

1994

Annual Survey of Virginia Law: Wills, Trusts, and Estates

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Recommended Citation

J. R. Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 28 U. Rich. L. Rev. 1145 (1994).
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WILLS, TRUSTS, AND ESTATES

*J. Rodney Johnson**

I. INTRODUCTION

The 1994 Session of the General Assembly enacted legislation dealing with wills, trusts, and estates that added, amended, or repealed a number of sections of the Code of Virginia (the Code).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 six Supreme Court of Virginia opinions, one federal district court opinion, one Virginia Circuit Court opinion, and one Virginia Attorney General's opinion in the year ending June 1, 1994 that involved 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. 1994 LEGISLATION

A. *Children of Assisted Conception*

The 1991 Session added a new chapter to the Code to deal with the status of children of assisted conception, effective July 1, 1993.² This comprehensive legislation expressly provided that its rules control in determining the status of a child for a number of stipulated succession purposes.³ Unfortunately this legislation conflicted with existing section 64.1-7.1 dealing with the status of a child born through reproductive technology, its interface with other sections of Title 64.1 (Wills and Decedents'

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1. In order to facilitate the discussion of numerous Code of Virginia sections, they will generally be referred to in the text by their section numbers only.

2. VA. CODE ANN. §§ 20-156 to -165 (Cum. Supp. 1994).

3. *Id.* § 20-164 (Cum. Supp. 1993).

Estates) was uncertain and it created some administrative problems. These problems and the 1994 legislative responses thereto are set forth below.

1. Limited Ten-Month Period

Section 20-158.B(ii) provides that if a person consents to being a parent in a writing executed prior to an implantation, then a child resulting therefrom is the consenting parent's child even though born after the consenting parent's death *without any limitation on the period of time that might be involved*.⁴ As originally enacted, this rule posed obvious problems in the orderly settlement of decedents' estates and the distribution of trusts, not to mention what would have been a violation of the rule against perpetuities if it appeared in a private document. Accordingly, section 20-164 was amended to provide that "a child born more than ten months after the death of a parent shall not be recognized as such parent's child for the purposes of subdivisions (i), (ii) and (iii) of this section."⁵

2. Class Gifts

The original class gift provision of section 20-164(iii) made the new rules applicable only when an individual was taking "as a member of a class determined by reference to the relationship."⁶ Thus no express coverage was provided for cases

4. *Id.* § 20-158(B)(ii) (Cum. Supp. 1994) (emphasis added).

5. Act of Apr. 20, 1994, ch. 919, 1994 Va. Acts 1529 (codified at VA. CODE ANN. § 20-164 (Cum. Supp. 1994)). The subdivisions referred to read as follows: "(i) intestate succession; (ii) probate law exemptions, allowances, or other protections for children in a parent's estate; and (iii) determining eligibility of the child or its descendants to share in a donative transfer from any person *as an individual or as a member of a class determined by reference to the relationship*." *Id.* (emphasized language added in 1994).

The interface between this provision and Title 64.1 is further strengthened by an amendment to section 64.1-8.1, dealing with afterborn heirs. As amended, this section now reads as follows: "Relatives of the decedent conceived before his death but born thereafter, and children resulting from assisted conception born after decedent's death who are determined to be relatives of the decedent as provided in Chapter 9 (§ 20-156 et seq.) of Title 20, shall inherit as if they had been born during the lifetime of the decedent." Act of Apr. 20, 1994, ch. 919, 1994 Va. Acts 1529 (codified at VA. CODE ANN. § 64.1-8.1 (Cum. Supp. 1994)).

6. VA. CODE ANN. § 20-164(iii) (Cum. Supp. 1993).

where a testator might devise "to my sister's first-born child," or use other relational language to make a gift to an individual. Accordingly, section 20-164(iii) was amended by the addition of alternative language "as an individual or" in order that the new rule might clearly be applicable to individual gifts.⁷

3. Exclusiveness

Although section 20-164 was intended to be the exclusive law when dealing with the rights of children of assisted conception in all succession matters, this was not expressly so stated. Instead, section 20-164 referred only to its dominance under Title 20 (Domestic Relations) and to three previously enumerated succession categories.⁸ To prevent any possible problem in the future, the General Assembly passed legislation (1) repealing former section 64.1-7.1,⁹ dealing with the status of a child born through the performance of reproductive technology and (2) further amending section 20-164 by adding thereto a reference to Title 64.1 (Wills and Decedents' Estates) as being completely superseded by the status provisions in Title 20 (Domestic Relations).¹⁰

4. Integration of Titles 20 and 64.1

Section 64.1-5.1, dealing with the meaning of child and other related terms for succession purposes,¹¹ was amended to reinforce the exclusiveness of the new rules in Title 20 and to point the practitioner in that direction. The amendment to the status

7. The complete subdivision, with the 1994 amending language emphasized, reads as follows: "(iii) determining eligibility of the child of its descendants to share in a donative transfer from any person *as an individual or* as a member of a class determined by reference to the relationship." Act of Apr. 20, 1994, ch. 919, 1994 Va. Acts 1529 (codified at VA. CODE ANN. § 20-164(iii) (Cum. Supp. 1994)).

8. VA. CODE ANN. § 20-164(i)-(iii) (Cum. Supp. 1994).

9. Act of Apr. 20, 1994, ch. 919, 1994 (codified at VA. CODE ANN. § 20-164 (Cum. Supp. 1994) (repealing VA. CODE ANN. § 64.1-7.1 (Repl. Vol. 1991)).

10. See VA. CODE ANN. § 20-164 (Cum. Supp. 1994).

11. Although this section is found in the intestate succession chapter of Title 64.1, its opening sentence clearly shows its applicability to all other chapters of Title 64.1. The opening sentence reads as follows: "*If, for purposes of this title* a relationship of parent and child must be established to determine succession by, through or from a person . . ." VA. CODE ANN. § 64.1-5.1 (Cum. Supp. 1994) (emphasis added).

section of Title 64.1 provides that "[t]he parentage of a child resulting from assisted conception shall be determined as provided in Chapter 9 (§ 20-156 et seq.) of Title 20."¹²

B. *Simultaneous Death*

The 1994 Session adopted the Revised Uniform Simultaneous Death Act.¹³ The nature of this Survey and space limitations preclude a line-by-line analysis of this comprehensive legislation.¹⁴ However, one dramatic change must be noted. The scope of the law is now much broader than true simultaneous death. The new Act presumes that, even though a primary beneficiary actually survives the donor, the donor would want the gift to fail and pass instead to donor's secondary beneficiary if the primary beneficiary's period of survivorship is insubstantial. The required survivorship time is the five-day period (expressed as 120 hours) adopted by the Uniform Probate Code in 1969.¹⁵

C. *Pour-Over Wills*

One very popular estate planning concept is the consolidation of a decedent's assets by way of a testamentary gift of the decedent's residuary estate to the decedent's previously established inter vivos trust.¹⁶ This "pour-over will" concept is codi-

12. Act of Apr. 20, 1994, ch. 919, 1994 Va. Acts 1529 (codified at VA. CODE ANN. § 64.1-5.1.2 (Cum. Supp. 1994)).

13. Act of Apr. 8, 1994, ch. 475, 1994 Va. Acts 660 (codified at VA. CODE ANN. §§ 64.1-104.1 to -104.9 (Cum. Supp. 1994)) (enacting UNIFORM SIMULTANEOUS DEATH ACT, 8 U.L.A. 11 (Supp. 1994)).

14. For a discussion of this Act, in the context of Virginia law, see J. Rodney Johnson, *The New Simultaneous Death Act: Welcome Changes for Donative Transfers*, VA. B. ASS'N J. Fall 1993 at 5. A national discussion of the issue can be found in J. Rodney Johnson, *The New Simultaneous Death Act*, PROB. & PROP. May/June 1994 at 22. Copies of the Act, containing the Commissioner's official comments which will be helpful in understanding this new law, may be obtained from the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611. The substantive Virginia departures from the official text are discussed in the Virginia Bar Association article.

