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Wills, Trusts, and Estates

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WILLS, TRUSTS, AND ESTATES

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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 2006 Session. In addition, there were six opinions from the Supreme Court of Virginia during the period covered by this review that presented issues of interest to the general practitioner as well as the specialist in wills, trusts, and estates. This article reports on all of these legislative and judicial developments.[1]

II. LEGISLATION

A. *Persons Presumed Dead—Chapter Revision*

Chapter 5 of Title 64.1, dealing with persons presumed dead following a disappearance exceeding seven years in the typical case, or following certain specified events in other cases, came before the General Assembly in the 2002 Session when it was amended to provide an accelerated remedy for the successors in interest of persons "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."[2] Chapter 5 returned in the

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

2. Act of Feb. 28, 2002, ch. 58, cl. 1, 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

2003 Session when a generic "specific peril" exception was added to the seven-year rule to provide an accelerated remedy in cases resulting from the 9/11 terrorist attacks that occurred at the World Trade Center in New York and aboard United Airlines Flight 93, which crashed in Pennsylvania, as well as in any other case where one disappears after having been "exposed to a specific peril of death."[3] The attention drawn to this area of law in the 2002 and 2003 Sessions disclosed a number of problems throughout Chapter 5, which prompted the Wills, Trusts and Estates Section of the Virginia Bar Association to undertake a several-year study that led to the passage of comprehensive legislation in the 2006 Session that is designed to completely revise and reform this body of law.

Although a detailed explanation of the 2006 legislation is not feasible within the confines of this annual review, a listing of the major changes would include the following: (1) All fact situations that would permit a determination of presumed death are now consolidated into Virginia Code section 64.1-105;[4] (2) A new section, Virginia Code 64.1-106.1, authorizes the appointment of a curator to manage the estate of a person who has been missing for one year, and who cannot be shown to be alive, until the presumption of death is made out;[5] (3) The chapter's language is clarified to ensure that its provisions, which originally focused mostly on probate related considerations, will also apply to survi-

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editor's note appended to Virginia Code section 64.1-105 (Repl. Vol. 2002). This legislation is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 37 U. RICH. L. REV. 357, 367–68 (2002).

3. Act of Mar. 16, 2003, ch. 254, 2003 Va. Acts 276 (codified as amended at VA. CODE ANN. § 64.1-105(B) (Cum. Supp. 2006)). This legislation is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 38 U. RICH. L. REV. 287, 300–01 (2003).

4. VA. CODE ANN. § 64.1-105 (Cum. Supp. 2006). Virginia Code section 64.1-105.1 (Repl. Vol. 2002), dealing with the presumption of death in cases of persons disappearing in floods resulting from Hurricane Camille, was repealed because it was believed to no longer serve any purpose, and the substance of Virginia Code section 64.1-105.2 (Repl. Vol. 2002), dealing with the presumption of death in cases of persons disappearing from a ship at sea or on board an aircraft that disappears at sea, was moved to Virginia Code section 64.1-105(C) (Cum. Supp. 2006).

5. *Id.* § 64.1-106.1 (Cum. Supp. 2006). This section further provides that "[i]n determining good cause hereunder, the court shall take into account the existence and efficacy of any durable power of attorney." *Id.* It should also be noted that there is some overlap between this remedy and the one provided by Chapter 6 of Title 26, entitled "Conservators of Property of Absentees." *Id.* §§ 26-68 to -71 (Repl. Vol. 2004). This will provide the successors in interest of a missing person with several options when determining the best way to obtain relief under the unique facts of a particular case.

vorship property, insurance, and other beneficiary designations, etc.;[6] (4) The failure of existing law to address the time of a person's presumed death in any case is cured by providing a specific date of death provision for each of the different instances of presumptive death;[7] and (5) The problems raised by the absence of any provision for the issuance of a death certificate in presumptive death cases are eliminated by new language that "[a] certified copy of the court's order determining that the supposed decedent is in fact dead shall be accepted as proof of death in all situations in which a certificate of death" would be accepted.[8] Finally, an unfortunate aspect of prior law was the rule that effectively prevented a missing person's successors in interest from receiving distribution of that person's estate for a period of fifteen years in many if not most cases, regardless of whether the determination of presumptive death was based upon a seven-year absence or upon a disappearance following an exposure to a specific peril. Although no such express rule was contained in the statutes, the requirement of Virginia Code section 64.1-112 that, following the court's determination that the presumption of death has been established, the successors in interest must post a refunding bond with surety prior to receiving distribution if the absence was less than fifteen years had the same practical effect—because no surety company would write such a bond in these cases.[9] The 2006 legislation completely eliminates this problem by providing for the successors in interest to post a refunding bond "without" surety.[10]

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6. See, for example, Virginia Code section 64.1-108 (Cum. Supp. 2006), which incorporates the substance of Virginia Code section 64.1-109 (Repl. Vol. 2002), prior to its repeal.

7. *Id.* § 64.1-111(B) (Cum. Supp. 2006).

8. *Id.* § 64.1-111(C) (Cum. Supp. 2006).

9. *Id.* § 64.1-112 (Repl. Vol. 2002). In such cases, the statute provided for the assets to be invested pursuant to court order with the "interest" arising therefrom to be paid annually to the successors in interest. The statute further provided that "[t]he investment shall continue until security is given, as aforesaid, or the court, on application, orders it to be paid to the persons appearing to be entitled to it." *Id.* It is unclear whether the latter part of the preceding sentence refers to the court entering an order during or following the fifteen-year period. Even if a court should be willing to interpret it as "during" this period, conventional judicial discretion would still not guarantee a distribution.

10. *Id.* (Cum. Supp. 2006).

B. *Inter Vivos Trusts—Tenancy by the Entirety—Any Property*

The form of concurrent ownership known as the tenancy by the entirety, which can exist only between a husband and wife, is the most popular form of real estate ownership for married couples in Virginia. The primary reason for this popularity is the common-law immunity of such property from the claims of the individual (but not the joint) creditors of the husband and the wife.[11] However, married couples who decided to base their estate planning upon an inter vivos trust were unable to obtain any benefit from this common-law immunity prior to July 1, 2000, because of the rule that realty owned by a trust was not owned by a husband and wife, even if the husband and wife were its grantors, trustees, and beneficiaries. Responding to this perceived inequity, the 2000 Session broke new ground by amending Virginia Code section 55-20.1 to enable a husband and wife to convey certain tenancy by the entirety real estate to "their joint revocable or irrevocable trust, or in equal shares to their separate revocable or irrevocable trusts" without losing its tenancy by the entirety status.[12] However, the only real estate that might be so protected was their "principal family residence," that was held by them as tenants by the entireties prior to its conveyance to the trust, and this protection will last only "so long as (i) they remain husband and wife, (ii) it continues to be held in the trust or trusts, and (iii) it continues to be their principal family residence."[13]

The 2006 Session broadened the language of this provision[14] by (1) eliminating its restriction to the "principal family residence" and providing instead for its applicability to "[a]ny [of their] property,"[15] (2) deleting the requirement that a conveyance to *H*'s and

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11. *See* Rogers v. Rogers, 257 Va. 323, 512 S.E.2d 821 (1999).

