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## Wills, Trusts and Estates (Annual Survey of Virginia Law, 1984-85)

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# WILLS, TRUSTS, AND ESTATES

*J. Rodney Johnson\**

The 1985 session of the General Assembly passed a number of bills dealing with wills, trusts, and estates, many of which resulted from the continuing law reform efforts of the Virginia Bar Association's Committee on Wills, Trusts and Estates.<sup>1</sup> In addition to this legislation, the Virginia Supreme Court decided six cases during the past year that involved issues of interest to both the general practitioner and the specialist in wills and trusts. This article reviews all of these legislative and judicial developments. In order to facilitate the discussion of numerous code sections, they will be referred to in the text by their section numbers only, which will be understood as always referring to the latest printing of the old sections and to the 1985 supplement for the new sections. All references to the Uniform Probate Code are to the 1982 publication.

## I. 1985 LEGISLATION

### A. *Intestate Succession by Children*<sup>2</sup>

Section 64.1-1, Virginia's statute of descent, provides for a married intestate's real estate to descend to the surviving spouse unless the intestate is survived by children or their descendants, one or more of whom are not children or their descendants of the surviving spouse. In the latter case, as well as the case in which there is no surviving spouse, section 64.1-1 previously provided for real estate to descend "to the intestate's children" (subject to dower or

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1. The Association's recommended 1985 legislation was developed by an ad hoc subcommittee under the able leadership of Professor John E. Donaldson, of the College of William and Mary, and was sponsored by Senator Thomas J. Michie, Jr. Valuable background information and explanatory comments will be found in Donaldson, *Law Reform—Suggested Revisions to Virginia's Wills Statutes: Part One*, 9 VA. BAR ASS'N J. 4 (Spring 1983) [hereinafter cited as Donaldson, *Part One*]; Donaldson, *Law Reform—Suggested Revisions to Virginia's Wills Statutes: Part Two*, 9 VA. BAR ASS'N J. 10 (Fall 1983) [hereinafter cited as Donaldson, *Part Two*].

2. VA. CODE ANN. § 64.1-1 (Cum. Supp. 1985).

curtesy if there is a surviving spouse). The 1985 amendment, which does not change the outcome of any case, merely adds the word "all" to the quoted language so that it now reads "to all the intestate's children."

### B. *Equitable Separate Estate*<sup>3</sup>

Section 64.1-21 has allowed a married woman to hold real estate free from the claims of a surviving husband's curtesy if the instrument conveying the real estate to her contained certain language. In *Jacobs v. Meade*,<sup>4</sup> a statutory construction case noted later in this review,<sup>5</sup> the Virginia Supreme Court held that under these same circumstances a married man could also hold real estate free from the claims of a surviving wife's dower. The 1985 amendment codifies the *Jacobs*' holding by rewriting section 64.1-21 to expressly recognize a married person's equitable separate estate in which a surviving spouse will not be entitled to dower or curtesy "if such right thereto has been expressly excluded by the instrument creating the same," or "if such instrument . . . describes the estate as his or her sole and separate equitable estate." This action represents the last nail to be driven into the coffin of interspousal property rights at death, and it also serves to emphasize that, under Virginia law, a surviving spouse has absolutely no rights in the deceased spouse's estate—except as the deceased spouse has allowed them to be created.<sup>6</sup>

### C. *Statutory Powers for Administrators*<sup>7</sup>

Section 64.1-57.1, which allows a circuit court to grant the boilerplate powers set forth in section 64.1-57 to "personal representatives," was amended to provide that such term "shall encompass within its meaning the administrator of an intestate decedent's estate."

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3. *Id.* § 64.1-21.

4. 227 Va. 284, 315 S.E.2d 383 (1984).

5. See *infra* text accompanying notes 53-56.

6. For a discussion of this point, see Johnson, *Interspousal Property Rights at Death*, 10 VA. BAR ASS'N J. 10 (Summer 1984).

7. VA. CODE ANN. § 64.1-157.1 (Cum. Supp. 1985).

#### D. *Revocation of Wills*<sup>8</sup>

Section 64.1-58, dealing with the revocation of wills, was repealed and replaced by section 64.1-58.1 for the primary purpose of changing the rule of *Timberlake v. State Planters Bank*.<sup>9</sup> This case held that, although a testator's second will might contain a clause expressly revoking the first will, nevertheless no part of such second will, including the revocation clause, was operative during the testator's lifetime. Therefore, if that second will should itself be revoked by physical act or by declaratory revocation (i.e., a written revocation not contained in a will but which is executed with all of the formalities required for a will) during testator's lifetime, the first will would never have been revoked and thus would be admitted to probate. The new statute provides that, upon the execution of a will which expressly revokes a previous will, the previous will (and any codicil thereto) is thereby "void and of no effect." However, the same result is not reached in those cases where a latter will or codicil does not expressly revoke a prior will entirely but instead (i) expressly revokes a part thereof, or (ii) contains provisions inconsistent therewith. In these two instances the prior will remains unaffected unless the latter will or codicil "becomes effectual upon the death of the testator." The new statute retains the prior rule that a declaratory revocation or a physical act of revocation operates immediately.

