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WILLS, TRUSTS, AND ESTATES

*J. Rodney Johnson**

I. INTRODUCTION

The General Assembly, in its 1998 Session, enacted legislation dealing with wills, trusts, and estates that added, amended, or repealed a number of sections of the Virginia Code. In addition to the legislative changes, there were four Supreme Court of Virginia opinions, one Court of Appeals for the Fourth Circuit opinion, one Bankruptcy Court opinion, and one Virginia circuit court opinion during the period covered by this review, all of which involved issues of interest to the general practitioner as well as to the specialist in wills, trusts, and estates. This article reports on all of these legislative and judicial developments.¹

II. LEGISLATION

A. *Uniform Probate Forms*

At the request of the Standing Committee on Commissioners of Accounts of the Judicial Council of Virginia, the 1997 Session provided for the creation of a number of mandatory uniform probate forms effective July 1, 1998.² This process continued into the 1998 Session and resulted in the four following mandatory forms.

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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.

2. This development is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 31 U. RICH. L. REV. 1249, 1268-71 (1997).

1. Inventory

Although the default rule in Virginia requires trustees of a testamentary trust to make annual accountings to the commissioner of accounts, as is true for all other court-appointed fiduciaries, the inventory requirement imposed on this latter group has not been applicable to testamentary trustees. As an inventory is ordinarily the starting point in the accounting process, the absence of an inventory for a testamentary trust has resulted in a certain awkwardness in the accounting process. To eliminate this problem, section 26-12, the inventory statute, was amended to require not only testamentary trustees but "[e]very trustee who qualifies in the clerk's office" to file an inventory with the commissioner of accounts.³ This inventory must list all realty and personalty under the trustee's supervision and control, and it is due "within four months after the first date that any assets are received."⁴

2. Fiduciary Accounting

As the accounting required of the administrators of an intestate decedent's estate is primarily for the benefit of the estate's distributees, section 26-20.1 eliminates the requirement for a formal accounting if all of the distributees are also administrators.⁵ Instead, such distributees may simply file "a statement under oath that all known charges against the estate have been paid, and that after the time required by law, the residue of the estate has been delivered to the distributees."⁶ Section 26-20.1 also provides a similar dispensation where all of the residuary beneficiaries of a testate estate are also personal representatives, except that the required affidavit has to be accompanied by vouchers showing satisfaction of any nonresiduary bequests.⁷ The 1998 amendment to section 26-20.1, applicable

3. VA. CODE ANN. § 26-12(C) (Cum. Supp. 1998).

4. *Id.* Provision also is made for making a further inventory if the trustee receives any additional assets after filing the initial inventory. *See id.* § 26-12(E) (Cum. Supp. 1998).

5. *See id.* § 26-20.1 (Cum. Supp. 1998).

6. *Id.*

7. *See id.*

only to testate cases, requires that the required affidavit now "include an itemized listing" of any nonresiduary bequests, which must be "substantiated" and accompanied by required vouchers.⁸

3. List of Heirs

Section 64.1-134 requires the personal representative of every decedent's estate, and the proponent of any will where there is no qualification on the estate, to file a list of the decedent's heirs in the clerk's office where the qualifying or propounding occurs and in the clerk's office for any other jurisdiction wherein the decedent owned real estate at death.⁹ Paralleling the 1996 path to uniformity of probate documents, the 1998 amendment deletes the statutorily mandated requirements for such a list and replaces them with a "list of heirs under oath in accordance with a form provided to each clerk of court by the Office of the Executive Secretary of the Supreme Court."¹⁰

4. Affidavit Relating to Intestate's Realty

As noted in the preceding paragraph, the list of heirs serves in part as a link in the chain of title to the decedent's intestate real estate. This list of heirs, however, can only be filed by a decedent's personal representative or a proponent of the decedent's will, and in some cases there are no probate proceedings in connection with an estate.¹¹ Section 64.1-135, on the other hand, specifically provides for a title-related affidavit in intestate cases that is similar to the list of heirs, but which can be filed by any person having an interest in the decedent's real estate.¹² Here again, the 1998 amendment provides for a uni-

8. *Id.* § 26-20.1 (Cum. Supp. 1998).

