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# Support of the Surviving Spouse and Minor Children in Virginia: Proposed Legislation v. Present Law

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### SUPPORT OF THE SURVIVING SPOUSE AND MINOR CHILDREN IN VIRGINIA: PROPOSED LEGISLATION V. PRESENT LAW

*J. Rodney Johnson\**

The death of any person creates for the decedent's family a number of problems of varying degrees of difficulty and immediacy. When the decedent's family consists of a surviving spouse and/or minor children who were dependent upon the decedent for their support, these problems have the highest degree of immediacy. If a question exists concerning the solvency of the decedent's estate the immediacy is compounded by a high degree of difficulty in finding viable solutions to these problems. In addition to having to cope with the tragedy of the personal loss caused by the death, the family must also cope immediately with the problems that life presents to the living in all of its mundane aspects and needs. For instance, the family's need for food, shelter, clothing, etc., exists in the same degree on the day after the decedent's death as it did on the day before his death. Yet, often the ability to provide for these needs is severely hampered or even eliminated by the very same factor that caused the problem—the decedent's death. Some of the economic problems that will be presented to the decedent's family might be classified as immediate, short-term problems that will be

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faced during the temporary period that the decedent's estate will be involved in the probate or administration process, which will typically be one year or less. However, there will also be other economic problems presented to the decedent's family that must be classified as future, long-term problems that will be faced by the family when the probate or administration process has been completed and life begins to settle down into some sort of continuing pattern.

This article will examine the various economic needs of the typical family during both the probate and the post-probate periods. The discussion will be presented under three separate headings which, it is hoped, will help to identify the major areas of concern. These three major areas of concern are: (I) a family allowance—to defray the ordinary and necessary expenses associated with the maintenance of a household for the decedent's family during the probate period, (II) a right to exempt property—to insure the continued possession by the decedent's family of those articles of personal property that are indispensable to the maintenance of daily life during both the probate period and the post-probate period, and (III) a homestead allowance—to guarantee a small "nest-egg" to the decedent's family as it enters the post-probate period. As a part of the discussion of each category of concern, there will be an examination of those provisions in existing Virginia law that attempt to respond to the needs that are found within that category, and a presentation of certain conclusions concerning the direction that Virginia law should take in the future. Lastly, an Appendix to this article will contain proposed language for what are believed to be four rather straight-forward statutes that would replace the present, inadequate laws with a well-balanced plan of basic protection for the decedent's surviving spouse or minor children.\*\*

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\*\* In order to facilitate the discussion in this article, the footnotes will contain a reproduction of each of the existing Virginia statutes dealing with the various exemptions and allowances that are currently provided for the benefit of a decedent's surviving spouse or minor children. As these footnotes are intended to be read as a part of the discussion, the extensive citation of authorities that is regularly found in the footnotes of a law review article has been eliminated in the interest of readability. In order to further facilitate the discussion of the code sections, an informal form of citation has been adopted when referring to a code section in the text of the article. Thus, for example, VA. CODE ANN. § 34-26 (Cum. Supp. 1980) will simply appear in the text as section 34-26, which will be understood as always referring to the current printing of the code section being referred to; and the

## I. THE FAMILY ALLOWANCE

The most immediate and obvious need of a decedent's family in the post-mortem period is the need for the basic necessities of life that are purchased by the typical family on a continuing basis such as food, shelter, clothing, utilities, medical care, monthly payments on outstanding accounts, etc. The General Assembly recognized this need long ago in legislation that is now found in section 64.1-126<sup>1</sup> and section 64.1-127.<sup>2</sup> However, as the reader will quickly note upon a casual reading of these two sections, they respond to only one of the immediate needs referred to above — the food need. Moreover, although the response that is made to this need of the decedent's family for food during the period that the estate is involved in the administration process may have been an adequate response to this need at one time during Virginia's agricultural past, it is obvious that this statutory "benefit" is of absolutely no assistance to the typical Virginia family today. Yet, this is the sole provision in Virginia law that relates to a living allowance for the decedent's family during the entire period the estate is involved in the administration process.

It is submitted that the only realistic solution for the problem represented by the immediate needs of the decedent's family is to provide the family with a reasonable monetary allowance from the

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draft statutes in the Appendix will be referred to in the text as S-1, etc.

1. VA. CODE ANN. § 64.1-126 (Repl. Vol. 1980) provides:

Family may use such dead victuals and livestock as are necessary. — The dead victuals, or as much thereof as may be necessary, which, at the death of any person, shall have been laid in for consumption in his family, shall remain for the use of such family, if the same be desired by any member of it, without account thereof being made. Any livestock necessary for the food of the family may be killed for that use before the sale or distribution of the estate and the same shall not be taken into account by the administrator or executor of the estate.

