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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

The General Assembly enacted legislation dealing with wills, trusts, and estates that added or amended a number of sections of the Virginia Code in its 2001 Session. In addition, one Supreme Court of Virginia opinion and three Virginia Circuit Court opinions raised issues of interest to the general practitioner as well as the specialist in wills, trusts, and estates during the period covered by this review. This article reports on all of these legislative and judicial developments.¹

II. LEGISLATION

A. *Decedents' Estates—Notice and Copies of Inventories and Accountings, and Wills*

House Bill 1195, carried over from the 2000 Session, sought to introduce modest informational provisions into Virginia probate law in favor of beneficiaries of decedents' estates.² As amended and enacted by the 2001 Session,³ this legislation adds section

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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 2001 supplement for the new sections.

2. H.B. 1195, Va. Gen. Assembly (Reg. Sess. 2000). This bill is briefly discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 34 U. RICH. L. REV. 1069, 1080–81 (2000).

3. H.B. 1195, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 15, 2001, ch. 265, 2001 Va. Acts 217) (codified as amended at VA. CODE ANN. §§ 26-12.4, -32 (Repl. Vol. 2001), § 64.1-122.2 (Cum. Supp. 2001)).

26-12.4⁴ to the Virginia Code to require personal representatives filing inventories or accounts to mail copies to entitled parties⁵ on or before the date these documents are filed with the commissioner of accounts.⁶ To ensure recipients a minimum amount of time within which to act upon the requested information, and to help enforce the notice provision itself, the commissioner is prohibited from approving an inventory or account until twenty-one days after its receipt and unless the inventory or account: (1) states that all requested copies were mailed; (2) shows the date of mailing; and (3) shows the names and mailing addresses of the addressees.⁷ To ensure that recipients are informed of the commissioner's actions on an account and to advise them of the time frame within which they may object, section 26-32 was amended to require the commissioner of accounts to send a copy of the commissioner's report and any attachments (except the account itself) to any entitled parties who make a written request for the report.⁸ In addition, the commissioner must advise the recipients that the report will be automatically confirmed by law fifteen days after its filing with the court unless they file objections.⁹ Finally, to ensure that interested persons are advised of the foregoing rights, section 64.1-122.2, which deals with notice of probate and qualification in decedents' estates, was amended to add a summary statement of these rights to the official form that personal representatives or proponents of wills must send to those entitled to notice thereunder.¹⁰

One further aspect of House Bill 1195, as originally introduced

4. VA. CODE ANN. § 26-12.4 (Repl. Vol. 2001).

5. The parties entitled to such copies are the same persons who are entitled to receive notice of probate, VA. CODE ANN. § 64.1-122.2(A)-(B) (Cum. Supp. 2001), except for intestate takers in a fully testate matter and beneficiaries who receive their bequests before the documents are filed with the commissioner of accounts, provided these persons make a written request to the personal representative for the copies. *Id.*

6. *Id.* § 26-12.4(A) (Repl. Vol. 2001). This right to receive also applies to copies of affidavits of intent to file a statement in lieu of an account at a later date and copies of any documents making changes to previously filed ones. Recipients are not, however, entitled to copies of any supporting vouchers, and a request does not entitle a person to copies of filings made before the request is received by the personal representative. *Id.*

7. *Id.* § 26-12.4(B) (Repl. Vol. 2001).

8. *Id.* § 26-32 (Repl. Vol. 2001).

9. *Id.*

10. *Id.* § 64.1-122.2(C)(5) (Cum. Supp. 2001). This amendment also requires the notice to include the mailing address of the commissioner with whom any required inventory or account will be filed. *Id.* § 64.1-122.2(C)(6) (Cum. Supp. 2001).

in the 2000 Session, was a requirement added to section 64.1-122.2 that personal representatives automatically send a copy of any will to everyone entitled to notice thereunder.¹¹ This provision did not appear in the 2001 version that was initially passed by the House,¹² but a Senate amendment (later accepted by the House) added ineffectual language apparently intending to give those persons entitled to request copies of inventories and accounts the further right to also request a copy of any will.¹³ This drafting error is best understood by first examining the primary purpose of the legislation—to give entitled parties a right to copies of inventories and accounts. The first step in this process, as noted above, was the enactment of the new section 26-12.4 to impose a duty upon personal representatives to send such copies upon request. The second step was an amendment to section 64.1-122.2 to advise persons receiving notice of probate of their rights to such copies. Unfortunately, the “will-copy” amendment fails to contain the required first step. Without imposing a duty upon the personal representative to send a copy, it simply advises affected parties of their (non-existent) right to receive a copy of the will from the personal representative. This error should not cause any immediate problem, however, because the bill applies only to “estates of persons dying on or after July 1, 2002.”¹⁴ Thus, remedial action can be taken in the 2002 Session. At such time, it is respectfully suggested that, instead of cleaning up the “right to a copy” approach taken by the Senate amendment, the Commonwealth would be better served by going back to the original approach taken in the 2000 Session’s version of House Bill 1195. Under that approach, personal representatives automatically send a copy of any will to everyone entitled to notice of probate under section 64.1-122.¹⁵

Lastly, it needs to be noted that although the General Assembly has now addressed the due process concerns that have existed in the probate area for too long, the present legislation leaves

11. H.B. 1195, Va. Gen. Assembly (Reg. Sess. 2000).

12. H.B. 1195, Amendment in the Nature of a Substitute, Va. Gen. Assembly (Reg. Sess. 2001).

13. The two amendments referring to copies of wills are found in section 64.1-122.2(A), which introduces the four categories of persons entitled to notice of probate, and section 64.1-122.2(C), which states the information to be contained in the notice. VA. CODE ANN. §§ 64.1-122.2(A), -122.2(C) (Cum. Supp. 2001).

14. Va. H.B. 1195 (Reg. Sess. 2001).

15. Va. H.B. 1195 (Reg. Sess. 2000).

much undone. The General Assembly's failure to impose comparable notice requirements upon testamentary trustees, conservators of incapacitated persons, and guardians of minors perpetuates the long-standing patent unconstitutionality in these areas of law.¹⁶

B. *Non-Probate Transfers—Non-Testamentary*

A certain tension has long existed in the law between documents that are clearly inter vivos or clearly testamentary in operation and inter vivos documents containing donative provisions designed to become effective at one's death. A recent example of the latter is found in *Zink v. Stafford*,¹⁷ wherein 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 fourth case a note made to him individually but later endorsed over to "Father or Daughter or the survivor."¹⁸ When Daughter claimed these notes upon Father's death, the Supreme Court of Virginia held that "the survivorship language on each note was an abortive testamentary act and not a gift."¹⁹ In response to the problem presented in *Zink* and other cases, the General Assembly, in its 2001 Session, added new section 64.1-45.3 to legitimize non-probate transfer at death provisions contained in virtually every inter vivos writing by declaring them to be non-testamentary.²⁰ This new section is, *mutatis mutandis*, a copy of Section 6-101 of the Uniform Probate Code, whose drafters stated that "[t]he sole purpose of this section is to prevent the transfers authorized here from being treated as testamentary."²¹

16. For a discussion of the constitutional issues involved, see J. Rodney Johnson, *The Absence of Due Process in Fiduciary Accounting: A Constitutional Concern*, VA. BAR ASS'N J., Fall 1997, at 11.

17. 257 Va. 46, 509 S.E.2d 833 (1999). For further discussion of *Zink*, see J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 33 U. RICH. L. REV. 1075, 1097 (1999).

18. *Zink*, 257 Va. at 49, 509 S.E.2d at 833.

19. *Id.* at 51, 509 S.E.2d at 836.

