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# Wills, Trusts and Estates (Annual Survey of Virginia) Law, 2008-2009

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# WILLS, TRUSTS, AND ESTATES

*J. Rodney Johnson* \*

## I. INTRODUCTION

The 2009 Session of the General Assembly enacted wills, trusts, and estates legislation (1) preventing, in cases where persons die after June 30, 2009, application of a regrettable 2008 Supreme Court of Virginia decision dealing with the rights of illegitimate heirs in intestate succession, and (2) amending Virginia's version of the Uniform Principal and Income Act to provide for taxpayer benefit and clarity in matters relating to total return unitrusts, the marital deduction, and the income taxation of trusts. In addition, there were several other enactments along with four opinions from the Supreme Court of Virginia during the one-year period ending June 1, 2009 that presented issues of interest in this area. This article reports on all of these legislative and judicial developments, and it concludes with a call to the 2010 General Assembly to repeal the one-year statute of limitations applicable to paternity claims of illegitimate persons in succession matters.<sup>1</sup>

## II. LEGISLATION

### A. *Illegitimacy—Succession—Statute of Limitations—Paternity Only*

As a consequence of the United States Supreme Court's decision in *Trimble v. Gordon*,<sup>2</sup> Virginia law was amended in 1978 by

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1. In order to facilitate the discussion of numerous Virginia Code sections, they will often be referred to in the text by their section numbers only. Unless otherwise stated, those sections will refer to the most recent version of the section to which reference is being made.

2. 430 U.S. 762, 766 (1977) (holding that "statutory discrimination against illegitimate children is unconstitutional").

adding section 64.1-5.1 to permit an illegitimate child to inherit from and through his father<sup>3</sup>—a right already existing on the maternal side.<sup>4</sup> However, this legislation did not result in a complete equality of taking because, while continuing the rule that “a person born out of wedlock is a child of the mother,” it provided that “[t]hat person is also a child of the father, if . . . [t]he paternity is established by clear and convincing evidence as set forth in § 64.1-5.2.”<sup>5</sup> Although the 1978 legislation was prompted by an intestate succession concern, its application was intended to be significantly broader, as was shown by its opening language, which provided for its rules to apply throughout the entirety of title 64.1, entitled Wills and Decedents’ Estates.<sup>6</sup> The scope of section 64.1-5.1 was further expanded in 1998 to provide for its rules to apply as follows: “If, for purposes of [Title 64.1] *or for determining rights in and to property pursuant to any deed, will, trust or other instrument*, a relationship of parent and child must be established to determine succession *or a taking* by, through or from a person . . . .”<sup>7</sup>

Section 64.1-5.1, as originally enacted in 1978, also contained a one-year limitation period within which claims by, or on behalf of, illegitimate children must be filed.<sup>8</sup> Up to the 2009 amendment, this provision continued to read as follows:

4. No claim of succession based upon the relationship between a child born out of wedlock and a parent<sup>9</sup> of such child shall be recognized *in the settle-*

3. Act of Apr. 8, 1978, ch. 647, 1978 Va. Acts 1047, 1048–49 (codified at VA. CODE ANN. § 64.1-5.1 (Cum. Supp. 1978)).

4. The background of this development is discussed in J. Rodney Johnson, *Inheritance Rights of Children in Virginia*, 12 U. RICH. L. REV. 275, 281–84 (1978).

5. Act of Apr. 8, 1978, ch. 647, 1978 Va. Acts 1047, 1048 (codified at VA. CODE ANN. § 64.1-5.1(2)(b) (Cum. Supp. 1978)). This same enactment also added section 64.1-5.2 to the Virginia Code, which limited the admissible evidence of paternity to six enumerated categories. *Id.* at 1049 (codified at VA. CODE ANN. § 64.1-5.2 (Cum. Supp. 1978)). As a result of amendments made in 1989, 1991, and 1999, all limitations on admissible evidence of paternity have been eliminated. *See* VA. CODE ANN. §§ 64.1-5.1(3)(b), 64.1-5.2 (Repl. Vol. 2007 & Supp. 2008).

6. VA. CODE ANN. § 64.1-5.1 (Cum. Supp. 1978) (The statute provided, “[i]f, for purposes of Title 64.1, a relationship of parent and child must be established to determine succession by, through or from a person: . . . ,” and then set forth specific rules for establishing paternity.)

7. Act of Apr. 15, 1998, ch. 603, 1998 Va. Acts 1409, 1409 (codified as amended at VA. CODE ANN. § 64.1-5.1 (Cum. Supp. 1998)). The 1998 legislation is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 32 U. RICH. L. REV. 1405, 1408–09 (1998).

