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Wills, Trusts, and Estates, Twenty-Sixth Annual Survey of Developments in Virginia Law

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WILLS, TRUSTS, AND ESTATES

*J. Rodney Johnson**

THE Virginia General Assembly continued its increased legislative activity in the area of wills, trusts, and estates during the past year by passing three major acts: Exempt Property and Allowances;¹ Acts Barring Property Rights;² and the Virginia Small Estate Act.³ In addition to these major bills, seven additional acts enacted by the General Assembly and four cases decided by the Supreme Court of Virginia involved issues important to both the general practitioner and the specialist in wills and trusts. This article reviews these legislative and judicial developments, with emphasis on the three most important legislative enactments.

I. EXEMPT PROPERTY AND ALLOWANCES

This comprehensive Act was designed to respond to the immediate economic needs of the surviving spouse and minor children of a deceased Virginia domiciliary. Specifically, the legislation (i) provides a family allowance⁴ for their support during the probate period, (ii) establishes an allowance of the decedent's tangible personal property⁵ for their continued use, and (iii) creates a true homestead allowance⁶ in an attempt to ensure that they might exit probate with a minimum "nest-egg" even when the estate is insolvent. The Act repeals all existing statutes⁷ relating to the support rights of a surviving spouse and minor children and replaces them with five integrated code sections based upon corresponding sec-

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¹ 1981 Va. Acts, ch. 580 (codified at Va. Code Ann. §§ 64.1-151.1 to .5 (Cum. Supp. 1981)) (repealing Va. Code Ann. §§ 34-10 to -12, -15 to -16, 64.1-126 to -127 (Cum. Supp. 1981); amending Va. Code Ann. §§ 34-17, -23 to -24, 64.1-11, -154 to -155, -157 (Cum. Supp. 1981)).

² *Id.*, ch. 469 (codified at Va. Code Ann. §§ 55-401 to -415 (Repl. Vol. 1981)) (repealing Va. Code Ann. § 64.1-18 (Cum. Supp. 1981)).

³ *Id.*, ch. 281 (codified at Va. Code Ann. §§ 64.1-132.1 to .4 (Cum. Supp. 1981)).

⁴ Va. Code Ann. § 64.1-151.1 (Cum. Supp. 1981).

⁵ *Id.* § 64.1-151.2.

⁶ *Id.* § 64.1-151.3.

⁷ See note 1 *supra*. For a discussion of the repealed statutes, see Johnson, Support of the Surviving Spouse and Minor Children in Virginia: Proposed Legislation v. Present Law, 14 U. Rich. L. Rev. 639 (1980).

tions of the Uniform Probate Code (UPC).⁸

A. *The Family Allowance*

The family allowance provides for the maintenance of the surviving spouse and minor children whom the decedent was obligated to support by awarding them a "reasonable allowance in money"⁹ from the decedent's estate during the entire probate period. If the estate is insolvent, however, the family allowance may not continue beyond one year.¹⁰ Because a basic aim of the family allowance provision is to make necessary funds available to the family as soon as reasonably possible, it allows the personal representative to determine and disburse the allowance in a lump sum not exceeding \$6,000 or in periodic payments of no more than \$500 per month for one year, without prior court approval.¹¹ Because some families will require a larger allowance or a longer period of time, and because some personal representatives may use this allowance unfairly to divert funds away from creditors, the General Assembly provided that the personal representative, or any recipient, creditor, or beneficiary who feels "aggrieved" by the personal representative's action or inaction, may petition the circuit court *ex parte* for "appropriate relief."¹² In those instances where the need is greater than \$500 per month, for example, the personal representative can make an immediate lump sum award up to the limit of his authority (\$6,000). This award would be sufficient to respond to the family's immediate needs until the personal representative, the spouse, or someone acting on behalf of the minor children could bring the matter before the circuit court for a determination of "a reasonable allowance in money" for the duration of the case in question.

The family allowance is ordinarily disbursed to the surviving spouse for the use of the surviving spouse and the minor children. If any of the minor children do not reside with the surviving

⁸ Uniform Probate Code §§ 2-401 to -404.

⁹ Va. Code Ann. § 64.1-151.1 (Cum. Supp. 1981).

¹⁰ *Id.*

¹¹ *Id.* § 64.1-151.4.

¹² *Id.* This section also extends the right of any interested person to petition the circuit court *ex parte* to those who are aggrieved by any action or inaction in connection with the allowance of tangible personal property, see notes 15-18 *infra* and accompanying text, or the homestead allowance, see notes 19-23 *infra* and accompanying text.

spouse, the allowance may be apportioned among the spouse and the children "as their needs may appear"; a nonresident child's portion is payable to the one having the care and custody of the child.¹³ The portion of the family allowance allocable to the surviving spouse does not qualify for the federal estate tax marital deduction because it is a "terminable" interest,¹⁴ i.e., the death of any recipient will terminate that person's right to any unpaid allowance. The family allowance provision, therefore, does not alter current methods of determining the "marital" share in a standard marital deduction will, nor does it reduce the amount otherwise allocable to the marital share in such a will.

