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WILLS, TRUSTS, AND ESTATES

J. Rodney Johnson *

I. INTRODUCTION

The General Assembly of Virginia enacted legislation dealing with wills, trusts, and estates that added or amended a number of sections of the Virginia Code in its 2003 Session. In addition, there were three opinions and one order from the Supreme Court of Virginia, and one Virginia Circuit Court opinion, that raised issues of interest to the general practitioner as well as the specialist in wills, trusts, and estates during the period covered by this review. This article reports on all of these legislative and judicial developments.¹

II. LEGISLATION

A. *Uniform Disclaimer of Property Interests Act (1999)*

The 2003 Session replaced Virginia's 1972 enactment of the Model Disclaimer Act² with the Uniform Disclaimer of Property

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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 section numbers will refer to the latest printing of the old sections and to the 2003 Supplement for the new sections.

2. Act of Apr. 6, 1972, ch. 449, 1972 Va. Acts 513 (codified as amended at VA. CODE ANN. §§ 64.1-188 to -196 (Repl. Vol. 2002)). Although there is no official statutory history for the original Virginia Disclaimer Act, a comparison of it with the American Bar Association ("ABA") Model Act leads one to the conclusion that the ABA Model Act was the obvious source of the Virginia legislation. See Special Committee of Disclaimer legislation, *Disclaimer of Testamentary and Non-Testamentary Dispositions—Suggestions for a Model Act*, 3 REAL PROP. PROB. & TR. J. 131, 137 (1968).

Interests Act (1999) (the "Uniform Act"),³ which will govern all disclaimers made after June 30, 2003, even though the property interest or power being disclaimed came into existence on or before that date.⁴ The Uniform Act, which is described by its authors as "the most comprehensive disclaimer statute ever written... is designed to allow every sort of disclaimer."⁵ From a functional standpoint, the Uniform Act is intended to operate as "an enabling statute which prescribes all the rules for refusing a proffered interest in or power over property and the effect of that refusal on the power or interest while leaving the effect of the refusal itself to other law."⁶ And, in a particularly noteworthy departure from existing American disclaimer law, the Uniform Act contains no rule requiring a disclaimer to be made within any given period of time.⁷ Although a detailed comparison of the Uniform Act to prior Virginia law is not feasible within the confines of this annual review, a listing of the significant Virginia differences with the Uniform Act is provided in the footnotes.⁸

3. UNIF. DISCLAIMER OF PROP. INTERESTS ACT (1999) (amended 2002), 8A U.L.A. 51 (Supp. 2003). Copies of the Uniform Act containing the Commissioners' official comments, which will be indispensable in seeking to completely understand the Uniform Act's operation, may be obtained from the National Conference of Commissioners on Uniform State Laws, 211 East Ontario Street, Suite 1300, Chicago, IL 60611.

4. Act of Mar. 16, 2003, ch. 253, 2003 Va. Acts ____ (codified at VA. CODE ANN. §§ 64.1-196.1 to -196.15 (Cum. Supp. 2003)). The effective date provision is found in VA. CODE ANN. § 64.1-196.15 (Cum. Supp. 2003).

5. UNIF. DISCLAIMER OF PROP. INTERESTS ACT (1999) (amended 2002), 8A U.L.A. 51, 51-52 (Supp. 2003).

6. *Id.* at 52. However, it should be noted that the 2003 disclaimer legislation did not repeal Chapter 16 (Virginia Code section 55-278 et. seq.) of Title 55, which deals in great detail with the right to, manner of, and consequences flowing from, a release of a power of appointment. The chapter on releases was retained because it was believed that its greater detail and specificity might be more advantageous in some situations than the Uniform Act. In order to coordinate the operation of these two somewhat overlapping chapters, an existing section of the release chapter was amended to provide that "[a] release made in accordance with [the disclaimer chapter] shall be effective as a disclaimer," and a new section was added to provide that "[n]othing in [the release chapter] shall operate as a limitation on the provisions of [the disclaimer chapter]." Act of Mar. 16, 2003, ch. 253, 2003 Va. Acts ____ (codified as amended at VA. CODE ANN. § 55-286.1 (Repl. Vol. 2003); codified at VA. CODE ANN. § 55-286.2 (Repl. Vol. 2003)).

7. A disclaimer under the Uniform Act will still have to be made within the time frame specified in the Internal Revenue Code in order to be recognized as a "qualified disclaimer" for federal transfer tax purposes. See 26 U.S.C. § 2518 (2000).

8. (A) There were five Virginia amendments to the Uniform Act, all of which were proposed by the Virginia Bar Association's Section on Wills, Trusts & Estates. Except as otherwise noted, the section number references are to the Act as enacted in Virginia, and not as originally promulgated. These amendments are:

(1) § 64.1-196.1(E). At the end of this subsection, which is the definition of "jointly held

property," Virginia adds "and includes, without limitation, property held as tenants by the entirety." VA. CODE ANN. § 64.1-196.1(E) (Cum. Supp. 2003).

(2)§ 64.1-196.4(C). This is a new subsection, added to the section dealing with the power to disclaim, in which Virginia provides that:

[a] custodial parent of a minor for whom no guardian of the property has been appointed may disclaim, in whole or in part, an interest in or power over property, including a power of appointment, that (but for the custodial parent's disclaimer) would have passed to the minor as the result of another disclaimer. The custodial parent may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim.

VA. CODE ANN. § 64.1-196.4(C) (Cum. Supp. 2003)

(3) § 64.1-196.14. At the beginning of this section, which deals with the permissive recodation of disclaimers, Virginia inserts a mandatory provision reading "[i]f an instrument transferring title to real property is disclaimed, a copy of the disclaimer shall be recorded in the office of the clerk of the circuit court for the jurisdiction where the real property is located." VA. CODE ANN. § 64.1-196.14 (Cum. Supp. 2003). It is doubtful that this addition has any meaning, notwithstanding its mandatory language, because: (i) a bona fide purchaser from the disclaimant would be protected from the disclaimant's unrecorded disclaimer by the recodation system anyway; and (ii) the Uniform Act provides that "[f]ailure to file, record, or register the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer." *Id.*; see also UNIF. DISCLAIMER OF PROP. INTERESTS ACT (1999) § 15, 8A U.L.A. 51, 70 (Supp. 2003).

(4) Virginia omits section 17 of the original 1999 Uniform Act, which provided that "[i]n applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it." UNIF. DISCLAIMER OF PROP. INTERESTS ACT (1999) § 18 (amended 2002), 8A U.L.A. 51, 71-72 (Supp. 2003). When a 2002 amendment to the Uniform Act added a new section 17, as noted in (B)(2), below, the original section 17 was renumbered as section 18.

(5) Virginia omits section 18 of the original 1999 Uniform Act, which provided that:

[i]f any provisions of this [Uniform Act] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this [Uniform Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Uniform Act] are severable.

Id. § 19, 8A U.L.A. at 72 (Supp. 2003). When a 2002 amendment to the Uniform Act added a new section 17, as noted in (B)(2), below, the original section 18 was renumbered as section 19.

(B) The Virginia Act differs from the Uniform Act in two other respects because the two 2002 amendments to the Uniform Act were not included in the Virginia legislation. The 2002 amendments to the Uniform Act were:

(1) A new provision was added stating that "'signed' means, with present intent to authenticate or adopt a record, to; (A) execute or adopt a tangible symbol; or (B) attach to or logically associate with the record an electronic sound, symbol, or process." *Id.* § 5(c)(2), 8A U.L.A. at 57 (Supp. 2003).

(2) A new section was added stating that:

[t]his [Act] modifies, limits, and supercedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001, et. seq.) but does not modify, limit, or supercede Section 101(c) of that act (15 U.S.C. Section 7001(c)) or authorize electronic delivery of any notices described in Section 103(b) of that act (15 U.S.C. Section 7003(b)).

Id. § 17, 8A U.L.A. at 71 (Supp. 2003). Note that the insertion of this new section 17 into the Uniform Act in 2002 caused sections 17-20 to be renumbered as sections

B. Powers of Attorney and Advance Directives—Access to the Safe-Deposit Box

It has become a very normal practice for persons who execute wills in order to avoid the default dispositive provisions of Virginia succession law upon their death to also execute powers of attorney and advance directives⁹ to avoid the default management provisions of Virginia's conservatorship¹⁰ and guardianship¹¹ laws upon their incapacity.¹² It is also a normal practice for persons leasing safe-deposit boxes for the safeguarding of their valuables to place their wills, powers of attorney, and advance directives therein. Post-death access problems relating to wills in safe-deposit boxes, when a decedent is the sole lessee or when no co-lessee is reasonably available, were addressed in the 1984 Session by adding section 6.1-332.1 to provide permissive authority for a "company or bank" to allow certain persons to make a supervised search of a decedent's box for a will, and to remove "the will or testamentary instrument for transmission to the appropriate clerk."¹³

The 2002 Session, faced with corresponding problems dealing with access to powers of attorney of incapacitated persons in safe-deposit boxes, amended section 6.1-332.1 in an attempt to provide a similar permissive-access remedy.¹⁴ However, the 2002 legislation failed to address advance directives, and its too-literal paral-

18-21.

