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WILLS, TRUSTS, AND ESTATES

J. Rodney Johnson *

I. INTRODUCTION

The 2007 Session of the General Assembly enacted substantially more wills, trusts, and estates legislation than one typically expects, some of which was of a particularly significant nature, such as that (1) providing for the probate of wills not executed with the required statutory formalities; (2) preventing any future application of an unfortunate augmented estate decision of the Supreme Court of Virginia; (3) avoiding the impact of federal Employee Retirement Income Security Act of 1974 (“ERISA”) preemption in certain insurance revocation and slayer statute cases; and (4) mandating notice to the public when modification or termination of a charitable trust, or the sale of its realty, is sought. In addition, there were fourteen other enactments from the 2007 Session, and three from the 2008 Session, along with eleven opinions from the Supreme Court of Virginia during the two-year period ending May 1, 2008 that presented issues of interest in this area. This article reports on all of these legislative and judicial developments.¹

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

II. 2007 LEGISLATION

A. *Will Execution—Statutory Formalities—Dispensation*

It is elementary law that, although a writing may have been executed in accordance with all of the mechanical formalities imposed by the statute of wills,² nevertheless, the writing will be denied probate if it is the product of fraud, duress, or undue influence. And this is the way it ought to be—no one should profit by such conduct. In this context, the layperson unencumbered by a legal education would probably think it an appalling non sequitur to say that, even though clear and convincing evidence (1) proves that a particular writing does represent the author's testamentary intent, (2) establishes the author's testamentary capacity, and (3) negates any fraud, duress, or undue influence, the writing will nevertheless be denied probate—solely because it was not executed in accordance with the statutory formalities intended to ensure these goals. Yet such has been the historic general rule in America and the historic position of the Supreme Court of Virginia. For example, “the statute must be strictly followed” in order to protect the testator and prevent fraud.³ A growing belief that a rigid adherence to the statutory formalities has not only failed to accomplish this goal,⁴ but, instead, has re-

2. Virginia's statute of wills (with the provisions relating to holographic wills omitted) reads as follows:

No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover . . . the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator . . .

VA. CODE ANN. § 64.1-49 (Repl. Vol. 2007 & Supp. 2008).

3. *Savage v. Bowen*, 103 Va. 540, 546, 49 S.E. 668, 669 (1905). In its most recent will-execution case, the Supreme Court of Virginia stated that this remains the rule, i.e., the statute “must be strictly followed,” but it then went on to render a decision that is difficult to defend under this theory. See *Hampton Roads Seventh-Day Adventist Church v. Stevens*, 275 Va. 205, 211, 657 S.E.2d 80, 83 (2008), discussion *infra* Part IV.K. It is interesting to note that the revocable inter vivos trust, which is increasingly being used as the primary vehicle for the disposition of one's estate at death, has no witnessing requirements or other formalities of execution, and yet there are no recorded Virginia cases where this has led to or facilitated the fraudulent creation of a trust.

4. An early doubter was Lord Mansfield, who observed some 250 years ago that “[i]n all my experience at the Court of Delegates, I never knew a fraudulent will, but what was legally attested.” *Estate of Parsons*, 163 Cal. Rptr. 70, 75 (Cal. Ct. App. 1980) (quoting *Wyndham v. Chetwynd*, (1757) 96 Eng. Rep. 53 (K.B.).

sulted in the failure of numerous substantively valid wills,⁵ and has led some courts to relax the Procrustean rigor with which these requirements have been enforced in favor of a substantial compliance approach.⁶ However, because of limitations inherent in the substantial compliance approach,⁷ this increasing dissatisfaction with strict compliance also led to the birth of the dispensation movement, which envisions a statute authorizing the trial court to dispense with any one or more of the statutory formalities if the ultimate goal of the statute of wills is satisfied by clear and convincing evidence.⁸

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") amended the Uniform Probate Code ("UPC") in 1990 in order to provide for such a dispensation statute,⁹ and the statute has since been enacted by Colorado,¹⁰ Hawaii,¹¹ Michigan,¹² Montana,¹³ South Dakota,¹⁴ and Utah;¹⁵ endorsed by the

5. A "substantively valid will" is a testamentary writing which reflects a capacitated person's intent and which is not the product of fraud, duress, or undue influence.

6. See the leading case *In re Will of Ranney*, 589 A.2d 1339, 1341-42 (N.J. 1991). There are several Virginia cases that have provided a remedy in the name of substantial compliance. See, e.g., *Robinson v. Ward*, 239 Va. 36, 42, 387 S.E.2d 735, 738-39 (1990); *Sturdivant v. Birchett*, 51 Va. (10 Gratt.) 67, 74, 89 (1853). However, even if these tentative steps away from the rigid adherence to statutory formalities had become the rule of law in Virginia, their limited applicability would represent an inferior solution to the overall problem as noted in the following text.

7. For example, there is no way that a will with only one subscribing witness can be said to have substantially complied with a statute that requires two.

8. For a more complete discussion of this subject in a Virginia context, see J. Rodney Johnson, *Dispensing with Wills Act Formalities for Substantively Valid Wills*, 18 VA. B. ASS'N J. 10 (1992), from which much of this paragraph is taken, and see also Kelly A. Hardin, Note, *An Analysis of the Virginia Wills Act Formalities and the Need for a Dispensing Power Statute in Virginia*, 50 WASH. & LEE L. REV. 1145 (1993).

9. See UNIF. PROBATE CODE § 2-503 (amended 1997), 8 U.L.A. 40 (Supp. 2007). This section provides in its entirety as follows:

Although a document or writing added upon a document was not executed in compliance with [the statute of wills], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.

Id.

10. COLO. REV. STAT. § 15-11-503(1) (2006).

11. HAW. REV. STAT. § 560:2-503 (Repl. Vol. 2006).

12. MICH. COMP. LAWS ANN. § 700.2503 (West 2002).

13. MONT. CODE ANN. § 72-2-523 (2004).

14. S.D. CODIFIED LAWS § 29A-2-503 (2004).

15. UTAH CODE ANN. § 75-2-503 (Supp. 2007).

Restatement of Property;¹⁶ and enacted, with modifications, by the 2007 Session as Virginia Code section 64.1-49.1, "Writings intended as wills, etc."¹⁷ Although the Virginia dispensation statute adopts the language of its UPC ancestor,¹⁸ it adds the three following restrictions: (1) a testator's signature may be dispensed with in only two instances, i.e., (a) where the testator signs the will's self-proving affidavit instead of the will itself, and (b) crossed wills, where each of two testators, typically husband and wife, inadvertently signs the other's will; (2) the remedy is not available in informal probate before the clerk but only in inter partes proceedings before the court; and (3) a proceeding in which the dispensation remedy is sought must be brought within one year of the decedent's death.¹⁹ It is believed that this forward-looking legislation will (1) significantly reduce the growing volume of Virginia litigation focusing on the minutiae of will execution formalities, and (2) result in an increased honoring of Virginians' testamentary intent because wills that are substantively valid will now be probatable notwithstanding technical defects in their execution.²⁰

B. *Augmented Estate—Life Insurance—Retirement Benefits*

Virginia's archaic, inadequate, and unfair laws purporting to provide a surviving spouse with certain rights in a deceased spouse's estate²¹ were replaced in 1991 by an augmented estate regime modeled on the 1969 UPC in order to guarantee a surviving spouse a "fair share" of the value of all assets that the deceased spouse owned or controlled at death.²² From the very be-

16. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (1999).

17. VA. CODE ANN. § 64.1-49.1 (Repl. Vol. 2007).

18. See *id.*

19. *Id.*

20. If this remedy had been available to the parties in the recent case of *Hampton Roads Seventh-Day Adventist Church v. Stevens*, 275 Va. 205, 657 S.E.2d 80 (2008), discussion *infra* Part IV.K., that case would have had its final resolution at the trial court level.