B. The Tangible Personal Property Allowance

The allowance of tangible personal property to the surviving spouse, or to the minor children if there is no surviving spouse, is designed to ensure that a minimum quantity of "household furniture, automobiles, furnishings, appliances and personal effects" will be preserved for the continued use of the family.¹⁵ Because all families will not be similarly situated or have the same needs, the General Assembly did not attempt to enumerate specific articles to vest in every family. The legislators instead established an allowance with a value of \$3,500 in excess of any security interests in the property chosen, and allowed the surviving spouse to select any tangible personal property from the estate until the \$3,500 limit is reached. If the estate contains less than \$3,500 worth of personal property, the surviving spouse may receive other assets of the estate. The only restriction on the freedom of choice of the surviving spouse (or the one selecting on behalf of the minor children) is that this spouse cannot select property specifically bequeathed or devised when other assets in the estate are available.¹⁶ In order to prevent the exempt-articles statute from affecting unfairly the claims of creditors or beneficiaries, a nonuniform amendment based on a parallel provision in debtor-creditor law¹⁷ allows the personal representative to execute a deed describing and valuing

¹³ Va. Code Ann. § 64.1-151.1 (Cum. Supp. 1981).

¹⁴ Uniform Probate Code § 2-403 comment.

¹⁵ Va. Code Ann. § 64.1-151.2 (Cum. Supp. 1981).

¹⁶ Id. § 64.1-151.4.

¹⁷ Id. § 34-14 (Repl. Vol. 1976).

each article of property set aside to the family.¹⁸

C. *The Homestead Allowance*

The last of the cumulative allowances in the Act is a \$5,000 homestead allowance in favor of the surviving spouse or in favor of the minor children of the decedent if there is no surviving spouse.¹⁹ The homestead allowance, along with the family allowance and the exempt-articles allowance, has priority over all creditor claims against the decedent's estate.²⁰ Although the Act provides that the family allowance²¹ and the exempt articles allowance²² are available to a family in addition to the other entitlements they receive by testate or intestate succession or statutory right, it does not accord similar treatment to the homestead allowance.²³ Because the homestead allowance is designed to ensure a minimum "nest-egg," if an equivalent or greater amount of money passes to or for the benefit of the family through other entitlements, the additional allowance of the homestead exemption would result in an unintended benefit. Thus, the spouse who receives dower or curtesy in the decedent's realty or a forced statutory share in the decedent's personalty forfeits the right to a homestead allowance. Similarly, the surviving spouse, or the children if there is no surviving spouse, must elect between taking the testate or intestate succession or taking the homestead allowance, except in those cases where the succession right is less than \$5,000. In the latter case, the Act allows a reduced homestead allowance to bring the succession amount up to \$5,000.²⁴

All of these provisions are protective rights that a family may elect on an "as needed" basis, much as a surviving spouse may elect to renounce a decedent's will and take a forced statutory

¹⁸ Id. § 64.1-151.4 (Cum. Supp. 1981). The same procedure is available in connection with property set aside pursuant to the homestead allowance. See notes 19-23 *infra* and accompanying text.

¹⁹ Va. Code Ann. § 64.1-151.3 (Cum. Supp. 1981).

²⁰ 1981 Va. Acts, ch. 580, cl. 3, which is not codified, provides that "the provisions of this act shall not affect homestead waivers executed on or prior to June thirty, nineteen hundred eighty-one, or to the renewal of an indebtedness executed prior to such date if the prior indebtedness contained such a waiver."

²¹ Va. Code Ann. § 64.1-151.1 (Cum. Supp. 1981).

²² Id. § 64.1-151.2.

²³ Id. § 64.1-152.3.

²⁴ Id.

share of the personal estate. A second nonuniform amendment, based on the provision for the election of a forced statutory share,²⁵ provides that the election to take any or all of these allowances must be made within one year of the decedent's death by filing a notarized writing in the office of the clerk of the circuit court that has jurisdiction over probate or the administration of the estate.²⁶ In the overwhelming majority of cases, the family will not make such an election because the estate will be solvent and it will be left to or for the benefit of the family. In the remaining cases, there may be a period of uncertainty as probate officials, attorneys, and fiduciaries implement these new provisions for the first time. Interested parties can minimize this uncertainty by using as interpretive guides the official comments to the sections of the UPC upon which these new laws largely are based,²⁷ as well as by looking for guidance from other states that have adopted these provisions of the UPC.²⁸

II. ACTS BARRING PROPERTY RIGHTS

The common law maxim that a wrongdoer should not profit from his own wrong often has been the basis for preventing one who has wrongfully killed another from succeeding to the property of his victim or in any other way benefiting from his wrongful killing. The strong public policy embodied in this common law principle and the desire to provide a framework within which to grant remedies in the future have caused a number of states to pass statutes that seek to prevent such unjust enrichment.²⁹ The Virginia General Assembly first enacted a statute dealing with this problem in 1919³⁰ and amended it several times thereafter before repealing and replacing it by this new act in 1981.³¹ The problems with Vir-

²⁵ Id. § 64.1-13 (Repl. Vol. 1980).

²⁶ Id. § 64.1-151.5 (Cum. Supp. 1981).

²⁷ See Uniform Probate Code §§ 2-401 to -404 & comments.