#### E. *Partial Revocation by Divorce*<sup>10</sup>

Section 64.1-59, which provided that all provisions in a testator's will in favor of a testator's spouse were revoked by operation of law upon the testator's becoming divorced *a vinculo matrimonii*, has been expanded in scope by an amendment based upon Uniform Probate Code section 2-508. The amended statute provides that the revocation by operation of law will also apply to provisions conferring a special or general power of appointment upon the spouse or nominating the spouse to a fiduciary office, unless the will expressly provides otherwise. The provisions conferring a power or office upon the divorced spouse are interpreted, and re-

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8. *Id.* § 64.1-58.1 (repealing *id.* § 64.1-58 (Repl. Vol. 1980)); see Donaldson, *Part One*, *supra* note 1, at 6-8.

9. 201 Va. 950, 115 S.E.2d 39 (1960).

10. VA. CODE ANN. § 64.1-59 (Cum. Supp. 1985); see also Donaldson, *Part Two*, *supra* note 1, at 11.

voked dispositions of property pass, as if the testator's spouse had predeceased the testator.<sup>11</sup> In addition, section 64.1-59 now applies to annulments as well as divorces, and it provides that the provisions of the will revoked solely by this section "shall" be revived upon the testator's remarriage to the former spouse. There are still no remedies in the following situations: (i) the case of a deserting spouse who is named as a beneficiary in the deceased spouse's will where there has been no final divorce, although section 64.1-23 would bar a deserting spouse's rights as a tenant by dower, tenant by curtesy, distributee, or heir; and (ii) the case where the divorced or deserted decedent has neglected to eliminate the spouse as beneficiary upon any life insurance policies.

#### F. *Revival of Wills*<sup>12</sup>

Section 64.1-60, dealing with revival of revoked wills, was amended in order to provide that a will revoked under the new revocation statute, noted herein at "D," can be revived only by reexecution thereof or by a codicil thereto, and then only to the extent to which an intention to revive is shown. Prior to the amendment, such was the rule for a will revoked in any manner. The amendment thus allows for a will revoked by divorce to be revived by remarriage of the parties, as provided in newly amended section 64.1-59, noted herein at "E."

#### G. *Ademption by Extinction*<sup>13</sup>

Section 64.1-62.3 is a new section establishing several constructional rules to provide presumptive solutions for certain cases, not covered by present law, where property specifically devised or bequeathed by testator's will is not in testator's estate at the time of testator's death. The common law responds to such cases by applying a "specific asset" test which completely ignores testator's intent. If the specific asset is not in the estate at testator's death, the gift simply fails or "adeems" by extinction. Although exceptions have been made where the absence of the original asset was due to

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11. *Jones v. Brown*, 219 Va. 599, 248 S.E.2d 812 (1978) (accord on the passage of property).

12. VA. CODE ANN. § 64.1-60 (Cum. Supp. 1985); see also *Donaldson, Part One, supra* note 1, at 6-8.

13. VA. CODE ANN. § 64.1-62.3 (Cum. Supp. 1985); see also *Donaldson, Part Two, supra* note 1, at 13.

a change in form only,<sup>14</sup> or to a disposition made while the testator was incompetent,<sup>15</sup> the basic rule has continued to govern most cases and to cause significant frustration of the testator's probable intent in some cases. A second matter addressed by this section is the problem of who receives accessions when, instead of specifically bequeathed property being absent at death, the testator has more than the quantity owned and referred to when the will was executed.

Section 64.1-62.3.1, taken from the Uniform Probate Code section 2-607(a), provides that a bequest of specific securities will not only include as much of the bequeathed securities as is part of the estate at the time of testator's death, but will also include any (i) additional or other securities of the same entity owned by the testator by reason of action initiated by the entity, except for any securities acquired by the exercise of purchase options, and (ii) any securities of another entity acquired with respect to the specific securities mentioned in the bequest as a result of a merger, consolidation, reorganization or other similar action initiated by the entity.<sup>16</sup>

Section 64.1-62.3.2, taken from the Uniform Probate Code section 2-608(a), provides that a bequest or devise of specific property shall include the amount of any condemnation award for the taking of the property which remains unpaid at death and any proceeds unpaid at death on fire and casualty insurance on the property.<sup>17</sup>

Section 64.1-62.3.3, taken from the Uniform Probate Code section 2-608(b), provides that if, while testator is under a disability,

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14. See *Skipwith v. Cabell*, 60 Va. (19 Gratt.) 758 (1870).