12. Act of Apr. 3, 2000, ch. 331, 2000 Va. Acts 473 (codified as amended at VA. CODE ANN. § 55-20.1 (Cum. Supp. 2000)).

13. VA. CODE ANN. § 55-20.1 (Cum. Supp. 2000). See J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 34 U. RICH. L. REV. 1069, 1076 (2000), from which this paragraph was taken, *mutatis mutandis*, for additional citations of authority.

14. This provision was moved from Virginia Code section 55-20.1 (Cum. Supp. 2000) to Virginia Code section 55-20.2(B) (Cum. Supp. 2001) by the 2001 Session as a part of a revision of the statutes governing concurrent ownership and survivorship. This development is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 35 U. RICH. L. REV. 845, 849–51 (2001).

15. Act of Mar. 30, 2006, ch. 281, 2006 Va. Acts ____ (codified as amended at VA. CODE ANN. § 55-20.2(B) (Cum. Supp. 2006)). One potentially fertile field of litigation may arise

W's separate revocable or irrevocable trusts must be "in equal shares," and (3) replacing the durational limitation on the creditor immunity of conveyed property from so long as it continues to be "their principal family residence," to so long as it continues to be "their property."[16]

Notwithstanding the common law principle that tenants by the entirety hold *per tout et non per my*,[17] one of the modern social hallmarks of the tenancy by the entirety is the assumed equality of ownership between husband and wife (an expression of the partnership theory). This will no longer be true when tenancy by the entirety property is conveyed to *H*'s and *W*'s separate trusts in shares that could range, for example, from 0.1% to 99.9% and, query, whether it is good public policy for the tenancy by the entirety's historic creditor immunity, which was based upon *H*'s and *W*'s "equal" ownership, to continue under these circumstances?[18] The amendment also raises a substantive concern in regard to the new durational language limiting creditor immunity of transferred property to "so long as . . . it continues to be their property."[19] Suppose, for example, *H* and *W* create a trust providing for themselves for their lives and for their children or others thereafter. Depending upon the language used, the remainder beneficiaries may have vested or contingent interests but, in both cases, they will have a legally recognized ownership interest. In such a case, does the tenancy by the entirety property conveyed to the trust "continue to be their [i.e., *H*'s and *W*'s] property?"[20] Or, will the protection of the new rule be construed by the courts to be limited to trusts where *H* and *W* are the only beneficiaries,

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in those cases where *H* conveys separate property to *H* and *W* as tenants by the entirety, and they immediately reconvey the same to their trust. The claim that the original conveyance was intended to "hinder, delay, or defraud" *H*'s creditors would appear to be more likely in those cases where *H*'s and *W*'s conveyance is to separate trusts with *H*'s trust receiving a much greater portion of the property.

16. *Id.*

17. "By the whole and not by the half." BLACK'S LAW DICTIONARY 1181 (8th ed. 2004).

18. The equality principle was sufficiently important to the 2000 Session for it to require that, if the principal family residence were to be conveyed to separate trusts of husband and wife, it must be conveyed to them "in equal shares." VA. CODE ANN. § 55-20.2(B) (Repl. Vol. 2003).

19. *Id.* (Cum. Supp. 2006). Of course the legal title to the property will not be theirs following its conveyance to the trust, but it is assumed that this language will be interpreted as applicable to the equitable or beneficial ownership.

20. This was not a concern under the statute as previously written because the fact that others might have an ownership interest in the trust holding legal title to *H*'s and *W*'s home would not prevent the home from "continuing to be their principal family residence."

which would be the direct parallel to the original tenancy by the entirety? Regardless of one's preferred interpretation, it is doubtful whether the prudent estate planner will act upon this new provision until its operation has been clarified by further legislation.

If this legislation should be reconsidered, it is hoped that someone might inquire why it was cast in the tenancy by the entirety format in the first place. If its purpose was simply to confer creditor immunity upon the property of married persons, insofar as their separate creditors are concerned, why not say so directly without the unnecessary involvement and confusion of the tenancy by the entirety concept? Further, why should it be required that married persons' property must be put into a trust in order to obtain the desired creditor immunity? Such a requirement will be benefit to married couples who wish to insulate their property from the claims of their separate creditors, and it discriminates against those whose estate plans are will-based. Although certainly not so intended, this legislation clearly has the potential for abusive use in the continuing struggles between debtors and creditors and it may even breathe new life into a 400-year-old "badge of fraud" from the common law.[21] Conceptually, a statute could be drafted to attain the assumed creditor protection goal, without involving either trusts or the tenancy by the entirety, by providing something like: "Neither the separate nor the joint property of persons married to each other, whether held by them outright or for them in their separate or joint trusts, is subject to the claims of their separate creditors." Such a provision would also be more democratic in operation because its benefits would be automatically applicable to all married persons, whereas the benefits of the 2006 trust-based legislation will be disproportionately utilized by the carriage trade.

21. The term "badges of fraud" is considered to have originated in *Twyne's Case*, 3 Co. Rep. 80a, 76 Eng. Rep. 809 (K.B. 1601). "The 5th sign of fraud mentioned in *Twyne's case*, 3 *Co.* 81. (b) is, that there 'was a trust between the parties; for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud.'" United States v. Hooe, 7 U.S. (3 Cranch) 73, 80 (1805).