²⁸ Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, and Utah have adopted the Uniform Probate Code. Table of Jurisdictions, 8 U.L.A. (Cum. Supp. 1981).

²⁹ For a general discussion of the authorities, see Annot., 42 A.L.R.3d 1116 (1972).

³⁰ Va. Code § 5274 (1919) (amended 1962). For a discussion of the history of this section, see *Life Ins. Co. v. Cashatt*, 206 F. Supp. 410 (E.D. Va. 1962).

³¹ 1981 Va. Acts, ch. 469 (codified at Va. Code Ann. §§ 55-401 to -415 (Repl. Vol. 1981)) (repealing Va. Code Ann. § 64.1-18 (Cum. Supp. 1981)). The Virginia Code Commission assigned the existing section numbers to the new Act. The original numbers were §§ 55-355

ginia's preceding statute were three-fold. First, it required that the wrongdoer have been convicted of murder, thus failing to provide a remedy in those cases where the wrongful killer was accused of manslaughter, where he was accused of murder but convicted of a lesser included offense or acquitted, or where he committed suicide prior to any judicial determination of his guilt. Second, the old statute dealt only with cases where the killer took from the victim by testate or intestate succession or pursuant to an insurance policy on the victim's life, thus failing to prohibit a taking by survivorship in a joint tenancy or tenancy by the entirety, by the law of dower, curtesy or forced statutory share, or by other, less common ways of taking. Finally, the Supreme Court of Virginia had classified the prior act as a penal statute and so had construed it narrowly rather than liberally, thus failing to carry out the obvious public policy it represented.³²

The latter two problems have been eliminated by the new Act, which is based upon a proposed Model Act drafted by Dean John W. Wade almost a half century ago.³³ The Act begins with a section³⁴ defining the terms "slayer,"³⁵ "decedent" and "property" and then makes the broad policy statement that "[n]either the slayer nor any person claiming through him shall in any way acquire any property or receive any benefits" as the result of the prohibited act.³⁶ It then addresses the "method of taking" problem discussed above with nine sections that catalog various means of taking benefit from the decedent's property and that specify who shall take such benefit instead of the slayer in each case.³⁷ The Act addresses the "narrow construction" problem associated with the prior statute by specifically declaring that the Act is not penal and

to -369. This explains the reference in § 55-413 to "§ 55-355," which inadvertently was left unchanged. The correct reference would be to § 55-401.

³² For a discussion of the prior law, see Comment, Barring Slayers' Acquisition of Property Rights in Virginia: A Proposed Statute, 14 U. Rich. L. Rev. 251 (1979).

³³ Wade, Acquisition of Property by Willfully Killing Another—A Statutory Solution, 49 Harv. L. Rev. 715 (1936). According to Bohich, Acts Barring Property Rights, 40 N.C.L. Rev. 175, 188 (1962), the laws of North Carolina, Pennsylvania and South Dakota also are based upon the Wade proposal. The Virginia variations from the Wade proposal are discussed in Comment, *supra* note 32.

³⁴ Va. Code Ann. § 55-401 (Repl. Vol. 1981).

³⁵ See text accompanying note 43 *infra*.

³⁶ Va. Code Ann. § 55-402 (Repl. Vol. 1981).

³⁷ *Id.* §§ 55-403 to -411.

should be "construed broadly in order to effect the policy of this Commonwealth."³⁸ The Act contains three additional provisions that protect bona fide purchasers from the slayer,³⁹ deal with the use of the criminal record in the civil proceeding,⁴⁰ and provide that the Uniform Simultaneous Death Act is not applicable to cases governed by the Act.⁴¹

The prior statute's restricted applicability remains, however, because the new Act narrowly defines the term "slayer." The bill originally defined "slayer" to mean "any person who participates, either as a principal or as an accessory before the fact, in the willful and unlawful killing of any other person."⁴² As amended by the House Courts of Justice Committee, however, the final version of the bill that was enacted into law defined "slayer" to mean "any person who is convicted of the murder of the decedent."⁴³

It is clear, therefore, that there is no statutory remedy preventing unjust enrichment when the person accused of wrongfully killing another is not convicted of murder. With the absence of a statutory remedy, the issue becomes whether the common law remedy of constructive trust is available in such cases in Virginia. Although decided under the old statute,⁴⁴ the recent case of *Sundin v. Klein*⁴⁵ is instructive in determining whether the Supreme Court of Virginia will regard the statutory remedy as exclusive.

The issue in *Sundin* was whether the Court should impose a constructive trust to prevent a husband, convicted of the murder of his wife, from taking by right of survivorship his wife's half of their tenancy by the entirety.⁴⁶ Counsel for the convicted murderer

³⁸ Id. § 55-414.

³⁹ Id. § 55-412.

⁴⁰ Id. § 55-413.

⁴¹ Id. § 55-415.

⁴² Va. H. 684, 1980 Sess. § 55-355.1 (1981).

⁴³ Va. Code Ann. § 55-401.1 (Repl. Vol. 1981).

⁴⁴ See notes 30-31 *supra* and accompanying text.