15. UNIF. PROB. CODE §§ 2-104, 2-601, 8 U.L.A. 64, 128 (1983) (intestate succession and wills, respectively). The new legislation codifies the 120-hour rule for statutory rights, for governing instruments, and for co-owners with the right of survivorship. VA. CODE ANN. §§ 64.1-104.2 to .4 (Cum. Supp. 1994).

16. The consolidation results in the decedent's assets being held and administered

fied in section 64.1-73 which, however, has generally contemplated the existence of a valid trust to serve as a receptacle for the property being poured over under a will.¹⁷ One problem encountered by lawyers in suggesting the use of a pour-over is the inability or unwillingness of some clients to place assets into the inter vivos trust (referred to as "funding") during the client's lifetime and, under the American common law rule, "(a) trust cannot be created unless there is trust property."¹⁸

For some time section 64.1-73 has provided an exception to the existence-of-property rule in the case of a pour-over to an unfunded insurance trust, which was deemed to be "established upon execution of the instrument creating such trust regardless of the existence, size or character of the corpus of the trust."¹⁹ In the case of a pour-over to any other type of trust, however, section 64.1-73 has not provided for any waiver of the existence-of-property rule. Responding to this problem in the context of clients' unwillingness or inability to fund these other trusts, another common practice developed of asking clients to furnish a ten or twenty-dollar bill that would be stapled to the trust agreement of the otherwise asset-less trust in an attempt to meet the existence-of-property rule.²⁰ The existence-of-property rule that led to the creation of this practice was eliminated

in an inter vivos trust instead of a testamentary trust. Until recently, this method was the only way to avoid the annual accounting that would otherwise be required of a testamentary trustee. The 1993 Session of the General Assembly eliminated this distinction by permitting a testator to waive the accounting requirement otherwise imposed upon a testamentary trust. VA. CODE ANN. § 26-17.7 (Cum. Supp. 1994).

17. VA. CODE ANN. § 64.1-73 (Repl. Vol. 1991).

18. RESTATEMENT (SECOND) OF TRUSTS § 74 (1959). The issue was recently before the Virginia Supreme Court in a different context. *See* 247 Va. 513, 443 S.E.2d 146 (1994). *See also* discussion *infra* part III.E.

19. VA. CODE ANN. § 64.1-73(B)(1) (Repl. Vol. 1991).

20. The effectiveness of this tactic is unclear, in the absence of affirmative appellate authority, because of the obvious argument that no genuine trust ever existed. In commenting upon a pour-over to a trust with a significant corpus, one appellate court commented as follows:

The trust from 1934 until the death of the testatrix at no time was a mere shell without the body of a trust. The trust with substantial assets has had since 1934 and continues to have an active independent life of its own. We are not concerned here, for example, with a trust with nominal or no assets in the settlor's lifetime which in substance is created by will.

Canal National Bank v. Chapman, 157 Me. 309, 310, 171 A.2d 919, 920 (1961).

by the 1994 amendments which extend the waiver-of-corpus rule, heretofore limited to inter vivos insurance trusts, to all inter vivos trusts serving as receptacles for testamentary pour-over provisions.²¹ All inter vivos trusts serving as pour-over receptacles are now deemed to be established "upon execution of the instrument creating such trust," for the purposes of the pour-over.²² In other words, the existence-of-property rule has been transformed into an existence-of-instrument rule, insofar as inter vivos receptacle trusts are concerned. However, it is important to note that the amendment to section 64.1-73 deals only with pour-overs to receptacle inter vivos trusts. The new rule does not have any applicability to a standard or non-receptacle inter vivos trust which must still comply with the common law existence-of-property rule.²³ Lastly, this section's former effective date provision is amended to provide for the applicability of the new rule to pour-over provisions in the wills of persons dying after June 30, 1994.²⁴

D. *Probate Avoidance—TOD Security Registration*

The P.O.D. or "payable on death" concept that is recognized by the federal government with regard to savings bonds,²⁵ and by Virginia with regard to accounts in financial institutions,²⁶ is expanded by the 1994 Session's enactment of the Uniform Transfer on Death (TOD) Security Registration Act.²⁷ The nature of this Survey and space limitations preclude a line-by-line analysis of this new legislation.²⁸ However, the following five

21. Act of Apr. 9, 1994, ch. 562, 1994 Va. Acts 787 (codified at VA. CODE ANN. § 64.1-73(B) (Cum. Supp. 1994)).

22. VA. CODE ANN. § 64.1-73(B)(1) (Cum. Supp. 1994).

23. *See id.*

24. *Id.* § 64.1-73(H) (Cum. Supp. 1994). It is easy to understand the insertion of a prospective effective date. However, it is not apparent why the following saving language from the prior repealed effective date provision was not retained: "However, the provisions of this section shall not be construed as casting any doubt upon the validity [of] . . . any devise or bequest which does not come within the provisions of this section." This language was eliminated from Virginia Code section 64.1-73(G) by Act of Apr. 9, 1994, ch. 562, 1994 Va. Acts 787.

25. 31 C.F.R. § 315.7 (1993).

26. VA. CODE ANN. §§ 6.1-125.1 to .16 (Repl. Vol. 1993).

27. Act of Apr. 7, 1994, ch. 472, 1994 Va. Acts 655 (codified at VA. CODE ANN. §§ 64.1-206.1 to .8 (Cum. Supp. 1994)) (enacting UNIF. TRANSFER ON DEATH (TOD) SECURITIES REGISTRATION ACT, 8B U.L.A. 479 (1983)).

28. As no substantive changes were made by Virginia in adopting this Uniform

points might be briefly noted. First, no entity is required to offer securities in TOD form; instead the Act encourages entities to offer such registration by providing significant protective provisions for those who do.²⁹ Second, although major national corporations may not accept this invitation for a period of time, one can immediately have the benefit of the Act by simply re-titling one's security account with one's broker as a TOD account.³⁰ And, if greater flexibility is desired, one can obviously have more than a single security account. Third, a variety of beneficiary designations are contemplated.³¹ Fourth, although no mention is made thereof in the Act's official comments, it is clear that, as the Act refers to a TOD beneficiary as a "person,"³² instead of an "individual," one can name a charity as a TOD beneficiary, or use the TOD designation to pour over securities to an inter vivos trust at death.³³ Lastly, this Act will be of particular assistance to individuals who, in the past, have attempted to keep their securities out of probate by registering them jointly in their name and the name of their intended successor. A joint registration immediately passes a one-half interest to the other person, to the sorrow of the original owner when the other asserts lifetime ownership rights, when the other's creditors levy thereon, or when the original owner desires a change of successor. All of these problems are eliminat-

Act, the Commissioners official comments thereto will be particularly helpful in gaining a complete understanding of its operation and potential utilization. Copies of the Act, containing these comments, may be obtained from the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611.

29. VA. CODE ANN. § 64.1-206.6 (Cum. Supp. 1994).

30. *Id.* § 64.1-206.1 (defining "security" as including "security account" which, in turn, is defined as including a "securities account with a broker").

31. One example offered by the Act is "John S. Brown Mary B. Brown JT TEN TOD John S. Brown, Jr., LDPS." *Id.* § 64.1-206(8)(B)(3). In such a case, John and Mary own with survivorship between them, and on the death of the second to die, John Jr. will become the owner or, if John Jr. is not then surviving, the ownership will pass to John Jr.'s then surviving lineal descendants in accordance with the law of intestate succession.

32. *Id.* § 64.1-206.1 (definition of "beneficiary"). For the treatment of the word "person" in Virginia, see Code § 1-13.19 (Repl. Vol. 1987), and cases annotated thereunder. Note also that the Act uses the more restrictive term, "individual," when identifying those who may create a TOD account. *Id.* § 64.1-206(2)(A).

