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J. Rodney Johnson
University of Richmond

WILLS, TRUSTS, AND ESTATES

*J. Rodney Johnson**

I. INTRODUCTION

The 1993 session of the General Assembly enacted legislation dealing with wills, trusts, and estates that added, amended, or repealed a number of sections of the Code of Virginia (the code). In addition to this legislation, there were five cases from the Supreme Court of Virginia in the year ending June 1, 1993 which involve issues of interest to both the general practitioner and the specialist in wills, trusts, and estates. This article analyzes each of these legislative and judicial developments.[1]

II. 1993 LEGISLATION

A. *Notice of Probate*

Virginia law offers the proponent of a will four methods for its probate: inter partes probate, quasi inter partes probate, ex parte probate in the circuit court, and ex parte probate before the clerk of the circuit court.[2] The latter method, ex parte probate before the clerk of the circuit court, has proven to be the overwhelming favorite[3] because of its simplicity, speed and economy.

In recent years, however, an evolving concept of due process in probate matters has generated a genuine apprehension that the "no-notice" aspect of Virginia's ex parte probate might be violative of the minimum notice requirements guaranteed by the Four-

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* Professor of Law, University of Richmond, T. C. Williams School of Law; B.A., 1965, College of William and Mary; J.D., 1967, Marshall-Wythe School of Law, College of William and Mary; LL.M., 1970, New York University.

1. In order to facilitate the discussion of numerous Code of Virginia sections, they will be generally referred to in the text by their section numbers only. Unless otherwise stated, those section numbers will refer to the latest printing of the old sections and to the 1993 supplement for the new sections.

2. GEORGE P. SMITH, JR., HARRISON ON WILLS AND ADMINISTRATION FOR VIRGINIA AND WEST VIRGINIA §§ 175(2)-(4) (3d ed. 1985).

3. There are no readily available statistics to prove the exact breakdown in each category, but the author is familiar with many lawyers who have never probated a will in any other way, and for those who have, they are quick to admit that it is seldom done.

teenth Amendment to the United States Constitution.[4] A 1988 United States Supreme Court decision discussing due process in a different probate law context[5] convinced the Wills, Trusts and Estates Section of the Virginia Bar Association (VBA) that Virginia's ex parte probate was constitutionally deficient. Thus, beginning with the 1989 Session of the General Assembly, the VBA has worked for the enactment of a notice procedure that would satisfy due process requirements, and at the same time, preserve as much as possible of the benefit associated with the historic ex parte procedure.

The VBA's continuing efforts resulted in this year's enactment of section 64.1-122.2,[6] which provides for after-the-fact notice to interested parties within thirty days[7] following the ex parte probate of a will in a testate case, or the qualification of an administrator in an intestate case.[8] The new section, which is applicable to estates of persons dying on or after January 1, 1994, is divided into seven paragraphs that (A) identify those entitled to notice, (B) eliminate the necessity for notice in certain cases, (C) state the information to be contained in the notice, (D) provide for the time and method of notice, (E) deal with failure to give notice, (F) establish a compliance mechanism, and (G) direct the Executive Secretary of the Supreme Court to create a form with instructions to be used for giving the required notice.[9] The nature of this survey and space limitations preclude a line by line analysis of this new legislation. Although the new procedure seems reasonable for the

4. For example, although the heirs of a decedent have standing to challenge the validity of the decedent's will, the competent, resident heirs may only do so within one year of the will's probate. VA. CODE ANN. § 64.1-89 (Repl. Vol. 1991). Thus, in cases where an heir doesn't learn of the death until after this one year period, the heir could not successfully challenge the will (thereby being deprived of a property interest) even though the will's proponent knew of the heir's existence, knew of the heir's ignorance of the decedent's death, and intentionally failed to give the heir any notice. A discussion of this and other due process issues in Virginia probate practice will be found in Gary B. Kline, Note, *Constitutionality of Notice in Virginia Probate and Estate Administration*, 42 WASH. & LEE L. REV. 1325 (1985).

5. Tulsa Professional Collection Serv., Inc. v. Pope, 485 U.S. 478 (1988) (dealing with notice to creditors in the estate settlement process).

6. Act of Feb. 9, 1993, ch. 4, 1993 Va. Acts 3 (codified at VA. CODE ANN. § 64.1-122.2 (Cum. Supp. 1993)).

7. VA. CODE ANN. § 64.1-122.2(D) (Cum. Supp. 1993).

8. *Id.* §§ 64.1-88, to -89 allows a competent resident who was not a party to an *ex parte* probate one year from the date thereof to challenge the same. Accordingly, the thirty-day after-the-fact notice will guarantee at least an eleven month period within which an interested party can challenge the probate action.

9. *Id.* §§ 64.1-122.2(A)-(G) (Cum. Supp. 1993).

most part,[10] and its concept of after-the-fact notice clearly preserves the simplicity, speed and economy of the historic ex parte probate, it remains to be seen whether or not this new concept will pass constitutional muster. The further question of due process notice requirements in the settlement of decedents' estates and the administration of testamentary trusts also remains open.[11] Thus, prudent counsel should consider giving notice to every person who has a possible interest, not only in probate, but throughout the process of settling the estate and the administration of any testamentary trust. One who has received actual notice cannot complain that such notice was defective because it was not mandated by a statute.

B. *Fiduciary's Inventory — Form*

Every court appointed fiduciary of another's property is required to file an inventory with the commissioner of accounts within four months of appointment.[12] Section 26-12 formerly provided that the property to be included in this inventory was (i) all of the personal and real estate under the fiduciary's supervision and control, and (ii) all other property of the estate of which the fiduciary had knowledge.[13] Under amended section 26-12,[14] the property to be

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10. It seems reasonably clear that the new law does not satisfy due process requirements in all cases. For instance, in a case where testator has executed a second will, completely eliminating the beneficiaries under the first, it is clear that any beneficiary under Will 1 has standing to contest Will 2. However, the new law provides for notice to the beneficiaries under Will 1 only if it has been "previously probated in the same court." VA. CODE ANN. § 64.1-122.2(A)(4) (Cum. Supp. 1993). If the proponent of Will 2 is aware of the existence of un-probated Will 1 and the identity of the beneficiaries thereunder, it would appear that the clear language of Tulsa Prof. Collection Serv., Inc. v. Pope, 485 U.S. 478 (1988) mandates these beneficiaries' entitlement to notice. In addition, the new law states that notice need not be provided to anyone "when the known assets passing under the will or by intestacy do not exceed $5,000" VA. CODE ANN. § 64.1-122.2(B)(i) (Cum. Supp. 1993), or to a non-heir who receives a testamentary gift of personalty "not in excess of $5,000." VA. CODE ANN. § 64.1-122.2(B)(8) (Cum. Supp. 1993). The latter case discloses an obvious problem in discriminating against legatees (because there is no comparable provision dispensing with notice to devisees who receive realty not in excess of $5,000), and although one appreciates the practical desirability of a *de minimis* provision, in both cases one needs to remember that in *Tulsa*, the major U.S. Supreme Court case discussing due process in the probate process, the Court does not even mention the amount in issue anywhere in its decision.

11. A discussion of these issues will be found in *Constitutionality of Notice in Virginia Probate and Estate Administration*, *supra* note 4.

12. VA. CODE ANN. § 26-12 (Cum. Supp. 1993).

13. *Id.* § 26-12 (Repl. Vol. 1992).