9. The term "advance directive" may refer to a medical power of attorney, a living will, or a document incorporating both of the foregoing. See VA. CODE ANN. § 54.1-2982 (Repl. Vol. 2002).

10. A conservator is "a person appointed by the court who is responsible for managing the estate and financial affairs of an incapacitated person." *Id.* § 37.1-134.6 (Cum. Supp. 2003).

11. A guardian is "a person appointed by the court who is responsible for the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person's support, care, health, safety, habilitation, education, and therapeutic treatment, and, if not inconsistent with an order of commitment, residence." *Id.*

12. The statute authorizing the general durable power of attorney is Virginia Code section 11-9.1. *Id.* § 11-9.1 (Repl. Vol. 1999). The Health Care Decisions Act, Virginia Code sections 54.1-2981 through 54.1-2993, governs "advances directives." *Id.* §§ 54.1-2981 to -2993 (Repl. Vol. 2002 & Supp. 2003).

13. Act of Apr. 4, 1984, ch. 446, 1984 Va. Acts 716 (codified at VA. CODE ANN. § 6.1-332.1 (Repl. Vol. 1999)).

14. Act of Apr. 1, 2002, ch. 312, 2002 Va. Acts 394 (codified at VA. CODE ANN. § 6.1-332.1(B) (Cum. Supp. 2002)).

lelism with the original wills' remedy raised a variety of interpretation issues because wills and powers of attorney are quite dissimilar instruments that operate in completely different contexts.¹⁵

The 2003 Session appears to have eliminated all of these problems by recasting section 6.1-332.1 into separate, self-contained subsections dealing with wills,¹⁶ powers of attorney,¹⁷ and advance directives,¹⁸ each of which employs subject-specific language to reach the desired result—third-party access to safe deposit boxes. Thus, upon a physician's certification that a sole lessee is incapacitated according to the conservatorship test,¹⁹ the 2003 legislation provides that the company or bank may allow certain persons²⁰ to search the box for a power of attorney "that relates to the management of his property or financial affairs,"²¹ and may allow any such power to be removed "for transmission to a person named as agent therein."²² Similarly, upon a physician's certification that a sole lessee is incapacitated according to the guardianship test,²³ the company or bank may allow certain per-

15. For additional discussion of these issues, see J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 37 U. RICH. L. REV. 357, 360–62 (2002).

16. VA. CODE ANN. § 6.1-332.1(A) (Cum. Supp. 2003).

17. *Id.* § 6.1-332.1(B) (Cum. Supp. 2003).

18. *Id.* § 6.1-332.1(C) (Cum. Supp. 2003).

19. This test, taken from Virginia Code section 37.1-134.6 (Cum. Supp. 2003), *mutatis mutandis*, refers to one who is:

incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of another.

Id. § 6.1-332.1(B) (Cum. Supp. 2003).

20. These persons are "the lessee's spouse, next of kin, and persons asserting a knowledge or belief that they are named as an agent in such a power of attorney believed to be in the box," and their "[a]ccess shall be under the supervision of a designated officer or employee." *Id.* § 6.1-332.1(B) (Cum. Supp. 2003).

21. *Id.*

22. *Id.* When a box is co-leased, and the co-lessees are not "reasonably available," the company or bank may also permit access to the "same persons and under the same circumstances" provided for solely-leased boxes. *Id.*

23. This test, taken from Virginia Code section 37.1-134.6 (Cum. Supp. 2003), *mutatis mutandis*, refers to one who is "incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to meet the essential requirements for his health, care, safety, or therapeutic need without the assistance or protection of another." *Id.* § 6.1-332.1(C) (Cum. Supp. 2003).

sons²⁴ to search the box for 'an advance medical directive²⁵ and may allow any such directive to be removed "for transmission to a person named as agent therein."²⁶ Lastly, a final subsection applicable to wills, powers of attorney, and advance directives continues the rule insulating the company or bank relying upon this section's permissive remedy from any liability,²⁷ and adds a new provision requiring: "The company or bank shall make a photocopy of any document removed from a lessee's box pursuant to this section and place such copy in the box prior to delivering the original to any person."²⁸

C. Powers of Attorney and Advance Directives—Delivery

A latent problem that was brought to the surface by the 2002 legislation dealing with access to powers of attorney in safe-deposit boxes, relates to the delivery requirement for powers of attorney and advance directives.²⁹ It is generally assumed throughout the law that no legal rights or relations are created under any document until it is delivered by its author.³⁰ This rule

24. These persons are "the lessee's guardian, spouse, next of kin, and persons asserting a knowledge or belief that they are named as an agent in an advance medical directive believed to be in the box," and their "[a]ccess shall be under the supervision of a designated officer or employee." VA. CODE ANN. § 6.1-332.1(C) (Cum. Supp. 2003).

25. *Id.*

26. *Id.* Because an advance directive that functions solely as a living will may speak directly to the patient's attending physician instead of naming an agent, the statute further provides for delivery of an advance directive "in the absence of such a person (named as an agent therein), to the lessee's attending physician to be made a part of the lessee's medical records." *Id.* When a box is co-leased, and the co-lessees are not "reasonably available," the company or bank may also permit access to the "same persons and under the same circumstances" provided for solely-leased boxes. *Id.*

27. The only exceptions to this immunity are when the bank or company acts in bad faith or permits other items to be removed from the box. *Id.* § 6.1-332.1(D) (Cum. Supp. 2003).

28. *Id.*

29. For addition discussion of this problem, see Johnson, *supra* note 15, at 362.

30. As stated by the Mississippi Supreme Court:

As between the parties, the principal and the purported attorney-in-fact, all that is requisite to the enforceability of the power of attorney is execution and delivery in the same sense that, as between grantor and grantee, all that is necessary for a deed to be valid and enforceable is that the grantor execute it and deliver it.

Kountouris v. Varvaris, 476 So. 2d 599, 604 (Miss. 1985). For a discussion of the delivery issue in the context of powers of attorney, see Andrew H. Hook et al., *Durable Powers of Attorney*, Tax Mgmt. (BNA), No. 859, at A-18 (2000).

presents an obvious problem when dealing with a power of attorney or advance directive that was never delivered by the principal and is not received by the agent until a time when the principal, due to incapacity, is legally incapable of making the requisite delivery.³¹ Although the new safe-deposit box legislation will increase the number of cases involving post-capacity receipt of powers of attorney and advance directives, a significant number of cases have existed for some time, such as, for example, those where the co-lessee of a safe-deposit box makes a document available to the agent following the principal's incapacity, or when a principal keeps the document at the home or office where it is discovered following the principal's incapacity and given to the agent, etc.

In order to prevent the non-delivery issue from creating a problem with the acceptance of powers of attorney and advance directives in the ordinary course of business, the 2003 Session added two new statutes to the Virginia Code. New Virginia Code section 11-9.7 provides that an agent in possession of an otherwise valid power of attorney "shall . . . be deemed to possess the powers and authority granted by such instrument notwithstanding any failure of the principal to deliver the instrument to him, and persons dealing with such . . . agent shall have no obligation to inquire into the manner or circumstances by which such possession was acquired."³² And new Virginia Code section 54.1-2989.1 creates a parallel provision applicable to the delivery of advance medical directives.³³

31. In order to avoid this delivery problem in practice, many attorneys advise their clients who are unwilling to make an immediate delivery of a power of attorney or advance directive to the chosen agent to make a delivery instead to a third party, in escrow, with the escrowee to make physical delivery to the agent upon the occurrence of facts or circumstances stipulated by the principal.

32. VA. CODE ANN. § 11-9.7 (Cum. Supp. 2003). Although this legislation is designed to eliminate any delivery question from arising as a power of attorney passes in commerce, it does not intend to otherwise eliminate this issue as a valid concern. Thus, this legislation also provides that "nothing herein shall preclude the court from considering such manner or circumstances [by which possession was acquired] as relevant factors in any proceeding brought to terminate, suspend or limit the authority of the attorney-in-fact or other agent." *Id.*

33. *Id.* § 54.1-2989.1 (Cum. Supp. 2003).

D. *Boiler-Plate Fiduciary Powers—Power of Sale over Realty—Definition of “Estate”*

Virginia Code section 64.1-57 contains a collection of fiduciary powers that may be conferred upon an executor or trustee by reference thereto in the governing will or trust,³⁴ and Virginia Code section 64.1-57.1 creates a procedure whereby a circuit court may grant any or all of these powers to a personal representative or trustee when the governing instrument fails to do so, and to an administrator where there is no will.³⁵ One of these powers authorizes a fiduciary to “sell . . . any . . . property, either real, personal or mixed, which may be included in, or may at any time become part of the trust or estate.”³⁶ In the context of a Virginia Code section 64.1-57.1 proceeding brought by an administrator requesting this power in order to sell real estate in an intestate decedent’s estate, a circuit court held that the word “estate” in this provision did not include a decedent’s real estate passing by intestate succession.³⁷ In response to this decision, the 2003 Session amended Virginia Code section 64.1-57 to provide that “[f]or the purposes of this section, the term ‘estate’ shall include all interests in the real or personal property of a decedent passing by will or by intestacy.”³⁸ In addition, the 2003 Session stated that “[t]his subsection is declarative of existing law.”³⁹

34. *Id.* § 64.1-57 (Supp. 2003).