33. Note, however, that such a pour-over could only be made to a funded trust. The 1994 amendments to § 64.1-73, eliminating the corpus requirement for a receptacle trust, are applicable only when devises or bequests are made thereto. See discussion *supra* notes 16-23 and accompanying text.

ed under the Act because a TOD registration "has no effect on ownership until the owner's death . . . [and it] may be canceled or changed at any time . . . without the consent of the beneficiary."³⁴

E. *Virginia Inheritance Tax*

Prior to the repeal of the Virginia inheritance tax, the Code provided for inheritance tax upon a remainder interest devised or bequeathed by a decedent to be assessed "at the time when the beneficiary becomes entitled to the same in possession or enjoyment."³⁵ The Virginia Estate Tax Act,³⁶ which replaced the repealed inheritance tax, imposed an estate tax³⁷ that would result in a form of double taxation of remainder interests in some cases if literally applied, because the repealed Virginia inheritance tax laws are still applicable with respect to untaxed interests derived from estates of decedents who died prior to January 1, 1980.³⁸

For example, suppose a decedent's will created a trust prior to January 1, 1980, for the surviving spouse for life in the typical way that would qualify for the federal estate tax marital deduction,³⁹ and then provided for the remainder to pass to the children. As previously noted, the Virginia inheritance tax on the children's remainder would not be assessed until the life tenant's death. However, under federal estate tax law, which is

34. Act of Apr. 7, 1994, ch. 422, 1994 Va. Acts 593 (codified at VA. CODE ANN. § 64.1-206.4 (Cum. Supp. 1994)).

35. VA. CODE ANN. § 58-173 (Repl. Vol. 1974), *repealed* by Act of Apr. 10, 1978, ch. 838, 1978 Va. Acts 1465 (second enactment).

36. Act of Apr. 10, 1978, ch. 838, 1978 Va. Acts 1465 (codified at VA. CODE ANN. §§ 58.1-900 to -938 (Repl. Vol. 1991 & Cum. Supp. 1994)).

37. This estate tax is imposed in the amount of the "federal credit," which is defined as "the maximum amount of credit for state death taxes allowable by § 2011 of the United States Internal Revenue Code of 1954, as amended or renumbered, or successor provision, in respect to a decedent's taxable estate." VA. CODE ANN. § 58.1-901 (Repl. Vol. 1991 & Cum. Supp. 1994).

38. *Id.* § 58-173 (Repl. Vol. 1974), *replaced* by VA. CODE ANN. §§ 58.1-900 to -938 (Repl. Vol. 1991 & Cum. Supp. 1994).

39. The most popular way to make a gift qualifying for the federal estate tax marital deduction at this time was by way of a trust pursuant to section 2056(b)(5) of the Internal Revenue Code, which required that the surviving spouse be entitled to all of the income for life and have either an inter vivos or testamentary general power of appointment over the corpus. I.R.C. § 2056(b)(5) (1986).

incorporated into the operation of the Virginia Estate Tax Act, the entire value of the property in question (life estate and remainder) will be included in the estate of the surviving spouse upon the surviving spouse's death.⁴⁰ Thus, upon the death of the surviving spouse, the remainder interest will be taxable twice, once to the children under the preserved portion of the Virginia inheritance tax law, and again in the surviving spouse's estate under the Virginia Estate Tax Act. In order to prevent this unfairness, the Virginia Department of Taxation did not apply the law literally but developed an unwritten policy of not taxing a remainder if the remainder was included in the taxable estate of the life tenant. Recently, some question has developed about the continued existence of this policy in the Department of Taxation. The 1994 amendments eliminate this concern by providing that "no inheritance taxes shall be imposed on any remainder interest included in the taxable estate and subject to the tax imposed by [the Virginia Estate Tax Act, which incorporates federal estate tax law]."⁴¹ The 1994 amendment also confirms the existence of the prior policy by providing that "the provisions of this act are declaratory of existing law."⁴²

F. *Estate Taxes*

1. Apportionment to Non-Probate Property

The general rule of Virginia estate tax apportionment law calls for the estate tax burden of a decedent's estate to be apportioned among the estate's beneficiaries in proportion to their interests therein.⁴³ Notwithstanding the general rule, freedom of choice is preserved by a further rule that allows a testator to "designate the fund or funds or property out of which such payment shall be made."⁴⁴ However, dictum in a recent federal case casts some doubt upon the ability of a testator, whose will contained language dealing with the apportionment of taxes, to

40. *Id.* § 2041 (1986).

41. Act of Apr. 12, 1994, ch. 208, 1994 Va. Acts 298 (codified at VA. CODE ANN. § 58.1-900 (1994)) (amending Act of Apr. 10, 1978, ch. 838, 1978 Va. Acts 1465).

42. VA. CODE ANN. § 58.1-900 (Cum. Supp. 1994).

43. *Id.* § 64.1-161 (Repl. Vol. 1991).

44. *Id.* § 64.1-165.

also direct that recipients of non-probate assets includible in the taxable estate pay any of the estate taxes attributable thereto.⁴⁵ In response, section 64.1-165 was amended by eliminating the language upon which the dictum was based.⁴⁶ In addition, section 64.1-165 was amended to expressly permit a donor, by testamentary or inter vivos document, to provide for non-probate property included in one's estate to bear a portion of the estate tax burden.⁴⁷

2. QTIP Remainder Beneficiaries

One of the ways in which a married person may leave property to the surviving spouse that will qualify for the federal estate tax marital deduction is by a "QTIP" (qualified terminable interest property) provision which, reduced to its simplest aspect, is a life estate in favor of the surviving spouse.⁴⁸ Upon the death of the surviving spouse in such a case, federal law requires that the full value of the property be included in the surviving spouse's gross estate,⁴⁹ and Virginia law apportions the estate tax attributable thereto to the beneficiaries who take

45. *Estate of Reno v. Commissioner*, 945 F.2d 733, 735-36 (4th Cir. 1991) (en banc), discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts and Estates*, 26 U. RICH. L. REV. 873, 899 (1992). The dictum focuses on Virginia Code § 64.165, the portion of the anti-apportionment statute which provides that if a will contains a direction regarding apportionment of taxes, "the provisions of the will . . . shall be given effect to the same extent as if this article had not been enacted." VA. CODE ANN. § 64.1-165 (Cum. Supp. 1991), *repealed by* Act of Apr. 20, 1994, ch. 917, 1994 Va. Acts 1518, (codified at VA. CODE ANN. § 64.1-165 (Cum. Supp. 1994)). The dictum interpreted this language to mean that no estate taxes can be collected from nonprobate assets if there is *any* disturbance of the statutory scheme. *Estate of Reno*, 945 F.2d at 736.

46. Act of Apr. 20, 1994, ch. 917, 1994 Va. Acts 1518 (codified at VA. CODE ANN. § 64.1-165 (Cum. Supp. 1994)) (amended Repl. Vol. 1991). The words, "and in every such case the provisions of the will or of such written instrument executed inter vivos shall be given effect to the same extent as if this article had not been enacted" are those which have been eliminated.

47. However, this portion cannot exceed a specific property's proportionate share of the taxes unless such provision is contained in the document creating the property interest. *Id.*

48. I.R.C. § 2056(b)(7) (1986). To qualify, this interest must provide for the property's income to be payable to the surviving spouse no less frequently than annually (or for the spouse to have the use of non-income producing property) for life, and must not allow any person to have a power of appointment exercisable over the property in favor of anyone other than the surviving spouse. *Id.* § 2056(b)(7)(ii).