14. Act of Mar. 25, 1993, ch. 581, 1993 Va. Acts 730 (codified at VA. CODE ANN. § 26-12 (Cum. Supp. 1993)).

inventoried is reorganized into three categories as follows: (i) all of the personal estate under the fiduciary's supervision and control;[15] (ii) all real estate over which he has the power of sale;[16] and (iii) any other real estate of the decedent of which the fiduciary has knowledge.[17]

Corresponding changes are made to the statutorily suggested forms for inventories contained in amended section 26-12.1.[18] In addition to the rearrangement of the forms, the new legislation also adds several more instructions to the end of the inventory forms, and these instructions highlight several puzzles.[19] First, instruction no. 5 clearly provides for the inventory to exclude survivorship personalty but instruction no. 6 provides for it to include survivorship realty, and the obvious question is why the difference?[20] Second, under the clear language of instruction no 5., joint accounts with survivorship, Totten trust accounts, and P.O.D. accounts in financial institutions need not be listed on the inventory. Yet, where other estate assets are insufficient, a decedent's interest in such accounts is liable for all estate needs other than satisfying

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15. Thus, the amendment removes real estate from the "supervision and control" category. This category of personal property will be included on schedule I of the amended statutorily suggested inventory form contained in VA. CODE ANN. § 26-12.1 (Cum. Supp. 1993).

16. The language focusing on "real estate over which he has a power of sale" is in lieu of the earlier deleted "real estate which is under his supervision and control." This category of property will be included on schedule II of the amended statutorily suggested inventory form contained in VA. CODE ANN. § 26-12.1 (Cum. Supp. 1993).

17. This category of property will be included on Schedule III of the amended statutorily suggested inventory form contained in VA. CODE ANN. § 26-12.1 (Cum. Supp. 1993).

18. Act of Mar. 25, 1993, ch. 581, 1993 Va. Acts 730 (codified at VA. CODE ANN. § 26-12.1 (Cum. Supp. 1993)).

19. VA. CODE ANN. § 27-12.1 (Cum. Supp. 1993) provides in part as follows:

> INSTRUCTIONS TO FIDUCIARIES AND APPRAISERS
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> 5. Personal property to be listed under Section I includes all assets other than real estate . . . and any other property having value . . . . Personal property which was held by the decedent and surviving spouse as tenants by the entirety or by the decedent and a surviving co-owner as joint tenants with right of survivorship or personal property payable directly to a surviving beneficiary need not be listed.
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> 6. Real estate to be listed under Section III includes real estate over which the personal representative has no power of sale such as property held by the decedent and another as joint tenants with right of survivorship or as tenants by the entireties or property which is subject to a direct devise.

Id.

20. It has been suggested that the commissioner of accounts needs to know of survivorship realty because a portion of the real estate taxes thereon might be a proper administrative expense. Accepting this, it is unclear why the commissioner would not also need to know of an automobile held in survivorship, as to which a portion of the personal property taxes thereon might be a proper administrative expense.

testamentary gifts,[21] and thus the existence of such accounts would seem to be of interest to those interested in the estate. Arguably, disclosure of such accounts was required by the prior law's provision requiring the disclosure of "all other *property* (emphasis added) of the estate[22] of the decedent of which he has knowledge,"[23] which was replaced by "all other *real estate* (emphasis added) of the decedent of which he has knowledge."[24] Regardless of whether disclosure of multiple party accounts was required under prior law, instruction no. 5 clearly states that such disclosure is not required under the new law.

If this section is to be amended again, there is another reason to require disclosure of all joint accounts on the inventory. The right of a party in interest to require a personal representative to pursue a claim against a joint account on behalf of the estate[25] must be asserted within six months of the personal representative's qualification.[26] In the absence of required disclosure on the inventory form, the likelihood of interested parties not discovering the existence of such accounts prior to the expiration of the six month limitation period is much greater than if disclosure were required.

C. *Probate Avoidance — Boat Titles*

Over the years, the General Assembly has enacted a number of statutes to facilitate the transfer of certain property from the dead

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21. VA. CODE ANN. § 6.1-125.8 (Repl. Vol. 1988) provides in part that "[n]o multiple party account will be effective against an estate of a deceased party to transfer to a survivor sums needed to pay debts, taxes, and expenses of administration, including statutory allowances to the surviving spouse, minor children and dependent children, if other assets of the estate are insufficient." VA. CODE ANN. § 6.1-125.1.5 (Repl. Vol. 1988) provides in part that a "'multiple party account' means any of the following types of account: (i) a joint account, (ii) a P.O.D. account, or (iii) a [Totten] trust account."

22. VA. CODE ANN. § 26-12 (Repl. Vol. 1992), repealed by Act of Mar. 25, 1993, ch. 581, 1993 Va. Acts 730 (codified at VA. CODE ANN. § 26-12 (Cum. Supp. 1993)). Some would argue that disclosure was not required under prior law because that law focused on "other property *of the estate*" and money in multiple party accounts, which are regarded as classic "probate-avoidance" concepts, and would not be considered assets "*of the estate*." VA. CODE ANN. § 26-12 (Repl. Vol. 1992) (emphasis added). The rejoinder to this argument is that the language in VA. CODE ANN. § 6.1-125.8 (Repl. Vol. 1988), making these assets reachable, does so only if "*other* assets of the estate" are insufficient. By referring to *other* assets of the estate, this code section is implying that these assets are also assets of the estate, else why the reference to *other* assets "of the estate"?

23. VA. CODE ANN. § 26-12 (Repl. Vol. 1992), repealed by Act of Mar. 25, 1993, Ch 581, 1993 Va. Acts 730 (codified at VA. CODE ANN. § 26-12 (Va. Supp. 1993)).

24. *Id.* § 26-12 (Cum. Supp. 1993).

25. On the grounds, for example, that survivorship was not intended by the decedent.

26. VA. CODE ANN. § 64.1-140 (Repl. Vol. 1991).

to the living without the necessity of going through the probate process.[27] The 1993 addition to this list is section 29.1-717.3, dealing with watercraft for which a title has been issued by the Virginia Department of Game, Inland Fisheries and Boating.[28] Pursuant to this section, in cases where there is no qualification upon the estate of a decedent who owned such a watercraft, title thereto will be transferred by the department upon the request of one[29] who (i) takes the watercraft or an interest therein by testate or intestate succession from the decedent, and (ii) makes a statement containing certain information to the department.[30] This statute will be very helpful in those cases where the only titled asset is a watercraft and where, in the past, there would have to be a qualification on the estate so that an administrator or executor could effect the necessary transfer.[31]

D. *Settlement of Fiduciary Accounts*

1. General. Generally, former section 26-17[32] required all court appointed fiduciaries of another's property to file an annual accounting with the commissioner of accounts for each fiscal year, beginning with the date of appointment, (i) showing all receipts and disbursements during the accounting period, (ii) displaying vouchers to support all disbursements, and (iii) containing a statement of cash on hand, cash in bank, and securities held at the end

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27. Among the most frequently used of these statutes are VA. CODE ANN. § 46.2-634 (Repl. Vol. 1989) (dealing with title to a motor vehicle); § 6.1-71 (Repl. Vol. 1988) dealing with small deposits in banks); § 6.1-194.58 (Repl. Vol. 1988) (dealing with small deposits in savings and loan associations); and § 6.1-225.48 (Cum. Supp. 1993) (dealing with small deposits in credit unions).

