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## UPDATING VIRGINIA'S PROBATE LAW

*Thomas S. Word, Jr.\**

THE estate of the average Virginian today is much more complex and diversified than the estate of the nineteenth century Virginia citizen, and consequently, problems of modern probate have become increasingly complicated. In 1870 the typical Virginian farmed, and land was the chief measure of his wealth. The farm, livestock, and household furnishings were normally the extent of his estate. Income and death taxes were unknown, and trusts were rare.

Today, however, Virginia's economy has become urban and industrial. The typical Virginia estate of the 1970's consists of a suburban residence (well mortgaged), life insurance proceeds, employee benefits, savings accounts, marketable securities, and perhaps a closely held business interest. Death taxes are a consideration for even the moderately well-to-do, and as a result, trusts have taken on major significance and corporate fiduciaries aggressively seek trust business. Despite these changes, however, Virginia's probate law—the rules governing decedents' estates, trusts, and the estates of minors and incompetents—remains little changed from that of one hundred years ago.

American probate law has recently come under severe attack for alleged inefficiencies and unfairness. Undue expenses, red tape, and delay are charged, resulting in increased pressure for reform.<sup>1</sup> After seven years of study, the National Conference of Commissioners on Uniform State Laws, working with the Real Property, Probate and Trust Law Section of the American Bar Association, has promulgated a Uniform Probate Code<sup>2</sup> (hereinafter called the "Code") designed to meet these complaints while providing adequate protection for fiduciaries and beneficiaries. Since the Code represents a comprehensive and modern approach to the problem, it should afford a basis for comparison and suggest weaknesses or strengths in Virginia's law.

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<sup>1</sup> See generally N. DACEY, *HOW TO AVOID PROBATE* (1965); M. BLOOM, *THE TROUBLE WITH LAWYERS* (1969).

<sup>2</sup> The entire text of the UNIFORM PROBATE CODE (hereinafter cited as U.P.C.) is included in 1 P.H. EST. PLAN. (1969).

## I. DECEDENTS' ESTATES GENERALLY

The continuing public indictment of probate bench and bar can be traced largely to solemn form probate, the customary procedure in many states under which the probate court, in *inter partes* proceedings, supervises the personal representative in each step of administration. Solemn form probate is basically the settlement of an estate in a lawsuit, with motions and orders, hearings and appearances, and guardians ad litem or special guardians, as they are sometimes called, all along the way.

To meet complaints about this procedure, and at the same time to protect fiduciaries and give them guidance where needed, the Code adopts two parallel systems for the initial probate and qualification of the personal representative—called formal testacy proceedings and informal testacy proceedings<sup>3</sup>—and for estate administration—called supervised administration and unsupervised administration.<sup>4</sup>

Informal testacy proceedings under the Code are strikingly similar to the usual *ex parte* probate proceedings in Virginia. Under the Code, an executor may generally probate the will and qualify without notice to anyone.<sup>5</sup> He is then required to give notice by mail within thirty days to each person who is apparently interested under the will and to publish notice to creditors in a newspaper.<sup>6</sup> Also, he must within three months send a copy of an inventory of the estate to interested persons who request it, or he may, but is not required to, file it with the clerk.<sup>7</sup>

Upon qualification under the Code, the personal representative gains broad discretionary powers.<sup>8</sup> He may compromise claims, borrow money, satisfy charitable pledges, employ agents, and sell real or personal property. He may continue an unincorporated business for four months in his own discretion, and thereafter with court approval; he

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<sup>3</sup> U.P.C. §§ 1-201(o), 3-401 to -414 (formal proceedings); §§ 1-201(s), 3-301 to -311 (informal proceedings).

<sup>4</sup> U.P.C. §§ 1-201 (pp) and 3-501 to -505 deal with supervised administration, and prescribe the restrictions imposed upon the supervised personal representative and the procedures to be followed by him to obtain authorization. Unless the order of appointment specifies further restriction, the only step which the supervised personal representative must subject to formal adjudication is distribution, and any additional restrictions on his powers must be endorsed on his letters of appointment. U.P.C. § 3-504.

<sup>5</sup> U.P.C. §§ 3-306, -310.

<sup>6</sup> U.P.C. §§ 3-705, -801.