9. *See id.* § 64.1-134 (Repl. Vol. 1995).

10. *Id.* § 64.1-134 (Cum. Supp. 1998). This form differs from other probate forms in the requirement that it be made under oath. The oath was believed to be important in the present case because the list of heirs serves, to a certain extent, as a link in the chain of title to intestate real estate and, for that reason, ought to be executed with at least the same dignity as a deed to realty.

11. *See id.*

12. *See id.* § 64.1-135 (Repl. Vol. 1995).

form form for this affidavit to be developed by the Executive Secretary of the Supreme Court.¹³

B. *Fiduciary Administration—Inflationary Adjustments*

Continuing the inflationary-adjustment work begun in 1996,¹⁴ the 1998 Session increased the ceiling applicable to the following four fiduciary administration statutes from \$5,000 to \$10,000: (i) clerk of court's permissive waiver of surety upon the official bond of a fiduciary qualifying in the clerk's office;¹⁵ (ii) clerk of court's mandatory waiver of the inventory and accounting requirement in a small estate where the fiduciary has a claim as an heir, beneficiary or creditor that is larger than the small estate;¹⁶ (iii) exemption of decedent's estate from probate tax;¹⁷ and (iv) personal representative's duty to file a probate tax return.¹⁸ While all other estate related legislation from the 1998 Session became effective on July 1, 1998, these provisions were passed as emergency legislation and, thus, became effective on March 18, 1998, the day the bill was signed by the Governor.¹⁹

C. *Document Interpretation—Meaning of Child and Related Terms—Termination of Parental Rights*

Although section 64.1-5.1,²⁰ dealing with the determination of parent-child relationships, has been located among the intestate succession provisions of the Virginia Code since its incep-

13. *See id.* § 64.1-135 (Cum. Supp. 1998). In this case, however, the statute continues to spell out the substance that the form must contain instead of leaving this to the discretion of the Executive Secretary. Briefly, the three requirements are as follows: (i) a description of the decedent's realty within the particular jurisdiction, (ii) a statement that the decedent died intestate, and (iii) the names and last known addresses of the decedent's heirs. *See id.*

14. For a report on adjustments made in 1996, see Johnson, *supra* note 2, at 1254-56. For a report on adjustments made in 1997, see *id.* at 1263.

15. *See* VA. CODE ANN. § 26-4 (Cum. Supp. 1998).

16. *See id.* § 26-12.3 (Cum. Supp. 1998).

17. *See id.* § 58-1712 (Cum. Supp. 1998).

18. *See id.* § 58.1-1714 (Cum. Supp. 1998).

19. *See* Act of Mar. 18, 1998, ch. 117, 1998 Va. Acts (codified as amended at VA. CODE ANN. §§ 24-4, 26-12.3, 58.1-1712, 58.1-1714 (Cum. Supp. 1998)).

20. VA. CODE ANN. § 64.1-5.1 (Repl. Vol. 1995).

tion in 1978,²¹ its scope extends far beyond intestacy matters. This statute is applicable whenever "for purposes of this title . . . [such a relationship] must be established to determine succession by, through or from a person."²² One of the 1998 amendments clarifies and extends this section's scope provision "for purposes of this title" by adding the following language: "or for determining rights in and to property pursuant to any deed, will, trust or other instrument."²³

The second amendment to section 64.1-5.1 adds a new subsection containing a default rule for cases wherein residual parental rights are terminated under section 16.1-283²⁴ and the court's order fails to address succession issues. In such a case, the rights of the parent to take from or through the child are terminated but otherwise "the rights of the child, the child's kindred, or the parent's kindred" are not affected.²⁵

D. *Spendthrift Trusts—Permissible Ceiling Increased*

The \$500,000 ceiling on spendthrift trusts that was established in 1980²⁶ received an inflationary-adjustment increase to \$600,000 in 1996.²⁷ Somewhat surprisingly, the 1998 Session further increased this ceiling to \$1,000,000.²⁸

21. For the background of this statute, see J. Rodney Johnson, *Inheritance Rights of Children in Virginia*, 12 U. RICH. L. REV. 275 (1978).