28. Act of Mar. 28, 1993, ch. 675, 1993 Va. Acts 955 (codified at VA. CODE ANN. § 29.1-717.3 (Cum. Supp. 1993)).

29. Any other persons having an interest in the watercraft, if of legal age, must also signify their consent to the requested transfer in writing.

30. This statement must contain information

> to the effect that there has not been and there is not expected to be a qualification on the estate and that the decedent's debts have been paid or that the proceeds from the sale of the watercraft will be applied against his debts . . . the name, residence at the time of death, and date of death of the decedent, and the names of any other persons having an interest in the watercraft. . . .

VA. CODE ANN. § 29.1-717.3 (Cum. Supp. 1993).

31. A parallel provision is found in VA. CODE ANN. § 64.1-123.2 (Repl. Vol. 1991), dealing with vessels registered by Virginia residents with the United States Bureau of Customs. However, that section's remedy is available only if the vessel "has a market value not exceeding $7,000. . . ." *Id.*

32. VA. CODE ANN. § 26-17 (Repl. Vol. 1992), repealed by Act of Mar. 28, 1993, ch. 689, 1993 Va. Acts 969.

of the accounting period.[33] This section further provided that, at the commissioner's request, the accounting fiduciary was also required to exhibit all securities held, and a statement from every financial institution in which funds were deposited at the end of the accounting period, to the commissioner.[34] The 1993 legislation repeals section 26-17 and two minor ancillary sections,[35] and adds new sub-sections dealing more specifically with the accounting requirements of the various fiduciaries. The nature of this survey and space limitations preclude a line by line analysis of this new legislation but each new section is mentioned and, to the extent it makes any significant change from the historical procedure already described, such change is noted.

2. Accounting Periods. Section 26-17.3 establishes the general requirement that all covered fiduciaries make accountings before the commissioner of accounts in the jurisdiction of their qualification.[36] Section 26-17.4, applicable only to guardians, curators, committees, trustees for ex-service persons and their beneficiaries, and receivers for minor married women reduces the time period covered by their first accounting from the first year to the first four months from qualification.[37] All subsequent accountings are for one year periods ending on the anniversary date of the first accounting's termination date. Section 26-17.5, applicable only to personal representatives, retains the historic accounting periods.[38] Section 26-17.6, applicable only to testamentary trustees, changes their annual accounting period from a fiscal year beginning at the date of their appointment to a calendar year basis.[39] Excepted from this change are (a) testamentary trustees who qualified before July 1, 1993, and (b) testamentary trusts in which one trustee is (i) a corporation qualified under section 6-1.5, or (ii) permitted by federal law

33. *Id.*

34. *Id.*

35. Act of Mar. 28, 1993, ch. 689, 1993 Va. Acts 969 (repealing VA. CODE ANN. §§ 26-17, 26-17.1 and 26-17.2). VA. CODE ANN. § 26-17.1, Vouchers for payments to the Internal Revenue Service, was re-enacted, verbatim, without title, by Act of Mar. 28, 1993, ch. 689, 1993 Va. Acts 969 (codified at VA. CODE ANN. § 26-17.9(C) (Cum. Supp. 1993); and VA. CODE ANN. § 26-17.2, Direct payments to a beneficiary's account, was re-enacted, *mutatis mutandis*, without title, by Act of Mar. 28, 1993, ch. 689, 1993 Va. Acts 969 (codified at VA. CODE ANN. § 26-17.9(B) (Cum. Supp. 1993).

36. Act of Mar. 28, 1993, ch. 689, 1993 Va. Acts 969 (codified at VA. CODE ANN. § 26-17.3 (Cum. Supp. 1993)).

37. *Id.* (codified at VA. CODE ANN. § 26-17.4 (Cum. Supp. 1993)).

38. *Id.* (codified at VA. CODE ANN. § 26-17.5 (Cum. Supp. 1993)).

39. *Id.* (codified at VA. CODE ANN. § 26-17.6 (Cum. Supp. 1993)).

to file income tax returns on a fiscal year basis, in which cases the trustees may continue to file accountings on a fiscal year basis.

3. Waiver of Accountings for Testamentary Trustees. For wills probated after July 1, 1993, section 26-17.7[40] recognizes the right of a testator to expressly waive the trustee's obligation to file accountings with the commissioner[41] if the trustee (i) provides certain of the beneficiaries[42] with specified information[43] within ninety days of qualification, and (ii) makes an annual accounting to such beneficiaries upon request. The testator's waiver may be negated by any of the foregoing beneficiaries,[44] or the court,[45] any of whom may require that annual accountings be filed with the commissioner. In the case of wills probated prior to July 1, 1993, which contain appropriate waiver language, the trustee will also be excused from accounting to the commissioner "with the written consent of all adult beneficiaries who may be entitled to receive income or principal at the time such written consent is signed."[46]

This provision is one of the most harmful pieces of estate legislation to issue from the General Assembly in recent years. Popular myth sees the accounting process as an unnecessary, time-consuming and unduly expensive procedure. And a case can be made for this position vis-a-vis trusts being administered by fiduciary institutions and knowledgeable attorneys. But, in this writer's experi-

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40. *Id.* (codified at VA. CODE ANN. § 26-17.7 (Cum. Supp. 1993)).

41. The statutorily suggested language is "I hereby direct that my trustee(s) shall not be required to file annual accounts with a court as otherwise required by Virginia law." VA. CODE ANN. § 26-17.7(B) (Cum. Supp. 1993). The use of this language is not mandatory and other language "substantially in form and effect" as the foregoing is also acceptable. *Id.*

42. This provision reads as follows: "all beneficiaries of the trust who are adults, whose addresses are known to the trustee and who may then be *entitled* to receive income or principal from the trust. . . ." VA. CODE ANN. § 26-17.7(A) (Cum. Supp. 1993) (emphasis added). Query: is a beneficiary who may receive income or principal in the absolute discretion of the trustee "entitled" within the meaning of this provision? What if this is the position of all beneficiaries? Suppose, in a case where both parents die prematurely, all current beneficiaries are minor children. Is anyone entitled to notice in these cases?

43. This provision reads as follows: "provides each with a copy of the applicable provisions of the will; advises each of his right to require an annual accounting; and provides each with a copy of this code section. . . ." VA. CODE ANN. § 26-17.7(A) (Cum. Supp. 1993).

44. VA. CODE ANN. § 26-17.7(C) (Cum. Supp. 1993), which also permits the negation power to be exercised by one legally empowered to act on behalf of a beneficiary, by a custodial parent on behalf of a minor, and by a minor who is at least fourteen years old. The negation power by, or on behalf of, minors may well be illusory because, as noted above, it appears that the only beneficiaries entitled to a notice of rights are certain adults. VA. CODE ANN. § 26-17.7(A) (Cum. Supp. 1993).

