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

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# WILLS, TRUSTS, AND ESTATES

*J. Rodney Johnson* \*

## I. INTRODUCTION

In its 1999 Session, the General Assembly enacted legislation dealing with wills, trusts, and estates that added, amended, or repealed a number of sections of the Code of Virginia in its 1999 Session. In addition, there were eleven Supreme Court of Virginia opinions and one Bankruptcy Court opinion in the period covered by this review that involved issues of interest to the general practitioner as well as the specialist in wills, trusts, and estates. This article reports on all of these legislative and judicial developments.<sup>1</sup>

## II. LEGISLATION

### A. *Fiduciary Investments—Uniform Prudent Investor Act*

Acting upon the recommendations of a joint study of fiduciary investing that was prepared by the Virginia Bar Association and the Virginia Bankers Association, the 1992 Session repealed Virginia's traditional prudent man rule and replaced it with a portfolio-oriented prudent investor rule.<sup>2</sup> The 1999 Session replaced this 1992 version of the prudent investor rule with the Uniform Prudent Investor Act,<sup>3</sup> which will apply to all fiduciaries' actions and decisions occurring after December 31, 1999, even if their control-

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1. In order to facilitate the discussion of numerous Virginia Code sections, they will often be referred to in the text by their section numbers only. Unless otherwise stated, those section numbers will refer to the latest printing of the old sections and to the 1999 supplement for the new sections.

2. See Act of Apr. 6, 1992, ch. 810, 1992 Va. Acts 1278 (codified as amended at VA. CODE ANN. §§ 2.1-328, 5.1-88.2, 6.1-21, 6.1-195.86, 26-40, 26-40.01, 26-44, 26-45.1, 51.1-803, 54.1-1119, 54.1-2113 (Repl. Vol. 1995)). The background and scope of this legislation is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 26 U. RICH. L. REV. 873, 890-91 (1992).

3. UNIF. PRUDENT INVESTOR ACT, 7B U.L.A. 57 (1985) (Supp. 1999). Copies of the Act, containing the Commissioners' official comments, which will be very important to an understanding the Act's operation, may be obtained from the National Conference of Commissioners on Uniform State Laws, 211 East Ontario Street, Suite 1300, Chicago, Illinois 60611.

ling document became effective prior to that date.<sup>4</sup> Although the basic concept of Virginia's prudent-investor rule is not changed by the Uniform Act, the latter does (i) contain a clearer and more comprehensive expression of the rule, (ii) align Virginia with the majority of other states, and (iii) deal with a number of other parallel concerns where statutory guidance will be helpful, such as diversification, loyalty, impartiality, delegation of investment and management functions, duties at inception of trust, etc.<sup>5</sup> Although a detailed comparison of the Uniform Act to prior Virginia law is not feasible within the confines of this annual review, a listing of the significant Virginia modifications to the Uniform Act will be found in the footnotes.<sup>6</sup>

### B. *Fiduciary Accounting—Uniform Principal and Income Act*

The regular course of a trustee's or personal representative's stewardship contemplates a number and variety of receipts and expenditures. The correct allocation of these items between present

4. See Act of Mar. 28, 1999, ch. 772, 1999 Va. Acts 1356 (codified as amended at VA. CODE ANN. §§ 26-45.3 to -45.14 (Cum. Supp. 1999)).

5. See *id.*

6. The following are the Virginia amendments to the Uniform Act, all of which were proposed by the Virginia Bar Association's Section on Wills, Trusts, and Estates. All section references are to the Act as enacted in Virginia, and not as originally promulgated.

(1) § 26-45.3(A). After the reference to "subsection B," the language "§§ 26-40 and 26-40.01" was inserted. This is a clearer expression of a somewhat similar reference found in former § 26-45.1(A). It recognizes the continuing (i) limited applicability of the "original legal list" and (ii) unlimited applicability of the "mini legal list." The latter's three "safe harbor" provisions will be of great importance to the lay fiduciary charged with investing a relatively small amount.

(2) § 26-45.3(B). The second and third sentences were added to continue the provisions of former § 26-45.1(E), dealing with waiver of the prudent investor rule. In the light of this change, this subsection's second sentence in the Uniform Act ("A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.") was deleted as no longer necessary.

(3) § 26-45.4(G). This entire subsection was added to continue the provisions of former § 26-45.1(F), added to the Code in 1998, to deal with certain insurance concerns that are discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 32 U. RICH. L. REV. 1405, 1412 (1998).

(4) § 26-45.11. After the word "modified," the words "by language articulating the investment standard to which the trustee is to be held" were inserted in order to provide for greater certainty of result in cases of claimed modification than the provisions of the Uniform Act were believed to give in their original formulation.

(5) § 26-45.13. This entire section is new. The Uniform Act was drafted to be applicable only to "trustees" and "trusts." The amendment, taken mostly from former section 26-45.1(G), makes the Act applicable to all statutory fiduciaries referred to in section 8.01-2, as well as to an agent under a written power of attorney.

(6) § 64.1-57(1)(c) and (c1). These statutory boilerplate powers dealing with fiduciary investments were deleted as being no longer necessary or desirable in light of the Act's adoption.

and future beneficiaries is determined by a jurisdiction's principal and income law. The 1999 Session replaced Virginia's version of the Uniform Principal and Income Act (1931)<sup>7</sup> with the Uniform Principal and Income Act (1997)<sup>8</sup> for all trusts, decedents' estates, and nontrust estates existing on January 1, 2000, except as the Virginia Code or a controlling document expressly provides to the contrary.<sup>9</sup> It would be difficult to overstate the importance of this enactment because of (i) the prior conflict between investing under a prudent investor rule and allocating the receipts therefrom under prior law,<sup>10</sup> (ii) the number and variety of new financial instruments not dealt with by prior law, and (iii) the increasing use of the inter vivos trust as a will substitute that was not contemplated by prior law. Although a detailed comparison of the Uniform Act to prior Virginia law is not feasible within the confines of this annual review, a listing of the significant Virginia modifications to the Uniform Act will be found in the footnotes.<sup>11</sup>

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7. Act of Mar. 30, 1936, ch. 432, 1936 Va. Acts 1024 (codified as amended at VA. CODE ANN. §§ 55-253 to -268 (Repl. Vol. 1995)).

8. UNIF. PRINCIPAL AND INCOME ACT, 7B U.L.A. 3 (1997) (Supp. 1999). Copies of the Act, containing the Commissioners' official comments, which will be indispensable to an understanding of the Act's operation, may be obtained from the National Conference of Commissioners on Uniform State Laws, 211 East Ontario Street, Suite 1300, Chicago, Illinois 60611.

9. See Act of Apr. 7, 1999, ch. 975, 1999 Va. Acts 2568 (codified as amended at VA. CODE ANN. §§ 55-277.1 to -27.33 (Cum. Supp. 1999)).

10. This conflict is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 26 U. RICH. L. REV. 873, 890-91 (1992). The resolution of this conflict is found in the default rule of new section 55-277.4 that authorizes a fiduciary to make adjustments between the principal and income accounts in order to reach a result that is fair and reasonable to all beneficiaries. See VA. CODE ANN. § 55-277.4(A) (Cum. Supp. 1999).

11. The following are the Virginia amendments to the Uniform Act, all of which were proposed by the Virginia Bar Association's Section on Wills, Trusts, and Estates. All section references are to the Act as enacted in Virginia, and not as originally promulgated.

(1) § 55-277.3(C). This entire subsection is new. The Uniform Act provides a body of default rules that can be avoided in several ways, one of which is by giving a fiduciary a "discretionary power of administration." The purpose of the added subsection is to guard against an almost universally used boilerplate power—permitting a fiduciary to "allocate receipts and expenses between income and principal"—from being interpreted as such a "discretionary power of administration." VA. CODE ANN. § 55-277.3(C) (Cum. Supp. 1999).

(2) § 55-277.4. All references to "trustee" in this section were changed to "fiduciary," in order to make the Act's fiduciary's adjustment power applicable to the personal representative of a decedent's estate.

(3) § 55-277.4(D). The second sentence of this subsection was added to incorporate an existing procedural remedy.

(4) § 55-277.4(G). This entire subsection is new. It was added in order to implement the decision mentioned in paragraph (2) of this footnote, that is, to make this section applicable to a decedent's estate.