35. *Id.* § 64.1-57.1 (Repl. Vol. 2002 & Supp. 2003).

36. *Id.* § 64.1-57(1)(b) (Supp. 2003).

37. *In re Estate of Rountree*, No. HQ-2426-4 (Va. Cir. Ct. Apr. 23, 2002) (Richmond City). This case, in which the Virginia Bar Association appeared as *amicus curiae* in opposition on appeal, was reversed by an order of the Supreme Court of Virginia. *See In re Bullock*, No. 021740 (Va. Apr. 17, 2003); *see also infra* Parts III.D., VI.

38. Act of Mar. 16, 2003, ch. 30, 2003 Va. Acts ____ (codified as amended at VA. CODE ANN. § 64.1-57(7) (Cum. Supp. 2003)).

39. *Id.* Anecdotal evidence indicates that when the General Assembly enacts legislation as “declarative” or “declaratory” of existing law, it does so to communicate its intent that the legislation in question is not meant to establish a new rule of law that will be effective only from the legislation’s effective date, which, in the absence of its passage as emergency legislation, would be July 1 of that legislative year. Such a statement might be a part of legislation that is intended to codify a common law rule believed to already exist in the Commonwealth, or as in the present case, to express the General Assembly’s intent regarding the proper interpretation of prior legislation, i.e., what it meant by what was originally said. However, the term has had a mixed reception in the courts. In *Sims Wholesale Co. v. Brown-Forman Corp.*, the Court found it unnecessary to “rule on the effect, if any, of the enactment” in order to correctly decide the case before it. 251 Va. 398,

E. Revocable Inter Vivos Trust—Conservator's Power to Revoke

In response to a petition filed by the conservator of an incapacitated grantor of a revocable inter vivos trust, the trial court's decision in *In re Rudwick*⁴⁰ concluded that Virginia statutory law empowered the conservator to revoke the trust without obtaining court approval.⁴¹ In response to this decision, the 2003 Session of the General Assembly amended Virginia Code section 37.1-137.5 to provide that "[a] conservator may exercise the incapacitated person's power to revoke or amend a trust or to withdraw or demand distribution of trust assets only with the approval of the court for good cause shown, unless the trust instrument expressly provides otherwise."⁴² Several of the practical problems presented by the *Rudwick* decision would also be a concern if an incapacitated person's power to revoke a revocable trust could be exercised by an agent under a durable power of attorney.⁴³ Thus, it is

407, 468 S.E.2d 905, 910 (1996). In *Berner v. Mills*, the Court determined, as a matter of law, that certain amendments "were not intended to be applied retroactively. Thus we hold that the phrase 'declaratory of existing law' is not a statement of retroactive intent." 265 Va. 408, 414, 579 S.E.2d 159, 161 (2003). When the meaning of the term was before the United States Court of Appeals for the Fourth Circuit, it stated that "[w]hile the legislature can only make law and cannot declare what the existing law is, the statement by the General Assembly clearly evidences an intent for the statute to be applied retroactively." *Ridenour v. Commissioner*, 36 F.3d 332, 335 (4th Cir. 1994).

40. No. 01633, 2002 WL 31730757, at *3-4 (Va. Cir. Ct. Dec. 5, 2002) (Arlington County).

41. *Id.* No final order was entered implementing this decision because the incapacitated person died while the court was reconsidering its decision following a rehearing in which amicus curiae briefs in opposition thereto were filed and arguments were made by the Virginia Bar Association and the Virginia Bankers Association. See *infra* Part IV.

42. Act of Mar. 16, 2003, ch. 528, 2003 Va. Acts ____ (codified as amended at VA. CODE ANN. § 37.1-137.5(D) (Cum. Supp. 2003)).

43. Two issues of significant concern arise in connection with control and succession. First, except in those cases where the agent and trustee are the same person, allowing an agent to revoke the trust will displace the one specifically chosen by the incapacitated person to be in control of the assets in question—without the need to show any cause therefore or that such action would be in the incapacitated principal's best interests. This is not good law or policy. The mere fact that the power of attorney contains language authorizing the revocation of trusts should make no difference when one takes into account how easy it is to obtain a power of attorney (which has no witness or notary requirement) from one who is in a weakened condition, and the fact that powers of attorney, typically seen as the quintessential "form" document, are seldom read prior to their execution. Second, an increasing number of persons are using the revocable inter vivos trusts as a will-substitute, including the primary dispositive provisions for their assets at death, and adding their probate estate thereto by way of a pour-over will. If, in such a case, the trust is revoked by an agent under a power of attorney, the principal will be rendered intestate and the principal's estate will pass to the principal's heirs and distributees under intestate succession law instead of to the principal's chosen beneficiaries. See VA. CODE ANN. § 64.1-73.1(C)

submitted that the 2004 Session should enact legislation applicable to agents that parallels the 2003 legislation applicable to conservators.

F. *Fiduciary Administration—Small Estates—Inflationary Adjustments*

Continuing the inflation-adjustment work begun in 2001,⁴⁴ the 2003 Session increased the ceiling applicable to five additional fiduciary administration or small estate statutes from \$10,000 to \$15,000.⁴⁵ These five provisions are: (1) the omnibus provision in Title 8 dealing with the payment of small amounts to certain persons through court without the intervention of a fiduciary, the somewhat similar authority of commissioners of accounts, and the exemption of certain fiduciaries from accountings;⁴⁶ (2) the clerk of court's permissive waiver of surety upon the official bond of a fiduciary qualifying in the clerk's office;⁴⁷ (3) the surrender of an incapacitated person's estate to the person upon restoration of capacity, or to the person's successors in interest upon death;⁴⁸ (4) the exemption of a decedent's estate from probate tax;⁴⁹ and (5) the personal representative's duty to file a probate tax return.⁵⁰

G. *Small Estates—First Account*

Virginia Code section 26-17.3 is the general statute requiring fiduciaries, governed by Chapter 2 of Title 26, to account before their jurisdiction's commissioner of accounts for all receipts and disbursements during each accounting period.⁵¹ The initial accounting period varies: (1) for a conservator, guardian of a minor's

(Repl. Vol. 2002). Again, this is not good law or policy.

44. For a report on the 2001 adjustments, see J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 35 U. RICH. L. REV. 845, 854–56 (2001). For a report on additional changes in 2002, see Johnson, *supra* note 15, at 363–64.

45. Act of Mar. 16, 2003, ch. 195, 2003 Va. Acts ____ (codified as amended at VA. CODE ANN. §§ 8.01-606 (Cum. Supp. 2003), *id.* § 26-4 (Cum. Supp. 2003), *id.* § 37.1-144 (Cum. Supp. 2003), *id.* §§ 58.1-1712, -1714 (Cum. Supp. 2003)).

46. VA. CODE ANN. § 8.01-606 (Cum. Supp. 2003).

47. *Id.* § 26-4 (Cum. Supp. 2003).

48. *Id.* § 37.1-144 (Cum. Supp. 2003).

49. *Id.* § 58.1-1712 (Cum. Supp. 2003).

50. *Id.* § 58.1-1714 (Cum. Supp. 2003).

51. *Id.* § 26-17.3 (Repl. Vol. 2001 & Cum. Supp. 2003).

estate, committee, and trustee under Virginia Code section 37.1-134.20, it is the first four months following qualification;⁵² (2) for a personal representative, it is the first twelve months following qualification;⁵³ and (3) for a testamentary trustee required to account,⁵⁴ it is the remainder of the calendar year in which the trust was funded.⁵⁵ Thereafter, all of these fiduciaries have an obligation to account annually so long as they remain in office.⁵⁶

In order to reduce the annual accounting burden on small estates, Virginia Code section 26-20 gives commissioners of accounts the discretion to allow fiduciaries listed in Virginia Code section 26-17.3 to account on a three-year basis, following their initial account, if their estates do not exceed \$15,000.⁵⁷ However, notwithstanding the varying periods established for initial accounts noted above, Virginia Code section 26-20 has inconsistently provided that the initial accounting period for all fiduciaries listed in Virginia Code section 26-17.3 is one year if their

52. *Id.* § 26-17.4(A) (Repl. Vol. 2001 & Cum. Supp. 2003). The title of this statute also referred to "receivers under § 55-44," until 2003, although the 1999 Session repealed Virginia Code section 55-44, which addressed the control of the estate of a married woman who is a minor, and deleted the reference thereto within the body of Virginia Code section 26-17.4. *See* Act of Feb. 27, 1999, ch. 16, 1999 Va. Acts 22 (codified as amended at VA. CODE ANN. § 26-17.4 (Repl. Vol. 2001)). An editor's note appended to this section in the 2003 Cumulative Supplement states that "[a]t the direction of the Virginia Code Commission 'under § 55-44' has been deleted from the end of the section catchline." However, the section catchline still refers to "receivers," a category of fiduciary not dealt with by the statute. VA. CODE ANN. § 26-17.4 (Cum. Supp. 2003).