8. VA. CODE ANN. § 64.1-5.1(3) (Cum. Supp. 1978).

9. Although the use of the words “parent” and “parenthood” in this subsection sug-

*ment of any decedent's estate* unless an affidavit by such child or by someone acting for such child alleging such parenthood has been filed within one year of the date of the death of such parent in the clerk's office of the circuit court of the jurisdiction wherein the property affected by such claim is located and an action seeking adjudication of parenthood is filed in an appropriate circuit court within said time.<sup>10</sup>

In *Jenkins v. Johnson*, the Supreme Court of Virginia held that the italicized language in the foregoing block quote—"in the settlement of any decedent's estate"—unambiguously showed a legislative intent to confine the one-year limitation period of section 64.1-5.1(4) to cases involving intestate succession to personal property.<sup>11</sup> Therefore, the court held that plaintiffs, who brought an action in 2006 seeking to share in the real estate left upon their alleged illegitimate father's death intestate fourteen years earlier, were not subject thereto.<sup>12</sup>

In order to minimize the restrictive impact of this decision, the Virginia Bar Association ("VBA") sponsored legislation in the 2009 Session that resulted in striking the language in question—"in the settlement of any decedent's estate"—from section 64.1-5.1(4), thereby clearly making the one-year rule applicable to all succession claims based upon an illegitimate birth.<sup>13</sup> However, the rule of the *Jenkins* case will continue to control in any cases

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gests at first glance that its one-year statute of limitations is equally applicable to claims of maternity and paternity, the reality is quite different. There are three exceptions to the one-year rule, one of which applies "where the relationship between the child born out of wedlock and the parent in question is (i) established by a birth record prepared upon information given by or at the request of such parent . . ." VA. CODE ANN. § 64.1-5.1(4) (Repl. Vol. 2007 & Supp. 2008). Assuming the correctness of the anecdotal evidence that birth information is almost always taken from the mother, then, notwithstanding the usage of "parent" in this subsection, its one-year statute of limitations is really a rule that is applicable only in paternity cases. Such was the intent of the proponents of the one-year rule, who wanted it to apply only to paternity claims because of their fear in 1978 that the new rule allowing illegitimate children to take on the paternal side might result in a number of spurious paternity claims being brought after rebutting evidence was no longer available. However, they feared that a statute of limitations applicable only to paternity cases would be vulnerable to the same equal protection argument that prevailed in *Trimble*. See *Trimble v. Gordon*, 430 U.S. 762, 766, 769, 772 (1977). Hence, the legislative legerdemain that makes the provision facially applicable to maternity and paternity effectively excludes its applicability to maternity cases by the "birth record" exception. For the record, this writer was in the committee room back in 1978 when the one-year rule was added to the bill under consideration and he clearly remembers it and its "birth record" exception being added for this express purpose.

10. VA. CODE ANN. § 64.1-5.1(4) (Repl. Vol. 2007 & Supp. 2008) (emphasis added).

11. 276 Va. at 30, 35, 661 S.E.2d 484, 486 (2008) (quoting VA. CODE ANN. § 64.1-5.1(4) (Repl. Vol. 2007 & Supp. 2008)). This case is discussed *infra* Part III.A.

12. *Id.* at 32, 35, 661 S.E.2d at 484, 486.

13. Act of Mar. 27, 2009, ch. 449, 2009 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 64.1-5.1(4) (Cum. Supp. 2009)).

that though brought after June 30, 2009, are based upon a death that occurred between July 1, 1978 (the date that the one-year rule was added to the Virginia Code) and July 1, 2009 (the effective date of its repeal). Most importantly, it should be noted that the legacy cases from this thirty-one-year period will not be limited to those raising the narrow holding in *Jenkins*—real estate passing by intestate succession.<sup>14</sup> Instead, they will also include every case where any property, real or personal, is passing outside of the estate administration process. The most significant of these cases will be real property devised by wills and both real and personal property passing via inter vivos trusts, which are increasingly being used as will substitutes. However, the potential negative impact of *Jenkins* in these cases will be reduced to some extent by (1) the probability that most persons having such a claim are unlikely to ever hear about the *Jenkins* rule and (2) the application of the doctrine of adverse possession in cases where the period has expired before any action is brought by illegitimate persons claiming to be successors.

### B. *Fiduciary Accounting—Principal and Income Act*

The 2009 General Assembly enacted House Bill 2435 to make significant technical changes to three sections of Virginia's Uniform Principal and Income Act ("VUPIA").<sup>15</sup>

#### 1. Total Return Unitrusts

Following the release of final regulations by the Department of the Treasury in 2003, which ended certain tax uncertainties con-

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14. Note also that some of these real estate cases might end up being subject to the one-year rule because of actions taken during an estate's administration. Pursuant to a request made under section 64.1-57.1, an administrator of a decedent's intestate estate may be granted the boilerplate fiduciary powers contained in section 64.1-57, one of which is the power to sell real estate. *See* VA. CODE ANN. §§ 64.1-57, 64.1-57.1 (Repl. Vol. 2007 & Cum. Supp. 2009). In cases where this power is granted, and exercised, it will bring the proceeds from such a sale into "the settlement of [the] decedent's estate." To the extent that any of these proceeds remain following the settlement of the decedent's estate, will they be treated as personal property or, under the doctrine of equitable conversion, will they be treated as real estate? How this question will be answered, and how it may impact upon the rights of any illegitimate heirs, where the death occurred in the 1978–2009 period under consideration, vis-a-vis their need to comply with the one-year rule, is yet to be determined by the court.

