

11-2004

Wills, Trusts, and Estates

J. Rodney Johnson

University of Richmond School of Law

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>

Part of the [Estates and Trusts Commons](#)

Recommended Citation

J. R. Johnson, *Wills, Trusts, and Estates*, 39 U. Rich. L. Rev. 447 (2004).

Available at: <https://scholarship.richmond.edu/lawreview/vol39/iss1/17>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

WILLS, TRUSTS, AND ESTATES

J. Rodney Johnson *

I. INTRODUCTION

The General Assembly enacted legislation dealing with wills, trusts, and estates that added or amended a number of sections of the Virginia Code in its 2004 Session. In addition, there were four opinions from the Supreme Court of Virginia 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. *Fiduciary Accounting—Total Return Unitrusts*

Many trusts receive a number and variety of income items during every annual accounting period. Since January 1, 2000, the correct allocation of these income items between current and future beneficiaries is determined by Virginia's version of the Uniform Principal and Income Act (1997)² ("UPIA"), except as the Virginia Code or a controlling document expressly provides to the

* Professor of Law, *Emeritus*, University of Richmond School of Law. B.A., 1965, College of William and Mary; J.D., 1967, Marshall-Wythe School of Law, College of William and Mary; LL.M., 1970, New York University.

1. In order to facilitate the discussion of numerous Virginia Code sections, they will often be referenced to in the text by the section numbers only. Unless otherwise stated, those section numbers will refer to the latest printing of the old sections and to the 2004 cumulative supplement for the new sections.

2. UNIF. PRINCIPAL AND INCOME ACT (1997), 7B U.L.A. 131 (Supp. 2003) [hereinafter UPIA].

contrary.³ Among other things, the enactment of UPIA provided a remedy for the conflict of interest caused by a trustee investing under a portfolio-oriented prudent investor rule, and then allocating the receipts therefrom under traditional principal/income considerations,⁴ by authorizing a trustee to make adjustments between the principal and income accounts in order to reach a result that is fair and reasonable to all beneficiaries.⁵ A more recent alternative to UPIA's "power to adjust" is the "total return unitrust" (TRU), which bases payments to present beneficiaries on a percentage of the trust portfolio's fair market value.⁶ Notwithstanding their obvious advantages to fiduciaries and beneficiaries, neither of these developments have been utilized to their full potential because of concerns by estate, gift, and income tax professionals regarding their treatment by the Internal Revenue Service.⁷ This uncertainty came to an end when the Department of the Treasury released final regulations on December 30, 2003,⁸ providing that the utilization of a power to adjust or the conversion of a standard trust into a TRU in accordance with a state's statutory law, and within the regulation's parameters, "will *not*: (1) Cause a loss of the federal estate tax marital deduction, or (2) Trigger a taxable transfer for gift tax purposes, or (3) Result in a taxable sale or exchange . . . , or (4) Undo generation-skipping transfer (GST) tax grandfathering."⁹ Against this background, and with statutory authority already existing in UPIA for the power to adjust, the 2004 Session enacted Virginia Code section 55-277.4:1, based upon Delaware's 2001 statute,¹⁰ to authorize

3. The Virginia General Assembly enacted UPIA as the Act of Apr. 7, 1999, ch. 975, 1999 Va. Acts 2568. It was codified at Virginia Code sections 55-277.1 to -277.33 (Repl. Vol. 2003). This enactment is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 33 U. RICH. L. REV. 1075, 1076-78 (1999).

4. This conflict is noted in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 26 U. RICH. L. REV. 873, 890-91 (1992).

5. VA. CODE ANN. § 55-277.4 (Repl. Vol. 2003).

6. See Robert B. Wolf & Stephan R. Leimberg, *Total Return Trusts Approved by New Regs., but State Law is Crucial*, 31 ESTATE PLANNING 179, 180-81 (2004).

7. *Id.* at 179-80.

8. Definition of Income for Trust Purposes, 69 Fed. Reg. 12 (Jan. 2, 2004) (to be codified at 26 C.F.R. pts. 1, 20, 25 & 26).

9. Wolf & Leimberg, *supra* note 6, at 179. TRU conversion statutes exist in seventeen states and power to adjust statutes exist in thirty-five states and the District of Columbia, with some jurisdictions having both options and some having neither. *Id.*

10. DEL. CODE ANN. tit. 12, § 3527 (2001) (enacted by 73 Del. Laws 48 (2001)). In *Lumbermens Mut. Cas. Co. v. Indemnity Ins. Co.*, 186 Va. 204, 209, 42 S.E.2d 298, 301 (1947), the Supreme Court of Virginia stated that "[w]hen the legislature of one State

the conversion of income trusts into TRUs (and vice versa) and to provide rules to govern their operation.¹¹ Although a detailed comparison of the Virginia TRU statute with its Delaware ancestor is not feasible within the confines of this annual review, a listing of the Virginia differences will be found in the footnotes.¹² One

adopts a statute of another State, such legislature is presumed to have adopted the construction placed upon it by the courts of that State." However, a Westlaw search on April 28, 2004, for "total return unitrust" within the Delaware case database returned the response "no documents satisfy your query."

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

12. The changes made by the Act of Apr. 12, 2004, ch. 639, 2004 Va. Acts ____ (codified at VA. CODE ANN. § 55-277.4:1 (Cum. Supp. 2004)) to DEL. CODE ANN. tit. 12, § 3527 (2001) were, with ministerial exceptions, as follows:

(1) Virginia Code section 55-277.4:1(A)(2). Virginia adds to the definition of "income trust" the following: "and regardless of whether the trust directs or permits the trustee to distribute the principal of the trust to one or more such persons." Virginia deletes therefrom the following sentence: "Notwithstanding the foregoing, no trust that otherwise is an 'income trust' shall qualify hereunder if it may be subject to taxation under I.R.C. § 2001 or § 2501 [26 U.S.C. § 2001 or § 2501] until the expiration of the period for filing the return therefor (including extensions)." DEL. CODE ANN. tit. 12, § 3527(a)(2) (2001).

(2) Virginia Code sections 55-277.4:1(B)(iii), (B)(1)(iii), (C)(iii), (C)(1)(iii), and (D). In each of these five places, Virginia replaces "and/or" with "or." DEL. CODE ANN. tit. 12, § 3527(b)(3), (b)(3)(a)(3), (c)(3), (c)(3)(a)(3), (d) (2001).

(3) Virginia Code sections 55-277.4:1(C)(3) and (C)(5). In both places, Virginia deletes "the determinations of the disinterested person." DEL. CODE ANN. tit. 12, § 3527(c)(3)(c), (c)(3)(e) (2001).

(4) Virginia deletes DEL. CODE ANN. tit. 12, § 3527(g) (2001) which reads:

The unitrust amount shall not be less than the net income of the trust, determined without regard to the provisions of subsection (h), for (i) a trust for which a marital deduction has been taken for federal tax purposes under I.R.C. § 2056 or § 2523 [26 U.S.C. § 2056 or 2523] (during the lifetime of the spouse for whom the trust was created), or (ii) a trust to which the generation-skipping transfer tax due under I.R.C. § 2601 [26 U.S.C. § 2601] does not apply by reason of any effective date or transition rule."

(5) Virginia deletes DEL. CODE ANN. tit. 12, § 3527(k) (2001) which reads:

In the case of a trust for which a marital deduction has been taken for federal tax purposes under I.R.C. § 2056 or § 2523 [26 U.S.C. § 2056 or § 2523], the spouse otherwise entitled to receive the net income of the trust shall have the right, by written instrument delivered to the trustee, to compel the reconversion during his or her lifetime of the trust from a total return unitrust to an income trust, notwithstanding anything in this section to the contrary."

(6) Virginia Code section 55-277.4:1(G). Virginia adds "(3) Shall treat the unitrust amount as if it were income of the trust for purposes of determining the amount of trustee compensation where the governing instrument directs that such compensation be based wholly or partially on income."

(7) Virginia Code section 55-277.4:1(J). Virginia deletes the restriction that

concern that has already been raised in connection with Virginia Code section 55-277.4:1 is its effective date provision which states that "this act shall be applicable to trusts in existence at the date of passage of this act."¹³ Read literally, this would mean that the statute does not authorize the conversion of income trusts created after its "date of passage"¹⁴ to be converted into TRUs. Typically, one would not expect such an interpretation, but in light of the fact that the interpretation will be made by the Internal Revenue Service, it seems likely that this language will be clarified by the 2005 Session.

B. *Legal Malpractice—Irrevocable Trusts*

In *Rutter v. Jones, Blechman, Woltz & Kelly, P.C.*,¹⁵ the Supreme Court of Virginia held that a decedent's executor could not bring a malpractice cause of action against an attorney who negligently drafted the decedent's revocable inter vivos trust because, as no damages arose until after the decedent's death, the decedent had no lifetime cause of action that could survive to the ex-

the trust be administered within the state. DEL. CODE ANN. tit. 12, § 3527(l) (2001).