C. *Probate Avoidance—Small Estate Act*

Virginia's well-intentioned Small Estate Act[22] ("Act") has been hobbled by its very low ceiling since its enactment in 1981.[23] Although the Act's original $5,000 ceiling has been increased to $15,000,[24] which is also the ceiling in most of Virginia's other probate avoidance statutes, the Act differs from these other statutes because of the Act's "umbrella" operation as opposed to the other statutes' "asset-specific" operation such as, for example, those applying to deposits in banks,[25] deposits in savings institutions,[26] deposits in credit unions,[27] securities of a corporation,[28] etc. The Act creates a collection by affidavit process that encourages third-party cooperation by providing that one who makes a transfer of personal property thereunder will be "discharged and released to the same extent as if he dealt with a personal representative of the decedent."[29] However, this process has been limited to those cases where "[t]he value of the entire personal probate estate, wherever located, does not exceed $15,000."[30] And therein lies the problem. Anecdotal testimony abounds regarding the number of instances in which an estate could be administered outside of the probate process but for the presence of one or more claims to personal property which, though of a relatively modest value, are not covered by any of Virginia's asset-specific probate avoidance statutes. Such cases present the kind of problem that the Act's generic coverage was designed to remedy. But the Act could not be utilized in many of these cases because the value of the decedent's "entire personal probate estate," as opposed to the claim in question, exceeded $15,000. Thus, the 2006 amendment, which increases the Act's ceiling to $50,000,[31] will give the Act more of an

22. VA. CODE ANN. §§ 64.1-132.1 to -132.4 (Repl. Vol. 2002 & Cum. Supp. 2006).

23. Act of Mar. 15, 1981, ch. 281, 1981 Va. Acts 322 (current version at VA. CODE ANN. §§ 64.1-132.1 to -132.4 (Repl. Vol. 2002 & Cum. Supp. 2006)).

24. Act of Mar. 19, 2001, ch. 368, 2001 Va. Acts 338 (codified as amended at VA. CODE ANN. § 64.1-132.2(A)(1) (Repl. Vol. 2002)).

25. VA. CODE ANN. § 6.1-71 (Cum. Supp 2006).

26. *Id.* § 6.1-194.58 (Cum. Supp. 2006).

27. *Id.* § 6.1-225.49 (Cum. Supp. 2006).

28. *Id.* § 64.1-123.1 (Repl. Vol. 2002).

29. *Id.* § 64.1-132.3 (Repl. Vol. 2002).

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

31. Act of Mar. 30, 2006, ch. 280, 2006 Va. Acts ___ (codified as amended at VA. CODE ANN. § 64.1-132.2(A)(1) (Cum. Supp. 2006)).

opportunity to reach its original potential and bring much needed relief in a number of cases as soon as it becomes effective.[32] Lastly, it should be noted that two asset-specific probate avoidance statutes which are linked to the Act also will be affected by the 2006 amendment. Virginia Code section 51.1-164, which deals with payments from the Virginia Retirement System, was amended by the 2004 Session to change its ceiling from $10,000 to "the maximum allowed in § 64.1-132.2,"[33] and section 51-511, dealing with persons entitled to payment of insurance on the death of a person covered under the state employee insurance program, provides that "[p]ayment which otherwise would be made to the estate of an employee may be made in accordance with the provisions of § 51.1-164."[34]

D. *Public Guardian or Conservator—Making Funeral Arrangements*

Virginia Code section 2.2-713 provides that a public guardian or conservator ("PG/C") for an incapacitated person has the same statutory powers as a person appointed by the court unless the court specifically provides to the contrary.[35] The 2006 Session amended this section to give a PG/C the authority to make funeral, cremation or burial arrangements in two different fact situations[36]: (1) "if the [PG/C] is not aware of any person that has been otherwise designated to make [such] arrangements" pursuant to a burial power of attorney,[37] or (2) "after the death of an incapacitated person if the next of kin of the incapacitated (sic) does not wish to make the arrangements and the [PG/C] has

32. Unlike most legislation from the 2006 Session, which will become effective on July 1, 2006, this provision has a delayed effective date of Jan. 1, 2007. *Id.* (codified as amended at Va. Code Ann. § 64.1-132.2 (Cum. Supp. 2006).

33. Act of Mar. 12, 2004, ch. 81, 2004 Va. Acts 145 (codified as amended at VA. CODE ANN. § 51.1-164 (Repl. Vol. 2005 & Supp. 2006)). This development is noted in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 39 U. RICH. L. REV. 447, 452–53 (2004).

34. VA. CODE ANN. § 51.1-511 (Repl. Vol. 2005).

35. *Id.* § 2.2-713 (Supp. 2006).

36. It would seem that the requirements of both of the statutory provisions recited in the following text should be satisfied prior to the empowerment of the PG/C, but the statute is not so written.

37. Act of Apr. 19, 2006, ch. 854, 2006 Va. Acts ___ (codified as amended at VA. CODE ANN. § 2.2-713 (Supp. 2006)). The statutory provision authorizing the burial power of attorney is Virginia Code section 54.1-2825 (Repl. Vol. 2005 & Supp. 2006).

made a good faith effort to locate the next of kin."[38] Interestingly, although the latter power grants the burial authority to the PG/C "after the death of an incapacitated person,"[39] there is no such limitation in the former power, leading to the implication that it also might be exercised during the incapacitated person's life.[40] A further question left open by this legislation is its interaction with Virginia Code section 64.1-136, which provides that one who is nominated as the executor of a will is authorized to "provide for the burial of the testator" prior to qualifying in the clerk's office.[41] Lastly, assuming that this burial power is a good idea, one wonders why it is restricted to a PG/C. Just because a private person happens to be serving as guardian or conservator doesn't necessarily mean that the same needs will not also exist in a certain number of such cases.

E. *Uniform Transfers to Minors Act—Joint Custodians*

The Uniform Transfers to Minors Act ("UTMA"),[42] enacted by Virginia in 1988,[43] and presently in force in fifty jurisdictions,[44] is a form-oriented hybrid between a trust and a guardianship that is designed to enable unrepresented consumers to make transfers to minors that will be recognized for both state property and federal tax purposes without any need for a court-appointed guardian by vesting legal title in the minor[45] while granting full management powers to a transferor-appointed custodian.[46] One of UTMA's major advantages is the ease and simplicity with which custodians thereunder can make transfers. As all of the custodian's powers are spelled out in the code of an enacting state,[47]

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38. Act of Apr. 19, 2006, ch. 854, 2006 Va. Acts ___ (codified as amended at VA. CODE ANN. § 2.2-713 (Supp. 2006)).

39. VA. CODE ANN. § 2.2-713 (Supp. 2006).

40. It is difficult to see any reason for such a difference but standard rules of statutory construction lead to this conclusion.

41. VA. CODE ANN. § 64.1-136 (Repl. Vol. 2002 & Cum. Supp. 2006).

42. UNIF. TRANSFERS TO MINORS ACT, 8C U.L.A. 1 (2001).

43. Act of Apr. 4, 1988, ch. 516, 1988 Va. Acts 626 (codified at VA. CODE ANN. §§ 31-37 to -59 (Repl. Vol. 2004 & Cum. Supp. 2006). This legislation is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 22 U. RICH. L. REV. 759, 768–71 (1988).