20. VA. CODE ANN. § 64.1-45.3 (Cum. Supp. 2001).

21. UNIF. PROBATE CODE § 6-101 cmt. (amended 1989), 8 U.L.A. 431 (1969).

C. *Joint Property—Survivorship—Securities' Accounts—
Presumption of Convenience*

The "presumption of convenience" was a judicial doctrine formerly applied to deposit accounts in financial institutions, pursuant to which a person depositing funds in a financial institution in the depositor's name and that of another (not the depositor's spouse), jointly, was presumed to have placed that other's name on the account solely for the depositor's convenience, i.e., so that the other might have access to these funds for the depositor's benefit if the depositor became ill or was otherwise unable to personally attend to the depositor's banking business.²² This presumption was repealed when the 1979 Session adopted uniform multiple party account legislation.²³

Unfortunately, the presumption of convenience resurfaced in the recent case of *Buck v. Jordan*,²⁴ wherein the Supreme Court of Virginia held that, although the presumption had been repealed vis-a-vis deposit accounts in financial institutions, it was applicable to investment accounts in investment corporations.²⁵ The problem thus created may be illustrated with the following hypothetical. If Father purchases specific stock and has it titled "Father and Daughter as joint tenants with the right of survivorship," they will own the stock equally during their joint lifetime, and Daughter will become the sole owner at Father's death. However, if Father opens an investment account titled in the same exact language, Father will own the entire account during their joint lifetime, and it will be an asset of his estate upon his death. Thus, as a result of *Buck*, ownership and survivorship rights in securities cases will be determined by whether the parties elect to have certificates of stock issued, or have the certificates held in an investment account—an unsupportable distinction. Accordingly, House Bill 1731 amended section 55-20.1 in order to pre-

22. This doctrine is more fully discussed in J. Rodney Johnson, *Joint, Totten Trust, and P.O.D. Accounts: Virginia Law Compared to the Uniform Probate Code*, 8 U. RICH. L. REV. 41 (1973).

23. 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 presumption of convenience in joint account cases was replaced with a presumption of survivorship by VA. CODE ANN. § 6.1-125.5(A) (Repl. Vol. 1999).

24. 256 Va. 535, 508 S.E.2d 880 (1998). Though recognized, the presumption was rebutted in this case, which is commented upon in Johnson, *supra* note 17, at 1095-97.

25. See *Buck*, 256 Va. at 541-42, 508 S.E.2d at 883.

vent the presumption of convenience from arising in this, or any, context in the future. The amendment provided that when any realty, personalty, or written memorial of a chose in action²⁶ is "titled, registered, or endorsed in the name of two or more persons 'jointly,' as 'joint tenants,' in a 'joint tenancy,' or other similar language," the parties will own the property as joint tenants without survivorship. However, if "the expression 'with survivorship' or any equivalent language" is added thereto, "it shall be presumed that such persons are intended to own the property as joint tenants with the right of survivorship as at common law."²⁷

In addition to this primary purpose, House Bill 1731 further clarified the law of concurrent estates by moving the language applicable to tenancies by the entireties formerly found in section 55-20.1, entitled "Joint ownership in real and personal property," into a new section 55-20.2, entitled "Tenants by the entireties in real and personal property; certain trusts."²⁸ Finally, House Bill 1731 also amended section 55-21, which deals with exceptions to section 55-20, to provide that its provisions are applicable to all fiduciaries, instead of only executors and trustees, and promis-

26. The term "written memorial of a chose in action" was added to the statute because of certain language in *Pitts v. United States*, 242 Va. 254, 408 S.E.2d 901 (1991), a case concerned with survivorship rights under section 55-21 "when it manifestly appears from the tenor of the instrument' creating the tenancy that survivorship was intended to be an attribute of the estate." *Id.* at 260, 408 S.E.2d at 904 (citation omitted). The Supreme Court of Virginia held that section 55-21 "intended to apply to joint tenancies and to tenancies by the entireties created by an 'instrument' of conveyance or devise. The promissory notes executed by the partnership are not such instruments. They did not *create* a tenancy by the entirety; they are memorials of a chose in action." *Id.* Thus, in order to ensure that the presumption of convenience would not be resurrected in the context of promissory notes, the 2001 Session added the term "written memorial of a chose in action" at this point in section 55-20.1 and inserted "memorializing the existence of" in section 55-21's opening sentence, viz., "[s]ection 55-20 shall not apply to any estate which joint tenants have as fiduciaries, nor to any real or personal property transferred to persons in their own right when it manifestly appears from the tenor of the instrument transferring such property, or *memorializing the existence of* a chose in action." VA. CODE ANN. § 55-21 (Cum. Supp. 2001) (emphasis added).

27. VA. CODE ANN. § 55-20.1 (Cum. Supp. 2001). This amendment further provided that "[t]his section is not applicable to multiple party accounts under §§ 6.1-125.1 through 6.1-125.16, or to any other matter specifically governed by another provision of this code." *Id.*

28. *Id.* § 55-20.2 (Cum. Supp. 2001). To complete this clarification, this legislation also moved the last sentence of Virginia Code section 55-21, also dealing with tenancies by the entirety, into new Virginia Code section 55-20.2 (Cum. Supp. 2001).

sory notes that only memorialize a chose in action instead of creating property.²⁹

D. Testamentary Trusts—Waiving Accounts—Inventories

The General Assembly, in its 1993 Session, added section 26-17.7 to Virginia probate law in order to permit a testator to expressly waive the statutory obligation of a testamentary trustee to account before the commissioner of accounts.³⁰ The primary purpose of House Bill 1733,³¹ enacted by the 2001 Session, was to amend section 26-12 to provide that, if a testator waives the requirement to account, the trustee “shall be exempted from the duty to file an inventory for so long as there remains no duty to file annual accounts.”³²

In addition, House Bill 1733 also amended the section dealing with account waiver in a most unusual manner. As originally enacted, subsection 26-17.7(A) (hereafter “A”) of the 1993 legislation regulated waiver of accounts for wills probated after June 30, 1993,³³ and subsection 26-17.7(D) (hereafter “D”) regulated waiver of accounts for wills probated prior to July 1, 1993.³⁴ For a testator’s waiver to be effective under A, the trustee must give certain notices and information to entitled beneficiaries within ninety days of qualification and make annual accounts to any of these beneficiaries that request them.³⁵ For the testator’s waiver to be effective under D, the trustee need only obtain written consent from the entitled beneficiaries.³⁶ A rather obvious problem

29. *Id.* § 55-21 (Cum. Supp. 2001). See *supra* note 26, for a discussion of the concept of “memorializing a chose in action.”

30. Act of Mar. 28, 1993, ch. 689, 1993 Va. Acts 969 (codified as amended at VA. CODE ANN. § 26-17.7 (Repl. Vol. 1997)). A provision also allowed for waiver of the obligation to account in testamentary trusts created before the effective date of this legislation if the will contained a waiver provision, and all adult beneficiaries who may be entitled to receive principal or income from the trust consent thereto. See J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 27 U. RICH. L. REV. 833, 840–41 (1993).

31. H.B. 1733, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 8, 2001, ch. 73, 2001 Va. Acts 48) (codified as amended at VA. CODE ANN. § 26-17.7 (Repl. Vol. 2001)).

32. VA. CODE ANN. § 26-12(C) (Repl. Vol. 2001).

33. *Id.* § 26-17.7(A) (Repl. Vol. 2001).

34. *Id.* § 26-17.7(D) (Repl. Vol. 2001).

35. *Id.* § 26-17.7(A) (Repl. Vol. 2001).