(8) Virginia Code section 55-277.4:1(J)(2). Virginia deletes the references to "I.R.C. § 1361(d), § 2702(a)(3) or § 2702(b) . . . [26 U.S.C. § 1361(d), § 2702 (a)(3), or § 2702(b)]." DEL. CODE ANN. tit. 12, § 3527 (l)(2) (2001).

(9) Virginia deletes DEL. CODE ANN. tit. 12, § 3527(l)(3) (2001) which reads:

one or more persons to whom the trustee could distribute income have a power of withdrawal over the trust that is not subject to an ascertainable standard under I.R.C. § 2041 or § 2514 [26 U.S.C. § 2041 or § 2514] or that can be exercised to discharge a duty of support he or she possesses. [Had this been adopted in Virginia, it would have appeared as section 55-277.4:1(J)(3).]

(10) Virginia Code section 55-277.4:1(J)(3). Virginia adds "or, 'my trustee shall not determine the distribution to the income beneficiary as a unitrust amount.'" DEL. CODE ANN. tit. 12, § 3527(l) (2001).

13. VA. CODE ANN. § 55-277.4:1 (Cum. Supp. 2004).

14. The term "date of passage" is not a defined term in the Virginia legislative process. The TRU bill was passed by the House of Delegates on February 17, passed by the Senate on March 9, signed by the Speaker of the House and the President of the Senate on March 24, signed by the Governor on April 12, and it became law on July 1, 2004. For a detailed discussion of the bill's legislature path, see the Bill Tracking Summary at <http://leg1.state.va.us/cgi-bin/legp504.exe?041+sum+HB1388ER> (last visited Sept. 16, 2004).

15. 264 Va. 310, 568 S.E.2d 693 (2002). This case is also discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 38 U. RICH. L. REV. 287, 307-10 (2003).

ecutor.¹⁶ This was a correct decision in the context of a revocable trust because the estate tax liability caused by the malpractice could have been avoided by amending the trust at any time before the settlor's death. By contrast, however, if the trust had been irrevocable, an injury would have occurred at the time of the trust's creation, notwithstanding the fact that the exact amount of the damages suffered as a result of this injury might not be known until a later time. This distinction between a revocable and an irrevocable inter vivos trust, however, was not made in the Supreme Court of Virginia's opinion. Therefore, in order to prevent the bench and bar from possibly misinterpreting the *Rutter* holding as being applicable to an irrevocable inter vivos trust, the 2004 Session amended Virginia Code section 64.1-145 to provide that "[a]n action at law for damages, including future tax liability, to the grantor, his estate or his trust, resulting from legal malpractice concerning an irrevocable trust shall accrue upon completion of the representation in which the malpractice occurred."¹⁷ In addition, to dispel any notion that this legislation was making any change to the law, the General Assembly further provided "[t]hat the provisions of this act are declaratory of existing law."¹⁸ This clarification of the law relating to a settlor's cause of action for attorney malpractice in connection with the settlor's irrevocable trust also serves to magnify the absence of any beneficiary remedy for attorney malpractice in connection with wills

16. *Rutter*, 264 Va. at 314, 568 S.E.2d at 695.

17. Act of Apr. 8, 2004, ch. 368, 2004 Va. Acts ____ (codified at VA. CODE ANN. § 64.1-145(B) (Cum. Supp. 2004)). This legislation also provided that: (1) "The action may be maintained pursuant to § 8.01-281 by the grantor, or by the grantor's personal representative or the trustee if such damages are incurred after the grantor's death," VA. CODE ANN. § 64.1-145(B) (Cum. Supp. 2004), and (2) "[a]ny action pursuant to this section shall survive pursuant to § 8.01-25." *Id.* § 64.1-145(C) (Cum. Supp. 2004).

18. Act of Apr. 8, 2004, ch. 368, cl. 2, 2004 Va. Acts ____ (codified at VA. CODE ANN. § 64.1-145 (Cum. Supp. 2004)). The General Assembly has sometimes employed the term "declaratory of existing law" to communicate its intent that particular legislation 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 express the General Assembly's intent regarding the proper interpretation of prior legislation, i.e., what it meant by what was originally said, or to codify a common law rule believed to already exist in the Commonwealth. However, case law and anecdotal evidence show that such usage has not been a consistent practice. *See, e.g.,* *Boyd v. Commonwealth*, 216 Va. 16, 20-21, 215 S.E.2d 915, 918 (1975), (per curiam) discussed *infra* Part III.A.2. But, in light of the Supreme Court of Virginia's recent decision in *Chappell v. Perkins*, 266 Va. 413, 587 S.E.2d 584 (2003), discussed *infra* Part III.A., it will be important, if not critical, for the General Assembly to employ this term in the future whenever prior legislation is being clarified or the common law is being codified.

and revocable or irrevocable trusts.¹⁹ A recent article lists Virginia as one of only nine jurisdictions in which a strict application of the privity rules still continues to prevent a beneficiary's cause of action in these cases,²⁰ regardless of the clarity of the evidence, the foreseeability of the harm, and the enormity of the damages. This is not a badge of honor for the estate planning bar or the General Assembly.

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

Continuing the inflation-adjustment work on small estate statutes that began in 2001,²¹ the 2004 Session increased the \$10,000 ceiling applicable to Virginia Code section 51.1-164,²² which deals with payments from the Virginia Retirement System. However, instead of following its established pattern and increasing this section's ceiling to \$15,000, the 2004 amendment increases the ceiling to "the maximum allowed in § 64.1-132.2."²³ This latter section is a part of the Virginia Small Estate Act²⁴ where the permissive payout, instead of focusing on the amount of the particular claim in question, is limited (like the Retirement Systems's remedy) to those cases where "[t]he value of the entire personal probate estate, wherever located, does not exceed \$15,000."²⁵ Thus, notwithstanding the 2004 amendment, the practical value of Virginia Code section 51.1-164 continues to pale in significance when it is compared to other small estate statutes

19. This topic is addressed in Johnson, *supra* note 15, at 307–10.

20. Martin D. Begleiter, *The Gambler Breaks Even: Legal Malpractice in Complicated Estate Planning Cases*, 20 GA. ST. U. L. REV. 277, 282 n.34 (2003). *Copenhaver v. Rogers*, 238 Va. 361, 384 S.E.2d 593 (1989), which Professor Begleiter cites as the controlling authority in Virginia, denied a remedy in tort and in contract to the beneficiaries. For further discussion of the *Copenhaver* case, see 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).

21. 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 adjustments made in 2002, see J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 37 U. RICH. L. REV. 357, 363–64 (2002); and for a report on further adjustments made in 2003, see Johnson, *supra* note 15, at 296.

22. Act of Mar. 12, 2004, ch. 81, 2004 Va. Acts ____ (codified at VA. CODE ANN. § 51.1-164 (Cum. Supp. 2004)).

23. *Id.*

24. VA. CODE ANN. §§ 64.1-132.1 to -132.4 (Repl. Vol. 2002).

25. *Id.* § 64.1-132.2(1) (Repl. Vol. 2002).

that authorize the payment of amounts due a decedent not exceeding \$15,000, without any regard to the value of the other assets, if any, in the decedent's probate estate.

D. *Recordation—Powers of Attorney—Social Security Number*

Virginia Code section 17.1-227, entitled "Documents to be recorded in deed books," was amended by the 2003 Session 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."²⁶ This legislation was strongly criticized in the 2003 *Annual Survey of Virginia Law*²⁷ because of the problem it created in regard to a power of attorney which, to be recognized by the Internal Revenue Service, "must contain the . . . [i]dentification number of the taxpayer (i.e., social security number and/or employer identification number)."²⁸ Two bills were introduced in the 2004 Session that would have satisfactorily resolved these problems by adding to the 2003 language the following clause:

except that with respect to a power of attorney, if the person offering such power of attorney for recordation authorizes the clerk to temporarily cover or conceal the social security number while the power of attorney is being recorded so that it will not appear on the recorded copy, the clerk shall accept such power of attorney for recordation."²⁹

However, the misguided legislation that was ultimately enacted provides as follows: "However, the attorney or party who prepares or submits the instrument has responsibility for ensuring that the social security number is removed from the instrument prior to the instrument being submitted for recordation."³⁰

There are two rather obvious problems presented by the 2004 enactment: (1) if the social security number is "removed," instead of being temporarily covered during the recordation process, the power of attorney will no longer meet the Internal Revenue Ser-

26. *Id.* § 17.1-227 (Cum. Supp. 2004).

27. Johnson, *supra* note 15, at 303-04.

28. Treas. Reg. § 601.503(a)(2) (2003).

29. This was the language of both House Bill No. 229, H.B. 229, Va. Gen. Assembly (Reg. Sess. 2004), and House Bill No. 332, H.B. 332, Va. Gen. Assembly (Reg. Sess. 2004).