44. UNIF. TRANSFERS TO MINORS ACT, 8C U.L.A. 1, 1–2 (Supp. 2006).

45. VA. CODE ANN. § 31-47(B) (Repl. Vol. 2004).

46. *Id.* § 31-49 (Repl. Vol. 2004).

47. *Id.* § 31-47(C) (Repl. Vol. 2004) ("By making a transfer, the transferor incorporates

the entity that a custodian asks to make a particular transfer can act with the highest level of certainty and safety by simply assuring itself that the person before it is in fact the person identified on the ownership writing as the custodian.[48] Although UTMA has provisions for successor custodians,[49] for purposes of simplicity it provided that "only one person may be the custodian" at any given time.[50] However, even though all of UTMA's provisions were drafted upon this premise of sole custodianship, the 2006 Session amended Virginia Code section 31-46 at the request of the Virginia Bankers Association to provide that "up to two persons may be joint custodians."[51] In an attempt to resolve the problems presented by forcing this square peg (i.e., joint custodians) into the Act's round hole (i.e., sole custodian), the amendment further provides that "[u]nless otherwise specified in any document creating the custodial property, each joint custodian shall have full power and authority to act alone with respect to the custodial property."[52]

Regrettably, this apparently straight forward "solution" can create a significant problem for the unknowing consumer who makes a UTMA gift to joint custodians. It is likely that, when one joint custodian seeks to act alone, an entity requested to make a transfer will decline to take immediate action because this joint custodian will not have the power to act alone if it is "otherwise specified in any document creating the custodial property."[53] And it would appear that the only way an entity can determine whether there is or is not such a specification therein will be by requiring the production of the creating document in question[54]

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in the disposition all the provisions of this chapter . . . .").

48. *Id.* § 31-52 (Repl. Vol. 2004).

49. *Id.* §§ 31-39, -54 (Repl. Vol. 2004).

50. *Id.* § 31-46 (Repl. Vol. 2004).

51. Act of Apr. 5, 2006, ch. 657, 2006 Va. Acts ___ (codified as amended at VA. CODE ANN. § 31-46 (Cum. Supp. 2006)). The Association claimed that its member banks were receiving "numerous" requests from its married customers to serve jointly for their children and that, upon being informed that this was not possible under Virginia law, they became unhappy with the banks. The amendment also provides that "[i]f either joint custodian resigns, dies, becomes incapacitated, or is removed, then the remaining joint custodian shall become sole custodian." *Id.*

52. *Id.*

53. VA. CODE ANN. § 31-46 (Cum. Supp. 2006).

54. It should be noted that the amendment refers to the document creating the "custodial property" as opposed to the document originally creating the custodianship itself. Thus, where assets have been added to a custodianship over time, there may be multiple documents creating the "custodial property," which may not all treat the power issue in

and, as front-line personnel in banks, brokerages, etc., typically have limited interpretive authority, it may also result in a referral to the entity's legal department for a final resolution. Thus, in a number of cases, UTMA's ease and simplicity will be compromised by undue delay, and this problem will be exacerbated when the joint custodians move to one of the other forty-eight UTMA jurisdictions where there is no familiarity with this novel concept.[55] For these reasons, as well as the general interpretive uncertainty created throughout UTMA by the "square peg/round hole" impact of the amendment, it is believed that the prudent estate planner will advise clients to avoid this new form of UTMA registration.

F. *Uniform Trust Code—Care of Animals*

A trust for an animal was not possible at common law because of the requirement that a trust have a beneficiary who could compel its performance in court.[56] However, there is some common-law authority for the recognition of a trust-like vehicle for the care of an animal which, though unenforceable, would be allowed to function if the "trustee" was willing to carry out its purposes. As the success of such a trust depended upon the honor of the trustee, as opposed to being a legally enforceable obligation, this became known as an "honorary" trust.[57] The 2005 Session reversed the original common law rule by providing that "[a] trust may be created to provide for the care of an animal alive during the settlor's lifetime."[58] Thus, it is surprising to see the 2006 Session amend this legislation by providing, among other things, that in construing the document creating a trust for an animal the court shall "presume against the merely . . . honorary nature of the disposition."[59]

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the same way. It is unknown whether third parties will require the production of all "creating" documents in such cases, but it is a likely possibility.

55. Tennessee is the only other jurisdiction that permits joint custodians. TENN. CODE ANN. § 35-7-211 (2001). The Virginia amendment was taken from this Tennessee provision.

56. GEORGE T. BOGERT, TRUSTS § 35 (6th ed. 1987).

57. *Id.*

58. Act of Apr. 6, 2005, ch. 935, 2005 Va. Acts 1793 (codified at VA. CODE ANN. § 55-544.08(A) (Cum. Supp. 2006)).

59. Act of Apr. 5, 2006, ch. 666, 2006 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-544.08(B) (Cum. Supp. 2006)). The omitted portion of the quoted language pro-

Unfortunately, this is just one of the issues presented by this 2006 legislation. Some of the others are: (1) The new language that trust funds may be used for burial expenses "as provided for in the instrument creating the trust"[60] may create the negative implication that trust funds may not be so used if a trust instrument fails to expressly provide therefor; (2) One of the 2006 amendments provides that the person appointed to enforce the trust "shall have the rights of a trust beneficiary for the purpose of enforcing the trust, including receiving accountings,"[61] while another provides that "[e]xcept as ordered by a court or required by the trust instrument, no . . . periodic accounting . . . shall be required;"[62] (3) Although the prohibition against a trustee commingling personal and trust assets is a fundamental rule of trust law[63] that has been codified in Virginia's Uniform Trust Code,[64] one of the 2006 amendments provides that "[e]xcept as ordered by a court or required by the trust instrument, no . . . separate maintenance of funds . . . shall be required;"[65] and (4) In dealing with the disposition of trust property which exceeds that required for the animal's care after the settlor's death, the original language of Virginia Code section 55-544.08 provided for it to be distributed to the "settlor's successors in interest" in the absence of trust language providing for a different result.[66] However, as amended by the 2006 legislation, this section now provides that (1) if the animal trust was created by a pre-residuary clause in a trust[67] or will, any excess trust funds will be distributed to the residuary

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vides that the court shall also presume against the disposition's "precatory" nature. *Id.* However, precatory language is defined as that which "merely expresses a wish or recommendation" that property given outright to a person be used in a particular way, and such language is "generally construed not to create a trust but instead to create at most an ethical obligation." BOGERT, *supra* note 56, § 19. This concept is not implicated here because the section assumes that a trust has in fact been created.

