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The Dead Hand Loses Its Grip In Virginia: A New Rule For Trust Amendment and Termination?

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COMMENT

THE DEAD HAND LOSES ITS GRIP IN VIRGINIA: A NEW RULE FOR TRUST AMENDMENT AND TERMINATION?*

> *[O]ne of the strongest motives to industry and economy; one of the highest excitements to the exercise of those duties which make a valuable citizen, is a conviction that the acquisitions of his frugality and enterprise, will be transmitted as he may direct at his death to promote the happiness of those who were dear to him in life.*[1]

I. INTRODUCTION

The majority rule in America for the amendment and termination of trusts was first adopted in *Claflin v. Claflin*[2] and came to be known as the Claflin Doctrine. This rule states that "a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out, unless they contravene some positive rule of law, or are against public policy."[3] In effect, the Claflin Doctrine is codified in the Restatement (Second) of Trusts, which states that trust beneficiaries cannot compel a trust's premature termination or modification unless 1) all beneficiaries consent (where none are incapac-

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1. Heirs of Cole v. Cole's Executors, 7 Mart. (n.s.) 414, 4-17 (La. 1829); *see* James L. Arruebarrena, Casenote, Albritton v. Albritton: *Trust Termination—The Settlor's Intent is Indestructible*, 38 LOY. L. REV. 1159 (1993).

2. 20 N.E. 454 (Mass. 1889).

3. *Id.* at 456.

itated), and 2) such termination or modification will not defeat a material purpose of the trust.[4] The Claflin Doctrine has been the law in Virginia for some time.[5]

In 1991, however, the Virginia General Assembly passed emergency legislation entitled *Petition for Reformation of Trust* which is in direct opposition to the Claflin Doctrine.[6] In effect, it allows "a trustee, personal representative or beneficiary" to petition for the amendment of a trust, "including . . . terminating the trust and ordering distribution of the trust property regardless of any spendthrift or similar protective provision."[7] The only requirement for termination is that good cause be shown.[8] The statute fails to require any consideration of the settlor's intent, the material purposes of the trust, or the interests of the beneficiaries which may be negatively affected by such termination. As a result, the common law Claflin Doctrine, which has been enforced in Virginia for many years, is in danger of being completely disregarded by literalist judges who may not be experienced in trust law.

Although the primary purpose of this statute was probably to allow for the amendment or termination of trusts where changes in tax laws or other circumstances may have caused hardship under the original trust instrument,[9] a literal reading of it allows a court to disregard the settlor's intent and terminate the trust to serve the beneficiaries' purposes. This conflict introduces much uncertainty into Virginia estate planning and effectively destroys the trust as a stable device to transfer property in accordance with the settlor's wishes. In fact, Professor Johnson has suggested 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."[10]

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4. RESTATEMENT (SECOND) OF TRUSTS § 337 (1959).
5. *See infra* text accompanying notes 36-52.
6. VA. CODE ANN. § 55-19.4 (Repl. Vol. 1995).
7. *Id.* § 55-19.4(A).
8. *Id.*
9. Section 55-19.4 replaced section 55-19.2 which had allowed the termination of small trusts, where such termination would not cause the purposes of the trust to fail.
10. J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Es-*

This comment will analyze the harm which can be done to a settlor's intent where a trust amendment and termination statute is not applied narrowly. First, it will summarize the American history of trust amendment and termination in Part II. Then, in Part III, this article will track the progression of trust amendment and termination specifically in Virginia. It will examine the effect of similar legislation in Missouri in Part IV as an example of what harm can result from a literalist interpretation of this type of statute. Finally, in Part V, this comment will provide a sample of possible solutions to trust amendment and termination, and specifically to our problem in Virginia.

II. HISTORY OF AMERICAN TRUST LAW REGARDING AMENDMENT AND TERMINATION

A. *The English Common Law Rule*

Prior to the Claflin decision, American courts followed the English common law rule for the amendment and termination of trusts. This rule was based on the belief that all property interests should be reasonably alienable, and beneficiaries should be able to control their own property interests once the settlor has surrendered them.[11] In other words, the English were against the concept of "dead hand" control where, even after death, the settlor continues to dictate the lives of his or her beneficiaries through a trust instrument.

The English rule was originally established in *Saunders v. Vautier*,[12] which held that if all adult beneficiaries consent and are sui juris,[13] the court is required to terminate a trust without regard to whether the settlor's material purposes may be frustrated in the process. In addition, there are two parliamen-

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tates, 25 U. RICH. L. REV. 925, 932-33 (1991).

11. *See* 4 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 337 (4th ed. 1987).

12. 49 Eng. 282, *aff'd*, 41 Eng. Rep. 482 (1841).

13. Sui juris is defined as "[o]f his own right; possessing full social and civil rights; not under any legal disability, or the power of another, or guardianship. Having capacity to manage one's own affairs; not under legal disability to act for one's self." BLACK'S LAW DICTIONARY 1434 (6th ed. 1990).

tary acts which control English law in this area. The first authorizes the trustee to make administrative deviations if beneficial to the trust as a whole.[14] The second act authorizes distributive deviation without court intervention if all adult beneficiaries who are sui juris consent.[15] An administrative deviation is where the trustee deviates from the administrative or management provisions of a trust; for example, selling property that otherwise would have been retained or making investments that otherwise would have been improper under the trust's express terms.[16] A distributive deviation, on the other hand, occurs where the trustee deviates from the express terms of the trust regarding the identity of the beneficiaries or the distribution of trust proceeds.[17]