53. *Id.* § 26-17.5(A) (Repl. Vol. 2001 & Cum. Supp. 2003).

54. Subject to certain limitations, a testamentary trustee's obligation to account may be waived by the testator or by the trust's adult beneficiaries. *Id.* § 26-17.7 (Repl. Vol. 2001 & Cum. Supp. 2003).

55. *Id.* § 26-17.6(A) (Repl. Vol. 2001). There are two exceptions to this rule. A trustee that is a corporation qualifying under Virginia Code section 6.1-5, and a trustee permitted by the Internal Revenue Service ("IRS") to file income tax returns on a fiscal year basis, may elect to file their initial account for the period of the trust's first "fiscal year." *Id.* § 26-17.6(C) (Repl. Vol. 2001 & Cum. Supp. 2003).

56. This annual period is expressed: (1) for a conservator, guardian of a minor's estate, committee, and trustee under Virginia Code section 37.1-134.20 as "each succeeding twelve-month period." *Id.* § 26-17.4(B) (Repl. Vol. 2001 & Cum. Supp. 2003); (2) for a personal representative as "each succeeding twelve-month period." *Id.* § 26-17.5(B) (Repl. Vol. 2001 & Cum. Supp. 2003); and (3) for a testamentary trustee required to account as "each calendar year thereafter." *Id.* § 26-17.6(A) (Repl. Vol. 2001 & Cum. Supp. 2003). There are three categories of such trustees who may elect, instead, each succeeding "fiscal year": (1) trustees who qualified prior to July 1, 1993 and elected to operate on a fiscal year basis; (2) trustees who qualify at any time, one of which is a corporation qualified under Virginia Code section 6.1-5; and (3) trustees permitted by IRS to file income tax returns on a fiscal year basis. *Id.* § 26-17.6(B)-(C) (Repl. Vol. 2001).

57. *Id.* § 26-20 (Cum. Supp. 2002).

fiduciary estate does not exceed \$15,000.⁵⁸ The 2003 Session eliminates this inconsistency by amending Virginia Code section 26-20 to provide that the initial accounting period for these small estates is "the appropriate time period provided in §§ 26-17.4 through 26-17.7."⁵⁹

H. *Decedents' Estates — Inventory Requirement — Attorneys in Default*

Virginia Code section 26-12 states the basic rule requiring fiduciaries to file an estate inventory with the commissioner of accounts within four months of qualifying on an estate.⁶⁰ The first of several enforcement provisions contained in Virginia Code section 26-13 requires the commissioner of accounts to issue a summons to any fiduciary failing to meet this four-month filing deadline, "requiring him to make such return" and, upon the fiduciary's failure to remedy this default within thirty days from service of the summons, to "report the fact to his court."⁶¹ As the receipt of a summons does not have the same motivating effect upon an attorney as upon a layperson, the 2003 Session further provided that:

[w]henever the commissioner reports to the court that a fiduciary, who is an attorney-at-law licensed to practice in the Commonwealth, has failed to make the required return within 30 days after the date of service of a summons, the commissioner shall also mail a copy of his report to the Virginia State Bar.⁶²

Presumably, the implied threat of an ethics proceeding will have the desired motivational impact.

58. "If the principal sum held by any fiduciary mentioned in § 26-17.3 does not exceed \$15,000, such fiduciary shall exhibit his accounts before the commissioner within four months after the expiration of one year from the date of the order conferring his authority as provided in § 26-17.3 . . ." *Id.*

59. Act of Mar. 16, 2003, ch. 193, 2003 Va. Acts ____ (codified as amended at VA. CODE ANN. § 26-20 (Cum. Supp. 2003)).

60. VA. CODE ANN. § 26-12 (Repl. Vol. 2001).

61. *Id.* § 26-13 (Cum. Supp. 2003).

62. Act of Mar. 16, 2003, ch. 193, 2003 Va. Acts ____ (codified as amended at VA. CODE ANN. § 26-13 (Cum. Supp. 2003)). The same language is found in the section dealing with the enforcement of a fiduciary's obligation to account before the commissioner of accounts. See VA. CODE ANN. § 26-18 (Repl. Vol. 2001).

I. *Spousal Allowances and Augmented Estate —Waiver — Writing Requirement*

The validity of an oral, post-marital property agreement, in an estates context, was brought before the Supreme Court of Virginia in *Flanary v. Milton*.⁶³ On the day preceding the husband's ("H") death, and while the wife's ("W") deposition was being taken in a divorce proceeding between H and W, "an oral agreement between the parties was recited into the record by the parties' attorneys," the provisions of which W agreed would constitute "a full and final settlement of all rights accrued by virtue of this marriage."⁶⁴ When W subsequently petitioned for spousal allowances and an elective share in H's augmented estate, the trial court ruled that the "oral agreement was valid and effectively released" these rights.⁶⁵ This ruling was consistent with the Court of Appeals of Virginia's decision in *Richardson v. Richardson*,⁶⁶ which held that "compromises and settlement agreements to pending litigation which incidentally include issues of property and spousal support' are not within the purview of [Virginia] Code [section] 20-155 and, thus, do not need to comply with the requirement that such agreements be in writing."⁶⁷ However, the Supreme Court of Virginia "reject[ed] . . . the rationale and holding of *Richardson*," and reversed the trial court's decision.⁶⁸

In response to *Flanary*, the 2003 Session amended Virginia Code section 20-155 to provide that:

[i]f the terms of such [marital] agreement[s] are (i) contained in a court order endorsed by counsel or the parties or (ii) recorded and transcribed by a court reporter and affirmed by the parties on the record personally, the agreement is not required to be in writing and is considered to be executed.⁶⁹

Although this legislation was prompted by *Flanary*, it would not have changed the result therein, even if it had been applicable

63. 263 Va. 20, 556 S.E.2d 767 (2002). *Flanary* is discussed in more detail in Johnson, *supra* note 15, at 377-78.

64. *Flanary*, 263 Va. at 21-22, 556 S.E.2d at 768 (2002).

65. *Id.*

66. 10 Va. App. 391, 392 S.E.2d 688 (Ct. App. 1990).

67. *Id.* at 398, 392 S.E.2d at 691.

68. *Flanary*, 263 Va. at 23, 556 S.E.2d at 769.

69. Act of Mar. 19, 2003, ch. 662, 2003 Va. Acts ____ (codified as amended Va. CODE ANN. § 20-155 (Cum. Supp. 2003)).

thereto, because although the agreement appears to have been recorded and transcribed by a "court reporter,"⁷⁰ it clearly was not affirmed by *H* on the record "personally."⁷¹

J. Presumption of Death—"Generic" Specific Peril Exception

Virginia Code section 64.1-105, dealing with the presumed death of a person who has not been heard from for a period of seven years, requires an unnecessarily long wait in those instances where it is reasonable to assume that one has in fact died at an earlier time. Thus the General Assembly of Virginia has passed specific and general exceptions to this seven-year rule to provide relief in some of these cases,⁷² and the 2002 Session added a "9/11 exception" dealing with missing persons who were "documented to have been in that portion of the Pentagon damaged by the terrorist attack of September 11, 2001, or on American Airlines Flight 77 on September 11, 2001, when it was flown into the Pentagon."⁷³ One problem with the 2002 legislation was its failure to address the consequences of the other September 11, 2001 terrorist attacks that occurred at the World Trade Center in New York and aboard United Airlines Flight 93 that crashed in Pennsylvania. When this deficiency was called to the attention of the 2003 Session, along with the general undesirability of con-

70. The term "court reporter" is not defined in the Virginia Code, and there has been some uncertainty about whether or not a staff person in an attorney's office, who is a notary public, fits within the term when taking the deposition of a party in the attorney's office as a part of a divorce proceeding. However, a recent attorney general's opinion has concluded that, assuming the notary public administers an oath to the individual giving the deposition, "an attorney's secretary, who is a notary public, accurately recording, by stenographic, electronic or other means, the testimony of a party to a divorce proceeding is a 'court reporter' within the context of [Virginia Code] § 20-155(ii)." Op. to Hon. William J. Howell, Speaker of the House of Delegates (July 31, 2003), available at <http://www.oag.state.va.us/> (last visited Sept. 22, 2003).

71. *H* was not present at the taking of *W*'s deposition. His assent to the agreement was given by his attorney. In response to a question from *W*'s attorney, *H*'s attorney responded "[m]y client is agreeable to the agreement as you stated for the record." Appendix to the Record at 10, *Flanary*, 263 Va. 20, 556 S.E.2d 767 (2002) (No. 010220).

72. See, for example, Virginia Code section 64.1-105.1 (Repl. Vol. 2002), dealing with persons disappearing in floods resulting from Hurricane Camille, and Virginia Code section 64.1-105.2 (Repl. Vol. 2002), dealing with persons disappearing from a ship or vessel at sea or on board an aircraft which disappears at sea.