<sup>7</sup> U.P.C. § 3-706.

<sup>8</sup> U.P.C. §§ 3-701 to -721.

may in his own discretion incorporate the business and continue it throughout the period of administration, if no adult beneficiary objects.<sup>9</sup> No bond is required of the personal representative unless requested by an interested party or deemed appropriate by the court.<sup>10</sup> When administration is complete, the personal representative may file a simple statement to that effect with the court.<sup>11</sup> He may exercise all these powers in his discretion and without prior specific court approval.<sup>12</sup>

A fearful beneficiary may gain protection against acts of the personal representative by requesting supervised administration,<sup>13</sup> or by requesting an adjudication by the court on a particular matter of administration.<sup>14</sup> A fearful or uncertain personal representative may gain court protection or guidance on his own motion by requesting supervised administration, or by requesting an adjudication by the court on a particular matter of administration.<sup>15</sup> Supervised administration will not be granted, however, unless the testator has requested it or unless it appears to the court to be justified under the circumstances; a disgruntled beneficiary is not permitted to complicate administration as a matter of spite.<sup>16</sup>

Virginia's procedures are much like informal proceedings and unsupervised administration under the Code. Proof of the will and qualification are customarily *ex parte*,<sup>17</sup> although interested persons may be made parties and thus bound.<sup>18</sup> As under the Code, these matters are usually handled by the clerk with little formality.<sup>19</sup> Unlike informal proceedings under the Code, the Virginia personal representative must file an inventory and accounting of receipts and disbursements with the commissioner of accounts, an administrative officer of the court.<sup>20</sup> The commissioner acts as a public auditor of these accounts, but on an

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<sup>9</sup> U.P.C. § 3-715.

<sup>10</sup> U.P.C. §§ 3-603, -605.

<sup>11</sup> U.P.C. § 3-1003.

<sup>12</sup> U.P.C. § 3-704.

<sup>13</sup> U.P.C. § 3-502.

<sup>14</sup> U.P.C. § 3-105.

<sup>15</sup> U.P.C. §§ 3-704, -105.

<sup>16</sup> U.P.C. § 3-502.

<sup>17</sup> VA. CODE ANN. § 64.1-85 (1968).

<sup>18</sup> VA. CODE ANN. §§ 64.1-79 to -81, -88 (1968).

<sup>19</sup> VA. CODE ANN. § 64.1-77 (1968).

<sup>20</sup> VA. CODE ANN. §§ 26-12, -17. A personal representative who is the sole beneficiary or distributee, or sole residuary legatee, may file a statement that he has discharged his duties in lieu of a formal accounting. VA. CODE ANN. § 26-20.1 (1960).

*ex parte* basis. Formal *inter partes* proceedings for the approval of fiduciary accounts are rare in Virginia.<sup>21</sup>

The Virginia personal representative may get the guidance and protection of the court on any doubtful matter by a suit in equity for advice and guidance.<sup>22</sup> The procedure is little different from the Code's provisions permitting a personal representative in unsupervised administration to obtain an adjudication, after notice to beneficiaries, on a particular point without invoking full supervised administration.<sup>23</sup> In the rare instance when a Virginia fiduciary wishes protection every step of the way, as may be the case with an insolvent estate, he may proceed in equity in a suit for complete administration, the equivalent of supervised administration under the Code.<sup>24</sup>

Thus, from the standpoint of simplicity of procedure, Virginia's law measures well by the standard of the Code. There are, however, some specific areas in which Virginia's probate laws have not kept pace with the changing times.

#### *Powers of the Personal Representative*

The Virginia personal representative may be hamstrung by lack of administrative powers, absent a well-drawn will. Historically, the powers of a personal representative have been limited, perhaps on the theory of protecting beneficiaries from his bad judgment. Only to a very limited extent can he sell land,<sup>25</sup> borrow money, or even renew obligations.<sup>26</sup> He may continue a business only long enough to wind it up, no matter how profitable.<sup>27</sup> He cannot sell personal property unless it is "likely to be impaired in value by keeping"<sup>28</sup> or unless the proceeds are needed to pay charges.<sup>29</sup>

Are these restrictions in the best interests of beneficiaries in light of today's circumstances? Perhaps sometimes, but lawyers seem to disagree, for nearly every attested will contains provisions giving the personal representative powers to override the law's restrictions. The his-

<sup>21</sup> See B. LAMB, VIRGINIA PROBATE PRACTICE § 135 (1957).