B. *The English and American Rules Part Company*

In 1889, the Supreme Judicial Court of Massachusetts parted company with the English common law rule. In *Claflin v. Claflin*,[18] the testator, Wilbur Claflin, created a trust in his will for the benefit of his minor son, Adelbert. According to the trust, Adelbert was to receive a third of his father's estate in the following manner: $10,000 at age twenty-one; $10,000 at age twenty-five; and the balance at age thirty.[19] After his father's death, Adelbert received his first installment at age twenty-one. He then brought suit, prior to age twenty-five, to compel the trustees to pay him the remainder of his trust fund. He contended that, according to English common law (which American courts had followed to this point), the provisions of the trust postponing payment beyond the time he reaches age twenty-one were void. He argued that his interest was vested and absolute, and authority was undisputed that restrictions against the alienation of absolute interests in the income of trust property were void.[20]

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14. Trustee Act, 1925, 15 & 16 Geo. 5, ch. 19, § 57 (Eng.).
15. English Variation of Trusts Act, 1958, 6 & 7 Eliz. 2, ch. 53, § 1 (Eng.).
16. Gail B. Bird, *Trust Termination: Unborn, Living, and Dead Hands—Too Many Fingers in the Trust Pie*, 36 HASTINGS L.J. 563, 588 (1985).
17. *See id.*
18. 20 N.E. 454 (Mass. 1889).
19. *Id.* at 455.
20. *Id.*

The court held, however, that the trust should not be terminated, stating that "a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out, unless they contravene some positive rule of law, or are against public policy."[21] The court added that

> [t]he existing situation is one which the testator manifestly had in mind, and made provision for. The strict execution of the trust has not become impossible; the restriction upon the plaintiff's possession and control is, we think, one that the testator had a right to make; other provisions for the plaintiff are contained in the will, apparently sufficient for his support; and we see no good reason why the intention of the testator should not be carried out.[22]

Therefore, the settlor's purpose became controlling in cases of trust amendment and termination. American courts began to follow the Claflin Doctrine, and it soon became the majority rule.[23] In fact, the United States Supreme Court gave its full support to the Claflin Doctrine in *Shelton v. King*.[24] The Court stated,

> [i]f the testatrix saw fit to have this fund accumulate in the hands of trustees, and thereby postpone the enjoyment of her gift, why shall her will be disregarded? . . . There is no higher duty which rests upon a court than to carry out the intentions of a testator when the provision is not repugnant to settled principles of public policy and is otherwise valid.[25]

Moreover, the permanence of the Claflin Doctrine is apparent by its codification in the Restatement (Second) of Trusts.[26]

In summary, the English and American majority rules disagree regarding the control of property by the living and the

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21. *Id.* at 456.

22. *Id.*

23. GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 1008 (rev. 2d ed. 1983); SCOTT & FRATCHER, *supra* note 11, § 337; *see* RESTATEMENT (SECOND) OF TRUSTS, *supra* note 4.

24. 229 U.S. 90 (1913).

25. *Id.* at 95, 101.

26. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 4.

dead. The English rule favors the control and free alienability of property by the living, while the American rule favors the testator's intent and freedom to dispose of their property as they choose. In order to gain trust termination under the English rule, one must overcome only one hurdle: consent of all beneficiaries, where they are all sui juris.[27] Under the American rule, however, one must overcome the English hurdle plus an additional requirement that the termination will not defeat a material purpose of the settlor.[28]

C. *English and American Views on Spendthrift Trusts*

Part of the reason for the difference between the English and American rules originates in each country's view of spendthrift trusts. A *spendthrift trust* is a trust "created with a view of providing a fund for the maintenance of another, and at the same time securing it against his own improvidence or incapacity for self-protection."[29] In other words, the assets of a spendthrift trust may be neither voluntarily nor involuntarily alienated by the beneficiaries. Since this is in direct opposition to the English view which favors the free alienation of property interests, English courts do not uphold spendthrift trusts and consider them invalid. This English rule was first established in *Brandon v. Robinson*.[30]

American courts, however, uphold spendthrift provisions as valid restraints on alienation.[31] *Broadway National Bank v. Adams*[32] was the decision which changed the direction of American law regarding the validity of spendthrift trusts. The *Broadway* court stated "that it would [not] violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary."[33] This approval of spendthrift

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27. Saunders v. Vautier, 49 Eng. Rep. 282, *aff'd*, 41 Eng. Rep. 482 (1841).
28. Claflin v. Claflin, 20 N.E. 454, 456 (Mass. 1889).
29. Wagner v. Wagner, 91 N.E. 66, 69 (Ill. 1910).
30. 34 Eng. Rep. 379 (Ch. 1811).
31. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 152, 153, 330 cmt. e, illus. 1 (1959).
32. 133 Mass. 170 (1882).
33. *Id.* at 173.

trusts was affirmed when the United States Supreme Court, in *Shelton v. King*, announced that it was not against public policy to bequeath property and restrict it from voluntary alienation or the reach of creditors.[34] Given this approval of spendthrift trusts by American courts, it is only natural for them to limit the right to amend or terminate a trust as another valid restraint on alienation. Moreover, spendthrift trusts are viewed by American courts as indestructible, as the beneficiaries cannot compel the trustee to terminate such a trust prematurely.[35]

III. HISTORY OF VIRGINIA TRUST LAW REGARDING AMENDMENT AND TERMINATION

A. *Progression of the Claflin Doctrine in Virginia*

In 1965, the Claflin Doctrine was upheld by the Supreme Court of Appeals of Virginia in *Telephones, Inc. v. LaPrade*.[36] In this case, the testator, Burgie Lee Fisher, worked his way up in the telephone business from a small town telephone repairman to become the owner of Lee Telephone Company.[37] He was quite a pioneer in the telephone industry, having installed the first dial equipment system in Virginia in 1932, and having received international recognition as the first in the world to install a tandem dialing system.[38] Fisher was proud of his company and addressed his intentions regarding his company stock specifically in his will. His will created a charitable trust for several religious institutions from the residuary of his estate.[39] This trust was discretionary, as the testator provided in his will that his executors, "in their sole and absolute discretion, and at such time and upon such terms and conditions as to them shall seem best, are directed to sell" the stock.[40]

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34. 229 U.S. 90, 97 (1913).
35. *See* RESTATEMENT (SECOND) OF TRUSTS, *supra* note 31.
36. 206 Va. 388, 143 S.E.2d 853 (1965).
37. *Id.* at 392, 143 S.E.2d at 855-56.
38. *Id.* at 392, 143 S.E.2d at 856.
39. *Id.* at 393, 143 S.E.2d at 856.
40. *Id.* at 398, 143 S.E.2d at 859.

