified as amended at VA. CODE ANN. § 26-17.9(E) (Cum. Supp. 2005)).

scribed by the court which appointed them” and, pursuant thereto, most courts have entered orders setting forth a schedule of fees to be charged by commissioners for their services.<sup>57</sup> In response to a concern that such fee schedules might establish binding minimums on commissioners, the 2005 Session amended Virginia Code section 26-8<sup>58</sup> to provide that “[e]ach commissioner shall have the authority, for any given service he performs, either to establish a lesser fee than that prescribed by the court, or to waive one or more fees.”<sup>59</sup>

### G. *Fiduciary Administration—Virginia Fiduciary Becoming Non-Resident*

Virginia Code section 26-1.2 requires that every person who wishes to qualify as a fiduciary must furnish certain information to the court or clerk.<sup>60</sup> The 2005 amendment to this section provides that a fiduciary who becomes a nonresident<sup>61</sup> following qualification must notify the clerk and the commissioner of accounts of the fiduciary’s new address within thirty days thereafter or be subject to a fifty-dollar civil penalty.<sup>62</sup> This same legisla-

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57. VA. CODE ANN. § 26-24 (Repl. Vol. 2004). A uniform fee schedule guideline, developed by the Standing Committee on Commissioners of Accounts of the Judicial Council of Virginia, was adopted by the Council on June 17, 1996, and subsequently recommended to the circuit courts for their consideration. See *Manual for Commissioners of Accounts*, ¶18.2, Recommended Uniform Fee Schedule (2004).

58. Act of Mar. 21, 2005, ch. 400, 2005 Va. Acts 534 (codified as amended at VA. CODE ANN. § 26-8 (Cum. Supp. 2005)). It is unclear why this amendment was made to Virginia Code section 26-8, which deals with the appointment of commissioners of accounts, instead of to Virginia Code section 26-24, entitled “Fees of commissioners of accounts.” See VA. CODE ANN. §§ 26-8, -24 (Repl. Vol. 2004).

59. Act of Mar. 21, 2005, ch. 400, 2005 Va. Acts 534 (codified as amended at VA. CODE ANN. § 26-8(C) (Cum. Supp. 2005)). There should be no problem with commissioners of accounts reducing the statutory fees that they may charge because of the ways in which they are expressed. See VA. CODE ANN. § 26-17.4 (Repl. Vol. 2004) (stating that a fee “shall not exceed twenty-five dollars”); *id.* § 26-17.7(D) (Repl. Vol. 2004) (referring to a fee “not to exceed twenty-five dollars”); *id.* § 26-20.1 (Repl. Vol. 2004) (referring to a fee “not to exceed seventy-five dollars”); *id.* § 31-8.2 (Repl. Vol. 2004) (providing that “[t]he commissioner shall not charge a fee in excess of \$100”).

60. VA. CODE ANN. § 26-1.2 (Cum. Supp. 2005).

61. Act of Mar. 23, 2005, ch. 644, 2005 Va. Acts 898 (codified as amended at VA. CODE ANN. § 26-1.2 (Cum. Supp. 2005)). “For purposes of this section, a person becomes resident in another state when he can no longer satisfy the residency requirements specified in § 38.2-1800.1.” VA. CODE ANN. § 26-1.2 (Cum. Supp. 2005).

62. Act of Mar. 23, 2005, ch. 644, 2005 Va. Acts 898 (codified as amended at VA. CODE ANN. § 26-1.2 (Cum. Supp. 2005)). The new rule does not apply if the nonresident has a Virginia resident serving as a cofiduciary. See VA. CODE ANN. § 26-1.2 (Cum. Supp. 2005).

tion also amends Virginia Code section 26-8.1 to give the commissioner of accounts permissive authority to certify the fiduciary's failure to comply with Virginia Code section 26-1.2 to the circuit court.<sup>63</sup> One wonders whether the threat of a possible fifty-dollar fine will have a significant motivating impact upon an expatriating fiduciary. Of far greater significance to the uncooperative expatriate would seem to be the provision already in the law that states as follows:

[U]pon the application of any person who is interested . . . [the] commissioner of accounts . . . shall . . . inquire . . . whether, by reason of . . . removal of any fiduciary [who is required to file accounts] from this Commonwealth . . . it is improper to permit the estate of the decedent, ward, or other person, to remain under his control. The result of every such examination and inquiry shall be reported by the commissioner to the court by which he is appointed and to the clerk of such court.<sup>64</sup>