2. VA. CODE ANN. § 34-26 (Cum. Supp. 1980), which is reproduced in full in note 4 *infra*, provides in part that:

[P]rovisions other than those hereinafter set out of the value of fifty dollars; two hoes; fifty bushels of shelled corn, or, in lieu thereof, twenty-five bushels of rye or buckwheat; five bushels of wheat, or one barrel of flour; twenty bushels of potatoes, two hundred pounds of bacon or pork, three hogs, fowl not exceeding in value twenty-five dollars, all canned and frozen goods, canned fruits, preserved fruits or home-prepared food put up and prepared for use and consumption of the family. . . .

This section is incorporated by reference into VA. CODE ANN. § 64.1-127 (Repl. Vol. 1980). See note 3 *infra*.

estate for the family's use during the period in which the estate will be involved in the probate process. This reasonable monetary allowance would be paid over to the surviving spouse (or person having the care and custody of the minor children if there is no surviving spouse) for the use of the dependent family members, and then expended by the recipient in any manner required in order to meet the unique needs of the family involved. Such is the solution offered in S-1. It is recognized that the "reasonable amount" that might be needed in any given case will be a question of fact that can be expected to vary from family to family and from time to time. At the same time, it is also recognized that there is an immediate need for these funds to start flowing to the decedent's family, and because of the immediacy of this need, the family cannot await the normal adjudicative processes of the law. Therefore, it is provided in S-4 that the executor or administrator has the authority to make an immediate, discretionary judgment (up to a certain ceiling amount) concerning the amount that is reasonable in the circumstances of the family with which he is involved and he may begin paying these funds over to the family without delay. The ceiling amount that is suggested in S-4 is \$500 per month which, on a balance of the equities, is believed to be a reasonable limitation on the amount that the personal representative should be able to award to the family on his own accord, and yet be sufficient to relieve the immediate economic pressure on the family. No matter what amount might be selected as an appropriate ceiling on the personal representative's discretion, it is reasonable to expect that this amount may not be enough in some cases. Therefore, in those cases where the ceiling amount is believed to be insufficient to respond to the needs of the family in question, considerations of fairness and equity require that the family have an opportunity to present its case to receive whatever amount may actually be required for its support during the administration period. These same considerations of fairness and equity require that the creditors of the estate also have an opportunity to object to an award of the personal representative that, even though beneath the ceiling amount, is nevertheless more than is reasonably required by the family in question and thus constitutes a diversion of assets that would otherwise be available to pay claims against the estate. Accordingly, S-4 provides that any interested person may petition

the circuit court to alter the family allowance to an amount larger or smaller than the one that the personal representative allowed or could have allowed. In order to simplify this petition to the court by an interested party, it may be made directly to the judge without the normal notice requirements of the law, except as the judge may deem necessary or desirable on a case by case basis.

## II. EXEMPT ARTICLES

In addition to the immediate need for a living allowance, the decedent's family will also have an immediate need for those articles of tangible personal property that are used in their personal maintenance and in the maintenance of their household on a daily basis. It must be noted, however, that under the common law form of property ownership that prevails in Virginia, the title to almost all of the tangible personal property in the typical household is vested in the breadwinner; therefore, absent a specific statute to the contrary, this tangible personal property will pass by operation of law to the breadwinner's personal representative who has a legal duty to take this property into his possession as estate assets. This is, of course, totally inconsistent with the continuing need of the decedent's family for such property on a day-to-day basis. Current Virginia law attempts to respond to this problem with section 64.1-127<sup>3</sup> which provides that the various articles of tangible personal property that a householder may hold exempt from the claims of his creditors during his lifetime, which are enumerated in section 34-26<sup>4</sup> and section 34-27,<sup>5</sup> shall vest upon the householder's death

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3. VA. CODE ANN. § 64.1-127 (Repl. Vol. 1980) provides:

What articles vest absolutely in surviving spouse and minor children. — Upon the death of a householder leaving a spouse or minor children, there shall be vested in them, absolutely and exempt from sale for funeral expenses, debts of the decedent or charges of administration of his estate, such of his property as would, if he were alive and a householder, be exempted under § 34-26 from levy or distress for his debts, and also, if he be at the time of his death actually engaged in the business of agriculture, such of his property as would, were he alive and a householder, be exempt under § 34-27 from levy or distress for his debts.

4. VA. CODE ANN. § 34-26 (Cum. Supp. 1980) provides:

Exempt articles enumerated. — In addition to the estate, not exceeding in value five thousand dollars, which every householder residing in this State shall be entitled to hold exempt, as provided in chapter 2 (§ 34-4 et seq.) of this title, he shall also be entitled to hold exempt from levy or distress the following articles or so much or so many thereof as he may have, to be selected by him or his agents:

in his surviving spouse and minor children.