22. VA. CODE ANN. § 64.1-5.1 (Repl. Vol. 1995). This section works in pari materia with section 64.1-71.1, dealing with the interpretation of wills and trusts, that also was enacted in 1978. See *id.* § 64.1-71.1 (Repl. Vol. 1995). Section 64.1-71.1 refers back to section 64.1-5.1 (by using the phrase the "rules for determining relationships for purposes of intestate succession") for a default rule. *Id.*

23. *Id.* § 64.1-5.1 (Cum. Supp. 1998). This amendment also added the language "or a taking" following the word "succession," in the phrase "to determine succession or a taking by, through or from a person." *Id.* Although it is difficult to think of a "taking" that would not also be included within the term "succession," this apparent redundancy seems to be harmless.

24. *Id.* § 16.1-283 (Cum. Supp. 1998).

25. *Id.* § 64.1-5.1(5) (Cum. Supp. 1998).

26. See Act of Mar. 22, 1980, ch. 267, 1980 Va. Acts 288 (codified as amended at VA. CODE ANN. § 55-19 (Repl. Vol. 1995)).

27. See Act of Mar. 31, 1996, ch. 397, 1996 Va. Acts 671 (codified as amended at VA. CODE ANN. § 55-19 (Cum. Supp. 1998)).

28. See VA. CODE ANN. § 55-19(B) (Cum. Supp. 1998).

E. *Power of Attorney—Apparent Authority*

When a principal terminates an agent's authority but does not recover the power of attorney document, or when a principal terminates an agent's authority but does not communicate that fact to persons with whom the agent has dealt previously on the principal's behalf, the agent still possesses the appearance of authority. Accordingly, Virginia law has protected innocent third parties who rely upon such an agent's apparent authority, in the "absence of fraud," if the agent executes an affidavit affirming the validity of the power.²⁹ The problem with this provision has been an uncertainty about the identity of the person who must be free from fraud—the agent, the third party, or both. The 1998 amendment eliminates this problem by replacing the phrase "absence of fraud" with new language stating "absence of actual knowledge to the contrary on the part of the person to whom such representations are made."³⁰

F. *Augmented Estate—Valuation of Insurance*

Although it has been clear that life insurance generally is to be included in a decedent's augmented estate,³¹ the Virginia Code has provided no valuation rules for gifts of insurance policies or for the payment of premiums on policies owned by another. Thus, a 1998 amendment to section 64.1-16.1 provided for the value of a gifted policy to be the same as "the cost of a comparable policy on the date of [the gift] or, if such a policy is not readily available, the policy's interpolated terminal reserve."³² The amendment further provides that "[t]he value of any premiums paid on an insurance policy owned by another

29. *See id.* § 11-9.2(b) (Repl. Vol. 1993).

30. *Id.* § 11-9.2(b) (Cum. Supp. 1998).

31. Specifically, life insurance is treated similar to any of the decedent's other property "to the extent owned by, vested in, or subject to the control of the decedent on the date of his death or the date of an irrevocable transfer by him during his lifetime." *Id.* § 64.1-16.1 (Repl. Vol. 1995).