45. VA. CODE ANN. § 26-17.7(E) (Cum. Supp. 1993).

46. *Id.* § 26-17.7(D).

ence, the majority of trusts will be administered by others, mostly by consumers with no prior trustee experience. However well meaning and honest these lay trustees may be, their lack of experience greatly increases the likelihood of error.[47] In such error-prone cases, it is difficult to overstate the importance of the commissioner's role in verifying that the testator's instructions have been correctly interpreted and implemented, trust assets are properly invested, receipts and expenditures are properly allocated between the principal and income accounts, compensation taken by the trustee is reasonable, etc. This waiver language likely will soon appear in the boilerplate provisions of most of the will-drafting forms available to lawyers and the public, and be copied as a part of every will by novice drafters, sometimes blindly (because the boilerplate is not read) and other times unaware of the potential consequences (because they are not known by the drafter). Accordingly, waiver will likely become a standard part of many wills. Although the waiver legislation will undoubtedly achieve its intended goal in most of the testamentary trusts administered by professionals, the price for this victory will be expensive. The Commonwealth will suffer many instances where the waiver will result in errors by an honest trustee going undetected, and thus uncorrected, and the creation of a tempting environment for a trustee who might not be so honest.[48]

4. Optional Form for Testamentary Trustees. Section 26-17.8 provides for a simplified form that may be used by a testamentary trustee who must make accounts before the commissioner.[49] However, a trustee has no right to use this form. It may only be used if the local commissioner or court is willing to accept it. It is difficult

47. Ironically, the reason for the 1993 legislation shortening the first accounting period for guardians, curators, committees, trustees for ex-service persons and their beneficiaries, and receivers for minor married women, from one year to four months was the general lack of knowledge of the consumers who regularly filled these positions and the errors that they naturally made. It was believed that shortening the period would enable the commissioner to catch these errors earlier, when they might be more easily corrected, and also provide the commissioner an opportunity for such education of these fiduciaries as might be required. The reasoning behind that change, with which the writer agrees, is totally inconsistent with complete waiver of accountings by testamentary trustees.

48. It is no answer to say that any beneficiary can require accountings to be made at any time. First, only certain adult beneficiaries will be made aware of this right. Second, the only beneficiaries who do receive notice are often not going to understand the process, or be aware of the problems, any more than the trustee, and thus they are not likely to appreciate the need for, or benefit of, a formal accounting.

49. Act of Mar. 28, 1993, ch. 689, 1993 Va. Acts 969 (codified at VA. CODE ANN. § 26-17.8 (Cum. Supp. 1993)).

to understand why the General Assembly chose to make this matter a local option.

5. Vouchers and payments. Section 26-17.9(A) continues the provisions of former section 26-17 regarding the fiduciary's display of vouchers for disbursements, and a statement of cash on hand and investments as a part of the accounting process.[50] Section 26-17.9(B) continues the provisions of former section 26-17.2,[51] dealing with disbursements to beneficiaries by bank transfers to their accounts.[52] Section 26-17.9(C) continues the provisions of former section 26-17.1,[53] dealing with payments to the Internal Revenue Service by wire transfer.[54]

6. Miscellaneous. Section 26-17.10(A) continues the provisions of former section 26-17[55] regarding the commissioner's (i) power to require an accounting fiduciary to exhibit the securities the fiduciary claims to hold and bank statements verifying cash on hand as of the account's terminal date, and (ii) duty to state, settle and report the fiduciary's account to the court.[56] Section 26-17.10(B) imposes a duty on a deceased fiduciary's personal representative to make any required accounting on behalf of the decedent unless the same is made by the decedent's successor fiduciary.[57]

E. *Statement in Lieu of Accounting*

One obvious reason for requiring a personal representative of a decedent's estate to file an accounting with the commissioner of accounts is to create a record of the personal representative's actions for the benefit of the decedent's successors. However, in a case where the personal representative is also the sole successor to the decedent's estate there is clearly no need for the creation of this record. Recognizing this reality in the case posed, as well as in certain other cases where there was a similar identity between personal representatives and distributees or residuary legatees, section 26-20.1 has allowed such personal representatives (if there are no more than three) to file a simple affidavit in lieu of the normal

50. *Id.* (codified at VA. CODE ANN. § 26-17.9(A) (Cum. Supp. 1993)).
51. *Id.* (repealing VA. CODE ANN. § 26-17.2) (Repl. Vol. 1992).
52. *Id.* (codified at VA. CODE ANN. § 26-17.9(B) (Cum. Supp. 1993)).
53. *Id.* (repealing VA. CODE ANN. § 26-17.1 (Repl. Vol. 1992)).
54. *Id.* (codified at VA. CODE ANN. § 26-17.9(C) (Cum. Supp. 1993)).
55. *Id.* (repealing VA. CODE ANN. § 26-17 (Repl. Vol. 1992)).
56. *Id.* (codified at VA. CODE ANN. § 26-17.10(A) (Cum. Supp. 1993)).
57. *Id.* (codified at VA. CODE ANN. § 26-17.10(B) (Cum. Supp. 1993)).

final accounting.[58] The 1993 amendments to section 26-20.1 (i) eliminate any attempt to specifically describe various situations in which the affidavit might be used, (ii) abolish the restriction that there be no more than three personal representatives, and (iii) increase the commissioner's fee for inspecting an affidavit from fifty to seventy-five dollars.[59] As amended, this procedure is now available in cases where "all distributees of a decedent's estate or all residuary beneficiaries under a decedent's will are personal representatives of that decedent's estate, whether serving alone or with one or more others who are not distributees or residuary beneficiaries."[60] This broadened language does not require that all personal representatives be distributees or residuary beneficiaries, only that all distributees or residuary beneficiaries be personal representatives. Thus, for example, the affidavit may now be used in a case where A is the sole beneficiary, but A and B (perhaps the testator's attorney) are the personal representatives.[61]

F. *Payment of Insolvent Decedent's Debts*

When the assets under the control of a personal representative are insufficient to satisfy all claims against the decedent's estate, section 64.1-57 determines the order and priority amount in which the claims are to be paid.[62] The 1993 amendment adds to the list, as a class five priority, claims by nursing homes not to exceed four hundred dollars.[63]

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58. The contents of this affidavit, as slightly reworded in the 1993 version, are "that all known charges against the estate have been paid, and that after the time required by law, the residue of the estate has been delivered to the distributees or beneficiaries." Act of Mar. 24, 1993, ch. 525, 1993 Va. Acts 647 (codified at VA. CODE ANN. § 26-20.1 (Cum. Supp. 1993)). "In the case of a residuary beneficiary, the statement shall be accompanied by proper vouchers showing satisfaction of all other bequests in the will." *Id.*

59. *Id.* (codified at VA. CODE ANN. § 26-20.1 (Cum. Supp. 1993)).

60. *Id.*

61. Curiously, if A in this example was a nonresident, and B was appointed a personal representative pursuant to the general rule of VA. CODE ANN. § 26-59 (Repl. Vol. 1992) requiring a nonresident fiduciary to have a resident co-fiduciary, the affidavit process would have been available to A and B under prior law. However, it would not have been available if they were both residents.