The first problem with the present statutory list is the problem that will always be presented by any such list — its destiny is to become outdated with the passage of time. A casual reading of the

(1) The family Bible.

(1a) Wedding and engagement rings.

(2) Family pictures, schoolbooks and library for the use of the family.

(3) A lot in a burial ground.

(4) All necessary wearing apparel of the debtor and his family, all beds, bedsteads and bedding necessary for the use of such family, two dressers or two dressing tables, wardrobes, chifforobes or chests of drawers or a dresser and a dressing table; carpets, rugs, linoleum or other floor covering; and all stoves and appendages put up and kept for the use of the family not exceeding three.

(5) All cats, dogs, birds, squirrels, rabbits and other pets not kept or raised for sale; one cow and her calf until one year old, one horse, six chairs, six plates, one table, twelve knives, twelve forks, two dozen spoons, twelve dishes, or if the family consists of more than twelve, then a plate, knife, fork and two spoons, and a dish for each member thereof; two basins, one pot, one oven, six pieces of wooden or earthenware; one dining room table, one buffet, china press, one icebox, freezer or refrigerator of any construction, one washing machine, one clothes dryer not to exceed one hundred fifty dollars in value, one loom and its appurtenances, one kitchen safe or one kitchen cabinet or press, one spinning wheel, one pair of cards, one axe and provisions other than those hereinafter set out of the value of fifty dollars; two hoes; fifty bushels of shelled corn, or, in lieu thereof, twenty-five bushels of rye or buckwheat; five bushels of wheat, or one barrel of flour; twenty bushels of potatoes, two hundred pounds of bacon or pork, three hogs, fowl not exceeding in value twenty-five dollars, all canned and frozen goods, canned fruits, preserved fruits or home-prepared food put up and prepared for use and consumption of the family, twenty-five dollars in value of forage or hay, one cooking stove and utensils for cooking therewith, one sewing machine, and in case of a mechanic, the tools and utensils of his trade, and in case of an oysterman or fisherman his boat and tackle, not exceeding one thousand five hundred dollars in value; if the boat and tackle exceed fifteen hundred dollars in value the same shall be sold, and out of the proceeds the oysterman or fisherman shall first receive one thousand five hundred dollars in lieu of such boat and tackle.

No officer or other person shall levy or distraint upon, or attach, such articles, or otherwise seek to subject such articles to any lien or process.

5. VA. CODE ANN. § 34-27 (Cum. Supp. 1980) provides:

Additional articles exempted to householder engaged in agriculture. — If the householder be at the time actually engaged in the business of agriculture, there shall also be exempt from such levy or distress, while he is so engaged, to be selected by him or his agent, the following articles, or so many thereof as he may have, to wit: a pair of horses or mules unless he selects or has selected a horse or mule under the preceding section (§ 34-26), in which case he shall be entitled to select under this section only one, with the necessary gearing, one wagon or cart, one tractor, not exceeding in value three thousand dollars, two plows, one drag, one harvest cradle, one pitchfork, one rake, two iron wedges and fertilizer and fertilizer material not exceeding in value one thousand dollars.

present list discloses that this destiny has been fulfilled because of the inclusion of many articles that are present in few, if any, Virginia households today. Moreover, this same casual reading will also disclose the second problem with the present statutory list — the rather conspicuous absence of many articles of tangible personal property that are found in a number of Virginia households today which would be considered by many homemakers to be as necessary or more necessary to the maintenance of daily life than other articles that are on the list. Such items might include the following: lamps, fans, air-conditioners, hot plates, radar ranges, electric mixers, electric irons, electric frying pans, electric percolators, vacuum cleaners, hair dryers, televisions, radios, lawn mowers, etc.

In addition to the problems of obsolescence and inadequacy, there is also a problem of gross economic unfairness in the present statutory scheme. The statute enumerates articles of property that vest in the surviving spouse and minor children to the exclusion of creditors, distributees and specific beneficiaries under the decedent's will without giving any consideration to the value of the articles involved. A prime example of this economic unfairness is illustrated by that portion of the list which enumerates "carpets, rugs, linoleum or other floor covering." For some families this language might translate into a single throw rug or piece of linoleum of insignificant value, while for others it might translate into numerous oriental carpets worth thousands of dollars each. As one continues to read the list of exempt articles enumerated in section 34-26 with this frame of reference in mind, it becomes immediately apparent that those whose homes are furnished with antique, high fashion, or other very expensive furniture enjoy a much larger exemption, one that in some cases will exceed \$100,000 as opposed to those whose homes or apartments are furnished with "ordinary" furniture. This very obvious discrimination in favor of those families whose homes are expensively furnished also represents an equally obvious unfairness to the decedent's creditors, as well as to the specific beneficiaries under the decedent's will.