49. *Id.* § 2044 (1986).

the remainder following the death of the surviving spouse.⁵⁰ As the negotiations with the Internal Revenue Service concerning the estate tax liability of the surviving spouse's estate will be conducted by the estate's personal representative, this means that those paying the tax (the remainder beneficiaries) are not only excluded from the negotiation process, they are not even entitled to any information concerning these proceedings.⁵¹ The 1994 amendment responds to this problem by imposing a duty of good faith upon the surviving spouse's personal representative vis-à-vis the remainder beneficiaries of QTIP property, entitling QTIP beneficiaries to certain relevant information from the surviving spouse's personal representative, and mandating that the representative of the QTIP beneficiaries be invited to attend any administrative conference or proceeding with the Internal Revenue Service where valuation issues affecting their tax liability will be considered.⁵² Although the 1994 amendment responds to the described problem, the real problem is far larger than the one described. The same fairness issues are involved whenever any non-probate property is included in a decedent's estate, i.e., whenever the recipients of the property who bear the estate tax burden are shut out of the tax resolution process. It is regrettable that the 1994 amendment focused on only one, admittedly major, aspect of the larger issue instead of providing an inclusive remedy for all takers of non-probate property as well.

3. Directions to Pay All Taxes

A "standard" clause found in most will-drafting books and, in this writer's experience, in most wills, is a direction to the executor to pay all death taxes without apportionment. This language, which causes the burden of all death taxes to be payable out of the assets going to the residuary beneficiaries, "is usually not appropriate . . . [and] can cause complete distor-

50. VA. CODE ANN. § 64.1-161(B) (Cum. Supp. 1994).

51. This causes some concern because of the possibility that an estate's personal representative might make concessions concerning valuation of the QTIP property to the detriment of the remainder beneficiaries in order to secure a concession from the I.R.S. regarding property that is taxable to the surviving spouse's estate.

52. Act of Apr. 20, 1994, ch. 917, 1994 Va. Acts 1518 (codified at VA. CODE ANN. § 64.1-161(C) (Cum. Supp. 1994)).

tion of the testator's estate plan."⁵³ One aspect of the distortion problem relates to the imposition of estate taxes on non-probate assets, which may not be thought of during the will writing process. Another aspect relates to the number and variety of death taxes, in addition to the estate tax, which also may not be thought of during the will writing process. Due to this latter problem, section 64.1-66.1 has provided that a general direction in a will "to pay all taxes imposed on account of a testator's death or similar language," would not be construed to include several death taxes imposed by federal law.⁵⁴ In recognition that this problem has worsened with the increase of additional death taxes in recent years, the 1994 amendments moved former section 64.1-66.1 into the tax apportionment act and extended its scope to refer to six death taxes.⁵⁵

4. General

In addition to the foregoing, the 1994 Session made certain amendments of a housekeeping and clarifying nature. Perhaps the only item of significance in this area is the recognition, in regard to tax apportionment, of the need to take into account not only the estate taxes levied by Virginia and the federal government, but also those imposed by other states.⁵⁶

G. *Filing List of Heirs*

One of the duties imposed upon the personal representative of a decedent's estate is the filing of a list of heirs identifying those persons who take the property of an intestate decedent or who would have taken the same but for the will of a testate

53. Jonathan G. Blattmachr, *Are You Using the "Wrong" Tax Apportionment Clause?*, PROB. & PROP., Nov./Dec. 1989, at 26.

54. VA. CODE ANN. § 64.1-66.1 (Repl. Vol. 1991), *repealed* by Act of Apr. 20, 1994, ch. 917, 1994 Va. Acts 1518 (codified at VA. CODE ANN. § 64.1-165.1 (Cum. Supp. 1994)).

55. *Id.* § 64.1-165.1 (Cum. Supp. 1994) (dealing with taxes on: (1) qualified use property under I.R.C. § 2032A, (2) general power of appointment property under I.R.C. § 2041, (3) qualified terminable interest property under I.R.C. § 2044, (4) qualified domestic trust property under I.R.C. § 2056A, (5) certain generation skipping transfers under I.R.C. Chapter 13, and (6) excess retirement accumulations under I.R.C. § 4980A).

56. *Id.* §§ 64.1-160, -161, -163.

decedent.⁵⁷ However, there has been no such requirement, in those cases where a will is probated but no one qualifies as personal representative. The 1994 legislation now imposes this filing duty upon the proponent of a will under these circumstances.⁵⁸

Unfortunately, although this legislation has solved a problem not covered by the Code, it appears to have inadvertently created a new problem where none previously existed. In a number of situations, particularly cases of husband and wife when the first dies, the predominance of survivorship property and other will substitutes eliminates the need for a decedent's will to be probated. Prior law provided that "[i]f there has been no qualification of a personal representative within thirty days following death, a list of heirs may be filed by any heir or devisee."⁵⁹ The 1994 legislation eliminates the words "or devisee" from this provision, and replaces them with "at law of a decedent who died intestate."⁶⁰ Thus, in those cases where the will of a testate decedent is not probated, the prior permissive authorization for any of the decedent's heirs to file a list of heirs after thirty days no longer exists.⁶¹ Although this gap may displease the genealogical community, it is doubtful that it will create any genuine legal problems.

57. *Id.* § 64.1-134 (Repl. Vol. 1991). In addition to the heirs' names, this section requires that their ages, addresses, and degrees of relationship to the decedent be stated. *Id.*

58. Act of Apr. 5, 1994, ch. 327, 1994 Va. Acts 457 (codified at VA. CODE ANN. § 64.1-134 (Cum. Supp. 1994)). This enactment further provides that all lists of heirs must be made under oath, which appears to be duplicative because existing language requires that the list of heirs be "accompanied by an affidavit that he [the person filing the list of heirs] has made diligent inquiry as to such names, ages and addresses and that he believes such list to be true and correct." VA. CODE ANN. § 64.1-134(2) (Cum. Supp. 1994).

59. VA. CODE ANN. § 64.1-134 (Repl. Vol. 1991).

60. *Id.* § 64.1-134 (Cum. Supp. 1994).

61. Similarly, no devisee under an unprobated will could file a list of heirs. However, the devisee aspect of this issue raises a "chicken v. egg" predicament because some would argue that no devisee can exist until a writing purporting to be a will is actually probated.

H. *Tax and Court Costs in Small Estates*

Section 26-4 grants the court and its clerk the discretionary power to dispense with surety upon the official bond of personal representatives, guardians and committees where the amount coming into the fiduciary's possession does not exceed \$5,000.⁶² This section has also contained a sentence providing that "on estates of decedents of \$500 or less in value there shall be no tax or court costs upon such qualification."⁶³ The 1994 amendment repeals the quoted language.⁶⁴ This repeal does not make any change in Virginia law, however, because other Code sections already eliminate any tax or clerk's fee when a decedent's estate is no more than \$5,000.⁶⁵

I. *Personal Representatives—Waiver of Surety*

To require surety upon the bond of a personal representative who is also the sole taker of a decedent's estate would be useless and foolish. Extending this realization somewhat, section 64.1-121 has provided for a waiver of surety whenever there is a complete identity between the personal representatives and the takers of a decedent's estate, whether originally or as a result of disclaimer, as long as there are no more than three persons serving in this dual capacity.⁶⁶ The 1994 amendment further expands this waiver of surety provision by eliminating any restriction on the number of persons serving in this dual capacity, and permitting the waiver as long as all of the takers of a decedent's estate are personal representatives, even though there may be one or more personal representatives who are not takers.⁶⁷ It is doubtful that there will be many instances

62. VA. CODE ANN. § 26-4 (Repl. Vol. 1992).

63. *Id.*

64. Act of Mar. 4, 1994, ch. 25, 1994 Va. Acts 29 (codified at VA. CODE ANN. § 26-4 (Cum. Supp. 1994)).

65. See VA. CODE ANN. § 14.1-112(4) (Repl. Vol. 1993) (providing that "[n]o [clerk's] fee shall be charged for estates of \$5,000 or less for qualifying a personal representative or other fiduciary"); *Id.* VA. CODE ANN. § 58.1-1712 (Repl. Vol. 1991) (providing that the probate "tax imposed by this section shall not apply to decedents' estates of \$5,000 or less in value").