73. Act of Feb. 28, 2002, ch. 58, 2002 Va. Acts 51. This legislation, which was enacted as "§ 1," was not codified in the Virginia Code. However, its text does appear in an editor's note appended to Virginia Code section § 64.1-105. VA. CODE ANN. § 64.1-105 (Repl. Vol. 2002). This legislation is discussed in more detail in Johnson, *supra* note 15, at 367-68.

tinuing to address such problems on an after-the-fact *ad hoc* basis, it enacted a Virginia Bar Association sponsored “specific peril” exception to the seven-year rule that will provide a remedy in cases brought after June 30, 2003, even though the disappearance in question may have occurred prior to that time, without the need for any further legislation.⁷⁴ This new “generic” specific-peril exception to the general rule of Virginia Code section 64.1-105 provides that “[t]he fact that any person was exposed to a specific peril of death may be a sufficient basis for determining at any time after the exposure that the person is presumed to have died less than seven years after the person was last heard from.”⁷⁵

K. *Wrongful Death or Personal Injury—No Executor for Deceased Plaintiff*

Virginia Code section 64.1-75.1 was amended by the 2001 Session to provide that when an action is brought for personal injury or wrongful death arising out of acts occurring in Virginia against a deceased resident, as well as a deceased non-resident, “for whose estate an executor has not been appointed, an administrator of such person may be appointed [in Virginia], solely for the purpose of prosecution of said suit.”⁷⁶ The 2003 Session extended this remedy to those cases where the action is being brought “on behalf of the estate or the beneficiaries of the estate of a [deceased] resident or nonresident” for whose estate no executor has been appointed.⁷⁷

74. Act of Mar. 19, 2001 ch. 254, 2003 Va. Acts ____ (codified as amended at VA. CODE ANN. § 64.1-105(B) (Supp. 2003)).

75. VA. CODE ANN. § 64.1-105(B) (Supp. 2003). The substantive language of the Virginia legislation was drawn from the New York provision in N.Y. EST. POWERS & TR. LAW § 2-1.7(b) (Consol. 2002), and a similar Pennsylvania provision in 20 PA. CONS. STAT. § 5701(c) (2002). The 2003 legislation also made several clarifying amendments to Virginia Code section 64.1-105 and recast it into four subsections. See Act of Mar. 16, 2003, ch. 254, 2003 Va. Acts ____ (codified as amended at VA. CODE ANN. § 64.1-105 (Supp. 2003)).

76. Act of Mar. 19, 2001, ch. 376, 2001 Va. Acts 356 (codified as amended at VA. CODE ANN. § 64.1-75.1 (Repl. Vol. 2002)). This legislation was the subject of negative comment in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 35 U. RICH. L. REV. 845, 863-64 (2001).

77. Act of Mar. 16, 2003, ch. 256, 2003 Va. Acts ____ (codified as amended at VA. CODE ANN. § 64.1-75.1 (Supp. 2003)). The negative comments mentioned in the preceding footnote were not addressed by the 2003 legislation.

L. *Wrongful Death—Statutory Beneficiaries*

Virginia Code section 8.01-53, which identifies the classes of statutory beneficiaries in wrongful death cases, was amended by the 2003 Session to provide that, in the absence of any such beneficiaries, "the award shall be distributed in the course of descents as provided for in § 64.1-1."⁷⁸ Although not a part of this legislation, it is interesting to note that although Virginia Code section 8.01-53 prohibits one whose parental rights have been terminated from being a beneficiary thereunder, it does not address two other cases where "undeserving" persons are prohibited from taking under intestate succession law.⁷⁹ Virginia Code section 64.1-5.1(3)(b), dealing with inheritance upon the death of an illegitimate person, prohibits the father and his kindred from inheriting "from or through the child unless the father has openly treated the child as his and has not refused to support the child;"⁸⁰ and Virginia Code section 64.1-16.3 prohibits abandoning spouses and parents from taking by intestate succession from those they have abandoned.⁸¹ It would seem that the public policy represented by these two sections of intestate succession law should also be made applicable to statutory beneficiaries of a wrongful death award.

M. *Preneed Funeral Contracts—Irrevocable Trusts*

The general rule of Virginia Code section 54.1-2820, which states the requirements for preneed funeral contracts, requires the inclusion of certain termination provisions in every such contract.⁸² However, this general rule is subject to an exception vis-à-vis irrevocable inter vivos trusts created to pay the funeral and burial expenses of the grantor.⁸³ The 2003 Session's amendment

78. Act of Mar. 18, 2003, ch. 632, 2003 Va. Acts ____ (codified as amended at VA. CODE ANN. § 8.01-53(A) (Cum. Supp. 2003)).

79. VA. CODE ANN. § 8.01-53 (Cum. Supp. 2003).

80. *Id.* § 64.1-5.1(3)(b) (Repl. Vol. 2002 & Supp. 2003). The recent trial court decision in *Williams v. Harris*, 59 Va. Cir. 369, 370, 372-73 (Cir. Ct. 2002) (Fairfax County), contains an excellent discussion of this provision's operation.

81. VA. CODE ANN. § 64.1-16.3(B) (Repl. Vol. 2002). This Virginia Code section also prohibits an abandoning spouse from taking "elective share, exempt property, family allowance, and homestead allowance." *Id.* § 64.1-16.3(A) (Repl. Vol. 2002).

82. *Id.* § 54.1-2820(A)(7) (Repl. Vol. 2002).

83. *Id.*

to this section “[c]larifies that preneed funeral contracts executed through an irrevocable trust are not revocable and, therefore, qualify as a resource exclusion under Medicaid or other federal or state needs-based assistance programs.”⁸⁴

N. Recordation—Powers of Attorney—Social Security Number

Virginia Code section 17.1-227, entitled “Documents to be recorded in deed books,” was amended to provide that “[t]he clerk may refuse to accept any instrument submitted for recordation that includes a grantor’s, grantee’s or trustee’s social security number.”⁸⁵ This legislation will probably be interpreted by clerks as applying to general powers of attorney, although it enumerates only grantors, grantees, and trustees, and omits any reference to “principals,” because the section’s opening sentence expressly refers to “powers of attorney to convey real estate,”⁸⁶ and every well-drafted general power of attorney authorizes the conveyance of real estate. And, although this legislation is cast in permissive language (the clerk “may”),⁸⁷ experience suggests that most clerks will treat it as a mandatory requirement. The problem presented by this legislation comes from the wide-spread use of durable powers of attorney to avoid the default management provisions of Virginia’s conservatorship laws upon incapacity,⁸⁸ and the Internal Revenue Service’s requirement that “[a] power of attorney must contain the . . . [i]dentification number of the taxpayer (i.e., social security number and/or employer identification number).”⁸⁹ This conflict can easily be avoided in the future by having a client execute two separate powers, identical in all respects except for one (the one to be recorded) not containing the principal’s social security number. The real problem arises in the context of presently incapacitated principals who can no longer execute another

84. DIV. OF LEGIS. SERVS., VA. GEN. ASSEMBLY 2003 SESS. SUMMARY 154 (2003), available at <http://dls.state.va.us/> (last visited Sept. 22, 2003). Act of Mar. 19, 2003, ch. 663, 2003 Va. Acts ____ (codified as amended at VA. CODE ANN. § 54.1-2820(B) (Supp. 2003)).

85. Act of Mar. 22, 2003, ch. 862, 2003 Va. Acts ____ (codified as amended at VA. CODE ANN. § 17.1-227 (Repl. Vol. 2003)).

86. *Id.*

87. *Id.*

88. A conservator is “a person appointed by the court who is responsible for managing the estate and financial affairs of an incapacitated person.” VA. CODE ANN. § 37.1-134.6 (Cum. Supp. 2003).

89. 26 C.F.R. § 601.503(a) (2003).

power, and persons presently capacitated who (or whose attorneys) do not learn of this option prior to their incapacity. Accordingly, it is suggested that the 2004 Session amend this Virginia Code section to authorize the clerk or the person offering a power of attorney for recordation to temporarily cover the offending social security number, prior to the power's recordation, instead of allowing the clerk to refuse to record the power.⁹⁰

O. *Commissioners of Accounts—Attorneys Only*

Virginia Code section 26-8 has provided that if an attorney cannot be found who is willing to serve as a commissioner of accounts for a particular jurisdiction, "the court shall appoint some other discreet and proper person."⁹¹ Similar language has appeared in Virginia Code section 26-10, dealing with the appointment of assistant commissioners of accounts,⁹² and in Virginia Code section 26-10.1, dealing with deputy commissioners of accounts.⁹³ The 2003 Session eliminated this language from each of these sections.⁹⁴ This legislation was recommended by the Judicial Council, which was "not aware of any persons currently holding such positions who are not attorneys."⁹⁵

P. *Fiduciary Accounts—Canceled Checks as Vouchers*

The general rule of Virginia Code section 26-17.9 requires a fiduciary, who is accounting before a commissioner of accounts, to submit vouchers in support of all disbursements made during the

90. The Attorney General has opined that "[i]n the absence of statutory authority, and regardless of the motivation behind the removal of such information from a deed of trust, a circuit court clerk who removes a social security number upon recordation of an instrument does so at the risk of liability." Op. to Hon. J. Jack Kennedy, Jr. (Dec. 19, 2002), available at <http://www.oag.state.va.us/> (last visited Sept. 22, 2003).