32. *Id.* § 64.1-16.1 (Cum. Supp. 1998). This language is based upon the federal gift tax valuation rule found in Treas. Reg. § 25-2512-6(a) (as amended in 1974).

person is the amount of the premiums only and not the insurance purchased or maintained with such premiums."³³

G. *Minors' Tort Settlements—Trusts—Accountings*

One of the options contained in section 8.01-424, dealing with compromises of suits or actions on behalf of persons under a disability, provide for payment on a minor's behalf to be made into a trust for the minor instead of into a guardianship.³⁴ Although the trust option provided a more flexible and efficient property management vehicle than a guardianship, the trust option had none of the guardianship's protections because there was no statutory basis for bringing such a trust into Virginia's fiduciary accounting process. The 1998 amendment eliminated this concern, both for trusts being created and existing trusts being augmented, by authorizing the court to make the trustee "subject to the same duty to qualify in the clerk's office and to file an inventory and annual accountings with the commissioner of accounts as would apply to a testamentary trustee."³⁵

H. *Appraisal of Decedent's Estate*

In the past, section 64.1-133 has provided for the clerk of court, upon request of a decedent's personal representative or on the clerk's own motion, to appoint three or more disinterested and competent persons to appraise the value of the decedent's estate under the supervision and control of the personal representative.³⁶ Although this procedure was helpful at one time in the past, it rarely has been used in recent years and no longer was thought to be helpful even as a permissive statute. Accordingly, the 1998 Session repealed this provision.³⁷

33. VA. CODE ANN. § 64.1-16.1 (Cum. Supp. 1998).

34. *See id.* § 8.01-4.24 (Repl. Vol. 1992).

35. *Id.* § 8.01-424(E) (Cum. Supp. 1998). The default rule of fiduciary accounting already requires trustees of testamentary trusts to file annual accountings with the commissioner of accounts, but it was not until this year that the inventory requirement was made applicable to testamentary trusts. This development is noted in Section II.A.1. *See supra* notes 3-4 and accompanying text.

36. VA. CODE ANN. § 64.1-133 (Repl. Vol. 1995).

37. *See* Act of Apr. 27, 1998, ch. 610, 1998 Va. Acts (repealing VA. CODE ANN. §

I. Prudent Investor Rule—Life Insurance Policies—Fiduciary Duties

One popular pattern for a tax-oriented estate plan involves the creation of an inter vivos trust to serve as the major dispositive and management vehicle for passage of the family wealth to the next generation with the traditional will playing only a supportive role. In this "receptacle trust—pourover will" arrangement, it is normal to integrate all life insurance policies into the plan by transferring their ownership to the trustee of the inter vivos trust. Quite often, this insurance policy will be the only asset of the trust during the settlor's lifetime and, increasingly, questions are being asked concerning the trustee's duties in regard thereto. In response to such concerns, the 1998 Session amended Virginia's prudent investor rule³⁸ to provide certain protections for the trustee of any trust that holds policies of life insurance. Generally, the legislation provides that the trustee has no duty (i) to determine the appropriateness of any policy as an investment, (ii) to dispose of any policy for diversification reasons, or (iii) to exercise any policy options.³⁹ Notwithstanding the specific limitation attached to these dispensations,⁴⁰ the new rule appears to be broader than necessary for two reasons. First, it is applicable to all trusts,⁴¹ not just to those described in the text where, in the ordinary case, the trustee has no other assets. Second, it is not limited to cases where the insurance policy in question is transferred to the trust by the settlor; it also is applicable when the insurance policy actually is purchased by the trustee.

64.1-133 (Cum. Supp. 1998)).

38. See VA. CODE ANN. § 26-45.1 (Cum. Supp. 1998).

39. See *id.* § 26-45.1(F) (Cum. Supp. 1998).

40. "However, apart from these specific authorities, this subsection is not intended and shall not be construed to affect the application of the standard of judgment and care as set forth in subsection A of this section." *Id.*

41. "This subsection shall apply to all trusts, regardless of when established." *Id.*