⁴⁵ 221 Va. 232, 269 S.E.2d 787 (1980). See notes 87-88 *infra* and accompanying text.

⁴⁶ The Court noted that

"[c]onstructive trusts have been said to arise through the application of the doctrine of estoppel, or under the broad doctrine that equity regards and treats as done what in good conscience ought to be done. * * * Their forms and varieties are practically without limit, being raised by courts of equity whenever it becomes necessary to prevent a failure of justice."

Id. at 240, 269 S.E.2d at 791-92 (quoting *Patterson's Ex'rs v. Patterson*, 144 Va. 113, 123, 131 S.E. 217, 220 (1926)).

argued that the Court was foreclosed from furnishing a remedy because the statute contained no prohibition dealing with survivorship cases.⁴⁷ In deciding to impose a constructive trust for the benefit of the wife's estate, the Court responded to counsel's argument as follows:

To say this . . . suggests that the General Assembly condones the acquisition by murder of all property rights not mentioned in [the old statute]. We know that such a proposition cannot be true. Indeed, we believe that [the statute] constitutes legislative recognition of a broad public policy against the acquisition of property rights by murder. We believe further that it is the duty of this court to attempt to give effect to the pronounced public policy by fashioning a remedy to protect the specific interest at issue in this case.⁴⁸

In *Sundin*, therefore, the Court decided that public policy justified imposing a constructive trust in a case not specifically addressed by the prior statute. Nevertheless, in light of the General Assembly's rejection of a more liberal definition of "slayer," it remains an open question whether the Court will impose a constructive trust against a wrongdoer who does not fit within the current statutory definition.⁴⁹ A possible answer comes from North Carolina. That state, which also based its statute on Dean Wade's Model Act,⁵⁰ has resolved the question by imposing the common law remedy of constructive trust in cases where the wrongdoer is not a "slayer" as that term is defined in the North Carolina statute.⁵¹

⁴⁷ *Id.* at 235, 269 S.E.2d at 788.

⁴⁸ *Id.*

⁴⁹ The Supreme Court of Virginia refused a petition for appeal under the old statute in a case where one survivorship tenant killed another but was acquitted by reason of insanity. See *Whitehurst v. Whitehurst*, 220 Va. cliv (1979). See also *Sundin*, 221 Va. at 235 n.1, 269 S.E.2d at 788 n.1.

⁵⁰ See note 33 *supra*.

⁵¹ For a discussion of North Carolina's extension of common law constructive trust relief to cases where no remedy is available under the statute because the wrongdoer is not a "slayer," see Note, *Decedents' Estates—Forfeitures of Property Rights by Slayers*, 12 Wake Forest L. Rev. 448 (1976). It is noteworthy that, in addition to having language that parallels that found in the Virginia act, Va. Code Ann. § 55-414 (Repl. Vol. 1981), quoted at text accompanying note 38 *supra*, the construction section of the North Carolina statute, N.C. Gen. Stat. § 31A-15 (Repl. Vol. 1976), also contains the following language:

As to all acts specifically provided for in this Chapter, the rules, remedies, and procedures herein specified shall be exclusive, and as to all acts not specifically provided

III. VIRGINIA SMALL ESTATE ACT

The Virginia Small Estate Act⁵² was designed to address the problem of administering a decedent's estate that contains only a small amount of probate personal property. The problem is not confined to small estates, but also exists in large estates where the use of inter vivos trusts, survivorship property, and other probate-avoidance devices can result in the estate's containing a relatively small amount of probate personal property.

The term "probate personal property" refers to personalty in a decedent's name that typically cannot be recovered from an obligor (such as an indebtedness) or that cannot be transferred to a new owner (such as stock in a non-Virginia corporation) without the assistance of the probate process. If the obligor or the transfer agent pays or transfers at the request of one other than the estate's duly authorized personal representative, he runs the risk that he may not receive an effective discharge and so may become personally liable if a court subsequently determines that the payment or transfer was made improperly. The choice presented to the family of the decedent, therefore, is either to spend the time and money required to complete the probate process or simply to abandon the property. Even if the family decides that the property is of sufficient value to warrant completing the probate process, the costs may prove disproportionate to the value that the family finally realizes.⁵³

The new Virginia Small Estate Act, based upon comparable provisions in the UPC,⁵⁴ responds to the family's dilemma by providing for the de facto administration of a limited amount of probate personal property⁵⁵ by an affidavit process, rather than by the

for in this Chapter, all rules, remedies, and procedures, if any, which now exist or hereafter may exist either by virtue of statute, or by virtue of the inherent powers of any court of competent jurisdiction, or otherwise, shall be applicable.

⁵² 1981 Va. Acts, ch. 281 (codified at Va. Code Ann. §§ 64.1-132.1 to .4 (Cum. Supp. 1981)). The Virginia Code Commission assigned these section numbers to the Act; the original section numbers were §§ 64.1-125.1 to .4.

⁵³ For a discussion of the prior law and the need for change, see Word, *Updating Virginia's Probate Law*, 4 U. Rich. L. Rev. 223 (1970).

⁵⁴ Uniform Probate Code §§ 3-1201 to -1202.