62. VA. CODE ANN. § 64.1-157 (Repl. Vol. 1991).

63. Act of Mar. 17, 1993, ch. 259, 1993 Va. Acts 290 (codified at VA. CODE ANN. § 64.1-157.5 (Cum. Supp. 1993)).

G. *Trustee's Power to Invade Trust*

Section 64.1-67.2, dealing with the construction of a trustee's power to invade the principal of a trust, was added to the code in 1988,[64] amended in 1991,[65] and amended again in 1992.[66] Both the 1991 and 1992 amendments provided that they were declaratory of existing law.[67] The original 1988 enactment was believed to be declaratory of existing law but the enacting legislation did not so state. Because of this omission, it would be possible to construe (i) the 1988 legislation as prospective from its effective date of July 1, 1988 and (ii) the 1991 and 1992 amendments as declaratory of the law only from that same date, with resulting adverse federal transfer tax consequences. The 1993 legislation cures the 1988 oversight by amending and reenacting Chapter 346 of the 1988 Acts of Assembly as "declaratory of existing law."[68]

H. *Revocation of Death Benefits Upon Divorce*

Following a divorce, it would be unusual for either party to wish to continue the other in any beneficiary relationship. Accordingly, the legislature has enacted laws giving expression to the normal intent of the parties in the case of wills,[69] survivorship tenancies[70] and multiple party accounts.[71] New section 20-111.1[72] fills an im-

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64. Act of Mar. 29, 1988, ch. 346, 1988 Va. Acts 417. For a discussion of this statute, see J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 22 U. RICH. L. REV. 759, 764-66 (1988).

65. Act of Mar. 20, 1991, ch. 432, 1991 Va. Acts 1263. For a discussion of this amendment, see J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 25 U. RICH. L. REV. 925, 927-28 (1991).

66. Act of Apr. 15, 1992, ch. 832, 1992 Va. Acts 1492. For a discussion of this amendment, see J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 26 U. RICH. L. REV. 873, 894 (1992).

67. Act of Mar. 20, 1991, ch. 432, 1991 Va. Acts 1263, cl. 2, and Act of Apr. 15, 1992, ch. 832, 1992 Va. Acts 1492, cl. 2.

68. Act of Mar. 24, 1993, ch. 524, 1993 Va. Acts 647, cl. 2.

69. VA. CODE ANN. § 64.1-59 (Repl. Vol. 1991) generally provides that divorce or annulment revokes all beneficial provisions in a testator's will in favor of testator's former spouse.

70. VA. CODE ANN. § 20-111 (Repl. Vol. 1990) provides for divorce to eliminate all survivorship rights in spousal tenancies in realty or personalty, and for the conversion of a tenancy by the entirety to be converted into a tenancy in common.

71. VA. CODE ANN. § 6.1-125.4 (Repl. Vol. 1988) provides for the termination of all rights of married persons in multiple party accounts, including survivorship, upon their divorce. Interestingly, although all four of the statutes referred to in this article apply to a divorce *a vinculo matrimonii*, the multiple party account statute is the only one that expressly applies to a divorce *a mensa et thoro*. In addition, the multiple party account statute and the survivorship tenancy statute do not expressly apply in case of an annulment.

portant gap in this collection of intent, effectuating statutes by revoking revocable beneficiary designations of death benefits[73] in favor of one's spouse upon divorce or annulment.[74] The statute further provides (i) that a covered death benefit will pass as if the former spouse died first (ii) for the protection of one who pays a covered death benefit to a former spouse without having received prior written notice of the revocation and (iii) that it is not applicable "to any trust or any death benefit payable to or under any trust."[75]

Although the remedy of section 20-111.1 is expressly restricted to cases where the decree of divorce or annulment is entered on or after July 1, 1993, it is applicable to insurance policies or other death benefits issued or contracted for prior to that date. In this regard, however, a recent federal case[76] concluded that a similar Oklahoma statute was "an unconstitutional impairment of contracts insofar as it applied to insurance contracts entered before the statute became effective,"[77] under the contracts clause of the United States Constitution.[78] This decision is poorly reasoned because, among other things, it fails to take into account the dual nature of an insurance policy (that it is in part a contract, and in part a gift, and the fact that the contractual element, the insurance company's obligation to pay upon the insured's death is not affected by the statute).[79] As a result of the decision's poor reasoning, the Joint Editorial Board of the Uniform Probate Code has issued a four-point rebuttal statement in which it states that "the

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72. Act of Mar. 22, 1993, ch. 417, 1993 Va. Acts 487 (codified at VA. CODE ANN. § 20-111.1 (Cum. Supp. 1993)).

73. "The term 'death benefit' includes any payments under a life insurance contract, annuity, retirement arrangement, compensation agreement or other contract designating a beneficiary of any right, property or money in the form of a death benefit." VA. CODE ANN.. § 20-111.1 (Cum. Supp. 1993).

74. "This section shall not apply (i) to the extent a decree of annulment or divorce from the bond of matrimony, or a written agreement of the parties provides for a contrary result as to specific death benefits . . ." VA. CODE ANN. § 20.1-111.1 (Cum. Supp. 1993).

75. *Id.* at § 20.1-111.1 (ii).

76. Whirlpool Corp. v. Ritter, 929 F.2d 1318 (8th Cir. 1991).

77. *Id.* at 1324.

78. U.S. CONST. art. I, § 10, cl. 1.

79. Note that the same dual relationship exists in the case of a multiple party account where a depositor contracts with a financial institution for monies to be paid to a beneficiary or survivor at the depositor's death. This dual nature of multiple party accounts is discussed in 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), and receives legislative recognition in VA. CODE ANN. § 6.1-125.2 (Repl. Vol. 1988).

Ritter opinion is manifestly wrong,"[80] and then proceeds to demonstrate the accuracy of its statement.[81]

I. *Acquisition of Property by Aliens*

Prior to 1993, the full text of section 55-1 was "(a)ny alien, not an enemy,[82] may acquire by purchase[83] or descent and hold real estate in this state; and the same shall be transmitted in the same manner as real estate held by citizens."[84] Although the issue of aliens, whether enemies or friends, taking by testate or intestate succession goes back to the common law, the debate concerning alien friends developed a new intensity during the period of the Cold War between America and communist countries. The legislative responses to the problems associated with alien friends were of two types: (i) retention statutes that focused on the right of the alien friend to retain the inherited property instead of it passing to the state, and (ii) reciprocity statutes that determined the alien friend's right to take as a function of an American's right to take under the law of the alien's country. In *Zschernig v. Miller*,[85] the United States Supreme Court held Oregon's combination retention/reciprocity statute unconstitutional because of its potential intrusion into the United State's conduct of foreign affairs.

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80. *Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents*, 17 AM. C. TR. & EST. COUNS. NOTES 184 (1991). Copies of this statement may be obtained from the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611. Lawrence W. Waggoner, *Spousal Rights in our Multiple Marriage Society*, 26 REAL PROP. PROB. AND TR. J. 683 (1992) discusses this issue at 699-701. Footnote 45, on page 700, notes the existence of a further article, S. Alan Medlin, *Joint Editorial Board Rebukes Eighth Circuit Decision*, PROB. PRAC. REP., Jan. 1992, at 1, which was not available to the writer in the preparation of this article.

81. *Joint Editorial Board Statement*, *supra* note 80, at 184.

82. The identity of an "alien enemy," which was relatively clear in World War II, would not have been so clear more recently in regard to citizens of North Korea, North Vietnam, or Iraq.

83. "Purchase" is not limited to transactions of purchase and sale. In this context, a "purchaser" is simply one who takes by deed or will (the "words of purchase" identifying the taker, and the "words of limitation" describing the estate taken) whether that deed or will be gratuitous or for a consideration. CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 31-32 (1962).

84. VA. CODE ANN. § 55-1 (Repl. Vol. 1986).

85. 389 U.S. 429 (1968).