The court upheld the executors' decision to sell the stock to a third party other than that requested by the beneficial institutions. The court stated,

> [w]here, as here, no considerations of public policy are involved, and the trust is active, rather than passive, the rule that beneficiaries may demand delivery in kind of the res of the trust estate and thus terminate the trust, must give way to another principle of law. That principle is that where the settlor expresses a clear intention that such delivery shall not take place and that such termination may not be compelled by the beneficiaries, the courts are bound to give effect to that expressed intention. Especially is this true where, as here, the trustees are vested with broad discretionary powers and there appears no abuse of discretion in the exercise of those powers.[41]

Therefore, even though all of the beneficiaries were sui juris and consented, the court still found the testator's intent to be controlling.

The Claflin Doctrine was affirmed by the Supreme Court of Virginia in 1984. In *Schmucker v. Walker*,[42] the court upheld the reasoning of *LaPrade*, stating that a trust could not be prematurely terminated against the testator's expressed intent.[43] In her will, the testator, Elizabeth Sawyer Walker, created a trust which was to be terminated, and the proceeds distributed, upon the death or remarriage of one of the life beneficiaries.[44] In addition, like *LaPrade*, the trustee was given "full discretionary powers of management" of the trust.[45] Thus, the court held that the trust could not be terminated until the life beneficiary either remarried or died, regardless of their consent or the other beneficiaries' consent to termination.[46] Moreover, the court added another compelling reason against trust termination; it was actually impossible for all of the beneficiaries to

41. *Id.* at 397, 143 S.E.2d at 859.
42. 226 Va. 582, 311 S.E.2d 108 (1984).
43. *Id.* at 585, 311 S.E.2d at 110.
44. *Id.* at 584, 311 S.E.2d at 109.
45. *Id.*
46. *Id.* at 585, 311 S.E.2d at 110.

consent where some remainder beneficiaries could not be determined until the remarriage or death of the life beneficiary.[47]

The Claflin Doctrine was again upheld as recently as 1990 by the Supreme Court of Virginia in *Landmark Communications, Inc. v. Sovran Bank, N.A.*[48] Here, the beneficiaries argued that they possessed vested remainders, and the trust should be terminated by the joint demand of all trust beneficiaries. They maintained that although the trust provided that it was to terminate on the death of the last income beneficiary, there was no requirement that the trust continue until that time.[49]

The beneficiaries relied upon the rules in *LaPrade* and *Schmucker* that a trust may be prematurely terminated where "(1) the settlor did not express a contrary intent in the document, and (2) all the beneficiaries concurred in the demand for termination."[50] The court, however, found that neither requirement was met in this case. It stated that the testator's intent clearly indicated that the trust terminate at no time other than "[u]pon the death of all income beneficiaries."[51] Finally, as in *Schmucker*, the court held that all beneficiaries could not possibly join in the demand of termination because they could not all be identified until the death of the last income beneficiary.[52]

B. *Virginia Parts Company with the Claflin Doctrine*

In 1991, the Virginia General Assembly passed emergency legislation entitled *Petition for Reformation of Trust*,[53] which if read literally seems to overturn the Claflin Doctrine. This statute effectively allows "a trustee, personal representative or beneficiary" to petition for the amendment of a trust, "including . . . terminating the trust and ordering distribution of

47. *Id.* at 586, 311 S.E.2d at 110.
48. 239 Va. 158, 387 S.E.2d 484 (1990).
49. *Id.* at 165, 387 S.E.2d at 488.
50. *Id.*
51. *Id.*
52. *Id.*
53. VA. CODE ANN. § 55-19.4 (Repl. Vol. 1995).

the trust property regardless of any spendthrift or similar protective provision."[54]

As previously discussed in the Introduction, the only requirement for such termination is that good cause be shown.[55] The statute fails to require any consideration of the settlor's intent, the material purposes of the trust, or the interests of the beneficiaries which may be negatively affected by such termination. In fact, the statute specifically addresses these considerations for any amendment *other than termination*. According to the statute, before amending a trust in any way other than termination, "the court must first find that . . . such action will neither (i) materially impair the accomplishment of the trust purposes nor (ii) adversely affect the interests of any beneficiary."[56] By exempting termination from these requirements, "the statute parts company with the Claflin Rule . . . which precludes termination that would (i) defeat a testator's (settlor's) material purpose, or (ii) adversely affect the interests of any non-consenting beneficiary."[57]

Since the showing of good cause is the only hurdle to be overcome in cases of trust termination, it is necessary to examine what is required to show good cause. According to the statute,

> good cause may be shown by evidence of (i) changes in any federal or Virginia tax laws, or the construction of such laws, whether by statute, court decision, regulation, ruling or otherwise, which, in the absence of reformation, would materially impair the purposes of the trust or adversely affect the interests of the trustor or any beneficiary, or which, if reformation were made, would materially benefit the trust or the interests of the trustor or any beneficiary or (ii) existing circumstances such that the purposes of the trust will be impaired or the interests of the trustor or any beneficiary adversely affected if the reformation is not made or that reformation if made would benefit the trust or interests of the trustor or any beneficiary. . . . [In addition, good

54. *Id.* § 55-19.4(A).
55. *Id.*
56. *Id.* § 55-19.4(B).
57. Johnson, *supra* note 10, at 931-32 n.40; *see* RESTATEMENT (SECOND) OF TRUSTS, *supra* note 4.