(5) § 55-277.6. All references to "trustee" in this section were changed to "fiduciary" in

### C. Estate Planning—Testamentary Pour-Over to Inter Vivos Trust Reform

Whereas traditional estate planning has been will-based, a number of today's estate planners sometimes favor a plan based upon an inter vivos trust. In these inter vivos trust-based plans, the desire to integrate all of the client's assets into one management vehicle following the client's death is accomplished by making a testamentary gift, called a "pour-over," of the client's residuary probate estate to the inter vivos trust. The 1999 Session replaced Virginia's aging pour-over statute with the more modern Uniform Testamentary Additions to Trusts Act (1991)<sup>12</sup> for wills of testators who die after June 30, 1999.<sup>13</sup> Although the form of the Uniform Act differs from its predecessor, the substance of its pour-over provisions differs in only three respects—all of which are thought to be intent-effectuating.<sup>14</sup>

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order to make the Act's rules dealing with distributions to residuary and remainder beneficiaries applicable to the personal representative of a decedent's estate.

(6) § 55-277.31. This entire section, dealing with expenses and receipts in nontrust estates, was added. Former section 55-265 dealt with the allocation of expenses in nontrust estates, but there was no prior provision relating to the apportionment of receipts in nontrust estates.

(7) § 55-277.33. This section, dealing with the Act's applicability, was amended to include references to "nontrust estates" in light of the amendment made in paragraph (6) of this footnote.

(8) § 64.1-57(1)(i). A statutory boilerplate fiduciary power dealing with allocation of receipts and expenditures, was deleted because it (i) is no longer necessary or desirable, and (ii) might create an initial confusion with the "discretionary power of administration" discussed in paragraph (1) *supra* of this footnote.

12. UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT, 8B U.L.A. 66 (Supp. 1999) (codified as amended at VA. CODE ANN. § 64.1-73.1 (Cum. Supp. 1999)). A discussion of this Act, in the context of Virginia law, will be found in J. Rodney Johnson, *Reforming Virginia's Pour-Over Rules—Three Proposals*, 15 VA. ST. B. TR. & EST. NEWSL. 2 (1998). Copies of the Act, containing the Commissioners' official comments which will be helpful in understanding the Act's operation, may be obtained from the National Conference of Commissioners on Uniform State Laws, 211 East Ontario Street, Suite 1300, Chicago, Illinois 60611.

13. See VA. CODE ANN. § 64.1-73.1 (Cum. Supp. 1999). The original statute will continue to govern pour-overs "under the will of a decedent dying . . . before July 1, 1999." *Id.* § 64.1-73(H) (Cum. Supp. 1999).

14. These changes are: (1) instead of the receptacle trust having to be executed "before or concurrently with" the pour-over will, it may be executed "before, concurrently with, or after," *id.* § 64.1-73.1(A) (Cum. Supp. 1999); (2) instead of a mandatory failure of the pour-over if the receptacle trust is inoperative at testator's death, it will fail "unless the testator's will provides otherwise," *id.* § 64.1-73.1(B) (Cum. Supp. 1999); and (3) instead of allowing post-death amendments of the receptacle trust to govern the pour-over portion only "if the testator expressly so specifies in his will," they will govern "unless the testator's will provides otherwise," *id.* § 64.1-73.1(C) (Cum. Supp. 1999).

In addition, the 1999 legislation deals with two related matters that are significant changes in Virginia law and policy. First, although the final barriers against a nonresident individual serving as a sole court-appointed fiduciary of a Virginian's estate fell in 1996,<sup>15</sup> there has been no corresponding relaxation of the prohibition against a nonresident fiduciary corporation serving in such a capacity.<sup>16</sup> This complete corporate prohibition comes to an end with the enactment of the 1999 pour-over legislation that expressly permits a nonresident "entity" to serve as trustee of a receptacle trust receiving a pour-over under a Virginia will.<sup>17</sup> Second, as a part of the earlier changes in the law allowing a nonresident individual to serve, noted above, it was also stipulated that such a fiduciary must always provide surety upon the official bond, even if the language of the governing document expressly waived the surety requirement.<sup>18</sup> This mandatory surety requirement is now eliminated for any nonresident, individual or entity, serving as trustee of an inter vivos trust receiving a pour-over under a Virginia will.<sup>19</sup>

#### D. *Guardian of Minor—Reform*

During the study of Virginia's adult guardianship laws that culminated in legislative reform in 1997,<sup>20</sup> a number of parallel problems were discovered in the guardianship laws applicable to the property of minors. These latter problems have been addressed in a comprehensive reform package drafted by the Wills, Trusts, and Estates section of the Virginia Bar Association, and enacted by the 1999 Session. The new legislation "makes a guardianship more like a typical minor's trust insofar as the guardian's administrative and distributive powers" are concerned.<sup>21</sup> Although the nature and space

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15. The same was also true in regard to the privately appointed trustee of an inter vivos trust who was intended to receive a pour-over addition under the settlor's will. For the history of this evolution, see J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 31 U. RICH. L. REV. 1249 (1997), and sources therein cited.

16. See VA. CODE ANN. § 26-59(B) (Repl. Vol. 1997); *id.* § 64.1-73(A)(2)(ii) (Cum. Supp. 1999).

17. See *id.* § 64.1-73.1(D) (Cum. Supp. 1999).

18. See *id.* § 64.1-73(A)(2) (Repl. Vol. 1995).

19. See *id.* For a discussion of the two changes mentioned in this paragraph, see Johnson, *supra* note 12.

20. For an excellent discussion of this 1997 legislation by a person who was involved in every step of its development, see John E. Donaldson, *Reform of Adult Guardianship Law*, 32 U. RICH. L. REV. 1273 (1998).

21. H.B. 1633, Va. Gen. Assembly (Reg. Sess. 1999) (enacted as Act of Feb. 27, 1999, ch. 16, 1999 Va. Acts 22) (codified as amended at VA. CODE ANN. §§ 26-17.4, 31-1 to -9, 31-14, 31-18.1 (Cum. Supp. 1999)). The act is "applicable to all guardianships, whenever created, except

limitations of this survey article preclude any meaningful analysis of this far-reaching legislation, a summary of its major elements would include the following: (1) clarifying the standard governing expenditures for a minor's benefit, requiring a minor's other resources to be taken into account in making disbursements, and eliminating the prohibition against use of principal for a minor's benefit without prior court approval;<sup>22</sup> (2) endowing the guardian with extensive administrative powers over the minor's estate, including the power to sell real estate unless, in the latter case, the court or commissioner of accounts affirmatively imposes requirements on such a sale;<sup>23</sup> and (3) codifying Virginia's common-law prohibition against using a minor's property for the minor's support where the minor has a parent capable of providing such support.<sup>24</sup>

In regard to a parent's support obligation, the legislation as introduced would not permit the assets of a minor who has a living parent to be expended for the minor's benefit without (i) permission in the document under which the minor's estate is derived, or (ii) a court order entered in a proceeding in which the minor is represented by a guardian ad litem wherein the judge makes one of three alternative factual findings.<sup>25</sup> However, as a result of the lobbying efforts of the Virginia Conference of Commissioners of Accounts,<sup>26</sup>

that a guardian who qualifies prior to July 1, 1999, shall have the power to make conveyances of his ward's estate only in accordance with the laws in effect on June 30, 1999 [unless such a guardian requalifies thereafter]." VA. CODE ANN. § 31-18.1 (Cum. Supp. 1999).

22. "[A]fter first taking into account the minor's other sources of income, support rights, and other reasonably available resources of which the guardian is aware, [the guardian] shall provide for the minor's health, education, maintenance and support from the income of such estate and, if income is not sufficient, from the corpus thereof." *Id.* § 31-8 (Cum. Supp. 1999).

23. These powers are found in VA. CODE ANN. section 31-14.1 (Cum. Supp. 1999). The real-estate restriction is found in section 31-14.1(B).

24. See VA. CODE ANN. § 31-8.1 (Cum. Supp. 1999); see also 9A MICHIE'S JURISPRUDENCE *Parent and Child* § 20 (discussing the common law background); Supreme Court of Virginia Form CC-1683 (INST) (1998) (*Instructions for Account for Minor*) ("[A] Guardian may use the income earned on the minor's estate for the maintenance and education of the minor, only to the extent the parent(s) cannot provide for those expenses.") The necessity of such a rule is obvious because, in its absence, the child's funds could be used to satisfy the parent's legal obligation of support, and thus the parent—not the child—would become the de facto beneficiary of the child's assets. For this reason, the parent so benefitting from a child's assets would have to include the amount in question in the parent's gross income for income tax purposes. See I.R.C. § 61(a)(12) (1988).