21. These so-called "rights," i.e., dower and curtesy in real property and a forced statutory share in personal property, are discussed in J. Rodney Johnson, *The Abolition of Dower in Virginia: The Uniform Probate Code as an Alternative to Proposed Legislation*, 7 U. RICH. L. REV. 99 (1972), and J. Rodney Johnson, *Interspousal Property Rights at Death, (You Can't Take It with You, but You Can Prevent Your Spouse from Getting Any of It)*, 10 VA. B. ASS'N J. 10 (1984).

22. See J. William Gray, Jr., *Virginia's Augmented Estate System: An Overview*, 24 U.

ginning, the General Assembly expressly provided, with qualifications not relevant to this discussion, that “the terms ‘estate’ and ‘property’ [as used in connection with the augmented estate] shall include insurance policies, [and] retirement benefits”²³ However, a 2006 decision of the Supreme Court of Virginia incorrectly concluded that certain language in the Code, which was designed to protect Virginia Retirement System administered group life insurance and retirement benefits from the reach of a beneficiary’s creditors, also prevented these assets from being included in an insured’s augmented estate.²⁴ To negate any future application or extension of this unfortunate decision, the 2007 Session amended Virginia Code Sections 64.1-16.1(D) and 64.1-16.2(F) to provide:

All such insurance policies and other benefits are included in the terms “estate” and “property” [as used in connection with the augmented estate] notwithstanding the presence of language contained in any statute otherwise providing that neither they nor their proceeds shall be liable to attachment, garnishment, levy, execution, or other legal process or be seized, taken, appropriated, or applied by any legal or equitable process or operation of law or any other such similar language.²⁵

C. *ERISA Preemption—Insurance Beneficiary Revocation on Divorce—Slayer Statute—Codified Constructive Trust*

1. ERISA Preemption

In order to provide a uniform federal rule for employers, ERISA preempts any state law that “relate[s] to” any ERISA-covered employee benefit plan.²⁶ In *Egelhoff v. Egelhoff*, the Supreme Court of the United States held that the decedent’s employer-provided insurance and pension plans were governed by ERISA, that a Washington statute providing for the automatic revocation

RICH. L. REV. 513 (1990); J. William Gray, Jr., *Administering the “Augmented” Estate*, 17 VA. B. ASS’N J. 9 (1991).

23. VA. CODE ANN. §§ 64.1-16.1(D), -16.2(F) (Repl. Vol. 2007).

24. *Sexton v. Cornett*, 271 Va. 251, 255–57, 623 S.E.2d 898, 901–02 (2006). This opinion is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 41 U. RICH. L. REV. 321, 338–41 (2006).

25. VA. CODE ANN. §§ 64.1-16.1(D), -16.2(F) (Repl. Vol. 2007). The rule of the *Sexton* case was applied in a recent circuit court case because the decedent therein died in 2005, prior to the effective date of this 2007 amendment. *Higham v. Williams*, CL-2006-11954, 2008 Va. Cir. LEXIS 27 (Cir. Ct. Mar. 28, 2008) (Fairfax County).

26. 29 U.S.C. § 1144(a) (2000).

upon divorce of the decedent's beneficiary designations in favor of his former wife related to ERISA, and therefore that the state statute was preempted by ERISA.²⁷ However, although ERISA preempts such state statutes, it should not preempt a common law remedy that prevents unjust enrichment in these cases by imposing a constructive trust upon an unintended beneficiary after the benefits have been received.²⁸ Moreover, NCCUSL believes that a state's codification of the common law constructive trust in these circumstances will not offend ERISA, and thus it has amended the UPC to provide such a remedy in section 2-804(h)(2).²⁹ Although this UPC provision has been enacted in Alaska,³⁰ Colorado,³¹ Hawaii,³² Michigan,³³ New Mexico,³⁴ South Dakota,³⁵ and Utah,³⁶ its validity has not yet been tested in the Supreme Court of the United States.³⁷

27. 532 U.S. 141, 146–47 (2001).

28. See Sarabeth A. Rayho, Note, *Divorcees Turn About in Their Graves as Ex-Spouses Cash In: Codified Constructive Trusts Ensure an Equitable Result Regarding ERISA-Governed Employee Benefit Plans*, 106 MICH. L. REV. 373, 390 (2007). The author is indebted to Ms. Rayho for sharing with him a prepublication draft of her article, which collects all of the relevant authority, pro and con, and provides an excellent analysis thereof. This material was very helpful during the legislative process leading up to the enactment of the Virginia legislation described *infra* Part II.C.2–3.

29. See UNIF. PROBATE CODE § 2-804(h)(2) cmt. (amended 1993), 8 U.L.A. 221 (1998). The Commissioners' Official Comment to UPC § 2-804(h)(2) provides in part that:

This provision respects ERISA's concern that federal law govern the administration of the plan, while still preventing unjust enrichment that would result if an unintended beneficiary were to receive the pension benefits. Federal law has no interest in working a broader disruption of state probate and nonprobate transfer law than is required in the interest of smooth administration of pension and employee benefit plans.

Id.

30. ALASKA STAT. § 13.12.804 (2006).

31. COLO. REV. STAT. § 15-11-804(8)(b) (2006).

32. HAW. REV. STAT. § 560:2-804 (Repl. Vol. 2006).

33. MICH. COMP. LAWS ANN. § 700.2809(2) (West 2002).

34. N.M. STAT. § 45-2-804(I) (Repl. Vol. 1995).

35. S.D. CODIFIED LAWS § 29A-2-804(h)(2) (2004).

36. UTAH CODE ANN. § 75-2-804(8)(b) (Supp. 2007).

37. It should be noted that although this legislation was prompted by the specter of ERISA preemption, it is not a narrow statute limited to ERISA but, instead, it is a broad remedy available whenever there is a preemption by any federal law. If, nevertheless, this codification of the common law constructive trust should be found to be a state statute that "relates to"—and thus is preempted by—ERISA, such a decision should not affect the availability of a constructive trust as a common law remedy. And, if the Supreme Court of the United States should determine that state common law remedies are also preempted by ERISA, the Court could still impose a constructive trust by an application of federal common law. For a discussion of federal common law in this context, see Rayho, *supra* note 28, at 384–87. For an application of federal common law in Virginia, in the context of

2. Revocation of Death Benefits on Divorce in Virginia

Section 20-111.1 of the Code of Virginia, which provides for the revocation of death benefits in favor of a former spouse upon divorce or annulment,³⁸ would render the same result as the Washington statute in *Egelhoff* and thus, in cases dealing with death benefits arising under ERISA covered plans, this code section would be preempted because it “relates to” ERISA. To prevent this or any other federal preemption from affecting the final result in any case, the 2007 Session followed the recommendation of NCCUSL and amended section 20-111.1 by adding thereto the relevant language of UPC section 2-804(h)(2) to provide for a codified constructive trust remedy if the statute is preempted by any³⁹ federal law.⁴⁰

3. Virginia Slayer Statute

It is a fundamental rule of Virginia’s public policy that a person should not profit as a result of the person’s own wrong. In order to prevent one of the most reprehensible violations of this public policy, Virginia enacted a “slayer statute” to prohibit one who is convicted of the murder of another⁴¹ from taking an economic benefit

the slayer statute, see *Connecticut General Life Insurance Co. v. Riner*, 351 F. Supp. 2d 492 (W.D. Va. 2005), *aff’d sub nom. Connecticut Life Insurance Co. v. Estate of Riner*, 142 Fed. Appx. 690 (4th Cir. 2005).

38. VA. CODE ANN. § 20-111.1 (Repl. Vol. 2008). “The term ‘death benefit’ includes any payments under a life insurance contract, annuity, retirement arrangement, compensation agreement or other contract designating a beneficiary of any right, property or money in the form of a death benefit.” *Id.*

39. Note that the amendment is not confined to cases where the federal preemption is because of ERISA; such a restriction might cause a court to determine that the amendment “relates to” ERISA and thus it would itself be preempted.