> cause may be shown by] evidence that [(iii)] the costs of administration are such that the establishment or the continuance of the trust would impair the purposes of the trust or [(iv)] the value of the trust principal is $25,000 or less, with no expectation of additions to the principal other than from interest or other earnings.[58]

In short, as Professor Johnson has said, this requirement of *good cause* "reduces to no more than a finding 'that reformation if made would benefit . . . the trustor or any beneficiary.'"[59] This is a relatively loose requirement which may be met easily. For example, a beneficiary's showing that they could benefit financially from the termination of a trust would satisfy the requirement.

The primary purpose of this statute was probably to allow for the amendment or termination of trusts where changes in tax laws or other circumstances may have caused hardship under the original trust instrument. A literal reading of it, however, allows beneficiaries merely to disregard the settlor's intent and terminate the trust to serve their own purposes. Although the General Assembly probably did not intend for the statute to be used that way, it has provided a tool for beneficiaries, empowering them to disregard the settlor's intent and thereby overturn the Claflin Doctrine in Virginia.

An additional effect of a literal reading of this statute is that spendthrift trusts are no longer effective in Virginia as valid restraints on alienation. As previously mentioned, the statute allows termination "regardless of any spendthrift or similar protective provision."[60] This directly contradicts the American majority view that spendthrift trusts are indestructible, as beneficiaries cannot compel the trustee to terminate such a trust prematurely.[61]

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58. VA. CODE ANN. § 55-19.4(D)(1)-(2) (Repl. Vol. 1995).

59. Johnson, *supra* note 10, at 931 n.39 (quoting VA. CODE ANN. § 55-19.4(D)(1) (Cum. Supp. 1991)).

60. VA. CODE ANN. § 55-19.4(A) (Repl. Vol. 1995).

61. *See* RESTATEMENT (SECOND) OF TRUSTS, *supra* note 31.

C. *Affirmation of the Claflin Doctrine by* Herndon v. Chesapeake National Bank

Although the mischief previously described could very well result from a literal reading of the trust amendment and termination statute, this was not the result in a recent decision regarding this statute, a case of first impression in Virginia. Fortunately, the judge in this case had a good understanding of the Claflin Doctrine and Virginia trust law. In *Herndon v. Chesapeake National Bank*,[62] Mary Herndon, the testator, created a spendthrift trust for the benefit of her son David. Upon his death, the proceeds were to be paid to his issue. At the age of fifty-six, David and his two children, ages twenty-five and twenty-one, joined in a petition to terminate the trust.[63] The trustee, Chesapeake National Bank, and the guardian ad litem (appointed to represent the interests of unborn or unascertained beneficiaries) opposed the termination.[64]

The beneficiaries contended that they had *good cause* for trust termination because it would benefit them, and their interests would be adversely affected if the trust were not terminated. Specifically, if termination were allowed, David would use the proceeds to build a waterfront home in Lancaster County. He contended that this home would appreciate in value at a greater rate than the securities which comprised the trust estate.[65] The court construed *good cause* narrowly, stating that "[u]nless the impairment, if the trust is not terminated, or the benefit, if it is, is reasonably apparent, absent some other special circumstance set forth in the statute, this court concludes good cause will not have been shown."[66]

The court then proceeded to weigh the different interpretations of the statute. The beneficiaries argued for a literal interpretation of the statute, overturning the common law Claflin Doctrine. The trustee, however, argued that "the statute was designed to provide a practical remedy in cases where changes

62. 33 Va. Cir. 152 (Lancaster County 1994).
63. *Id.* at 152.
64. *Id.*
65. *Id.* at 153.
66. *Id.*

in federal or state tax laws adversely affect an existing trust, or where other special or unusual circumstances indicate that reformation or termination is clearly in the best interests of the trust or its beneficiaries."[67] The court construed the statute narrowly in accordance with the view advocated by the trustee. Upholding the Claflin Doctrine and addressing the problem recognized by Professor Johnson, the court stated,

> [t]estamentary intent has long been a "hallowed concept" . . . in this Commonwealth. Our citizens are entitled to plan their estates, and their lawyers must be able to give estate planning advice with confidence. To 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.[68]

Although this decision gives an excellent analysis of the possible mischief resulting from a literal interpretation of the statute, it has no precedential value outside of its circuit. Therefore, the statute may still prove dangerous in the hands of a judge who is literalist and lacks experience in Virginia trust law. As a result, remedial legislation is necessary to correct this problem.

D. *Danger of Uncertainty and Further Erosion of the Claflin Doctrine by* In re Estate of Morton Diamond

As of September 1, 1995, pleadings have been filed in the Circuit Court of Fairfax County, Virginia for *In re Estate of Morton Diamond*,[69] a case which is most definitely a threat to the Claflin Doctrine due to its equitable issues. In this case, Morton Diamond, the settlor and testator, died unexpectedly on July 15, 1994 during divorce proceedings with his second wife Sharon Diamond.[70] Since the divorce was not yet final, he had failed to change his will which named Sharon as trustee and

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67. *Id.* at 154.

68. *Id.* (quoting Johnson, *supra* note 10, at 932).

69. No. 54571 (Fairfax County filed Mar. 10, 1995).

70. Petition for Reformation of a Trust at 1-2, *In re* Estate of Morton Diamond, No. 54571 (Fairfax County filed Mar. 10, 1995).

life beneficiary of a Unified Credit Shelter Trust created for estate tax purposes.[71] In fact, his will leaves his entire estate minus this trust, arguably more than one million dollars, to Sharon Diamond. Mr. Diamond's daughters from his first marriage, Jacquie Zuvich and Susan Moreines, were named, together with any grandchildren of Mr. Diamond, as the remainder beneficiaries of this trust, which was to terminate upon Sharon's death.[72]

The daughters brought this suit in order to terminate the trust and distribute the $600,000 in proceeds to them as the remainder beneficiaries.[73] In fact, their Petition states that "[c]learly, the cross-claims of cruelty in the divorce petition, and the mere filing of the divorce petition, indicate that it is not in the Testator's best interest, nor in the Petitioners' (beneficiaries') best interest, to have the unified credit shelter trust continue."[74] Moreover, Petitioners allege that it would not be the Testator's intent for Sharon Diamond to inherit his estate.[75]