25. The court must find "that (a) the parent is unable to completely fulfill the parental duty of supporting the child, (b) the parent cannot for some reason be required to provide such support, or (c) a proposed distribution is beyond the scope of parental duty of support in the circumstances of a specific case." VA. CODE ANN. § 31-8.1(A) (Cum. Supp. 1999).

26. This is a trade organization of commissioners of accounts. It should not be confused with the Standing Committee on Commissioners of Accounts created by the Judicial Council of Virginia in 1993, briefly discussed in J. Rodney Johnson, *Annual Survey of Virginia Law*:

the introduced legislation was amended by the addition of a new section 31-8.2 that empowers a commissioner of accounts "to authorize the same distributions under the same circumstances as the court may authorize . . . except that (i) the total distributions authorized in any one year shall not exceed \$3,000 . . ." <sup>27</sup> Although one can understand and be sympathetic to a desire for a shortcut procedure in small cases, this particular shortcut appears to be unconstitutional because its language goes on to expressly provide that "[t]he provisions of § 31-8.1 B shall not apply to proceedings under this section." <sup>28</sup> Section 31-8.1(B), thus made inapplicable in cases before a commissioner, requires the appointment of a guardian ad litem for a minor whose funds are being taken in a circuit court proceeding. <sup>29</sup> Thus, as newly added section 31-8.2 permits the taking of a minor's property for a parent's benefit in a proceeding before a commissioner without anyone appearing on the minor's behalf, <sup>30</sup> it would appear to be a taking without due process of law. <sup>31</sup>

#### E. *Tenancy by the Entirety—Personal Property*

The form of concurrent ownership known as the tenancy by the entirety, which can exist only between a husband and wife, is the most popular form of real estate ownership for married couples in Virginia. The primary reason for this popularity is the immunity of such property from the claims of the individual (but not the joint) creditors of the husband and the wife. <sup>32</sup> There has been increasing uncertainty, however, concerning whether, and if so to what extent, personal property might be held in this fashion. <sup>33</sup> The 1999 Session attempted to eliminate this uncertainty by adding section 55-20.1 to the Virginia Code, providing in part that "[a]ny persons may own real or personal property . . . if husband and wife, as tenants by the entireties." <sup>34</sup> However, as this statute does not contain an effective

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*Wills, Trusts, and Estates*, 31 U. RICH. L. REV. 1249, 1268 (1997).

27. VA. CODE ANN. § 31-8.2 (Cum. Supp. 1999).

28. *Id.*

29. *See id.* § 31-8.1(B) (Cum. Supp. 1999).

30. *See id.* § 31-8.2 (Cum. Supp. 1999).

31. Section 31-8.2 does give one, ineffectual, nod in the direction of due process with its provision that "the commissioner shall give five days written notice of the scheduled hearing date to any minor who is fourteen years of age or older." *Id.*

32. This point was reaffirmed by the Supreme Court of Virginia in the recent case of *Rogers v. Rogers*, 257 Va. 323, 512 S.E.2d 821 (1999). *See infra* Part III.J.

33. For an excellent discussion of the multiple facets of this uncertainty, see the opinion in the recent case of *In re Massey*, 225 B.R. 887 (Bankr. E.D. Va. 1998). *See discussion infra* Part III.L.

34. VA. CODE ANN. § 55-20.1 (Cum. Supp. 1999).



date provision, it may be found to be applicable only to estates created after June 30, 1999.<sup>35</sup> In addition to adding new section 55-20.1, the 1999 Session amended section 55-9 to provide that either spouse may be the conveyer creating their tenancy by the entirety in realty or personalty,<sup>36</sup> and also amended section 55-21 to provide that the intent to create such a tenancy "shall be manifest from a designation of a husband and his wife as 'tenants by the entireties' or 'tenants by the entirety.'"<sup>37</sup> A possible problem with the amendment to section 55-21, giving illustrative language that would show the requisite intent, is the fact that this section continues to require such intent to be found in the "instrument" in question, and the Supreme Court of Virginia has held that promissory notes are not within the word "instrument" as used in section 55-21.<sup>38</sup>

#### F. Augmented Estate—Separate Property

The purpose of the augmented estate's separate property exclusion is to prevent a surviving spouse from obtaining any benefit based upon the decedent's interest in property gratuitously received from anyone other than the surviving spouse.<sup>39</sup> In order to make this

35. The argument for retroactive application of section 55-20.1 will be found in the discussion of the amendments to section 55-9, *infra* note 36.

36. See VA. CODE ANN. § 55-9 (Cum. Supp. 1999). This section already contained an effective date provision stating that "[a]ll such deeds made prior to July 1, 1986, are validated notwithstanding defects in the form thereof which do not affect vested rights." *Id.* § 55-9 (Repl. Vol. 1995). In addition to the action noted in the text, the 1999 amendments to section 55-9 also replaced the word "deeds" in this sentence with the word "conveyances" and, as amended, this entire section is reenacted. See *id.* § 55-9 (Cum. Supp. 1999). The better view would suggest that the amendment and reenactment of the effective date provision in section 55-9, which occurred *in pari materia* with the enactment of new section 55-20.1, shows a legislative intent that section 55-20.1 should be treated the same way, i.e., retroactively, except to the extent that such retroactivity would affect vested rights. See *id.* §§ 55-9, -20.1 (Cum. Supp. 1999).

37. *Id.* § 55-21 (Cum. Supp. 1999). This language is clearly intended to be interpreted as illustrative and not mandatory. Thus a designation such as "ATBE," found in *In re Massey*, 225 B.R. 887 (Bankr. E.D. Va. 1998), commented on in Part III.L., *infra*, should be recognized as sufficient under this section. For further discussion, see *infra* Part III.L.

38. See *Pitts v. United States*, 242 Va. 254, 260, 408 S.E.2d 901, 904 (1991).

39. The separate property provision specifically excludes

- (ii) the value of any property, its income or proceeds, received by the decedent by gift, will, or intestate succession, before or during the marriage to the surviving spouse, from a person other than the surviving spouse to the extent such property, income, or proceeds were maintained by the decedent as separate property.

VA. CODE ANN. § 64.1-16.1 (first unnumbered paragraph following subsection (3)(d), prior to the 1999 amendment) (Repl. Vol. 1995). Note: a further convenience added to this section by the 1999 legislation is the numbering or lettering of every paragraph, which will eliminate the necessity for awkward citations such as the one contained in the preceding sentence. See *id.* § 64.1-16.1 (Cum. Supp. 1999).

exclusion applicable to every conceivable gratuitous transfer, the original legislation referred to property received by (i) "will or intestate succession" to include all probate transfers, and (ii) the generic term "gift" to comprehensively include all other gratuitous transfers.<sup>40</sup> A concern developed in recent years, however, that an attorney or judge who is not learned in estate and property law matters might give the word "gift" a more narrow construction than was intended by the General Assembly. To prevent such an error from occurring, the separate property exclusion is amended by adding additional language declaratory of existing law as follows: "gift, will, intestate succession, or any other method or form of transfer to the extent it is received without full consideration in money or money's worth."<sup>41</sup>

### G. Augmented Estate—Valuation of Survivorship Property

Although nonseparate survivorship property has always been subject to inclusion in a decedent's augmented estate under section 64.1-16.1, the Virginia Code has contained no rules for the valuation of such property interests. A new paragraph added to this section in 1999 replaces this vacuum with a collection of valuation rules that, except in two instances, are believed to be declaratory of original intent and existing practice.<sup>42</sup> One of the two new rules provides that tenancy by the entirety property will be valued the same as a joint tenancy with the right of survivorship and the other provides that joint property owned by persons married to each other "shall be rebuttably presumed to have been acquired with contributions of equal value by each tenant."<sup>43</sup>

### H. Joint Accounts in Financial Institutions—Disclosure

The longstanding issue of a decedent's intent regarding survivorship in joint accounts in banks, savings and loan associations, and credit unions led to the complete reform of the laws applicable to all nonbusiness multiple-party accounts, in 1979, and their restatement as one set of rules applicable to all such accounts in any financial institution.<sup>44</sup> One of the innovations of this reform was section

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40. See *id.* § 64.1-16.1(3)(d)(ii) (Repl. Vol. 1995).