15. See VA. CODE ANN. § 8.01-77 (Repl. Vol. 1984); *Bryson v. Turnbull*, 194 Va. 528, 74 S.E.2d 180 (1953).

16. The further provision in U.P.C. § 2-607(a) that such a bequest also includes "any additional securities of the entity owned by the testator as a result of a plan of reinvestment if it is a regulated investment company" was not proposed to the General Assembly.

N.B. The distinction between a portion of the U.P.C. model not being proposed to the General Assembly, instead of being considered and rejected by that body, will be of great importance when such legislation has to be interpreted by the courts. See Anderson, *The Influence of the Uniform Probate Code in Nonadopting States*, 8 U. PUGET SOUND L. REV. 599, 617-19 (1985).

17. The further provisions in U.P.C. § 2-608(a) that such a bequest also includes "any balance of the purchase price (together with any security interest) owing from a purchaser to the testator at death by reason of sale of the property," and "property owned by testator at his death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation." were not proposed to the General Assembly.

(i) specifically devised or bequeathed property is sold by testator's conservator, guardian or committee, or (ii) proceeds of fire or casualty insurance as to such property are paid to the fiduciary, then the beneficiary shall be entitled to any of the remaining specific property plus a legacy in the amount of (i) the net sales price of the property sold, or (ii) the insurance proceeds. The net sales remedy is reduced by any amounts received under section 64.1-62.3.2, and it does not apply if, after the sale or casualty, it is adjudicated that the testator's disability has ceased and the testator survives the adjudication by one year. The Uniform Probate Code recommendation, that this "substituted legacy" concept also apply when specifically devised or bequeathed property is taken by condemnation proceedings during testator's disability, was not proposed to the General Assembly. The remedy under existing law in such cases, as well as other cases of involuntary disposition of an incompetent's property, is to give the intended beneficiary the proceeds still remaining in the estate at testator's death.<sup>18</sup> The difference between a "substituted legacy" in some cases and the remaining proceeds (if any) in other cases where specifically devised or bequeathed property is disposed of during a testator's disability cannot be justified. Further legislation is needed to eliminate these differing results. Such legislation might also consider the parallel problem presented when specifically devised or bequeathed property is sold under a durable power of attorney during a testator's period of disability which, in the normal course of events, will not be an adjudicated disability. The present statute provides a remedy only if a sale is made by a "conservator, guardian or committee."

#### H. *Ademption by Satisfaction*<sup>19</sup>

Section 64.1-63, dealing with satisfaction of testamentary gifts, was repealed and replaced by section 64.1-63.1, which was taken from the first sentence of Uniform Probate Code section 2-612. Under the new statute, an inter vivos gift made by the testator to a beneficiary in the testator's will is not treated as a total or partial satisfaction of the beneficiary's devise or bequest unless: (i) the testator's will provides for the deduction of such gifts; (ii) the testator so declares his intent in a writing made contemporaneously

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18. See *Bryson v. Turnbull*, 194 Va. 528, 74 S.E.2d 180 (1953).

19. VA. CODE ANN. § 64.1-63.1 (Cum. Supp. 1985) (repealing *id.* § 64.1-63 (Repl. Vol. 1980)); see also *Donaldson, Part Two, supra* note 1, at 12-13.

with the gift; or (iii) the beneficiary acknowledges in a writing made at any time that the gift was in satisfaction.

The remainder of Uniform Probate Code section 2-612, which was not proposed to the General Assembly, provides that, in cases of partial satisfaction, inter vivos gifts are to be valued at the earlier of the time the beneficiary comes into possession or enjoyment of the property, or the testator's death. In the absence of a statutory rule, it would appear that the case law result under section 64.1-17—the statute dealing with the analogous problem of advancements in intestate succession—would provide persuasive authority for the proposition that such a gift should be valued as of the date it is received by the beneficiary.<sup>20</sup>

### I. *Anti-Lapse*<sup>21</sup>

Section 64.1-64, which has provided a presumptive solution for those cases in which a will has failed to anticipate the possibility of a beneficiary predeceasing a testator, has been repealed and replaced by section 64.1-64.1, the scope of which is narrower in several respects. Although the new anti-lapse statute, which adopts the philosophy of the Uniform Probate Code section 2-605, continues (i) to operate in favor of the children and descendants of deceased children of a predeceased beneficiary, (ii) to apply to void<sup>22</sup> gifts as well as lapsed gifts, and (iii) to apply to class gifts as well as individual gifts, it is now limited to those cases where the beneficiary is a "grandparent or a descendant of a grandparent of the testator." The former statute applied to a gift to any beneficiary. The new rules continue to be presumptive and thus will yield in all respects to a contrary intention appearing in the will.