30. Act of Apr. 8, 2004, ch. 352, 2004 Va. Acts ____ (codified at VA. CODE ANN. § 17.1-227 (Cum. Supp. 2004)).

vice's recognition requirements noted above, and this was the reason for the 2004 legislation in the first place; and (2) there is no authority for an agent, or any other person, to remove anything from a principal's power of attorney.³¹ Accordingly, it is suggested that the 2005 Session replace this year's non-responsive legislation with language allowing the person offering a document for recordation to temporarily cover any social security number therein so it will not appear on the recorded copy.³²

E. Power of Attorney—Incapacitated Principal—Accounting and Revocation

Virginia Code section 11-9.1, which authorizes one to create a durable power of attorney, has provided that when a conservator or committee is appointed for an incapacitated principal, the principal's agent must thereafter account to such appointee the same as the agent would otherwise be obligated to account to the principal.³³ The 2004 amendment to this section adds guardians to the list of appointees to whom the incapacitated principal's agent must account.³⁴ This is a good idea because, in the typical case, the presence of a durable power of attorney will most likely keep the court from appointing a conservator to handle the incapacitated person's business affairs and thus there would be no one to review the agent's actions.³⁵ A second 2004 amendment to Vir-

31. 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/media%20center/Opinions/2002opns/02-116.htm> (last visited Sept. 16, 2004). It is not believed that the language of the 2004 amendment could legitimately be interpreted as impliedly granting authority to "the attorney or party who prepares or submits the instrument" for recordation to remove the principal's social security number therefrom. Act of Apr. 8, 2004, ch. 352, 2004 Va. Acts ____ (codified at VA. CODE ANN. § 17.1-227 (Cum. Supp. 2004)). And, even if it could, this removal would not solve the problem. The only solution to the problem is temporary concealment.

32. A very simple amendment to the 2003 "no-recordation" provision, which would not place any burden on the clerk of court, might take the following form: "Except that if a person offering a power of attorney for recordation temporarily covers or conceals any social security number thereon, so that it will not appear on the recorded copy, the clerk shall accept such power of attorney for recordation."

33. See VA. CODE ANN. § 11-9.1 (Repl. Vol. 1999).

34. Act of Apr. 8, 2004, ch. 380, 2004 Va. Acts ____ (codified at VA. CODE ANN. § 11-9.1(A) (Cum. Supp. 2004)).

35. Virginia Code section 37.1-134.14 (Cum. Supp. 2004) provides in part that:

ginia Code section 11-9.1 includes an incapacitated person's guardian in the list of those who have standing to seek the revocation, suspension, or limitation of the agent's authority in circuit court.³⁶ Again, and for the same reason stated above, this is a good idea.³⁷

F. Charitable Corporation—Directors' Standard of Care

Following a four-to-three decision of the Supreme Court of Virginia holding that the State Corporation Commission had exclusive jurisdiction over the regulation of public charities operating as non-profit corporations,³⁸ the 2002 Session enacted two remedial statutes: one giving the circuit courts subject matter jurisdiction over such corporations,³⁹ and another giving the Attorney

[a] conservator need not be appointed for a person (i) who has appointed an agent under a durable power of attorney, unless the court determines pursuant to § 37.1-134.22 that the agent is not acting in the best interests of the principal or there is a need for decision-making outside the purview of the durable power of attorney

It might also be noted that, for similar reasons, there might not be a guardian either, because Virginia Code section 37.1-134.14 (Cum. Supp. 2004) further provides in part that:

[a] guardian need not be appointed for a person who has appointed an agent under an advance directive . . . [medical power of attorney] unless the court determines that the agent is not acting in accordance with the wishes of the principal or there is a need for decision-making outside the purview of the advance directive.

36. Act of Apr. 8, 2004, ch. 380, 2004 Va. Acts ____ (codified at VA. CODE ANN. § 11-9.1(B) (Cum. Supp. 2004)).

37. Act of Apr. 8, 2004, ch. 380, 2004 Va. Acts ____ (codified at VA. CODE ANN. § 11-9.1(B) (Cum. Supp. 2004)). In theory, the need for the guardian to be added to the list of those who have standing to seek an agent's removal is not as great as the need for the guardian to receive accountings from the agent because the class of those who have standing to seek an agent's removal also includes "a person interested in the welfare of the principal as defined in § 37.1-134.22." VA. CODE ANN. § 11-9.1(B) (Cum. Supp. 2004). However, the removal provision does contain an Achilles heel because, although this defined class ("person interested in the welfare of the principal as defined in § 37.1-134.22") does include certain members of the principal's family, certain other fiduciaries, and the adult protective services unit of the local social services board, it still does not guarantee that there will be someone to seek the agent's removal. A recent circuit court case correctly determined that this section's definition of "family" does not include cousins (even though they are the closest kindred). *Turner v. Bowman*, 64 Va. Cir. 354, 361 (Cir. Ct. 2004) (Rockingham County). And, the court found that there were no "other fiduciaries," and the local "Adult Protective Services has expressed no desire to participate in this litigation or initiate its own investigation or litigation." *Id.* at 362.

38. See *Commonwealth v. JOCO Found.*, 263 Va. 151, 164-65, 558 S.E.2d 280, 286-87 (2002), cited in *Johnson, supra* note 21, at 371, 378 (2002).

39. Act of Apr. 8, 2002, ch. 792, 2002 Va. Acts 1321 (codified as amended at VA. CODE ANN. § 17.1-513.01(A) (Cum. Supp. 2004)), cited in *Johnson, supra* note 21, at 371 (2002).

General standing to act on behalf of the public in connection therewith.⁴⁰ Thereafter, a concern developed within the bar that these changes in the enforcement mechanism for non-profit corporations might also imply a change in the standard of care applicable to the directors of such corporations.⁴¹ This concern was eliminated by the 2004 Session, which added, to both the jurisdiction and the standing sections created by the 2002 Session, the following language: "Nothing contained in this section is intended to modify the standard of conduct applicable under existing law to the directors of charitable corporations incorporated in or doing any business in Virginia."⁴²

G. Cemeteries—Authorization for Interment

The 2004 Session added section 57-27.3 to the Virginia Code to provide that, unless a cemetery is on written notice of a dispute between a decedent's next of kin, it may accept the notarized signature of any one of them as authorization for interment, entombment, and the erection of a memorial.⁴³ This legislation is quite troubling because it ignores certain priorities that should be recognized within the ranks of a decedent's successors. Another

40. Act of Apr. 8, 2002, ch. 792, 2002 Va. Acts 1321 (codified as amended at VA. CODE ANN. § 2.2-507.1(A) (Cum. Supp. 2004)), cited in Johnson, *supra* note 21, at 371 (2002).

41. The source of this concern is a sentence in the "standing" section that reads in part as follows: "The assets of a charitable corporation incorporated in or doing any business in Virginia shall be deemed to be held in trust for the public . . ." VA. CODE ANN. § 2.2-507.1(A) (Cum. Supp. 2004)).

42. Act of Mar. 31, 2004, ch. 289, 2004 Va. Acts ____ (codified at VA. CODE ANN. § 2.2-507.1(B) (Cum. Supp. 2004)), and Act of Mar. 31, 2004, ch. 247, 2004 Va. Acts ____ (codified at VA. CODE ANN. § 17.1-513.01(B) (Supp. 2004)). In addition to the foregoing, the "standing" section was amended to change a non-profit corporation's charitable purposes from those "established by the donor's intent as expressed in governing documents or by other applicable law," VA. CODE ANN. § 2.2-507.1 (Cum. Supp. 2003), to those "established by the governing documents of such charitable corporation, the *gift or bequest* made to such charitable corporation, or other applicable law." Act of Mar. 31, 2004, ch. 289, 2004 Va. Acts ____ (codified at VA. CODE ANN. § 2.2-507.1(A) (Cum. Supp. 2004) (emphasis added)). It seems rather obvious that the word "gift" in the preceding sentence is used to generically describe anything passing other than by will, and that the word "bequest" is used to describe anything passing by will, whether it is technically a "bequest" of personalty or a devise of realty. However, such an interpretation by the courts is not a certainty in the light of the Supreme Court of Virginia's interpretation of the word "gift" in the context of "gift, will, or intestate succession" for purposes of the augmented estate. See *Chappell v. Perkins*, 266 Va. 413, 587 S.E.2d 584 (2003), discussed *infra* Part III.A.