41. *Id.* § 64.1-16.1(B)(ii) (Cum. Supp. 1999) (emphasis added).

42. See *id.* § 64.1-16.1(C)(3) (Cum. Supp. 1999).

43. *Id.*

44. See Act of Mar. 26, 1979, ch. 407, 1979 Va. Acts 596 (codified as amended at VA. CODE ANN. §§ 6.1-125.1 to -125.16 (Repl. Vol. 1999)). The background of this legislation may be found in J. Rodney Johnson, *Joint, Totten Trust, and P.O.D Bank Accounts; Virginia Law*

6.1-125.15, which provided that every financial institution offering joint accounts “shall” offer its depositors two differently labeled alternatives: “JOINT ACCOUNT WITH SURVIVORSHIP” and “JOINT ACCOUNT—NO SURVIVORSHIP.”<sup>45</sup> The 1999 amendment to section 6.1-125.15 continues further down this same path by providing that financial institutions “shall” also add certain disclosure language to these labels, effective July 1, 2000.<sup>46</sup>

Though well-intentioned, the 1999 disclosure requirement suffers from the same defect as the 1979 label requirement. Although both of them state that financial institutions “shall” take the required steps, there is no enforcement mechanism or penalty for failure to comply, and twenty years after the label requirement became effective, anecdotal evidence indicates that all financial institutions have not yet complied.<sup>47</sup> With all due respect, one wonders about the efficacy of this disclosure language to accomplish the desired result. It is submitted that the meanings of the terms “survivorship” and “non-survivorship” are known to the average bank customer. If this is true, it would appear that a problem exists today because (i) the financial institution is not labeling the forms as required by existing law, or (ii) the depositor is not reading the labels that are provided. Personal experience suggests that the latter is the more likely reason, but if either is true, the mandating of more language to be ignored (whether by a financial institution or its customers) will not solve the problem.

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*Compared to the Uniform Probate Code*, 8 U. RICH. L. REV. 41 (1973).

45. VA. CODE ANN. § 6.1-125.15(A) (Repl. Vol. 1999).

46. *See id.* § 6.1-125.15(B) (Repl. Vol. 1999). The amendment provides in part:

Disclosure in a form substantially similar to the following shall satisfy the requirements of this section:

Joint Account With Survivorship—On the death of a party to the account, the deceased party’s ownership in the account passes to the surviving party or parties to the account.

Joint Account—No Survivorship—On the death of a party to the account, the deceased party’s ownership in the account passes as a part of the party’s estate under the party’s will, trust [sic], or by intestacy.

*Id.*

47. The recent case of *Patterson v. Patterson*, 257 Va. 558, 515 S.E.2d 113 (1999), noted in Part III.K., *infra*, is of some relevance at this point. In this case Husband (using Wife’s funds) opened a \$100,000 account with Wife, as joint tenants with the right of survivorship, at a Richmond bank 19 days before Wife’s death in 1995. *See Patterson*, 257 Va. at 560, 515 S.E.2d at 114. There was no evidence in the record that Wife was even aware that the bank had allowed Husband to open this joint account, and it was clear that she did not sign a signature card. *See id.*

### I. Succession—Paternity—Illegitimacy—Exhumation—Evidence

Section 32.1-286,<sup>48</sup> dealing with exhumations, was amended in 1997 to empower the circuit court to order disinterment for the purpose of genetic testing to establish a biological relationship in succession matters “[u]pon the presentation of substantial evidence by a moving party that he will prevail in his attempt.”<sup>49</sup> The 1999 amendment to this section (i) strikes the above quoted “substantial evidence” requirement, and (ii) states the opposite: “[t]his provision . . . shall not require substantive proof of parentage to obtain the exhumation order.”<sup>50</sup> It is believed that most of such exhumations will arise in the context of illegitimacy, and the bill that made the above amendment also made minor amendments to two statutes dealing with proof of paternity when illegitimacy is involved.<sup>51</sup>

### J. Boilerplate Powers—Custodial Trust—Incapacitated Person

The statutory boilerplate fiduciary powers in section 64.1-57 were amended, in 1992, by the addition of a power to make distribution for an incapacitated beneficiary to a custodial trustee under the Uniform Custodial Trust Act.<sup>52</sup> However, this 1992 amendment did not clearly state what definition of “incapacitated” would control for the purpose of this remedy: the standard “adjudicated” definition found in guardianship and conservatorship law,<sup>53</sup> or the special “functional” definition found in the Uniform Custodial Trust Act.<sup>54</sup>

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48. VA. CODE ANN. § 32.1-286 (Cum. Supp. 1999).

49. *Id.* § 32.1-286(C) (Repl. Vol. 1997). The background and scope of this development is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 31 U. RICH. L. REV. 1249, 1262-63 (1997).

50. VA. CODE ANN. § 32.1-286(C) (Cum. Supp. 1999).

51. The section dealing with the meaning of child and related terms was amended by adding a reference to “scientifically reliable genetic testing.” *Id.* § 64.1-5.1(3)(b) (Cum. Supp. 1999). The section dealing with evidence of paternity was amended by (i) changing “medically reliable genetic blood grouping tests” to “scientifically reliable genetic tests, including DNA tests,” and (ii) adding a reference to “scientific” to the previously referenced “medical and anthropological evidence.” *Id.* § 64.1-5.2(7), (8) (Cum. Supp. 1999). The interaction of these two statutes was before the supreme court in *Jones v. Eley*, 256 Va. 198, 501 S.E.2d 405 (1998), noted *infra* Part III.D.

52. Act of Mar. 31, 1992, ch. 584, 1992 Va. Acts 780 (codified as amended at VA. CODE ANN. § 64.1-57(1)(p) (Repl. Vol. 1995)). The significance of this development is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 26 U. RICH. L. REV. 873, 892 (1992).

53. See VA. CODE ANN. § 37.1-134.6 (Cum. Supp. 1999).

54. See *id.* § 55-34.1 (Repl. Vol. 1995).

The 1999 amendment to section 64.1-57 confirms the latter, functional, definition to be the one intended.<sup>55</sup>

### K. *Judicial Grant of Boilerplate Powers—Inter Vivos Trust—Venue*

Section 64.1-57.1<sup>56</sup> was added to the Virginia Code in 1976 to permit a circuit court to grant the boilerplate fiduciary powers found in section 64.1-57<sup>57</sup> to a decedent's personal representative.<sup>58</sup> This section was amended in 1985 to clarify that the term "personal representative" included the administrator of an intestate estate;<sup>59</sup> and again in 1988 to extend the scope of the section to trustees of testamentary and inter vivos trusts.<sup>60</sup> The 1988 extension created a procedural problem, however, because the statute's original language directed any fiduciary seeking the grant of these powers "to the circuit court in which he is qualified,"—yet the trustee of an inter vivos trust does not qualify in any court.<sup>61</sup> The 1999 amendment eliminates this problem by providing for venue in such cases to be in "the circuit court for the jurisdiction in which the grantor resides or resided at the time of his death, a trustee resides or a corporate trustee has an office."<sup>62</sup>

### L. *Estate Tax—Marital Deduction—QTIP Election by Trustee*

The Internal Revenue Code was amended, effective January 1, 1982, to create an estate tax marital deduction for the estate of a married person who left a gift of "qualified terminable interest property" to the surviving spouse.<sup>63</sup> One of the requirements for obtaining this deduction is that the decedent's "executor" make a specific election on the estate tax return of the decedent's estate.<sup>64</sup> In response to this new option, the 1982 Session added section 64.1-57.2 to the Code, to authorize a "personal representative" to make the required election for qualified gifts passing to a surviving spouse by will or inter vivos trust.<sup>65</sup> The 1999 Session, responding to

55. *See id.* § 64.1-57(1)(p) (Cum. Supp. 1999).

56. *Id.* § 64.1-57.1 (Cum. Supp. 1999).

57. *Id.* § 64.1-57 (Cum. Supp. 1999).

58. *See* Act of Apr. 3, 1976, ch. 437, 1976 Va. Acts 509.