In her Answer, Sharon Diamond denies that the Testator would not have intended that she inherit his estate, as directed by his will.[76] In addition, she further denies that trust termination would be in the beneficiaries' best interests, since such potential beneficiaries include Mr. Diamond's grandchildren, or Petitioners' own prospective children, who are currently unborn and unascertained.[77]

Given these facts, one could argue that the intent of a testator can only be ascertained by the testator's will, especially where the will and trust were obviously designed to achieve a particular estate tax result. However, this is the very type of case which may invite judges to interpret the Virginia statute literally, merely to achieve a more equitable result for the parties. The daughters here could certainly be viewed as having a

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71. *Id.* at 2.
72. *Id.* at 2-3.
73. *Id.* at 3.
74. *Id.*
75. *Id.*
76. Respondent's Answer at 3, *In re* Estate of Morton Diamond, No. 54571 (Fairfax County filed Mar. 10, 1995).
77. *Id.*

noble purpose for the proposed trust termination. In fact, it could be argued that their primary motivation is to preserve their father's actual intent, not to serve their own selfish purposes. Since the settlor's intent provides the backbone for the Claflin Doctrine itself, it is possible that a judge may mistakenly believe that he or she is actually adhering to the Claflin Doctrine by using the Virginia statute to terminate the trust in order to achieve the settlor's "true" intent for equitable reasons. Such a result is even more likely here, where the daughters' interests are in direct conflict with those of the trustee, their father's second wife, who is not their mother and probably does not have their best interests at heart.

The fact remains, however, that the Testator's "true" intent can never be ascertained since he has been forever silenced. It is entirely possible that Mr. Diamond and his wife may have reached a reconciliation before the divorce was actually final. Therefore, his will and estate plan are the best existing evidence of his intent and should be preserved. If the Virginia statute is used effectively to terminate the trust in this case, such a result would be in derogation of not only the Claflin Doctrine but the traditional common law of wills as well. Finally, as the Respondent argues, it is certainly not in the unborn and unascertained beneficiaries' best interests for the trust to be terminated and distributed to the current remainder beneficiaries.[78] Therefore, although the daughters may argue that their father did not intend for his estranged wife to inherit his estate, can they effectively show that he intended for his grandchildren to be deprived of any trust proceeds, even where he specifically mentioned them as beneficiaries?

Furthermore, under the Virginia statute as currently written, the Testator's intent is irrelevant regarding a petition for termination. Instead, the proper argument in such a case is that the termination would benefit the trustor or beneficiaries. Therefore, by arguing Testator's intent, the daughters are attempting to argue Claflin Doctrine principles under the very part of the statute which has disregarded the Claflin Doctrine. Such an argument is misplaced and provides an illustration of the confusion caused by this statute.

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78. *Id.*

The danger of this case lies in the fact that the required showing of good cause in the Virginia statute is so vaguely defined. A judge who desires a certain equitable result may be inclined to find that such a case presents the very type of *good cause* or hardship which the statute was designed to overcome. This illustrates the inherent danger of the Virginia statute and the necessity for immediate legislative attention by the General Assembly.

E. *Spendthrift Trusts in Virginia*

Spendthrift trusts, as previously explained, protect beneficiaries from their own improvidence and from the claims of their creditors. This is achieved by making the trust property in question both voluntarily and involuntarily inalienable. Consistent with the English common law rule in favor of alienability, such trusts were invalid in Virginia prior to 1919.[79] Before that time, the Code of Virginia provided that all trust interests were subject to the debts of beneficiaries.[80]

In 1919, however, the Code was revised to read:

> [A]ny such estate, not exceeding one hundred thousand dollars in actual value, may be holden or possessed in trust upon condition that the corpus thereof and income therefrom, or either of them, shall be applied by the trustee to the support and maintenance of the beneficiaries without being subject to their liabilities or to alienation by them; but no such trust shall operate to the prejudice of any existing creditor of the creator of such trust.[81]

According to this language, the trust's purpose had to be limited to the *support and maintenance* of the beneficiary for its spendthrift features to be valid.

In 1934, however, the Supreme Court of Virginia read *support and maintenance* in a very broad manner. In *Sheridan v.*

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79. James P. Witt, *Spendthrift Trusts in Virginia—The "Support and Maintenance" Requirement*, VA. LAW., Jan. 1994, at 65.

80. VA. CODE ANN. § 2428 (1887).

81. VA. CODE ANN. § 5157 (1919); Witt, *supra* note 79, at 65.

Krause,[82] the trust directed that the trustee distribute income "as [the trustee] may consider proper."[83] The court held that although the purpose of the trust was not limited to providing for the beneficiary's support and maintenance, that purpose was obviously the testator's dominant motive, given the surrounding circumstances.[84] The court then went on to interpret the statute's *support and maintenance* language broadly, as not establishing an absolute condition of support and maintenance, but allowing spendthrift protection where such purposes are foreseeable.[85] This broad reading of *support and maintenance* was subsequently repeated in *Rountree v. Lane*[86] and *In re Hersch*.[87]

The 1988 decision of *Levey v. First Virginia Bank*,[88] by the Fourth Circuit Court of Appeals, however, threw doubt upon the prior broad interpretations of *support and maintenance*. In this case, the beneficiary was given an income interest with no specified standard of support and maintenance. However, his principal interest did include such a standard.[89] The court held that the income interest was subject to creditors' claims, while the principal interest was not.[90]

The Virginia General Assembly responded to this decision by amending the statute.[91] The phrase "applied by the trustee to the support and maintenance of beneficiaries" was replaced by "paid to or applied by the trustee for the benefit of the beneficiaries."[92] Thus, it appears that the requirement of the *support and maintenance* standard for spendthrift trusts has been effectively removed. Some doubt remains, however, as there was a statement in the legislation that it was "declaratory of existing law."[93] Regardless, spendthrift trusts are certainly valid in Vir-

82. 161 Va. 873, 172 S.E. 508 (1934).
83. *Id.* at 879, 172 S.E. at 509.
84. *Id.* at 885-87, 172 S.E. at 512.
85. *Id.*
86. 155 F.2d 471 (4th Cir. 1946).
87. 57 B.R. 667 (E.D. Va. 1986).
88. 845 F.2d 80 (4th Cir. 1988).
89. *Id.* at 82.
90. *Id.*
91. VA. CODE ANN. § 55-19 (Repl. Vol. 1995).
92. 1989 Va. Acts ch. 600.
93. *Id.* at cl. 2.

ginia; there is merely a question as to whether a *support and maintenance* standard is needed to make them effective.