<sup>22</sup> *Id.* §§ 129-33.

<sup>23</sup> U.P.C. §§ 3-704, -105.

<sup>24</sup> See LAMB, *supra* note 21, §§ 134-37.

<sup>25</sup> VA. CODE ANN. § 64.1-146 (1968); *Virginia Trust Co. v. Evans*, 193 Va. 425, 69 S.E.2d 409 (1952) (dictum).

<sup>26</sup> VA. CODE ANN. § 64.1-143 (1968).

<sup>27</sup> *Davis v. Christian*, 56 Va. (15 Gratt.) 11 (1859); *Thurmond v. Guyan Valley Coal Co.*, 85 W.Va. 501, 102 S.E. 221 (1920).

<sup>28</sup> VA. CODE ANN. § 64.1-154 (1968); *Virginia Trust Co. v. Evans*, 193 Va. 425, 69 S.E.2d 409 (1952).

<sup>29</sup> VA. CODE ANN. § 64.1-155 (1968).

toric restrictions are thus reserved for the intestate and the layman who writes his own will.

The Code, in contrast, presumes that the individual would prefer his personal representative to have power to do what is best under the circumstances, without formal restrictions or distinctions between legalistic classifications of wealth. The testator is left free to impose any restrictions he wants by his will.<sup>30</sup>

### *Residence Requirements for Fiduciaries*

The Code contains no residence requirements for fiduciaries.<sup>31</sup> In Virginia, non-resident individuals may not qualify as personal representatives, except in conjunction with a Virginia resident individual or a Virginia-based "corporation authorized to do business in Virginia."<sup>32</sup> The Virginia testator who leaves an uncomplicated estate in fee simple to his son living out of state must appoint someone to serve with the son or in his stead as personal representative. In earlier times, distance and difficulty of travel made it hard for creditors and beneficiaries to deal with a non-resident personal representative. Our present mobility, and a requirement that the personal representative submit to the jurisdiction of Virginia courts for suit purposes, eliminate these objections.

Foreign banks and trust companies are prohibited from acting as personal representatives or trustees under wills of Virginia decedents, either alone or in conjunction with another.<sup>33</sup> Virginia residents with banking connections elsewhere must, therefore, test the ingenuity of their lawyers. The use of a revocable inter vivos trust when a will would better serve,<sup>34</sup> or the naming of "strawman" personal representatives and trustees who hire out-of-state banks as their agents, is often the result.

The testator's wishes and free competition aside, there may be other justifications for doing away with the prohibition of non-resident fiduciaries. If Virginia did not have its restrictive statutes, Virginia-

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<sup>30</sup> U.P.C. §§ 3-701 to -721 set forth the powers and duties of a personal representative.

<sup>31</sup> U.P.C. § 3-602 provides that a personal representative by acceptance of appointment submits personally to the jurisdiction of the court in any suit relating to the estate.

<sup>32</sup> VA. CODE ANN. § 26-59 (1969).

<sup>33</sup> *Id.*

<sup>34</sup> For a discussion of income tax problems created by the use of a revocable inter vivos trust in the place of a will, see *Postmortem Income Tax Aspects of the Living Trust*, 4 REAL PROP. PROB. & TRUST L.J. 339 (1969).

based banks could serve as fiduciaries in a number of states which have reciprocal statutes permitting out-of-state corporate fiduciaries to serve if the foreign bank's state likewise permits banks of the reciprocating state to serve. Such statutes have been adopted by several states.<sup>35</sup>

### *Statute of Limitations*

There is no statute of limitations on the probate of an after-discovered will in Virginia.<sup>36</sup> Personal representatives are protected in making distribution if they have no knowledge of another will, but beneficiaries may find years later that they must give up an inheritance.<sup>37</sup> Under the Code, a will must generally be presented for probate within three years of the decedent's death, and beneficiaries by intestacy or a prior will are thereafter vested indefeasibly.<sup>38</sup>

### *Adopted Persons*

While Virginia's law corresponds basically with the Code's as to the rights of adopted persons in intestacy and affords certainty,<sup>39</sup> the right of an adopted beneficiary under a will occupying the status of "heir," "issue," "descendant," "child," or "grandchild" is not nearly so clear. The Virginia cases, although not altogether consistent, generally indicate that the use of "issue" connotes blood kin only.<sup>40</sup> The court has, however, relied heavily on the particular facts of a case,

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<sup>35</sup> See, e.g., N.C. GEN. STAT. § 55-132 (Cum. Supp. 1969); PA. STAT. ANN. tit. 7, § 106 (1967); TENN. CODE ANN. § 35-610 (Cum. Supp. 1969).