⁵⁵ The total probate personalty must not exceed \$5,000. Va. Code Ann. § 64.1-132.2(A)(1) (Cum. Supp. 1981). See text accompanying note 59 *infra*. The Act will not resolve fully the problem of administering probate personal property until this ceiling either is raised or eliminated.

standard probate process. The Act begins by defining a "successor" as any noncreditor entitled to the personal property of a decedent by either testate or intestate succession.⁵⁶ It next provides that anyone "may" pay or deliver personalty to,⁵⁷ and a transfer agent "shall" transfer stock at the request of,⁵⁸ a successor who presents him with an affidavit stating that (1) the total probate personalty does not exceed \$5,000, (2) sixty or more days have passed since the decedent's death, (3) no one has applied for qualification as personal representative, (4) any will has been probated and a list of heirs has been filed, and (5) the successor is entitled to payment or delivery of the property for the reason stated in the affidavit.⁵⁹

The Act provides that anyone who pays, delivers, or transfers in reliance upon such an affidavit is discharged to the same extent as if the person had dealt with a personal representative.⁶⁰ The obligor or transfer agent need not verify the correctness of the facts in the affidavit nor see to the proper application of the property paid, delivered, or transferred.⁶¹ Although the successor who recovers the property is accountable to the estate's personal representative if one later qualifies, or to another person with a superior right to the property, the original obligor or transfer agent who relied on the affidavit is not similarly liable.⁶² Because of the protection that the Act affords to those who rely on the successor's affidavit, it will encourage voluntary compliance with requests made by successors. Nevertheless, the Act gives successors standing to compel payment, delivery, or, if necessary, transfer by suit.⁶³

⁵⁶ Va. Code Ann. § 64.1-132.1 (Cum. Supp. 1981).

⁵⁷ Id. § 64.1-132.2(A).

⁵⁸ Id. § 64.1-132.2(B).

⁵⁹ Id. § 64.1-132.2(A).

⁶⁰ Id. § 64.1-132.3.

⁶¹ Id.

⁶² Id.

⁶³ Id. If an obligor's or transfer agent's sole reason for refusing to comply is the absence of a personal representative, however, it would be faster and cheaper for the successor to qualify as a personal representative than to sue pursuant to this section, especially when the successor is dealing with a foreign transfer agent.

IV. OTHER LEGISLATION

A. *Reformation of Private Trusts*

This legislation is designed to give the Commonwealth access to property held in a discretionary trust created for the benefit of an incompetent whenever the incompetent beneficiary "has received benefits from any State or from any State and federal program of public assistance."⁶⁴ Parents of incompetents often create discretionary trusts to which the incompetent is the sole possible lifetime beneficiary or may be one of several beneficiaries. The trustee of such a trust ordinarily is granted great discretion concerning who is to be paid from the trust, as well as the amount and timing of any payments. The beneficiary of a true discretionary trust, therefore, has no rights to any funds—he is merely a permissible recipient.⁶⁵ Furthermore, the present law⁶⁶ providing for recovery from the incompetent's estate for the expenses of his care, treatment, and maintenance in a state institution gives the Commonwealth no greater rights to the discretionary trust than those enjoyed by the incompetent.

The new legislation attempts to assist the Commonwealth in recovering funds from incompetent beneficiaries of discretionary trusts by allowing it to petition the circuit court to reform the trust and to direct the trustee to pay income and corpus to the Commonwealth as reimbursement for past and future benefits provided to the incompetent.⁶⁷ The proper manner of implementing the statute is difficult to determine, however, because it is poorly worded and contains many internal contradictions.⁶⁸ Moreover, the

⁶⁴ 1981 Va. Acts, ch. 545 (codified at Va. Code Ann. § 55-19.1 (Repl. Vol. 1981)). The original section number was § 55-31.2. The Virginia Code Commission assigned the present section number.

⁶⁵ G. Bogert, *Law of Trusts* § 41 (5th ed. 1973).

⁶⁶ Va. Code Ann. § 37.1-105 (Repl. Vol. 1976). The recovery authorized by this section "shall not exceed the actual per capita cost for the particular type of service rendered . . . [and] in no event shall recovery be permitted for amounts more than five years past due." *Id.*

⁶⁷ *Id.* § 55-19.1 (Repl. Vol. 1981).

⁶⁸ Compare the language in the first sentence of *id.* § 55-19.1(B) (limiting the court's order to the trustee to the amount to which the beneficiary "would be entitled in accordance with the provisions of the trust"), with the language in the second sentence (authorizing the court in a discretionary trust to "direct exercise of such discretion, having due regard for the public's interest and for the basic needs of the other beneficiaries of the trust and their relationship to the settlor"). Compare also the second sentence with the limiting language of

statute limits itself severely by excluding spendthrift trusts from its coverage.⁶⁹ Because most trusts created for incompetents have spendthrift clauses among their boilerplate provisions, this exception will eliminate the rule in most cases.