J. Trusts—Appointment of New Trustees by Court or Beneficiaries

Section 26-48 deals with the court's authority to appoint a new trustee in a variety of circumstances, one of which has been when the incumbent trustee "removes beyond the limits of the Commonwealth."⁴² One of the 1998 amendments to this section adds the words "when residency is statutorily required" immediately in front of this language.⁴³ As residency has not been statutorily required of trustees since July 1, 1997,⁴⁴ the amendment renders this provision meaningless. Parallel amendments are made to the following two sections: (i) section 26-49, which deals with the power of beneficiaries to appoint a new trustee if such power is contained in the trust instrument,⁴⁵ and (ii) section 26-51, which deals with the management of trusts prior to the appointment of a new trustee.⁴⁶

A further amendment to section 26-48 provides for the replacement of a corporate trustee of a trust being managed in Virginia if the trustee moves its management function out of the state and "if the court finds that the management of such trust after such removal results in good cause for the substitution of such trustee."⁴⁷ To the extent that the quoted language does not effectively pull the teeth of this new replacement provision, the following sentence certainly does: "A corporate trustee that maintains a place of business in the Commonwealth where one or more trust officers are available on a regular basis for personal contact with trust customers or beneficiaries shall not be deemed to have removed such management function."⁴⁸ Nevertheless, in light of several mergers of Virginia and North Carolina banks in recent years, the amendment

42. *Id.* § 26-48 (Repl. Vol. 1997).

43. *Id.* § 26-48 (Cum. Supp. 1998).

44. For a discussion of this development, see Johnson, *supra* note 2, at 1249-51.

45. See VA. CODE ANN. § 26-49 (Cum. Supp. 1998).

46. See *id.* § 26-51 (Cum. Supp. 1998).

47. VA. CODE ANN. § 26-48 (Cum. Supp. 1998). In such a case, section 26-51 is amended to provide for the corporate trustee being replaced to continue its management function until the court appoints a new trustee pursuant to section 26-48. See *id.* § 26-51 (Cum. Supp. 1998).

48. *Id.* § 26-48 (Cum. Supp. 1998).

should serve as a statement of concern by the General Assembly for the interests of the Virginia customers of the newly merged banks and a diplomatic warning of stronger measures to follow, if necessary.

III. JUDICIAL DECISIONS

A. *Uniform Transfers to Minors Act—Jurisdiction*

In *Smith v. Smith*,⁴⁹ the father purchased bonds in his name as the custodian for his daughter under the Virginia Uniform Transfers to Minors Act.⁵⁰ The father left the bonds on deposit with his broker and, according to the daughter's allegations, later converted them to his own use.⁵¹ The daughter's uncontroverted evidence, however, showed that, although "Virginia" was used as the state designation on these bonds, all of the parties were residents of the District of Columbia when the transaction occurred and that also was where the bonds were located. Accordingly, the Supreme Court of Virginia affirmed the dismissal of the plaintiff's case based upon a lack of subject matter jurisdiction.⁵²

49. 254 Va. 99, 487 S.E.2d 212 (1997).

50. The Uniform Gifts to Minors Act, VA. CODE ANN. §§ 31-26 to -36 (Repl. Vol. 1997), was in force in Virginia at the time these bonds were acquired. This Act, however, was repealed in 1988 and replaced with the Uniform Transfers to Minors Act, VA. CODE ANN. §§ 31-37 to -59 (Repl. Vol. 1997), which is applicable to existing custodianships. See *id.* § 31-58 (Repl. Vol. 1997). This development is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 22 U. RICH. L. REV. 759, 768-71 (1988).

51. Interestingly, the court notes that the father, who was called as an adverse witness, testified that

when he established the account [with the broker], he did not make a gift to [his daughter] and that he explicitly told his broker "not to do anything with respect to a gift or any sort of gift act." Rather, [the father] stated that he had directed his broker to purchase the bonds and structure the transaction so that the bonds would be taxed at his daughter's lower rate of income taxation.

254 Va. at 102, 487 S.E.2d at 214. The court, however, does not discuss the possible ramifications of these facts to which it calls attention.