<sup>36</sup> See *Hawkins v. Tampa*, 197 Va. 22, 87 S.E.2d 636 (1955); *In re Bentley*, 175 Va. 456, 9 S.E.2d 308 (1940); *Bliss v. Spencer*, 125 Va. 36, 57-58, 99 S.E. 593, 599 (1919).

<sup>37</sup> See *Bliss v. Spencer*, 125 Va. 36, 99 S.E. 593 (1919); *Carter v. Skillman*, 108 Va. 204, 60 S.E. 775 (1908); *Crauford v. Smith*, 93 Va. 623, 23 S.E. 235 (1895).

<sup>38</sup> U.P.C. § 3-108. If fraud is involved, a proceeding may be commenced within two years after discovery of the fraud, but no proceeding may be brought against one not the perpetrator of the fraud later than five years from the commission of the fraud. U.P.C. § 1-106.

<sup>39</sup> VA. CODE ANN. § 63.1-234 (1968) and U.P.C. § 2-109 each provide that an adopted child inherits from and through his adopting parent, and not his natural parent, except that adoption by the spouse of a natural parent does not affect the relationship of the child with his natural parents.

<sup>40</sup> See, e.g., *Merson v. Wood*, 202 Va. 485, 117 S.E.2d 66 (1961) ("heir" held to mean "heir of the body" or "issue," not including adopted child); *Newsome v. Scott*, 200 Va. 833, 108 S.E.2d 369 (1959); *Mott v. National Bank of Commerce*, 190 Va. 1006, 59 S.E.2d 97 (1950); *Fletcher v. Flanary*, 185 Va. 409, 69 S.E.2d 433 (1946); *Dickenson v. Buck*, 169 Va. 39, 192 S.E. 748 (1937) ("legal heir" held to include adopted child); *Munday v. Munday*, 164 Va. 145, 178 S.E. 917 (1935) ("issue" held not to include adopted persons).

especially the feelings of the testator toward the individual concerned. In view of the frequency of adoption today (particularly in the case of adoption of a child by the spouse of a natural parent), a statutory rule of construction of wills (and deeds) providing that persons adopted while they are under the age of twenty-one years take unless expressly excluded would provide desirable certainty. The Code adopts such a rule.<sup>41</sup>

### *Small Estates*

Small estates have long been a problem for Virginia lawyers and beneficiaries alike. Unless the estate is under \$2,500 and the judge can be persuaded to handle distribution through a small fund order,<sup>42</sup> the full probate procedure of qualification, inventory, and accounting is required for the smallest Virginia estate, even though all beneficiaries are adults. The frustrating experience of having to qualify on an estate and go through this time-consuming and expensive procedure, solely for the purpose of transferring a few shares of stock or obtaining funds from a bank account, has caused many a Virginia citizen to think less of the law and lawyers.

The Code meets this problem by permitting persons having assets belonging to a decedent to deliver or transfer them to the successor or successors of the decedent thirty days after the decedent's death on the basis of an affidavit.<sup>43</sup> The affidavit is made by the successors and must state that (i) the estate, less liens and encumbrances, does not exceed \$5,000; (ii) no personal representative has been appointed; and (iii) the successors are entitled to the property.<sup>44</sup> Persons dealing with the successors are thereby protected. A similar procedure would seem appropriate for Virginia.

### *Joint Bank Accounts*

Ownership of joint bank accounts upon the death of a joint depositor constantly erupts into litigation in Virginia. The Supreme Court of Appeals has passed on six such cases since 1955,<sup>45</sup> but this is

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<sup>41</sup> U.P.C. § 2-611.

<sup>42</sup> VA. CODE ANN. § 8-750 (Cum. Supp. 1968).