59. *See* Act of Mar. 17, 1985, ch. 345, 1976 Va. Acts 394.

60. *See* Act of Mar. 29, 1988, ch. 345, 1988 Va. Acts 416.

61. *Id.*

62. VA. CODE ANN. § 64.1-57.1 (Cum. Supp. 1999).

63. I.R.C. § 2056(b)(7) (1986).

64. *See id.* § 2056(b)(7)(B)(v) (1986).

65. *See* Act of Apr. 11, 1982, ch. 551, 1982 Acts 945. This Act also made a parallel amendment to the boilerplate powers statute at VA. CODE ANN. section 64.1-57(1)(s). Section 64.1-57.2 was amended the following year to provide for the finality of a good faith election.

a concern arising where the decedent's estate plan is based upon an inter vivos trust and where there may not be a "personal representative" because there will be no probate estate, amended the statute to provide in such cases that "[a]s used in this section, the term 'personal representative' shall include the trustee of a qualified terminable interest property trust."<sup>66</sup>

#### M. *Durable Power of Attorney—Non-Judicial Accounting*

The 1995 General Assembly responded to a concern for certain victims of financial exploitation by enacting, among other remedies, section 11-9.6 that provides for a nonjudicial accounting of the activities of an agent under a durable power of attorney for a two-year period.<sup>67</sup> The 1999 Session amended this section to provide that, if the principal dies before a request is made, (i) the request must be made within one year of the death, and (ii) the two-year period of the accounting begins at the time of death instead of the time of the request.<sup>68</sup>

#### N. *Decedent's Estates—Funeral Expenses*

Section 64.1-136.1, largely declaratory of existing law, was added to the Code by the 1999 Session at the request of the Virginia Bankers Association.<sup>69</sup> This section provides that a decedent's reasonable funeral and burial expenses are an obligation of the decedent's estate, and that the estate is liable therefore to "(i) the funeral establishment, (ii) the cemetery, (iii) any third-party creditor who finances the payment of such expenses, or (iv) any person authorized to make arrangements for the funeral of the decedent who has paid such expenses."<sup>70</sup> However, a possible problem may be created by this new statute when a person borrows from a bank to pay a decedent's funeral expenses, uses the borrowed funds for that purpose, obtains reimbursement from the decedent's personal representative for the funeral expenses so paid and then, after expending these funds for private purposes, is unable to repay the

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See Act of Mar. 10, 1983, ch. 54, 1983 Va. Acts 61.

66. VA. CODE ANN. § 64.1-57.2 (Cum. Supp. 1999).

67. See Act of Mar. 18, 1995, ch. 369, 1995 Va. Acts 522. The background and operation of this remedy is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 29 U. RICH. L. REV. 1175, 1176-77 (1995).

68. See VA. CODE ANN. § 11-9.6 (Cum. Supp. 1999).

69. See *id.* § 64.1-136.1 (Cum. Supp. 1999).

70. *Id.* This provision is expressly made subject to VA. CODE ANN. section 64.1-157 (Cum. Supp. 1999), which, in insolvent estates, makes funeral expenses a priority-three claim, subject to a \$2,000 limitation. See *id.*

creditor bank. In this case the literal language of part (iii) of the new statute creates a direct liability of the decedent's estate to "any third-party creditor who finances the payment of such expenses,"<sup>71</sup> and it may also have introduced some uncertainty into the law and practice of fiduciary administration.

### O. *Fiduciary Accounting—Federal Benefits Excluded*

With one exception, every court-appointed fiduciary of another's property who qualifies in the clerk's office is required to file an annual accounting with the commissioner of accounts detailing all receipts and disbursements during the accounting period.<sup>72</sup> However no provision of Virginia law requires a representative payee<sup>73</sup> who receives only federal source benefits<sup>74</sup> on behalf of another to account for the same before the commissioner.<sup>75</sup> It has been unclear, however, whether a fiduciary who was required to make an accounting because of other income or property, and who was also serving as a representative payee for the same beneficiary, had to also include any federal source benefits in the required accounting. A 1999 amendment to section 26-17.10 ends this uncertainty by providing that "no accounting to the commissioner shall be required of [federal source] benefits paid to a designated representative on behalf of the recipient if the representative is otherwise required to account for such benefits."<sup>76</sup> Although no detailed accounting will now be required in connection with federal source benefits, the 1999 amendment goes on to provide that a fiduciary who is required to

71. *Id.* § 64.1-136.1(iii) (Cum. Supp. 1999).

72. *See id.* § 26-17.3 (Repl. Vol. 1997). One exception is made for testamentary trusts created in wills probated after July 1, 1993, in which the testator has expressly waived the trustee's duty to account. *See id.* § 26-17.7 (Repl. Vol. 1997).

73. "Representative payee" is a federal law term identifying a person who receives federal source benefits on behalf of another who is unable to manage the benefits because of a mental condition, a physical condition, or youth. *See*, for example, in connection with Social Security benefits, 20 C.F.R. § 404.2001 (1998).

74. The primary federal source benefits are Social Security, supplemental security income, and Veteran's benefits.

75. The representative payee of such benefits may be subject to an obligation to account therefore to some agency of the federal government. For example, the SOCIAL SECURITY ADMIN., PUB. NO. 65-008, SOCIAL SECURITY HANDBOOK (13th ed. 1997), provides in part that "[a]n annual report form (Representative Payee Report) is sent to representative payees for them to explain how Social Security benefits or SSI payments were managed during the 12-month report period . . . . Depending on the payee's responses, SSA may have to interview the payee and complete a more detailed report (Representative Payee Evaluation Report) in order to determine the continued suitability of the representative payee." *Id.* at § 1622.

76. VA. CODE ANN. § 26-17.10(C) (Cum. Supp. 1999).

account under Virginia law "shall disclose thereon the total amount of such (federal source) benefits received during the accounting period."<sup>77</sup> The purpose of this single entry disclosure is to enable the commissioner to determine the total resources available to a beneficiary from all sources, so that the commissioner might know how much, if any, of the beneficiary's other assets might need to be expended to provide for a beneficiary who is also receiving federal source benefits during the accounting period.

*P. Fiduciary Accounting—Corporate Affidavits—Check Copies*

Section 26-17.9, dealing with the vouchers or receipts required to support expenditures in a fiduciary accounting before the commissioner of accounts, was the subject of two 1999 amendments requested by the Virginia Bankers Association.<sup>78</sup> The first amendment, expressly restricted to corporate fiduciaries, allows them to submit one affidavit attesting to all of their disbursements for debts, taxes, and expenses, instead of having to submit a separate receipt or voucher for each disbursement.<sup>79</sup> The second amendment, ostensibly available to all fiduciaries, allows them to use a front-and-back copy of a check as a voucher or receipt, instead of having to submit the original check to the commissioner, if the "copy was made in the regular course of business in accordance with the admissibility requirements of § 8.01-391."<sup>80</sup> However this apparent relaxation of the "no copy of a check" rule will be unavailable to the typical fiduciary because of the "regular course of business" limitations imposed by the reference to section 8.01-391.<sup>81</sup>

*Q. Fiduciary Administration—Technical & Procedural Amendments*

In response to a request of the Standing Committee on Commissioners of Accounts of the Judicial Council of Virginia, the 1999 Session made the following technical or procedural amendments: (1) the words "guardians of minor's estates" were added to the statute imposing the accounting requirement on fiduciaries for incapacitated persons;<sup>82</sup> (2) erroneous references to "§ 26-17" were changed to

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77. *Id.*

78. *See id.* § 26-17.9 (Cum. Supp. 1999).

79. *See id.*

80. *Id.* § 26-17.9(E) (Cum. Supp. 1999).

81. *See id.*

82. *Id.* § 26-17.4(A) (Cum. Supp. 1999). This provision was inadvertently omitted in the 1997 reform of the laws applicable to guardians of adults.