The 1980 amendment, which made the anti-lapse statute applicable to "the interest passing upon a termination of a testamentary trust" and to "an inter vivos trust which receives a devise or bequest such as contemplated in section 64.1-73" (the pour-over statute), has no counterpart in the new statute. However, there would appear to be nothing in the past or present statute to prevent it

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20. See *Ratcliff v. Meade*, 184 Va. 328, 35 S.E.2d 114 (1945); *Chinn v. Murray*, 45 Va. (4 Gratt.) 348 (1848).

21. VA. CODE ANN. § 64.1-64 (Cum. Supp. 1985) (repealing *id.* § 64.1-64 (Repl. Vol. 1980)); see also Donaldson, *Part One*, *supra* note 1, at 4-5.

22. The common law defined a void gift as one where the beneficiary was dead at the time testator's will was executed; a lapsed gift was one where the beneficiary was alive at that time, but predeceased the testator.

from applying to the remainderman under a testamentary trust who predeceases the testator. The 1980 extension of the statute to inter vivos trusts that receive testamentary pour-overs was intentionally left out of the new anti-lapse statute in favor of a direct amendment to the pour-over statute if a statutory solution to this problem is found to be necessary.<sup>23</sup>

#### J. *Passage of Lapsed Gifts*<sup>24</sup>

Section 64.1-65, which has provided part of the answer to the question concerning the proper takers of gifts not saved by the anti-lapse statute, was repealed and replaced by section 64.1-65.1, which provides a complete response to this problem following the general language of Uniform Probate Code section 2-606, except for the addition of a provision making these rules yield to a contrary intention appearing in the testator's will. These rules provide that non-residuary bequests or devises that lapse become a part of the residue, and, if there are multiple residuary beneficiaries, residuary gifts that lapse pass to the other residuary beneficiaries in proportion to their interests in the residue. This legislation does not change existing Virginia law concerning the passage of lapsed gifts; it merely brings it all into one section.

#### K. *Blind Exercise of General Powers*<sup>25</sup>

Section 64.1-67, which created a presumption that the residuary clause of a testator's will was intended to exercise any general powers of appointment held by a testator, has been repealed and replaced by section 64.1-67.1, which provides that, absent a contrary intention appearing in the will, a residuary clause shall not exercise a power of appointment held by a testator. The new statute, which is based on Uniform Probate Code section 2-610, is the majority rule in the United States. In addition, it is probably more accurately reflective of the typical donor's intent that, if the power is not specifically exercised by the donee, the appointive property should pass under the donor's well thought out gift in default rather than under the donee's "blind" exercise.

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23. See Donaldson, *Part Two*, *supra* note 1, at 15-16.

24. VA. CODE ANN. § 64.1-65.1 (Cum. Supp. 1985) (repealing *id.* § 64.1-65 (Repl. Vol. 1980)); see also Donaldson, *Part One*, *supra* note 1, at 5-6.

25. VA. CODE ANN. § 64.1-67.1 (Cum. Supp. 1985) (repealing *id.* § 64.1-67 (Repl. Vol. 1980)); see also Donaldson, *Part Two*, *supra* note 1, at 12.

### L. *Pretermitted Spouse*<sup>26</sup>

Section 64.1-69.1, taken from Uniform Probate Code section 2-301(a), provides a new remedy for those cases where a testator fails to provide by will for a surviving spouse who married the testator after the execution of the will. Since the repeal of former section 64.1-58,<sup>27</sup> which eliminated the rule that a single person's will was automatically revoked upon subsequent marriage, the only remedy of a pretermitted spouse would be to take dower or curtesy in the decedent's real estate under sections 64.1-19 to -44 and to renounce the decedent's will under section 64.1-13 in order to take the statutory forced share in the decedent's personal estate as provided in section 64.1-16. The new rule provides that a pretermitted spouse "shall" take the same as if the decedent had died intestate, which will be the entire estate unless the decedent is survived by children or their descendants, one or more of whom are not children or their descendants of the surviving spouse. In the latter case, the share of the surviving spouse will be one-third.

Following its Uniform Probate Code model, the new statute provides that its remedy is not available to a pretermitted spouse if it appears from the will that the omission was intentional. However, the statute does not include the remainder of the language from Uniform Probate Code section 2-301(a), providing that the remedy also is not available if "the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence." This omission may prove to be troublesome in some cases, but it is a problem that the knowledgeable draftsman should be able to avoid easily. Lastly, there is a policy problem with a system of laws that will allow a spouse who is omitted from a pre-marriage will to take the decedent's entire estate in some circumstances while the maximum that a surviving spouse who is omitted from a post-marriage will can receive is one-third of the decedent's real estate and one-half of decedent's personal estate. This policy problem becomes more acute in those cases where a marriage in the first instance is of relatively short duration and the survivor has made no economic

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26. VA. CODE ANN. § 64.1-69.1 (Cum. Supp. 1985); see also Donaldson, *Part Two*, *supra* note 1, at 10-11.