## H. *Executor and Trustee Compensation Bank*<sup>65</sup>—*Fee Schedules—Reasonableness*

### 1. The Background

The statutory basis for fiduciary compensation is Virginia Code section 26-30, which provides in relevant part that “[t]he commissioner . . . shall allow the fiduciary . . . except in cases in which it is otherwise provided, a reasonable compensation, in the form of a commission on receipts or otherwise.”<sup>66</sup> The premise undergirding this rule is the assumption that a commissioner, as an experienced practitioner in this area of the law, can review the file in a given case and determine what would be reasonable in the light of its specific facts.<sup>67</sup> However, banks have determined that they

63. Act of Mar. 23, 2005, ch. 644, 2005 Va. Acts 898 (codified as amended at VA. CODE ANN. § 26-8.1 (Cum. Supp. 2005)). Whereas the amendment to Virginia Code section 26-1.2 provides that a defaulting fiduciary “shall be subject to a civil penalty of \$50,” the amendment to Virginia Code section 26-8.1 provides that the court “may impose a \$50 civil penalty.” *See id.*

64. VA. CODE ANN. § 26-2 (Repl. Vol. 2004).

65. Except as the context indicates to the contrary, the word “bank” includes “trust company” in the following discussion.

66. VA. CODE ANN. § 26-30 (Cum. Supp. 2005).

67. There is a reasonable factual basis to conclude that the system does not operate in this idealistic fashion in the usual case. Instead, one finds that virtually all commissioners

wish to take this matter out of the commissioner's hands by making their fiduciary fees a matter of agreement with their customers. Indeed, in the ordinary case, they will not agree to serve as an executor or trustee unless the governing document contains a compensation clause, such as, for example, the following clause found in *In re Estate of Fine*: "For its services, the bank, or its successor, shall receive the compensation stipulated in its regularly published fee schedule *in effect at the time such compensation becomes payable.*"<sup>68</sup>

Notwithstanding the presence of this clause, the commissioner of accounts in *Fine* refused to allow the bank the amount of the executor's compensation called for by its fee schedule.<sup>69</sup> On appeal to the circuit court, the bank argued that the commissioner did not have any authority to review its fee because the Supreme Court of Virginia had allowed a fee to be fixed by the testator in *Williams v. Bond*.<sup>70</sup> However, the Norfolk City Circuit Court affirmed the decision of its commissioner and held that under these facts

the testator did not fix the executor's compensation. . . . [N]either he nor [the bank] had any way of knowing what those fees would be *in futuro*. There were no limitations on the fee, and [the bank], in its sole discretion, was free to change its published schedule of fees at any time for any reason.

. . . .

Absent a clear, definite provision setting the compensation of an executor, the Court had not only the authority but also the duty to inquire as to the reasonableness of the executor's compensation.<sup>71</sup>

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have developed a fee schedule based upon a percentage of the assets under the supervision and control of an executor or trustee, and that they routinely allow compensation in this amount. Generally, it is only in cases where beneficiaries object to the compensation claimed, or where a fiduciary claims a higher amount than is routinely allowed, that the commissioner of accounts becomes actively involved in fee determinations.

68. 41 Va. Cir. 597, 598 (Cir. Ct. 1995) (Norfolk City) (emphasis in original). This case is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 32 U. RICH. L. REV. 1405, 1418-19 (1998) which, with slight modification, serves as the source for this subparagraph (1).

69. 41 Va. Cir. at 597-98.

70. 120 Va. 678, 91 S.E. 627 (1917).

71. *Fine*, 41 Va. Cir. at 598-99.

## 2. The Bankers' Reply

The Virginia Bankers Association response to *Fine* came in the 2005 Session via an amendment to Virginia Code section 26-30, in the following words:

[W]here the compensation of an institutional fiduciary is specified under the terms of the trust or will by reference to a standard published fee schedule, the commissioner shall not reduce the compensation below the amount specified, unless there is sufficient proof that i) the settlor or testator was not competent when the trust instrument or will was executed or ii) such compensation is excessive in light of the compensation institutional fiduciaries generally receive in similar situations.<sup>72</sup>