"§ 26-17.3" in the statute dealing with forfeiture of fiduciary commissions,<sup>83</sup> and in the statute permitting three-year accountings in small estates,<sup>84</sup> and (3) the statute dealing with the commissioner of accounts' enforcement procedure when a fiduciary fails to account was revised.<sup>85</sup>

#### R. *Federal Estate Tax—Conservation Easement Exclusion*

Section 2031 of the Internal Revenue Code,<sup>86</sup> which defines the concept of the gross estate for federal estate tax purposes, provides for a limited exclusion from taxation for land subject to a qualified conservation easement if, among other things, the estate's executor makes the appropriate election.<sup>87</sup> The necessity of this election presents no problem where all of the estate's beneficiaries are competent, consenting adults. The problem presented by the inability of other beneficiaries to consent to such an election by the executor (or by the trustee where the property is in a trust) is addressed by the 1999 Session's creation of new section 64.1-57.3 that authorizes the circuit court to give this consent "on behalf of any unborn, unascertained or incapacitated heirs, beneficiaries and devisees whose interests are affected thereby."<sup>88</sup>

#### S. *Charitable Trusts—Shares of Professional Entities*

This 1999 legislation authorizes the transfer of shares in professional corporations and membership interests in limited liability companies to a "qualified charitable remainder trust," if certain conditions are met.<sup>89</sup>

#### T. *Fiduciary Administration—Multistate Trust Institutions Act*

This lengthy legislation, the Multistate Trust Institutions Act,<sup>90</sup> was enacted by the 1999 Session "to enable and promote the

83. *See id.* § 26-19 (Cum. Supp. 1999).

84. *See id.* § 26-20 (Cum. Supp. 1999).

85. *See id.* § 26-18 (Cum. Supp. 1999).

86. I.R.C. § 2031 (1968).

87. *See id.* § 2031(c).

88. VA. CODE ANN. § 64.1-57.3 (Cum. Supp. 1999). This statute provides that a guardian ad litem must be appointed to represent such persons, and the court must find that "(i) the donation of the conservation easement will not adversely affect such heirs, beneficiaries or devisees or (ii) it is more likely than not that such heirs, beneficiaries or devisees would consent if they were before the court and capable of giving consent." *Id.*

89. Act of Mar. 15, 1999, ch. 100, 1999 Va. Acts 126 (codified as amended at VA. CODE ANN. §§ 13.1-550, -552, -1115, -1117 (Cum. Supp. 1999)).

90. Act of Mar. 29, 1999, ch. 835, 1999 Va. Acts 1516 (codified as amended at VA. CODE ANN. §§ 6.1-32.31 to -32.45 (Cum. Supp. 1999)).

establishment of trust offices in other states by Virginia banks, trust companies and trust subsidiaries, and to permit out-of-state trust institutions, including without limitation national banks whose home state is other than Virginia, to engage in the trust business in this state."<sup>91</sup>

### III. JUDICIAL DECISIONS

#### A. *Charitable Entity—Standing of Attorney General*

*Tauber v. Commonwealth*<sup>92</sup> involved the disposition of assets located in Virginia that belonged to a Maryland charitable corporation in dissolution.<sup>93</sup> To the claimed error of the trial court in allowing the Virginia Attorney General to bring this case, the supreme court responded that it had "long ago recognized the common law authority of the Attorney General to act on behalf of the public in matters involving charitable assets."<sup>94</sup>

#### B. *Contracts to Make a Will*

In *Runion v. Helvesting*,<sup>95</sup> the trial court sustained a demurrer to plaintiffs' claim of an oral contract for a devise of certain real estate, and for a purchase option on other real estate, that were both based upon plaintiffs' promise to provide long-term care for the property owner.<sup>96</sup> Applying the "well-established" requirements for the enforcement of such oral contracts to the facts that were admitted for purposes of the demurrer,<sup>97</sup> the case was reversed and remanded for a trial on the merits.<sup>98</sup>

#### C. *Future Interests—Vested or Contingent Remainder*

In *Coleman v. Coleman*,<sup>99</sup> testatrix devised certain real estate to *S* for life, and also left a remainder in one-half of the same real estate to *S* (by way of the residuary clause in testatrix's will).<sup>100</sup> *S* survived testatrix and there was no condition of survivorship

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91. VA. CODE ANN. § 6.1-32.31(B) (Cum. Supp. 1999).

92. 255 Va. 445, 499 S.E.2d 839 (1998).

93. See *id.* at 448, 499 S.E.2d at 840.

94. *Id.* at 451, 499 S.E.2d at 842 (citing *Clark v. Oliver*, 91 Va. 421, 427-28, 22 S.E. 175, 177 (1895)).

95. 256 Va. 1, 501 S.E.2d 411 (1998).

96. See *id.* at 3, 501 S.E.2d at 412.

97. *Id.* at 6, 501 S.E.2d at 414 (quoting *Wright v. Puckett*, 63 Va. (22 Gratt.) 370 (1872)).

98. See *id.* at 10, 501 S.E.2d at 415-16.

99. 256 Va. 64, 500 S.E.2d 507 (1998).

100. See *id.* at 65, 500 S.E.2d at 508.

expressed in testatrix's will.<sup>101</sup> Nevertheless, the trial court held that S's remainder in this real estate was a contingent remainder that failed upon her death because S "did not possess a 'present capacity' to take her residuary interest upon termination of the prior life estate."<sup>102</sup> The Supreme Court of Virginia referring to the early vesting rule as "a firmly established principle of will construction in Virginia,"<sup>103</sup> reversed and entered final judgment that S's remainder interest vested absolutely in S at testatrix's death.<sup>104</sup>

#### D. *Intestate Succession—Illegitimacy—Clear and Convincing Evidence*

Section 64.1-5.1 of the Code,<sup>105</sup> which replaced its unconstitutional predecessor in 1978,<sup>106</sup> marks the beginning of illegitimate succession through males in Virginia law.<sup>107</sup> As introduced, that legislation contained a simple "clear and convincing evidence" test for establishing paternity. However, a fear of spurious paternity claims in those pre-DNA days led the General Assembly to restrict this test to "clear and convincing evidence as set forth in § 64.1-5.2."<sup>108</sup> Section 64.1-5.2,<sup>109</sup> created expressly for this purpose, contained a listing of six exclusive evidences of paternity that were taken from then existing section 20-61.1 (used for determining paternity for child support purposes), which was declared unconstitutional in 1984.<sup>110</sup> Ultimately recognizing that this same unconstitutional taint also infected section 64.1-5.2, the 1991 Session rather dramatically amended it by reversing the introductory language preceding the listed evidences from "shall be limited to" to "may include, but shall not be limited to."<sup>111</sup>

101. *See id.*

102. *Id.* This unique future interests analysis was not further discussed as there was neither brief nor argument for appellees in the supreme court. *See id.*

103. *Id.* at 66, 500 S.E.2d at 508.

104. *See id.* at 67, 500 S.E.2d at 509.

105. VA. CODE ANN. § 64.1-5.1 (Cum. Supp. 1999).

106. *See id.* § 64.1-5 (repealed in 1978).

107. *See id.* § 64.1-5.1 (Cum. Supp. 1999). The background of this development is discussed in J. Rodney Johnson, *Inheritance Rights of Children in Virginia*, 12 U. RICH. L. REV. 275 (1978).

108. VA. CODE ANN. § 64.1-5.1(3)(b) (Repl. Vol. 1995). This is still the language of VA. CODE ANN. § 64.1-5.1(3)(b) (Cum. Supp. 1999).

109. *Id.* § 64.1-5.2 (Cum. Supp. 1999).

110. *See Jones v. Robinson*, 229 Va. 276, 287, 329 S.E.2d 794, 802 (1985). This development is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 19 U. RICH. L. REV. 779, 792-94 (1985).

111. VA. CODE ANN. § 64.1-5.2 (Repl. Vol. 1995). This development is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 25 U. RICH. L. REV. 925, 925-27 (1991).

In this context, the supreme court in a four to three decision in *Jones v. Eley*,<sup>112</sup> concluded that the trial court's factual determination that petitioners were the decedent's illegitimate children was supported by clear and convincing evidence.<sup>113</sup> In addition to disagreeing with the majority based upon the evidence presented, the dissenting opinion refers several times to the fact that none of the factors mentioned in section 64.1-5.2 were proven.<sup>114</sup> In light of this section's tortured history (which the dissent does not indicate was called to its attention), however, this concern would not appear to be justified.<sup>115</sup>

#### E. *Deed of Gift-Rescission*

In *Ayers v. Mosby*,<sup>116</sup> testatrix's executors, who were also devisees of a half-interest in certain real estate under her will, sought to rescind testatrix's deed of gift to this same realty, executed eighteen months prior to the will in question, based on allegations of mutual mistake of fact or coercion.<sup>117</sup> No new issues of law were presented: "[t]he facts are virtually undisputed; the controversy is over the inferences to be drawn from the facts."<sup>118</sup> After reviewing the facts, the Supreme Court of Virginia affirmed the chancellor's award of summary judgment to the defendant.<sup>119</sup>

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112. 256 Va. 198, 501 S.E.2d 405 (1998).