B. *Commutation and Valuation of Certain Estates and Interests*

The General Assembly increased the assumed interest rate used in the statutory annuity table, the table of uniform seniority, the Makehamized mortality table, and the commutation of certain life estates from five percent to eight percent.⁷⁰ It also made corresponding changes in the sections stating rules and examples of calculations.⁷¹

C. *Payment of Small Accounts to Next of Kin*

On occasion, the only probate asset left by a decedent that requires administration of his estate is an account in a financial institution. In order to eliminate the need for a personal representative to qualify upon all such estates—and thus to subject the estate to the mandatory inventory and accounting requirements—Virginia has passed several statutes allowing the next of kin to withdraw these funds from accounts in banks,⁷² savings and loan associations,⁷³ and credit unions,⁷⁴ provided the accounts do not exceed a certain amount. The new legislation⁷⁵ increases from \$2,500 to \$5,000 the size of share balances that a credit union may pay to the decedent's spouse or to his next of kin where there is no qualification on the estate. It also reduces the waiting period from the decedent's death from 120 days to 60 days.

the third sentence ("nothing in this section shall permit the circuit court to affect any income or trust res to which the beneficiary receiving public assistance has no legal or equitable entitlement whatsoever").

⁶⁹ "Nothing herein shall permit the invasion of a trust res created under § 55-19 of the Code." *Id.* Va. Code Ann. § 55-19 (Repl. Vol. 1981) is the provision validating spendthrift trusts.

⁷⁰ 1981 Va. Acts, ch. 612 (amending Va. Code Ann. §§ 55-269.1 to -271, -272.1 to -275, -277 (Repl. Vol. 1981)).

⁷¹ *Id.*

⁷² Va. Code Ann. § 6.1-71 (Cum. Supp. 1981).

⁷³ *Id.* § 6.1-195.29 (Repl. Vol. 1979).

⁷⁴ *Id.* § 6.1-208.4.

⁷⁵ 1981 Va. Acts, ch. 330 (amending Va. Code Ann. § 6.1-208.4 (Cum. Supp. 1981)).

D. *Deposition of Absent Witness at Probate*

The procedure for deposing an absent witness to a will formerly involved withdrawing the original of the will from the clerk's office in order that it might be used during the absent witness's deposition. New legislation continues to provide for such withdrawal as a possibility, but also adds as an alternative that "in the discretion of the clerk, the party may be given a certified copy of the original."⁷⁶

E. *Statement in Lieu of Settlement of Accounts*

The primary purpose of requiring a personal representative to file a settlement of his accounts is to inform the decedent's successors in interest of the financial transactions involved in the settlement of the estate. Recognizing that such notice is unnecessary when the personal representative is also the sole successor in interest, former law⁷⁷ provided that in lieu of a final account, such a personal representative might file an affidavit "that he has, or they have, paid all known charges against the estate and, after the time required by law, deliver [sic] the residue of the estate to himself, or themselves, as such distributee, distributees, beneficiary or beneficiaries."⁷⁸

A new amendment extends this procedure to those cases where the sole successor in interest cannot qualify as the sole personal representative because he is not a resident of Virginia.⁷⁹ In such a case, the nonresident must have a resident appointed to serve with him as co-personal representative;⁸⁰ under the former statute, the presence of this resident "qualifying" personal representative who was not a taker prevented the use of the affidavit. Because the amendment by its literal language applies only when the nonresident personal representative is the "sole"⁸¹ successor, it is unclear whether local commissioners of accounts will interpret it to apply to those cases where more than one nonresident becomes a co-per-

⁷⁶ Id., ch. 183 (amending Va. Code Ann. § 64.1-87 (Cum. Supp. 1981)).

⁷⁷ Va. Code Ann. § 26-20.1 (Repl. Vol. 1979).

⁷⁸ Id. The statute applies when there are multiple personal representatives who are the only successors in interest, "if there be not more than three" such persons. Id.

⁷⁹ 1981 Va. Acts, ch. 199 (amending Va. Code Ann. § 26-20.1 (Cum. Supp. 1981)).

⁸⁰ Va. Code Ann. § 26-59 (Repl. Vol. 1979).

⁸¹ Id. § 26-20.1 (Cum. Supp. 1981).

sonal representative with a "qualifying" Virginia resident.

F. Proof of Debts and Demands

Prior Virginia law required a commissioner of accounts faced with the task of settling the accounts of a personal representative to appoint a time and place for receiving proof of debts or demands against the decedent or his estate, upon the request of a proper party.⁸² A new amendment adds flexibility to this scheme by providing that the commissioner "may" appoint a time and place for receiving proof of debts and demands at any time, even when no accounting is pending.⁸³ The new amendment's purpose is to enable personal representatives to become aware of outstanding claims at an early date, thereby facilitating the administration of the estate.

G. Recapture of Estate Tax

The General Assembly has amended the Virginia Estate Tax Act⁸⁴ to include a section providing for a recapture tax in those instances where a nonpermissible disposition of any "special use valuation" property occurs, or where the special use ceases within fifteen years of a decedent's death.⁸⁵ The amendment aims to recapture the amount that the special valuation has saved the estate.⁸⁶

V. JUDICIAL DECISIONS

A. Constructive Trusts

During the past year, the Supreme Court of Virginia decided to impose constructive trusts in two cases. In *Sundin v. Klein*,⁸⁷ the Court imposed a constructive trust to prevent a convicted murderer from taking from his deceased wife by survivorship in a tenancy by the entirety. Although the Court decided this case under a statute since repealed by the new Acts Barring Property Rights

⁸² Id. § 64.1-171 (Repl. Vol. 1980).