The 1993 amendment to section 55-1[86] makes it a reciprocity statute which appears to be confined to personal property.[87] However, instead of a Virginia court's finding of a lack of reciprocity resulting in the forfeiture of the alien's right to take, the court making such a finding "*may* direct the money or property to be paid into the court for the benefit of the alien."[88] This property must be paid out upon order of the impounding court or "a court of competent jurisdiction."[89] Any property still retained by the impounding court three years from the decedent's death[90] "*shall* be paid out by the court as if the alien had predeceased the decedent."[91] Thus, if the deemed predeceased alien has descendants, they will be the takers if decedent died intestate.[92] The descendants will be the presumptive takers if the decedent died testate, and the alien is a grandparent or a descendant of a grandparent of the decedent.[93] The steps to be taken at this point are unclear if these descendants are similarly aliens, as is the constitutional reception to be accorded this statute. In this latter regard, interested parties will find that numerous law review articles have been written on this general topic.[94]

J. *Transfers for Religious Purposes*

Former section 57-7,[95] dealing with transfers for religious purposes, was rewritten by the legislature in 1993 in order to clarify its intent and simplify its language,[96] and reenacted as section 57-

86. Act of Mar. 24, 1993, ch. 535, 1993 Va. Acts 657 (codified at VA. CODE ANN. § 55-1 (Cum. Supp. 1993)).

87. This is somewhat curious because the statute's original language dealing with alien enemies, quoted in the text accompanying notes 80-82, is concerned with real property only.

88. VA. CODE ANN. § 55-1 (Cum. Supp. 1993) (emphasis added).

89. *Id.* It is unclear what other court the language refers to.

90. In some cases more than three years will pass from the decedent's death before the property is available for distribution (i.e., payment into court) by the personal representative.

91. VA. CODE ANN. § 55-1 (Cum. Supp. 1993) (emphasis added).

92. *Id.* § 64.1-1 (Repl. Vol. 1991).

93. *Id.*

94. For a survey of federal and state policies regarding aliens and estate matters see *Rights and Restrictions on Interests' of Aliens in U.S. Estates: Federal and State Laws Affecting Administration and Distribution of U.S. Estates in Which Aliens Hold Interests*, 15 REAL PROP. PROB & TR. J. 659 (1980).

95. Act of Mar. 19, 1993, ch. 370, 1993 Va. Acts 420 (repealing VA. CODE ANN. § 57-7 (Repl. Vol. 1986)).

96. This section consisted of three sentences, containing 232 words, 216 words, and 30 words, respectively. VA. CODE ANN. § 57-7 (Repl. Vol. 1986). It is discussed in J. Rodney Johnson, *Virginia Laws Affecting Churches — Restated*, 17 U. RICH. L. REV. 1, 6-8 (1982).

7.1.[97] The new section, which was passed as declaratory of existing law,[98] continues (i) to validate all gratuitous and nongratuitous inter vivos and testamentary conveyances and transfers of realty and personalty to church entities, "subject to the provisions of § 57-12," (ii) to provide that any transfer not stating a specific purpose will be held for the religious and benevolent purposes of the church entity, and (iii) to prohibit the failure of any transfer because the beneficiaries are insufficiently designated, if the church entity has trustees or ecclesiastical officers, or is capable of securing the appointment of trustees.[99]

K. *Death — Tolling of Statute of Limitations*

Section 8.01-229(B), dealing with the effect that death of a party has on the running of the statute of limitations, provides for four instances where the statute will not run until the latter of (i) the expiration of the statute of limitations on the underlying claim, or (ii) one year (or two in one instance) after the qualification of the appropriate personal representative.[100] In order to prevent the manipulation of these rules by refusing to qualify a personal representative for a significant period of time, this section has further provided that, if not actually qualified earlier, a personal representative will be deemed to have qualified the day before the first anniversary of the decedent's death for the purpose of these rules.[101] The 1993 amendment changes this period to the day before the second anniversary of the decedent's death.[102]

In a case where plaintiff, unaware of defendant's death, brings a personal action against defendant instead of defendant's personal representative, section 8.01-229(B)(2)(b) has permitted plaintiff to substitute decedent's personal representative as party defendant

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97. Act of Mar. 19, 1993, ch. 370, 1993 Va. Acts 421 (codified at VA. CODE ANN. § 57-7.1 (Cum. Supp. 1993)).

98. *Id.* at § 57-7.1(2).

99. VA. CODE ANN. § 57-7.1 (Cum. Supp. 1993). Code of Virginia § 57-12 imposes limits on the amount of real and personal property that may be owned by a church entity. VA. CODE ANN. § 57-12 (Repl. Vol. 1986).

100. *Id.* § 8.01-229(B)(1) (Death of person entitled to bring a personal action) (one year); -229(B)(2)(a) (Death of person against whom personal action may be brought) (one year); -229(B)(4) (Accrual of a personal cause of action against the estate of any person subsequent to such person's death) (two years); and -229(B)(5) (Accrual of a personal cause of action in favor of decedent) (one year).

101. *Id.* § 8.01-229(B)(6) (Repl. Vol. 1992).

102. Act of Mar. 29, 1993, ch. 844, 1993 Va. Acts 1223 (codified at VA. CODE ANN. § 8.01-229(B)(6) (Cum. Supp. 1993)).

before the latter of (i) the expiration of the statute of limitations on the underlying claim, or (ii) one year after the date the suit papers were filed with the court.[103] The 1993 amendment increases the latter of these periods from one year to two years.[104]

L. *Medicaid*

In response to a 1991 legislative request,[105] the Joint Legislative Audit and Review Commission issued a fifty-eight-page report on November 24, 1992, recommending certain changes in Virginia medicaid law.[106] Because of a belief that the length of the report and the complexity of the law would not allow sufficient time for interested parties to study its recommendations in the short interval before the commencement of the 1993 legislative session, an ad hoc group identified as "Virginia Elder Law Attorneys"[107] requested the General Assembly to defer action on these recommendations until 1994. Although this request was supported by an eleven-page critical response to the report,[108] and was endorsed by the Virginia Bar Association, most of the report's recommendations were enacted by the legislature. Although space limitations and the nature of this survey preclude a discussion of the report and the response, and an analysis of the new legislation, the latter will be noted for the convenience of the reader. The three new additions to the Code were section 32.1-325.01, Certain term life insurance considered resources;[109] section 32.1-326.1, Department to operate program of estate recovery;[110] and section 55-19.5, Provi-

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103. VA. CODE ANN. § 8.01-229(B)(2)(b) (Repl. Vol. 1992).

104. Act of Mar. 29, 1993, ch. 844, 1993 Va. Acts 1223 (codified at VA. CODE ANN. § 8.01-229(B)(2)(b) (Cum. Supp. 1993)).

105. S.J. Res. No. 91, Va. Gen. Assembly, (Reg. Sess. 1991). *Requesting the Commission on Health Care for All Virginians* (to study the issue of property transfer for purposes of medicaid eligibility).

106. S. Doc. 10, MEDICAID ASSET TRANSFERS AND ESTATE RECOVERY, Va. Gen. Assembly (Reg. Sess. 1993).

107. The shared characteristic of these attorneys, who represented the private, public and academic sectors, was their membership in the National Association of Elder Law Attorneys. The author was a member of this group.

108. *Virginia Elder Law Attorneys Respond to Senate Document No. 10 — White Paper on JLARC Study — Medicaid Asset Transfers and Estate Recovery.* A copy of this document and a copy of the *Resolution* requesting deferral until 1994 are on file in the offices of the University of Richmond Law Review.