60. Act of Apr. 5, 2006, ch. 666, 2006 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-544.08(A) (Cum. Supp. 2006)).

61. *Id.* (codified as amended at VA. CODE ANN. § 55-544.08(C) (Cum. Supp. 2006)).

62. *Id.* (codified as amended at VA. CODE ANN. § 55-544.08(D) (Cum. Supp. 2006)).

63. BOGERT, *supra* note 56, § 100.

64. VA. CODE ANN. § 55-548.10(B) (Cum. Supp. 2006) ("A trustee shall keep trust property separate from the trustee's own property.").

65. Act of Apr. 5, 2006, ch. 666, 2006 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-544.08(D) (Cum. Supp. 2006)).

66. VA. CODE ANN. § 55-544.08(C) (Cum. Supp. 2005).

67. This provision creates a threshold problem because, although traditional will drafting contemplates all wills having a residuary clause, this is not true for all inter vivos trusts. And, if a trust does not have a residuary clause, it would follow that it could not have a "pre-residuary" clause.

beneficiaries named in the trust or will,[68] and (2) if the animal trust was created by the residuary clause in a trust[69] or will, the excess "shall be distributed to the settlor's successors in interest."[70] One rather obvious question raised by this provision is, Who is entitled to receive the excess when the provision is created by an inter vivos trust that has no "pre-residuary" or "residuary" clause?[71] A second question arises when the trust is created by the residuary clause in a will that has other residuary beneficiaries.[72] Does the term "successors in interest" identify the other residuary beneficiaries or the testator's intestate successors? One might ordinarily think of the former, but the amendment's use of "residuary clause" to identify takers when the trust is created by a "pre-residuary clause" and "settlor's successors in interest" to identify takers when the trust is created "otherwise" (i.e., in the residuary clause) casts doubt upon such a construction. Although the foregoing is not an exhaustive listing of the problems created by this legislation, it is hoped that it is sufficient to convince the 2007 Session that it needs to be clarified.

G. *Deceased Tenant—Landlord's Disposal of Personal Property*

New Virginia Code section 55-248.38:3 authorizes a landlord to dispose of the property of a deceased tenant/sole occupant located in the premises or in a landlord-provided storage area if (1) no personal representative has been appointed, and (2) the landlord gives ten days written notice (i) to the person identified to receive such notice in the rental application, lease or other document or, if no such person is identified, (ii) to the tenant in accordance with section 55-248.6.[73] The ten-day written notice must include a

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68. Act of Apr. 5, 2006, ch. 666, 2006 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-544.08(E) (Cum. Supp. 2006)).

69. As noted earlier, this provision creates a threshold problem because, although traditional will drafting contemplates all wills having a residuary clause, this is not true for all inter vivos trusts.

70. Act of Apr. 5, 2006, ch. 666, 2006 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-544.08(E) (Cum. Supp. 2006)).

71. As noted earlier, if an inter vivos trust does not have a residuary clause, it cannot, by definition, have a pre-residuary clause.

72. For example, *T*'s will might leave his residuary estate 40% to Brother Bob, 50% to Sister Sue, and 10% in trust to Fido, all to the chagrin of his closest kin, Son Sam. Fido's trust fails to provide for a taker of any trust assets remaining at Fido's death. Who gets these assets, Bob and Sue, or Sam?

73. Act of Apr. 6, 2006, ch. 820, 2006 Va. Acts ___ (codified at VA. CODE ANN. § 55-

statement that such property "would be treated as abandoned property and disposed of, if not claimed within 30 days in accordance with the provisions of § 55-248.38:1."[74] The interaction of these ten-day and thirty-day periods is unclear. It also might be noted that, as no waiting period is provided, a landlord can give the ten-day notice on the day of a tenant's death. This seems more than a little premature, given that a security deposit accompanies many if not most tenancies. In addition, a certain amount of time can be expected to pass before the appointment of a personal representative in any case and, when a tenant dies intestate leaving two or more distributees who cannot agree upon which one will serve as administrator, the clerk cannot appoint an administrator until thirty days after the tenant's death.[75] It is difficult to see any imminent danger to the landlord's economic interests if a reasonable waiting period preceded the right to give the ten-day notice. This new law also seems rather harsh in that its utilization is not affected by the fact that the deceased tenant's rent already may be paid for some time into the future, or that someone is willing to keep it current pending the appointment of a personal representative. It is submitted that, absent significant changes, the commonwealth would be best served by the 2007 Session repealing this provision in its entirety.

H. *Appointment of Administrator—Priorities*

The 2002 Session revised Virginia Code section 64.1-118 to provide who might qualify as an administrator during the first thirty days following a decedent's death, who might qualify after thirty days have passed, and who might qualify after sixty days have passed.[76] The 2006 Session further amended this section to pro-

248.38:3 (Cum. Supp. 2006)). Interestingly, the referenced code section provides that "[a] person 'notifies' or 'gives' a notice or notification to another by taking steps reasonably calculated to inform another person whether or not the other person actually comes to know of it." VA. CODE ANN. § 55-248.6(B) (Repl. Vol. 2003). Notwithstanding the forgiving nature of the "whether or not" language of this provision, it remains difficult to see how one takes "steps reasonably calculated to inform" a decedent of anything.

74. VA. CODE ANN. § 55-248.38:3 (Cum. Supp. 2006).

75. During the first thirty days following the intestate's death, the clerk may grant administration [only] (1) to a sole distributee or his designee or (2) in the absence of a sole distributee, to any distributee or his designee who presents written waivers of right to qualify from all other competent distributees. *Id.* § 64.1-118(A)(1) (Cum. Supp. 2006).

76. Act of Mar. 22, 2002, ch. 197, 2002 Va. Acts 262 (codified as amended at VA. CODE ANN. § 64.1-118(A)(1)–(3) (Repl. Vol. 2002)). This development is discussed in J. Rodney

vide that "[a]fter 45 days have passed since the intestate's death, the clerk may grant administration to any nonprofit charitable organization that operated as a conservator or guardian for the decedent at the time of his death."[77]

III. DECISIONS OF THE SUPREME COURT OF VIRGINIA

A. *Augmented Estate—Waiver—Separately Maintained—Insurance—Attorney Fees*

In the first of four augmented estate holdings in *Dowling v. Rowan*,[78] the Supreme Court of Virginia concluded that the specific language of the premarital agreement between Husband ("*H*") and Wife ("*W*") was sufficient to waive *H*'s rights to an elective share, exempt property, and a family allowance in *W*'s separate property that was listed in the agreement's appendices.[79] The second issue focused on *H*'s augmented estate rights in certain Peruvian real estate that *W* acquired by intestate succession during their marriage. The statute defining the augmented estate provides for the value of property gratuitously received from third parties to be excluded from the recipient's augmented estate "to the extent such property, income, or proceeds were maintained by the decedent as separate property."[80] In determining the meaning of "separately maintained" in this statute, a matter of first impression, the court disagreed with *H*'s contention that it "re-

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Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 37 U. RICH. L. REV. 357, 357–59 (2002).