36. *Id.* § 26-17.7(D) (Repl. Vol. 2001).

arose in a certain number of post-June 30, 1993 trusts governed by A when the trustees, upon first consulting counsel some months following their qualification, were informed that the testator's waiver provision could not be honored because the trustee had failed to give the required notices and information within ninety days as mandated by A. In response to this problem, House Bill 1733 amended D in a manner that transforms the failure to comply with the ninety-day notice requirements of A from a fatal to a relatively inconsequential matter. This transformation was accomplished by replacing the requirement in D that wills governed by D be probated "prior to July 1, 1993" with "whenever probated," and then generally (though not exactly) importing the notice and information requirements of A into D.³⁷

The practical effect of this amendment was to allow the trustee of a post-June 30, 1993 trust, who unwittingly (or intentionally) failed to comply with A, to nevertheless qualify for waiver under subsection D, which now substitutes the entitled beneficiaries' consents for the former ninety-day notice requirement. Thus, the trustee who is aware of the ninety-day rule may now decide to ignore it and qualify under D which, unlike A, has no further provision requiring the trustee to make annual accounts to any of the entitled beneficiaries that request them. Although the goal of this legislation does not seem unreasonable, one wonders why this bit of statutory legerdemain was employed to reach it. If the ninety-day rule was proving too harsh, why not address it directly by an appropriate amendment to A—instead of permitting the avoidance of A by an amendment to D?³⁸ Lastly, House Bill 1733 also made two relatively minor amendments to subsections 26-17.7(A) and (C) dealing with the waiver of accounts.³⁹

37. *Id.*

38. While commenting upon the drafting in this portion of the bill, it should also be noted that the amendments to subsection D gratuitously inserted "an inventory or" in its opening sentence, which now reads "Notwithstanding the provisions of this section, any trustee under a will of a decedent containing the requisite waiver, whenever probated, shall be relieved of the duty to file an inventory or annual accounts . . ." *Id.* No reference to waiver of inventory should be made in a section whose title talks only about waiver of accounts and, most importantly, such language is absolutely unnecessary. The amendments to section 26-12 already provided that trustees who do not have to account under section 26-17.7 do not have to file an inventory. *Id.* § 26-12(C) (Repl. Vol. 2001).

39. These two changes are: (1) The class entitled to the required written notices in § 26-17.7(A) was changed from adults "who may then be entitled to receive income or principal from the trust," to adults "other than the trustee . . . to whom income or principal of the trust could be currently distributed," and (2) the provision in § 26-17.7(C) permitting

E. *Personal Representatives—Settlement of Accounts—Statement in Lieu*

Although the general rule of Virginia probate law contemplates that personal representatives of decedents' estates will file periodic accounts,⁴⁰ section 26-20.1 provides that if all distributees of an intestate estate or residuary beneficiaries under a will are also personal representatives, they may file a statement in lieu of making the required account.⁴¹ The required provision in this statement, that the estate has been distributed "after the time required by law," has been somewhat troublesome throughout this section's history because there is no such "time required by law" in any of the laws of the Commonwealth.⁴² The first of the 2001 amendments to this section ended this uncertainty by replacing the ambiguous phrase with "six months have elapsed since the personal representatives qualified in the clerk's office."⁴³ Another question has been whether a personal representative that is a residuary beneficiary and who is also the trustee of a trust was meant to have the benefit of this section; that question was given a negative answer by the second amendment.⁴⁴

Another concern developed from this section, which provided that a personal representative who was not able to make the required statement by the time an account was due might simply file a notice with the commissioner that the required statement "will be filed when all requisites of this section have been met."⁴⁵ As there was no limit on the number of such notices that might be filed, a number of years might pass before any estate paperwork

beneficiaries to demand that an account be filed notwithstanding a testator's waiver, was enlarged to permit such a demand notwithstanding a beneficiary's prior consent to waiver. *Id.* §§ 26-17.7(A), (C) (Repl. Vol. 2001).

40. *Id.* § 26-17.5 (Repl. Vol. 2001).

41. This statute requires that this statement recite "under oath that all known charges against the estate have been paid, and that after the time required by law, the residue of the estate has been delivered to the distributees or beneficiaries." *Id.* § 26-20.1 (Cum. Supp. 2000) (prior to amendment).

42. However, the Attorney General has opined that "After the time required by law" refers to a period determined reasonable by the commissioner of accounts in light of general law governing creditors' rights and the particular circumstances of the case." 1983-84 op. Va. Att'y Gen. 474.

43. VA. CODE ANN. § 26-20.1(A) (Repl. Vol. 2001).

44. "For the purposes of this section, the term 'residuary beneficiary' shall not include the trustee of a trust that receives a residuary gift under a decedent's will." *Id.*

45. *Id.* § 26-20.1 (Cum. Supp. 2000) (prior to amendment)

arrived in the commissioner's office, thereby increasing the opportunity for accidental or intended wrongs to be left undetected. Accordingly, the third amendment required personal representatives filing a notice of intent to file a statement at a later time to include therein "an explanation of why such a statement cannot presently be filed," and it also authorized the commissioner to require the filing of an interim account if the commissioner determines that the proffered explanation is not sufficient.⁴⁶ The fourth amendment authorized the commissioner to charge a \$75 fee for examining a notice of intent to file a statement, which is the same amount allowed for examining the statement itself.⁴⁷

F. *Spendthrift Trusts—Ceiling Removed—Child Support Exception*

The ceiling on the amount that may be held in a spendthrift trust, thereby immune from most claims of a beneficiary's creditors, and which was increased from \$600,000 to \$1,000,000 just three years ago,⁴⁸ was completely removed by the 2001 Session.⁴⁹ However, this same legislation also provided that "no such [spendthrift] condition shall operate to the prejudice of a judgment against a beneficiary for the support of the beneficiary's child."⁵⁰

G. *Non-Probate Payments—Adjustments*

Over the years, the General Assembly enacted numerous probate-related statutes that contain references to specific dollar amounts. It is the destiny of any such statute to decline in significance as inflation decreases the actual value of the specified amount. Responding to this problem, as well as providing a certain upgrading of these statutes, the General Assembly increased the amounts in a number of these statutes.⁵¹

46. *Id.* § 26-20.1(B) (Repl. Vol. 2001).

47. *Id.* § 26-20.1(C) (Repl. Vol. 2001).

48. Act of Apr. 2, 1998, ch. 214, 1998 Va. Acts 329 (codified as amended at VA. CODE ANN. § 55-19 (Cum. Supp. 2000)).

49. VA. CODE ANN. § 55-19(B) (Cum. Supp. 2001).

50. *Id.*

51. Although inflationary adjustment was one argument behind these increases, all

1. Probate Avoidance—Small Estates

The Virginia Code contains a number of statutes designed to facilitate the transfer of specific kinds of property from the dead to the living without requiring the recipients to go through the probate process. These statutes are permissive in nature and, although they fully protect the transferor who elects to rely upon them, a potential transferee cannot force their use. A further common denominator in most of these statutes has been a requirement that the value of the property in question not exceed \$10,000. This ceiling has been increased to \$15,000 in the following instances: (1) certain sums due decedents from the Commonwealth, the United States, labor unions or employers;⁵² (2) corporate securities owned by the decedent;⁵³ (3) sums due deceased trust or estate beneficiaries;⁵⁴ (4) sums due deceased inmates of state mental institutions;⁵⁵ (5) sums due deceased patients of municipally operated health care facilities;⁵⁶ and (6) personal property belonging to nonresident decedents.⁵⁷

2. Small Estates Act

The Virginia Small Estate Act⁵⁸ has provided for an affidavit-based personal property collection process in estates where the value of the entire personal probate estate does not exceed \$10,000.⁵⁹ The 2001 legislation increased this ceiling to \$15,000.⁶⁰

but two of these sections were increased from \$5,000 to \$10,000 in 1996 and, while Virginia has not experienced 50% inflation since that time, these same sections are now increased to \$15,000. The 1996 increases are discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 31 U. RICH. L. REV. 1249, 1254–56 (1997). The discussion in the following text is taken from this source, with appropriate modifications, but without traditional attribution.

52. VA. CODE ANN. § 64.1-123 (Cum. Supp. 2001).

53. *Id.* § 64.1-123.1 (Cum. Supp. 2001).

54. *Id.* § 64.1-123.3 (Cum. Supp. 2001).

55. *Id.* § 64.1-124 (Cum. Supp. 2001).

56. *Id.* § 64.1-124.1 (Cum. Supp. 2001).

57. *Id.* § 64.1-130 (Cum. Supp. 2001).

58. *Id.* §§ 64.1-132.1 to -132.4 (Repl. Vol. 1995 & Cum. Supp. 2001). For a discussion of this Act as originally enacted, see J. Rodney Johnson, *Wills, Trusts, and Estates*, 68 VA. L. REV. 521, 529–30 (1982).