43. Act of Mar. 31, 2004, ch. 247, 2004 Va. Acts ____ (codified at VA. CODE ANN. § 57-27.3 (Cum. Supp. 2004)).

troubling part of this statute, which addresses a problem that would rarely exist if priorities were recognized, is its provision that, in the event of a dispute, “the cemetery shall have no obligation to perform . . . until there is agreement of *all* next of kin, or a court order.”⁴⁴ The practical effect of this provision is to enable one of a decedent’s more remote relatives, by notifying the cemetery of his dispute with the decedent’s surviving spouse, children, or other close relatives, to delay the decedent’s interment until suit is brought and a court order is obtained. The final troubling part of this statute is its self-contained definition of “next of kin:”

For purposes of this section, “next of kin” means any of the following persons, regardless of the relationship to the decedent: any person designated to make arrangements for the disposition of the decedent’s remains upon his death pursuant to § 54.1-2825, the legal spouse, child over 18 years of age, custodial parent, noncustodial parent, siblings over 18 years of age, guardian of minor child, guardian of minor siblings, maternal grandparents, paternal grandparents, maternal siblings over 18 years of age and paternal siblings over 18 years of age, or any other relative in the descending order of blood relationship.⁴⁵

A major problem with this definition is its inclusion of a “person designated to make arrangements for the disposition of the decedent’s remains upon his death pursuant to § 54.1-2825” as one of the decedent’s “next of kin.”⁴⁶ Virginia Code section 54.1-2825 was enacted to enable one to select the person who would have complete and exclusive control over all funeral arrangements and thereby eliminate any family squabble that might otherwise occur.⁴⁷ But the misbegotten 2004 legislation gelds Virginia Code section 54.1-2825 by treating the appointee thereunder as just another one of the decedent’s next of kin—one whose decision can be thwarted by any other next of kin, or at least postponed until a court order is obtained. For all of these reasons, this legislation does not make good sense or good law

44. VA. CODE ANN. § 57-27.3 (Cum. Supp. 2004) (emphasis added).

45. *Id.* This is the same definition found in Virginia Code section 54.1-2800, which applies to Chapter 28 of Title 54.1, “Funeral Services,” Virginia Code sections 54.1-2800 to -2825. *Id.* § 57-2800 (Cum. Supp. 2004).

46. *Id.* § 57-27.3 (Cum. Supp. 2004).

47. This simple, one-sentence statute reads as follows: “Any person may designate in a signed and notarized writing, which has been accepted in writing by the person so designated, an individual who shall make arrangements for his burial or the disposition of his remains, including cremation, upon his death.” *Id.* § 54.1-2825 (Repl. Vol. 2002).

and it should not be suffered to exist beyond the 2005 Session. Moreover, after reporting on a recent funeral services case that disclosed a number of problems in Virginia funeral law,⁴⁸ the 2002 *Annual Survey of Virginia Law* recommended that the 2003 Session "consider legislation clarifying the rights and priorities of family members regarding the burial of their dead."⁴⁹ Now, with the separate provisions relating to funeral services and to interment both in disarray, the need is clearly much greater. There are many Virginia laws that will have no impact on the typical person but, at the risk of stating the obvious, funeral and burial laws will affect everyone, and the citizens of the Commonwealth have the right to clarity, fairness, and common sense therein. Thus, the 2002 plea for corrective legislation is renewed.

III. DECISIONS OF THE SUPREME COURT OF VIRGINIA

A. *Augmented Estate—Exclusions—Burden of Proof—Definition of "Gift"*

A decedent's ("D's") augmented estate, in which a surviving spouse ("S") is entitled to an elective share at D's death, is composed of D's net probate estate under Virginia Code section 64.1-16.1(A), to which certain values may be added pursuant to section 64.1-16.1(A)(1-3), and from which certain values may be excluded pursuant to section 64.1-16.1(B).⁵⁰ The basic issue before the Supreme Court of Virginia in *Chappell v. Perkins*⁵¹ was whether several investment accounts and a parcel of realty were a part of D's augmented estate.⁵²

48. See *Mazur v. Woodson*, 191 F. Supp. 2d 676 (E.D. Va. 2002), discussed in Johnson, *supra* note 21, at 385-88 (2002).

49. Johnson, *supra* note 21, at 388 (2002).

50. See VA. CODE ANN. § 64.1-16.1 (Repl. Vol. 2002 & Cum. Supp. 2004).

51. 266 Va. 413, 587 S.E.2d 584 (2003). For the convenience of the reader, this article will follow the numbering convention adopted by the Supreme Court of Virginia in its opinion, i.e., identifying the subsections as they are currently found in Virginia Code section 64.1-16.1 (Repl. Vol. 2002 & Cum. Supp. 2004). See *Chappell*, 266 Va. at 416 n.1, 587 S.E.2d at 585 n.1.

52. This enumeration misses the mark. Those who will benefit by the exclusion of values from the augmented estate are those who will have a contribution liability if the values in question are included in the augmented estate. VA. CODE ANN. § 64.1-16.2(B) (Repl. Vol. 2002 & Cum. Supp. 2004). In a number, and perhaps a majority, of cases, the "benefi-

1. Burden of Proof

In this case of first impression, the court, after noting that *S* would benefit by the addition of values to the augmented estate, while *D*'s "beneficiaries or heirs" would benefit by the exclusion of values from the augmented estate,⁵³ "conclud[ed] that the party seeking inclusion of property under Subsection A of Code § 64.1-16.1 has the burden of proof under that subsection and the party seeking exclusion of property under Subsection B of that section carries the burden of establishing such exclusion."⁵⁴ Accordingly, the trial court's decision placing the burden of proof upon *D*'s estate to establish the exclusionary requirements under Virginia Code section 64.1-16.1(B) for the investment accounts and the realty was affirmed.⁵⁵ The problem with this aspect of the decision is not the general rule that was adopted, but the application of that rule to the realty in this case. The burden of proof regarding the realty's exclusion from the augmented estate was placed upon *D*'s executor because the court mistakenly treated the realty as a part of *D*'s probate estate.⁵⁶ However, it is clear from the opinion's recitation of facts⁵⁷ and the record that the realty was not a part of *D*'s probate estate.⁵⁸ Thus, a correct application of the court's new burden of proof rule would have required *S* to prove the realty's initial inclusion in *D*'s augmented estate in a proceeding to which *D*'s trustee was a party.⁵⁹ However, not only was this not

ciaries or heirs" will have no contribution liability; it will instead fall exclusively on the recipients of inter vivos transferees under Virginia Code section 64.1-16.1(A)(3) (Repl. Vol. 2002 & Cum. Supp. 2004). And, of course, in some cases it will be a mixed bag. There is, however, no reason to believe that the opinion's misstep in any way affects the validity of the general rule being adopted, i.e., "the party seeking exclusion . . . carries the burden of establishing such exclusion." *Chappell*, 266 Va. at 418, 587 S.E.2d at 587.

53. *Chappell*, 266 Va. at 418, 587 S.E.2d at 586-87.

54. *Id.* at 418, 587 S.E.2d at 587.

55. *Id.*

56. "The property at issue includes two investment accounts and a parcel of real property . . . all held in [*D*'s] name." *Id.* at 416-17, 587 S.E.2d at 586.

57. "[*D*] transferred the property to the [*D*] Revocable Living Trust in 1997." *Id.* at 417, 587 S.E.2d at 586.

58. The inventory filed for *D*'s estate had two places for listing real estate: Part II, real estate in Virginia in which the decedent had an interest over which the personal representative has a power of sale; and Part III, real estate in Virginia and elsewhere in which the decedent had an interest over which the personal representative does not have a power of sale. The inventory shows "n/a" in the description blocks, and "0.00" in the valuation blocks, for both Part II and Part III. See Joint Appendix at 298, *Chappell v. Perkins*, 266 Va. 413, 587 S.E.2d 584 (2003) (No. 022966) [hereinafter Joint Appendix].

59. See VA. CODE ANN. § 64.1-16.2(C) (Repl. Vol. 2002 & Cum. Supp. 2004); see also *J.*

done, *D*'s trustee was not even made a party to the present case.⁶⁰ Assuming that *D*'s trustee was before the court, and that *S* was successful in establishing that the realty should be included in the initial computation of *D*'s augmented estate under Virginia Code section 64.1-16.1(A)(3)(b),⁶¹ the burden of proof would then shift to *D*'s trustee, under the court's new burden of proof rule, to attempt to establish the realty's exclusion therefrom under section 64.1-16.1(B). As *D*'s trustee was not before the court, however, nothing said in the opinion could establish any contribution liability from the realty in question.⁶²

2. The Investment Accounts

D's executor claimed that the investment accounts should be excluded from *D*'s augmented estate under the "separate property" exclusion of Virginia Code section 64.1-16.1(B)(ii) because they consisted of proceeds from *D*'s first spouse's retirement plan and life insurance, and the sale of their home.⁶³ The separate

William Gray, Jr., *Virginia's Augmented Estate System: An Overview*, 24 U. RICH. L. REV. 513, 536-38 (1990).