15. H.B. 2435, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Mar. 27, 2009, ch. 477, 2009 Va. Acts \_\_\_\_).

cerning their usage, the 2004 General Assembly amended the VUPIA to authorize the “total return unitrust” (“TRU”),<sup>16</sup> which bases income payments to a trust’s present beneficiaries on a percentage of the trust portfolio’s fair market value.<sup>17</sup> The 2009 General Assembly significantly amended this legislation in two ways. First, its application, which was previously restricted to the conversion of existing income trusts into TRUs, was extended to “grantor-created” TRUs.<sup>18</sup> Second, it authorized all qualified beneficiaries, except for the attorney general, to go into “circuit court to convert an income trust to a total return unitrust, convert a total return unitrust to an income trust, or change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust assets.”<sup>19</sup> Under prior law, these rights could only be exercised by trustees.<sup>20</sup>

## 2. The Marital Deduction

One of the most popular ways of obtaining the federal estate tax marital deduction is by creating a qualified terminable interest property (“Q-Tip”) trust for the surviving spouse under § 2056(b)(7) of the Internal Revenue Code, which requires, among other things, that the spouse be “entitled to all the income from the property, payable annually or at more frequent intervals . . . .”<sup>21</sup> In 2006, the Internal Revenue Service, focusing on cases involving qualified defined benefit plans and individual retirement accounts (“Funds”) that were held by Q-Tip trusts, issued Revenue Ruling 2006-26, in which it considered the circumstances under which the spouse’s interest in these Funds would

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16. Act of Apr. 12, 2004, ch. 639, 2004 Va. Acts 927, 927–29 (codified at VA. CODE ANN. § 55-277.4:1 (Cum. Supp. 2004)).

17. The background and details of these developments are discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 39 U. RICH. L. REV. 447, 447–50 (2004).

18. Act of Mar. 27, 2009, ch. 477, 2009 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 55-277.4:1(G) (Cum. Supp. 2009)). Section 55-277.4:1(A)(3) provides that a “[g]rantor-created unitrust” means a trust, created either by an inter vivos or a testamentary instrument, which provides that the trust shall be administered in the manner of a total return unitrust as provided in this section.” *Id.* (codified as amended at VA. CODE ANN. § 55-277.4:1(A)(3) (Cum. Supp. 2009)).

19. Act of Mar. 27, 2009, ch. 477, 2009 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 55-277.4:1(D) (Cum. Supp. 2009)).

20. See VA. CODE ANN. § 55-277.4:1(D) (Repl. Vol. 2007).

21. I.R.C. § 2056(b)(7)(B)(ii)(I) (2006).

meet the income requirements of § 2056(b)(7).<sup>22</sup> Revenue Ruling 2006-26 also contains a safe harbor provision, which guarantees that Funds will meet these income requirements if two elements are satisfied. “First, the Fund’s income must be determined as if the Fund itself were a marital trust. Second, the surviving spouse must have the right to receive this income without regard to the income of any trust to which the Fund is payable.”<sup>23</sup>

The National Conference of Commissioners on Uniform States Laws, acting at its summer 2008 annual meeting, amended section 409 of the Uniform Principal and Income Act (“UPIA”)<sup>24</sup> so that actions taken thereunder in enacting jurisdictions would meet the safe harbor requirements of Revenue Ruling 2006-26.<sup>25</sup> The 2009 Session amended section 55-277.18 to make corresponding changes to the Virginia version of UPIA section 409, *mutatis mutandis*, in order to satisfy the safe harbor requirements of Revenue Ruling 2006-26.<sup>26</sup>

### 3. Income Taxes

Lastly, this 2009 legislation made an amendment to section 55-277.29 that “clarifies how a trust that is required to pay income to a beneficiary keeps enough money to pay its taxes and distribute the balance of the income to the mandatory income beneficiary.”<sup>27</sup>

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22. Rev. Rul. 2006-26, 2006-1 C.B. 939, 939. Although the cases in this revenue ruling arose in the context of IRAs under § 2056(b)(7), the ruling also deals with marital deduction trusts under § 2056(b)(5) in the context of all funds payable to either. *Id.* at 940–41.

23. Steven B. Gorin, *Principal and Income Act Amendment Saves the Marital Deduction for Retirement Plans*, PROB. & PROP., Mar./Apr. 2009, at 13.

24. The Summer 2008 amendments to UPIA section 409 can be found incorporated into the text of the entire Act at [http://www.law.upenn.edu/bll/archives/ulc/upaia/2008\\_final.htm](http://www.law.upenn.edu/bll/archives/ulc/upaia/2008_final.htm) (last visited on Oct. 11, 2009).