59. *Id.* § 64.1-132.2 (Cum. Supp. 2000).

60. *Id.* § 64.1-132.2 (Cum. Supp. 2001).

3. Homestead, Exempt Property, and Living Allowance

The General Assembly, in its 1981 Session, enacted comprehensive legislation governing the rights of a decedent's spouse and children to exempt property and allowances.⁶¹ The 2001 amendments increased the homestead allowance from \$10,000 to \$15,000,⁶² the exempt property allowance from \$10,000 to \$15,000,⁶³ and the personal representative's authority to award a living allowance from \$12,000 to \$18,000 if payment is made as a lump sum, and from \$1,000 to \$1,500 monthly for one year if payment is made on a periodic basis.⁶⁴ It should be noted that the living allowance amount is not a limitation upon the amount of this entitlement, which remains a "reasonable allowance,"⁶⁵ but only a limitation upon what can be disbursed without court approval.⁶⁶

H. *Incorporation by Reference—Questionable Legislation*

Generally speaking, the common law term "incorporation by reference" refers to "[a] method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained with the primary one."⁶⁷ Virginia common law imposes the following three conditions upon the employment of this concept:

- (1) the document [to be incorporated] must be a paper in actual existence at the time of the execution of the will; (2) it must appear from the face of the will that it is a paper in actual existence; and (3) it must be identified and described with reasonable certainty in the will.⁶⁸

61. Act of Mar. 22, 1981, ch. 580, 1981 Va. Acts 897 (codified at VA. CODE ANN. §§ 64.1-151.1 to -151.6 (Repl. Vol. 1995 & Cum. Supp. 2001)). For a discussion of this Act and its background, see J. Rodney Johnson, *Support of the Surviving Spouse and Minor Children in Virginia: Proposed Legislation v. Present Law*, 14 U. RICH. L. REV. 639, 646-52 (1980)), and Johnson, *supra* note 58, at 521-25.

62. VA. CODE ANN. § 64.1-151.3 (Cum. Supp. 2001).

63. *Id.* § 64.1-151.2 (Cum. Supp. 2001).

64. *Id.* § 64.1-151.4 (Cum. Supp. 2001).

65. *Id.* § 64.1-151.1 (Repl. Vol. 1995).

66. *Id.* § 64.1-151.4 (Cum. Supp. 2001).

67. BLACK'S LAW DICTIONARY 770 (7th ed. 1999).

68. Thrasher v. Thrasher, 202 Va. 594, 603, 118 S.E.2d 820, 825 (1961) (citing Law-

In Virginia there is one statutory exception to the requirements of this doctrine,⁶⁹ and two superficially similar but different matters that need to be distinguished therefrom.⁷⁰ Against this background, a number of questions arise in connection with the General Assembly's enactment of section 64.1-45.2.⁷¹

less v. Lawless, 187 Va. 511, 518, 47 S.E.2d 431, 434 (1948)). Although these cases refer to outside papers to be incorporated in wills, there is no reason to believe that the rules would be any different if the recipient paper was something other than a will.

69. See VA. CODE ANN. § 64.1-57 (Cum. Supp. 2001) (listing boilerplate fiduciary powers that may be wholly or partially incorporated into a trust or will by reference thereto). Whereas the common law rule permits only presently existing writings to be incorporated into another, this section provides that "unless the will or trust instrument expresses a contrary intention, the incorporation by reference of powers enumerated by this statute shall refer to those powers existing at the time of death." *Id.* § 64.1-57(4) (Cum. Supp. 2001).

70. In 1995 the General Assembly added section 64.1-45.1 to the Virginia Code, which legitimated the concept of a testator's post-will list to dispose of items of tangible personal property, and declared that "except as provided herein, [this section] shall not otherwise affect the law of incorporation by reference." *Id.* § 64.1-45.1 (Repl. Vol. 1995 & Cum. Supp. 2001). Notwithstanding the General Assembly's mention of "incorporation by reference" in this statute, it does not involve this concept for a rather obvious reason. Under any definition of the incorporation doctrine, the writing to which reference is made becomes a part of the paper making the reference. However, the list authorized by section 64.1-45.1 does not become a part of the testator's will and it is not admitted to probate in the clerk's office, but a copy must be furnished to the commissioner of accounts during the accounting process. *Id.* A discussion of this list can be found in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 29 U. RICH. L. REV. 1175, 1185-86 (1995). In 1997 the General Assembly extended a similar, but somewhat restricted, privilege to settlors of inter vivos trusts. VA. CODE ANN. § 55-7.2 (Cum. Supp. 2001); see also Johnson, *supra* note 51, at 1264-65.

71. VA. CODE ANN. § 64.1-45.2 (Cum. Supp. 2001). This section, entitled "Incorporation by reference; letter of instruction or memorandum into a will, power of attorney or trust instrument," states:

A. The following original documents may be incorporated by reference into a will, power of attorney or trust instrument:

1. A letter or memorandum to the fiduciary or agent as to the interpretation of discretionary powers of distribution where the will, power of attorney or trust instrument provides the fiduciary or agent the power to make distributions to beneficiaries in the discretion of the fiduciary or agent; and

2. A letter or memorandum stating the views or directions of the maker of the will, power of attorney or trust instrument as to the exercise of discretion by the fiduciary or agent in making health care decisions for the maker.

B. No provision in the original document sought to be incorporated by reference under this section that contradicts or is inconsistent with a provision of the incorporating will, power of attorney or trust instrument shall be enforced.

C. This section shall not prevent the incorporation by reference of any writing into any other writing that would otherwise be effective under § 64.1-45.1 or under any other law of incorporation by reference.

In summary, this puzzling statute appears to provide for the incorporation into wills, powers of attorney, and trust instruments of (1) "original documents," (2) that "may be prepared before or after" the execution of the incorporating document, and (3) that have been "signed and notarized," if the original documents relate to either "the interpretation of discretionary powers of distribution," or the maker's views or directions "as to the exercise of discretion by the fiduciary or agent in making health care decisions."⁷² The primary question to be posed is "Why was this statute enacted?" Privacy cannot be a goal because an incorporated document becomes a part of the original and thus, anyone entitled to a copy of the primary document would be entitled to a copy of anything incorporated therein. Legal efficacy cannot be a goal because, although incorporation by reference can be very helpful in some cases, knowledgeable estate planners would agree that if a decision regarding a fiduciary's exercise of discretion is made before the primary document is executed it should be stated therein, and if such a decision (or a contrary one) is made thereafter, it should be expressed in a new will, power of attorney, or trust agreement.⁷³ For obvious reasons, simplicity, economy and convenience cannot be goals.⁷⁴ The one possible goal that can be envisioned is the creation of a mechanism for retaining a certain amount of control over distributions from an *irrevocable* inter vivos trust by a post-execution "letter or memorandum to the fiduciary . . . as to the interpretation of discretionary powers of distribution."⁷⁵ However, an irrevocable trust is typically utilized only

D. The documents referenced in subsection A shall be signed and notarized, and may be prepared before or after the execution of the will, power of attorney or trust instrument.

Id.

72. *Id.*

73. The problem of contradictions and inconsistencies between original and recipient documents is recognized in Virginia Code section 64.1-45.2(B). *See id.* § 64.1-45.2(B) (Cum. Supp. 2001) (addressing contradiction). However, the easiest way to avoid the problem of reconciling conflicting documents, which occurs far too often, is to have only one document. Moreover, the one-document approach not only reduces the likelihood of litigation, but it also increases the likelihood that the client's goals will be accomplished.

74. Once upon a time, when preparation of new documents was the laborious quill-pen task of scribes, a genuine case could be made for codicils to wills and amendments to other lengthy documents. These considerations are absent in today's highly automated word-processing environment and thus, except in unusual cases, the knowledgeable estate planner finds it easier, faster, and better to execute a new document instead of attempting to modify an existing one.