40. VA. CODE ANN. § 20-111.1(D) (Repl. Vol. 2008). The Virginia provision reads in full as follows:

If this section is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under this section is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted.

Id.

41. The statute, as in force in 2007, was also applicable to a person found to be a murderer by a preponderance of the evidence in a civil proceeding where the person “is not available for prosecution by reason of his death by suicide or otherwise.” *Id.* § 55-401 (Repl. Vol. 2007). The 2008 Session enlarged the definition of “slayer” to include voluntary manslaughter. Act of Apr. 11, 2008, ch. 830, 2008 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-401). This and the other 2008 amendments to the slayer statute are discussed in Part III.A., *infra*.

from that person by deed, will, intestacy, insurance, etc.⁴² In the present context, the rather obvious question is whether, when the benefits in question are flowing from an employer-provided benefit plan, the slayer statute “relates to” ERISA and thus would be preempted. When this question was collaterally raised in *Egelhoff*, the Supreme Court of the United States noted, in dicta, that almost all of the states have such statutes, that these statutes pre-date ERISA, “[a]nd because the statutes are more or less uniform nationwide, their interference with the aims of ERISA is at least debatable.”⁴³ However, even though the validity of slayer statutes vis-à-vis ERISA remains an open question in the Supreme Court of the United States,⁴⁴ the 2007 Session also amended Virginia’s slayer statute by adding UPC-suggested language⁴⁵ to provide for a codified constructive trust remedy if any court should decide that the slayer statute is preempted by any federal law.⁴⁶

D. Charitable Trusts—Modification, Termination, or Sale of Realty—Public Notice

It is accepted common law that, although the public, or some reasonably large segment thereof, is the ultimate beneficiary of a charitable trust, no member of the public has any right to participate in any legal proceedings seeking the modification or termination of the trust, or the sale of its real property; instead, the

42. See VA. CODE ANN. §§ 55-401 to -415 (Repl. Vol. 2007 & Supp. 2008). The background of this statute is discussed in J. Rodney Johnson, *Wills, Trusts, and Estates*, 68 VA. L. REV. 521, 525–28 (1982).

43. *Egelhoff v. Egelhoff*, 532 U.S. 141, 152 (2001).

44. In *Connecticut General Life Insurance Co. v. Riner*, the court held that even if Virginia’s slayer statute was preempted by ERISA, federal common law would prevent a life insurance beneficiary convicted of murdering the insured from profiting by this wrong. 351 F. Supp. 2d 492, 497 (W.D. Va. 2005), *aff’d sub nom. Connecticut General Life Insurance Co. v. Estate of Riner*, 142 Fed. Appx. 690 (4th Cir. 2005).

45. See UNIF. PROBATE CODE § 2-803(i)(2) (amended 1993), 8 U.L.A. 213 (1998).

46. See VA. CODE ANN. § 55-414(B) (Supp. 2008). The Virginia provision reads in full as follows:

If this chapter or any part thereof is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this chapter, any person who, not for value, receives a payment, an item of property, or any other benefit to which he is not entitled under this chapter, shall return that payment, item of property, or other benefit or be liable for the amount of the payment or the value of the property or benefit to the person who would have been entitled to it were this chapter or part thereof not preempted.

public's interest in such matters is represented by the Attorney General.⁴⁷ A logical extension of this rule, which provides that as the general public has no right to participate in such matters it has no right to receive any notice thereof, generated significant interest in an unreported circuit court case dealing with the sale of certain charitable real estate in the City of Richmond in 2005. The members of the neighborhood in which the realty was located, who did not learn of the proposed sale until after it had been authorized by the court and the property was being advertised, believed that they had relevant information which, had it been considered by the court, would have led to a different outcome.⁴⁸ However, notwithstanding the Attorney General's willingness to argue these points on behalf of the neighborhood members, final judgment on the trustee's right to sell had already been entered in the circuit court proceeding.⁴⁹

To prevent such results in the future, the 2007 Session amended the notice provisions of the Uniform Trust Code ("UTC") to require petitioners to give notice "if the proceeding seeks the modification or termination of a charitable trust or the sale of any of its real estate, to the public at large by order of publication published once a week for three consecutive weeks prior to any hearing or trial . . ." ⁵⁰ However, as noted *supra* in footnote 47, this notice provision does not change the common law rule that members of the public at large have no right to participate in such proceedings. "The purpose of the notice, which shall be stated therein, is solely to make the public aware of the nature of such proceedings, the remedy being sought therein, and the opportunity to share their views in regard thereto with the Attorney General."⁵¹ It is believed that this public interest legislation is a salutary solution to a longstanding problem in the law of charita-

47. Notwithstanding the acceptance of this rule, it is difficult to find any case making a clear statement thereof. For this reason, and also to ensure that this remains the rule, the legislation being reported upon provides in part that "[t]his notice provision does not change the common law rule that members of the public at large are not entitled to be parties to such judicial proceedings or to have any right to appear therein." *Id.* § 55-542.06(A)(3)(a) (Repl. Vol. 2007).

48. See Scott Bass, *Windsor Farms Braces for Brouhaha*, STYLE WKLY., Sept. 13, 2006, available at <http://www.styleweekly.com/article.asp?idarticle=12963>.

49. See *id.*

50. VA. CODE ANN. § 55-542.06(A)(3)(a) (Repl. Vol. 2007). The amendment further provides that "[t]he court shall not conduct any hearing or trial until it has made a finding that the required notice to the public has been given as specified herein." *Id.*

51. *Id.*

ble trusts and one that is worthy of being considered in other jurisdictions.

E. *The Doctrine of Worthier Title—Abolished*

The common law Doctrine of Worthier Title (“DWT”) held that if Grantor conveyed realty to *X* for life, with the remainder to Grantor’s heirs, the remainder was void.⁵² Thus, the state of the title in such a case would be “life estate in *X*, followed by a reversion in fee simple in Grantor.” Upon Grantor’s death, this reversion would pass to Grantor’s heirs⁵³ by intestate succession because wills were not allowed at common law prior to the Statute of Wills in 1540. Thus, the intended persons, Grantor’s heirs, would still take the property but, instead of taking it by deed, they would take it by intestacy, which was said to be the “worthier title.”⁵⁴ Subsequent American developments resulted in DWT being extended to personalty and, in many jurisdictions, being changed from a rule of law to a canon of construction.⁵⁵

The U.S. Congress passed legislation in 1993 that allows the assets of a person who is under age 65 and disabled pursuant to the Social Security Act definition to be used to create a Special Needs Trust (“SNT”) for the person’s own benefit that will not count as a resource in determining the person’s eligibility for Medicaid.⁵⁶ When trial courts create a SNT for such a disabled person, frequently using assets from the person’s tort claim recovery,⁵⁷ the courts typically require that any remainder following the disabled person’s death (after repaying the state for all Medicaid expenditures) go to the person’s “heirs.” This practice presents a problem when DWT is a part of state law because it enables the Social Security Administration to maintain that DWT

52. The operative fact is the attempted remainder to Grantor’s heirs, which led to the rule’s alternative name—the rule prohibiting remainders to the grantor’s heirs.

53. Although the rule and this paragraph speak in the plural, it should be noted that in most common law cases there would be a single heir—Grantor’s eldest son, pursuant to the doctrine of primogeniture.

54. This intestate passage would also result in the feudal equivalent of death taxes having to be paid, a result that would not occur if the property had passed inter vivos to Grantor’s heirs.

55. For the common law history of DWT, see the highly respected opinion of Judge Benjamin F. Cardozo in *Doctor v. Hughes*, 122 N.E. 221 (N.Y. 1919).