77. Act of Apr. 5, 2006, ch. 724, 2006 Va. Acts ___ (codified as amended at VA. CODE ANN. § 64.1-118(A)(3) (Cum. Supp. 2006)). This right is subject to the qualification that

> (i) [I]f, during the first 45 days following the intestate's death, any distributee notifies the clerk of an intent to qualify after the 45-day period has elapsed, the clerk shall not appoint any such organization administrator until the clerk has given all such distributees an opportunity to be heard, and (ii) such organization certifies that it has made a diligent search to find an address for any sole distributee and has given not less than 30 days notice by certified mail of its intention to apply for administration to the last known address or addresses of the distributee discovered or, alternatively, that it has not been able to find any such address.

VA. CODE ANN. § 64.1-118(A)(3) (Cum. Supp. 2006). However, "[q]ualification of such organization is not subject to challenge on account of a failure to have made the certification herein required. *Id.*

78. 270 Va. 510, 621 S.E.2d 397 (2005).

79. *Id.* at 518, 621 S.E.2d at 400–01.

80. VA. CODE ANN. § 64.1-16.1(B)(ii) (Repl. Vol. 2002 & Cum. Supp. 2006).

quire[d] physical repair or maintenance upon the property," and concluded that it "refers to keeping a legal interest in the property separate."[81] Accordingly, as *H* admitted that *W* "did nothing with regard to these properties," the court held that their value was excluded from her augmented estate.[82] The third issue focused on two term life insurance policies, not listed in the premarital agreement, that *W* transferred to an irrevocable trust for her daughter three years prior to *W*'s death.[83] The statute defining the augmented estate includes irrevocable gifts made during the calendar year of one's death, or during any of the five preceding calendar years, "to the extent that the aggregate value of the transfers to the donee exceeds $10,000 in that calendar year."[84] This statute also provides that "[t]he value of an insurance policy that is irrevocably transferred during the lifetime of a decedent is the cost of a comparable policy on the date of transfer or, if such a policy is not readily available, the policy's interpolated terminal reserve."[85] *H* argued for the inclusion of the two policies at their face values because the "evidence of a 'comparable policy' [was] not available for the date of transfer, and there was no interpolated terminal reserve."[86] The court rejected this argument as an attempt to rewrite the statute and refused to include any insurance value in *W*'s augmented estate because *H*, who had the burden of proof, had "failed to prove the $10,000 threshold to trigger the 'pull back rule' in the statute."[87] Lastly, *H*, who was the executor of *W*'s estate, and an attorney, claimed legal fees relating both to the general administration of *W*'s estate and to the aug-

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81. *Dowling*, 270 Va. at 519, 621 S.E.2d at 401. The court also noted that domestic relations law provides that a married person's separate property:

> [W]ill retain its "separate" status for purposes of equitable distribution unless one of several circumstances transmutes the nature of the property, such as commingling separate assets with marital assets or retitling the property in the joint names of the spouses. Code § 20-107.3(A)(3)(d), (e), and (f). Since the primary purpose of the equitable distribution statute is to provide a fair manner for classifying assets accumulated during a marriage, we find that this body of law is sufficiently analogous to the issue at hand to inform our decision.

Id. at 520, 621 S.E.2d at 401 (citing VA. CODE ANN. § 20-107.3(A)(3)(d)–(f) (Cum. Supp. 2006)).

82. *Id.* at 520, 621 S.E.2d at 401–02.

83. *Id.*, 621 S.E.2d at 402.

84. VA. CODE ANN. § 64.1-16.1(A)(3)(d) (Repl. Vol. 2002 & Cum. Supp. 2006).

85. *Id.* § 64.1-16.1(C)(2) (Repl. Vol. 2002 & Cum. Supp. 2006).

86. *Dowling*, 270 Va. at 521, 621 S.E.2d at 402.

87. *Id.*

mented estate matter. However, following the "'American rule' which embodies the principle that each litigant must pay his own attorney's fees in the absence of a statute or contractual provision that would shift the burden,"[88] the court affirmed the trial court's allowance of the former and denial of the latter because they were occasioned by *H*'s personal interests and not "'necessary' to settle the estate."[89]

B. *Trust Interpretation—Early Vesting Presumption*

In *Schmidt v. Wachovia Bank,*[90] the wills of Husband ("*H*") and Wife ("*W*"), which created testamentary trusts for their two children for their lives, did not make any specific gift of remainders thereafter but each contained a standard contingency clause providing in part that property not "'disposed of by this will, shall pass to and descend to my heirs at law.'"[91] Following the death of the second child, the trustee sought the aid and direction of the court to determine whether the remainder interests under these contingency clauses vested at the time of *H*'s and *W*'s deaths, respectively, or at the time of the second child's death.[92] Applying settled law to the stipulated facts of this case, and finding no clear language of an expressed intent to postpone vesting to some future time, the majority of the Supreme Court of Virginia applied the long-standing presumption of early vesting and affirmed the trial court's holding that the remainders in question vested at each testator's death.[93]

88. *Id.* at 521–22, 621 S.E.2d at 402.

89. *Id.* at 523, 621 S.E.2d at 403.

90. 271 Va. 20, 624 S.E.2d 34 (2006).

91. *Id.* at 23, 624 S.E.2d at 36.

92. *Id.* The trustee attempted to participate in the appeal, arguing in favor of the trial court's application of the early vesting rule. But it was dismissed as an appellee because "Wachovia, however, received the aid and guidance that it had sought in the trial court and, therefore, does not have standing to so act. Moreover, a trustee cannot litigate the claims of one set of legatees against the others." *Id.* at 24 n.1, 624 S.E.2d at 37 n.1.

93. *Id.* at 26, 624 S.E.2d at 38. *H*'s and *W*'s wills both contained standard spendthrift language, and one dissenting Justice believed that "it defies logic and reason that the Testators would create spendthrift trusts and, at the same time, intend to vest [one of the children] with the corpora thereof," which would be the result under the early vesting rule. *Id.* at 27, 624 S.E.2d at 39 (Stephenson, J., dissenting).