A fourth problem presented by the present approach is that section 64.1-127 awards the title to the property that will be held exempt from creditors and specific beneficiaries to the surviving

spouse and minor children together, as tenants in common. What is to happen if there is a need or a desire to dispose of a portion of this property during the children's minority? The legal incompetency of the children, due to their minority, will prevent them from being able to participate in such a transfer even if it is clearly in their best interest. Therefore, court action will be necessary. Furthermore, the surviving parent may be faced with a problem when the minor children become adults at age eighteen and wish to have "their" share of the household property delivered over to them.

The foregoing problems are eliminated by S-2 which establishes an amount of overall value (\$3,500) that may be held exempt from the claims of creditors or beneficiaries of the estate. The surviving spouse (or guardian of the minor children if there is no surviving spouse) is then allowed to select articles of tangible personal property from the decedent's estate according to personal choice until the allowed exempt amount is reached. Such an approach will provide the flexibility that is indispensable in order to respond to the varying needs of the many different families that will be affected in the future, and also to respond to the composition of the various estates from which they will be choosing. Moreover, this value-oriented solution to the exempt articles problem will also eliminate the present discriminatory treatment among families that is based on the quality of the furnishings in their homes, and prevent the present abuse of the legitimate rights and expectations of creditors and specific beneficiaries.

### III. THE HOMESTEAD ALLOWANCE

In those cases where the decedent has died without sufficient assets to pay all of his debts and also to provide for his family, another matter which must be resolved concerns the provision for the decedent's family after the probate period has ended. The family allowance and the right to exempt property will insure the maintenance of the household during the period of estate administration. Yet, if there will be no inheritance due to the insolvency of the estate, where will the funds come from to replace the family allowance during the post-probate period? It is quite possible that survivors' benefits under the Federal Social Security law may be available to the family. However, these benefits are based upon the

lifetime contributions of the decedent instead of upon the post-probate needs of the decedent's family. Thus, even if such assistance is forthcoming, it may not respond to all of the family's needs. Therefore, it is generally recognized that the family should be assured of exiting the probate proceedings, even in an insolvent estate, with a small "nest-egg" that will give the family something to fall back on in case of a temporary, unusual or emergency need. It is also possible that the "nest-egg" might be used to provide job training so that the surviving spouse could enter the work force to supplement the Social Security payments while the children are finishing school, or to replace the Social Security payments when they end upon the children finishing school prior to the surviving spouse reaching retirement age.

The Virginia General Assembly recognized the legitimacy of this post-probate need long ago and provided for an additional exemption for a decedent's family, referred to as the Homestead Exemption, which is currently \$5,000. In providing this additional exemption to a decedent's family, however, the General Assembly did not create a wholly new statutory scheme in that portion of the code dealing with the law of decedent's estates. Instead, it superimposed additional language and additional code sections in Chapter 2 of Title 34, which deals with the \$5,000 homestead exemption of a householder who is being pursued by his creditors during his lifetime. Building upon this inter-vivos right of a householder,<sup>6</sup> the operative code sections allow the surviving spouse and minor children to continue a homestead exemption set apart by the householder during his lifetime,<sup>7</sup> or to set apart a survivor's homestead

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6. VA. CODE ANN. § 34-4 (Cum. Supp. 1980) provides:

Exemption created. - Every householder or head of a family residing in this State shall be entitled, in addition to the property or estate which he is entitled to hold exempt from levy, distress or garnishment under §§ 34-26, 34-27 and 34-29, to hold exempt from levy, seizure, garnishment or sale under any execution, order or process issued on any demand for a debt or liability on contract, his real and personal property, or either, to be selected by him, including money and debts due him, to the value of not exceeding five thousand dollars. The word "debt," as used in this title, shall be construed to include a liability incurred as the result of an unintentional tort.

7. VA. CODE ANN. § 34-10 (Repl. Vol. 1976) provides:

How real estate, so set apart, held after death of householder. - The real estate set apart by any householder in his lifetime shall, after his death, be held by his surviving spouse and minor children, or such of them as there may be, exempt as before and also from the debts and obligations of such surviving spouse and children or any

in either real estate<sup>8</sup> or personal property<sup>9</sup> in those instances where the householder either failed to set apart a homestead exemption during his lifetime or failed to set apart the maximum amount that is allowed. Although the foregoing provisions may seem responsive to the family's post-probate need upon first inspection, a further reading of these sections and a study of their interaction with the other sections in Chapter 2 of Title 34 discloses a number of problems which prevent this exemption from functioning as it must in order to respond to the family's post-probate need.