Given the validity of spendthrift trusts in Virginia, it follows that the General Assembly did not purposely revoke the Claflin Doctrine, as it is usually upheld where spendthrift trusts are upheld, and vice versa. It would be contradictory, indeed, for Virginia to support spendthrift trusts as valid restraints on alienation, while effectively revoking the Claflin Doctrine in order to return to the English common law rule. Spendthrift trusts and the English rule are concepts in direct opposition to each other which cannot co-exist and be applied consistently in the same commonwealth. They are, in fact, mutually exclusive concepts whose underlying philosophies are contradictory. The current language of Virginia's statute, however, not only seems to revoke the Claflin Doctrine, but also frustrates the effectiveness of spendthrift trusts, as previously discussed, by allowing their termination. At common law, such trusts were inherently indestructible. Therefore, it is illogical for Virginia to support spendthrift trusts as valid restraints on alienation, while stripping them of their effectiveness by making them vulnerable to termination, especially given that they are indestructible by their very nature.

From all of these contradictory concepts which cannot rationally be applied together, it can only be surmised that the General Assembly mistakenly excluded *trust termination* from the requirements of the Claflin Doctrine. Otherwise, if the General Assembly had actually intended to revoke the Claflin Doctrine, it would have completely removed the Claflin language from the statute. Instead, the language remains and effectively applies to all trust amendments except terminations.

IV. LITERALIST INTERPRETATION OF A SIMILAR TRUST STATUTE IN MISSOURI

A. *The Missouri Statute*

In opposition to the approach taken in Virginia, Missouri has interpreted its trust amendment and termination statute literal-

ly and has, thereby, repealed the Claflin Doctrine.[94] In 1983, the Missouri legislature adopted Missouri Revised Statute section 456.590.2 which allows the court to amend or terminate a trust where such amendment or termination will benefit the disabled, minor, unborn and unascertained beneficiaries. The statute provides,

> [w]hen all of the adult beneficiaries who are not disabled consent, the court may, upon finding that such variation will benefit the disabled, minor, unborn and unascertained beneficiaries, vary the terms of a private trust so as to reduce or eliminate the interests of some beneficiaries and increase those of others, to change the times or amounts of payments and distributions to beneficiaries, or to provide for termination of the trust at a time earlier or later than that specified by the terms.[95]

This language requiring a benefit is comparable to Virginia's statute which requires a showing that the amendment would benefit the trustor or any beneficiary.

B. *Interpretation of the Missouri Statute by* Hamerstrom v. Commerce Bank of Kansas City[96]

In *Hamerstrom*, the testator, Erle Smith, created a trust with Elizabeth Hamerstrom as a life beneficiary. The trust was to provide monthly payments of $150 to her and to be terminated upon her death or when the proceeds were exhausted, whichever came first. Upon her death, the proceeds were to be distributed to her husband if he survived her, or else in equal shares to her two sons or the survivor of them.[97] Mrs. Hamerstrom requested that her monthly payment be increased from $150 to $2000 due to unforeseen changes in her family's economic and personal circumstances, including inflation, her husband's retirement, and increases in health care costs.[98] Mrs.

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94. Becky O. Kilpatrick, Note, *Missouri Takes a Stand: The Death of the Dead Hand in the Control of Trusts?* Hamerstrom v. Commerce Bank of Kansas City, 57 MO. L. REV. 1003 (1992).

95. MO. ANN. STAT. § 456.590.2 (Vernon 1992).

96. 808 S.W.2d 434 (Mo. Ct. App. 1991).

97. *Id.* at 435.

98. *Id.*

Hamerstrom's husband and her two sons consented to her request. Although the trustee neither opposed nor supported the request, the guardian ad litem (appointed to protect the rights of the unascertained and unborn beneficiaries) opposed the request.[99]

The trial court denied Mrs. Hamerstrom's request, holding that the unnamed, unborn issue of her sons were beneficiaries and that the proposed deviation failed to benefit them as Missouri Revised Statute section 456.590.2 requires.[100] The Missouri Court of Appeals for the Western District reversed and remanded with directions to grant the deviation,[101] stating that the term *beneficiary* only applied to those persons expressly identified by the testator.[102] The court also held that the statute allows deviation from the terms of a private trust when all expressly identified beneficiaries are adults who consent and are sui juris.[103] With this holding, the court adopted the English rule of trust amendment and termination, with no regard for the settlor's intent or the material purposes of the trust. In so doing, the court has effectively overturned the Claflin Doctrine in Missouri.

According to Professor Wiedenbeck,[104] there are three interpretive issues which the Missouri statute fails to address. First, where, there are no disabled, minor, unborn or unascertained beneficiaries of the trust does a court have jurisdiction to approve a proposed amendment or termination where all other beneficiaries consent?[105] Second, in deciding whether disabled, minor, unborn or unascertained beneficiaries will benefit where they do exist in a give case, will the court consider whether the amendment or termination is consistent with the settlor's underlying purposes imposed through conditions or restrictions in

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99. *Id.*

100. *Id.* The trial court relied upon the Claflin Doctrine to support its holding, stating that deviation was not permitted where the settlor's material purpose would be frustrated. *Id.* at 437.