C. *Will Contract—Mutual and Reciprocal Wills*

The case of *Plunkett v. Plunkett*[94] "concern[ed] the proper construction of a marital agreement and two mutual and reciprocal wills, all of which were executed simultaneously."[95] Following Husband's death, his children sought to have a constructive trust imposed on his separate property, claiming that his testamentary disposition thereof "was inconsistent with his intent, the [marital] Agreement, and [his] 'prior relationship with and devotion to his children.'"[96] The trial court granted this relief after determining that the agreement was ambiguous[97] and then construing it in the light of the children's extrinsic evidence. However, applying established principles of law, the Supreme Court of Virginia, concluding that "[t]he terms of this Agreement and the wills incorporated therein are not ambiguous and can be harmonized," reversed the trial court and entered final judgement in favor of Wife.[98]

D. *Augmented Estate—Group Life Insurance and Retirement Benefits*

In *Sexton v. Cornett*,[99] Husband ("*H*") changed the beneficiary of his Virginia Retirement System ("VRS") administered group life insurance and retirement benefits from Wife ("*W*") to Sister ("*S*") and Niece ("*N*") two months before his death.[100] When *W* sought a portion of the value of these assets as a part of her rights in *H*'s augmented estate, the issue before the court was the interplay between that body of law and certain exemption statutes providing (1) that "'[t]he insurance provided for in this chapter [VRS] . . . and all proceeds therefrom shall be exempt from

94. 271 Va. 162, 624 S.E.2d 39 (2006).

95. *Id.* at 164, 624 S.E.2d at 40.

96. *Id.* at 166, 624 S.E.2d at 41.

97. "The trial court's opinion letter does not expressly state that the Agreement is ambiguous or that resort to extrinsic evidence was necessary. Nonetheless, the fact that such evidence was considered and was apparently deemed necessary to the trial court's judgment implicitly indicates that such a finding occurred." *Id.* at 166 n.2, 624 S.E.2d at 41 n.2.

98. *Id.* at 169–70, 624 S.E.2d at 43.

99. 271 Va. 251, 623 S.E.2d 898 (2006).

100. *Id.* at 254, 623 S.E.2d at 900.

levy, garnishment, and other legal process,'"[101] (2) that "'[r]etirement allowances and other benefits accrued or accruing to any person under this title [VRS] . . . shall not be subject to execution, attachment, garnishment, or any other process whatsoever,'"[102] and (3) that all group life insurance is similarly exempt.[103] The court noted that these statutes "have been a part of the law of Virginia since 1960, 1952, and 1934, respectively,"[104] observed that "[u]ndoubtedly, much legal advice has been given and many estate plans have been made in reliance upon them,"[105] and then stated that the question before it was whether these statutes "were partially repealed by implication when the augmented estate laws were enacted in 1990."[106]

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101. *Id.* at 255–56, 623 S.E.2d at 901 (quoting VA. CODE ANN. § 51.1-510 (Repl. Vol. 2005)). The quoted statute was not mentioned in the trial court's opinion or in the brief of any party.

102. *Id.* at 256, 623 S.E.2d at 901 (quoting VA. CODE ANN. § 51.1-124.4 (Repl. Vol. 2005)). The quoted statute was not mentioned in the trial court's opinion or in the brief of any party.

103. Virginia Code section 38.2-3339 (Repl. Vol. 2002 & Cum. Supp. 2006) was quoted in full by the court in *Sexton*, as follows:

> § 38.2-3339. Exemption of group life insurance policies from legal process. — No group life insurance policy, nor its proceeds, shall be liable to attachment, garnishment, or other process, or to be seized, taken, appropriated, or applied by any legal or equitable process or operation of law, to pay any debt or liability of any person insured under the policy, or his beneficiary, or any other person who has a right under the policy, either before or after payment. If the proceeds of a group life insurance policy are not made payable to a named beneficiary, the proceeds shall not constitute a part of the insured person's estate for the payment of his debts.

271 Va. at 256, 623 S.E.2d at 901.

104. *Sexton*, 271 Va. at 256, 623 S.E.2d at 901.

105. *Id.* No such claims were made in the brief of any party. When the question was posed to a group of over one hundred lawyers from all across the Commonwealth who were attending Virginia's premiere estate planning conference at the Tides Inn, in April 2006, none of them had based an estate plan upon any of these statutes nor were they aware of any other lawyer who had.

106. *Id.* The portion of the court's decision concluding that "if the augmented estate laws are read in isolation, the assets held by these beneficiaries, as donees of the decedent's property within the year prior to his death, are clearly subject to the widow's claim," *Id.* at 255, 623 S.E.2d at 900, is omitted from the text because, although the court cited the wrong authority for its conclusion, this error did not affect the outcome of the case.

The court based includability upon Virginia Code section 64.1-16.1(A)(3)(d) (Repl. Vol. 2002 & Cum. Supp. 2006) but this provision deals with irrevocable gifts, and *H*'s beneficiary designations in this case were revocable. *Sexton*, 271 Va. at 255, 623 S.E.2d at 900. It should be noted that the court correctly applied this statutory authority in *Dowling v. Rowan*, where, instead of making a revocable insurance beneficiary designation, the insured transferred the insurance in question to an irrevocable trust. 270 Va. 510, 520–21, 621 S.E.2d 397, 402 (2005). The *Dowling* case is discussed *supra* Part III.A.

The correct inclusion section for revocable transfers, such as the insurance beneficiary designation in this case, is Virginia Code section 64.1-16.1(A)(3)(b) (Repl. Vol. 2002 &

Noting that implied repeal is not favored, and that the older insurance exemption statutes are special in their operation while the more recent augmented estate statutes are general in their application to all property, the court decided to

> [A]dhere to a rule of construction that where there are two statutes, the earlier special and the later general, and the terms of the general are broad enough to include the subject matter provided for in the special, a presumption arises that the earlier special act is to be considered as remaining in effect as an exception to the later general law.[107]

However, although this presumption is rebuttable, and although the opinion notes that "[t]he courts assume that a legislative body, when enacting new legislation, was aware of existing laws pertaining to the same subject matter,"[108] the opinion fails to mention the following statutory language, defining "estate" and "property" in the general, i.e., the augmented estate, statutes:

> As used in this section, the terms "estate" and "property" shall include insurance policies, retirement benefits exclusive of federal social security benefits, annuities, pension plans, deferred compensation arrangements, and employee benefit plans to the extent owned by, vested in, or subject to the control of the decedent on the date of his death or the date of an irrevocable transfer by him during his lifetime.[109]

It is respectfully submitted that, in resolving the conflict between the general and specific statutes before it, the purpose and impact of this language found in the section defining the augmented estate[110] should have been discussed in light of the general purpose and public policy of the augmented estate legislation. But this definitional provision is not even mentioned in the opinion, even though it was called to the court's attention in the Brief of Appellant,[111] the Brief of Appellee,[112] and the Brief of

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Cum. Supp. 2006). The distinction is significant because inclusion of irrevocable transfers under section 64.1-16.1(A)(3)(d) is limited to transfers made "within the calendar year of the decedent's death or any of the five preceding calendar years to the extent that the aggregate value of the transfers to the donee exceeds $10,000 in that calendar year," and there are no such time or monetary limitations applicable to revocable transfers included under section 64.1-16.1(A)(3)(b).