75. VA. CODE ANN. § 64.1-45.2(A)(1) (Cum. Supp. 2001).

when the settlor is seeking income and/or estate tax advantages, and it is clear that in such cases the settlor's possession of a power to control a trustee's discretionary distribution power will result in the loss of any income or estate tax benefit otherwise available to an irrevocable inter vivos trust.⁷⁶

In addition to the primary "why" question discussed above, a non-exclusive list of other concerns raised by this statute includes the following: (1) How does one employ this concept? The Supreme Court of Virginia has stated how the common law rule is employed, the statutory fiduciary-power exception states how it is employed, the analogous but different statutes dealing with disposition of tangible personal property at death state how they are employed, but the present statute is silent; (2) Why is the term "original documents" used, and what happens if no original document is found but a copy is?; (3) Why does this statute provide for incorporating letters or memoranda relating to health care decisions into a trust or will, neither of which relate to such matters and the latter of which does not become a legal document until after the testator has died and health care decisions can no longer be made?; (4) Why does this statute expressly state that instruments effective under section 64.1-45.1 shall not be negatively affected by its provisions, but make no similar statement about the spiritual twin of section 64.1-45.1, section 55-7.2?; and (5) Why, if there is any good purpose to be served by this statute, will an intended incorporation thereunder fail if the original document sought to be incorporated is not notarized, notwithstanding uncontradicted evidence of its authenticity? Giving such obeisance to a largely meaningless formality is totally out of step with reason and reality.

In short, there appears to be only one good thing that can be said of this statute. It expressly states that "[t]his section shall not prevent the incorporation by reference of any writing into any other writing that would otherwise be effective under . . . any other law of incorporation by reference."⁷⁷ Thus, notwithstanding the problems presented by this statute, the Virginia lawyer may continue to use and rely upon the settled rules of prior law in all non-tax matters. However, because of the possible loss of income

76. See I.R.C. § 674(a) (1994), as to income tax, and I.R.C. § 2038 (1994), as to estate tax.

77. VA. CODE ANN. § 64.1-45.2(C) (Cum. Supp. 2001).

and estate tax advantages associated with irrevocable inter vivos trusts, the prudent estate planner may wish to include a provision expressly renouncing this new incorporation power in any post-June 30, 2001, irrevocable trust instruments, and to suggest to clients who created irrevocable trusts prior to July 1, 2001, that they execute an instrument disclaiming or renouncing their after-the-fact acquisition of this power under the 2001 legislation. Taking all of this section's problems into account, in light of its failure to accomplish any purpose, it is submitted that the General Assembly, in its 2002 Session, should repeal, rather than attempt to redraft, this statute.

I. *Certain Small Estates—Waiver of Inventory and Settlement*

Section 26-12.3, designed to facilitate the probate process in small estates, has provided that “[w]hen an estate does not exceed \$10,000 in value, and an heir, beneficiary or creditor whose claim exceeds the value of the estate seeks qualification, the clerk shall waive inventory under § 26-12 and settlement under § 26-17.”⁷⁸ The 2001 amendments to this section changed “an estate” to “a personal estate under the supervision and control of the personal representative or curator,” and added the further requirement that “the personal representative or curator does not have the power of sale over real estate.”⁷⁹

The initial portion of the first amendment, changing “an estate” to a “personal estate” not exceeding \$10,000, standing alone, would extend this section's operation because it would eliminate the value of any real estate from the computation. However, the complete language of the first amendment, “a personal estate under the supervision and control of the personal representative or curator,”⁸⁰ raises a major issue regarding the continuing viability

78. *Id.* § 26-12.3 (Cum. Supp. 2000) (prior to amendment).

79. As amended, the statute reads as follows:

When (i) a personal estate under the supervision and control of the personal representative or curator does not exceed \$10,000 in value, (ii) the personal representative or curator does not have the power of sale over real estate, and (iii) an heir, beneficiary or creditor whose claim exceeds the value of the estate seeks qualification, the clerk shall waive inventory under § 26-12 and settlement under § 26-17.

Id. § 26-12.3 (Repl. Vol. 2001).

80. *Id.*

of this section's relief provisions because, if there is already a personal representative in existence under clause (i), why would another person be seeking qualification under clause (iii)? Moreover, even if another should seek qualification in such a case, the clerk does not have the power to make such an appointment,⁸¹ so why state that "the clerk shall waive" inventory and settlement upon making the appointment that the clerk does not have the authority to make?⁸² The further requirement added by the second amendment, that "the personal representative or curator does not have the power of sale over real estate,"⁸³ adds to the confusion regarding this legislation because curators do not have a power of sale over real estate⁸⁴ and an administrator would have that power only if granted by the circuit court.⁸⁵ In addition, the first amendment's change of "an estate" to "a personal estate" creates an ambiguity regarding the meaning of "the estate" in clause (iii),⁸⁶ and clause (iii) also refers to a non-existent "§ 26-17."⁸⁷ Because of the uncertainties surrounding the application of this legislation, it needs to be readdressed during the 2002 Session of the General Assembly.

81. In *Bolling v. D'Amato*, 259 Va. 299, 526 S.E.2d 257 (2000), the court referred to the "ancient and settled rule" that "when an administrator had been appointed and qualified, the power of the court or clerk is exhausted, and no further appointment can be made until a vacancy occurs in the office in some way recognized by law." *Id.* at 304, 526 S.E.2d at 259 (quoting *Beavers v. Beavers*, 185 Va. 418, 423, 39 S.E.2d 288, 290 (1946)).

82. Of course, the court or clerk has the power to appoint an executor under a will that has been brought forward after the qualification of an administrator on an estate believed to be intestate, but the remedy of the section in question is aimed at the qualification of "an heir, beneficiary or creditor whose claim exceeds the value of the estate." *Compare* VA. CODE ANN. § 26-12.3 (Repl. Vol. 2001), with *id.* § 64.1-77 (Repl. Vol. 1995).

83. VA. CODE ANN. § 26-12.3 (Repl. Vol. 2001).

84. The curator's role, however, is broader than that of an administrator because, although the latter has no control over a decedent's real property by virtue of office, a curator "may lease or receive the rents and profits of any real estate whereof the decedent or testator may have died seized or possessed." *Id.* § 64.1-93 (Repl. Vol. 1995).

85. Section 64.1-57.1 empowers the circuit court to grant "all or a part of such powers as may be incorporated by reference pursuant to § 64.1-57." *Id.* § 64.1-57.1 (Cum. Supp. 2001). One of these fiduciary powers is the power to sell real estate. *Id.* § 64.1-57(1)(b) (Cum. Supp. 2001).

86. For example, when clause (iii) refers to "an heir, beneficiary or creditor whose claim exceeds the value of the estate," it is unclear whether "the estate" means the entire estate or only the personal estate. *Id.* § 26-12.3 (Repl. Vol. 2001) (emphasis added).

87. This section's reference to § 26-17 has been incorrect since the latter was repealed in 1993. Act of Mar. 28, 1993, ch. 689, § 2, 1993 Va. Acts 969. The correct reference is VA. CODE ANN. § 26-17.5 (Repl. Vol. 2001).

J. Small Estates—Waiver of Surety

The general rule of section 26-4 allows a court or its clerk to waive surety upon the official bond of a personal representative, guardian, conservator or committee if the amount coming under the fiduciary's control does not exceed \$10,000.⁸⁸ However, when the General Assembly, in its 1983 Session, amended section 26-59 to allow certain nonresidents to qualify as personal representatives, it stipulated that bond with surety would be required "in every case . . . unless a resident personal representative . . . qualifies at the same time."⁸⁹ It was believed important to have a surety on the bond of every nonresident acting as sole fiduciary in order that the commissioner of accounts and estate beneficiaries might have some leverage or control over these persons once they left the Commonwealth, taking estate assets with them. Thus, the "in every case" language of the 1983 legislation was intended to preclude the application of the small-estate waiver provision of section 26-4 to cases involving nonresident fiduciaries serving without a Virginia co-fiduciary. As time passed, and the General Assembly became more comfortable with the concept of nonresident fiduciaries serving alone, it partially relaxed the requirement of section 26-59 by permitting the circuit court to waive surety upon fiduciary bonds in accordance with the small estate provision of section 26-4.⁹⁰ However, it refrained from extending this power to clerks of court.