<sup>43</sup> U.P.C. § 3-1201.

<sup>44</sup> *Id.*

<sup>45</sup> *Haynes v. Hurt*, 209 Va. 447, 164 S.E.2d 671 (1968); *Wilkinson v. Witherspoon*, 206 Va. 297, 142 S.E.2d 478 (1965); *Stevens v. Sparks*, 205 Va. 128, 135 S.E.2d 140 (1964); *Quesenberry v. Funk*, 203 Va. 619, 125 S.E.2d 869 (1962); *Wrenn v. Daniels*,

only a small indication of the number of similar controversies that have been compromised or decided in lower courts.

Under present Virginia law rights of ownership in joint accounts upon the death of a depositor, except in the case of husband and wife accounts, have been said to depend upon the intention of the parties and the terms of the deposit contract—fruitful objects of litigation.<sup>46</sup> In many cases, these accounts are created without any real understanding of the deposit contract, and without any satisfactory evidence of the parties' intent.

In the case of joint accounts between husband and wife, the General Assembly has settled the question by providing that ownership vests absolutely in the surviving spouse.<sup>47</sup> This has achieved the desirable certainty and, in view of the relationship, probably carries out the individual's intentions in most cases. Perhaps a similar rule should apply to joint accounts between other persons, but presumably the General Assembly has feared unjust results in individual cases.

The Code attempts to solve the problem by providing that sums remaining on deposit at the death of a party to a joint account belong to the surviving joint depositor, unless there is "clear and convincing evidence" of a different intention at the time the account is created.<sup>48</sup> If a right of survivorship is expressly stated in the terms of the account, that right cannot be changed by will.<sup>49</sup> The Code also deals comprehensively with payable-on-death (P.O.D.) accounts and accounts in the name of a trustee (so-called Totten trust accounts).<sup>50</sup>

### *Intestate Succession*

Few would argue with the proposition that the laws governing intestate succession should follow the presumed intention of the "average man" for the devolution of his property. Based on the usual content of wills of persons with modest estates, the framers of the Code have provided that upon intestacy the surviving spouse generally receives the first \$50,000 of the estate, with the balance divided equally between the surviving spouse and the deceased spouse's issue, or if none,

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200 Va. 419, 106 S.E.2d 126 (1958); *King v. Merryman*, 196 Va. 844, 86 S.E.2d 141 (1955).

<sup>46</sup> See cases cited note 47 *supra*.

<sup>47</sup> VA. CODE ANN. § 6.1-73 (1966).

<sup>48</sup> U.P.C. § 6-104.

<sup>49</sup> U.P.C. § 6-104(e).

<sup>50</sup> U.P.C. § 6-101(j), (n).

the deceased spouse's parents. If there are no issue and no parents of the deceased spouse, the surviving spouse takes all.<sup>51</sup>

Virginia's laws governing intestate succession give to the surviving spouse one-third of the decedent's personal estate, with the balance passing to his issue; if there are no issue, the surviving spouse takes all.<sup>52</sup> In the case of real estate, the surviving spouse takes a life interest in one-third, with the balance passing to issue.<sup>53</sup> Again, if there are no issue, the surviving spouse takes all.<sup>54</sup> By an unusual quirk in Virginia's laws governing intestate personalty, a surviving spouse in the case of partial intestacy will receive only what the will specifically provides for him or her (subject to the rights upon renunciation).<sup>55</sup> Thus, in the not unusual case of a layman who dies partially intestate with a holographic will specifying certain items for his wife and not mentioning the balance, the wife will receive nothing more of the personal property than is specified for her in the will, even though the testator's nearest relatives may be second cousins.<sup>56</sup>

Under Virginia's intestate laws, kinship is traced to the furthest possible degree, with the result that distant relatives who did not know the decedent may find themselves unexpected heirs.<sup>57</sup> The Code carries kinship no further than grandparents and issue of grandparents; if no persons are living within this degree of kinship, the estate escheats.<sup>58</sup>

Under Virginia's intestacy statutes, relatives of the half blood inherit only half as much as those of the whole blood.<sup>59</sup> Under the Code, relatives of the half blood inherit in the same manner as relatives of the whole blood.<sup>60</sup> With the common occurrence of half-brother and half-sister relationships due to the frequency of divorce and remarriage in our society, the Code's provisions may come closer to carrying out the presumed intention of a majority, but the point is arguable.