25. Gorin, *supra* note 23, at 13–14.

26. Act of Mar. 27, 2009, ch. 477, 2009 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 55-277.18 (Cum. Supp. 2009)).

27. Summary as Passed House, HB 2435: Uniform Principal and Income Act; Trustee Required to Demand Certain Distributions If Requested, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=HB2435> (last visited Oct. 11, 2009).

C. *Nonresident Decedents—Virginia Personal Property—Simplified Transfer—Problem*

The 2009 Session amended section 64.1-130, which provides several methods by which tangible or intangible Virginia personal property of a deceased foreign domiciliary may be paid directly to the decedent's domiciliary personal representative without the necessity for any probate of the property in Virginia.<sup>28</sup> According to the General Assembly's Legislative Information Services Division, the 2009 amendment

[c]larifies that a transferor of a nonresident decedent's stocks, bonds, securities, money or tangible personal property held in Virginia may comply with either the law of Virginia or the comparable law of the state in which the nonresident decedent was domiciled regarding the transfer of the decedent's property held in Virginia.<sup>29</sup>

However, the 2009 amendment itself, which was made into the final, one-sentence paragraph of section 64.1-130 that provides a constructional rule for the section, causes that sentence to read as follows:

This section shall be construed as providing, as to the payment of money and the delivery of personal property belonging to nonresident decedents or their estates, optional methods of procedure in addition to those otherwise permitted or provided by law, *including a comparable law of the state in which the nonresident decedents were domiciled*, and shall not as to such matters add any limitations or restrictions to existing law.<sup>30</sup>

According to this author's reading of section 64.1-130 prior to the 2009 amendment, the first paragraph created remedies and the one-sentence second paragraph in question merely said that these remedies were options to other (Virginia) procedures, and the section's enactment did not have any negative impact upon these other procedures. His reading of the amendment is "ditto as to the laws of other states," insofar as the remedies of the first paragraph are concerned. In other words, neither the options provided in section 64.1-130, nor the comparable options provided by a de-

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28. Act of Mar. 27, 2009, ch. 250, 2009 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 64.1-130 (Cum. Supp. 2009)).

29. Summary as Passed, SB 806: Nonresident Decedents' Personal Property in State; Transferor Thereof May Comply with Law of State, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=SB806> (last visited Oct. 11, 2009).

30. Act of Mar. 27, 2009, ch. 250, 2009 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 64.1-130 (Cum. Supp. 2009)).



cedent's domiciliary state, have any negative impact on other Virginia procedures for transferring the personal property of a nonresident decedent. Thus, although the intent of the 2009 amendment is clearly shown by its title and by its official summary as passed<sup>31</sup>—i.e., to authorize Virginians to also make the transfers covered by this section pursuant to the laws of a foreigner's domiciliary state—it is believed that the actual language of the amendment to the construction paragraph does not accomplish this goal. And this might not be a bad result when one considers the complexity and uncertainty that would accompany an obligor's determination of a non-resident's domiciliary state and the potential employment of the laws of any American state in what are typically low-asset cases. Thus, instead of repairing this amendment in the 2010 General Assembly, it is respectfully submitted that it would be better to repeal it.

#### D. *Federal Estate Tax—Open-Space Easement Exclusion*<sup>32</sup>

Section 2031 of the Internal Revenue Code excludes from taxation any land subject to a qualified conservation easement when the estate's executor makes the necessary election.<sup>33</sup> While this election poses no problem where the estate's beneficiaries are competent, consenting adults, the inability of other beneficiaries to consent to such an election by the executor (or by the trustee where the property is a trust) proved to be troublesome. The necessity of this election presents no problem where all of the estate's beneficiaries are competent, consenting adults. However, the inability of other beneficiaries to consent to such an election by the executor (or by the trustee where the property is a trust) proved to be troublesome. This problem was addressed by the 1999 Session of the General Assembly, which created a new section 64.1-57.3, authorizing the circuit court to give this consent "on behalf of any unborn, unascertained or incapacitated heirs, beneficiaries, or devisees whose interests are affected thereby."<sup>34</sup>

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31. See *supra* note 29.

32. The General Assembly's 1999 amendments regarding conservation easement exclusion are also discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 33 U. RICH. L. REV. 1075, 1090 (1999).