27. 1956 Va. Acts 65 (repealing VA. CODE ANN. § 64-58 (Cum. Supp. 1956)), as clarified by 1968 Va. Acts 656 (enacting VA. CODE ANN. § 64.1-58 (Repl. Vol. 1968)).

contribution to the marital estate, as contrasted with a marriage in the second instance of long duration where the economic contribution of the surviving spouse may have been quite significant to the marital estate. It is suggested that the preferable solution to this policy problem is not to move backwards insofar as this new legislation is concerned, but instead to move forward to deal more fairly with the surviving spouse in the second instance.

#### M. *Self-Proving Affidavits*<sup>28</sup>

Section 64.1-87.1, which sets forth the requirements of the affidavit used to make a will self-proving, previously required that the affidavit be made before an officer authorized to administer oaths "under the laws of this Commonwealth." The problem created by this quoted language when out-of-state self-proving wills were offered for probate in Virginia has been addressed by the addition thereto of the words "or the laws of the state where acknowledgement occurred." The problem is not yet solved however because, although the amendment will be applicable to all wills made self-proved after July 1, 1985, the amendment is applicable to existing wills only if the existing wills were made self-proved prior to June 1, 1977. Thus there is no coverage for foreign wills that were made self-proved between June 1, 1977, and July 1, 1985.

Section 64.1-87.2, which was added in 1983 to provide an alternate means of making a will self-proved, has also been amended to recognize affidavits made before officials authorized to administer oaths under the laws of the state where the acknowledgement occurred. This alternate procedure, which dispenses with the need for the signature of the testator and witnesses, is not recommended for use by Virginia lawyers because it does not have the same extra-territorial recognition as does section 64.1-87.1, which parallels the language of Uniform Probate Code section 2-504(b).

#### N. *Payment of Small Trust Sums to Next of Kin*<sup>29</sup>

Section 64.1-123.3 is a new statute paralleling existing laws designed to facilitate probate avoidance where the only probate assets in a decedent's estate are small deposits in banks, savings and

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28. VA. CODE ANN. §§ 64.1-87.1 and -87.2 (Cum. Supp. 1985); see also Donaldson, *Part Two*, *supra* note 1, at 17.

29. VA. CODE ANN. § 64.1-123.3 (Cum. Supp. 1985).

loan associations, and credit unions. The new statute, which deals with cases wherein an amount not exceeding \$5,000 is due the decedent from a trust, provides that if there has been no qualification on the decedent's estate within sixty days after death, the trustee "may pay such sum to the distributees of the decedent or other person entitled thereto under the laws of this Commonwealth."

O. *Disbursements and Accountings in Small Estates*<sup>30</sup>

Section 8.01-606, dealing with the payment of small amounts to certain persons through court without intervention of a fiduciary and the parallel authority of commissioners of accounts, has been amended to increase the ceiling below which commissioners of accounts can approve final distribution of funds from \$500 to \$2,500, to authorize commissioners of accounts to exempt fiduciaries from filing further accounts when the value of the sum being administered is less than \$2,500, and to authorize circuit courts to exempt fiduciaries from filing further accounts when the value of the sum being administered does not exceed \$4,000.

P. *Nuisance Bequests*<sup>31</sup>

On occasion a testator will bequeath one dollar or some other nominal sum to a beneficiary, not in order to confer a benefit upon such person but instead to demonstrate that the person was not accidentally omitted or, in some cases, to insult the recipient. As might be expected, such beneficiaries cannot always be counted on to cooperate with the personal representative in making settlement of the decedent's estate. Accordingly, section 26-17, which requires that a personal representative making an accounting must exhibit vouchers for all disbursements made during the accounting period, has been amended to eliminate the need for a voucher when a disbursement not exceeding twenty-five dollars is made to a legatee who refuses to take possession or fails to present the disbursement check to a bank for payment. A problem may be presented in some cases because the statute does not specify a time period that will be presumptive of a "failure" to present, as opposed to a mere "delay" in presenting. By an amendment to section 64.1-65.1, it is further provided that if a legatee refuses to take possession of such a bequest then the bequest shall fail and become a part of the resi-

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30. *Id.* § 8.01-606.