56. 42 U.S.C. § 1396p(d)(4)(A) (2000).

57. The same would be true when a court authorizes a disabled person’s guardian to create a SNT with other assets of the disabled person.

voids the intended remainder to the disabled person's heirs, thereby leaving this interest in the disabled person as a reversion. Thus, as the disabled person now owns all of the interests in the trust (i.e., the life estate and the reversion) it becomes a revocable trust in fact, even though it is expressly stated to be irrevocable, and therefore not entitled to SNT treatment.⁵⁸

It is clear that DWT was a part of Virginia law when the 2007 Session began, although it is uncertain whether it existed as a rule of law or as a canon of construction.⁵⁹ It was also clear that DWT no longer served any necessary or desirable function in Virginia law. Thus, in order to prevent the above-described SNT problems from arising in Virginia, the 2007 Session added section 55-14.1 to the Code to provide that "[t]he doctrine of worthier title is abolished in this Commonwealth as a rule of law and as a rule of construction."⁶⁰

F. *Fiduciary Investments—“Mini” Legal List—\$100,000 Immunity—Uniform Transfers to Minors Act—Uniform Custodial Trust Act*

This topic has been the subject of several reports in these pages, the most recent of which, in 2005, treated it at such length⁶¹ that it is unnecessary to plow the same ground again. Accordingly, the 2005 report is hereby incorporated by reference, with the following changes due to amendments enacted by the 2007 Session: (1) The 2005 amendment is repealed;⁶² (2) the immunity of the mini legal list is limited to \$100,000, absent court action;⁶³ (3)

58. This paragraph's summary does not treat all matters relevant to SNTs, but it is believed to be sufficient for its purpose, which is to illustrate the problem presented to the 2007 Session. For a complete and excellent discussion of this subject, see Andrew H. Hook & Thomas D. Begley, Jr., *When Is an Irrevocable Special Needs Trust Considered To Be Revocable?*, 31 EST. PLAN. 205 (2004).

59. See *Braswell v. Braswell*, 195 Va. 971, 974–75, 81 S.E.2d 560, 562 (1954).

60. VA. CODE ANN. § 55-14.1 (Repl. Vol. 2007). This language is identical to the first sentence of UPC § 2-710. See UNIF. PROBATE CODE § 2-710 (amended 1993), 8 U.L.A. 204 (1998). The remainder of that section was thought to be unnecessary to accomplish the desired goal.

61. See J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 40 U. RICH. L. REV. 381, 383–86 (2005).

62. See Act of Mar. 19, 2007, ch. 517, 2007 Va. Acts 601 (codified as amended at VA. CODE ANN. § 26-40.01(E) (Cum. Supp. 2007)). This amendment provided that “[n]othing in this section shall relieve a fiduciary of his obligation, pursuant to § 26-45.3, to comply with the provisions of the prudent investor rule.” *Id.*

63. See VA. CODE ANN. § 26-40.01(E) (Cum. Supp. 2008).

the immunity of the mini legal list is extended to custodians under the Virginia Uniform Transfers to Minors Act and custodial trustees under the Virginia Uniform Custodial Trust Act⁶⁴ who are otherwise subject to Virginia's Prudent Investor Act.⁶⁵

G. *Incarcerated Felons—Civil Disabilities—Testamentary Capacity*

It appeared from anecdotal evidence offered to the 2007 Session that far too many lawyers and judges subscribe to a belief in the *civiliter mortuus* of felons while incarcerated, i.e., that they are treated the same as those who have been adjudicated as incapacitated persons, vis-à-vis their legal inability to manage their own property and business affairs. However, this is true only in those cases where the court has appointed a committee for a felon,⁶⁶ and, again, anecdotal evidence indicates that this rarely happens. Thus, in almost all cases, the incarcerated felon enjoys the same legal rights vis-à-vis his property and business affairs as any other person.⁶⁷ In an attempt to clarify this matter, and to provide some certainty for the commercial community, the 2007 Session codified the Virginia common law rule by providing that "until a committee is appointed, such [incarcerated felon] shall continue to have the same capacity, rights, powers, and authority over his estate, affairs, and property that he had prior to such conviction and sentencing."⁶⁸ And, breaking new ground, the 2007 Session

The presumption under subsection B shall apply to (i) a fiduciary only for a calendar year in which the value of the intangible personal property under the fiduciary's control or management does not exceed \$100,000 at the beginning of such year, or (ii) a fiduciary who, on motion for good cause shown, has obtained express authorization from the court having jurisdiction over such fiduciary for the presumption under subsection B to apply.

Id.

64. See *id.* § 26-40.01(A) (Cum. Supp. 2008).

65. See *id.* § 26-45.13 (Cum. Supp. 2008); § 31-48(B) (Cum. Supp. 2008) (Custodial Trust Act); § 55-34.7 (Repl. Vol. 2007) (Transfers to Minors Act).

66. *Id.* § 53.1-221 (Cum. Supp. 2008).

67. See *Haynes v. Peterson*, 125 Va. 730, 734, 100 S.E. 471, 472 (1919). Note, however, that for purposes of title 8.01 of the Code, the definition of "person under a disability" includes "a person convicted of a felony during the period he is confined." VA. CODE ANN. § 8.01-2(6)(a) (Repl. Vol. 2007).

68. *Id.* § 53.1-221(D) (Cum. Supp. 2008).

further provided that “[a] person for whom a committee is appointed . . . is not thereby deprived of the capacity to make a will.”⁶⁹

H. *Doctrine of Exoneration—Abolished for Devises and Legacies*

Reversing the common law rule that testamentary recipients of property subject to an encumbrance upon which the testator is personally liable are entitled to have this encumbrance satisfied from other assets of the estate, the 2007 Session enacted Virginia Code section 64.1-157.1 to provide that, “[u]nless a contrary intent is clearly set out in the will,⁷⁰ a specific devise or bequest of real or personal property passes, subject to any mortgage, pledge, security interest, or other lien existing at the date of death of the testator, without the right of exoneration.”⁷¹ However, this rule will not apply if the encumbrance in question was placed upon the property by (1) an agent acting pursuant to a durable general power of attorney⁷² for an incapacitated⁷³ testator, unless “thereafter ratified by the testator when he is not incapacitated,”⁷⁴ or (2) “a conservator, guardian or committee of the testator . . . [unless] there is an adjudication that the testator’s disability has ceased and the testator survives that adjudication by at least one year.”⁷⁵

One issue not addressed by this legislation relates to the increasing number of cases where inter vivos trusts are being used as will substitutes. Suppose, for instance, X contributes property

69. *Id.*

70. On this point, the new statute also provides that “[a] general directive in the will to pay debts shall not be evidence of a contrary intent” *Id.* § 64.1-157.1(A) (Repl. Vol. 2007).

71. *Id.*

72. This exception will not apply if the power “was limited to one or more specific purposes and was not general in nature.” *Id.* § 64.1-157.1(B) (Repl. Vol. 2007).

73. This portion of the statute reads as follows:

For the purposes of this section, (i) no adjudication of the testator’s incapacity is necessary, (ii) the acts of an agent within the authority of a durable power of attorney are rebuttably presumed to be for an incapacitated testator, and (iii) an incapacitated person is one who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause creating a lack of sufficient understanding or capacity to make or communicate responsible decisions.

Id.

74. *Id.*

75. *Id.* § 64.1-157.1(C) (Repl. Vol. 2007).

subject to an encumbrance upon which *X* is personally liable to *X*'s inter vivos trust, and the trust provides for the transfer of this property to *B* at *X*'s death. If, at *X*'s death, any portion of this indebtedness remains unpaid, the duty of *X*'s personal representative to pay *X*'s debts will result in the exoneration of the property going to *B*. Although it would appear that the same considerations leading to the new anti-exoneration rule for wills would also be applicable to will substitutes, the new statute does not address the latter.⁷⁶ It would also appear that the new rule will likely generate a new set of practical problems in the administration of decedents' estates as executors deal with affected devisees and legatees in cases where the encumbrance may be thought to exceed the value of the property, or cases where the devisee or legatee wishes to receive the property but does not have the funds with which to satisfy the indebtedness, cannot borrow the same, and the obligee is unwilling to enter into a novation accepting the devisee or legatee as the sole party liable for the debt and releasing the estate from liability thereon.