⁸³ 1981 Va. Acts, ch. 484 (amending Va. Code Ann. § 64.1-171 (Cum. Supp. 1981)).

⁸⁴ Va. Code Ann. §§ 58-238.1 to .38 (Cum. Supp. 1981).

⁸⁵ 1981 Va. Acts, ch. 399 (codified at Va. Code Ann. § 58-238.38 (Cum. Supp. 1981)).

⁸⁶ Va. Code Ann. § 58-238.38(E) (Cum. Supp. 1981).

⁸⁷ For additional discussion of *Sundin*, see notes 44-51 *supra* and accompanying text.

legislation,⁸⁸ the decision nonetheless provides guidance for determining whether the new legislation is merely coextensive with existing judicial remedies or whether it is the exclusive remedy for preventing unjust enrichment in wrongful killing cases.

In *Leonard v. Counts*,⁸⁹ the Court imposed a constructive trust against a husband and wife following their repudiation of an oral agreement, made by the husband at an auction sale, to purchase a piece of property jointly with another person.⁹⁰ The Court found sufficient evidence in the totality of the circumstances to support the trial court's finding that the parties in fact had made an oral agreement to be joint purchasers.⁹¹ The Supreme Court believed that it was appropriate to impose a constructive trust in the case, "to prevent fraud or injustice."⁹² Although the chancellor had stated that he was not holding that "any fraud occurred" in the case, the Supreme Court distinguished "actual" from "constructive" fraud and noted that "[a] constructive trust arises not only when there has been actual fraud, but whenever one holding title to property 'is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.'"⁹³ The Court accordingly affirmed the trial court's holding that the husband and wife⁹⁴ held the property covered by the oral agreement as constructive trustees for the other party.⁹⁵

⁸⁸ See notes 2, 29-51 *supra* and accompanying text.

⁸⁹ 221 Va. 582, 272 S.E.2d 190 (1980).

⁹⁰ The Court found that Mr. Leonard and Mr. Counts agreed at the auction to be joint purchasers of the property and tentatively agreed to the boundaries and to the percentage of the total price each party would pay. Mr. Leonard ultimately had the property conveyed only to himself and then tendered a deed to a portion of the property to Mr. Counts with restrictions to which the parties had not agreed. *Id.* at 587-88, 272 S.E.2d at 194.

⁹¹ The Court noted that an agreement that forms the basis for a constructive trust may be proven by parol evidence without violating the Statute of Frauds. *Id.* at 587, 272 S.E.2d at 194.

⁹² *Id.* at 588, 272 S.E.2d at 195.

⁹³ *Id.* at 590, 272 S.E.2d at 195-96 (quoting A. Scott, *The Law of Trusts* § 462, at 3413 (3d ed. 1967)).

⁹⁴ The Court rejected the argument that it should not impose constructive trust relief against Mrs. Leonard because she was not a party to the oral agreement. The Court concluded that Mr. Leonard was acting as his wife's agent in the transaction, and that she therefore was bound by his oral agreement. *Id.* at 591, 272 S.E.2d at 196.

⁹⁵ The Court noted that this case could have been decided by imposing a purchase money resulting trust to carry out the presumed intentions of the parties. *Id.* at 588, 272 S.E.2d at 194-95. One of the various instances in which a purchase money resulting trust arises by

B. Intestate Succession From an Illegitimate

In *King v. Commonwealth*,⁹⁸ the paternal relatives of an illegitimate child challenged a lower court's decree that the illegitimate decedent's estate must escheat to the Commonwealth because the decedent had no living maternal relatives. The paternal relatives claimed that the Virginia statute⁹⁷ permitting illegitimate children to inherit and transmit inheritances only on the maternal side was unconstitutional under the fourteenth amendment because it invidiously discriminated on the basis of illegitimacy.⁹⁸ These claimants relied on the United States Supreme Court's decision in *Trimble v. Gordon*,⁹⁹ which held that a similar Illinois statute allowing illegitimate children to inherit only through their mothers was invalid on equal protection grounds.

In rejecting the claimants' argument, the Supreme Court of Virginia first noted that it must analyze the challenged statute in light of the case's specific facts.¹⁰⁰ It then proceeded to distinguish *Trimble* from *King* on its facts. In *Trimble*, the claimant was an illegitimate child who had been denied her intestate share of her father's estate, even though a judicial proceeding during the father's lifetime had determined his paternity. The United States Supreme Court invalidated the statute on which the state had based its denial. The *King* Court refused to sanction a legislative classification that distinguished between legitimate and illegitimate children in their receipt of statutory benefits.¹⁰¹

In *King*, however, the claimants were relatives of the decedent's putative father¹⁰² whose paternity had never been adjudicated or acknowledged. *King* therefore presented the question of the constitutionality of a statutory classification based not upon the legitimacy or illegitimacy of the claimant, but rather upon the claim-

operation of law is when "prior to the purchase one person binds himself to pay purchase money and stands behind his commitment, but title is conveyed to another." *Id.*, 272 S.E.2d at 195. Because the complaint only addressed the constructive trust theory, however, the Court did not rely on a purchase money resulting trust rationale for its decision. *Id.*

⁹⁶ 221 Va. 251, 269 S.E.2d 793 (1980).