109. Act of Apr. 7, 1993, ch. 990, 1993 Va. Acts 1626 (codified at VA. CODE ANN. § 32.1-325.01 (Cum. Supp. 1993)). This was passed as emergency legislation. *Id.* at cl. 2.

110. Duplicate bills were passed and enacted. Act of Mar. 15, 1993, ch. 966, 1993 Va. Acts 1582 (codified at VA. CODE ANN. § 32.1-326.01 (Cum. Supp. 1993)) (Senate version) is Act of

sion in certain trust void.[111] The only amendment was to section 63.1-133.1, No lien to attach to property of applicant or recipient; release of existing unforeclosed liens.[112]

III. 1992-93 JUDICIAL OPINIONS

A. *Executors — Power of Sale*

In *Yamada v. McLeod*,[113] decedent's duly probated will left her residuary estate to her daughters, named them as her executors, and stated in part "I grant unto my Executor . . . the full power and authority to sell . . . . any real property which I may own at the time of my death. . . ."[114] Acting in their capacity as executors, the daughters sold certain real estate and conveyed the same by deed in which their husbands did not join. When purchaser later attempted to sell this property it was claimed that, as the daughters were also residuary beneficiaries, they also needed to execute the deed in such capacity and their husbands had to join therein in order to release their contingent curtesy claims.[115] Citing prior law for the proposition that the daughters' exercise of their naked power of sale in their capacity as executors divested the daughters' rights as beneficiaries, the Supreme Court also concluded that "(b)ecause the daughters' title was divested *during* their lifetimes, they no longer had interests in the property to which their husbands' derivative curtesy interests could attach."[116]

Mar. 28, 1993, ch. 700, 1993 Va. Acts 981 (codified at VA. CODE ANN. § 32.1-326.01 (Cum. Supp. 1993)) (House version).

111. Act of Mar. 28, 1993, ch. 701, 1993 Va. Acts 981 (codified at VA. CODE ANN. § 55-19.5 (Cum. Supp. 1993)).

112. Duplicate bills were passed and enacted. Act of Apr. 7, 1993, ch. 989, 1993 Va. Acts 1625 (codified at VA. CODE ANN. § 63.1-133.1 (Cum. Supp. 1993)) (Senate version); Act of Apr. 7, 1993, ch. 953, 1993 Va. Acts 1541 (codified at VA. CODE ANN. § 63.1-133.1 (Cum. Supp. 1993)) (House version).

113. 243 Va. 426, 416 S.E.2d 222 (1992). For an additional discussion of this case see L. Charles Long, Jr., *Annual Survey of Virginia Law: Property Law*, 27 UNIV. RICH. L. REV. 805, 816 (1993).

114. *Id.* at 428, 416 S.E.2d at 223.

115. All claims to dower and curtesy were abolished effective January 1, 1991, except for those vested prior to that date, by Acts of Apr. 9, 1990, ch. 831 (codified at VA. CODE ANN. § 64.1-19.2 (Repl. Vol. 1991)). In the instant case the decedent died in 1988 and the daughters' sale was made in 1989. *Yamada*, 243 Va. at 428, 416 S.E.2d at 233.

116. *Yamada*, 243 Va. at 431, 416 S.E.2d at 225 (emphasis added) (citing George L. Haskins, *The Defeasability of Dower*, 98 U. PA. L. REV. 826, 833 (1950)).

B. *Wills — Interpretation — Intent*

The issue in *Yancey v. Scales*,[117] concerned the proper disposition of $50,000 in insurance proceeds on testator's life which, for lack of a specific beneficiary, was payable to testator's estate. As testator's forty-one-clause will neither made an express disposition of these proceeds, nor contained an express residuary clause, testator's distributees claimed these proceeds as intestate property. However, the trial court held that clause 16[118] of the will operated as a residuary clause and awarded the proceeds to the legatees thereunder. The supreme court reversed, holding that

> [testator] expressly limited the bequest to '[a]ll the money I have left in any bank,' . . . . Thus, her intention, as determined by what she actually said, is clear, and we cannot give her words a different meaning simply because there are common-law presumptions against intestacy and in favor of a residuary disposition.[119]

C. *Validity of Unlimited Non-General Power of Appointment*

The issue before the court in *Leach v. Hyatt*[120] was "the validity of a clause in a will which gives the executor absolute discretion to dispose of the testator's property, provided that he does not use it to enlarge his own bequest under the will."[121] Although Virginia has accepted the validity of a special power of appointment,[122] and

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117. 244 Va. 300, 421 S.E.2d 195 (1992).

118. "In clause SIXTEENTH, (testator) stated that '[a]ll the money I have left in any bank, after the payment of all of my debts and funeral expenses and administrative expenses and the above bequests, shall be equally divided among [the legatees].' " *Id.* at 302, 421 S.E.2d at 195.

119. *Id.* at 303, 421 S.E.2d at 196.

120. 244 Va. 566, 423 S.E.2d 165 (1992).

121. *Id.* at 567, 423 S.E.2d at 167. The portion of the clause in question reads as follows:

> In the absence of full and complete instructions from me to my Executor or Executrix, the persons to receive something under this Clause II and what each is to receive shall be appointed by my Executor or Executrix in his or her sole and absolute discretion, consistent with the stated objective of this Clause II, but this limited power of appointment shall not be used to increase or enlarge any bequest I make to any persons who serve as my Executor or Executrix, by this will or any codicil to it.

Id. at 568, 423 S.E.2d at 167.

122. A special power arises when the donee has a power to appoint within a specified class which does not include the donee or the donee's creditors. Daniel v. Brown, 156 Va. 563, 159 S.E. 209 (1931).

a general power of appointment,[123] the supreme court had never ruled on the validity of the present "limited" power of appointment.[124] The majority rule invalidates such powers, generally "on the grounds that such powers lack definite beneficiaries."[125] However, the supreme court concluded that "the minority approach, in examining whether the donor unambiguously expressed an intent to create a limited power of appointment, provides the better analytic framework for ascertaining the donor's intended disposition of his property."[126] Applying this test to the facts of the present case, the court found that testator's language demonstrated a clear intent to confer a limited power upon the donee and therefore upheld the validity of the power.[127]

D. *Wills — Interpretation — Intent*

In *West v. Hines*,[128] the testator left an estate of $690,012.00, a holographic will, and six holographic codicils, thereby tending to guarantee the ensuing litigation to construe various provisions and determine testator's intent. In this factual inquiry, the court applied settled principles of law in upholding the trial court's decision.[129]

E. *Wills — Disclaimer*

In paragraph Fifth of the will examined in *Roseberry v. Moncure*,[130] the testator devised approximately five-hundred acres of real property to the Humane Society of the United States (HSUS) "for the purpose of establishing a wildlife refuge."[131] The paragraph further provided that, if HSUS attempted to "transfer, alienate or otherwise convey any title or interest in any of the

123. A general power arises when the power given to the donee enables the donee to appoint to himself or his creditors. Shriners Hosp. v. Citizens Bank, 198 Va. 130, 92 S.E.2d 503 (1956).

124. The power in this case is most often referred to as a "non-general" power, a nomenclature accepted by the American Law Institute in RESTATEMENT (SECOND) OF PROPERTY § 11.4 (1986).