I. *UTC—Transfers to Trusts*

Unlike a corporation, a trust is not a legal entity capable of holding title to property; title to its property is vested in its trustee. Unfortunately, too many lawyers are unaware of this distinction and of the corresponding rule that conveyances intended for the benefit of a trust's beneficiaries are to be made "to the trustee of the XYZ trust," instead of "to the XYZ trust," and this has led to too many incorrectly drafted transfer documents. To remedy this problem, the 2007 Session amended Virginia Code section 55-548.10 to provide that "[a] deed or other instrument purporting to convey or transfer real or personal property to a trust instead of to the trustee or trustees of the trust shall be deemed to convey or transfer such property to the trustee or trustees as fully as if made directly to the trustee or trustees."⁷⁷

76. The same consideration will apply to other instances of encumbered properties passing outside of probate, where the decedent is personally liable thereon, such as survivorship tenancies, transfer on death property, payable on death property, etc., although in the survivorship tenancies, the survivor's right of exoneration from the decedent's probate estate will be limited to the decedent's proportionate share of the obligation. See, e.g., *Brown v. Hargraves*, 198 Va. 748, 96 S.E.2d 788 (1957).

77. VA. CODE ANN. § 55-548.10(E) (Repl. Vol. 2007).

J. *Insolvent Estates—Priority of Debts*

Virginia Code section 64.1-157 establishes the priorities in which claims against an insolvent decedent's estate are to be paid. The 2007 Session promoted "[d]ebts and taxes due localities and municipal corporations of the Commonwealth" from the last category of "[a]ll other claims" into a new category of its own, immediately preceding the "[a]ll other claims" category.⁷⁸

K. *Incapacitated Persons—Conservator's Sale of Realty—Restrictions*

Virginia Code section 37.2-1023(B) authorizes circuit court judges to impose certain enumerated requirements upon conservators seeking to convey an incapacitated person's realty.⁷⁹ The 2007 Session amended this provision by adding another permissible condition thereto, "requiring the use of a common source information company, as defined in § 54.1-2130,⁸⁰ when listing the property."⁸¹

L. *Retirement Benefits—Exemption from Creditor Claims—Bankruptcy Conformity*

The 2007 Session amended Virginia Code section 34-34 so that it matches the state exemption of retirement benefits to the exemption permitted under new federal bankruptcy law.⁸²

M. *Uniform Transfers to Minors Act—Use of Property—Termination*

The 2007 Session amended Virginia Code section 31-50, which deals with the custodian's use of custodial property, by adding language providing that "[a]t any time a custodian may, without

78. *Id.* § 64.1-157(8)–(9) (Supp. 2008).

79. *See id.* § 37.2-1023(B) (Cum. Supp. 2008).

80. "'Common source information company' means any person, firm, or corporation that is a source, compiler, or supplier of information regarding real estate for sale or lease and other data and includes, but is not limited to, multiple listing services." *Id.* § 54.1-2130 (Cum. Supp. 2008).

81. *Id.* § 37.2-1023(B)(v) (Cum. Supp. 2008).

82. *See* Act of Mar. 12, 2007, ch. 302, 2007 Va. Acts 428 (codified as amended at VA. CODE ANN. § 34-34 (Cum. Supp. 2008)).

court order, transfer all or part of the custodial property to a qualified minor's trust.⁸³ Such a transfer terminates the custodianship to the extent of the custodial property transferred."⁸⁴

N. *Power of Attorney—Removal of Agent for Cause—Attorney Fees*

Along with the increasing use of durable powers of attorney for the management of a functionally incapacitated (but not adjudicated) person's property has come an increase in the instances of agents abusing their powers thereunder and, not surprisingly, an increase in the number of circuit court cases seeking the removal of such agents. One of the factors preventing more cases from being brought is the inability or unwillingness of family members to advance the necessary attorney fees which, under the American legal system, are not recoverable from the agent even if the family prevails. To help remedy this problem, the 2007 Session amended Virginia Code section 11-9.1 to provide that "[i]f an agent is removed by the court because of abuse, neglect or exploitation of the principal, all fees and costs associated with the removal proceeding, including the attorney's fees of the prevailing party, shall be borne by the agent."⁸⁵

O. *UTC—Beneficiary's Right to Information—Trustee's Duty*

Many settlors of inter vivos trusts have a desire to keep the terms and provisions thereof as private as possible, and this desire often extends to withholding significant trust-related information from the beneficiaries themselves.⁸⁶ Virginia's enactment of the UTC advanced the interests of the beneficiaries in this regard by providing that "[u]nless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request

83. "Qualified minor's trust' means any trust (including a trust created by a custodian) that meets the requirements of § 2503(c) of the Internal Revenue Code of 1986 and the regulations implementing that section." VA. CODE ANN. § 31-37 (Cum. Supp. 2008).

84. *Id.* § 31-50 (Cum. Supp. 2008).

85. *Id.* § 11-9.1(D) (Cum. Supp. 2008). For reasons that are unknown, this same legislation also codified one of the most basic rules of the common law, *viz*: "The agent stands in a fiduciary relationship to the principal by whom he was appointed and may be held liable for a breach of any fiduciary duty to the principal." *Id.* § 11-9.1(C) (Supp. 2007).

86. See *Fletcher v. Fletcher*, 253 Va. 30, 35, 480 S.E.2d 488, 491 (1997), discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 31 U. RICH. L. REV. 1249, 1277-78 (1997).

for information related to the administration of the trust.”⁸⁷ The pendulum swung back to the settlors’ side in 2007 as the General Assembly effectively gelded this rule by providing that

[a] trustee who fails to furnish information to a beneficiary or respond to a request for information regarding the administration of the trust in a good faith belief that to do so would be unreasonable under the circumstances or contrary to the purposes of the settlor shall not be subject to removal or other sanctions therefor.⁸⁸

Thus, if a settlor clearly states that privacy/secretcy is a trust purpose, even insofar as beneficiaries are concerned, then the trustee who refuses a beneficiary’s request for information “in a good faith belief that to do so would be . . . contrary to the purposes of the settlor shall not be subject to removal or other sanctions therefor.”⁸⁹ If this language receives a literal interpretation in the courts, it will be game, set, and match for settlor.

P. UTC—Mandatory Rules

One of the mandatory rules of the UTC that cannot be overridden by the terms of a trust, the trustee’s duty to act in accordance with the purposes of the trust, was expanded by the 2007 Session to a duty to act in accordance with “the terms and purposes of the trust and the interests of the beneficiaries.”⁹⁰

Q. UTC—Creditors’ Rights—Mandatory Distribution

Even in the case of a spendthrift trust, a beneficiary’s creditors can reach a mandatory distribution due but unpaid to the beneficiary while it is still in the trustee’s possession if the distribution is not made “within a reasonable time after the designated distribution date.”⁹¹ For the purposes of this rule, the 2007 Session added a definition of “mandatory distribution”⁹² that, with one

87. VA. CODE ANN. § 55-548.13(A) (Repl. Vol. 2007). This subsection also provides that “[a] trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.” *Id.*

88. *Id.*

89. *Id.* This provision also reverses the rule of the common law. See *Fletcher*, 253 Va. at 35, 480 S.E.2d at 491, discussed in Johnson, *supra* note 86, at 1277–78.

90. VA. CODE ANN. § 55-541.05(B)(2) (Repl. Vol. 2007).

91. *Id.* § 55-545.06(B) (Repl. Vol. 2007).