In the 2001 Session, the General Assembly amended section 26-59 to extend this power to clerks of court. This amendment was contained in a lengthy omnibus bill, the official summary of which opens by stating that it "[m]akes technical corrections . . . that are not intended to create any substantive changes in policy."⁹¹ In regard to the specific amendment in question, the same source states that "an unintended conflict between the section relating to nonresident fiduciaries and a section relating to the qualification of a fiduciary without security is eliminated by

88. VA. CODE ANN. § 26-4 (Repl. Vol. 2001).

89. Act of Mar. 27, 1983, ch. 467, 1983 Va. Acts 605 (codified at VA. CODE ANN. § 26-59(B) (Repl. Vol. 1985)).

90. Act of Apr. 6, 1996, ch. 680, 1996 Va. Acts 1179 (codified at VA. CODE ANN. § 26-59 (A) (Repl. Vol. 2001)).

91. S.B. 891, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Apr. 5, 2001, ch. 836, 2001 Va. Acts 1173) (codified at VA. CODE ANN. § 26-59 (Repl. Vol. 2001)).

clarifying that the clerk may waive the surety when he appoints.⁹² It is submitted, however, that the change in question was substantive as opposed to technical and that the difference it eliminated was not “an unintended conflict.”

K. *Wrongful Death or Personal Injury—Action Against Resident or Nonresident*

Section 64.1-75.1 provided that when a nonresident sought to be sued for personal injury or wrongful death arising out of acts occurring in Virginia has died, “an administrator of such person may be appointed [in Virginia], solely for the purpose of prosecution of said suit.”⁹³ In the 2001 Session, the General Assembly first broadened the applicability of this section by also making its remedy applicable to actions against estates of deceased residents.⁹⁴ But then it restricted the section’s applicability by limiting it to a suit against a decedent “for whose estate an executor has not been appointed.”⁹⁵ It is difficult to believe that this legislation was intended to require a Virginia plaintiff to prosecute a Virginia-origin suit against a deceased nonresident defendant in the nonresident’s jurisdiction simply because an executor has been appointed there, but such is the literal language of the statute. Similarly, it is difficult to believe that this legislation was intended to allow the appointment of an administrator “solely for the purpose of prosecution of” these suits even if a Virginia administrator has already been appointed for a Virginia decedent’s estate, but again such is the literal language of the statute.⁹⁶ It is

92. *Id.*

93. VA. CODE ANN. § 64.1-75.1 (Repl. Vol. 1995) (prior to amendment).

94. *Id.* § 64.1-75.1 (Cum. Supp. 2001).

95. *Id.*

96. The statute allows the appointment of this administrator “for the sole purpose” of suit except when an executor has been appointed. It is possible that this legislation was meant as a response to *Bolling v. D’Amato*, 259 Va. 299, 526 S.E.2d 257 (2000), where one interpretation of the Court’s decision suggested that a practice might have developed of appointing administrators “for the sole purpose” of suit even though the clerk had already appointed an administrator, notwithstanding any legal justification for such an appointment. See Johnson, *supra* note 2, at 1088. However, if the purpose of the legislation was to legitimate the appointment of an administrator “for the sole purpose” of suit when an administrator of the estate had already been appointed, it is difficult to see why such a possibility would not also be legitimated if the personal representative already qualified on the decedent’s estate happened to be an executor instead of an administrator.

submitted that this legislation needs to be readdressed and clarified in the 2002 Session.

L. *Personal Representatives—Suits by or Against*

Section 64.1-144, the entire text of which provided that “[a] personal representative may sue or be sued upon any judgment for or against or any contract of or with his decedent,”⁹⁷ was amended by adding the following language to its end: “including, but not limited to, suits for personal injury or wrongful death.”⁹⁸ It is not clear why this amendment was believed to be necessary but, if it was, logic would suggest that provision should also be made for tort actions where neither personal injury nor death is involved. Thus, this legislation needs to be added to the list of 2001 enactments requiring further action in the 2002 Session.

M. *Fiduciary Bonds—Execution by Agent*

Section 26-3, dealing with fiduciary bonds, provided that any fiduciary required to post additional bond or a new bond must personally appear before the court or clerk to make the required oath and sign the necessary paperwork.⁹⁹ This procedure has become more inconvenient since Virginia relaxed its fiduciary qualification laws and increasing numbers of non-Virginians have begun serving in a variety of fiduciary capacities. In response to the travel, time, and expense problems presented by requiring a fiduciary’s personal appearance in bond matters, the General Assembly amended section 26-3 to authorize “the fiduciary’s execution [of a new, additional, or reduction in, bond] to be made by the fiduciary’s agent under a power of attorney expressly authorizing the same.”¹⁰⁰

97. VA. CODE ANN. § 64.1-144 (Repl. Vol. 1995) (prior to amendment).

98. *Id.* § 64.1-144 (Cum. Supp. 2001).

99. *Id.* § 26-3 (Repl. Vol. 1997) (prior to amendment).

100. *Id.* § 26-3(B) (Repl. Vol. 2001). This legislation also made clarifying changes to VA. CODE ANN. § 26-3(A) (Repl. Vol. 2001).

N. *Commissioners of Accounts—Duties of Assistant Commissioners*

Section 26-10, dealing with the appointment, duties, and powers of assistant commissioners, has been somewhat ambiguous in regard to those duties and powers. This ambiguity is eliminated by the 2001 amendment, which provided that “[o]n all qualifications after June 30, 2001, assistant commissioners of accounts shall act only in such cases as the commissioner of accounts delegates to him.”¹⁰¹

O. *Trusts—Trustee Hiatus—Who to Execute*

Section 26-51 deals with who is to execute a trust in a variety of circumstances, such as when a trustee dies, resigns, becomes incapacitated, or is confined, and a replacement has not yet been appointed.¹⁰² This section was rewritten by the General Assembly to clarify its operation and to make it grammatically correct.¹⁰³ No substantive changes were made.¹⁰⁴

P. *Notice of Probate—Affidavit of No Notice Required*

The General Assembly, in its 1993 Session, created section 64.1-122.2 to provide for a form of after-the-fact notice of probate to interested parties in response to a concern that Virginia’s ex parte probate process did not comply with the minimum notice requirements of the Fourteenth Amendment.¹⁰⁵ To ensure compliance, this section requires the party charged with giving notice thereunder to file an affidavit in the clerk’s office “stating the names and addresses of the persons to whom he has mailed or delivered notice and when the notice was mailed or delivered to each,”¹⁰⁶ and prohibits the commissioner of accounts from approv-

101. *Id.* § 26-10 (Repl. Vol. 2001).

102. *Id.* § 26-51 (Cum. Supp. 2000) (prior to amendment).

103. Compare *id.* § 26-51 (Repl. Vol. 2001), with *id.* § 26-51 (Cum. Supp. 2000).

104. *Id.* § 26-51 (Repl. Vol. 2001).

105. Act of Feb. 9, 1993, ch. 4, 1993 Va. Acts 3 (codified at VA. CODE ANN. § 64.1-122.2 (Repl. Vol. 1995)); see also Johnson, *supra* note 30, at 833–35.