This legislation raises a number of issues including, but not limited to, the following four. First, what is an “institutional fiduciary?” A word search of the Virginia Code discloses no such term, and its meaning is unclear. Regardless of what the drafters might have been thinking, the issue before the courts will be “Who did the General Assembly intend to be included within the term when it passed this legislation?” One wonders, for instance, whether “professional corporation[s] engaged in the practice of law,” which are specifically authorized by statute to serve as executors and trustees,<sup>73</sup> are intended to be within the term. If they are not, one further wonders whether there is any legitimate basis upon which to deny them this legislation’s “fee-schedule privilege” when they are competing with banks to provide the same fiduciary services?<sup>74</sup> Second, what is a “standard” published fee schedule and where would one be found? Of course, every bank that serves as a fiduciary has its own unique fee schedule and, as noted in *Fine*, the traditional compensation clause in a will or trust where a bank is serving refers to “its” unique fee schedule<sup>75</sup>—but the statute legitimates references to “a standard sched-

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72. VA. CODE ANN. § 26-30 (Cum. Supp. 2005).

73. *Id.* § 13.1-546.1 (Repl. Vol. 1999).

74. The fee schedule provisions of the Guidelines for Fiduciary Compensation adopted by the Judicial Council of Virginia in December 2004, discussed in subparagraph (4), *infra*, are equally applicable to all executors and trustees, whether individual or corporate; and the provisions for “specified” compensation of trustees, contained in Virginia Code section 55-547.08 of the Virginia version of the Uniform Trust Code, discussed in subparagraph (3), *infra*, are equally applicable to all trustees, whether individual or corporate.

75. *Fine*, 41 Va. Cir. at 598.

ule,” not to the fiduciary’s unique schedule.<sup>76</sup> Third, does the language providing for a “reference to a standard published fee schedule” imply a reference to an existing schedule? Again, as noted in *Fine*, the drafting practice is to refer to the schedule “*in effect at the time such compensation becomes payable*.”<sup>77</sup> Does the statute’s failure to employ this standard language of futurity strengthen the implication that it is referring to a schedule in existence when the document in question is executed? Fourth, the amendment prohibits the commissioner from reducing the compensation specified in the schedule “unless there is sufficient proof that i) the settlor or testator was not competent when the trust instrument or will was executed.”<sup>78</sup> However, it would appear that if there is sufficient proof of settlor’s or testator’s incompetency when the trust or will was signed, the trust or will would be declared void and any fee-reduction issue would be moot.

### 3. The Uniform Trust Code

The Virginia version of the Uniform Trust Code (“Virginia UTC”), which was presented to the 2005 Session by the Virginia Bar Association, and enacted effective July 1, 2006,<sup>79</sup> contains the following compensation provision:<sup>80</sup>

§ 55-547.08. Compensation of trustee.—A. If the terms of a trust do not specify the trustee’s compensation, a trustee is entitled to compensation that is reasonable under the circumstances.

B. If the terms of a trust specify the trustee’s compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if:

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76. VA. CODE ANN. § 26-30 (Cum. Supp. 2005).

77. *Fine*, 41 Va. Cir. at 598.

78. VA. CODE ANN. § 26-30 (Cum. Supp. 2005).

79. The Virginia version of the Uniform Trust Code is noted briefly *supra*, in Part II.A, and is discussed in detail in John E. Donaldson & Robert T. Danforth, *Annual Survey of Virginia Law: The Virginia Uniform Trust Code*, 40 U. RICH. L. REV. 325 (2005). The technical and lobbying efforts of the Virginia Bar Association were handled by the Legislative Committee of its Section on Wills, Trusts, and Estates. The writer is a member of the Legislative Committee.

80. As introduced, the Virginia UTC stated that “[t]his chapter applies to express trusts.” S.B. 891, Va. Gen. Assembly (Reg. Sess. 2005). During the legislative process, it was amended to read that “[t]his chapter applies to express inter vivos trusts [and it] also applies to testamentary trusts, except to the extent . . . it is clearly inapplicable to them.” VA. CODE ANN. § 55-541.02(A) (Cum. Supp. 2005).