92. *Id.* § 55-545.06(A) (Repl. Vol. 2007).

possible exception, is reasonably obvious and should admit of straight-forward application. The potentially troublesome language states that “[t]he term does not include a distribution subject to the exercise of the trustee’s discretion even if . . . (ii) the terms of the trust authorizing a distribution use language of discretion with language of direction.”⁹³ Taking into account the many word choices available to drafting attorneys and the imagination of litigators, this exception for distributions that “use language of discretion with language of direction” may prove to be troublesome in some cases.

R. *Durable Power of Attorney—Non-Judicial Accounting—Judicial Discovery*

The 1995 Session responded to the problem of an agent for a functionally incapacitated (but not adjudicated) principal who refuses to provide members of the principal’s family with any information regarding the principal’s affairs by creating (1) a non-judicial accounting remedy in favor of a person “interested in the welfare of a principal”⁹⁴ who is “unable to properly attend to his affairs,”⁹⁵ and (2) a judicial discovery remedy in favor of these same persons when the desired information is not forthcoming or where further action against the agent might be in order.⁹⁶ The 2007 Session expanded the operation of these remedies by (1) changing the reference from a principal who “is unable to properly attend to his affairs,” to one who is “believed to be unable to attend to his affairs,” (2) allowing the remedies to be pursued after the principal’s death, (3) extending the duration of the accounting period from two to five years, (4) providing for access to the judicial discovery remedy if the agent fails to respond to a request for a non-judicial accounting within sixty days, and (5) expanding the scope of judicial discovery to cases where property recovery or personal liability might be the ultimate goal.⁹⁷

93. *Id.*

94. This term is defined in VA. CODE ANN. § 37.2-1018(A) (Cum. Supp. 2008).

95. This term is defined in VA. CODE ANN. § 37.2-1018(A) (Cum. Supp. 2008).

96. This development is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 29 U. RICH. L. REV. 1175, 1176–79 (1995).

97. See VA. CODE ANN. §§ 11-9.6, 37.2-1018(A)–(B) (Cum. Supp. 2008) (emphasis added).

III. 2008 LEGISLATION

A. *Slayer Statutes—Revision—Clarification—Voluntary Manslaughter Problem*

It is a fundamental rule of Virginia's public policy that a criminal should not profit as a result of his crime. In order to prevent one of the most reprehensible violations of this public policy, i.e., a murderer taking an economic benefit from his victim by deed, will, intestacy, insurance, etc., Virginia has a "slayer statute" which traces its antecedents back to 1919,⁹⁸ and which evolved over the years into a comprehensive set of rules enacted by the 1981 Session entitled "Acts Barring Property Rights."⁹⁹ The 2008 Session amended a number of these rules based upon a study and recommendations by the Virginia Bar Association ("VBA"), and it also made an amendment, opposed by the VBA, to another rule.¹⁰⁰ This report will deal with the enacted VBA recommendations (House Bill No. 949) in Section 1, the other enacted recommendation (Senate Bill No. 450) in Section 2, and then present their combined definition of the term "slayer" in Section 3.

1. House Bill No. 949

The space constraints of this survey article preclude a complete discussion of these enactments, but they may be summarized as follows: (1) the definition of "slayer" in Virginia Code section 55-401 was expanded to include one "who is determined, whether be-

98. The history of the slayer statute can be found in *Life Insurance Co. of Virginia v. Cashatt*, 206 F. Supp. 410, 412-13 (E.D. Va. 1962).

99. See VA. CODE ANN. §§ 55-401 to -415 (Repl. Vol. 2007 & Supp. 2008). This legislation was based upon a proposed Model Act drafted by John W. Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936). For a discussion of Virginia law prior to this legislation, and the language recommended for enactment, see Sandra Gross Schneider, Comment, *Barring Slayers' Acquisition of Property Rights in Virginia: A Proposed Statute*, 14 U. RICH. L. REV. 251 (1979). For a discussion of the Virginia legislation as amended and enacted, see J. Rodney Johnson, *Wills, Trusts, and Estates*, 68 VA. L. REV. 521, 525-28 (1982).

100. The VBA recommendations were contained in House Bill No. 949; the recommendation opposed by the VBA was contained in Senate Bill No. 450. These two bills were conformed during the legislative process (i.e., each one was amended to contain the contents of both), contrary to the wishes of the VBA, and both bills were enacted. H.B. 949, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Apr. 11, 2008, ch. 822, 2008 Va. Acts ___); S.B. 450, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Apr. 11, 2008, ch. 830, 2008 Va. Acts ___).

fore or after his death, by a court of appropriate jurisdiction by a preponderance of the evidence to have committed” the offense in question;¹⁰¹ (2) the language preventing any “person claiming through” a slayer from taking was amended in two code sections to clarify that (a) it referred to one deriving title through the slayer as a “transferee, assignee or other” person claiming through him,¹⁰² and (b) it did not refer to “[a]n heir or distributee who establishes his kinship to the decedent by way of his kinship to a slayer”;¹⁰³ (3) the rule preventing the anti-lapse statute from applying to a testamentary provision for a slayer was reversed;¹⁰⁴ (4) the misleading titles of the two sections dealing with concurrent ownership were clarified;¹⁰⁵ (5) the language ex-

101. Act of Apr. 11, 2008, ch. 822, 2008 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-401 (Supp. 2008)). This opportunity to apply the slayer statute in a civil proceeding in cases where a conviction is not obtained in a criminal prosecution is sometimes referred to as an “O.J.” remedy because of its application under California law to a famous football player with that nickname.

102. Act of Apr. 11, 2008, ch. 822, 2008 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-402 (Supp. 2008)). In consequence of this change, the “through” language in the insurance section (§ 55-411) had no further operation except as a “corruption of the blood” provision that penalizes an innocent party for the wrongs of another. Thus, it was deleted as contrary to Virginia’s public policy. *Id.* (codified as amended at VA. CODE ANN. § 55-411(A) (Supp. 2008)).

103. Act of Apr. 11, 2008, ch. 822, 2008 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-403 (Supp. 2008)).

104. Act of Apr. 11, 2008, ch. 822, 2008 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-404 (Supp. 2008)). When this provision was enacted in 1980, Virginia had one of the broadest anti-lapse statutes in the country; it was applicable to any beneficiary predeceasing the testator leaving children or descendants of deceased children. *See* Act of Mar. 31, 1980, ch. 454, 1980 Acts 522 (codified as amended at VA. CODE ANN. § 64.1-64 (Repl. Vol. 1980) (repealed 1985)). As the anti-lapse statute is now restricted to cases where the substituted beneficiaries are also close kindred of the testator, *see* VA. CODE ANN. § 64.1-64.1 (Repl. Vol. 2007), it was determined that the former provision was inconsistent with the intestate succession rule found in section 55-403 and also amounted to a “corruption of the blood” contrary to Virginia’s public policy.