33. I.R.C. § 2031(c) (2006).

34. VA. CODE ANN. § 64.1-57.3 (Cum. Supp. 1999).

For the same reasons that led to the 1999 legislation, the 2009 Session amended section 64.1-57.3 to also apply to “an open-space easement as provided in the Open-Space Land Act (§ 10.1-1700 et seq.).”<sup>35</sup>

### III. CASES

#### A. *Illegitimacy—Action to Establish Succession—No Time Limitations on Heirs*

In *Jenkins v. Johnson*, Joseph died intestate in 1992, survived by his wife, Madelyn, and their four children.<sup>36</sup> In 2006, Sharon and Joann, who claimed to be Joseph’s illegitimate children born prior to his marriage to Madelyn, brought an action seeking to establish their rights as co-heirs with Madelyn and her four children in certain real estate Joseph owned at his death.<sup>37</sup> Madelyn and her children defended in part on the ground that one of the steps required by statute before an illegitimate person’s claim to intestate succession based upon biological parentage can be recognized is that “an action seeking adjudication of parenthood is filed in an appropriate circuit court within” one year of the alleged parent’s death.<sup>38</sup> The governing statute, section 64.1-5.1, provided in relevant part that:

If, for purposes of this title or for determining rights in and to property pursuant to any deed, will, trust or other instrument, a relationship of parent and child must be established to determine succession or a taking by, through or from a person:

. . . .

4. No claim of succession based upon the relationship between a child born out of wedlock and a parent<sup>39</sup> of such child shall be recognized *in the settlement of any decedent’s estate* unless an affidavit by such child or by someone acting for such child alleging such parenthood has been filed within one year of the date of the death of such parent in the clerk’s office of the circuit court of the jurisdiction

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35. Act of Mar. 27, 2009, ch. 588, 2009 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 64.1-57.3 (Cum. Supp. 2009)); *see also* VA. CODE ANN. §§ 10.1-1700–10.1-1705 (Repl. Vol. 2006).

36. *Jenkins v. Johnson*, 276 Va. 30, 32, 661 S.E.2d 484, 484 (2008).

37. *Id.* 661 S.E.2d at 484–85.

38. *Id.* at 33–34, 661 S.E.2d at 485-86 (quoting VA. CODE ANN. § 64.1-5.1(4) (Repl. Vol. 2007)).

39. *See supra* note 9 for an explanation of why “parent” and “parenthood” in this provision really mean “father” and “paternity” in the typical case.

wherein the property affected by such claim is located<sup>40</sup> and an action seeking adjudication of parenthood is filed in an appropriate circuit court within said time.<sup>41</sup>

Holding that “the language of Code § 64.1-5(4) is plain and unambiguous,” and affirming the trial court decision, the Supreme Court of Virginia concluded that the one-year limitation period of the statute “appl[ies] only to ‘the settlement of [a] decedent’s estate,’ and do[es] not apply to the determination of heirs to, and the partition of, real property passing by intestate succession.”<sup>42</sup>

Thus, as Sharon and Joann had successfully established Joseph’s paternity,<sup>43</sup> when Joseph’s real estate descended to his heirs at the instant of his death intestate, it descended to them along with his other heirs without regard to the one-year limitation period of section 64.1-5.1(4), even though their failure to comply with this one-year rule would bar them from sharing in Joseph’s personal estate passing through probate<sup>44</sup>—a point confirmed by the court’s 2007 decision in *Belton v. Crudup*.<sup>45</sup> To say that such a result appears to be inconsistent with any rational legislative purpose seems to be stating the rather obvious. However, the Supreme Court of Virginia never considered this point because, it said, under the “plain meaning” rule, “when the language of a statute is plain and unambiguous, courts may not interpret that language in a manner effectively holding that the General Assembly did not mean what it actually stated.”<sup>46</sup>

But, was this statutory provision really “plain and unambiguous” in the first place? Note that the one-year provision in sec-

40. Such an affidavit was filed by Sharon in 2006, prior to the initiation of the circuit court action. *Jenkins*, 276 Va. at 32, 661 S.E.2d at 484.

41. VA. CODE ANN. § 64.1-5.1 (Repl. Vol. 2007 & Supp. 2008) (emphasis added).

42. *Jenkins*, 276 Va. at 35, 661 S.E.2d at 486.

43. See *id.* at 33 n.1, 661 S.E.2d at 485 n.1 (“This Court refused [Defendants’] assignment of error that the commissioner and the circuit court erred in concluding that [Plaintiffs] had proven by clear and convincing evidence that Joseph was their biological father. Thus, we do not address that issue in this opinion.”)

44. *Id.* at 35, 661 S.E.2d at 486.

45. 273 Va. 368, 373, 641 S.E.2d 74, 76 (2007) (discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 43 U. RICH. L. REV. 435, 464 (2008)). On this point, the Supreme Court of Virginia stated that “[u]nlike the proceedings in *Belton*, the present case does not involve the administration of an estate comprised of personal property, but addresses the determination of title to real property passing by intestate succession. Thus, our holding in *Belton* is inapposite to the conclusion we reach here . . .” *Jenkins*, 276 Va. at 36, 661 S.E.2d at 486.