1. The duties of the trustee are substantially different from those contemplated when the trust was created; or
2. The compensation specified by the terms of the trust would be unreasonably low or high.<sup>81</sup>

As noted in subparagraph (2), *supra*, the Bankers' amendment to Virginia Code section 26-30 provides that the compensation of an "institutional" trustee whose fee is determined by reference to a "standard" fee schedule is not subject to that section's general rule of reasonableness. However, Virginia Code section 26-30 applies only to trustees operating under the supervision of the commissioner of accounts which, for all practical purposes, means trustees of testamentary trusts.<sup>82</sup> Accordingly, it would appear that when an "institutional" trustee is serving as trustee of an inter vivos trust that is not accounting to the commissioner of accounts, its compensation may be reduced pursuant to Virginia Code section 55-547.08(B)(2) if it is unreasonably high, notwithstanding that its fee is determined by reference to a "standard" fee schedule. Moreover, as the amendment to Virginia Code section 26-30 operates only by prohibiting the commissioner from reducing a fee in the indicated cases, nothing therein prevents the commissioner from recommending a fee reduction to the court in these very same cases.

#### 4. The Judicial Council of Virginia

In December of 2004, the Judicial Council of Virginia adopted a six-page document entitled Guidelines for Fiduciary Compensation,<sup>83</sup> that was prepared by its Standing Committee on Commis-

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81. VA. CODE ANN. § 55-547.08 (Cum. Supp. 2005). The Bankers' amendment to Virginia Code section 26-30, discussed in subparagraph (2), intends to negate this part of the Virginia UTC, to the extent it would otherwise apply to institutional trustees specifying compensation pursuant to a standard published fee schedule, by providing for the amendment to govern "[n]otwithstanding the foregoing provisions or any provision under Chapter 31 (§ 55-401 et seq.) of Title 55." *Id.* § 26-30 (Cum. Supp. 2005).

82. Although the amendment to Virginia Code section 26-30 provides for its rule to control, "[n]otwithstanding . . . any provision under [the Virginia UTC]," this rule nevertheless has a limited scope of operation. It only prohibits the commissioner of accounts from reducing the "institutional" trustee's compensation in the indicated cases. Thus, as the trustee of the typical inter vivos trust does not account to the commissioner, the amendment to Virginia Code section 26-30 has no applicability thereto.

83. These guidelines will not be widely available until the next edition of the Manual for Commissioners of Accounts is issued in 2006, unless the Manual's publisher (Virginia CLE) decides to issue a 2005 supplement. A copy of the Guidelines can be obtained from

sioners of Accounts.<sup>84</sup> On behalf of the Judicial Council, the Executive Secretary of the Supreme Court of Virginia sent copies of these Guidelines to all circuit court judges on December 17, 2004, explaining that

[t]he purpose of the Guidelines is to assist the Commissioners with the sometimes difficult task of determining "reasonable compensation," provide fiduciaries with guidance on their fees before they begin their tasks and otherwise promote uniformity of fiduciary fees around the Commonwealth. Council is asking that you review these Guidelines and consider approving them in principle for use by the Commissioners of Accounts in your circuit.<sup>85</sup>

The portion of the Guidelines relating to fee schedules of executors and trustees provides as follows:

Where the will states that the Executor shall receive for services the compensation set out in a referenced published fee schedule in effect at the time such services are rendered, fees as set out in the fee schedule shall be presumed to be reasonable, as that term is used in § 26-30. The burden of persuading the Commissioner that fiduciary compensation taken according to such a fee schedule is not reasonable would be on an objecting party. The ultimate responsibility of determining the reasonableness of the compensation rests with the Commissioner.<sup>86</sup>

## 5. The Problem

A combination of protectionism and poor drafting, resulting in ambiguity, inconsistency, and conflict, has created an intolerable confusion in what should be a relatively straightforward area of the law. Fortunately, as most of the issues arise from the 2005 amendment to Virginia Code section 26-30, which has a delayed effective date of July 1, 2006, there is time to resolve them before

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the Office of the Executive Secretary of the Supreme Court of Virginia. A copy is also on file with the *University of Richmond Law Review*.

84. The writer was a member of the Standing Committee from its inception, in January, 1993, to July, 2005. For reasons having nothing to do with the present discussion, he voted against the adoption of the Guidelines.

85. Memorandum from Robert N. Baldwin, Executive Secretary of the Supreme Court of Virginia, to Circuit Court Judges (Dec. 17, 2004) (on file with the *University of Richmond Law Review*).

86. Guidelines for Fiduciary Compensation ¶ A(2) (2004). Paragraph A of the Guidelines applies to decedent's estates, which explains why paragraph A(2) only refers to the compensation of executors. However, paragraph B(2) of the Guidelines states that paragraph A(2) also applies to trusts and thus the executor language quoted in the text is equally applicable to trustees, *mutatis mutandis*.

their impact is felt. It would appear that the only effective way to resolve these multi-faceted issues would be for the leaders of the Bankers Association, the Bar Association, and the Standing Committee to develop compromise legislation for introduction in the 2006 Session and, if submitted, it is incumbent upon them to do so.