66. VA. CODE ANN. § 64.1-121, (Repl. Vol. 1991).

67. Act of Apr. 6, 1994, ch. 393, 1994 Va. Acts 569 (codified at VA. CODE ANN.

where it will be desirable for four or more persons to be involved in the administration of a decedent's estate, but a reasonable number of cases can be expected where a non-taker, such as a beneficiary's or decedent's lawyer, will be serving as personal representative with others who are all takers.

J. *Inter Vivos Trusts—Merger*

The common law rule of merger provides that "if two consecutive, vested, legal estates in land should, after their creation, come to be owned by the same person, the lesser estate is merged in the larger."⁶⁸ To illustrate, suppose X conveys to Y for life, remainder to the heirs of Z (a living person). First, the state of the title is possessory life estate in Y, contingent remainder in the (unascertained) heirs of Z, and reversion in fee simple in X (which is vested, subject to complete divestment in favor of Z's heirs upon Z's death). Second, if, sometime prior to Z's death, X conveys X's reversion to Y (the life tenant), Y will now own two, consecutive, vested, legal estates, and the smaller (the life estate) will merge into the larger (the reversion in fee simple) and cease to exist as a separate estate. Under a further common law rule, the doctrine of destructibility of contingent remainders, the consequence of the above merger would be the destruction of the contingent remainder in the heirs of Z, with the result that the state of the title would be "Y, in fee simple absolute."⁶⁹

In this context, certain title insurance companies became concerned with the state of the title to real estate held in a revocable, inter vivos trust where the settlor was the sole trustee and sole beneficiary during the settlor's lifetime, and the only interest not owned by the settlor was a contingent future interest in the settlor's heirs, surviving children, or some other unascertained group. There was no justification for such a concern because: (1) the doctrine of merger does not apply to land

§ 64.1-121 (Cum. Supp. 1994).

68. LEWIS M. SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS § 15, at 51 (1951).

69. *Id.* "If the prior estate of freehold [Y's life estate] terminates before the happening of the contingency on which a contingent remainder is limited [Z's death], the remainder can never take effect." *Id.*

held in trust, but only to legal interests in land,⁷⁰ (2) the doctrine of merger does not apply if the life estate, contingent remainder, and reversion are created at the same time by the same instrument,⁷¹ and (3) even if the doctrine of merger did apply, the doctrine of destructibility of contingent remainders has been abolished in Virginia.⁷² Nevertheless, new Code section 55-7.1 was enacted to provide that "[t]he doctrine of merger shall not apply to inter vivos trusts in which the trustee, whether the creator or a third party, is a beneficiary and has the power of revocation or power of appointment over the trust corpus."⁷³

K. *Probate Avoidance—Boat Titles*

The Code contains a number of statutes designed to assist a decedent's successors in interest to avoid probate in situations where it would not otherwise be necessary except for the presence of certain assets. These provisions were expanded in 1993 to include watercraft for which a title was issued by the Virginia Department of Game, Inland Fisheries and Boating.⁷⁴ A similar statute focusing on vessels registered with the United States Bureau of Customs, but restrained to instances where the vessel's market value did not exceed \$7,000, was amended by the 1994 Session to apply to all such vessels regardless of their market value.⁷⁵

70. *Id.*

71. *Id.*

72. VA. CODE ANN. § 55-15 (Repl. Vol. 1986).

73. Act of Apr. 9, 1994, ch. 563, 1994 Va. Acts 789 (codified at VA. CODE ANN. § 55-7.1 (Cum. Supp. 1994)). The enactment further provides that "[s]uch a trust, whenever created, is for all purposes a valid trust so long as the trust document identifies one or more other beneficiaries, whether present or future, vested or contingent." *Id.*

74. VA. CODE ANN. § 29.1-717.3 (Cum. Supp. 1994), discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts and Estates*, 27 U. RICH. L. REV. 833, 837 (1993).

75. Act of Apr. 6, 1994, ch. 399, 1994 Va. Acts 572 (codified at VA. CODE ANN. § 64.1-123.2 (Cum. Supp. 1994)).

L. *Environmental Concerns*

The 1990 Session amended section 64.1-57, which authorized the incorporation by reference of certain fiduciary powers into wills and trusts, by adding a new subsection containing extensive powers relating to environmental concerns.⁷⁶ The portion of this amendment relating to a fiduciary's personal liability, which was inappropriately placed in the powers section in the first place, was moved by the 1994 legislation to new section 26-7.4.⁷⁷ This legislation adds a further provision to the new section purporting to insulate a fiduciary from liability under environmental laws "unless the fiduciary's acts or omissions outside the scope of its fiduciary duties constitute conduct that independently would give rise to individual liability."⁷⁸

M. *Elder Law*

The 1994 Session continued the trend of recent sessions in passing numerous bills relating to this recently recognized separate field of law. Although this legislation is tangentially related to the wills, trusts and estates field, the 1994 elder law legislation is too extensive to summarize as a part of this survey. It is hoped that this subject might soon be addressed as a separate subject in these pages. In the interim, it may be noted

76. This legislation is noted in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts and Estates*, 24 U. RICH. L. REV. 827, 837 (1990).

77. Act of Apr. 8, 1994, ch. 476, 1994 Va. Acts 662 (codified at VA. CODE ANN. § 26-7.4(C)-(D) (Cum. Supp. 1994)) (replacing VA. CODE ANN. § 64.1-57(t)(6) (Repl. Vol. 1991)). The language reads:

A fiduciary shall not be liable in its individual capacity to any beneficiary or other party for any decrease in value of assets in trust or in an estate by reason of the fiduciary's investigation or evaluation of potential contamination of property held in the trust or estate or the fiduciary's compliance with any environmental law, specifically including any reporting or disclosure requirement under such law.

Neither a fiduciary's acceptance of property nor its failure to inspect property shall be deemed to create any implication as to whether or not there is or may be any liability under any environmental law with respect to such property.

Id.

78. VA. CODE ANN. § 26-7(4)(B) (Cum. Supp. 1994).

that the Virginia Bar Association created a separate Elder Law Section this past year, and that one may obtain a summary of the 1994 legislation relating to elder law from the Association's offices.⁷⁹

III. 1993-94 JUDICIAL OPINIONS

A. *Wills—Fraud and Undue Influence*

The Virginia Supreme Court applied long-settled principles of law to the facts in *Carter v. Williams*,⁸⁰ and determined that, although the contestant's evidence did not create a presumption of undue influence, it did create a presumption of fraud.⁸¹ The presumption of fraud holding was reached "even though [the attorney/draftsman] was not the *direct* beneficiary in the will. By naming his wife as a beneficiary, [the attorney/draftsman] became an *indirect* beneficiary, and that, coupled with other suspicious circumstances, was sufficient to raise the presumption."⁸²

In addition to the presumption of fraud, the attorney who drafted the testatrix' will in this case was also clearly in violation of Disciplinary Rule 5-104(B) because the attorney's wife, who was the primary beneficiary, was not related to the testator.⁸³ However, the trial court correctly excluded the

79. Requests for the legislative summaries prepared by the Virginia Bar Association may be addressed to the Association at 701 East Franklin Street, Suite 1120, Richmond, Virginia 23219.

80. 246 Va. 53, 431 S.E.2d 297 (1993).

81. *Id.* at 59, 431 S.E.2d at 300. In reaching the latter conclusion, the court relied upon a prior case where it stated:

We have repeatedly subscribed to the principle that where the draftsman holds a position of trust or confidence, and is himself a major beneficiary in the will, his participation creates a presumption of fraud. The courts view such conduct with disfavor. It is necessary to overcome this presumption by evidence which satisfies the jury, and it is for the jury to determine whether the burden has been borne.