The Code does away with advancements unless the decedent has declared in a contemporaneous writing that a gift is intended as an advancement, or the heir acknowledges an advancement in writing.<sup>61</sup> In

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<sup>51</sup> U.P.C. §§ 2-102, -103.

<sup>52</sup> VA. CODE ANN. § 64.1-11 (1968).

<sup>53</sup> VA. CODE ANN. § 64.1-19 (1968).

<sup>54</sup> VA. CODE ANN. § 64.1-1 (1968).

<sup>55</sup> VA. CODE ANN. § 64.1-16 (1968).

<sup>56</sup> *Newton v. Newton*, 199 Va. 785, 102 S.E.2d 312 (1958).

<sup>57</sup> VA. CODE ANN. § 64.1-1 (1968).

<sup>58</sup> U.P.C. §§ 2-103, -105.

<sup>59</sup> VA. CODE ANN. § 64.1-2 (1968).

<sup>60</sup> U.P.C. § 2-107.

<sup>61</sup> U.P.C. § 2-110.

view of the current frequency of gifts, often motivated by tax considerations, the Code's provision would appear to reflect more nearly the presumed intention of decedents. Virginia's statutes concerning advancements have recently been amended to do away with presumptions concerning advancements, but advancements may still be proven by parol or other evidence.<sup>62</sup>

### *Property Rights of Spouse Electing to Take Against Will*

Abolition of the distinction between real and personal property and the resulting abolition of dower and curtesy is the Code's most radical departure from Virginia law.<sup>63</sup> Under the Code, an individual is free to dispose of real or personal property during his lifetime without the concurrence of a spouse, and no distinction is made between the two classes of property for purposes of estate administration or intestate succession.

The Code deals comprehensively with the rights of a surviving spouse in the estate of a decedent.<sup>64</sup> It introduces a concept of an "augmented estate,"<sup>65</sup> which is defined as the decedent's net probate estate, plus certain transfers made by him during his marriage or outside his probate estate on death (a) to persons other than his surviving spouse, and (b) to the surviving spouse. Property transferred by the decedent during his lifetime to a person other than the surviving spouse is included in the augmented estate if the decedent retained income rights, invasion rights, or survivorship rights; also included are gifts made within two years of death to the extent of more than \$3,000 per year to one donee. Life insurance proceeds and pension payments payable to a person other than the surviving spouse are not included.<sup>66</sup> Property transferred by the decedent during his lifetime or outside probate on his death to his spouse is included whether or not the decedent retained any rights. For example, a trust created by the decedent for his spouse during lifetime, property appointed to the spouse under a power of appointment, proceeds of insurance payable to the spouse attributable to premiums paid by the decedent or his employer, and the decedent's retirement benefits are all regarded as part of the augmented estate.

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<sup>62</sup> VA. CODE ANN. § 64.1-63 (1968).

<sup>63</sup> U.P.C. § 1-201 (hh) defines "property" to include real and personal property. U.P.C. § 2-113 abolishes dower and curtesy.

<sup>64</sup> U.P.C. §§ 2-201 to -207.

<sup>65</sup> U.P.C. § 2-202.

<sup>66</sup> *Id.*

The spouse who elects to take against the will receives an amount equal to one-third of the augmented estate, but is charged with the amount of the augmented estate which she has already received.<sup>67</sup> The Code's approach thus avoids the unjust case of a spouse who has received substantial benefits from the decedent (as, for example, through life insurance proceeds, employee benefits, joint bank accounts or jointly held real property), but who can nevertheless elect to take a substantial share of the probate estate which the decedent wished to pass to his children.<sup>68</sup>

It can be argued that by abolishing dower and curtesy and permitting free alienation of real property, the surviving spouse may be effectively cut out of any meaningful share of the decedent's wealth. Present Virginia law, however, permits even greater latitude than the Code to a resourceful spouse with respect to personal property, as illustrated in *Dillon v. Gow*.<sup>69</sup> In that case, the husband, on his death bed, defeated his wife's elective share by transferring assets to an irrevocable trust under which he retained the right to income for life, the right to receive principal for his needs in the trustee's discretion, and the right to appoint by his will the remainder interest in the trust to any person other than himself, his estate, and his creditors. Under the Code, the trust created by the husband would have constituted a part of the augmented estate, and the wife would have had elective rights with respect to it, since the husband retained the income right for life.<sup>70</sup>

In view of the relative economic insignificance of dower and curtesy in the typical estate today, the safeguard afforded the surviving spouse is insignificant. The Code's provisions afford far better protection for the surviving spouse in the usual modern case.<sup>71</sup>

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<sup>67</sup> U.P.C. §§ 2-201, -207.