125. 244 Va. 566, 570, 423 S.E.2d 165, 168 (1992).

126. *Id.* at 570, 423 S.E.2d at 168.

127. *Id.* at 566, 423 S.E.2d at 169.

128. 245 Va. 379, 429 S.E.2d 1 (1993).

129. The major portion of the decision focused on testator's intended meaning of the verb "reduced," which the court noted "has at least 14 definitions." *Id.* at 384, 429 S.E.2d at 3.

130. 245 Va. 436, 429 S.E.2d 4 (1993). The author has discussed this case with counsel for the executor but has no financial interest therein.

131. *Id.* at 437, 429 S.E.2d at 5.

property,"[132] the testator's executor was authorized to convey the same to another entity in order to accomplish testator's primary goal. The trial court held that, upon HSUS' disclaimer of this devise, the executor was authorized to convey the same in accordance with the provisions of the will.

Quoting from Professor Scott,[133] and citing the Restatement,[134] the supreme court held that "the beneficial interest in the real property did not vest in HSUS because when it disclaimed the property, the disclaimer operated retroactively."[135] Thus, as the property had never vested in HSUS, the court concluded that HSUS could not have "attempted to transfer, alienate, or otherwise convey any title or interest in the real property. Thus, [the executor] is not authorized to convey the real property."[136]

In this case, the court referred to HSUS as the "beneficiary" under paragraph Fifth and decided the case under authority focusing on a disclaimer by a "beneficiary." However, if, as it facially appears, paragraph Fifth of testator's will created a charitable trust, then the court's description of HSUS as a "beneficiary" was wrong, as was its reliance on the rules applicable to private trusts. When one makes a gift to a charitable entity, the beneficiary is the public — not the charity.[137] The position of the donee-charity

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132. *Id.* at ___ 429 S.E.2d at 4. The full text of what the court referred to as the "relevant part" of paragraph Fifth reads as follows:

> In the event that HSUS violates the above terms and conditions, or in the event that the HSUS attemps [sic] to transfer, alienate or otherwise convey any title or interest in any of the property, then I authorize my Executors, or if they be not living, a court of competent jurisdiction, to convey all of the said real property under the terms and conditions as hereinabove set forth unto any corporation, organization or institution capable and willing to maintain said property as a wildlife refuge. It is my expressed intention that all of my real property be treated as one parcel, except as otherwise specifically stated herein, regardless of source of title.

Id.

133. The quoted language reads as follows:

> If a trust is created without notice to the beneficiary or the beneficiary has not accepted the beneficial interest under the trust, he can disclaim. Although the beneficial interest vests in him without his knowledge or consent, he cannot be compelled to retain it. The effect of his disclaimer is to put him in the same position as though the beneficial interest had never vested in him, his disclaimer operating retroactively.

Id. at 439, 429 S.E.2d at 6 (1993) (quoting 1 WILLIAM F. FRATCHER AND AUSTIN W. SCOTT, THE LAW OF TRUSTS § 36.1, pp. 389-92 (4th ed. 1987) (footnotes omitted)).

134. 245 Va. 430, 439, 429 S.E.2d 4, 6 (1993) citing RESTATEMENT (SECOND) OF TRUSTS § 36 (1959)).

135. *Id.*

136. *Id.*

137. "In the case of a charitable trust the beneficial interest is not given to individual beneficiaries, but the property is devoted to the accomplishment of purposes that are benefi-

(HSUS) in such a case is that of trustee, holding and using the property to the donor's end. When the trustee of an intended charitable trust disclaims, "although it relieves the trustee of liability, [it] does not destroy the trust."[138]

Even if testator's will did not create a charitable trust, it still appears that the court relied upon the wrong authority. It is very clear from the language of paragraph Fifth that HSUS was not to take a beneficial interest in testator's real estate.[139] A fair reading of the will indicates that HSUS was to use the property solely to accomplish testator's purpose and, if it didn't, it was to be replaced by one who would. Thus, even if paragraph Fifth created a private trust, the role of HSUS was not that of beneficiary but that of trustee. Accordingly, the court's authority and discussion relating to the consequences of a disclaimer by a *beneficiary* is incorrect. In the case of a private trust, "[i]f the trustee named in the will disclaims, the court will appoint a new trustee to administer the trust.[140]

Lastly, the court's interpretation of testator's intent in this case is regrettably narrow. The accomplishment of a particular purpose was clearly paramount to testator. In furtherance of this purpose, testator provided for selection of a new trustee if HSUS should attempt to "transfer, alienate *or otherwise convey*"[141] the property. What was meant by "otherwise convey" in this context? Testator could easily have used this language to mean "or any other action of HSUS that results in it not holding title to this property."[142] The supreme court recognized that, in will interpretation cases, "[w]hen the words are arguably ambiguous . . . [t]he relative merits of the inferences urged must be weighed and the conflict

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cial or supposed to be beneficial to the community . . ." FRATCHER, *supra* note 133, at § 364, p. 108. *Accord*, RESTATEMENT (SECOND) OF TRUSTS § 36 (1959).

138. RESTATEMENT (SECOND) OF TRUSTS § 354, com. a. (1959). *Accord*, FRATCHER, *supra* note 133, at § 354, p. 59. The ultimate destiny of property that is disclaimed by a charitable corporation is discussed in *Id.* at § 397.3, p. 419.

139. Indeed, the court found that the property was devised to HSUS "for the purpose of establishing a wildlife refuge." 245 Va. at 437, 429 S.E.2d at 5 (1993).

140. FRATCHER, *supra* note 133, at § 35, p. 385. *Accord*, RESTATEMENT (SECOND) OF TRUSTS § 35 (1959).

141. 245 Va. at 437, 429 S.E.2d at 5 (1993) (emphasis added).

142. In addition, although it must be admitted that a disclaimer is not a *de jure* transfer, a disclaimer is nevertheless regularly referred to as a *de facto* transfer.

resolved by a disinterested arbiter."[143] Nevertheless the court concluded:

> The language the testator chose to use in paragraph Fifth is subject to only one interpretation and is free of all doubt. The testator simply did not give the executor authority to convey the real property to another entity in the event HSUS chose to disclaim it.[144]

It is difficult to understand how the court could conclude that the language "or otherwise convey," in the context of testator's will, is not "arguably ambiguous," but instead, is "free of all doubt" and "subject to only one interpretation." This construction could be defended in a case dealing with the interpretation of a bilateral contract where, because of the conflicting interests of the parties, an objective theory prevails. In the case of a will, where the intent of the testator is sovereign, it cannot.[145]

IV. CONCLUSION

As in 1992, the 1993 session produced more than the normal volume of will, trust, and estate-related legislation. Some of this legislation was constitutionally required. Other was consumer intent-effectuating, lawyer's technical work for the common good, medicaid-reactive, or constituent response. Most of it was good. The major problem was the statute authorizing waiver of accountings by testamentary trustees. This provision will result in significant injury to numerous persons not in a position to protect themselves therefrom.

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143. 245 Va. at 439, 429 S.E.2d at 6 (1993) (quoting Powell v. Holland, 224 Va. 609, 613-14, 299 S.E.2d 509, 511 (1983)).

144. *Id.* at 440, 429 S.E.2d at 6.

145. Although the supreme court reversed the chancellor's decree, it did not enter final judgment. *Id.* The case was remanded to the trial court where, the author understands, proceedings continue at the date of this article.