60. The record shows that *D*'s son, John R. Chappell, was designated to become trustee upon *D*'s death. See Joint Appendix at 291. John R. Chappell was made a party individually, and in his capacity as Executor of *D*'s estate, but not in his capacity as Trustee of *D*'s revocable trust. See *id.* at 1. "The petition [filed by *S*] initially named the Estate and [*D*']s four children as respondents. The children did not file a response or make an appearance in proceedings before the trial court." *Chappell*, 266 Va. at 416 n.2, 587 S.E.2d at 586 n.2.

61. This would be the obvious subsection when attacking a revocable trust because it provides, in part, for inclusion of the value of a tainted transfer where the decedent has reserved a lifetime power to revoke. VA. CODE ANN. § 64.1-16.1(A)(3)(b) (Repl. Vol. 2002 & Cum. Supp. 2004). As *D* also retained lifetime enjoyment of the trust, Joint Appendix at 286-87, inclusion could be based upon Virginia Code section 64.1-16.1(A)(3)(a) (Repl. Vol. 2002 & Cum. Supp. 2004).

62. It is necessary to the validity of its judgment that a court must have jurisdiction over the subject matter and over the necessary parties. It has no jurisdiction to act outside the limits of the law or mode of procedure, or beyond the issues in the pleadings. No judicial proceeding can deprive a man of his property without giving him an opportunity to be heard in accordance with the provisions of the law, and if a judgment is rendered against him without such opportunity to be heard, it is absolutely void. A void judgment is in legal effect no judgment. By it no rights are divested and from it no rights are obtained. All claims flowing out of it are void. It may be attacked in any proceeding by any person whose rights are affected.

Harris v. Deal, 189 Va. 675, 686-87, 54 S.E.2d 161, 166 (1949) (citations omitted).

63. See *Chappell*, 266 Va. at 417, 587 S.E.2d at 586.

property exclusion, as it appeared at *D*'s death in 1997—with its 1999 amendments being shown in italics—read as follows:

B. Nothing herein shall cause to be included in the augmented estate . . . (ii) the value of any property, its income or proceeds, received by the decedent by gift, will, intestate succession, *or any other method or form of transfer to the extent it is received without full consideration in money or money's worth*, before or during the marriage to the surviving spouse, from a person other than the surviving spouse to the extent such property, income, or proceeds were maintained by the decedent as separate property[.]⁶⁴

To the estate's argument that "the word 'gift' as it appeared in the subsection prior to 1999 included any property received without full consideration and that the 1999 amendment merely clarified existing law,"⁶⁵ the Supreme Court of Virginia responded in part that

[r]ules of statutory construction preclude adoption of the Estate's position.

Legislation is presumed to effect a change in the law unless there is clear indication that the General Assembly intended that the legislation declare or explain existing law. *Boyd v. Commonwealth*, 216 Va. 16, 20, 215 S.E.2d 915, 918 (1975) (per curiam). Nothing in the 1999 amendment indicates that the General Assembly enacted the amendment as a clarification of existing law. See 1997 Acts, ch. 565 (stating that changes to Code § 8.01-249 "are declaratory of existing law").⁶⁶

Although such a presumption does exist, it is respectfully submitted that it is not as strong as the above language might suggest. In the cited per curiam case, where the presumption was rebutted and the change was found to be merely a clarification, there was nothing "in" the amendment to so indicate, nor was it enacted as "declaratory of existing law."⁶⁷ It should also be noted that the *Chappell* opinion appears to be giving considerably more

64. *Id.* at 419, 587 S.E.2d at 587 (quoting VA. CODE ANN. § 64.1-16.1(B) (Repl. Vol. 2002 & Cum. Supp. 2004)).

65. *Id.* at 420, 587 S.E.2d at 587.

66. *Id.* at 420, 587 S.E.2d at 587–88.

67. The totality of the rebutting evidence in this case was: (1) "a representation in the defendant's brief" that there were inconsistent decisions in the trial courts on the interpretation issue, and (2) the fact that "[t]he amendments, by emergency legislation, followed passage of the 1973 Act within a year." *Boyd*, 216 Va. at 20, 215 S.E.2d at 918.

meaning to the term “declaratory of existing law” than the court has in the past.⁶⁸

The opinion continues as follows:

Rules of statutory construction also assume that words in a statute are read according to their common meaning; however, if a term has a known legal definition, that definition will apply unless it is apparent that the legislature intended otherwise. “Gift” is a commonly used legal term and there is nothing to indicate that the General Assembly intended that the term have some other or additional meaning in this statute. A “gift” *requires donative capacity and intent, delivery, and acceptance. The term does not include the mere receipt of property “without full consideration in money or money’s worth.”*⁶⁹

Although the opening sentences of this quotation speak in terms of “definition” and “meaning,” the first italicized sentence does not deliver either; it simply states the requirements for making a parol gift of tangible personal property—donative intent, delivery, and acceptance.⁷⁰ And, most importantly, the opinion fails to recognize that the Virginia Code does contain at least an indirect definition of “gift” in section 64.1-01, which was added to that section in 1992 to provide a definition of bona fide purchaser for augmented estate purposes.⁷¹

Virginia Code section 64.1-01 provides in part that “[a] ‘purchaser’ is one who acquires property by sale, lease, discount, negotiation, mortgage, pledge, or lien or who otherwise deals with property in a voluntary transaction, *other than a gift.*”⁷² Thus, this statutory definition, not mentioned in the opinion or the briefs of counsel, recognizes the logical proposition that if a voluntary property transaction is a purchase, it is not a gift and, con-

68. In *Sims Wholesale Co. v. Brown-Forman Corp.*, 251 Va. 398, 468 S.E.2d 905 (1996), the court found it unnecessary to “rule on the effect, if any, of the enactment [declaratory of existing law]” in order to correctly decide the case before it. *Id.* at 407, 468 S.E.2d at 910. In *Berner v. Mills*, 265 Va. 408, 579 S.E.2d 159 (2003), the court determined as a matter of fact 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.” *Id.* at 414, 579 S.E.2d at 161.

69. *Chappell*, 266 Va. at 420, 587 S.E.2d at 588 (emphasis added) (citations omitted).

70. See RAY ANDREWS BROWN, *THE LAW OF PERSONAL PROPERTY* § 38, at 84 (2d ed., Callaghan & Co. 1955).

71. Act of Apr. 3, 1992, chs. 617, 647, 1992 Va. Acts 897, 953 (codified as amended at VA. CODE ANN. § 64.1-01 (Repl. Vol. 2002)). The background of this enactment is discussed in Johnson, *supra* note 4, at 885–86.

72. VA. CODE ANN. § 64.1-01 (Repl. Vol. 2002) (emphasis added).

versely, *if it is not a purchase, it is a gift*.⁷³ And it is submitted that this logical proposition necessarily recognizes part-sale/part-gift transactions when there is an advantageous sale between parties who are not dealing with each other at arms length, such as where a married person “sells” a \$200,000 parcel of realty to a sibling for \$20,000. It cannot logically be claimed that this transfer does not include a gift of \$180,000.

Nevertheless, the second italicized sentence in the above block quote states that “[t]he term [gift] does not include the mere receipt of property ‘without full consideration in money or money’s worth.’”⁷⁴ However, in addition to the statutory definition of “gift” contained in Virginia Code section 64.1-01, there is compelling authority to the contrary. The gift tax provisions of the Internal Revenue Code provide that, except as between parties dealing with each other at arm’s length, “[w]here property is transferred for less than an adequate and full consideration in money or money’s worth, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift.”⁷⁵

This fundamental concept of federal gift tax law, which is well known by every estate planning lawyer, was adopted by the General Assembly as a part of its original augmented estate enactment in 1990, and parallel language was incorporated into Virginia Code section 64.1-16.1(A)(3).⁷⁶ Before developing this point further, however, it will be helpful to focus upon the purpose of Virginia’s augmented estate regime, which was stated by the court in another part of its opinion to be as follows: “[T]o prevent one spouse from disinheriting the other by transferring property prior to the transferor’s death and thereby diminishing the transferor’s estate. To achieve this purpose, the value of certain property transferred by the decedent during marriage is imputed to the decedent’s augmented estate.”⁷⁷

73. *See id.*

74. *Chappell*, 266 Va. at 420, 587 S.E.2d at 588.

75. I.R.C. § 2512(b) (2003).

76. Act of Apr. 9, 1990, ch. 831, 1990 Va. Acts 1354 (codified as amended at VA. CODE ANN. § 64.1-16.1(A)(3) (Repl. Vol. 2002 & Cum. Supp. 2004)).