91. VA. CODE ANN. § 26-8 (Repl. Vol. 2001).

92. *Id.* § 26-10 (Repl. Vol. 2001) ("[T]he court may appoint some other discreet and proper person.").

93. *Id.* § 26-10.1 (Repl. Vol. 2001) ("Some other discreet and proper person may be so appointed.").

94. Act of Mar. 16, 2003, ch. 194, 2003 Va. Acts ____ (codified as amended at VA. CODE ANN. §§ 26-8, -10, -10.1 (Cum. Supp. 2003)).

95. DIV. OF LEG. SERVS., *supra* note 84, at 93, available at <http://dls.state.va.us/> (last visited Sept. 22, 2003).

accounting period.⁹⁶ The 1999 Session added a new subsection to Virginia Code section 26-17.9 to allow fiduciaries to use a front-and-back copy of a canceled check as a voucher, instead of having to submit the original check to the commissioner, if the “copy was made in the regular course of business in accordance with the admissibility requirements of § 8.01-391.”⁹⁷ The 2003 Session further amended Virginia Code section 26-17.9 by providing, as an alternative to front-and-back copies, for the submission of “a copy of the front side of the check, and the periodic statement, from the financial institution showing the check number and the amount that coincides with the copy.”⁹⁸

Q. Transfer of Decedent's Motor Vehicle—Sales Tax

Virginia Code section 58.1-2403, which provides for exemptions from the Virginia Motor Vehicle Sales and Use Tax, was amended by the 2003 Session to provide for the exemption of motor vehicles “[t]itled in the name of a deceased person and transferred to the spouse or heir [sic], or under the will, of such deceased person.”⁹⁹

R. Private Trust Company Act

The 2003 Session added a new article to Title 6.1 to create the structure for a private trust company that may serve as a trustee and as an executor only for members of the family that created

96. VA. CODE ANN. § 26-17.9(A) (Repl. Vol. 2001).

97. Act of Mar. 10, 1999, ch. 74, 1999 Va. Acts 75 (codified at VA. CODE ANN. § 26-17.9(E) (Repl. Vol. 2001)).

98. Act of Mar. 16, 2003, ch. 201, 2003 Va. Acts ____ (codified as amended at VA. CODE ANN. § 26-17.9(E)(ii) (Cum. Supp. 2003)). A further 2003 amendment to this subsection provides that “the commissioner of accounts may require a fiduciary to exhibit the original check or proper voucher for a specific payment or for distributions to beneficiaries or distributees.” *Id.*

99. Act of Mar. 16, 2003, ch. 278, 2003 Va. Acts ____ (codified as amended at VA. CODE ANN. § 58.1-2403(27) (Cum. Supp. 2003)). This legislation further provides for its applicability to “such transfers occurring on or after July 1, 2003.” *Id.* It is believed that the “transfer” referred to is the one from the decedent’s personal representative to the decedent’s ultimate successor in interest, which would indicate this provision’s applicability in cases where the decedent died prior to the statute’s effective date, but the personal representative acted thereafter. *Id.* For additional discussion of the developments in Virginia tax law over the past year, see Craig D. Bell, *Annual Survey of Virginia Law: Taxation*, 38 U. RICH. L. REV. 267 (2003).

it.¹⁰⁰ Because of its costs, complexities, and limited application, this concept will be seldom employed.

III. DECISIONS OF THE SUPREME COURT OF VIRGINIA

A. *Marital Agreements—Contribution from Co-Obligor's Estate*

The primary question in *Caine v. Freier*¹⁰¹ was the impact, if any, upon the wife's ("W") rights in the husband's ("H") estate, of a post-marital agreement that was executed only by W, but was partially performed by H prior to his death.¹⁰² The Supreme Court of Virginia did not reach the issues relating to this agreement because the parties in interest failed to make appropriate assignments of error to the trial court's rulings.¹⁰³ This case, which originated as a suit brought by H's personal representative for aid and guidance, also presented two issues involving settled questions of Virginia law and another turning on a factual determination. The first of these issues focused on the right of a person who "believes himself aggrieved" by a final trial court decision to present a petition for appeal to the Supreme Court of Virginia.¹⁰⁴ In dismissing the personal representative as a party appellant, the supreme court held that it was not "aggrieved" by the trial court's decision because it "merely asked for the aid and guidance of the lower court in administering the decedent's estate, and the decree complained of gave it that relief."¹⁰⁵ The second issue dealt with the liability of H's estate vis-à-vis the unpaid balance of \$434,000 due on a purchase money indebtedness, for which H and W were jointly and severally liable, and which was secured by a deed of trust on tenancy by the entirety real estate that became the sole

100. Private Trust Company Act, ch. 910, 2003 Va. Acts ____ (codified as amended at VA. CODE ANN. §§ 6.1-32.30:1 to -32.30:7 (Cum. Supp. 2003)).

101. 264 Va. 251, 564 S.E.2d 122 (2002).

102. *Id.* at 254, 564 S.E.2d at 123-24.

103. *Id.* at 257, 564 S.E.2d at 125.

104. *Id.* at 257, 564 S.E.2d at 125 (citing VA. CODE ANN. § 8.01-670(A) (Repl. Vol. 2002)).

105. *Id.* The Court noted that the trial court's rulings had no adverse affect on the "estate" being administered by the personal representative, but only upon the beneficiaries of the estate, and that "[t]he personal representative 'has no right, at the expense of the estate, to seek [rulings] favorable to these legatees.'" *Id.* (quoting *Shocket v. Silberman*, 209 Va. 490, 492, 165 S.E.2d 414, 417 (1969)).

property of *W* following *H*'s death.¹⁰⁶ Referring to prior Virginia authority that one of two jointly liable parties who pays more than a proportionate share of their debt is entitled to contribution, the supreme court affirmed the trial court's ruling that *H*'s estate was liable to *W* "for one-half of the indebtedness that is due at the time contribution is sought."¹⁰⁷ Lastly, the supreme court did not reach the legal question regarding the enforceability of a certain "general oral agreement regarding the decedent's estate distribution plans" because "there [was] no credible testimony that [*H* and *W*] had a definite oral agreement for the distribution of his estate."¹⁰⁸

B. *Legal Malpractice—Drafting Revocable Inter Vivos Trust*

The issue in *Rutter v. Jones*,¹⁰⁹ was "the ability of an executor to bring an action for legal malpractice in connection with the preparation of testamentary [sic] documents."¹¹⁰ In this case, decedent ("*D*") told her attorney ("*A*") that she "wanted each of her two housekeepers to receive a 'remembrance amounting to about \$5,000 respectively'"¹¹¹ and that she wished five percent of her residuary estate to go to each of two charities.¹¹² However, the language of the revocable trust, drafted by *A*, only "suggested" the sum of \$5,000 for the housekeepers' gifts and "ultimately left the bequest amount to the trustee's discretion."¹¹³ The uncertainty of the housekeepers' gifts made the percentage based residuary

106. *Id.* at 259, 565 S.E.2d at 126.

107. *Id.* at 260, 564 S.E.2d at 127 (citing *Brown v. Hargraves*, 198 Va. 748, 752, 96 S.E.2d 788, 792 (1957)).

108. *Id.* at 258, 564 S.E.2d at 126. The court did, however, call attention to Virginia Code section 64.1-49 (Repl. Vol. 2002) (requiring wills to be in writing), and Virginia Code sections 20-155, -149 (Repl. Vol. 2000) (requiring marital agreements to be in writing), and made clear that it was not deciding that an oral plan would be enforced even if its existence was supported by credible evidence. See *Caine*, 264 Va. at 258, 564 S.E.2d at 126 (citing VA. CODE ANN. §§ 20-155, -149 (Repl. Vol. 2000)). However, the Supreme Court of Virginia has held that the language of Virginia Code section 20-155 requiring marital agreements to be in writing does not prevent married persons from entering into a valid oral contract to make a will. See *Black v. Edwards*, 248 Va. 90, 94, 445 S.E.2d 107, 110 (1994). For a more detailed discussion of *Black*, see J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 29 U. RICH. L. REV. 1175, 1191-94 (1995).

109. 264 Va. 310, 568 S.E.2d 693 (2002).

110. *Id.* at 313, 568 S.E.2d at 694.

111. *Id.* at 312, 568 S.E.2d at 694.