<sup>68</sup> The purpose of the concept of augmenting the probate estate in computing the elective share is twofold: (1) to prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share, and (2) to prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent. . . . U.P.C. § 2-202, Comment.

<sup>69</sup> 2 OPINIONS OF BROCKENBROUGH LAMB 78 (Richmond Ch., 1956).

<sup>70</sup> U.P.C. § 202(a)(1).

<sup>71</sup> Abolition of dower and curtesy and the distinctions between real and personal property have been advocated for Virginia. See Lewis, *It's Time to Abolish Dower and Curtesy in Virginia*, 3 U. RICH. L. REV. 299 (1969); Spies, *Property Rights of the Surviving Spouse*, 46 VA. L. REV. 157 (1960). In 1967, the Virginia Advisory Legislative Council studied the problem and recommended that dower and curtesy be converted into a fee simple estate. REPORT OF THE VALC TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA ON COMMISSIONERS OF ACCOUNTS AND FIDUCIARIES

### *Simultaneous Death*

Death as a result of common accident is a haunting fear for today's Virginian. Under present Virginia intestacy laws, the sequence of deaths, although they may vary only an instant or a few minutes, may well determine which spouse's family receives a substantial estate. Take, for example, the case of a childless and intestate husband and wife who are traveling together and die as a result of an accident, with the wife surviving for five minutes longer than the husband. The husband's entire estate thus passes to the wife and on to the wife's relatives, although the husband may have originated all of the wealth. The Code meets this problem by providing that a person is not deemed to survive for purposes of intestate succession unless he survives for one hundred-twenty hours.<sup>72</sup> A similar rule of construction is provided for wills, unless the will provides otherwise.<sup>73</sup>

## II. ESTATES OF MINORS AND INCAPACITATED PERSONS

Virginia's procedural laws concerning the protection of minors and incapacitated persons, like Virginia's procedures concerning decedents' estates, are uncomplicated in their administration.<sup>74</sup> As in the case of laws governing decedents' estates, however, the powers of a Virginia guardian or committee are rather severely limited. A guardian or committee may not sell or lease the ward's real property.<sup>75</sup> The guardian of a minor may not spend beyond income for the ward's maintenance and education without the advance approval of the court in a formal proceeding.<sup>76</sup> If the real property of an incapacitated person or minor is to be sold, leased or encumbered, the fiduciary must bring a highly technical statutory court proceeding with presumptive heirs as parties.<sup>77</sup> If the property is sold by the court, the proceeds must be invested and disbursed by the court, rather than turned over to the fiduciary for management in the same manner as the ward's personal estate.<sup>78</sup>

The Code deals comprehensively with the protection of persons under disability and minors and their property in article V. Two separate

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(1967). The Bill introduced for this purpose, however, (Senate Bill Number 275) was not reported out of the Courts of Justice Committee.

<sup>72</sup> U.P.C. § 2-104.

<sup>73</sup> U.P.C. § 2-601.

<sup>74</sup> VA. CODE ANN. §§ 31-4 to -6 (1969).

<sup>75</sup> VA. CODE ANN. §§ 8-675, -677 (1957).

<sup>76</sup> VA. CODE ANN. § 31-10 (1969).

<sup>77</sup> VA. CODE ANN. §§ 8-675, -677 (1957).