106. VA. CODE ANN. § 64.1-122.2(F) (Cum. Supp. 2001).

ing an account until this affidavit has been filed.¹⁰⁷ A minor problem has developed under this compliance provision in those cases where notice is not required to be given to anyone. In such cases an affidavit that notice was given cannot be filed and, in the absence of such an affidavit, some commissioners would not approve an account. To resolve this impasse, the General Assembly amended the compliance provision to require either the filing of the affidavit of notice given or an affidavit “that the name and address of the person to whom notice is required” cannot be found.¹⁰⁸

Q. *Wills—Recordation—Certified Copy*

Section 64.1-94, addressing the recordation of wills, was amended to clarify that a “duly certified copy” of a will includes a copy “prepared from [a] microfilmed or electronic record and certified as authentic by the clerk or his designee.”¹⁰⁹

R. *Charitable Trusts—Charitable Corporations as Trustees*

Although Virginia law prohibits any legal entity from engaging in the trust business without a certificate of authority from the State Corporation Commission,¹¹⁰ anecdotal evidence presented during the 2001 Session indicated that some schools and other charitable entities were in fact serving as trustees of their own pooled income funds and split-interest trusts in which they were one of the beneficiaries. Seeing no harm in such a practice, the General Assembly amended section 6.1-32.12,¹¹¹ dealing with exemptions to the general prohibition, by adding language that “[c]larifies and validates the existing practice.”¹¹²

107. *Id.*

108. *Id.*

109. *Id.* § 64.1-94 (Cum. Supp. 2001).

110. *Id.* § 6.1-32.13 (Repl. Vol. 1999).

111. *Id.* § 6.1-32.12(7) (Cum. Supp. 2001).

112. H.B. 1730, Summary as introduced, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 26, 2001, ch. 717, 2001 Va. Acts 968).

S. *International Wills—Registry System*

In 1995, the General Assembly enacted the Uniform International Wills Act.¹¹³ In the 2001 Session, the General Assembly made a ministerial amendment to the section dealing with Virginia's registry system for international wills by changing the term "Secretary of State" (an office that does not exist in Virginia), to "Secretary of the Commonwealth."¹¹⁴

T. *Intestate Succession—Appointment of Administrator—Priorities*

The basic rule of section 64.1-118 has been to give a surviving spouse the first priority in qualifying on a decedent's intestate estate and, in the absence of a spouse who wishes and is able to qualify, to allow administration to be granted to "such of the others entitled to distribution as the court or clerk shall see fit."¹¹⁵ This latter provision has resulted in what some have referred to as a "race to the courthouse" that has led to undesirable results in some cases. Accordingly, House Bill 1732 was introduced to eliminate the race aspect of this statute.¹¹⁶ However, notwithstanding the General Assembly's passage of this bill, a gubernatorial amendment accepted during the 2001 Special Session provided "[t]hat the provisions of this act shall not become effective unless reenacted by the 2002 Session of the General Assembly and signed by the Governor."¹¹⁷ The Governor did not state his reasons for this amendment; they remain unknown at the time of this publication.

113. Act of Mar. 20, 1995, ch. 443, 1995 Va. Acts 637 (codified at VA. CODE ANN. §§ 64.1-96.2 to -96.11 (Repl. Vol. 1995)); see UNIF. PROBATE CODE, art. II, pt. 10, 8 U.L.A. 191 (1995); see also Johnson, *supra* note 70, at 1190.

114. VA. CODE ANN. § 64.1-96.11 (Cum Supp. 2001).

115. *Id.* § 64.1-118 (Cum. Supp. 2000) (prior to amendment).

116. H.B. 1732, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Apr. 4, 2001, ch. 795, 2001 Va. Acts 1084) (codified as amended at VA. CODE ANN. § 64.1-118 (Cum. Supp. 2001)).

117. Act of Apr. 9, 2001, ch. 795, 2001 Va. Acts (codified as amended at VA. CODE ANN. § 64.1-118 (Cum. Supp. 2001)).

III. SUPREME COURT OF VIRGINIA DECISION

A. *Estate Administration—Section 64.1-57 Powers—Reliance*

The primary issue before the court in *Roberts v. Roberts*¹¹⁸ was “whether Code § 64.1-57(1)(k)¹¹⁹ insulates a fiduciary against a claim of negligence in the preparation and filing of an estate tax return by an ‘agent or professional representative.’”¹²⁰ Shortly after S qualified as executor on T’s estate he determined that this undertaking was beyond his level of competence and, pursuant to the above-referenced power incorporated by reference in T’s will, he retained Bank as his agent to provide the necessary expertise and services in the administration of T’s estate.¹²¹ One service provided by Bank was the preparation of an estate tax return for T’s estate, on which Bank failed to include certain bonds that had been found in a safe deposit box owned jointly by S and T.¹²² S claimed to own these bonds by way of gifts from T.¹²³ Although S signed the return prepared by Bank, S “did not read such return, expecting same to be correct.”¹²⁴ Following the settlement of tax claims based upon the noninclusion of the bonds, estate beneficiaries brought an action against S seeking to recover the amount their expected inheritances had been reduced because of the additional payments to federal and state tax authorities.¹²⁵ The commissioner in chancery to whom the trial court referred this mat-

118. 260 Va. 660, 536 S.E.2d 714 (2000).

119. When incorporated by reference into a will or trust, or granted to an administrator in intestacy, this subsection empowers a fiduciary:

To employ and compensate, out of the principal or the income or both as to the fiduciary shall seem proper, agents, accountants, brokers, attorneys-in-fact, attorneys-at-law, tax specialists, licensed real estate brokers, licensed salesmen and other assistants and advisors deemed by the fiduciary needful for the proper administration of the trust or estate, and to do so without liability for any neglect, omission, misconduct, or default of any such agent or professional representative provided he was selected and retained with reasonable care.

VA. CODE ANN. § 64.1-57(1)(k) (Cum. Supp. 2001).

120. *Roberts*, 260 Va. at 662, 536 S.E.2d at 715.

121. *Id.* at 663, 536 S.E.2d at 716.

122. *Id.*

123. *Id.* at 664, 536 S.E.2d at 716.

124. *Id.* at 669, 536 S.E.2d at 719.

125. A secondary issue in this case focused on S’s alleged negligence in failing to sue Bank to recover this amount for the estate. *See id.* at 666, 670, 536 S.E.2d at 719–20. The trial court’s affirmative response was reversed. *See id.* at 670, 536 S.E.2d at 720.

ter found that S selected and relied upon [Bank] because of its expertise and that S “fully informed [Bank] of the facts necessary to prepare the tax return for the estate.”¹²⁶ Nevertheless, the commissioner reported, and the trial court held, that S owed T’s estate a duty to review the tax return in detail and that S “did not use ‘reasonable care and skill’ when he blindly relied upon” Bank.¹²⁷

However, the Supreme Court of Virginia, in reversing the trial court, noted that “Code § 64.1-57(1)(k) would be rendered meaningless if a fiduciary could hire an agent whose expertise is essential to managing an estate or trust and then be held liable for relying on the expertise provided by that agent.”¹²⁸ The court’s review of the evidence disclosed no negligence on S’s part in selecting or retaining Bank as his agent, and it concluded that “[h]is reliance upon the bank’s work was not ‘blind’; rather, it reflected the sort of reliance anticipated by Code § 64.1-57(1)(k), which contemplates the situation where a fiduciary does not have the ability to perform this function himself.”¹²⁹

IV. VIRGINIA CIRCUIT COURT OPINIONS

A. *Augmented Estate—Exclusions—Gifts to Decedent—Proceeds*

The issue before the court in *In re Estate of Seitz*¹³⁰ was whether a certain farm purchased by a testatrix and owned at her death should be included in her augmented estate.¹³¹ Testatrix’s executor and children claimed they might be able to establish at trial that the funds used by Testatrix to purchase the farm were received by gift or inheritance from her former husband.¹³² However, on a motion in limine, the court held that such evidence “would be irrelevant for purposes of determining whether the farm is included in the augmented estate.”¹³³ The court further

126. *Id.* at 669, 536 S.E.2d at 719.

127. *Id.*

128. *Id.*

129. *Id.* at 669–70, 536 S.E.2d at 719.

130. No. 99-47-01, 2000 WL 890737 (Va. Cir. Ct. June 23, 2000).

131. *Id.* at *1.