113. *See id.* at 201, 501 S.E.2d at 408.

114. *See id.* at 204-05, 501 S.E.2d at 708-09 (Koontz, J., dissenting).

115. *See id.* (Koontz, J., dissenting).

116. 256 Va. 228, 504 S.E.2d 845 (1998).

117. *See id.* at 229, 504 S.E.2d at 846.

118. *Id.* at 230, 504 S.E.2d at 846.

119. *See id.* at 235, 504 S.E.2d at 849. In the course of its opinion the supreme court noted that

To carry out her plan to dispose of her assets in order to qualify for Medicaid funding, the decedent intentionally transferred the fee simple interest in her real property to defendant so that he could "take care" of her. There was no mistake on her part; she accomplished just what she intended, that is, to liquidate her assets but have them remain available for support during her life.

*Id.* at 234, 504 S.E.2d at 848. There is no mention of any possible fraudulent intent motivating the decedent in this transaction or the impact, if any, that such an intent might have on the transfer in question.

### F. *Trustee's Implied Power to Grant Purchase Option*

The primary issue in *Ward v. Nationsbank of Virginia, N.A.*<sup>120</sup> was whether a trustee breached its fiduciary duty by granting a purchase option over the trust's real estate when the trust document, which did not expressly confer a power upon the Trustee to grant such an option, did contain an express power to sell real estate.<sup>121</sup> The trial court relied upon the Restatement of Trusts for the common-law rule that "[w]here by the terms of a trust a power of sale is conferred upon the trustee, it is ordinarily not proper for the trustee to give an option to purchase property."<sup>122</sup> The supreme court held that the trial court erred on this point because the claimed option power was not based solely upon the power to sell, but was instead to be found implied from the settlors' intent, the language of the trust agreement, and the purpose of the trust.<sup>123</sup> In this latter regard the supreme court referred to traditional boilerplate language in the trust instrument stating that the trustee might

do all other acts and things not inconsistent with [the trust agreement which the trustee] may deem necessary or desirable for the proper management [of the trust] *in the same manner and to the same extent as an individual might or could do with respect to his own property.*<sup>124</sup>

Immediately following this quotation, the supreme court's opinion states that "[a]ny reasonable interpretation of this language would include the ability of the Trustee to grant an option to purchase."<sup>125</sup> This rather absolute statement, instead of the *ejusdem generis* interpretation that one might have anticipated, gives significantly more impact to a standard form-book provision than one might have expected, and if this is what the court intends, attorneys will need to exercise correspondingly greater care when drafting trust agreements in the future. There is some question concerning the court's meaning, however, because immediately after saying "[a]ny reasonable interpretation . . . would include," the decision states "[t]herefore, we must determine whether an option to purchase is

120. 256 Va. 427, 507 S.E.2d 616 (1998).

121. *See id.* at 431-32, 507 S.E.2d at 618. Other issues that were decided within the framework of existing law were (i) good faith exercise of a fiduciary power, (ii) removal of a trustee, and (iii) award of attorney's fees to a trustee. *See id.* at 434-41, 507 S.E.2d at 621-25.

122. *Id.* at 434, 507 S.E.2d at 620 (quoting from RESTATEMENT (SECOND) OF TRUSTS § 190 cmt. k (1959)).

123. *See id.* at 434-35, 507 S.E.2d at 620-21.

124. *Id.* at 435, 507 S.E.2d at 621.

125. *Id.*

appropriate or necessary to carry out the purpose of the trust."<sup>126</sup>  
This factual determination was resolved in the affirmative.<sup>127</sup>

### G. *Joint Investment Account—Presumption of Survivorship—Survivorship*

In *Buck v. Jordan*,<sup>128</sup> Father and Daughter opened a joint investment account with Investment Corporation that was funded with \$100,000 supplied by Father and titled as "Joint Tenants with Rights of Survivorship and not as tenants in common or as tenants by the entirety" based upon a form signed by Father and Daughter.<sup>129</sup> In an action brought to determine ownership of this account following Father's death, the trial court held for daughter because the language of this form was "clear, unambiguous, and unequivocal and sufficient to rebut the presumption, to which the trial court referred, that the account was opened solely as convenience to [Father]."<sup>130</sup> The presumption that this investment account was opened for the convenience of Father (because he supplied the funds), to which the trial court referred, is also recognized by the supreme court at two places in its opinion.<sup>131</sup> However, the only authority cited by the supreme court for this presumption involves deposit accounts in financial institutions (banks, savings and loan associations, and credit unions) wherein, the supreme court

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126. *Id.* at 435-36, 507 S.E.2d at 621.

127. *See id.* at 442, 507 S.E.2d at 625.

128. 256 Va. 535, 508 S.E.2d 880 (1998).

129. *Id.* at 537-38, 508 S.E.2d at 881. The form that Father and Daughter signed "further provided that '[i]n the event of the death of either or any of the undersigned, the entire interest in the Joint Account shall be vested in the survivor . . .'" *Id.* at 538 n.1, 508 S.E.2d at 881 n.1. This additional language approximates the disclosure language mandated by the 1999 Session of the General Assembly for joint accounts in financial institutions (effective July 1, 1999) that is intended to make the parties to such accounts aware of the consequences of the term "joint tenants with the right of survivorship." *See supra* Part II.H. Interestingly, when Father had another person telephone Investment Corporation to inquire about the form and consequences of the investment account in this case, (i) the first responder stated that the account was owned as "joint tenants in common . . . [meaning that] 'if one passes away the Estate of that individual will receive that half and the other living party will get half,'" *Buck*, 256 Va. at 539, 508 S.E.2d at 881-82; (ii) in a later call a second responder stated "if one passes away . . . the survivor gets 100 percent of the account," *id.*; and (iii) in a final call to the first responder that person replied that the second responder "has no knowledge on this account whatsoever," *id.*; and repeated the original response that it was owned by Father and Daughter as tenants in common. *See id.*

130. *Id.* at 540, 508 S.E.2d at 882.

131. *See id.* at 537-38, 542-43, 508 S.E.2d at 881, 883-84.

recognizes, it was abolished in 1980,<sup>132</sup> and the present case involves an investment account with an investment company.<sup>133</sup>

If this "presumption of convenience," formerly applicable to deposit accounts in financial institutions,<sup>134</sup> is to now be the rule for investment accounts with investment corporations, logically it must also be applied to investment accounts with brokerage houses, mutual funds, etc. Accordingly, this case is of great significance for the investment community and it may also signal a need for some form of legislation because of the potential confusion that will now exist in the investment marketplace. Take, for instance, the case where a consumer goes into a bank and opens a \$50,000 deposit account at desk number one (with an employee of the bank) and then opens a \$50,000 investment account at desk number two (with an employee of the bank's separately chartered investment company).<sup>135</sup> One can argue that a presumption of convenience should be applicable to both accounts, or to neither account, but it is submitted, one cannot argue for such a presumption to be applicable at desk number two but not at desk number one. Going a bit further down this same road, it might be noted that the larger issue is further confused by the fact that, although a presumption of convenience now exists for joint "investment accounts," such a presumption apparently does not exist for individual joint "investments" themselves.<sup>136</sup>

Coming back to the case at hand, the supreme court noted that although the common-law rule of survivorship between joint tenants has been abolished in Virginia, there is an exception in cases where "it manifestly appears from the tenor of the instrument that it was intended the part of the one dying should belong to the others."<sup>137</sup> In this matter of first impression, the court held that this statutory

132. *See id.* at 542 n.5, 508 S.E.2d at 884 n.5.

133. *See id.*

134. For a discussion of the presumption of convenience as formerly applicable to joint accounts in financial institutions, see Johnson, *supra* note 44.

135. The investment account in the present case was opened with Sovran Investment Corporation. *See Buck*, 256 Va. at 538, 508 S.E.2d at 881.