105. *See* Act of Apr. 11, 2008, ch. 822, 2008 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 55-405 to -406 (Supp. 2008)). Until 1992, a “slayer” of a cotenant in a tenancy involving survivorship rights was prohibited from acquiring the cotenant’s half-interest by survivorship; instead, the death of the cotenant causing a severance of the tenancy and the slain tenant’s half-interest passed with his other property by will or intestate succession (but not to the slayer). The 1992 amendment to section 55-406 continued this rule as to cotenancies not involving survivorship. But, with regard to every form of survivorship tenancy, the 1992 amendment to section 55-405 provided for the passing of the slayer’s interest to the estate of the decedent as if the slayer had predeceased the decedent. However, the failure to make corresponding changes in the titles of these two sections has created a certain confusion that the 2008 amendments now eliminate by retitling section 55-405 as “Concurrent ownership with survivorship,” and section 55-406 as “Concurrent ownership without survivorship.” For a discussion of the 1992 legislation, *see* J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 26 U. RICH. L. REV. 873, 895–96 (1992). The 2008 amendments also rewrote the final clause of section 55-406 which, since the 1992 amendments, had erroneously referred to survivorship concerns

empting life insurance companies from liability on policies “procured and maintained by the slayer or on which all the premiums were paid by him,” was replaced with language focusing on policies procured within two years of the insured’s death as part of a plan to murder the insured;¹⁰⁶ and (6) the chapter’s construction section was amended to expressly state that its provisions are not exclusive,¹⁰⁷ and that “all common law rights and remedies that prevent one who has participated in the willful and unlawful killing of another from profiting by his wrong shall continue to exist in the Commonwealth.”¹⁰⁸

2. Senate Bill No. 450

The 2008 Session adopted a further amendment to Virginia Code section 55-401 which expanded the definition of “slayer” to include a person convicted of voluntary manslaughter or who, though not so convicted, is found guilty thereof by a preponderance of the evidence in a civil proceeding brought before or after his death.¹⁰⁹ This legislative proposal was introduced in response to a 2007 federal district court case, *Boston Mutual Life Insurance Co. v. Ludwig*, in which the court stated the issue to be “whether a person convicted of voluntary manslaughter, but not murder, is precluded as a beneficiary of the decedent’s life insurance proceeds by the slayer statute in Pennsylvania or Virginia.”¹¹⁰ Although Pennsylvania law was found to be controlling, the court noted in dicta that

even if Virginia law applied, the result would be the same since Virginia’s common law rule that no person shall be allowed to profit by his own wrong has not been abrogated by any act of the General Assembly, thereby precluding a person convicted of voluntary manslaughter from receiving life insurance proceeds.¹¹¹

in this non-survivorship section.

106. The legislation as introduced provided for the complete repeal of this provision. The enacted language is the result of conferences between the VBA, certain insurance industry representatives, and the bill’s patron.

107. Act of Apr. 11, 2008, ch. 822, 2008 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-414(A) (Supp. 2008)). This provision is a codification of *Peoples Security Life Insurance Co. v. Arrington*, 243 Va. 89, 92, 412 S.E.2d 705, 707 (1992).

108. Act of Apr. 11, 2008, ch. 822, 2008 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-414(A) (Supp. 2008)).

109. Act of Apr. 11, 2008, ch. 830, 2008 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-401 (Supp. 2008)).

110. No. 1:06CV1072(JCC), 2007 U.S. Dist. LEXIS 34812, at *1 (E.D. Va. May 10, 2007).

111. *Id.* at *17.

Nevertheless, the fact that the Virginia slayer statute contained no provision expressly requiring such a result prompted the introduction of Senate Bill No. 450 to add a person convicted of voluntary manslaughter to the statute's definition of "slayer."¹¹²

However, it is submitted that this lack of an express provision in the slayer statute presented no real problem in light of other applicable case law¹¹³ and the intended solution to the perceived problem has, itself, created a significant problem in the jurisprudence of the Commonwealth. It is a regrettable fact that there are some premeditated homicide cases where, although a murder conviction is sought (and deserved), the Commonwealth accepts a plea to voluntary manslaughter because of an evidentiary problem, or a divided jury returns a compromise verdict of voluntary manslaughter, etc. On the other hand, there are a number of non-premeditated homicide cases that will also result in a voluntary manslaughter conviction, such as: (1) the classic case of the abused spouse who finally snaps and strikes back with excessive force; (2) the spouse who catches the other in an act of adultery

112. S.B. 450, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Apr. 11, 2008, ch. 830, 2008 Va. Acts ___). As introduced, the bill also sought to include involuntary manslaughter in the definition of "slayer." S.B. 450, Va. Gen. Assembly (Reg. Sess. 2008).

113. In addition to the dicta in *Boston*, there is a 1962 federal district court case arising in the Eastern District of Virginia, with facts parallel to those in *Boston*, where the court, recognizing that there were no Virginia cases on point, refused to allow the spouse convicted of voluntary manslaughter to take, noting that,

There can be no doubt that the general rule, followed probably universally, is that a beneficiary of an insurance policy who kills the insured by murder or voluntary manslaughter cannot take the proceeds of the policy. This is because of the ancient common law doctrine that no man shall be allowed to profit by his own wrong.

Life Ins. Co. of Va. v. Cashatt, 206 F. Supp. 410, 411 (E.D. Va. 1962). The court in *Boston* appears to have reached its conclusions without an awareness of this case, as it is not referenced therein.

It should also be noted that the Supreme Court of Virginia held in 1992 that the General Assembly did not abrogate the common law when it enacted the slayer statute. Peoples Sec. Life Ins. Co. v. Arrington, 243 Va. 89, 92, 412 S.E.2d 705, 707 (1992). And, it might be further noted that one of the VBA's enacted recommendations was a codification of the *Peoples* holding along with additional consequential language flowing from this codification. See *supra* text accompanying notes 107-08.

and kills in the heat of passion; (3) cases involving mutual combat, e.g., two family members fighting and one dies; and (4) cases of imperfect self-defense.¹¹⁴

It is clear that the actors in all of these non-premeditated manslaughter cases are “wrong” in what they do, and they are subject to appropriate punishment in the criminal law courts that takes into account all of the circumstances of their cases. But, adding “voluntary manslaughter” to the definition of “slayer” in section 55-401 also imposes a mandatory forfeiture of any inheritance or other assets “from” the decedent in all of these cases—regardless of the circumstances—with the court being powerless to prevent or reduce it. However, the common law remedy of constructive trust (which would be the remedy in the absence of the amendment in question) would provide a flexible rule in these cases—with the court determining whether or not, under the unique circumstances of a particular case, a forfeiture would be appropriate and, if so, to what extent.

In the preceding paragraph, reference was made to a mandatory forfeiture of any inheritance or other assets “from” a decedent. The word “from” was placed in quotation marks because the magnitude of the forfeiture in a number of cases will be far greater than the word “from” might otherwise suggest. For example, in the case of the abused spouse, it is not unrealistic to assume that in some cases the title to “their” property might be in the deceased abuser’s sole name—and yet the statute mandates a forfeiture of the *entire* property in every case, with the court being unable to make any exceptions.¹¹⁵ Moreover, even if the couples in the abuse and the adultery cases mentioned above hold their property as tenants by the entirety, or joint tenants with the right of survivorship, the surviving spouse will forfeit *both* halves of the property under the slayer statute (not just the decedent’s half) because section 55-405 mandates that survivorship property

114. In addition to the number of persons convicted of voluntary manslaughter in such criminal prosecutions, the number of persons affected by this amendment will be increased by (1) those whom the Commonwealth decided should not be prosecuted; (2) those whom a grand jury failed to indict; and (3) those who were tried but acquitted, but who, in any of these three instances, are later found in a civil proceeding to have committed the offense.

115. This would be the statutory mandate even if the abused spouse had been primarily responsible for the property’s acquisition by making the house payments, car payments, etc.

pass “as though the slayer had predeceased the decedent.”¹¹⁶ Thus, the fact of the statute’s mandatory forfeiture in voluntary manslaughter cases where a chancellor would not impose a constructive trust is made even worse by the magnitude of the forfeiture that will occur in some of them. It is to be hoped that this state of the law will not be suffered to exist any longer than is necessary for its correction.