The first problem existing in the present approach which establishes a homestead exemption for the surviving spouse and minor children, and one that is inherent in any scheme that "piggy-backs" upon the law of debtors' rights, is that the policy considerations in the law of debtors' rights that restrict the availability of the homestead exemption to householders in a number of cases<sup>10</sup>

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of them, until his death or marriage, and, after his death or marriage, by such children until they respectively attain the age of eighteen years, or marry, if they marry before attaining that age.

8. VA. CODE ANN. § 34-11 (Repl. Vol. 1976) provides:

How set apart, if not by householder in his lifetime. - If no real estate or not so much as the householder may have been entitled to set apart has been so set apart by him in his lifetime, upon his death his surviving spouse and minor children, or such of them as there may be, on petition to the circuit court of the county or city wherein his real estate or the greater part thereof is, may have so much thereof set apart by commissioners appointed by the court as the householder might have set apart in his lifetime, to be held by them as it would have been under the preceding section (§ 34-10) if it has been so set apart.

9. VA. CODE ANN. § 34-15 (Repl. Vol. 1976) provides:

How, if householder has not set it apart in his lifetime. - If a householder die, leaving a spouse or minor children, and he has not selected and set apart personal estate as provided in the two preceding sections (§§ 34-13, 34-14) such surviving spouse, or if such spouse die or marry, such minor children, each by his guardian or next friend, may select and set apart such personal estate in the manner prescribed by the preceding section (§ 34-14); and the same so set apart, and what, if any, may have been set apart by the householder in his lifetime, shall be held by the surviving spouse and minor children in the same manner and exempt as real estate set apart under this chapter would be held by them after the death of such householder. If a surviving spouse receives dower, jointure or curtesy under chapter 2 (§ 64.1-19 et seq.) of Title 64.1, the value thereof shall be deducted from any exemption such spouse may claim under this section, but in such case the rights of minor children hereunder shall not be impaired.

10. VA. CODE ANN. § 34-5 (Repl. Vol. 1976) provides:

To what debts exemption shall not apply. - Such exemption shall not extend to any execution order or other process issued on any demand in the following cases:

are not equally applicable to the decedent's family. Yet, as an inevitable consequence of the incorporation by reference that is involved in this "piggy-back" approach, the restrictions in section 34-5 are also applicable to the decedent's family, thereby greatly reducing this benefit in some cases and totally eliminating it in other cases.

The second problem arises because the "holding" nature of the homestead exemption granted to a householder merely prevents the householder's creditors from levying upon the property claimed as exempt during the householder's lifetime, instead of granting the householder the absolute right to this property.<sup>11</sup> As

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(1) For the purchase price of such property or any part thereof. If the property purchased and not paid for be exchanged for or converted into other property by the debtor, such last named property shall not be exempted from the payment of such unpaid purchase money under the provisions of the preceding section (§ 34-4).

(2) For services rendered by a laboring person or mechanic.

(3) For liabilities incurred by any public officer or officer of a court, or any fiduciary, or any attorney at law for money collected.

(4) For a lawful claim for any taxes, levies or assessments.

(5) For rent.

(6) For the legal or taxable fees of any public officer or officer of a court.

(7) Such exemption shall not be claimed or held in a shifting stock of merchandise or in any property the conveyance of which by the homestead claimant has been set aside on the ground of fraud or want of consideration. A stock of merchandise shall be considered a shifting stock within the meaning of this paragraph after an assignment by the owner thereof for the benefit of creditors and after a voluntary or involuntary adjudication in bankruptcy.

11. VA. CODE ANN. § 34-24 (Repl. Vol. 1976) provides:

When the exemption ceases; how estate passes; lien of judgment or decree against householder. - When any person, entitled as a householder to the exemption provided for in § 34-4, ceases to be a householder or when any person removes from this State, his right to claim or hold any estate as exempt under the provisions of this chapter, shall cease; and, upon the death of a householder leaving neither surviving spouse nor minor children surviving him, or, if the spouse or any of them survive the decedent householder, and he leaves any estate which they or any of them are entitled to hold, or to have set apart to be held by them, as exempt under the preceding sections of this chapter, then upon such spouse's death or marriage, and if there be minor children, as soon as the youngest of those who attain the age of eighteen years attains that age, or all marry, if they all marry before attaining that age, the exemption of any estate, real or personal, of such householder, then remaining and held as exempt under the provisions of this chapter, shall cease, and it shall pass as other real and personal estate, according to the law of descents and distributions, or as the same may be devised or bequeathed by the householder, subject to his debts; but the lien of a judgment, or decree for money, rendered against a householder, and which is not paramount to the exemption provided for in this chapter, shall, as to the real estate held as exempt by him, his surviving spouse or minor children, attach to such only of