46. *Jenkins*, 276 Va. at 34–35, 661 S.E.2d at 486.

tion 64.1-5.1(4) requires that the affidavit of paternity be filed “in the clerk’s office of the circuit court of the jurisdiction *wherein the property* affected by such claim *is located*.”<sup>47</sup> This “is located” language is what would typically be used to refer to real property, because only realty has a unique situs that cannot be changed. This alone would seem to create a genuine ambiguity on the issue of whether the one-year rule applies to personalty (settlement of the estate), to realty (where the property is located), or both. Moreover, the introductory language of section 64.1-5.1—“[i]f, for purposes of this title . . . a relationship of parent and child must be established to determine succession or a taking by, through or from a person”<sup>48</sup>—is very broad and suggests that the section’s rules are intended to apply across the board, that is, to intestate realty as well as to intestate personalty, or at least the point would be debatable and ambiguous. However, neither of these issues was mentioned in the court’s opinion. Believing this opinion to be wrong, and learning that counsel for Madelyn and her children intended to seek a rehearing, the VBA sought, and was granted, permission to file an amicus curiae brief in support thereof.<sup>49</sup> However, the petition for a rehearing was denied,<sup>50</sup> which led the VBA to lobby for, and obtain, legislation in the 2009 Session of the General Assembly that reverses the court’s holding for cases where decedents die after June 30, 2009.<sup>51</sup>

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47. VA. CODE ANN. § 64.1-5.1(4) (Repl. Vol. 2007 & Supp. 2008) (emphasis added).

48. *Id.* § 64.1-5.1 (Repl. Vol. 2007 & Supp. 2008).

49. Order Granting Motion Requesting Leave to File a Brief Amicus Curiae, *Jenkins*, 276 Va. 30, 661 S.E.2d 484 (2008) (No. 071206). The VBA acted through its section on Wills, Trusts, and Estates, with Katherine E. Ramsey, Esquire, of Hunton and Williams LLP, Richmond, Virginia, serving as counsel. The writer is a member of the VBA’s section on Wills, Trusts, and Estates and played an active role on the matter.

50. Order Denying Petition for Rehearing, *Jenkins*, 276 Va. 30, 661 S.E.2d 484 (2008) (No. 071206). Unfortunately, the court does not state any reasons when it denies a rehearing. One wonders what the responses might have been to the points made in Ms. Ramsey’s brief concerning (1) the ambiguity of the phrase, “settlement of [a] decedent’s estate,” (2) the applicability of the introductory language of section 64.1-5.1 to the case at bar, (3) the public policy of the Commonwealth, and (4) the court’s contrary decision in *Hupp v. Hupp*, 239 Va. 494, 391 S.E.2d 329 (1990). See Brief for Virginia Bar Association as Amicus Curiae in Support of Appellants’ Petition for Rehearing, *Jenkins*, 276 Va. 30, 661 S.E.2d 484 (2008) (No. 071206).

51. See *supra* notes 13–14 and accompanying text.

B. *Joint Accounts—Agency—Confidential Relationship—Presumption of Undue Influence*

In *Parfitt v. Parfitt*, the facts followed a reasonably well-established pattern, that is, a terminally ill parent (Jane) adding the name of one of her sons (Jeff) to her bank account as a joint owner “to assist Jane in paying her bills.”<sup>52</sup> The joint bank account, which in another context was once referred to by the Supreme Court of Virginia as the “poor man’s will,”<sup>53</sup> can also be referred to, as shown in the present context, as the “poor man’s power of attorney.” In recognition of this latter use, the 1996 Session of the General Assembly added section 6.1-125.15:1 to the Virginia Code to provide in part that “[p]arties to a joint account in a financial institution occupy the relation of principal and agent as to each other, with each standing as a principal in regard to his ownership interest in the joint account and as agent in regard to the ownership interest of the other party.”<sup>54</sup>

In *Parfitt*, during the period between the joint account’s creation in 2004 and Jane’s death in 2006, Jeff liquidated and transferred “at least \$338,580.12” of Jane’s assets to the joint account.<sup>55</sup> During this same period, although Jeff made no personal deposits to this joint account, from it he (1) transferred \$305,591.00 to a joint account he shared with his wife, (2) wrote \$67,500.00 in checks to himself, and (3) wrote \$9,013.37 in checks to various payees for the benefit of himself and his wife.<sup>56</sup> When Jane’s estate brought an action against Jeff alleging, *inter alia*, breach of fiduciary duty, the trial court, following a three-day non-jury trial, ruled that “(i) the Estate had failed to establish the existence of undue influence [and] (ii) the evidence had not established a confidential relationship between Jeff and Jane.”<sup>57</sup>

The Supreme Court of Virginia, recognizing the difficulty of producing direct proof in cases of alleged undue influence, noted longstanding precedent in two contractual situations for raising a

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52. 277 Va. 333, 337, 672 S.E.2d 827, 828 (2009).

53. *King v. Merryman*, 196 Va. 844, 849, 86 S.E.2d 141, 143 (1955).

54. Act of Mar. 19, 1996, ch. 260, 1996 Va. Acts 472, 472 (codified at VA. CODE ANN. § 6.1-125.15:1 (Cum. Supp. 1996)).

55. *Parfitt*, 277 Va. at 338, 672 S.E.2d at 828.