132. *Id.*

133. *Id.* at *2.

explained that if evidence was offered to show that the farm itself had been received gratuitously, then the farm would be excluded from Testatrix's augmented estate pursuant to Virginia Code section 64.1-16.1(B), but "[i]f, however, merely the money which [Testatrix] used to purchase the farm was 'received' . . . [gratuitously], then the farm *would not be excluded* from the augmented estate."¹³⁴ Another way of stating the court's conclusion is that the exclusion in question extends only to the original gifted property and not to its proceeds.

Although the court quoted from the code section that states the correct answer to the question before it, the court failed to quote the controlling provision in its entirety. Two of the words omitted by the court would have led it to the opposite, and correct, holding in this case. The relevant provision reads in full as follows:

"Nothing herein shall cause to be included in the augmented estate . . . (ii) the value of any property, its income *or proceeds*, received by the decedent by 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, before or during the marriage to the surviving spouse . . . to the extent such property, income, *or proceeds* were maintained by the decedent as separate property."¹³⁵

B. *Augmented Estate—Exclusions—Date of Transfer*

The issue believed to be controlling in *In re Estate of Swecker*,¹³⁶ was whether Decedent conveyed certain farm property to a family partnership before or after August 15, 1987, the date of his marriage to the surviving spouse who, upon his death, elected to take her augmented estate rights in his estate.¹³⁷ This determination was based upon section 64.1-16.1(A)(3), which includes in a decedent's augmented estate certain tainted transfers made "during the marriage to the surviving spouse."¹³⁸ The surviving spouse argued that the transfer to the family partnership

134. *Id.* at *1.

135. VA. CODE ANN. § 64.1-16.1(B)(ii) (Cum. Supp. 2001) (emphasis added).

136. No. 150600, 2000 Va. Cir. LEXIS 361 (Cir. Ct. Aug. 7, 2000) (Fairfax County). This citation is to the court's opinion letter which is incorporated by reference into the court's final decree of August 25, 2000, as "Exhibit B." The Report of the Special Commissioner in Chancery, to be referred to later, was incorporated into the final decree as "Exhibit A."

137. See Report of Special Commissioner in Chancery at 5, 7.

138. VA. CODE ANN. § 64.1-16.1(A)(3) (Cum. Supp. 2001).

was not made until October 27, 1987, the date the deed in question was recorded, which was more than two months after her marriage to Decedent.¹³⁹ Relying upon the report of the special commissioner in chancery to whom this matter was referred, the court held that the farm property in question was transferred after August 14, 1987, and thus was included in Decedent's augmented estate.¹⁴⁰

Neither the court nor the commissioner discussed another provision of Virginia's augmented estate law which, if applicable, would have led to a contrary conclusion. The relevant provision reads in full as follows: "Nothing herein shall cause to be included in the augmented estate . . . (iii) any transfer made to anyone other than the surviving spouse *prior to January 1, 1991*, to the extent that such transfer is irrevocable on that date."¹⁴¹ Although Decedent had certain rights in the family partnership to which the farm property was conveyed, it appears from the facts recited in the commissioner's report that the conveyance itself was irrevocable on October 27, 1987.¹⁴² Further, the law is clear that a pre-January 1, 1991 irrevocable transfer is excluded from the transferor's augmented estate even if it is made during the marriage dissolved by the transferor's death.¹⁴³

C. Rule Against Perpetuities—Applicability of Correct Version

The issue before the court in *Richards v. Maiden*,¹⁴⁴ was the validity of Testatrix's residuary trust created for "the educational benefit of all of my grandchildren."¹⁴⁵ Testatrix was survived by four children and three grandchildren, and the court found that, as she intended to provide for "her present and future born grandchildren," the residuary trust violated the rule against perpetuities.¹⁴⁶ The court's decision would have been correct if the common law Rule Against Perpetuities had governed this case,

139. See Report of Special Commissioner in Chancery at 5–6.

140. *Swecker*, 2000 Va. Cir. LEXIS 361, at *1–2.

141. VA. CODE ANN. § 64.1-16.1(B)(iii) (Cum. Supp. 2001) (emphasis added).

142. See Report of Special Commissioner in Chancery at 6.

143. VA. CODE ANN. § 64.1-16.1(B)(iii) (Cum. Supp. 2001).

144. No. CH99-17404, 2000 Va. Cir. LEXIS 494 (Cir. Ct. Dec. 29, 2000) (Rockingham County).

145. *Id.* at *1.

146. *Id.* at *2.

but it did not. Virginia abandoned the common law “might have been” rule in favor of a statutory “wait and see” rule in 1982.¹⁴⁷

Under a common law “might have been” analysis, the residuary trust would be void ab initio because of the possibility that a right might be acquired by an after-born grandchild more than twenty-one years following the death of the last life in being at Testatrix’s death. However, the governing statutory “wait and see” rule provides that “a transfer of an interest in property fails, if the interest does not vest, if it ever vests, within the period of the rule against perpetuities.”¹⁴⁸ Under this statutory rule, instead of making a decision based on future possibilities at the time the trust becomes irrevocably operative, one waits to see what actually happens during the perpetuity period.¹⁴⁹ If the contingency in question is in fact resolved before lives in being and twenty-one years have passed, the interest is deemed valid.¹⁵⁰ If the contingency is not resolved within this period, then instead of a declaration of invalidity as under the common law rule, the statutory rule directs the court to reform the trust under *cy pres* principles at that future time.¹⁵¹ Lastly, although the court applied the common law rule to determine the validity of Testatrix’s residuary trust, it applied the statutory *cy pres* power under section 55-13.3(B) after finding the trust to be void.¹⁵² If the common law rule had been the governing rule in this case then, upon finding the residuary trust to be void, the property in question should have passed to Testatrix’s heirs by intestate succession.¹⁵³

147. See Act of Apr. 7, 1982, ch. 249, 1982 Va. Acts 399 (codified at VA. CODE ANN. § 55-13.3 (Repl. Vol. 1995)). Although the 2000 Session adopted a version of the Uniform Statutory Rule Against Perpetuities, and an ill-conceived and problem-plagued provision intended to allow one to “opt-out” of the Rule Against Perpetuities in certain cases, the 1982 “wait and see” rule was retained as the governing rule for “all donative interests created on or after July 1, 1982, and before July 1, 2000.” VA. CODE ANN. § 55-13.3(B)(i) (Cum. Supp. 2001). These developments are discussed in Johnson, *supra* note 2, at 1069–74. The court’s decision does not mention the date of Testatrix’s death, but a copy of the clerk’s order probating Testatrix’s will states that it was January 31, 1998.

148. VA. CODE ANN. § 55-13.3(A) (Cum. Supp. 2001).

149. See *id.*

150. See *id.*

151. *Id.* A more complete discussion of the 1982 perpetuities legislation can be found in J. Rodney Johnson, *The Transformation of the Rule Against Perpetuities in Virginia*, NEWSLETTER, (T. C. Williams Sch. of Law, Univ. of Richmond, Va.) Oct. 1982, at 10.

152. *Richards v. Maiden*, 2000 Va. Cir. LEXIS 494, at *4 (Cir. Ct. Dec. 29, 2000) (Rockingham County).

153. *Id.*

V. CONCLUSION

For the reasons recited herein, it is respectfully submitted that the 2002 Session of the Virginia General Assembly should (1) correct the drafting errors in the 2001 legislation dealing with notice and copies of inventories, accountings, and wills,¹⁵⁴ waiver of inventory and settlement in small estates,¹⁵⁵ wrongful death or personal injury actions against deceased residents or nonresidents,¹⁵⁶ and suits by or against personal representatives;¹⁵⁷ (2) repeal the misbegotten incorporation by reference statute;¹⁵⁸ and (3) impose due process notice provisions on testamentary trustees, conservators of incapacitated persons, and guardians of minors that are comparable to those imposed on personal representatives.¹⁵⁹

154. *See supra* Part II.A.

155. *See supra* Part II.I.

156. *See supra* Part II.K.

157. *See supra* Part II.L.

158. *See supra* Part II.H.

159. *See supra* Part II.A.