has been noted earlier, the decedent's family needs assets that can be expended, not merely used, during the post-probate period in order to respond to the variety of needs that may arise. Yet, the "piggy-back" approach of the present law has caused the Virginia Supreme Court to confirm that the surviving spouse and minor children do not have "any legal estate whatever"<sup>12</sup> in the property claimed as homestead, but only a right to the use of it. Also, as section 34-24 makes very clear, this right to the use of the homestead property will come to an end upon the termination of the children's minority or when the surviving spouse remarries, whichever occurs last. Because the family has only the use as opposed to the ownership of the homestead property, it cannot make any disposition or exchange of the property by its own act. Instead, the property that is held as the homestead can only be sold by petition to the circuit court. The court must then not only approve of the proposed disposition of the real estate or personal property that is involved, but must also approve the subsequent investment of the proceeds of the sale<sup>13</sup> (which, again, the family will not own but merely have the right to the use of for so long as they remain qualified). A third problem is faced by the decedent's family if they wish to move to another state in order to be closer to supportive relatives, to obtain medical or educational aid, to seek greater employment opportunities, or for any other reason. The language of section 34-24 states clearly that the homestead exemption of any person ceases when the person moves from the State. Thus, a most undesirable roadblock is placed in front of those families whose best interest would be served by relocating, but who face the loss

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that estate as he may be possessed of or entitled to at the time the exemption thereof ceases, as aforesaid, and until that time the lien shall not be enforced. Such judgments shall attach in the order of their priority, respectively.

12. *Murphy v. City of Richmond*, 111 Va. 459, 466, 69 S.E. 442, 445 (1910).

13. VA. CODE ANN. § 34-16 (Repl. Vol. 1976) provides:

Sale of exempted property after householder's death. - Any real or personal estate set apart and held as a homestead by a householder in his lifetime, or by his surviving spouse and minor children, or any of them, after his death, may, upon his death, on a petition for the purpose filed by such spouse and minor children, or any of them, in the circuit court of the county or city, wherein they or any of them reside, or the estate or any part thereof is, be sold by order of the court and the proceeds of sale invested in other property, if it appears to the court that such sale and investment would be proper. To such petition all others interested who are not plaintiffs shall be made defendants.

of what little they have if they do relocate.

The fourth problem arises because the Virginia law of debtors' rights expressly permits a householder to waive his right to a homestead exemption insofar as any given creditors are concerned.<sup>14</sup> The reader who has had only minimal business or personal financial experience will be aware of the fact that virtually every "form" note or contract used by lending institutions and merchants who extend consumer credit contains such a waiver in the "boiler-plate" provisions of the document. Some have questioned the basic fairness of such a provision when the householder is concerned, contending that it makes a hollow mockery of the homestead exemption due to the invariable presence of these waivers in all standard form documents. Regardless of what one's position might be concerning the householder's waiver of the homestead exemption insofar as he is personally concerned, it is wholly indefensible to allow the inter-vivos waiver of the homestead exemption to extend to the homestead exemption of the surviving spouse and minor children. However, this is the result of the present "piggy-back" approach of the existing law as section 34-23<sup>15</sup>

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14. VA. CODE ANN. § 34-22 (Repl. Vol. 1976) provides:

Waiver of exemption; its effect; form of waiver. - If any person shall declare in a bond, bill, note or other instrument by which he is or may become liable for the payment of money to another or by a writing thereon or annexed thereto that he waives, as to such obligation, the exemption from liability of the property or estate which he may be entitled to claim and hold exempt under the provisions of this chapter, such property or estate, whether previously set apart or not, shall be liable to be subjected for such obligation, under legal process, in like manner and to the same extent as other property or estate of such person. But such waiver shall not extend to or affect the exemption of the property or estate exempt under §§ 34-26, 34-27 and 34-29. The following or equivalent words shall be sufficient to operate as the waiver hereinbefore provided for: "I (or we) waive the benefit of my (or our) exemption as to this obligation." If a debt which is superior to the homestead, or as to which the homestead is waived, be paid off by a surety therein, the principal shall not be allowed to claim the homestead as against such surety.

15. VA. CODE ANN. § 34-23 (Repl. Vol. 1976) provides:

How claim enforced when exemption waived, etc. - In any proceeding for the enforcement of a claim, which by reason of the waiver aforesaid or otherwise, is paramount to the exemption, if there be in the county or city wherein the proceeding is estate of the debtor other than that which has been set apart as aforesaid, such other estate shall be subjected and exhausted before the estate so set apart is resorted to. If, however, the claim is secured by mortgage, deed of trust or other specific lien on the estate set apart, nothing in this section contained shall prevent the enforcement of the security in the first instance and before resorting to other estate of the debtor.

makes very clear.