77. *Chappell*, 266 Va. at 421, 587 S.E.2d at 588. It should be noted that the augmented estate regime was also enacted to accomplish another important purpose, i.e., to prevent *S*, who had been adequately provided for by *D* from obtaining more than a fair share of *D*’s assets by “double-dipping.” *See* VA. CODE ANN. §§ 64.1-16.1(A)(1)–(2),

In other words, the value of certain transfers that *D* makes to third parties during *D*'s marriage to *S* are brought into *D*'s augmented estate by Virginia Code section 64.1-16.1(A)(3).⁷⁸ And it will be noted that this section has provided, since the enactment of the original augmented estate legislation in 1990, for the inclusion of such transfers "*to the extent that the decedent did not receive adequate and full consideration in money or money's worth.*"⁷⁹ What clearer statement could there be, and within the body of Virginia Code section 64.1-16.1 itself, that a transfer to a non-bona fide purchaser for less than an adequate and full consideration in money or money's worth is, to that extent, a gift? Moreover, this employment of "adequate and full consideration in money or money's worth" is not confined to Virginia Code section 64.1-16.1(A)(3). The General Assembly has used the same terminology in two other subsections of section 64.1-16.1 to convey the same meaning.⁸⁰

The purpose of the augmented estate's separate property exclusion is to prevent a surviving spouse from obtaining any benefit based upon the decedent's interest in property gratuitously received from anyone other than the surviving spouse, if it is maintained as separate property.⁸¹ It is submitted that in order to make this exclusion applicable to every conceivable gratuitous transfer, the original legislation referred to property received by (1) "will or intestate succession," including all probate transfers,

-16.2(A) (Repl. Vol. 2002 & Cum. Supp. 2004); Gray, *supra* note 59, at 517-19.

78. This section does not bring back the value of any transfer to a bona-fide purchaser (BFP), nor does it bring back the value of any other transfer to the extent that the transfer is supported by adequate and full consideration in money or money's worth. See VA. CODE ANN. § 64.1-16.1(A)(3) (Repl. Vol. 2002 & Cum. Supp. 2004).

79. *Id.* (emphasis added).

80. Virginia Code sections 64.1-16.1(A)(1), since its enactment in 1990, has provided for the inclusion of certain transfers from *D* to *S* in *D*'s augmented estate "to the extent the property is derived from [*D*] . . . without a full consideration in money or money's worth." *Id.* § 64.1-16.1(A)(1) (Repl. Vol. 2002 & Cum. Supp. 2004). Virginia Code section 64.1-16.1(A)(2), also dealing with the inclusion of certain transfers from *D* to *S* in *D*'s augmented estate, was amended in 1992 by adding the qualifying language "received by gift and the proceeds thereof . . . without a full consideration in money or money's worth." Act of Apr. 3, 1992, ch. 617, 1992 Va. Acts 897 (codified as amended at VA. CODE ANN. § 64.1-16.1(A)(2) (Repl. Vol. 2002 & Cum. Supp. 2004)). Although the formulation in (A)(2) simply refers to property received by gift "without a full consideration in money or money's worth" without the qualifying phrase "to the extent that," this difference has no substantive meaning. Both of these subsections convey the same meaning in this regard. For the background of the 1992 amendment, see Johnson, *supra* note 4, at 875-76.

81. See Gray, *supra* note 59, at 524.

and (2) the generic term “gift,” comprehensively including all other gratuitous transfers.⁸² Thus, it is further submitted that when the 1999 Session amended the separate property exclusion by adding “or any other method or form of transfer to the extent it is received without full consideration in money or money’s worth,”⁸³ it was not expanding the definition of the term “gift;” it was merely clarifying it.⁸⁴

Lastly, it will be remembered that *D*’s estate was arguing for the exclusion of certain investment accounts under Virginia Code section 64.1-16.1(B)(ii) because they allegedly consisted of proceeds from *D*’s first spouse’s retirement plan and life insurance, and the sale of their home.⁸⁵ The court concludes its discussion of the investment accounts issue as follows:

Indeed, at oral argument, counsel for the Estate could not identify any instance in which the receipt of funds from an insurance policy, from a retirement plan, from the sale of a house, or by operation of law qualified as receipt of property by gift.⁸⁶

However, notwithstanding what counsel could or could not identify at oral argument, the Supreme Court of Virginia long ago recognized that

a voluntary gift valid in law or equity may be made of any property, real or personal, legal or equitable, in possession, reversion or re-

82. This usage is repeated in the 2004 Session’s amendment of Virginia Code section 2.2-507.1 to change the determination of a non-profit corporation’s charitable purposes from those “established by the donor’s intent as expressed in governing documents or by other applicable law,” VA. CODE ANN. § 2.2-507.1 (Cum. Supp. 2003), to those “established by the governing documents of such charitable corporation, the *gift or bequest* made to such charitable corporation, or other applicable law.” Act of Mar. 31, 2004, ch. 289, 2004 Va. Acts ____ (codified at VA. CODE ANN. § 2.2-507.1(A) (Cum. Supp. 2004) (emphasis added)). It seems rather obvious that the word “gift” in the latter sentence is used to describe generically anything passing other than by will and that the word “bequest” is used to describe anything passing by will, whether it is technically a “bequest” of personalty or a devise of realty. Any other interpretation, in this context, would make no sense. Although this legislation was not passed until after *Chappell* was decided, it does show a pattern of legislative usage supporting the broadest interpretation of the word “gift” in Virginia Code section 64.1-16.1(B)(ii) in future cases.

83. Act of Mar. 4, 1999, ch. 38, 1999 Va. Acts 37 (codified at VA. CODE ANN. § 64.1-16.1(B) (Repl. Vol. 2002 & Cum. Supp. 2004)).

84. By way of full disclosure, it should be noted that the present writer took this same position in commenting upon the 1999 amendment in that year’s annual review. See Johnson, *supra* note 3, at 1082–83.

85. *Chappell v. Perkins*, 266 Va. 413, 417, 587 S.E.2d 584, 586 (2003).

86. *Id.* at 420, 587 S.E.2d at 588.

mainder, vested or contingent, and including choses in action, unless they be of such a nature as that an assignment of them would be a violation of the law against maintenance and champerty.⁸⁷

Thus, under the court's own precedents, it is clear that each one of the items enumerated in this opinion can be the subject matter of a gift. Moreover, applying the statutory definition found in Virginia Code section 64.1-01, unless the "funds from an insurance policy, from a retirement plan, or from the sale of a house, or by operation of law"⁸⁸ were acquired by "purchase," they necessarily had to be acquired by gift.⁸⁹ Thus, even if the 1999 amendments had never been enacted, the transactions enumerated in the opinion should have been recognized as gifts to the extent that *D*'s estate could show that they were gratuitous. And, to the further extent that *D*'s estate could (1) trace the proceeds therefrom into the investment accounts presently before the court, and (2) establish that these accounts were separately maintained, the value of the investment accounts should be excluded from *D*'s augmented estate pursuant to Virginia Code section 64.1-16.1(B)(ii).

However, the court concludes that "because there is no evidence in this record showing that the funds in the investment accounts came from a gift, a will, or intestate succession, the circuit court did not err in holding that the Estate failed to carry" the burden of proof to exclude the investment accounts from *D*'s augmented estate under Virginia Code section 64.1-16.1(B)(ii).⁹⁰ Unfortunately, it is clear that the court is using the word "gift" in the preceding sentence in the unique way that it is defined in this opinion. This would automatically exclude therefrom "the receipt

87. *Mayo v. Carrington*, 60 Va. (19 Gratt.) 74, 123 (1869) (quoting *Henry v. Graves*, 52 Va. (16 Gratt.) 244, 254 (1861)).

88. *Chappell*, 266 Va. at 420, 587 S.E.2d at 508.

89. It would seem highly unusual that the funds a beneficiary receives from a spouse's insurance policy or retirement plan would have been purchased by the beneficiary. Although funds received from the sale of a house that the seller had purchased would not be a gift, proceeds from the sale of a house (or an interest in a house) that had been given to the seller would be impressed with the donative character of the original gift. See the express provision for "proceeds" to be impressed with the character of their source in Virginia Code sections 64.1-16.1(A)(1)-(2), (B)(ii) and section 16.2(C)(i) (Repl. Vol. 2002 & Cum. Supp. 2004). Lastly, funds received by "operation of law," which is assumed in the context of the opinion to mean "by survivorship," would typically be via gift, as opposed to a purchase but, if, in a given case, the survivor had contributed more than one-half to the property's purchase, there would not be a gift to that extent.