Carter, 246 Va. at 58, 431 S.E.2d at 300 (quoting *Barnes v. Barnes*, 171 Va. 1, 8, 197 S.E. 403, 405 (1938)).

82. 296 Va. at 59, 431 S.E.2d at 300 (emphasis in original).

83. DR 5-104(B) provides that "[a] lawyer shall not prepare an instrument giving the lawyer or a member of the lawyer's family any gift from a client, including a testamentary gift, except where the client is a relative of the donee." CODE OF PROFESSIONAL RESPONSIBILITY VA. LAW REG., Aug. 1993, at 5, 15.

contestant's evidence of this violation because "[t]he Code of Professional Responsibility does not provide a basis for private causes of action."⁸⁴

B. Wills—Testamentary Intent

The main issue in *Bailey v. Kerns*⁸⁵ was the correctness of the trial court's ruling that a holographic writing found on the back of a hardware store receipt contained evidence of testamentary intent.⁸⁶ The full text of this writing was as follows:

George Kerns

When this property is sold I want this

Tommy Kerns \$10,000

Shelly Guidara \$10,000

David Penny \$5,000

Jamie Penny \$5,000

The rest goes to you and your family.

Of course all my Bills are to be paid.

Love you even if I haven't been much of a Mom

- Edith B. Kerns.⁸⁷

Examining the entirety of the document, the court observed that "the instrument contains several elements commonly associated with wills,"⁸⁸ and held "that these elements, appearing together, constitute evidence of testamentary intent on the face of the instrument."⁸⁹ This holding led the court to the second-

84. *Carter*, 246 Va. at 60, 431 S.E. at 301 (citing *Ayyildiz v. Kidd*, 220 Va. 1080, 1085, 266 S.E.2d 108, 112 (1980)). In *Ayyildiz*, the court rejected the argument that "negligence might be founded upon a duty owed to the opposing party under the Code of Professional Responsibility." *Ayyildiz*, 270 Va. at 1085.

85. 246 Va. 158, 431 S.E.2d 312 (1993).

86. "The word 'testamentary' means 'applicable or related to death; having to do with dispositions or arrangements effective upon the happening of that event.'" *Id.* at 162, 312 S.E.2d at 314-15 (quoting *Poindexter v. Jones*, 200 Va. 372, 376, 106 S.E.2d 144, 146 (1958)).

87. *Id.* at 161, 431 S.E.2d at 314.

88. *Id.* at 162, 431 S.E.2d at 315. These elements were the allocation of specific dollar amounts to specified persons, followed by a disposition of the balance from the property's sale, the fact that it was addressed to another and referred to a sale in the future, the statement regarding the payment of all bills, the declaration of affection in closing, and the signature using Edith's full name. *Id.* at 162-63, 431 S.E.2d at 315.

89. *Id.* at 163, 431 S.E.2d at 315.

ary issue which was the admissibility of extrinsic evidence to establish testamentary intent of a writing offered as a will. Although observing that this question must be answered in the negative when the will is devoid of testamentary intent, the court referred to prior authority for the rule that "when the face of the instrument contains some evidence of testamentary intent, extrinsic evidence may be admitted to determine whether the instrument is testamentary in nature."⁹⁰

C. Wills—Interpretation

The sole issue in *Bowles v. Kinsey*⁹¹ was "whether the trial court erred in construing the term 'personal property' to include only tangible personal property."⁹² Article IV of the testatrix' attorney drawn will bequeathed "all of my personal property" outright to her daughter, and the residuary clause in Article V created a trust of "[a]ll the rest and residue of my property, real, personal or mixed" for the daughter until she reached age sixty-five.⁹³ The court's opinion begins with the predicable recognition that "[t]he paramount rule of will construction is that the intention of the testator controls,"⁹⁴ and that in determining this intent "a court must examine the will as a whole and give effect, so far as possible, to all its parts."⁹⁵ Having set the stage, the court reasoned as follows: (1) "[s]ince the term 'personal property' is a technical term, the testatrix generally is presumed to have used that term in its technical sense" in Article IV,⁹⁶ (2) "[i]f the testatrix had intended to limit the specific bequest in Article IV to only her tangible personal property, she could have directed her attorney to effectuate that re-

90. *Id.* at 164, 431 S.E. 2d at 316 (citing *Grimes v. Grimes*, 175 Va. 126, 132-34, 7 S.E.2d 115, 117-18 (1940)).

91. 246 Va. 298, 435 S.E.2d 129 (1993).

92. *Id.* at 299, 435 S.E.2d at 129. The trust was to be divided into three equal shares when the daughter reached the age of 60, and these shares were to be paid to her at ages 60, 62 and 65. *Id.* at 300, 435 S.E.2d at 129-30.

93. *Id.* at 299, 435 S.E.2d at 129. The trust was to be divided into three equal shares when the daughter reached the age of 60, and these shares were to be paid to her at ages 60, 62 and 65. *Id.* at 300, 435 S.E.2d at 129-30.

94. *Id.* at 300, 435 S.E.2d at 130.

95. *Id.* at 301, 435 S.E.2d at 130 (quoting *Thomas v. Copenhaver*, 235 Va. 124, 128, 365 S.E.2d 760, 763 (1988)).

96. *Id.* at 302, 435 S.E.2d at 130.

sult,⁹⁷ and (3) “[a] specific bequest must prevail over a residual bequest.”⁹⁸ Accordingly the court concluded that all of testatrix’ personalty passed outright to the daughter under Article IV. The court

disagree[d] with the trial court’s ruling that, in order to give effect to the trust provisions in Article V, Article IV must be construed to include only tangible personal property. The record shows that the testatrix’ real property is valued at \$67,500. In accordance with the powers given the trustees in the will, this real property can be rented or sold to produce an income until (the daughter) is 60 years old.⁹⁹

With respect, it is submitted that the court erred in this matter. First, the purpose of the trust was not “to produce an income until Bowles [the daughter] is 60 years old.”¹⁰⁰ It was to insure her “support and maintenance” until that time.¹⁰¹ Second, although the court refers to the record showing that the testatrix’ real estate was worth \$67,500, the opinion fails to mention that the record also shows the value of testatrix’ intangible personal property at her death was \$137,435.13.¹⁰² Looking at testatrix’ goal of insuring her daughter’s support until age 65 in the context of the relatively small earnings that could be expected from a trust of only \$67,500,¹⁰³ it is difficult to believe that testatrix intended her intangible personal property, which amounted to two-thirds of her estate, to pass outright to the daughter upon testatrix’ death instead of also going into the trust for the daughter’s benefit. On these facts, this writer, like the trial court judge, is “lead to the inescapable conclusion” that Article IV was intended to pass only the testatrix’ tangible

97. *Id.*

98. *Id.*

99. *Id.* at 301, 435 S.E.2d at 131.

100. *Id.*

101. *Id.* at 299, 435 S.E.2d at 130.

102. *Id.* at 29. This is the amount shown on the estate inventory filed by the testatrix’ executors. Appellant’s Appendix at 14 *Bowles v. Kinsey*, 246 Va. 298, 435 S.E.2d 129 (1993) (Record No. 921770).

103. The record shows that the will was drafted on November 7, 1990 and that the testatrix died on July 12, 1991. *Id.* at 13, 15. This was not a time which was characterized by high interest rates, and the entire \$137,435.13 of intangible personal property was composed of bank deposits. *Id.* at 14.

personal property outright to her daughter.¹⁰⁴ Finally, some comment must be made about the court's statement that "[i]f the testatrix had intended to limit the specific bequest in Article IV to only her tangible personal property, she could have directed her attorney to effectuate that result."¹⁰⁵ It is quite possible that testatrix did just that, in her own words, and then relied on his choice of legal language to accomplish that result.¹⁰⁶ Certainly it cannot be expected that a layperson has the ability to literally direct her attorney in the choice of legal language to be used. This would be completely unrealistic. It is unfortunate that the court used this language in the resolution of this case, whatever was meant. It is submitted that had the court remained faithful to its opening recognition that "[t]he paramount rule of will construction is that the intention of the testator controls,"¹⁰⁷ a complete examination of the facts, in light of the testatrix' purpose, would have lead to a rebuttal of the presumptive, all-inclusive meaning accorded to "personal property."