Finally, even if none of the foregoing reasons were seen as sufficient for change, the unnecessary complexity of the present approach, with its numerous sections and parts of sections that must be fitted together as pieces of a puzzle which changes form with the nature of the problem being presented, is a sufficient reason for rewriting this portion of the law and placing it in its proper part of the code. The present approach involves over a dozen sections in Title 34 when the problem can be handled more efficiently by the addition of two sections in Title 64.1, where this legislation appropriately belongs.

The proposed replacement, S-3, would respond to the post-probate need of the decedent's family by simply awarding a homestead allowance in the amount of \$5,000, in fee simple, to the surviving spouse or, if there is no surviving spouse, to the minor children as a group. S-3 also continues the present provision of Virginia law that prevents a surviving spouse from having the benefit of the homestead exemption in addition to the right of dower or curtesy.<sup>16</sup> Furthermore, S-3 closes the loop-hole in the present law that allows a surviving spouse to take an elective share in the decedent's personal estate under sections 64.1-13 through 64.1-16 and also have a homestead exemption.

#### IV. CREDITORS' RIGHTS

It is not possible to create or continue any sort of exemptions for the assistance of a decedent's family without recognizing that the allowance of such exemptions is in derogation of valid claims of

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If a debtor die leaving unsecured debts which stand on the same footing but as to some of which the homestead is waived and as to others not, his property not embraced in the homestead shall be first applied ratably to all debts of the same class and if it be not sufficient to pay them all in full, then the creditors holding a waiver of the homestead exemption may resort to the property set apart as a homestead for the payment of the balance of their debts.

16. VA. CODE ANN. § 34-12 (Repl. Vol. 1976) provides:

If surviving spouse receives dower, jointure or curtesy he cannot have the exemption. - The two preceding sections (§§ 34-10, 34-11) are subject to this qualification: If the surviving spouse be entitled to dower, jointure or curtesy, under chapter 2 (§ 64.1-19 et seq.) of Title 64.1, and claims and receives either, he shall not have the benefit of the provisions of either of such sections; but, in such case, the rights of the minor children thereunder shall not be impaired.

general creditors who dealt in good faith with the decedent on the reasonable expectation that they would be paid. Notwithstanding the validity and legitimacy of these creditor claims, exemptions and allowances for the benefit of a decedent's family exist in every state in this country and have existed in Virginia for over a century. The only instance in which it is clear that a creditor will always have a priority over a decedent's family is when the creditor in question is a secured creditor who has a valid lien or mortgage on some of the decedent's property in addition to his general personal claim against the decedent's estate. Accordingly, the proposed statutes would provide such a priority for the family allowance, the right to exempt articles and the homestead allowance, allowing them to prevail over all claims against the estate except for the claims of secured creditors insofar as their collateral is concerned.

The need for this subordination of legitimate creditors' claims in favor of certain basic claims of a decedent's family is not difficult to understand or to defend. Even though the amounts involved may not be very large on some scales, the results can approximate a personal catastrophe for the affected family if such family is without resources since the loss remains where it is imposed. On the other hand, when the loss is imposed upon the business community it is not ultimately imposed on the individual businessman. Instead, it is added to the cost of goods sold, along with all other costs of doing business, and is passed on to the consuming public. The end result is that the loss is borne by society as a whole. Some may suggest that if the end result of these allowances and exemptions is to impose the ultimate loss upon society as a whole, the more appropriate way to achieve this outcome is through direct welfare payments from various levels of government. It is submitted, however, that it is more desirable for society to bear these losses in this indirect fashion rather than through the direct welfare approach: (i) because of the high administrative expenses associated with the delivery of welfare services, (ii) because a certain percentage of those who begin the receipt of welfare benefits will remain on the welfare rolls permanently, with the extra costs to society that this permanency entails, and (iii) because of the stigma that some associate with the acceptance of welfare benefits.

## V. CONCLUSION

It is believed that the proposed statutes that follow in the appendix represent a well-balanced package of basic protection for the decedent's surviving spouse and minor children. The cumulative amount of the family allowance (\$0 to \$6,000), the right to exempt property (\$3,500), and the homestead allowance (\$5,000) will vary from \$8,500 to \$14,500 in the typical case, depending upon the amount of the family allowance, if any, that is allowed. It is believed that this is an amount large enough to meet the reasonable needs of the typical family. Yet, it is not so large as to be an unreasonable imposition on the legitimate expectations of the decedent's creditors. It is recognized that not everyone will necessarily agree with the mechanics or the amounts of the suggested statutes. However, it is apparent that Virginia's present laws are woefully inadequate insofar as protection of the surviving spouse and minor children are concerned. Therefore, it is respectfully concluded that those who disagree with the mechanics or the amounts of the suggested statutes must accept the responsibility of coming forward with alternative suggestions.