101. *Id.* at 439.

102. *Id.* at 438.

103. *Id.*

104. Peter J. Wiedenbeck, *Missouri's Repeal of the Claflin Doctrine—New View of the Policy Against Perpetuities?*, 50 MO. L. REV. 805 (1985).

105. Kilpatrick, *supra* note 94, at 1010 (citing Wiedenbeck, *supra* note 104, at 813).

the trust?[106] Finally, will the court consider the settlor's material purposes in its decision?[107] The first and third issues were addressed by the *Hamerstrom* court.

With regard to the first issue, because the language of the Missouri statute does not provide for the contingency where no disabled, minor, unborn or unascertained beneficiaries exist, it is uncertain whether a court would have the jurisdiction to amend or terminate a trust in such a case. The *Hamerstrom* court, however, did not view this as a problem, but merely stated that the statute authorizes courts to amend or terminate a trust with the consent of all adult beneficiaries who are not disabled, even where no other protected beneficiaries are identifiable.[108]

The *Hamerstrom* court addressed the third issue by resoundingly adopting the English common law rule established in *Saunders v. Vautier*[109] that where all adult beneficiaries who are not disabled consent, they must compel termination of a trust regardless of any frustration of the settlor's material purposes. The *Hamerstrom* court stated that, "[t]he statute provides a mechanism for 'adult beneficiaries who are not disabled' to vary, extend or eliminate a trust under circumstances where the settlor's purpose is not considered."[110] In fact, the only remaining difference between the Missouri statute and the English rule is that Missouri requires judicial approval of the amendment or termination.[111] "Whether courts will completely ignore the settlor's intent in authorizing changes will probably depend on the particular circumstances of each case and the courts' willingness to shake seventy-seven years of precedent. The possibility also exists that a settlor's intent will play an implicit role in a court's decision-making process."[112] This is certainly true, as the *Herndon* court construed the Virginia statute narrowly, managing to abide by the statute and uphold the Claflin Doctrine.

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106. *Id.*
107. *Id.*
108. *Hamerstrom*, 808 S.W.2d at 436, 438.
109. 49 Eng. Rep. 282, *aff'd*, 41 Eng. Rep. 482 (1841).
110. *Hamerstrom*, 808 S.W.2d at 438.
111. *See* Wiedenbeck, *supra* note 104, at 813-14.
112. Kilpatrick, *supra* note 94, at 1015.

It was not necessary for the *Hamerstrom* court to reach the second issue regarding the requirement of a benefit to disabled, minor, unborn or unascertained beneficiaries, because the court determined that such a protected class did not exist in that case. When this issue is finally addressed, though, the following two questions must be answered regarding how *benefit* will be defined:

> 1. Does the benefit that the court is required by statute to find include only pecuniary benefit or can it include indirect, non pecuniary benefits created by the variation?
> 2. Should the court take into account the purposes of the settlor in determining benefit to the protected class, or should it base its decision exclusively on the court's evaluation of the best interests of the beneficiaries, uninfluenced by the settlor's purpose?[113]

If Missouri courts continue to follow the English rule, the definition of *benefit*, addressed in the first question, could be construed quite broadly. English courts have gone so far as to include social and psychological benefits to the protected class as a basis for approving trust amendment and termination.[114] Regarding the second question, English courts only view the settlor's purpose as a background issue to be taken into account. They do not consider it at all controlling, especially where the beneficiaries' interests outweigh its consideration.[115] Given the decision in *Hamerstrom* with its broad construction and literal application of the statute, it is likely that Missouri courts will continue to follow the English rule and to disregard the Claflin Doctrine.

C. *Other States with Trust Amendment and Termination Statutes*

Aside from Virginia and Missouri, other states which permit courts, upon petition, to amend trusts or terminate them pre-

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113. Kilpatrick, *supra* note 94, at 1016 (citing Wiedenbeck, *supra* note 104, at 815-20).

114. Kilpatrick, *supra* note 94, at 1016 (citing Wiedenbeck, *supra* note 104, at 818-19).

115. Kilpatrick, *supra* note 94, at 1016 (citing Wiedenbeck, *supra* note 104, at 823).

maturely include California, New York, Ohio, Pennsylvania, and Wisconsin.[116] Therefore, regardless of how these statutes are interpreted, these states are the minority, and the Claflin Doctrine remains the American majority rule.

V. COMMENT ON POSSIBLE SOLUTIONS

A. *Comparison of Virginia and Missouri Cases*

The previous discussion of the *Hamerstrom*[117] case illustrates the damage that can be done to the common law Claflin Doctrine if these types of remedial statutes are interpreted literally. If it is true that the legislatures intended these statutes as tools to alleviate hardship, then they must be narrowly construed in order to be effective and still maintain the Claflin Doctrine.

The *Herndon*[118] case in Virginia provides an excellent example of how a judge, who is knowledgeable in the trust area, can apply the statute narrowly and, thereby, maintain respect for the settlor's intent and material purposes. The *Herndon* court defined *good cause* and *benefit* very narrowly so that the trust would be terminated only in cases where the hardship or benefit was "reasonably apparent."[119] In this way, beneficiaries cannot merely defy the settlor's intent because they desire the trust proceeds prior to termination. The court successfully applied the statute by using the Claflin Doctrine as a background for its analysis. In effect, the court considered the settlor's intent and material purposes in its definitions of *good cause* and *benefit*. This is one possible solution for how a court may reconcile this type of statute with the Claflin Doctrine.

If this solution were applied in a case like *Hamerstrom*, except in this example, assume there is a class of protected beneficiaries, then it would be unnecessary to repeal the Claflin Doctrine in such a case. For example, the statute there re-

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116. Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 51 n.205 (1992).