D. Wills-Forfeiture Provisions

Virginia Foundation of Independent Colleges v. Goodrich,¹⁰⁸ raised the issue "whether a forfeiture provision in a will is actuated when a beneficiary files a declaratory judgment action seeking an interpretation of a phrase in the will."¹⁰⁹ Decedent's bequest of "all other of my personal property exclusive of antique furniture and library [A] and [B], or the survivor of them, in approximately equal shares," was interpreted by the executor as encompassing only tangible personal property.¹¹⁰ Decedent's will further provided for the forfeiture of the gifts to any beneficiary who contested the will, or who ques-

104. More could be said in regard to this case but the space limitations of this review article preclude a complete discussion of all points.

105. *Bowles*, 246 Va. at 301, 435 S.E.2d at 130.

106. How many lawyers have heard clients say the equivalent of, "I don't really understand all of this legal mumbo jumbo, but if you say its what I want, I'll sign it."

107. *Id.* at 300, 435 S.E.2d at 130.

108. 246 Va. 435, 436 S.E.2d 418 (1993).

109. *Id.* at 437, 436 S.E.2d at 419.

110. *Id.* Note that this was the same issue before the court in *Bowles v. Kinsey*. See *supra* part III.E.

tioned any acts in its making.¹¹¹ When one of the legatees brought a declaratory judgment proceeding to determine whether the phrase "personal property" also included intangible personal property, the executor and another beneficiary asserted that the forfeiture provision had been violated and this legatee's gift was forfeited.¹¹² On the first aspect of the forfeiture provision, the court followed the general rule that "one who seeks the guidance of a court in interpreting a provision in a will is not considered to have 'contested' the will in a manner which would actuate a forfeiture clause."¹¹³ Regarding the second aspect of the forfeiture provision, the court concluded that the term "question" was restricted to questions regarding the making of the will or its provisions, and did not apply to questions regarding the meaning of the same.¹¹⁴ Accordingly, the trial court's action in sustaining the legatee's demurrer to the defendants' cross-bills was affirmed.¹¹⁵

E. *Trusts-Creation and Trustee Compensation*

The issue in *Ballard v. McCoy*¹¹⁶ was the right to trustee fees pursuant to a revocable trust agreement dated February 9,

111. The relevant part of the forfeiture clause was "in any way to contest . . . (my will), or the validity thereof, or its due or proper execution, or the provisions applicable to him or her, or any other provisions, or shall in any way question any acts in making this will or any of its provisions." *Id.* at 438, 436 S.E.2d at 419.

112. The legatee's complaint requested the court to first determine if the legatee's request was a "contest" in the context of the testator's forfeiture provision, and "[i]f and only if" the court answered no to this inquiry, to decide the meaning of the phrase "personal property" in the gift to the legatee. *Id.* at 437, 436 S.E.2d at 419.

113. *Id.* at 438, 436 S.E.2d at 420.

114. *Id.* at 439, 436 S.E.2d at 420.

Even assuming the word "question" used in the second category includes seeking clarification or interpretation, the punctuation used limits the prohibition to questioning acts which surrounded the *making* of the will or the *making* of any part of the will. Questions regarding the meaning of the will itself or of a provision within the will are not prohibited under this second category of actions.

Id.

115. *Id.* at 435, 436 S.E.2d at 421. The defendants also contended that they were entitled to an evidentiary hearing to determine whether the legatee's actions amounted to a violation of the forfeiture provision. The court disagreed, however, noting that all of the relevant facts and circumstances (the will, the pleadings, and the actions of the legatee) were already before the court. *Id.* at 439-40, 436 S.E.2d at 420.

116. 247 Va. 513, 443 S.E.2d 146 (1994).

1988, in which the settlor stated that “[t]o establish a trust I transfer to you all my right, title and interest in the property described on Schedule A attached.”¹¹⁷ The list of assets attached to the trust agreement identified property worth, in the trustees’ estimation, \$532,628.93.¹¹⁸ Following the settlor’s death on March 6, 1990, the trustee admitted a claim in the estate proceedings for trustee fees of \$31,518.01, pursuant to the schedule of compensation contained in the trust agreement.¹¹⁹ However, there was no evidence in the record to show any actual or constructive delivery of any of the property in question to the trustees,¹²⁰ and the trust agreement also provided that “[t]his trust is established when you and I have signed this agreement and I have delivered property to Trustee.”¹²¹ Relying on this language in the trust agreement, and the common law rule requiring a transfer of property from the settlor as a condition precedent to the creation of a trust (except in the case of a self-trusted trust), the court held that “the trust contemplated by the trust agreement was never established.”¹²² Accordingly, the trial court’s allowance of compensation to the trustees was reversed.¹²³

F. *Gift Causa Mortis-Delivery*

In the two-day period preceding his death, the donor in *Woo v. Smart*,¹²⁴ gave to one with whom he had a relationship “like husband and wife” three personal checks payable to her order in the total amount of \$124,600.¹²⁵ None of the checks were cashed or negotiated prior to the donor’s death. A declara-

117. *Id.* at 514, 443 S.E.2d at 146.

118. *Id.* at 515, 493 S.E.2d at 147.

119. *Id.* This portion of the trust agreement provided that “[y]our compensation for the services which you render in accordance with this Trust Agreement shall be at the rate of five percent of the principal and five percent of the income received by you as Trustee.” *Id.* The claim for compensation was based upon the value of the assets on the list attached to the trust agreement, and income in the amount of \$97,731.17 received by settlor and settlor’s spouse from the date of the trust agreement through the end of 1989. *Id.*

120. *Id.* at 517, 443 S.E.2d at 148.

121. *Id.* at 514, 443 S.E.2d at 146.

122. *Id.* at 518, 443 S.E.2d at 148.

123. *Id.* at 518, 443 S.E.2d at 149.

124. 247 Va. 365, 442 S.E.2d 690 (1994).

125. *Id.* at 366, 442 S.E.2d at 691.

tory judgment proceeding was initiated thereafter by the donor's administrator seeking a declaration that the attempted causa mortis gifts were invalid.¹²⁶ The question of first impression on appeal was whether the delivery of the checks to the donee was a sufficient delivery of the underlying property—the money in the bank. The court referred to prior authority for the proposition that “the required delivery must be ‘actual and complete, such as deprives the donor of all further control and dominion,’”¹²⁷ and then noted that such deprivation did not occur in this case because, among other things, the donor could have issued a stop payment at any time prior to death.¹²⁸ Accordingly, the court decided to “adopt the majority rule elsewhere that a donor's own check drawn on a personal checking account is not, prior to acceptance or payment by the bank, the subject of a valid gift causa mortis.”¹²⁹

G. Charitable Trusts-Cy Pres Doctrine

In *United States ex rel United States Coast Guard v. Cerio*,¹³⁰ a Virginia testator left his residuary estate to the Coast Guard Academy in trust, providing that the “annual net income from the corpus of the said fund is to be awarded and paid to the graduating cadet who has attained the highest

126. The requirements for a valid gift causa mortis were stated by the court as follows:

First, there must be an intent to make a gift. Second, the gift must be of personal property. Third, the gift must be made while the donor is under the apprehension of imminent death, upon the essential condition that the property shall belong to the donee if the donor dies as anticipated leaving the donee surviving, and the gift is not revoked in the meantime. Fourth, possession of the property given must be delivered at the time of the gift to the donee, or to someone for the donee, and the donee must accept the gift.

Id. at 368-69, 442 S.E.2d at 692 (citations omitted).