## APPENDIX

EXEMPT PROPERTY AND ALLOWANCES<sup>17</sup>

**#1. Family Allowance.** - Upon the death of a domiciliary of this state, the surviving spouse and minor children whom the decedent was obligated to support are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge all allowed claims. The family allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor children, otherwise, to the person having the care and custody of the minor children; but in case any minor child is not living with the surviving spouse, the family allowance may be made partially to the spouse and partially to the person having the child's care and custody as their needs may appear. The family allowance has priority over all claims against the estate.

The family allowance is in addition to any benefit or share passing to the surviving spouse or minor children by the will of the decedent, by intestate succession, or by way of dower, curtesy or elective share. The death of any person entitled to family allowance terminates the person's right to any allowance not yet paid.<sup>18</sup>

**#2. Exempt Property.** - In addition to the family allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding \$3,500 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances and personal effects. If there is no surviving spouse, the minor children of the decedent are entitled

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17. The following statutes are based upon art. II, pt. 4 of the UNIFORM PROBATE CODE [hereinafter cited as U.P.C.]. The U.P.C. was approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association in August, 1969. The U.P.C., which represents six years of work by a group composed of judges, lawyers, and academicians has been adopted virtually intact in Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, and Utah. In addition, the U.P.C. has greatly influenced probate legislation in Illinois, Indiana, Maryland, New Jersey, Oregon, Pennsylvania, and Wisconsin. See 8 U.P.C. Notes 1 (July, 1974); 22 U.P.C. Notes 1 (May, 1978); 23 U.P.C. Notes 1 (March, 1979); 24 U.P.C. Notes 13 (Oct., 1979); and 8 U.L.A. (Supp. 1980).

18. Based on U.P.C. § 2-403.

jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than \$3,500, or if there is not \$3,500 worth of exempt property in the estate, the spouse or minor children are entitled to other assets of the estate, if any, to the extent necessary to make up the \$3,500 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, but not over the family allowance.

The right to exempt property is in addition to any benefit or share passing to the surviving spouse or minor children by the will of the decedent, by intestate succession, or by way of dower, curtesy or elective share.<sup>19</sup>

**#3. Homestead Allowance.** - In addition to the right to family allowance and exempt property, a surviving spouse of a decedent who was domiciled in this state is entitled to a homestead allowance of \$5,000. If there is no surviving spouse, each minor child of the decedent is entitled to a homestead allowance amounting to \$5,000 divided by the number of minor children of the decedent. The homestead allowance has priority over all claims against the estate, but not over the right to family allowance and exempt property.

The homestead allowance is in lieu of any share passing to the surviving spouse or minor children by the will of the decedent or by intestate succession; provided, however, if the amount passing to the surviving spouse and minor children by the will of the decedent or by intestate succession is less than \$5,000, then the surviving spouse or minor children shall be entitled to a homestead allowance in an amount which, when added to the property passing to the surviving spouse and minor children by the will of the decedent or by intestate succession, will equal the sum of \$5,000.

If the surviving spouse is entitled to dower or curtesy under Chapter 2 (Section 64.1-19 et seq.) of Title 64.1, or if the surviving spouse is entitled to an elective share of the decedent's personal estate under Sections 64.1-13 through 64.1-16, and claims and receives either, the surviving spouse shall not have the benefit of any

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19. Based on U.P.C. § 2-402.

homestead allowance.<sup>20</sup>

**#4. Source, Determination and Documentation of Family Allowance, Exempt Property, and Homestead Allowance.**

- If the estate is otherwise sufficient, property specifically bequeathed or devised shall not be used to satisfy rights to exempt property and homestead allowance. Subject to this restriction, the surviving spouse or the guardian of the minor children may select property of the estate as exempt property and homestead allowance. The personal representative may make these selections if the surviving spouse or the guardian of the minor children is unable or fails to do so within a reasonable time, or if there is no guardian of the minor children. The personal representative may execute a deed of distribution to establish the ownership of property taken as homestead allowance or exempt property; which deed, if executed, shall: (i) describe the property with reasonable certainty, and (ii) state the value of each asset included therein. The personal representative may determine the family allowance in a lump sum not exceeding \$6,000, or periodic installments not exceeding \$500 per month for one year, and he may disburse funds of the estate in payment of the family allowance and any part of the exempt property or homestead allowance, payable in cash.

The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment or failure to act under this section may petition the circuit court for appropriate relief, which relief may provide a family allowance larger or smaller than that which the personal representative determined or could have determined. Such petition may be ex parte; provided, however, that the court in its discretion may require such notice to and the convening of interested parties as it may deem proper in each case.<sup>21</sup>

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20. Based on U.P.C. § 2-401.

21. Based on U.P.C. § 2-404.