31. *Id.* §§ 26-17, 64.1-65.1.

due of the testator's estate. Although the amendment to section 64.1-65.1 is addressed to the same problem as the amendment to section 26-17, the amendment to section 64.1-65.1 fails to address the problem of the legatee who receives the disbursement check but fails to present it to a bank for payment. Moreover, if the amendment to section 64.1-65.1 causes a refused bequest to fail and become a part of the residue, there would appear to be no need for the corresponding amendment to section 26-17 eliminating the need for a voucher from the legatee of the refused gift.

#### Q. *Fiduciary Compensation*<sup>32</sup>

The Virginia fiduciary compensation rule provides that a fiduciary is entitled to "reasonable compensation" for the performance of the duties incumbent upon a particular fiduciary office. This rule, codified in section 26-30, has presented problems to fiduciaries in some instances, such as an administrator who, being charged only with a responsibility for a decedent's personal estate, nevertheless in the course of a competent and complete administration of a decedent's affairs may render services in connection with decedent's real estate. As this real estate related service is beyond the legal scope of the administrator's fiduciary office, the traditional answer has been that the administrator was not allowed any compensation for these services, even though they were quite beneficial to the decedent's estate. The 1985 amendment to section 26-30 remedies this problem by providing that "if a fiduciary renders services with regard to real estate owned by the ward or beneficiary, compensation may also be allowed for the services rendered with regard to the real estate and the income therefrom or the value thereof."

#### R. *Fiduciary Investment*<sup>33</sup>

The "legal list" of fiduciary investments, contained in section 26-40, has been expanded to include (i) accounts in credit unions insured by the National Credit Union Share Insurance Fund or the Virginia Credit Union Share Insurance Corporation, up to the amount of such insurance, and (ii) certain governmental obligations subject to the obligation or right of the seller to repurchase at a future date.

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32. *Id.* § 26-30 (Repl. Vol. 1985).

33. *Id.* § 26-40.

### S. *Gifts of Incompetent's Property by Substituted Judgment*<sup>34</sup>

The 1984 session amended section 37.1-142 to enable the circuit court, upon petition of a ward's fiduciary, to direct the fiduciary to make gifts from income and principal, not necessary for the ward's maintenance, to those persons to whom the ward would, in the court's judgment, have made such gifts if the ward were of sound mind. The process requires that a guardian ad litem be appointed for the incompetent, that reasonable notice be given to the ward and parties who would be affected by the proposed gifts, and that due consideration be given by the court to six enumerated factors plus any other factors relevant to the proposed gifts. The present amendment to section 37.1-142 authorizes the fiduciary to make such gifts not to exceed one hundred dollars per donee without court approval, appointment of a guardian ad litem, or notice, if the above-mentioned enumerated factors are considered and there is a finding that the ward has a history of giving similar gifts to a specific donee for three years prior to the appointment of the fiduciary. The total of such gifts cannot exceed five hundred dollars in any calendar year.

### T. *Probate Tax*<sup>35</sup>

Section 58.1-1712 imposes a tax on the probate of every will or grant of administration on an intestate estate in the amount of ten cents per hundred dollars of probate property, with a minimum tax of one dollar. Estates not in excess of one hundred dollars have been exempt from this probate tax. Section 58.1-1712 has been amended to extend this exemption to estates not in excess of five hundred dollars.

## II. 1984-85 JUDICIAL DECISIONS

### A. *Meaning of "Issue" in a Will*

In the case of *Vicars v. Mullins*,<sup>36</sup> testator died in 1904 leaving a will that provided in part as follows: "I will my grandson W. S. Salyer also one third of all my Real Estate to be given him on the upper end of my farm and if he should die without issue, I

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34. *Id.* § 37.1-142 (Cum. Supp. 1985).

35. *Id.* § 58.1-1712.

36. 227 Va. 432, 318 S.E.2d 377 (1984).

then. . . ."<sup>37</sup> W.S. Salyer died in 1956, survived by his illegitimate son whom he had also adopted. As stated by the court, "[t]he question for determination in this appeal is whether the illegitimate son of a male devisee under a will is 'issue' of the devisee within the meaning of the will."<sup>38</sup> The court applied the common law canon of construction that generic descriptive language, such as "issue," presumptively excludes both illegitimates<sup>39</sup> and adoptees, and then held that the evidence was insufficient to rebut this presumption in the case at bar.

Although this case is valuable as a good explanation of prior law, it will have no application to wills of decedents dying after July 1, 1978 (regardless of when executed), which will be governed by a statute passed in 1978 for the express purpose of reversing these common law presumptions.<sup>40</sup> Moreover, although the new presumption is statutorily mandated only for wills of decedents dying after July 1, 1978, this would not prevent the court from construing earlier wills in accordance with its terms, as to both illegitimates and adoptees, if so requested.<sup>41</sup>

### B. *Illegitimates Proving Paternity in Intestate Succession*

Effective July 1, 1978, the absolute prohibition against inheritance by, from, or through illegitimates on the paternal side was repealed in Virginia.<sup>42</sup> However, the United States Supreme Court decision that led to this repeal also recognized that "[t]he more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fa-

37. *Id.* at 434, 318 S.E.2d at 377.