56. *Id.* at 338, 342, 672 S.E.2d at 828, 830.

57. *Id.* at 338, 672 S.E.2d at 828.

presumption of undue influence<sup>58</sup> which would shift the burden of going forward to the defense and serve as sufficient proof if not rebutted.<sup>59</sup> Breaking new ground, the court then held that “[t]hese principles apply to gratuitous transfers as well as contracts.”<sup>60</sup> Accordingly, the court found that “[b]ecause Jeff did not contribute any funds to Jane’s account, he was, by operation of statute [referring to section 6.1-125.15:1], an agent with regard to the entire account. By statute, a confidential relationship was established . . . ,” and one of the instances in which a presumption of undue influence will arise is when one is in a confidential relationship profits as a result of self-dealing.<sup>61</sup> Thus, as “[t]he confidential relationship created a presumption that the self-dealing transactions were ‘unduly obtained,’”<sup>62</sup> the trial court’s decision to the contrary was reversed and the case remanded for further proceedings.<sup>63</sup>

### *C. Wills—Probate—Appeal of Clerk’s Order—Bill to Impeach*

In *Matthews v. Matthews*, Donald, Sr. died on October 3, 2005, survived by his wife Ingeborg and three children from a prior marriage—Allan, Donald, Jr., and Kathy.<sup>64</sup> On February 1, 2006, after first attempting to probate a copy of Donald, Sr.’s 1995 will, which was refused by the clerk, Ingeborg returned to the clerk’s office with the original of his 1993 will which the clerk admitted to probate.<sup>65</sup> Kathy and Donald, Jr. brought an action to impeach the 1993 will on the theory that (1) it was revoked by the 1995 will, (2) the 1995 will had been denied probate, and (3) therefore Donald, Sr. had died intestate.<sup>66</sup> Thereafter, Ingeborg filed defensive pleadings to the bill to impeach the 1993 will and also filed a separate appeal of the February 1, 2006 clerk’s order refusing the 1995 will’s probate.<sup>67</sup> Following a motion by the children to dis-

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58. See *Fishburne v. Ferguson’s Heirs*, 84 Va. 87, 111, 4 S.E. 575, 582 (1887).

59. *Id.* at 339–40, 672 S.E.2d at 829 (quoting *Bailey v. Turnbow*, 273 Va. 262, 267, 639 S.E.2d 241, 243 (2007)).

60. *Id.*

61. *Id.* at 340–42, 672 S.E.2d at 829–30.

62. *Id.* at 342, 672 S.E.2d at 830 (quoting *Fishburne v. Ferguson’s Heirs*, 84 Va. 87, 113, 4 S.E. 575, 582 (1887)).

63. *Id.* at 344, 672 S.E.2d at 831.

64. 277 Va. 522, 525, 675 S.E.2d 157, 158 (2009).

65. *Id.*

66. *Id.*

67. *Id.*

miss this appeal, which was denied by the court, the bill to impeach the 1993 will and the appeal of the 1995 will's denial of probate were consolidated for trial with the consent of the parties.<sup>68</sup> At the trial's end, the court granted a directed verdict holding that the 1993 writing was not Donald, Sr.'s last will, and the jury found in favor of the 1995 will.<sup>69</sup>

On appeal, the children claimed that Ingeborg's probate of the 1993 will precluded her from later appealing the denial of the 1995 will's probate because it would be "an impermissible collateral attack upon the validity of the 1993 will, result[ing] in [Ingeborg] approbating and reprobating because she assumed mutually contradictory positions, and was barred by judicial estoppel."<sup>70</sup> However, after discussing these claims in technical detail, and determining their non-applicability, the Supreme Court of Virginia concluded by noting that Ingeborg had not been successful with the probate of the 1993 will at the time she filed her appeal of the 1995 will's denial because of the children's challenge to the 1993 will, and, therefore, the court held that she "should not have been judicially estopped from appealing the clerk's order denying probate of the 1995 will."<sup>71</sup> Accordingly, the trial court's judgment was affirmed and final judgment was entered for Ingeborg.<sup>72</sup>

#### D. *Trustee's Duty to Sell—Evidence of Damages*

In *SunTrust Bank v. Farrar*, the primary question before the Supreme Court of Virginia, on unique facts, was

whether the circuit court erred in entering a monetary judgment against the trustee and in favor of the beneficiaries of a trust for breach of fiduciary duty arising from the management of a coal mining property [and failing to sell it in 1991 instead of 1997] when the only evidence of damages presented by the beneficiaries was based on an appraisal without evidence of a willing buyer at the appraised value.<sup>73</sup>

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68. *Id.* at 525–26, 675 S.E.2d at 158.

69. *Id.* at 526, 675 S.E.2d at 159.

70. *Id.*

71. *Id.* at 530, 675 S.E.2d at 161.

72. *Id.*

73. *Id.* at 549, 675 S.E.2d at 187–88.