### III. DECISIONS OF THE SUPREME COURT OF VIRGINIA

#### A. *Pre-1978 Inter Vivos Trusts—“Direct Lineal Descendants”—Adopted Persons*

During the period from 1929 to 1931, seven siblings created eleven inter vivos trusts, each of which described beneficiaries as “direct lineal descendants” of certain family members, thereby leading to the substantive issue decided by the Supreme Court of Virginia in *McGehee v. Edwards*,<sup>87</sup> i.e., whether this term included adopted persons.<sup>88</sup> Virginia Code section 64.1-71.1, which provides in part that “[i]n determining the intent of a testator or settlor, adopted persons are presumptively included in such terms as . . . ‘descendants’ or similar words of classification and are presumptively excluded by such terms as . . . ‘descendants of the body’ or similar words of classification,” also states that it “shall apply to all inter vivos trusts executed after July 1, 1978.”<sup>89</sup> Nevertheless, the trial court held that, in the absence of any evidence bearing on the settlors’ actual intent, the term “direct lineal descendants” included adoptees in these pre-1978 trusts,

stat[ing] that its decision was guided by a presumption purportedly<sup>90</sup> adopted by other jurisdictions that, if beneficiaries in a class are to be identified over a period of time, the grantor intends that changes in the law subsequent to the execution of the trust be grafted onto provisions of the trust.<sup>91</sup>

However, the Supreme Court of Virginia’s opinion states (1) that absent an internal provision to the contrary, “the language of an

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87. 268 Va. 15, 597 S.E.2d 99 (2004).

88. *Id.* at 17, 597 S.E.2d at 100.

89. VA. CODE ANN. § 64.1-71.1 (Repl. Vol. 2002).

90. It is unclear why the opinion employs this characterization.

91. *McGehee*, 268 Va. at 19, 597 S.E.2d at 101.

inter vivos trust should be construed according to the law in effect at the time the trust is executed,<sup>92</sup> (2) that “[a]t common law, adopted persons were not included within the term ‘issue,’<sup>93</sup> and (3) that the term “direct lineal descendants” is synonymous with the term “issue.”<sup>94</sup> Accordingly, the court rejected the presumption adopted by the trial court and held that “[u]nder the common law, then, the grantor did not include adopted persons in the phrase ‘direct lineal descendants’ unless such intent is clear from other parts of the document.”<sup>95</sup> The court also noted that “[t]he General Assembly abrogated the common law when it enacted Code § 64.1-71.1,” but that “[b]y its own terms, however, Code § 64.1-71.1 does not apply to trusts executed before 1978.”<sup>96</sup> Although they concurred with the substance of the court’s opinion, two dissenting justices would have reversed the trial court because, for procedural reasons, it “did not acquire jurisdiction to consider” the issue decided by the court.<sup>97</sup>

There are three further matters of interest to the Virginia estates’ attorney in connection with this case. First, although a premise of the court’s opinion, i.e., “[a]t common law, adopted persons were not included within the term ‘issue,’<sup>98</sup> is flawed, because, as the court has noted in the past, “[t]he right to adopt children was unknown to the common law and is probably inherited from the civil law of Rome,”<sup>99</sup> the result in this case is nevertheless supported by the court’s prior decisions.<sup>100</sup> Second, in regard to the 1978 statute’s presumptive inclusion of adopted

92. *Id.*, 597 S.E.2d at 102. The opinion further states that “[s]uch a rule is also compelled by Code § 1-16, which mandates that ‘no new law shall be construed . . . in any whatever to affect . . . any right accrued, or claim arising before the new law takes effect.’” *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* Technically speaking, the statute, “by its own terms,” states that it “shall apply to all inter vivos trusts executed after July 1, 1978.” VA. CODE ANN. § 64.1-71.1 (Repl. Vol. 2002).

97. *McGehee*, 268 Va. at 22, 597 S.E.2d at 103.

98. *Id.* at 20, 597 S.E.2d at 102.

99. *Fletcher v. Flanary*, 185 Va. 409, 411, 38 S.E.2d 433, 434 (1946). Although *Fletcher* was cited in the *McGehee* majority opinion, 268 Va. at 20, 597 S.E.2d at 102, it was cited for a different point and the court does not mention this aspect of that case.