127. *Id.* at 370, 442 S.E.2d at 693 (quoting *Quarles v. Fowlker*, 147 Va. 493, 507, 157 S.E. 365, 369 (1927)).

128. *Id.*

129. *Id.* at 369, 442 S.E.2d at 693. Even though such a check is not accepted or paid by the bank, the gift should also be complete if the donor's personal check is negotiated to a holder in due course prior to donor's death, because this negotiation will terminate the donor's personal defense of lack of consideration, and thus would deprive the donor of “dominion and control” over the money in question. VA. CODE ANN. § 8.3A-305(b) (Cum. Supp. 1994).

130. 831 F. Supp. 530 (E.D. Va. 1993).

grade average in chemistry and physics while enrolled in the Academy.¹³¹ The amount of this annual award was projected to be between \$65,000 and \$130,000, based on a corpus of \$1,300,000 and a range of interest rates from five to ten percent, but there was no mention in the case that the testator was aware of this fact.¹³² The Academy believed that the award of such a significant sum to a cadet each year "would disrupt the Academy's educational program and unduly interfere with its mission of preparing young men and women for a life of public service in the Coast Guard."¹³³ Accordingly, being unwilling to accept the trust under testator's terms, the Academy sought judicial modification thereof pursuant to the equitable doctrine of cy pres.¹³⁴ This doctrine, which is statutory in Virginia,¹³⁵ "permits courts to alter a [charitable] trust so as to carry out a testator's intent 'as near as possible' when it is not possible to effectuate this intent in the exact manner specified by the testator."¹³⁶ Following a detailed analysis of the facts and the law, this well-written, thirteen-page opinion applies the doctrine of cy pres and modifies testator's trust to provide for two annual \$750 awards (one in physics and the other in chemistry) and for a number of other awards and uses beneficial to the Academy.¹³⁷

H. *Trusts-Premature Termination*

Section 55-19.4, added to the Code in 1991, is entitled "petition for reformation of trust," but it also provides for the premature termination of trusts. In fact, if read literally, this sec-

131. *Id.* at 534.

132. *Id.*

133. *Id.*

134. *Id.*

135. VA. CODE ANN. § 55-31 (Repl. Vol. 1986). "For the doctrine of cy pres to be properly invoked, there must be: (1) a valid charitable trust without a gift over, (2) an existing general charitable intent, and (3) the beneficiaries must be indefinite or uncertain, or (4) the purpose of the trust must be indefinite, impossible to perform, or so impracticable of performance as to characterize the fulfillment of the purpose as 'impossible.'" *Cerio*, 831 F. Supp. at 535 (quoting *Smith v. Moore*, 225 F. Supp. 434, 441 (E.D. Va. 1963), *modified and remanded on other grounds*, 343 F.2d 594 (4th Cir. 1965) (emphasis in original)).

136. *Cerio*, 831 F. Supp. at 535.

137. *Id.* at 541-43.

tion authorizes termination of trusts contrary to long-standing common law and regardless of a spendthrift provision, solely on the ground that such termination would "benefit . . . the interests of any beneficiary" ¹³⁸

*Herndon v. Chesapeake National Bank*¹³⁹ was an action brought by trust beneficiaries under section 55-19.4 to terminate a spendthrift trust on the ground that "termination of the trust would benefit them and their [economic] interests will be adversely affected if the trust is not terminated."¹⁴⁰ The trial court, however, declined to accept the requested literal reading of the statute. The court reasoned:

[t]o adopt the petitioners construction of this statute would seem to imperil the ability of both testators and lawyers to establish trusts and plan estates with reasonable assurance that their intentions will be carried out. A more logical interpretation, it seems to me, is to consider the statute as a means provided by the Legislature to alleviate hardship and to allow for some flexibility where changes in tax laws or other circumstances clearly warrant the reformation or termination of a trust.¹⁴¹

Although this was an excellent decision, it is not precedent outside of its circuit and thus legislation is still necessary to correct the underlying problem in Virginia law.

IV. ATTORNEY GENERAL'S OPINION-TRANSFERRING REALTY TO A SELF-TRUSTED INTER VIVOS TRUST

The concept of the revocable, inter vivos trust as a will substitute has been receiving significant attention both nationally and locally.¹⁴² One of the considerations involved in making

138. VA. CODE ANN. § 55-19.4(D) (Cum. Supp. 1994); see J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts and Estates*, 25 U. RICH. L. REV. 925, 931-33 (1991) (discussing this problem). This discussion concludes by noting that "[a]bsent remedial action to restrict the scope of this statute, it may be that the prudent Virginia attorney will be forced to create trusts under the laws of other jurisdictions in order to insure that a client's legitimate purposes will not be frustrated." *Id.* at 932-33.

139. 33 Va. Cir. 152 (Lancaster County 1994).

140. *Id.* at __.

141. *Id.* at __.

142. For a discussion of this concept in the context of Virginia law, see J. Rodney

the choice between the will and the inter vivos trust is the cost of "funding" (i.e., transferring assets to) the inter vivos trust by the settlor. In this regard, it has generally been believed that a grantor's deed conveying real estate to an inter vivos trust of which the grantor was the initial beneficiary would be exempt from Virginia's recordation tax,¹⁴³ even though the trust assets will pass to others at the grantor's death, under either the identity exemption¹⁴⁴ or the deed of gift exemption.¹⁴⁵ However, a recent opinion of the Virginia Attorney General concluded that the identity exemption is not available in these cases¹⁴⁶ because although there is an identity between the grantor in the deed and the initial beneficiary, "the subsequent or contingent beneficiary of the trust is a different person."¹⁴⁷ This opinion also concluded that the deed of gift exemption is not available in these cases because it applies to deeds of gift between individuals and "in its ordinary meaning the term 'individual' does not include a trust."¹⁴⁸ Legislation seeking to overturn this opinion was introduced into the 1994 Session, but it did not pass.¹⁴⁹ The applicability of the recordation tax to inter vivos trusts obviously makes them more expensive to fund and thus this opinion may be expected to diminish the use of inter vivos trusts as will substitutes in marginal cases.

Johnson, *The Living Trust vs. The Will: Which is Best for the Typical Virginian?*, VA. LAW., Jan. 1994, at 37. See also Mark G. Ferguson, *Tempting the Title Insurance Company Gods-Placing Real Property in a Revocable Living Trust*, VA. ST. B. TR. & EST. SEC. NEWSL., Summer 1994, at 21.

143. The recordation tax is \$0.15 per \$100 (or fraction thereof) of the greater of the consideration for the transfer or the actual value of the property being conveyed. VA. CODE ANN. § 58.1-801 (Repl. Vol. 1991).

144. The identity exemption exempts from the recordation tax any deed (conveying real estate) "[t]o trustees of a trust, when the grantors in the deed and the beneficiaries of the trust are the same persons . . ." VA. CODE ANN. § 58.1-811(A)(12) (Cum. Supp. 1994).

145. The deed of gift exemption provides in part that "[n]o recordation tax shall be required for the recordation of any deed of gift between an individual grantor or grantors and an individual grantee or grantees when no consideration has passed between the parties." VA. CODE ANN. § 58.1-811(D) (Cum. Supp. 1994).

146. 1993 ATTY. GEN. ANN. REP. 258.

147. *Id.*

148. *Id.*

149. H.B. 787, Va. Gen. Assembly (Reg. Sess. 1994).

V. SUMMARY

1993-1994 witnessed the enactment of more than the average volume of legislation in the field of wills, trusts and estates. Most of this legislation, whether consumer-oriented or lawyer's technical work, resulted from proposals that were studied, drafted and requested by the Wills, Trusts, and Estates Section of the Virginia Bar Association.¹⁵⁰ In so doing, this group has rendered significant service to the General Assembly and to the Commonwealth for which it should be commended.

150. The legislation discussed in Paragraphs B, C, D, E, F, I, J and L of Part II originated in this Section's legislative committee.