107. *Sexton*, 271 Va. at 257, 623 S.E.2d at 901.

108. *Id.* The quoted sentence continues "and intended to leave them undisturbed." *Id.*

109. VA. CODE ANN. § 64.1-16.1(D) (Repl. Vol. 2002 & Cum. Supp. 2006). This language, from the section defining the augmented estate, also appears in the section dealing with the satisfaction of rights thereunder. *Id.* § 64.1-16.2(F) (Repl. Vol. 2002 & Cum. Supp. 2006).

110. *Id.* § 64.1-16.1(D) (Repl. Vol. 2002 & Cum. Supp. 2006).

111. Brief of Appellant at 4–5, *Sexton*, 271 Va. 251, 623 S.E.2d 898 (No. 050643).

Guardian ad litem for *N*.[113] Lastly, after applying the orthodox presumption, the court concluded that the insurance and retirement benefits in this case

> [D]id not become a part of the augmented estate, that their value should not be added to it,[114] and that the beneficiaries are not subject to any claims for contribution. Although we do not agree with the reasoning expressed by the trial court in reaching its decision, its holding was correct and we will affirm the judgment.[115]

E. *Holographic Will—Entirely in T's Handwriting*

The issue in *Berry v. Trible*[116] was "whether the circuit court erred in confirming a jury verdict that a handwritten phrase and notation, made on a typewritten draft of a will containing many other handwritten entries, constituted a valid holographic will."[117] These handwritten markings were so numerous, varied, and scattered that, instead of attempting to describe them, the court took the somewhat unusual step of attaching a copy of the page in question to its opinion.[118] After surveying the relevant law, the court decided to "take this opportunity to reaffirm [the following two] basic principles"[119]:

> We hold that a holographic will may only be established upon consideration of all handwritten entries made by the testator on a document, not upon consideration of only portions of those handwritten entries selected by the will's proponent . . .. We further hold that a purported holographic will is invalid if the handwritten entries are interwoven or joined to the typewritten material on the document, or continue from the typewritten material in physical form, by reference, or in sequence of thought.[120]

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112. Brief of Appellee at 2, *Sexton*, 271 Va. 251, 623 S.E.2d 898 (No. 050643).

113. Brief of Guardian *ad litem* at 3, *Sexton*, 271 Va. 251, 623 S.E.2d 898 (No. 050643).

114. The trial court had "ruled that the value of the life insurance proceeds and the value of the retirement benefits should be added to the augmented estate." *Sexton*, 271 Va. at 254, 623 S.E.2d at 900. "No cross-error [was] assigned to this ruling." Brief of Appellant *supra* note 111, at 5. Indeed, both appellees agreed therewith. *See* Brief of Appellee, *supra* note 112, at 2; Brief of Guardian *ad litem*, *supra* note 113, at 3.

115. *Sexton*, 271 Va. at 257, 623 S.E.2d at 902.

116. 271 Va. 289, 626 S.E.2d 440 (2006).

117. *Id.* at 293, 626 S.E.2d at 441.

118. *Id.* at 303, 626 S.E.2d at 448.

119. *Id.* at 301, 626 S.E.2d at 446.

120. *Id.*

The court then held that "[a]pplying these principles, we conclude that the proffered holographic will fails as a matter of law."[121]

F. *Trusts—Accounting*

The issue in *Campbell v. Harmon*[122] was "whether the personal representative of the estate of a decedent who was a lifetime beneficiary of a trust has standing to seek an accounting from the trust fiduciaries."[123] Husband ("*H*"), who was the sole income beneficiary of an inter vivos trust created by his deceased wife for the fifteen years preceding his death in 1999, received distributions therefrom but never received any accountings from its trustees.[124] In response to a petition by *H*'s executor to compel an accounting by the trustees in connection with this income interest, the court reversed the decision below, concluding that "[a] decedent's personal representative has standing under the plain language of Code § 8.01-25 to maintain a cause of action existing at the time of the decedent's death,[125] which includes the right to compel an accounting under Code § 8.01-31 from the trustees of a trust of which the decedent was a beneficiary."[126]

IV. CONCLUSION

For the reasons recited herein, it is respectfully submitted that the 2007 Session should (1) repeal or clarify the amendments re-

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121. *Id.*

122. 271 Va. 590, 628 S.E.2d 308 (2006).

123. *Id.* at 593, 628 S.E.2d at 309.

124. *Id.* at 594, 628 S.E.2d at 309–10.

125. In an earlier part of its opinion, the court stated that "[n]o issue was raised by the parties or the trial court contesting whether [*H*] had a cause of action for an accounting prior to his death. We will therefore assume, without deciding, that a cause of action did accrue to [*H*] by virtue of the Trustees' failure to account and that such failure was the necessary injury or damage by which a cause of action accrued." *Id.* at 597 n.5, 628 S.E.2d at 311 n.5.

126. *Id.* at 601, 628 S.E.2d at 314. However, in regard to a second accounting regarding the Trustees' alleged actions in connection with certain personal property that occurred after *H*'s death, the court affirmed the trial court's denial because "[*H*] clearly had no cause of action against the Trustees during his lifetime" in regard thereto that could survive under Virginia Code section 8.01-25 (Repl. Vol. 2000 & Cum. Supp. 2006). *Campbell*, 271 Va. at 601, 628 S.E.2d at 313–14.

lating to (i) trusts and the tenancy by the entirety[127] and (ii) a landlord's disposal of a deceased tenant's personal property;[128] (2) clarify the amendments relating to (i) the burial authority of a public guardian or conservator,[129] and (ii) trusts for the care of animals;[130] and (3) enact legislation clarifying its original intent that the presence of a creditor immunity provision in a statute does not prevent the value of property covered by that statute from being included in the value of a decedent's augmented estate.[131]

127. *See supra* Part II.B.
128. *See supra* Part II.G.
129. *See supra* Part II.D.
130. *See supra* Part II.F.
131. *See supra* Part III.D.

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