100. See *Langhorne v. Langhorne*, 212 Va. 577, 186 S.E.2d 50, *cert. denied*, 406 U.S. 946 (1972) (cited in the principal case at 268 Va. at 20, 597 S.E.2d at 102), and cases cited therein. The adoption issue and the *Langhorne* case are discussed in J. Rodney Johnson, *Inheritance Rights of Children in Virginia*, 12 U. RICH. L. REV. 275, 291-92 (1978).

persons in the terms “issue,” “descendants,” etc., this presumption was not contained in the original 1978 legislation—it was added to Virginia Code section 64.1-71.1 in 1987.<sup>101</sup> Third, there were three other holdings of the trial court, from which no appeal was taken, dealing with the rights of illegitimate persons and persons conceived through artificial conception to take as “direct lineal descendants” in this case.<sup>102</sup>

### B. *Spendthrift Trusts—Exceptions*

In *Jackson v. Fidelity and Deposit Co. of Maryland*,<sup>103</sup> *T* left seventy-five percent of her residuary estate in trust for *A* and twenty-five percent in trust for *B*.<sup>104</sup> *T*'s will contained a spendthrift clause providing in part that “[n]either *H*,<sup>105</sup> *A*, or any other beneficiary of any other trust under this agreement shall have the right . . . [to transfer, etc.] . . . nor shall any part of the trust estate including income, be liable for the debts or obligations of any kind of the Beneficiary.”<sup>106</sup> *B*, who qualified as administrator,

101. The 1987 amendments to Virginia Code section 64.1-71.1 were made in response to the Supreme Court of Virginia's unfortunate 4–3 decision in *Hyman v. Glover*, 232 Va. 140, 348 S.E.2d 269 (1986). The retention of the 1978 effective date when the 1987 amendments were made evidences the General Assembly's purpose to clarify its original intent, in the light of the statute's misinterpretation in *Hyman*, instead of making any substantive change to Virginia Code section 64.1-71.1. This legislation is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 21 U. RICH. L. REV. 855, 855–57 (1987) and the *Hyman* case is also discussed, *id.* 867–69. It might also be noted that the 1987 Session, recognizing that some grantors might use deeds as will substitutes, also added Virginia Code section 55-49.1 to provide a parallel provision governing the interpretation of deeds. This legislation is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 21 U. RICH. L. REV. 855, 858 (1987).

102. The trial court held that:

[T]he term “direct lineal descendants” as used in the various subject trusts is to include . . . b) persons born out of wedlock to a mother who is a direct lineal descendant of an individual referred to in the subject trusts, c) persons born out of wedlock to a father who is a direct lineal descendant of an individual referred to in the subject trusts, if paternity can be established through scientifically reliable genetic tests; and d) persons conceived through assisted conception where the mother or father is a direct lineal descendant of an individual referred to in the subject trusts.

See Joint Appendix at 106, *McGehee*, 268 Va. 15, 597 S.E.2d 99 (No. 031595).

103. 269 Va. 303, 608 S.E.2d 901 (2005).

104. *Id.* at 306, 608 S.E.2d at 902.

105. *H*, who was *T*'s husband, would have been the beneficiary of a trust but for having predeceased *T*. *Id.* at 306 n.1, 608 S.E.2d at 902 n.1.

106. *Id.* at 308, 608 S.E.2d at 903.

c.t.a., of *T*'s estate, breached his fiduciary duty to *T*'s estate resulting in damages of \$127,808.60, which were reimbursed to the estate by *B*'s surety, *S*, who, in turn, obtained a personal judgment against *B* in the same amount.<sup>107</sup> *S* then brought a garnishment proceeding seeking to reach *B*'s spendthrift trust in partial satisfaction of this judgment.<sup>108</sup> The first basis upon which the trial court held for *S* was because, as *T* referred to *B* only by general language—"any other beneficiary of any other trust under this agreement,"<sup>109</sup> while referring to *A* by name, "[*T*] intended [*B*]'s Trust to have less spendthrift protection than [*A*]'s Trust."<sup>110</sup> However, the Supreme Court of Virginia dismissed this fact as "a distinction of no meaning or significance."<sup>111</sup>

The second basis for the trial court's holding in favor of *S* was its belief that there is a public policy exception to spendthrift protection if such protection would "allow one beneficiary, through his or her misconduct, to deprive the other beneficiaries of their entitlements."<sup>112</sup> The Supreme Court of Virginia, noting that the Commonwealth recognizes spendthrift trusts by statute,<sup>113</sup> also noted that the General Assembly has created exceptions thereto for certain creditors,<sup>114</sup> and cited prior authority for the proposition that "[t]he mention of . . . specific item[s] in a statute implies that other omitted items were not intended to be included in the scope of the statute."<sup>115</sup> Notwithstanding the fact that an omis-

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107. *Id.* at 307, 608 S.E.2d at 902-03.