112. *Id.*

113. *Id.*

charitable gifts uncertain, and thus they failed to qualify for the federal estate tax charitable deduction,¹¹⁴ which increased the estate tax liability of *D*'s estate by \$663,996.¹¹⁵ The executor's action to recover this amount and the attorney fees *D* paid for the negligent drafting was met by *A*'s demurrer—which was sustained by the trial court and affirmed by the Supreme Court of Virginia.¹¹⁶ The supreme court noted that: (1) a fundamental requirement for the survival of a cause of action is its existence during a decedent's lifetime;¹¹⁷ (2) no cause of action can arise until there is damage;¹¹⁸ and (3) the damage claimed in this case did not arise until after *D*'s death.¹¹⁹ Thus, as *D* had no action against *A* in her lifetime, there was nothing to survive to her executor.¹²⁰ Although this decision appears to be correct under existing Virginia law, it is the sort of "technical" decision that laypersons complain about so often, that allows one who is guilty of a wrong to avoid any liability therefor. And, in a case such as the present, where the wrongdoer hiding behind the "technical" rules is an attorney, the appearance of collusion and protectionism within the legal system makes the problem that much worse. Moreover, this case does not stand alone. It must be considered in the context of the Supreme Court of Virginia's earlier decision in *Copenhaver v. Rogers*¹²¹—the practical effect of which appears to be the immunization of the will drafting attorney from malpractice claims brought by the client's beneficiaries, whether their claim is based in tort or contract.¹²² Although the narrow holding in *Copenhaver*

114. The federal provisions for charitable deductions for estate taxes can be found at 26 U.S.C. § 2055(a) (2000).

115. 264 Va. at 312, 568 S.E.2d at 694.

116. *Id.* at 312, 314, 568 S.E.2d at 694–95.

117. *Id.* at 313, 568 S.E.2d at 695.

118. *Id.*

119. *Id.* at 314, 568 S.E.2d at 695. The third element listed by the court, i.e., damage did not arise until after *D*'s death, would appear to have been met in this case because the trust in question was revocable until *D*'s death. *Id.* Thus the estate tax liability could have been avoided and the malpractice cured by amending the trust any time prior to *D*'s death. By contrast, however, if an irrevocable trust had been involved, it would appear that an injury would have occurred at the time of its execution (or the time it became irrevocable, if it was initially revocable), notwithstanding the fact that the exact amount of damages suffered by virtue of this injury might not be known until a later time.

120. *Id.*

121. 238 Va. 361, 384 S.E.2d 593 (1989).

122. See generally Brian Adams, Note, *Whose Beneficiaries Are They Anyway? Copenhaver v. Rogers and the Attorney's Contract to Prepare a Will in Virginia*, 24 U. RICH. L. REV. 415 (1990) (discussing the ramifications of the *Copenhaver* decision).

left the door open for beneficiaries to bring an action based upon a third-party-beneficiary-contract theory,¹²³ there are three significant problems facing such litigants: (1) the court “assume(d) without deciding,” for the purpose of its decision in *Copenhaver*, that Virginia’s third-party-contract-beneficiary statute, which refers to such claims based on a “covenant or promise,”¹²⁴ would apply to an oral contract;¹²⁵ (2) the two completely unrealistic examples provided by the supreme court—to make an illogical distinction between an estate beneficiary and a contract beneficiary,¹²⁶ and to illustrate a possible instance of third-party-beneficiary-contract liability to a testator’s beneficiaries¹²⁷—are both so unlikely to occur as to be non-existent;¹²⁸ and (3) the supreme court’s statement that “under traditional rules, it will no

123. The supreme court found that “[t]he [beneficiaries] never alleged that [testators] and [attorney] entered a contract of which they were intended beneficiaries. Thus, the motion for judgment utterly fails to allege a third-party beneficiary contract claim.” 238 Va. at 369, 384 S.E.2d at 597. Accordingly, the court’s further comments regarding third-party beneficiary contracts are dicta and have no binding effect on future cases.

124. VA. CODE ANN. § 55-22 (Repl. Vol. 1995) (allowing persons who are not parties to take under an “instrument” and to sue on a “covenant or promise”).

125. 238 Va. at 367, 384 S.E.2d at 595–96 (1989). The typical agreement between an attorney and a client for drafting a will, or a revocable trust to serve as a will-substitute, is not evidenced by a written contract.

126. *Id.* at 368, 384 S.E.2d at 596. It is submitted that everyone to whom a testator devises or bequeaths is an intended, as opposed to an incidental, beneficiary of the testator and of the testator’s agreement with the will-drafting attorney.

127. *Id.* at 369, 384 S.E.2d at 597.

128. The court’s opinion states in part as follows:

There is a critical difference between being the intended beneficiary of an estate and being the intended beneficiary of a contract between a lawyer and his client. A set of examples will illustrate the point: A client might direct his lawyer to put his estate in order and advise his lawyer that he really does not care what happens to his money except that he wants the government to get as little of it as possible. Given those instructions, a lawyer might devise an estate plan with various features, including *inter vivos* trusts to certain relatives, specific bequests to friends, institutions, relatives and the like. In this first example, many people and institutions might be beneficiaries of the estate, but none could fairly be described as beneficiaries of the contract between the client and his attorney because the intent of that arrangement was to avoid taxes as much as possible. By contrast, a client might direct his lawyer to put his estate in order and advise his lawyer that his one overriding intent is to ensure that each of his grandchildren receive one million dollars at his death and that unless the lawyer agrees to take all steps necessary to ensure that each grandchild receives the specified amount, the client will take his legal business elsewhere. In this second example, if the lawyer agrees to comply with these specific directives, *one might fairly argue* that each grandchild is an intended beneficiary of the contract between the client and the lawyer.

Id. at 368–89, 384 S.E.2d at 596–97 (second emphasis added).

doubt be difficult for a litigant, in a case of this kind, to meet the requirements of third-party beneficiary claims."¹²⁹ It is submitted that this shameful state of the law cannot be defended and that it is incumbent upon the General Assembly, with its attorney members in the forefront, to rectify this unjust state of the law in the 2004 Session.

C. *Revocable Trusts—Grantor/Trustee/Life Beneficiary's Conveyance of Assets*

In *Austin v. City of Alexandria*,¹³⁰ grantor ("G") created a revocable inter vivos trust in 1993 ("Trust 1"), of which he was trustee and life beneficiary, and from which he was permitted to withdraw property by a signed instrument "upon giving reasonable notice in writing to the Trustee."¹³¹ On the same day, G conveyed certain real estate to Trust 1 by a deed, which provided in part that "[a]ny revocation of [Trust 1] by the [G] shall not be effective as to the property herein conveyed unless he execute[s] a deed, duly recorded, evidencing such revocation and reversion of title."¹³² G created another revocable inter vivos trust in August 1999 ("Trust 2"), of which he was also trustee and life beneficiary, and to which he purported to deed the real estate previously conveyed to Trust 1.¹³³ However, this deed made no mention of the

129. *Id.* at 371, 384 S.E.2d at 598. This statement follows the Supreme Court of Virginia's discussion of a Pennsylvania case wherein the Supreme Court of Pennsylvania, citing one of its prior opinions, stated that a will beneficiary would be able to maintain a third party beneficiary action against a negligent drafter only if their "*contract indicated the intention of both parties to benefit the legatee . . . [and] even if the naming of the legatee in the will is taken as indicating the testator's intent to benefit the legatee, it cannot be taken to indicate that the drafting attorney intended to confer any benefit.*" *Id.* at 370, 384 S.E.2d at 598 (alteration in original) (quoting *Guy v. Liederbach*, 459 A.2d 744, 751 (1983)). With due respect to the Supreme Courts of both Pennsylvania and Virginia, it is submitted that the drafting attorney does not have to intend to make a gift to a client's beneficiaries in order to have the requisite intent to "confer any benefit" upon them. The benefit the attorney intends (or should be deemed to intend) to confer upon them, for a consideration paid by the client, is a negligence-free will or trust that will enable them to receive their intended gifts from the client.

130. 265 Va. 89, 574 S.E.2d 289 (2003).

131. *Id.* at 91–92, 574 S.E.2d at 290.

132. *Id.* at 92, 574 S.E.2d at 290–91.

133. *Id.* at 93, 574 S.E.2d at 291.

1993 deed of the same property to Trust 1, and the signature thereon did not describe *G* as the trustee of Trust 1.¹³⁴

In October 1999, *G*, acting as trustee of Trust 2, entered into a contract for the sale of the real estate in question.¹³⁵ Following *G*'s death in March 2000, and prior to the date for performance of the real estate sale contract, the successor trustee of Trust 1 sought a declaratory judgment that the property in question remained a part of Trust 1 and thus was not subject to the sales contract.¹³⁶ The trial court, applying a substance over form analysis, concluded that the property was a part of Trust 2, and thus subject to the sales contract, because *G* had withdrawn the property from Trust 1 "by virtue of the documents creating [Trust 2] and the deed to himself as trustee of [Trust 2]."¹³⁷ However, the supreme court reversed, holding that "the 1999 deed purporting to convey the property to [Trust 2] was ineffective because [*G*] did not make the conveyance as trustee of [Trust 1] and he had no legal title in the property to convey in his individual capacity."¹³⁸

D. Boiler-Plate Fiduciary Powers—Meaning of "Estate"

Virginia Code section 64.1-57 contains a collection of fiduciary powers that may be conferred upon an executor or trustee by reference thereto in the governing will or trust,¹³⁹ and Virginia Code section 64.1-57.1 creates a procedure whereby a circuit court may grant any or all of these powers to a personal representative or trustee when the governing instrument fails to do so, and to an administrator where there is no will.¹⁴⁰ One of these powers authorizes a fiduciary to "sell . . . any . . . property, either real, personal or mixed, which may be included in, or may at any time become part of the trust or estate."¹⁴¹ In *In re Estate of Trent*,¹⁴² the testatrix's personal estate was insufficient to pay her debts and her administrator c.t.a. petitioned the court, pursuant to Virginia

134. *Id.*

135. *Id.*

136. *Id.* at 94, 574 S.E.2d at 291-92.