136. In *Wrenn v. Daniels*, 200 Va. 419, 106 S.E.2d 126 (1958), "[c]ounsel for complainant . . . contend that no such presumption [of convenience] exists with regard to the transfer of shares of stock to a form of joint ownership. . . . Counsel for defendant agree with that statement of law," and the supreme court appears to also agree. *Id.* at 426-27, 106 S.E.2d at 131. This result would appear to strengthen the suggestion made in the text for legislation to develop a consistent body of rules for jointly held assets, regardless of the form or nature of the property or entity involved.

137. *Id.* at 542, 508 S.E.2d at 883 (quoting VA. CODE ANN. § 55-21 (Repl. Vol. 1995)).

exception was applicable to the investment account in the present case, and after examining the “tenor of the instrument” signed by Father and Daughter, affirmed the trial court decision in favor of Daughter.<sup>138</sup>

#### H. *Promissory Notes—Joint Tenancy—Ownership—Survivorship*

In *Zink v. Stafford*,<sup>139</sup> Father sold parcels of real estate to four persons, taking back promissory notes in three cases that were made to “Father and Daughter or the survivor,” and in the other case made to him individually but later endorsed over to “Father or Daughter or the survivor.”<sup>140</sup> Daughter claimed these promissory notes after Father’s death on the basis that, pursuant to section 55-21, “the tenor of the instrument” showed a clear intent for survivorship.<sup>141</sup> However, one of Father’s intestate successors argued that Daughter’s survivorship issue would not arise unless she could first establish an ownership interest in these notes.<sup>142</sup> The supreme court agreed and, although noting that the form of titling is ordinarily prima facie evidence of ownership, concluded on the facts of the case that Father never intended to make any lifetime gift to Daughter.<sup>143</sup> Instead, “the survivorship language on each note was an abortive testamentary act and not a gift.”<sup>144</sup>

#### I. *Will Contest—Person Interested—Object of Power of Appointment*

In *Martone v. Martone*,<sup>145</sup> the trial court upheld testator’s 1995 will in a proceeding in which testator’s beneficiary and all of his heirs

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138. See *id.* at 542, 508 S.E.2d at 833.

139. 257 Va. 46, 509 S.E.2d 833 (1999).

140. *Id.* at 49, 509 S.E.2d at 834.

141. *Id.* at 48, 509 S.E.2d 833-34. In this regard Daughter sought to distinguish the present case from *Pitts v. United States*, 242 Va. 254, 408 S.E.2d 901 (1991), wherein the supreme court held that promissory notes were not within the word “instrument” as used in section 55-21. See *id.* at 260, 408 S.E.2d at 904.

142. See *Zink*, 257 Va. at 50, 509 S.E.2d at 835.

143. See *id.* at 51, 509 S.E.2d at 835.

144. *Id.* at 51, 509 S.E.2d at 836. Without disagreeing with this quote as an accurate statement of existing law, one might nevertheless ask why this has to be so. Had the language in question been on four bank accounts (debts owed by a bank) instead of on four promissory notes (debts owed by individuals) the result would have been different. If Father’s intent for Daughter to have these funds following his death is clear, should a matter of form control the substance and frustrate this intent? The provisions of article 6, section 101 of the Uniform Probate Code, entitled “Nonprobate Transfers on Death,” offers a statutory vehicle for addressing cases such as this. “The sole purpose of this section is to prevent the transfers authorized here from being treated as testamentary.” UNIF. PROBATE CODE § 6-101, cmt. (amended 1989), 8 U.L.A. 431 (1969).

145. 257 Va. 199, 509 S.E.2d 302 (1999).



were joined as parties.<sup>146</sup> Thereafter a grandchild, whose parent was a party in the prior proceeding, brought an action attacking the 1995 will and seeking to establish testator's 1991 will.<sup>147</sup> The grandchild claimed to not be bound by the prior proceeding for lack of being a party, and further claimed standing to contest the 1995 will as a "person interested" under the 1991 will, a term not previously defined in Virginia law.<sup>148</sup> In responding to this issue of first impression, the supreme court held that to be a "person interested," "an individual must have a legally ascertainable pecuniary interest, which will be impaired by probating a will or benefitted by setting aside the will, and not a mere expectancy."<sup>149</sup> The grandchild's claimed pecuniary interest under the 1991 will was based on a power granted to testator's executor over net income during the period of administration to (i) distribute within a class of objects composed of testator's spouse and issue, (ii) accumulate and add to the residuary estate, or (iii) apply to estate obligations.<sup>150</sup> The supreme court concluded that the grandchild's interest as a member of the class defined as testator's "issue" under (i) "is a mere expectancy, not a legally ascertainable right. It is, therefore, not sufficient to satisfy the requirement of a 'person interested' under Virginia Code § 64.1-90."<sup>151</sup>

#### *J. Tenancy by the Entirety—Separate Judgments by Same Creditor*

The question in *Rogers v. Rogers*,<sup>152</sup> was "whether creditors, who obtained a judgment against a husband and a different judgment against his wife, may compel the sale of real property owned by the husband and wife as tenants by the entireties with right of survivorship to satisfy those judgments."<sup>153</sup> Notwithstanding plaintiff's claim that a different result should be allowed where the separate judgments are related, the supreme court affirmed the common law rule that tenancy by the entirety property is "exempt from the claims of creditors who do not have joint judgments against the husband and wife."<sup>154</sup>

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146. *See id.* at 202, 509 S.E.2d at 304.

147. *See id.*

148. *Id.*

149. *Id.* at 205-06, 509 S.E.2d at 306.

150. *See id.* at 204-05, 509 S.E.2d at 304-06.

151. *Id.* at 207, 509 S.E.2d at 306.

152. 257 Va. 323, 512 S.E.2d 821 (1999).

153. *Id.* at 324, 512 S.E.2d at 821.

154. *Id.* at 326, 512 S.E.2d at 822.

### K. *Certificate of Deposit—Husband and Wife—Ownership—Survivorship*

The facts established in *Patterson v. Patterson*<sup>155</sup> show that, nineteen days prior to her death, wife withdrew \$100,000 of her own funds from Bank A and turned it over to Husband who deposited it in Bank B in their joint names with the right of survivorship, but that Wife did not sign Bank B's signature card or in any other way ratify the creation of this account.<sup>156</sup> After reviewing the evidence, the supreme court held that the trial court's decision that Wife "did not intend to make a gift to her husband . . . is not plainly wrong or without adequate evidence to support it and, thus, will not be disturbed on appeal."<sup>157</sup>

### L. *Bankruptcy—Tenancy by the Entirety in Personal Property*

In *In re Massey*,<sup>158</sup> "the sole issue before the court [was] whether, under Virginia law, shares of stock and a brokerage account—neither of which constitutes proceeds of, or the rents or profits from, tenancy by the entireties real estate—can be held as tenants by the entirety and thereby claimed exempt under § 522(b)(2)(B), Bankruptcy Code."<sup>159</sup> The court's opinion, which answers this question in the affirmative, contains a comprehensive treatment of Virginia's troubled history relating to tenancies by the entireties in personal property.<sup>160</sup>

## IV. CONCLUSION

Most of the estate-related legislative and judicial developments during the period of this review were positive. However, three of these matters deserve attention in the 2000 Session. The joint account disclosure provisions<sup>161</sup> do not offer a realistic solution to the present problems in this area of the law and thus they should be either strengthened or repealed before they become effective on July 1, 2000. The supreme court's resurrection of the "presumption of convenience" from prior bank account law and application thereof

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155. 257 Va. 558, 515 S.E.2d 113 (1999).

156. *See id.* at 560, 515 S.E.2d at 114.

157. *Id.* at 564, 515 S.E.2d at 116.

158. 225 B.R. 887 (Bankr. E.D. Va. 1998).

159. *Id.* at 888.

160. *See id.* at 889-90. It is this troubled history that led to the 1999 legislation discussed in *supra* Part II.E that attempts to resolve all facets of this issue.

161. *See discussion supra* Part II.H.

to investment accounts<sup>162</sup> has created an unacceptable confusion for the consumer that can only be resolved by legislation. Increased recognition of nonprobate transfers at death<sup>163</sup> is a worthy goal deserving of legislative action.

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162. See discussion *supra* Part III.G.

163. See discussion *supra* Part III.H.