<sup>78</sup> VA. CODE ANN. § 8-685 (Cum. Supp. 1968).

fiduciary relationships are created for the protection of minors and incapacitated persons. The first is "guardian and ward," under which the guardian is given powers and responsibilities similar to those of a parent in order to deal with the ward's personal needs and day-to-day welfare.<sup>79</sup> The second is "conservator-protected person," under which the conservator is given broad discretionary management powers and duties with respect to the protected person's property, similar to the powers of the personal representative of a decedent under the Code.<sup>80</sup>

The Code also introduces a "facility of payment" provision which permits anyone under a duty to pay or deliver money or personal property to a minor in amounts of not more than \$5,000 per annum to pay or deliver (i) directly to the minor if he has attained age 18 or is married, or (ii) to any person having the care and custody of the minor with whom the minor resides, or (iii) to a guardian of the minor, or (iv) to a financial institution in the form of a deposit in an insured savings account in the sole name of the minor.<sup>81</sup> Any person to whom property is paid under this provision is charged with the duty of applying the funds to the support and education of the minor and retaining the rest for delivery to the minor upon his attaining majority. The purpose of the section is to avoid the expense of protective proceedings for a minor with limited funds.

The Code permits a parent to designate a guardian of a minor child by will, and the appointment becomes effective upon acceptance of the guardianship in writing.<sup>82</sup> The court may also appoint a guardian for a minor.<sup>83</sup> The duties of a guardian are basically those of a parent, and he is charged with the duty to take care of the ward's personal effects and to commence protective proceedings to protect other property, if necessary. He is authorized to receive funds due the minor (without limitation as to amount), and he is charged with the duty of applying the funds to the minor's support, care and education. Any excess must be conserved for the ward's future needs unless a conservator has been appointed for the minor, in which case the excess is paid over annually to the conservator. The guardian is not entitled to compensation unless specially awarded by the court. Thus the guardian, if he is sufficiently brave, can care for the ward's personal needs as well as his financial affairs. Unlike the conservator, however, he does not have

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<sup>79</sup> U.P.C. §§ 5-201 to -313.

<sup>80</sup> U.P.C. §§ 5-401 to -431.

<sup>81</sup> U.P.C. § 5-103.

<sup>82</sup> U.P.C. § 5-201. Compare VA. CODE ANN. § 31-2 (1969).

<sup>83</sup> U.P.C. § 5-204.

broad management powers with respect to the ward's property. Accordingly, if the infant's financial affairs are at all complicated, it will probably be necessary to appoint a conservator.

The basic framework for protection of incapacitated persons under the Code parallels that for minors. The guardian of an incapacitated person has powers and responsibilities comparable to those of a guardian of a minor; the conservator has identical powers in the case of an incapacitated person and the case of a minor.<sup>84</sup>

The Code adopts a Virginia innovation—the power of attorney which does not terminate upon disability of the principal. This deviation from the common law was adopted by statute in Virginia in 1954.<sup>85</sup> Under it, an individual may provide that broad powers granted an attorney-in-fact will continue after disability if the instrument of appointment so states. The Code goes one step further and permits the instrument to provide that it shall “become effective upon the disability of the principal.”<sup>86</sup> As a matter of practice in Virginia, this result has sometimes been obtained by having a power of attorney delivered to the attorney-in-fact and then re-delivered in escrow to a third person who is authorized to release it to the attorney-in-fact upon certification of disability by a physician. As in Virginia, the attorney-in-fact under the Code becomes accountable to the conservator, and the conservator has the power to revoke the power of attorney. This provision has permitted elderly persons facing senility or physical incapacity and their families to avoid the expense and embarrassment of guardianship proceedings.

### III. CONCLUSION

Virginia's probate system appears to work relatively well in practice, and the principal causes for complaint in other states, aside from the human failings of fiduciaries and their lawyers, do not exist in Virginia. Virginia's probate laws do, however, leave something to be desired in light of changes in forms of wealth and the relative unimportance of real estate.

If we accept the basic premise of the framers of the Code—that the probate law should be designed to carry out the presumed intention of the average man concerning administration and distribution of his estate or the handling of his affairs upon his incapacity

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<sup>84</sup> U.P.C. § 5-424.

<sup>85</sup> VA. CODE ANN. § 11-9.1 (1964).

<sup>86</sup> U.P.C. § 5-501.

—formal restrictions and limitations on personal representatives', guardians', or committees' powers should be removed and real and personal property should be treated alike. The Uniform Commercial Code has proven the advantage of a uniform, modern and comprehensive code for commercial transactions. Perhaps the Uniform Probate Code will someday afford a means to update Virginia's probate laws.