Relying on well-established precedent, the court answered this question in the negative.<sup>74</sup> In addition, the court further held that the trial court's judgement against the Trustee for \$89,028.30 in damages due to the Trustee's delay in not making a sale in 1991 was erroneous because "there was insufficient evidence to show that any action or inaction by the Trustee resulted in a failure to sell the property prior to 1997 . . . ."<sup>75</sup> Accordingly, the trial court was reversed on all counts, and final judgment was entered for the Trustee.<sup>76</sup>

#### IV. CONCLUSION

The developments during the period covered by this article that will affect the most persons<sup>77</sup> are (1) the decision of the Supreme Court of Virginia in *Jenkins v. Johnson*, holding that the one-year statute of limitations in § 64.1-5.1(4) did not apply to a decedent's illegitimate heirs,<sup>78</sup> and (2) the 2009 Session's legislative response reversing the impact of that decision in cases where persons die after June 30, 2009.<sup>79</sup> It is respectfully submitted that the better legislative response would have been to completely repeal the one-year rule in order to end this discrimination against illegitimate persons in all succession matters and allow them to take on the same basis as legitimate persons.<sup>80</sup> In support of this view, the

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74. *Id.* at 554, 557, 675 S.E.2d at 190, 192 (citing *Pizzarelle v. Dempsey*, 259 Va. 521, 527, 526 S.E.2d 260, 263 (2000); VA. CODE ANN. § 8.01-680 (Repl. Vol. 2007 & Cum. Supp. 2008)).

75. *Id.*

76. *Id.*

77. The two developments in question both related to illegitimate children. In 2007, the latest year for which statistics are available, Virginia recorded 108,417 live births, of which 38,281 (35.3%) were illegitimate. Virginia Department of Health, Table 2: Resident Total Live Births with Rates per 1,000 Females Ages 15-44 by Race and Non-Marital Live Births with Percents Non-Marital of Total Births by Planning District and City or County, Virginia, 2007, available at <http://www.vdh.virginia.gov/healthstats/NonMaritalBirths07.pdf>.

78. *See supra* Part III.A.

79. *See supra* Part II.A.

80. The one-year provision, as amended in 2009, reads in its entirety as follows: No claim of succession based upon the relationship between a child born out of wedlock and a deceased parent of such child shall be recognized unless an affidavit by such child or by someone acting for such child alleging such parenthood has been filed within one year of the date of the death of such parent in the clerk's office of the circuit court of the jurisdiction wherein the property affected by such claim is located and an action seeking adjudication of parenthood is filed in an appropriate circuit court within said time. How-



reader's attention is directed to the following arguments: (1) the statute is unfairly discriminatory because it applies only in cases where an illegitimate person is trying to establish paternity;<sup>81</sup> (2) advances in scientific evidence since 1978 have eliminated the old concern about spurious claims of paternity; (3) the public's attitude toward illegitimate persons has shifted significantly since the one-year rule was established in 1978; (4) anecdotal evidence from attorneys shows that the majority of persons do not discriminate against potential illegitimate family members when they write their wills; and (5) the mandate that "such one-year period shall run notwithstanding the minority of such [illegitimate] child,"<sup>82</sup> when nothing requires the claim of a legitimate minor to be made within a year of a "parent's" death, is at least unfair and perhaps a denial of due process and equal protection.<sup>83</sup> To those who would argue that repealing the one-year rule would result in a flood of claims and unsettle titles to property, it should be noted that, (1) this does not respond to the justice of the proposal, and (2) with the exception of personal property passing by intestate succession, the *Jenkin's* decision has already eliminated the one-year rule in all succession cases where the "parent" died between July 1, 1978, and July 1, 2009. Thus the floodgates for these thirty-one years have already been opened. Accordingly, for the foregoing reasons, it is respectfully submitted that the 2010 Session of the General Assembly should repeal section 64.1-5.1(4).

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ever, such one-year period shall run notwithstanding the minority of such child. The limitation period of the preceding sentence shall not apply in those cases where the relationship between the child born out of wedlock and the parent in question is (i) established by a birth record prepared upon information given by or at the request of such parent; or (ii) by admission by such parent of parenthood before any court or in writing under oath; or (iii) by a previously concluded proceeding to determine parentage pursuant to the provisions of former § 20-61.1 or Chapter 3.1 (§ 20-49.1 et seq.) of Title 20.

VA. CODE ANN. § 64.1-5.1(4) (Cum. Supp. 2009).

81. See *supra* note 9.

82. VA. CODE ANN. § 64.1-5.1(4) (Cum. Supp. 2009).

83. *Id.* § 8.01-229(A)(1) (Repl. Vol. 2007 & Cum. Supp. 2009) (with exceptions not relevant to the present case, providing in part that "[i]f a person entitled to bring any action is at the time the cause of action accrues an infant . . . such person may bring it within the prescribed limitation period after such disability is removed . . .").