⁹⁷ 1902-04 Va. Acts, ch. 430 (formerly codified at Va. Code Ann. § 64.1-5 (1950)) (repealed 1978). See notes 106-08 *infra* and accompanying text.

⁹⁸ 221 Va. at 252, 269 S.E.2d at 794.

⁹⁹ 430 U.S. 762 (1977).

¹⁰⁰ 221 Va. at 253-54, 269 S.E.2d at 794-95.

¹⁰¹ *Id.*

¹⁰² *Id.* The claimants were the children of the decedent's putative father's brother.

ant's maternal or paternal kinship with the decedent.¹⁰³ In upholding the statute, the Court held that a classification distinguishing between maternal and paternal relatives is not suspect under a traditional equal protection analysis and the Commonwealth need only support such a classification with a rational basis.¹⁰⁴

Although the General Assembly has repealed the statute challenged in *King*,¹⁰⁵ other constitutional attacks on it are still possible because the law remains applicable in cases where the decedent died before July 1, 1978. In cases where the decedent died after June 30, 1978, however, a different statute applies,¹⁰⁶ providing—under certain circumstances¹⁰⁷—for inheritance on the paternal side by and from illegitimate children whose parents never marry.¹⁰⁸

C. Testamentary Capacity

In *Thomason v. Carlton*,¹⁰⁹ the Supreme Court of Virginia held that an elderly testatrix did have testamentary capacity when she executed a will excluding her daughter. In rejecting the daughter's challenge to the will, the Court found that "the evidence was over-

¹⁰³ There were no maternal relatives involved in the *King* case. The contest was between the paternal relatives and the escheater of the City of Fredericksburg, proceeding under Chapter 10 of Title 55. See generally Va. Code Ann. §§ 55-168 to -201.1 (Repl. Vol. 1981).

¹⁰⁴ 221 Va. at 254, 269 S.E.2d at 795. The Court found that, in light of the Commonwealth's need to provide for the orderly disposition of property at death, the rational basis for the statute was the greater difficulty in proving paternity. *Id.*

¹⁰⁵ See note 97 *supra*.

¹⁰⁶ Va. Code Ann. § 64.1-5.1(2) (Repl. Vol. 1980). For a discussion of the new statute, see 64 Va. L. Rev. 1543, 1553-54 (1978).

¹⁰⁷ Illegitimate children whose parents never marry may inherit and may transmit inheritances on the paternal side if

[t]he paternity is established by clear and convincing evidence as set forth in § 64.1-5.2; provided, however, that the paternity establishment [sic] pursuant to this subparagraph b shall be ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his and has not refused to support the child.

Va. Code Ann. § 64.1-5.1(2)(b) (Repl. Vol. 1980).

¹⁰⁸ If the parents of the illegitimate have participated in a marriage ceremony, then, "even though the attempted marriage was prohibited by law, deemed null or void or dissolved by a court," inheritance rights are extended to and from illegitimates on the same basis as legitimates. *Id.* § 64.1-5.1(2)(a).

¹⁰⁹ 221 Va. 845, 276 S.E.2d 171 (1981).

whelming"¹¹⁰ that the testatrix possessed testamentary capacity. Accordingly, the Court reversed the trial court's decision and set aside the jury's verdict.¹¹¹

Although the three-member majority stated that "the simple issue in this case is mental competency,"¹¹² two dissenters suggested instead that "[a]t this appellate stage of the proceeding, the *real* question is whether there is credible evidence to support the jury's conclusion on the issue of competency."¹¹³ The dissent stated that if there is credible evidence to support the jury's verdict, the appellate court should not disturb it.¹¹⁴ Furthermore, the dissent noted that on appeal following a jury verdict favorable to the contestants, the contestants are entitled to have the evidence in the case considered in a light most favorable to them.¹¹⁵ Following this analysis, and finding "credible, substantial evidence to support the jury's findings,"¹¹⁶ the dissenters would have affirmed the lower court's refusal to probate the testatrix's will.

The dissenting opinion's reasoning is compelling. *Thomason* will encourage litigants who have already had their day in court to attempt to relitigate factual issues of competency *de novo* before the Supreme Court. This avenue of review opened by the Court will result in additional cost and delay to the parties before final resolution of their cases.

¹¹⁰ Id. at 856, 276 S.E.2d at 177.

¹¹¹ Id., 276 S.E.2d at 178.

¹¹² Id., 276 S.E.2d at 177.

¹¹³ Id. at 856-57, 276 S.E.2d at 178 (emphasis in original).

¹¹⁴ Id. at 857, 276 S.E.2d at 178 (citing *Eason v. Eason*, 203 Va. 246, 253, 123 S.E.2d 361, 366 (1962)).

¹¹⁵ Id. (citing *Lewis v. Roberts*, 207 Va. 742, 744, 152 S.E.2d 44, 45 (1967)).

¹¹⁶ Id.