108. *Id.*, 608 S.E.2d at 903.

109. *Id.* at 308, 608 S.E.2d at 903. The use of the word "agreement" suggests that the person drafting *T*'s will might have been copying from a form for an inter vivos trust.

110. *Id.* at 307, 608 S.E.2d at 903.

111. *Id.* at 310, 608 S.E.2d at 904.

112. *Id.* at 307, 608 S.E.2d at 903. It might be noted that as *S* made complete restitution to *T*'s estate, no beneficiary was deprived of an entitlement due to *B*'s defalcation.

113. VA. CODE ANN. § 55-19 (Repl. Vol. 2003). As a part of the 2005 Session's enactment of the Virginia UTC, this section was repealed and replaced by Virginia Code sections 55-545.01 to -545.04, which became effective on July 1, 2006. *See* Act of Apr. 6, 2005, ch. 935, 2005 Va. Acts 1793 (codified as amended at VA. CODE ANN. §§ 55-541.01 to -551.06 (Cum. Supp. 2005)).

114. The creditors who are granted access to a debtor's spendthrift trust are (i) the United States, the Commonwealth, and any county, city or town, (ii) a child who has a judgment for child support, and (iii) certain recipients of public assistance. *See* VA. CODE ANN. § 55-19 (Repl. Vol. 2003). Under the Virginia UTC, effective July 1, 2006, these exceptions are retained and a new one is added for "a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust." *Id.* § 55-545.03 (Cum. Supp. 2005); *see* Act of Apr. 6, 2005, ch. 935, 2005 Va. Acts 1793 (codified as amended at VA. CODE ANN. §§ 55-541.01 to 55-551.06 (Cum. Supp. 2005)).

115. *Jackson*, 269 Va. at 313, 608 S.E.2d at 906 (quoting *Smith Mountain Lake Yacht*

sion might occur simply because the omitted item was not brought to the attention of the General Assembly, instead of having been consciously rejected by it,<sup>116</sup> the court held that "because the statute specifically lists exceptions to spendthrift protection, those exceptions are the only ones allowed by law."<sup>117</sup> Accordingly, the decision of the trial court was reversed on both counts and final judgment was entered on behalf of *B*'s Trustee.<sup>118</sup>

## V. CONCLUSION

For the reasons recited herein, it is respectfully submitted that the 2006 Session should (1) amend the mini legal list to include custodians under the Uniform Transfers to Minors Act and custodial trustees under the Uniform Custodial Trust Act among the fiduciaries entitled to its protection, and repeal the ineffectual 2005 amendment attempting to subordinate the immunity provision of the mini legal list to the prudent investor rule;<sup>119</sup> and (2) repeal or significantly revise the 2005 amendment relating to the waiver of trustee accounting for "sole" beneficiaries.<sup>120</sup>

It is further submitted that the Virginia Bankers Association, the Virginia Bar Association, and the Standing Committee on Commissioners of Accounts should work together to draft legislation for submission to the 2006 Session that would eliminate the problems relating to fiduciary compensation.<sup>121</sup>

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Club, Inc. v. Ramaker, 261 Va. 240, 246, 542 S.E.2d 392, 395 (2001)).

116. In this connection the Supreme Court of Virginia's opinion stated:

To affirm the trial court's addition of another exception would violate the principle of *expressio unius est exclusio alterius*. Under this principle, we have held that "when a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way." [S]'s argument would require the Court to add an exception to the statute which the General Assembly has not seen fit to adopt. "Courts are not permitted to rewrite statutes. This is a legislative function."

*Id.* (citations omitted).

117. *Id.*

118. *Id.* at 314, 608 S.E.2d at 906-07.

119. See *supra* Part II.B.

120. See *supra* Part II.C.

121. See *supra* Part II.H.