117. Hamerstrom v. Commerce Bank of Kansas City, 808 S.W.2d 434 (Mo. Ct. App. 1991).

118. Herndon v. Chesapeake Nat'l Bank, 33 Va. Cir. 152 (Lancaster County 1994).

119. *Id.* at 153.

quired that the court find that any amendment or termination would "benefit the disabled, minor, unborn and unascertained beneficiaries."[120] The court could construe *benefit* narrowly in a case where there was a protected class of beneficiaries. In this way, the court would use the Claflin Doctrine as the basis for how it defines *benefit* and how it analyzes the types of amendment or termination that would not frustrate the settlor's intent or material purposes. Thus, only in cases where the hardship or the benefit was so great that the settlor themselves would have desired amendment or termination would the court allow it. This presents a further problem, however, as illustrated in *Estate of Morton Diamond*,[121] where it is sometimes difficult to ascertain whether the settlor would have desired amendment or termination.

B. *Legislative Solution in Virginia*

Although the above solution provides a method for reconciling the statutes with the Claflin Doctrine, it is imperfect because there is no guarantee that any given judge will possess the requisite knowledge to apply such a solution. In Virginia, the General Assembly must remedy this problem through legislation to prevent any further mischief. In fact, all that is necessary is to remove the phrase "other than termination" from the sentence "[i]n the case of any reformation other than termination, such action will neither (i) materially impair the accomplishment of the trust purposes nor (ii) adversely affect the interests of any beneficiary."[122] This is the only way to ensure that the Claflin Doctrine will continue to protect the settlor's intent and material purposes, and that the trust will remain a stable device for the transfer of property in Virginia.

C. *An Equitable Solution*

Where remedial legislation is not possible, this solution presents a compromise which satisfies the beneficiary while effectu-

120. MO. ANN. STAT. § 456.590.2 (Vernon 1992).

121. *In re* Estate of Morton Diamond, No. 54571 (Fairfax County filed Mar. 10, 1995).

122. VA. CODE ANN. § 55-19.4(B)(2) (Repl. Vol. 1995).

ating the settlor's intent. In cases where the remainder beneficiary wants the trust terminated prematurely, and the life tenant has disclaimed their interest and consented to trust termination, an equitable solution may be for the court to make the remainder beneficiary an income beneficiary (in place of the life tenant) until the proper termination date of the trust.[123] At that time, if the remainder beneficiary is still living, he or she will take possession of the trust property that is rightfully his or hers. If he or she is dead, however, this approach allows the alternate remainder beneficiary to take possession of the trust property upon the trust's original termination date, as the settlor intended. In this way, the alternate remainder beneficiary will not be excluded, as they would have been if the trust were terminated prematurely. As a result, the settlor's intent will be maintained, especially in cases where all remainder beneficiary have not yet been ascertained until the designated termination date. This solution protects the interests of unborn, unascertained beneficiaries, while effecting the settlor's intent regarding their expressed termination date. In addition, the remainder beneficiary can enjoy an income interest in the meantime. Trust termination statutes may also be amended to take advantage of this equitable solution. It should be noted, though, that this solution is only possible in limited situations. But, in those limited situations, it provides a method to appease the remainder beneficiary temporarily, without having to actually terminate the trust prematurely.

VI. CONCLUSION

This comment has provided an overview of the possible problems created by the trust amendment and termination statute in Virginia. The Claflin Doctrine, which honors the settlor's intent and material purposes, has long been the majority rule in Virginia for good reason. A settlor or testator has every right to dispose of their own property as they wish. Because trusts have become so prevalent as a substitute for wills, it follows that a settlor's intent for a trust should be protected to the

123. *See* Patricia J. Roberts, *The Acceleration of Remainders: Manipulating the Identity of the Remaindermen*, 42 S.C. L. REV. 295, 321 (1991).

same extent as a testator's intent for a will. The Claflin Doctrine has accomplished this in Virginia and has assured that trusts remain stable devices for the transfer of property.

The Virginia trust amendment and termination statute, however, has placed this stability in jeopardy. With its apparent disregard for the Claflin Doctrine, the statute has provided beneficiaries with a tool to serve their own purposes. Virginia estate planners cannot confidently assure their clients that the material purposes of their trusts will be carried out until this statute is amended through remedial legislation. Meanwhile, estate planners can only hope that courts will continue to apply the statute as the *Herndon* court has done. Of course, there is no guarantee that other courts will exhibit the insight and sensitivity to the trust issues that the court did in *Herndon*.

Moreover, as recognized by Professor Johnson, it is ironic that the very title of the Virginia statute, *Petition for Reformation of Trust*, refers to *reformation*, "a well-recognized common law remedy for accomplishing original intent."[124] Reformation is "[a] court-ordered correction of a written instrument to cause it to reflect the true intentions of the parties."[125] At first glance, one might think Virginia's trust statute, with its reference to reformation, would accomplish the amendment or termination of a trust in order to better reflect the settlor's true intent.

In fact, the use of the term *reformation* in the statute's title merely serves to bolster the belief that the Virginia General Assembly intended the statute as a means to alleviate hardship. For example, where tax laws have changed, such that the original purposes of a trust cannot be accomplished as it is currently written, the court may reform the trust in order to accomplish the original intent of the settlor in light of the new tax laws. In this sense, the amendment or termination of a trust could be viewed as a reformation, because it would be accomplished with the sole purpose of achieving the settlor's original intent. This is most likely the scenario the General Assembly had in mind when it enacted Virginia's statute.

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124. Johnson, *supra* note 10, at 933 n.47

125. BLACK'S LAW DICTIONARY 1281 (6th ed. 1990).

Unfortunately, though, if given a literal interpretation, the statute may serve as a tool for trust beneficiaries to defy the settlor's intent. This certainly does not qualify as reformation. In reality, the settlor's intent is completely disregarded by the Virginia statute in cases of termination, accomplishing nothing more than the derogation of the Claflin Doctrine and the erosion of the trust as a stable device for the transfer of property.

Jessica L. Lacey