90. *Chappell*, 266 Va. at 420, 587 S.E.2d at 588.

of funds from an insurance policy, from a retirement plan, or from the sale of a house, or by operation of law,”⁹¹ even if these funds were gratuitously received, notwithstanding the definition of “gift” in section 64.1-01 and established case law since 1861.⁹²

3. The Realty

Virginia Code section 64.1-16.1(B)(i)—the “consent or joinder” exclusion—provides for the exclusion from a decedent’s augmented estate of “the value of any property transferred by the decedent during marriage with the written consent or joinder of the surviving spouse.”⁹³ In this case, *D* and *S* purchased the realty in question as tenants by the entirety in 1989, they jointly conveyed it to *D* by deed of gift in 1991, and *D* conveyed it to *D*’s revocable inter vivos trust in 1997.⁹⁴ The question raised by these facts is whether the 1991 conveyance by *D* and *S* to *D* fits within the language and intent of the joinder exclusion, or whether that exclusion applies only when *D* and *S* join in a conveyance to a third party. After noting that the purpose of the augmented estate regime is to protect one spouse from a unilateral diminution of the other spouse’s “estate,”⁹⁵ the court stated that

[i]f a transfer does not remove the property from the transferring spouse’s estate, the consent of the non-transferring spouse, while a consent to the transfer, is not a consent to any diminution in the estate by virtue of that transfer. Accordingly, we conclude that subparagraph (B)(i) of Code § 64.1-16.1 applies when a spouse consents to a specific conveyance that removes the property from, or decreases the value of, the transferring spouse’s estate.⁹⁶

The problem presented by this part of the case is in determining the context in which the court is using the word “estate.” The quoted text uses the word “estate” three times and it is unclear whether it is referring to the transferring spouse’s (1) presently owned property; (2) “potential probate” estate (which is really the

91. *Id.*

92. *Mayo*, 60 Va. (19 Gratt.) at 123.

93. VA. CODE ANN. § 64.1-16.1(B)(i) (Repl. Vol. 2002 & Cum. Supp. 2004).

94. See *Chappell*, 266 Va. at 417, 587 S.E.2d at 586.

95. See *id.* at 421, 587 S.E.2d at 588. See *supra* note 77 for a statement of the second purpose of the augmented estate regime, and *infra* note 98 for an illustration of the problem under prior law.

96. *Chappell*, 266 Va. at 422, 587 S.E.2d at 589.

same as (1)); or (3) "potential augmented" estate. As the opinion speaks in terms of removing property "from" the transferring spouse's "estate," it could not be referring to (1) or (2) because no part of this realty was "in" either of these estates of *D* at the time of the transfer from *D* and *S* to *D*.⁹⁷ Logically, the opinion could not be referring to (3) because whether the conveyance operated as a diminution of *D*'s potential augmented estate or not was the point in issue.⁹⁸ Nevertheless, the Supreme Court of Virginia held that "the conveyance was not subject to Code § 64.1-16.1(B)(i) because it did not result in the diminution of [*D*'s] estate," and the court affirmed the trial court's inclusion of the property in *D*'s augmented estate.⁹⁹

Approaching the realty's inclusion in *D*'s potential augmented estate as an original proposition, it is submitted that the court's conclusion is correct, but for different reasons. As noted earlier, one of the purposes of the augmented estate regime is to prevent *S*, for whom *D* has sufficiently provided, from using its provisions to obtain more than a "fair share," as was the case under prior law.¹⁰⁰ This is accomplished by including in *D*'s augmented estate the value of all probate gifts¹⁰¹ and most non-probate gifts¹⁰² to *S*, and then setting off this amount against the value of *S*'s augmented estate entitlement.¹⁰³ The other side of this "aggregating"

97. This realty was tenancy by the entirety property in which *D*, individually, had no interest. The realty was owned by the jural entity of *S* and *D*, and *D*'s interest would pass outside of *D*'s probate estate, by survivorship, upon *D*'s prior death.

98. The resolution of this usage is further confused by the fact, noted earlier, that the opinion proceeds on the mistaken basis that the realty was in *D*'s probate estate notwithstanding its conveyance to *D*'s revocable inter vivos trust. See *supra* note 56 and accompanying text.

99. *Chappell*, 266 Va. at 422, 587 S.E.2d at 589. It would appear that, under a literal application of the court's analysis, a gift of this property by *D* & *S* to a third party would not be subject to the joinder exclusion because it would not result in a diminution of *D*'s estate, i.e., (1) or (2), as it was never "in" such estate to begin with. Such, however, cannot be.

100. See *supra* note 77 and accompanying text. Under prior law, *D* might have: (1) contributed all of the consideration for the acquisition of certain survivorship property with *S* worth \$200,000, (2) paid all of the premiums on a \$200,000 life insurance policy naming *S* as beneficiary, and (3) died leaving the probate estate of \$200,000 in personalty to *D*'s parents. Notwithstanding the fact that *D* had arranged *D*'s affairs so that two-thirds of *D*'s assets would pass to *S*, at *D*'s death, *S* could nevertheless renounce *D*'s will and take a forced share of *D*'s probate estate and still retain the \$400,000 passing outside of probate. This would not be true under the augmented estate, as is described in the following text.

101. VA. CODE ANN. § 64.1-16.1(A) (Repl. Vol. 2002 & Cum. Supp. 2004).

102. See *id.* § 64.1-16.1(A)(1)-(2) (Repl. Vol. 2002 & Cum. Supp. 2004).

103. See *id.* § 64.1-16.2(A) (Repl. Vol. 2002 & Cum. Supp. 2004).

concept is seen in Virginia Code section 64.1-16.1(B)(ii)'s provision for the exclusion of "gifts" from *D*'s augmented estate, which expressly states its non-applicability to gifts to *D* from *S*, to ensure that gifts from *S* to *D* will be included in *D*'s augmented estate.¹⁰⁴ From the standpoint of this latter provision, it would be entirely inconsistent to say that a piece of realty that *S* individually owned and conveyed to *D* by deed of gift would not be excluded from *D*'s augmented estate by Virginia Code section 64.1-16.1(B)(ii), but a piece of realty that *S* owned with *D*, and conveyed to *D* by deed of gift in which *D* joined, would be excluded from *D*'s augmented estate by section 64.1-16.1(B)(i). Thus, a literal application of Virginia Code section 64.1-16.1(B)(i), i.e., excluding the conveyance of *D* and *S* to *D* from *D*'s augmented estate merely because of *S*'s joinder therein, would be inconsistent with the express non-exclusion provision found in subsection 64.1-16.1(B)(ii), with which it is *in pari materia*. Accordingly, the joinder exclusion of Virginia Code section 64.1-16.1(B)(i) should only be applicable when the conveyance in which *S* joins is one that is made to a third party. This was not true in the present case. Thus, the court's inclusion of the realty in *D*'s augmented estate would have been correct, but for reasons other than those it stated, if *D*'s trustee had been before the court.¹⁰⁵

B. Augmented Estate—Election—Capacity

Virginia Code section 64.1-13 permits a surviving spouse to take a certain minimum share of a deceased spouse's augmented estate by filing an election therefor in the clerk's office within six

104. *Id.* § 64.1-16.1(B)(ii) (Repl. Vol. 2002 & Cum. Supp. 2004).

105. Using its "non-diminution" analysis described above, the court "also reject[ed] the Estate's contention that Code § 55-41 specifically provides that when a husband and wife join in a deed of conveyance, the provisions of Code § 64.1-16.1-(B)(i) are satisfied." *Chappell*, 266 Va. at 422, 587 S.E.2d at 589. The relevant part of section 55-41 provides as follows:

When a husband and his wife have signed and delivered a writing purporting to convey any estate, real or personal, such writing . . . shall . . . operate to manifest the spouse's written consent or joinder, as contemplated in Code § 64.1-16.1 to the transfer embraced therein . . . [and] the writing passes from such spouse . . . all right, title and interest of every nature . . .

VA. CODE ANN. § 55-41 (Repl. Vol. 2003 & Supp. 2004). Again, and for the same reasons, it is submitted that the "non-diminution" theory is also flawed in this context, and the correct analysis should simply be that the General Assembly intended the terms "convey" and "transfer," as used in section 55-41, to mean conveyances or transfers by a husband and wife to a third party.

months of the later of (1) the admission of the deceased spouse's will to probate, or (2) the appointment of an administrator for the deceased spouse's intestate estate.¹⁰⁶ However, there is no statutory provision stating the capacity required for the surviving spouse to make such an election. In *Jones v. Peacock*,¹⁰⁷ a case of first impression, the Supreme Court of Virginia declined to apply the standard applicable to a deed or contract, as argued by *D*'s executor,¹⁰⁸ or the lesser standard applicable to a will, as argued by respondents.¹⁰⁹ Instead, the court held that, at the time of making the election, "the surviving spouse must have the capacity to understand his right to elect against the will and receive a share of the estate established by law and to know that he is making such an election."¹¹⁰ It is unfortunate that the court states the test in terms of the surviving spouse understanding "his right to elect against the will," because (1) the concept of "electing against" is a creature of prior law that ended with the adoption of the augmented estate concept,¹¹¹ and (2) the surviving spouse is

106. VA. CODE ANN. § 64.1-13 (Repl. Vol. 2002 & Cum. Supp. 2004).

107. 267 Va. 16, 591 S.E.2d 83 (2004).