38. *Id.*

39. In Virginia, this common law presumption was not applied when the gift was to the "children" of a female because a female's illegitimate children were placed on the same footing as her legitimate children. *Bennett v. Toler*, 56 Va. (15 Gratt.) 588 (1860).

40. Section 64.1-71.1 provides as follows:

Construction of generic terms.—In the interpretation of wills and trusts, adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession unless a contrary intent shall appear on the face of the will or trust. This section shall apply to all inter vivos trusts executed after July one, nineteen hundred seventy-eight and to all wills of decedents dying after July one, nineteen hundred seventy-eight, regardless of when executed.

VA. CODE ANN. § 64.1-71.1 (Repl. Vol. 1980).

41. See *Wheeling Dollar Savings and Trust Co. v. Hanes*, 237 S.E.2d 499 (W. Va. 1977), for an instance of such retroactive application.

42. 1978 Va. Acts 647. The background of this development is discussed in *Johnson, Inheritance Rights of Children in Virginia*, 12 U. RICH. L. REV. 275 (1978).

thers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally."<sup>43</sup> Picking up on this language, the General Assembly provided that, although a person born out of wedlock is a child of the mother, such a person is a child of the father only if the "paternity is established by clear and convincing evidence as set forth in section 64.1-5.2."<sup>44</sup> This latter section excludes all evidence of paternity except for six specific actions or categories of conduct by the alleged father.

In the recent case of *Johnson v. Branson*,<sup>45</sup> the only one of these six categories which was relevant was the following: "That he gave consent to a physician or other person, not including the mother, charged with the responsibility of securing information for the preparation of a birth record that his name be used as the father of the child upon the birth records of the child."<sup>46</sup> The illegitimate's evidence consisted of a certified copy of his West Virginia birth certificate, which stated that the decedent was his father, and a copy of the relevant West Virginia law which stated that "if the child is illegitimate, the name or residence of, or other identifying details relating to, the putative father shall not be entered without his consent. . . ."<sup>47</sup> Notwithstanding this statutory requirement of consent, the court held that, as there was no affirmative evidence before it that the decedent actually consented to have his name entered on the illegitimate's birth certificate, "the mere listing of [the decedent's] name on the West Virginia birth certificate is insufficient to prove paternity under our statute requiring such proof to be made by clear and convincing evidence."<sup>48</sup>

A major issue still to be decided in cases involving proof of paternity for purposes of intestate succession is the constitutionality of section 64.1-5.2, which limits the evidence that may be introduced in such cases. This section was copied from section 20-61.1,<sup>49</sup>

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43. *Trimble v. Gordon*, 430 U.S. 762, 770 (1977).

44. VA. CODE ANN. § 64.1-5.1(2)(b) (Repl. Vol. 1980). Paternity may also be proven by establishing that "[t]he biological parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage was prohibited by law, deemed null or void or dissolved by a court." *Id.* § 64.1-5.1(2)(a).

45. 228 Va. 65, 319 S.E.2d 735 (1984).

46. *Id.* at 69, 319 S.E.2d at 736 (quoting VA. CODE ANN. § 64.1-5.2.2 (Repl. Vol. 1980)).

47. *Id.* (quoting W. VA. CODE § 14(h) (1931)).

48. *Id.* at 71, 319 S.E.2d at 737.

49. As it existed at the time of this 1978 copying, Va. Code Ann. § 20-61.1 consisted of the introductory paragraph and the first four numbered paragraphs of the version currently found in the code.

which limits the evidence of paternity that may be admitted in support proceedings. In the recent case of *Jones v. Robinson*,<sup>50</sup> the court struck down section 20-61.1 as unconstitutional because it denied certain illegitimates a reasonable opportunity to prove paternity.<sup>51</sup> In a telling portion of its opinion, the court wrote as follows:

[O]nly illegitimate children whose fathers had lived with their mothers for the entire 10 months prior to birth or had affirmatively acknowledged their children in the narrowly restricted ways allowed by § 20-61.1 could establish their right to support. Children whose fathers avoided the acts described in § 20-61.1 could never recover support, even if the father openly admitted paternity in ways not specified in the statute. Allowable proof of paternity lay within the absolute control of the father, whose unwillingness to assume voluntarily the obligation of support denied his illegitimate child a right which could not be denied a legitimate child. No meaningful device for establishing paternity was available to the illegitimate child. Such restrictions on the available methods of proof imposed an impenetrable barrier resulting in the kind of invidious discrimination contemplated by *Gomez*.<sup>52</sup>

Granted that the right of support is different from the right of inheritance, the question remains whether or not that difference is sufficient to justify leaving "allowable proof of paternity . . . within the absolute control of the father"<sup>53</sup> in inheritance cases.