52. See *id.* at 106, 487 S.E.2d at 216. Where "Virginia" is the designated state in an attempted transfer under the Uniform Transfers to Minors Act, the transaction can be recognized only "if, at the time of the transfer, the transferor, the minor, or the custodian is a resident of [Virginia] or the custodial property is located in [Virginia]." VA. CODE ANN. § 31-38 (Repl. Vol. 1997).

B. Wills—Right of Contribution—Doctrine of Election

In *Pickett v. Spain*,⁵³ the husband's will directed his executor to pay his "just debts, excluding any mortgage indebtedness on [the] home for which [his] wife and [he] are jointly liable, even though [his] home passes to her by survivorship."⁵⁴ The trial court, however, allowed the wife, who was a beneficiary under her husband's will, to receive contribution from her husband's estate for one-half of this indebtedness. On appeal, the estate argued that the wife's voluntary acceptance of benefits under her husband's will amounted to an election barring her otherwise clear right of contribution. Affirming the trial court, however, the Supreme Court of Virginia held that "[h]ere, the doctrine of election simply has no application."⁵⁵

C. Wills—Estate Taxes—Insufficient Residue—Apportionment

In *Stickley v. Stickley*,⁵⁶ the issue before the Supreme Court of Virginia was "whether an article in a will, which directs all estate taxes and administration expenses to be paid out of the residuary estate, avoids apportionment of the remaining estate taxes upon depletion of the residuary estate."⁵⁷ The result of

53. 254 Va. 107, 487 S.E.2d 233 (1997).

54. *Id.* at 108, 487 S.E.2d at 234.

55. *Id.* at 110, 487 S.E.2d at 235. In an earlier part of this opinion the supreme court noted that "in order to make a case of election it is equally well settled that the intention of the testator to give that which is not his own must be clear and unmistakable." *Id.* (quoting *Waggoner v. Waggoner*, 111 Va. 325, 328, 68 S.E. 990, 991-92 (1910)).

The common law doctrine of election would be applicable if, for example, the husband purported to devise this survivorship property to X, and also made his wife a beneficiary under his will. In such a case, where the husband is clearly trying to dispose of that which is not his own (the survivorship property), the wife would be put to an election to (i) stand on her legal right to the survivorship property and forfeit her benefits under the will, or (ii) allow X to take the survivorship property and receive her benefits under the will.

Beyond the common law doctrine of election, a testator also specifically may put a beneficiary to an election between alternative rights or provisions. On this point, however, the Supreme Court of Virginia concluded that the husband "did not use language . . . which evinces a clear intention to require his [wife] to make an election between her right of contribution and any benefit she may receive under the will." 254 Va. at 110, 487 S.E.2d at 235.

56. 225 Va. 405, 497 S.E.2d 862 (1998).

57. *Id.* at 407, 497 S.E.2d at 862. The provision in question, Article One of the

an affirmative answer is that such taxes should be a general charge against the remaining probate estate assets. Noting that the testator had provided for funeral expenses, debts, costs of administration, and estate taxes to be treated the same, i.e., to be paid from the residuary estate, the supreme court concluded that "[a]n insufficient residuary estate does not change that intent."⁵⁸ Thus, the supreme court affirmed the trial court's holding that the remaining estate taxes should not be apportioned equitably pursuant to the statute⁵⁹ in this case but should be treated as a general charge against the remaining probate estate.⁶⁰

D. Wills—Execution—Capacity

The issue before the court in *Fields v. Fields*⁶¹ was whether the testator had the requisite testamentary capacity at the time he executed the document that was offered for probate as his will. Applying settled law to the unique facts of this case, the Supreme Court of Virginia reversed the trial court and directed that the document be admitted to probate.⁶²

testator's will, reads as follows:

All estate, inheritance, and other death taxes including interest and penalties together with the expenses of my last illness and all administration expenses including an appropriate marker for my grave, payable in any jurisdiction by reason of my death, (including those taxes and expenses payable with respect to assets which do not pass under this will) shall be paid out of and charged generally against the principal of my residuary estate. I waive any right of reimbursement for or recovery of those death taxes and administration expenses.