137. *Id.* at 94, 574 S.E.2d at 292.

138. *Id.* at 97, 574 S.E.2d at 293.

139. VA. CODE ANN. § 64.1-57 (Supp. 2003).

140. *Id.* § 64.1-57.1 (Repl. Vol. 2002 & Supp. 2003).

141. *Id.* § 64.1-57(1)(b) (Supp. 2003).

142. 58 Va. Cir. 83 (Cir. Ct. 2001) (Richmond City).

Code section 64.1-57.1, "for a grant of the powers set out in Va. Code § 64.1-57, particularly the power to sell the [testatrix's] real estate."¹⁴³ However, the court denied this request on the ground that the power in question would only authorize the sale of realty in testatrix's "estate" and "[i]n the absence of testamentary language to the contrary, title to real property vests in the devisee or heir immediately upon the death of the decedent."¹⁴⁴ To the argument that the word "estate," as used in Virginia Code section 64.1-57(1)(b), did not have such a limited meaning, the court responded that there was no need for statutory construction because the provision in question was "clear and unambiguous [and] . . . [s]ince the real property belonging to [testatrix] has never become part of her estate, the court cannot grant petitioner the power he seeks."¹⁴⁵ No appeal was taken from this decision.

In a subsequent case before the same court, *In re Estate of Rountree*,¹⁴⁶ an intestate's personal estate was insufficient to pay her debts and her administrator petitioned the court, pursuant to Virginia Code section 64.1-57.1, for a grant of the powers set out in Virginia Code section 64.1-57 in order to sell her real estate.¹⁴⁷ However, the court denied this request, "for the reasons stated . . . in [*Trent*]."¹⁴⁸ In reversing the *Rountree* decision, the Supreme Court of Virginia noted that the case upon which the trial court relied in *Trent*¹⁴⁹ "did not hold that a decedent's real property is not part of the estate merely because title vests in the decedent's heirs or devisees,"¹⁵⁰ and that "[w]ith regard to the definition of the word 'estate', we have previously acknowledged 'the varied meaning which attaches to this word under varying conditions[.]'"¹⁵¹ As the supreme court's decision in *Rountree* came in the form of an unpublished order, the full text of this order is re-

143. *Id.* at 83. For a more detailed discussion of Virginia Code section 64.1-57, see *supra* Part II.D.

144. *In re Estate of Trent*, 58 Va. Cir. at 84 (citing *Broadbuss v. Broadbuss*, 144 Va. 727, 741-42, 130 S.E. 794, 798-99 (1925)).

145. *Id.* at 86.

146. No. HQ-2426-4 (Va. Cir. Ct. Apr. 23, 2002) (Richmond City); see also *supra* note 37 and accompanying text.

147. *Rountree*, No. HQ-2426-4, at 1.

148. *Id.*

149. 58 Va. Cir. 83, 84 (Cir. Ct. 2001) (Richmond City) (relying upon *Broadbuss*, 144 Va. at 741-42, 130 S.E. at 798-99).

150. *In re Bullock*, No. 021740, slip op. at 3 (Va. Apr. 17, 2003).

151. *Id.* at 3-4 (quoting *Neblett v. Smith*, 142 Va. 840, 851, 128 S.E. 247, 250 (1925)).

produced as an appendix to this article¹⁵² as a service to the bar because it reverses the result and rationale of a published trial court opinion (*Trent*), and it contains further definitional material relating to "estate" that will be helpful to the bar beyond the narrow context of the *Trent* and *Rountree* cases.¹⁵³

IV. VIRGINIA CIRCUIT COURT: REVOCABLE INTER VIVOS TRUST— REVOCATION BY CONSERVATOR

The issue in *In re Rudwick*¹⁵⁴ was whether the conservator of an incapacitated settlor could exercise the settlor's reserved power of revocation to revoke her inter vivos trust.¹⁵⁵ The trial court rendered a decision concluding that, unless negated by the trust agreement, "the statutory powers conferred on [the conservator] pursuant to Va. Code Ann. §§ 37.1-137.3, 37.1-137.4, and 64.1-57, affirmatively empower him to exercise [the settlor's] power to revoke her trust, without prior court approval."¹⁵⁶ Because of the legal issues and practical problems raised by this decision, the Virginia Bar Association and the Virginia Bankers Association requested and received permission to file amicus curiae briefs in opposition thereto and to participate in a rehearing prior to the entry of a final order based upon that decision. However, the case was rendered moot by the settlor's death prior to the scheduled rehearing which automatically terminated the settlor's trust and the conservator's powers.¹⁵⁷ As a result of this case, the

152. See *infra* Part VI.

153. The results in *Trent* and *Rountree* prompted an amendment to Virginia Code section 64.1-57. The amendment specifies that "[f]or the purposes of this section, the term 'estate' shall include all interests in the real or personal property of a decedent passing by will or by intestacy." Act of Mar. 16, 2003, ch. 30, 2003 Va. Acts ____ (codified as amended at VA. CODE ANN. § 64.1-57(6) (Cum. Supp. 2003)). For additional discussion of this amendment, see *supra* Part II.D.

154. No. 01-633, 2002 WL 31730757 (Va. Cir. Ct. Dec. 5, 2002) (Arlington County).

155. *Id.* at *1.

156. *Id.* at *6.

157. Due to the settlor's death, the trial court concluded that "this matter no longer presents a justiciable controversy" and entered a final order dismissing the case. *In re Rudwick*, No. 01-633 (Va. Cir. Ct. May 19, 2003) (final order dismissing case). For a copy of the final order see *infra* Part VI. Ordinarily, this mootness would prevent the case from being the subject of comment in this annual review. However, as the court's opinion was the subject of a front-page story in *Virginia Lawyers Weekly* (Paul Fletcher, *Conservator Has Power to Revoke Trust for Ward*, 17 VA. LAW WKLY. 709 (2002)); was published by one of the national reporting systems, was digested in *Virginia Lawyers Weekly*, *id.* at 724;

Virginia Bar Association successfully sought legislation in the 2003 Session providing that "[a] conservator may exercise the incapacitated person's power to revoke or amend a trust or to withdraw or demand distribution of trust assets only with the approval of the court for good cause shown, unless the trust instrument expressly provides otherwise."¹⁵⁸

V. CONCLUSION

For the reasons recited herein, it is respectfully submitted that the 2004 Session should: (1) enact legislation removing all barriers presently preventing a decedent's beneficiaries and personal representative from bringing a cause of action to recover damages from the attorney whose negligent will or trust drafting has resulted in economic loss or damage;¹⁵⁹ (2) enact legislation applicable to an agent seeking to revoke a principal's inter vivos trust that parallels the 2003 legislation applicable to a conservator;¹⁶⁰ and (3) amend Virginia Code section 17.1-227 to provide for temporarily covering a principal's social security number upon the recordation of a power of attorney.¹⁶¹

and was picked up by at least one professional newsletter; it is possible that many who have heard of the opinion might not otherwise hear of its ultimate resolution and that some might rely upon its analysis as a correct statement of Virginia law.

158. Act of Mar. 16, 2003, ch. 528, 2003 Va. Acts __ (codified as amended at VA. CODE ANN. § 37.1-137.5(D) (Cum. Supp. 2003)); *see also supra* discussion Part II.E.

159. *See supra* Part III.B.

160. *See supra* Part II.E.

161. *See supra* Part II.N.

VI. APPENDIX

A. In re Estate of Rountree

*Virginia:**In the Circuit Court of the City of Richmond, John Marshall Courts Building*IN RE: THE ESTATE OF
ROSETTA S. ROUNTREE, Deceased

HQ-2426-4

O R D E R

This cause came on April 5, 2002, on the petition of Willie E. Bullock, Administrator of the Estate of Rosetta S. Rountree, deceased, to be granted the powers set out in Va. Code § 64.1-57, particularly the power to sell the real property located at 1432 Boroughbridge Road in Richmond, and was argued by counsel.

Upon consideration whereof, and for the reasons stated in the letter opinion dated November 27, 2001, in Case No. HQ-1786-4, In Re: The Estate of Carolyn Carlotta Trent, Deceased, it is --

ORDERED that the petition is denied, petitioner's objection being noted.

And nothing further remaining to be done herein, it is ordered that this action is removed from the active docket of the court and the papers placed among the ended causes.

A copy of this order was mailed this day to counsel of record.

ENTER

4/23/2002

RECEIVED

APR 25 2002


Randall G. Johnson, Judge