### C. *Separate Equitable Estate for Males*

In *Jacobs v. Meade*<sup>54</sup> a major issue was whether section 64.1-21, the statute recognizing the equitable separate estate of a female in which a surviving husband would not be entitled to curtesy, was unconstitutional on equal protection grounds because it granted rights to wives that were not granted to husbands. The court did not reach this constitutional issue because of section 64.1-19.1, which was enacted in 1977 as an apparent response to various deci-

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50. 229 Va. \_\_\_, 329 S.E.2d 794 (1985) (consolidating *sub. nom.* *Jones v. Robinson*, *Whiteman v. Kelley*, and *Vivier v. Page*).

51. *Id.* at \_\_\_, 329 S.E.2d at 801. The court's decision relates only to § 20-61.1 as it existed prior to its expansion in 1982, which was the same language it contained in 1978, described *supra* note 49.

52. *Id.* (referring to *Gomez v. Perez*, 409 U.S. 535 (1983)).

53. *Id.*

54. 227 Va. 284, 315 S.E.2d 383 (1984).

sions of the United States Supreme Court involving gender-based classifications. This section provides: "Where the word 'curtesy' appears in this chapter of the Code, it shall be taken to be synonymous with the word 'dower' as the same appears in this chapter or this Code, and shall be so construed for all purposes."<sup>55</sup> The court held that "when section 64.1-19.1 and section 64.1-21 are read together, it is manifest that a husband can acquire a sole and separate equitable estate."<sup>56</sup> This holding was codified in the 1985 session of the General Assembly by an amendment to section 64.1-21.<sup>57</sup>

Although section 64.1-19.1 can, in light of the *Jacobs* decision, be relied upon for guidance in dower/curtesy matters when rights are given to a husband but not a wife, or vice versa, a problem still remains when conflicting rights are given to husbands and wives. For example, one can create jointure which will eliminate a surviving wife's right to dower if the requirements of sections 64.1-29 and -30 are met. However, even though these same requirements are met, section 64.1-22 allows a surviving husband to renounce and take curtesy. Query: if "dower" and "curtesy" are synonymous, does this mean (i) that a surviving wife can renounce jointure, (ii) that a surviving husband can no longer renounce jointure, (iii) that these code sections are void because of their irreconcilable conflict, or (iv) none of the above? It is submitted that none of the above is the correct answer and that, if the concept of dower and curtesy is to be retained, a legislative overhaul of this chapter is the answer.

#### D. *Will Construction*

In *Edwards v. Bradley*,<sup>58</sup> the issue before the court was whether certain language in a will created a fee simple or a life estate. Applying settled principles of law and rules of construction, the trial court's decision in favor of the life estate construction was upheld.

#### E. *Bona Fide Purchaser from an Apparent Heir*

In *Cheatham v. Gregory*,<sup>59</sup> the court was concerned with the application of section 64.1-95, which provides in relevant part as

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55. *Id.* at 286, 315 S.E.2d at 384 (quoting VA. CODE ANN. § 64.1-19.1 (Repl. Vol. 1980)).

56. *Id.* at 288, 315 S.E.2d at 385.

57. See *supra* note 3.

58. 227 Va. 224, 315 S.E.2d 196 (1984).

59. 227 Va. 1, 313 S.E.2d 368 (1984).

follows:

The title of a bona fide purchaser without notice for valuable consideration from the heir at law of a person who has died . . . having title to any real estate of inheritance in the Commonwealth, shall not be affected by a devise of such real estate made by the decedent, unless within one year after testator's death the will devising the same . . . shall be filed for probate . . . .<sup>60</sup>

In a per curiam decision, the court determined on undisputed facts that the purchaser in question was a bona fide purchaser without notice for valuable consideration (\$400) who was entitled to the protection of section 64.1-95, and reversed the trial court's decision to the contrary.

*F. Undue Influence—Confidential Relationship—Constructive Fraud*

*Nuckols v. Nuckols*<sup>61</sup> involved a bill of complaint brought by grantor's attorney in fact seeking rescission of several deeds of conveyance. Although this case involved deeds instead of wills, the excellent discussion of the undue influence presumption, confidential relationships between related parties, and constructive fraud makes this decision required reading for the lawyer preparing for a will contest case which involves these issues.

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60. *Id.* at 4, 313 S.E.2d at 370 (quoting VA. CODE ANN. § 64.1-95 (Repl. Vol. 1980)).

61. 228 Va. 25, 320 S.E.2d 734 (1934).