Id. at 407, 497 S.E.2d at 863.

58. *Id.* at 409, 497 S.E.2d at 864. The supreme court further noted that "the Testator's intent to avoid apportionment of his estate taxes, even if the residuary estate is depleted, is further evidenced by his waiver, in Article One of any right of recovery of the estates [sic] taxes." *Id.* at 410, 497 S.E.2d at 864. This "right of recovery" language to which the court refers is set forth, in context, in the immediately preceding footnote.

59. The default rule of section 64.1-161, VA. CODE ANN. § 64.1-161 (Repl. Vol. 1995), provides for the burden of estate taxes to be apportioned equitably among the takers of the taxable estate, but section 64.1-165, VA. CODE ANN. § 64.1-165 (Repl. Vol. 1995), allows one to avoid this result by making a contrary provision.

60. See 255 Va. at 410, 497 S.E.2d at 864.

61. 255 Va. 546, 499 S.E.2d 826 (1998).

62. See *id.* at 551, 499 S.E.2d at 829.

E. *Wills—Federal Court—Jurisdiction*

The case of *Turja v. Turja*⁶³ is an excellent review of “the venerable, but infrequently discussed, probate exception to a federal court’s diversity jurisdiction.”⁶⁴ In an action attacking the validity of the decedent’s will and inter vivos trust, the Court of Appeals for the Fourth Circuit recognized federal diversity jurisdiction over the inter vivos trust but concluded that “a federal court does not gain jurisdiction to determine a will’s validity merely because the issue is ‘incidental’ to other claims.”⁶⁵

F. *Spendthrift Trusts—Accrued Income—Bankruptcy*

The issue in *In re Pearson*⁶⁶ was “whether income [sic] that has accrued to the debtor but remains in the hands of the Trustee of the Trust is protected by the spendthrift provisions of the Trust.”⁶⁷ Although Virginia law does not allow creditors to reach a beneficiary’s interest in a spendthrift trust,⁶⁸ the issue of a creditor’s access to a beneficiary’s interest in trust principal that is immediately payable on the beneficiary’s demand, but which has not yet been distributed by the trustee, remains undecided by the Supreme Court of Virginia. The Bankruptcy Court concluded that protection of the spendthrift trust in such a case would continue “until the principal is no longer in the hands of the trustee.”⁶⁹ However, as the debtor’s

63. 118 F.3d 1006 (4th Cir. 1997).

64. *Id.* at 1007. The basic rule states:

[A] federal court has no jurisdiction to probate a will or administer an estate . . . federal courts of equity have jurisdiction to entertain suits “in favor of creditors; legatees and heirs” and other claimants against a decedent’s estate “to establish their claims” so long as the federal court does not interfere with the probate or assume general jurisdiction of the probate or control of the property in the custody of the state court.

Id. at 1009 (quoting *Markham v. Allen*, 326 U.S. 490, 494 (1946)).

65. *Id.* at 1008.

66. 212 B.R. 128 (Bankr. E.D. Va. 1997).

67. *Id.* at 132. Though the court used the word “income” when stating the issue, it is clear from the facts, opinion, and holding that the court focused upon the “principal” of the trust.

68. *See* VA. CODE ANN. § 55-19 (Cum. Supp. 1998).