108. "A party is competent to execute a deed or contract if at the time of execution, the party has sufficient mental capacity to understand the nature of the transaction and agree to its provisions." *Id.* at 19 n.1, 591 S.E.2d at 86 n.1 (citing *Hill v. Brooks*, 253 Va. 168, 175, 482 S.E.2d 816, 821 (1997)).

109. "A party is competent to execute a will if the party has sufficient mental capacity at the time of execution to 'recollect[] his property, the natural objects of his bounty, and their claims upon him, and kn[o]w the business about which he was engaged and how he wished to dispose of his property.'" *Id.* at 19 n.2, 591 S.E.2d at 86 n.2 (quoting *Fields v. Fields*, 255 Va. 546, 550, 499 S.E.2d 826, 828 (1998)).

110. *Id.* at 21, 591 S.E.2d at 87. The Court also stated that "[c]ompetency to execute the notice of claim does not require a surviving spouse to know the specific amount that will be received as a result of such an election . . . [and] [w]hether a surviving spouse exercises good judgment when making an election is not relevant to the issue of mental capacity. . . ." *Id.* The latter aspect, "good judgment," is not too much of a concern when making an election under augmented estate law. There was a real possibility of loss under prior law because electing against the will meant renouncing any provision made therein for the surviving spouse which, in some cases, turned out to be worth more than was obtained by electing. This result is not possible under augmented estate law because the electing spouse retains all benefits conferred by the deceased spouse and, if that is less than the surviving spouse's elective share in the augmented estate, liability for the difference is "equitably apportioned among the recipients of the augmented estate in proportion to the value of their interest's therein." VA. CODE ANN. § 64.1-16.2(B) (Repl. Vol. 2002 & Cum. Supp. 2004); see *Gray*, *supra* note 59, at 533-34. The only possible detriment that an electing spouse might suffer is the loss of the \$15,000 homestead allowance because section 64.1-151.3 provides that "[i]f the surviving spouse claims and receives an elective share of the decedent's estate under §§ 64.1-13 through 64.1-16, the surviving spouse shall not have the benefit of any homestead allowance." VA. CODE ANN. § 64.1-151.3 (Repl. Vol. 2002).

111. See *supra* note 108 and accompanying text.

permitted to make an election whether there is a will or not.¹¹² Applying its newly coined test to the facts of this case, the Supreme Court of Virginia, “begin[ning] with the presumption that all persons are competent, and the party challenging this presumption has the burden of establishing incompetency,”¹¹³ concluded that the deceased spouse’s “[e]xecutor failed to satisfy his burden of establishing” the surviving spouse’s lack of capacity at the time he made the election in this case.¹¹⁴

C. Uniform Transfers to Minors Act—Self-Dealing—Safe Harbor

In *Richardson v. AMRESKO Residential Mortgage Corp.*,¹¹⁵ Mother (“M”) and her one-year old daughter (“D”) were residents of Kentucky in 1990 when D became entitled to a \$700,000 settlement because of her father’s death.¹¹⁶ M was appointed guardian of D’s estate by the appropriate Kentucky court and received the settlement as custodian for D under the Kentucky Uniform Transfers to Minors Act (“KUTMA”).¹¹⁷ M and D moved to Virginia in 1996, where M used some of D’s funds to buy a parcel of realty in Virginia Beach, taking title thereto as custodian for D under KUTMA.¹¹⁸ In March 1997, M executed a quitclaim deed in her official capacity as D’s custodian by which she conveyed this realty to herself, personally.¹¹⁹ In April 1997, M obtained a \$139,750 personal loan from a mortgage company (“MC”), giving a deed of trust on her newly acquired property as security therefor.¹²⁰ In January 1998, M obtained a \$35,000 personal loan from a bank (“B”), again giving a deed of trust on her newly acquired property as security therefor.¹²¹ In July 1999, a successor guard-

112. VA. CODE ANN. § 64.1-13 (Repl. Vol. 2002 & Cum. Supp. 2004).

113. *Jones*, 267 Va. at 22, 591 S.E.2d at 87.

114. *Id.* at 23, 591 S.E.2d at 88.

115. 267 Va. 43, 592 S.E.2d 65 (2004).

116. *Id.* at 46, 592 S.E.2d at 66.

117. *Id.*

118. *Id.*

119. *Id.* Both the deed to M for D under KUTMA and the quit-claim deed were recorded prior to this transaction. *Id.*

120. *Id.*, 592 S.E.2d at 67.

121. *Id.* at 47, 592 S.E.2d at 67. Many facts not necessary to a report on the UTMA aspect of this case are omitted. Note that this case is further discussed in Brian R. Marron, *Annual Survey of Virginia Law: Real Estate and Land Use*, 39 U. RICH. L. REV. 357, 364-65 (2004).

ian ("SG") was appointed for *D*¹²² and he filed a suit against *MC*, *B*, and others seeking a declaration "that the quitclaim deed was 'null and void' and to declare that [*D*'s] estate owned the property 'free and clear of all liens and encumbrances.'"¹²³ Applying Virginia law, because the property conveyed by the quitclaim deed is in Virginia, the court held that, as the deed was voidable due to *M*'s prohibited self-dealing, *D*'s "attack on the quitclaim deed requires that the deed be set aside, and that the chancellor erred in reaching a contrary conclusion."¹²⁴ In response to the claims of *MC* and *B* that they were protected under the "safe harbor" provisions of KUTMA,¹²⁵ the court concluded that in the absence of case law in either Virginia or Kentucky, "because the Act's plain language encompasses only third parties who 'deal with' a 'person purporting to make a transfer or purporting to act in the capacity of a custodian,' such protections do not extend to those who merely rely on various acts of a custodian."¹²⁶ The court also rejected *MC*'s and *B*'s claim that they were protected as bona fide purchasers, pointing out that

the recorded instruments in the chain of title to the property placed the mortgagees under a duty of inquiry. On its face, [*M*]'s transfer of the property by quit claim deed to herself raised a question of fiduciary self-dealing, and further inquiry concerning the conveyance would have yielded additional facts revealing the unauthorized nature of the transfer.¹²⁷

Accordingly, the court "remand[ed] the case to the chancellor for entry of an order to be recorded among the land records voiding the quitclaim deed and the mortgagees' deeds of trust."¹²⁸

122. *Richardson*, 267 Va. at 47, 592 S.E.2d at 67.

123. *Id.* at 48, 592 S.E.2d at 67. However, as *M* had apparently made an advantageous (though judicially prohibited) contract for the sale of the realty to third parties in the interim, the court allowed the sale to go forward and the proceeds to become the subject matter of the suit. *Id.*, 592 S.E.2d at 67–68.

124. *Id.* at 50, 592 S.E.2d at 69. The Court found Kentucky Revised Statutes section 385.162 to be "substantively identical to Virginia Code § 31-52." *Id.* at 48, 592 S.E.2d at 68. The "safe harbor" provision extends certain protections to third parties acting in good faith who "deal with any person purporting to make a transfer or purporting to act in the capacity of a custodian . . ." VA. CODE ANN. § 31-52 (Repl. Vol. 2004).

125. *Richardson*, 267 Va. at 50, 592 S.E.2d at 69.

126. *Id.* at 50–51, 592 S.E.2d at 69.

127. *Id.* at 52, 592 S.E.2d at 70.

128. *Id.*

D. *Future Interest—Vested Remainder—Creditors' Rights*

In *Jones v. Hill*,¹²⁹ Husband ("H"), who died in 1993, left his entire estate to his wife ("W") for life, along with a power to dispose of the same during her lifetime but, to the extent she did not, remainder to his children in equal shares.¹³⁰ On August 29, 2000, a creditor ("X") docketed a judgment in the Circuit Court of Brunswick County against one of H's children ("C").¹³¹ C died on December 10, 2000, survived by his wife ("CW") as the sole beneficiary under his will.¹³² W died on December 17, 2001, still owning a parcel of realty in Brunswick County that had originated in H's estate.¹³³ Applying settled law to these facts, the Supreme Court of Virginia affirmed the trial court's holding that C died owning a vested remainder (subject to divestment to the extent that W exercised her power of disposition) in this realty to which X's lien had attached when X's judgment was docketed.¹³⁴ Thus, as W never exercised her power of disposition, CW received C's interest subject to X's lien.

IV. CONCLUSION

For the reasons recited herein, it is respectfully submitted that the 2005 Session should: (1) enact legislation removing all barriers presently preventing a decedent's beneficiaries 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;¹³⁵ (2) 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;¹³⁶ and (3) reform Virginia's funeral and burial laws.¹³⁷

129. 267 Va. 708, 594 S.E.2d 913 (2004).

130. *Id.* at 710, 594 S.E.2d at 913-14.

131. *Id.*, 594 S.E.2d at 914.

132. *Id.*

133. *Id.*

134. *Id.* at 711, 594 S.E.2d at 914-15.

135. *See supra* Part II.B.

136. *See supra* Part II.D.

137. *See supra* Part II.G.