69. 212 B.R. at 132.

interest in the trust before the court "far exceeds" the limitation allowable under Virginia law⁷⁰ and as such excess is clearly reachable by the trustee in bankruptcy, the court noted that its analysis "appears to be purely academic."⁷¹

G. *Fiduciary Compensation—Reasonableness—Bank Fee Schedule*

The statutory basis for an executor's compensation in Virginia is section 26-30, which provides in relevant part that "[t]he commissioner . . . shall allow the fiduciary . . . except in cases in which it is otherwise provided, a reasonable compensation, in the form of a commission on receipts or otherwise."⁷² The theory undergirding this rule is the assumption that the commissioner, as an experienced practitioner in this area of the law, can review the file in a given case and determine what would be reasonable in light of its specific facts.⁷³ Corporate fiduciaries, however, have determined that they wish to take this matter out of the commissioner's hands by making their executorial fee a matter of agreement with their customer. Indeed, in the ordinary case, a corporate fiduciary will not agree to serve as an executor unless the will contains a compensation clause, such as, for example, the following standard clause found in *In re Estate of Fine*: "For its services, the bank, or its successor, shall receive the compensation stipulated in its regularly published fee schedule *in effect at the time such compensation becomes payable*."⁷⁴

Notwithstanding the presence of this clause, the commissioner of accounts refused to allow the bank the amount of compen-

70. This limitation, which was \$500,000 at the time this case was brought, was increased to \$1,000,000 in 1998. See *supra* Section II.D.

71. 212 B.R. at 132.

72. VA. CODE ANN. § 26-30 (Repl. Vol. 1997).

73. There is a reasonable factual basis to conclude that the system does not in fact operate in this idealistic fashion in the typical decedent's estate. Instead, one finds that the typical commissioner has developed a fee schedule based upon a percentage of the assets under the personal representative's supervision and control, and the commissioner routinely allows compensation in this amount. Only in cases where beneficiaries might object to the compensation claimed, or where a personal representative claims a higher amount than routinely allowed, does the commissioner of accounts become actively involved in fee determinations.

74. 41 Va. Cir. 597, 598 (Norfolk City 1995).

sation provided for in its fee schedule. On appeal to the circuit court, the bank argued that the commissioner did not have any authority to review its fee because it had been fixed by the testator as allowed by the case of *Williams v. Bond*.⁷⁵ The Norfolk Circuit Court, however, affirmed the decision of its commissioner and held that under these facts

the testator did not *fix* the executor's compensation. . . . [N]either he nor [the Bank] had any way of knowing what those fees would be *in futuro*. There were no limitations on the fee, and [the Bank], in its sole discretion, was free to change its published schedule of fees at any time for any reason.

. . . .
Absent a clear, definite provision setting the compensation of an executor, the Court had not only the authority but also the duty to inquire as to the reasonableness of the executor's compensation.⁷⁶

What impact this case may have on fiduciary compensation practices of Virginia's banks, on compensation review issues before other commissioners, and on drafting practices of estates' lawyers, remains to be seen.

IV. CONCLUSION

The estate-related legislation enacted during the 1998 Session of the General Assembly is significantly smaller in volume and significance than that enacted in recent years. However, a number of bills of significant importance that were introduced in the 1998 Session were not defeated but, instead, were carried over for action in the 1999 Session. Included within this number were the following proposals: (i) to enact the Uniform Prudent Investor Act,⁷⁷ (ii) to enact the Uniform Principal and Income Act,⁷⁸ (iii) to repeal the Rule Against Perpetuities in some instances,⁷⁹ and (iv) to revise the laws relating to joint

75. 120 Va. 678, 91 S.E. 627 (1917).

76. 41 Va. Cir. at 598-99 (emphasis added).

77. See H.B. 841, Va. Gen. Assembly (Reg. Sess. 1998).

78. See H.B. 842, Va. Gen. Assembly (Reg. Sess. 1998).

79. See H.B. 645, Va. Gen. Assembly (Reg. Sess. 1998).

bank accounts.⁸⁰ Taking into account the amount of carryover legislation from 1998, and the amount of legislation that might normally be expected to be introduced in a given session, the 1999 Session of the General Assembly promises to be a significant one for estates matters.

80. See H.B. 944, Va. Gen. Assembly (Reg. Sess. 1998).