3. The Enacted Legislation

As a result of the 2008 Session’s action in conforming House Bill No. 949 and Senate Bill No. 450, and passing both of them, the slayer statute’s enacted definition of “slayer” now reads as follows:

“Slayer” shall mean any person (i) who is convicted of the murder or voluntary manslaughter of the decedent or, (ii) in the absence of such conviction, who is determined, whether before or after his death, by a court of appropriate jurisdiction by a preponderance of the evidence to have committed one of the offenses listed in subdivision (i) resulting in the death of the decedent.¹¹⁷

In all other respects, the enacted legislation is as noted in Section 1 of this Paragraph A.¹¹⁸

B. *Wills—Self-Proving Affidavit—Notarial Seal*

Prior to 1977, the statutory form for an affidavit that would make a will self-proving provided for the officer before whom the affidavit was executed to affix the officer’s official seal thereto. The 1977 Session removed the “seal” requirement from the statutory form¹¹⁹ and the Code presently provides that the affidavit will be effective “notwithstanding that (i) the officer did not attach or affix his official seal thereto”¹²⁰ Although Virginia’s Notary Act provides that a notary “shall” affix an official seal on every notarial certificate, it has also provided that “failure to affix an official seal shall not in any way impact the legality or efficacy

116. VA. CODE ANN. § 55-405 (Supp. 2008).

117. Act of Apr. 11, 2008, ch. 830, 2008 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-401 (Supp. 2008)).

118. See *supra* notes 101–08 and accompanying text.

119. Act of Mar. 22, 1977, ch. 333, 1977 Va. Acts 471 (codified as amended at VA. CODE ANN. § 64.1-87.1 (Repl. Vol. 2007)).

120. VA. CODE ANN. § 64.1-87.1 (Repl. Vol. 2007).

of the paper document.”¹²¹ However, this latter provision was repealed by the 2008 Session,¹²² which also added a section to the conveyancing chapter, providing in part that “[a] writing that is not properly notarized . . . shall not invalidate the underlying document.”¹²³ Summing up these developments, it is clear that the absence of a seal on a self-proving affidavit will have no negative impact upon the will itself; at most it will simply require that the will be probated in the traditional manner, which typically will be upon the testimony of one of the attesting witnesses. Whether the 2008 repeal of the general provision in section 47.1-16(C) of the Notary Act, that “failure to affix an official seal shall not in any way impact the legality or efficacy of the paper document,”¹²⁴ also impliedly repeals the specific provision contained in section 64.1-87.1 that a self-proving affidavit will be effective “notwithstanding that (i) the officer did not attach or affix his official seal thereto,”¹²⁵ seems doubtful. Nevertheless, until this issue is resolved the prudent attorney will ensure that every self-proving affidavit is under seal in order to meet the requirements of the Notary Act.¹²⁶

It should also be noted that the 1983 Session provided for an alternate form of self-proving affidavit, usually referred to as the “short form” affidavit, which differs from the long-form affidavit by not requiring the signatures of the testator and witnesses thereto.¹²⁷ The short-form affidavit has never had any provision for a “seal,” nor has it contained any language like that found in the long-form section providing that a seal is not necessary. Accordingly, it seems clear that the short-form affidavit will be gov-

121. *Id.* § 47.1-16(A)–(C) (Cum. Supp. 2008).

122. Act of Mar. 2, 2008, ch. 117, 2008 Va. Acts ___ (codified as amended at VA. CODE ANN. § 47.1-16(C) (Cum. Supp. 2008)). However, the legislation making this change also contained a savings clause providing “[t]hat any document notarized prior to July 1, 2008, shall not be affected or invalidated by amendments to this Act effective July 1, 2008.” H.B. 218, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 2, 2008, ch. 117, 2008 Va. Acts ___).

123. Act of Mar. 2, 2008, ch. 117, 2008 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-106.2 (Cum. Supp. 2008)).

124. VA. CODE ANN. § 47.1-16(C) (Cum. Supp. 2008).

125. *Id.* § 64.1-87.1 (Repl. Vol. 2007).

126. It is believed that most attorneys are already following this practice in order to give their documents as much effect as possible beyond Virginia’s boundaries because the “seal” is required on self-proving affidavits in many states. See UNIF. PROBATE CODE § 2-504(a), 8 U.L.A. 148 (1998).

127. Act of Mar. 14, 1983, ch. 83, 1983 Va. Acts 94 (codified at VA. CODE ANN. § 64.1-87.2 (Repl. Vol. 2007)).

erned by the provisions of the Notary Act, discussed above, and thus it will not be effective without the required seal.¹²⁸

C. *Insolvent Estates—Priority of Debts*

Virginia Code section 64.1-157 establishes the priorities in which claims against an insolvent decedent's estate are to be paid. The 2008 Session increased the priority amount for funeral expenses from \$2000 to \$3500.¹²⁹

IV. DECISIONS OF THE SUPREME COURT OF VIRGINIA

A. *Principal and Agent—Joint Accounts—Presumption of Fraud*

The primary issue in *Grubb v. Grubb* involved Brother, who was agent under Sister's durable general power of attorney, claiming ownership of certain joint bank accounts upon Sister's death.¹³⁰ In disputed testimony, Brother claimed that Sister had added his name to these accounts before he became her agent and that "he merely renewed the accounts in order to maintain the 'status quo.'"¹³¹ The Supreme Court of Virginia noted prior authority for the proposition that "any transaction involving her assets that he consummated to his own benefit while acting as her fiduciary is presumptively fraudulent,"¹³² and added that the presumption arose in this case when Brother "either opened or renewed those accounts using his power of attorney."¹³³ After reviewing the conflicting evidence in this case, the court affirmed the chancellor's decision that Brother had not rebutted the presumption.¹³⁴

128. Anecdotal evidence indicates that the short-form does not enjoy a wide following among Virginia lawyers, because it is not believed to have as much currency outside the commonwealth as the long-form.

129. Act of Apr. 2, 2008, ch. 817, 2008 Va. Acts __ (codified as amended at VA. CODE ANN. § 64.1-157(3) (Supp. 2008)).

130. 272 Va. 45, 49–50, 630 S.E.2d 746, 749 (2006).

131. *Id.* at 53, 630 S.E.2d at 751.

132. *Id.* (citing *Economopoulos v. Kolaitis*, 259 Va. 806, 812, 528 S.E.2d 714, 718 (2000); *Nicholson v. Shockey*, 192 Va. 270, 277–78, 64 S.E.2d 813, 817–18 (1951)).

133. *Grubb*, 272 Va. at 54, 630 S.E.2d at 752.

134. *Id.* at 58, 630 S.E.2d at 754.

B. *Wrongful Death Action—Administrator May Not Proceed Pro Se*

In *Kone v. Wilson*, the Supreme Court of Virginia “consider[ed] whether the administrator of a decedent’s estate may file a wrongful death action pro se.”¹³⁵ Answering this question in the negative, the court noted that, although this statutory “right of action” is vested in a personal representative by Virginia Code section 8.01-50(B), “[t]he cause of action, however, does not belong to the personal representative but to the decedent’s beneficiaries identified in Code § 8.01-53.”¹³⁶

C. *Wills—Personal Property—Personal Injury Cause of Action—D.C. Law*

In *Huaman v. Aquino*, Sister bequeathed unto three of her six brothers “all the personal property I own or over which I have disposing power at the time of my death, including funds in any and all financial accounts.”¹³⁷ At the time of Sister’s death she had a personal injury action pending in Washington, D.C., which was settled after her death—which occurred as a result of these injuries—with payment to her estate of \$1,778,578.¹³⁸ Sister’s executor maintained that these funds did not pass under the above bequest because Sister “neither owned nor had power to dispose of such property, namely the proceeds, at the time of her death.”¹³⁹ Although such a personal injury action would not survive Sister’s death under Virginia law, where a new cause of action for wrongful death would arise in favor of certain statutory beneficiaries instead of Sister’s estate, the Supreme Court of Virginia found the contrary to be true under District of Columbia law.¹⁴⁰ Thus, “[t]his particular chose in action was ‘owned’ at the moment of [Sister’s] death . . . and pass[ed] under the personal property clause.”¹⁴¹

135. 272 Va. 59, 61, 630 S.E.2d 744, 745 (2006).

136. *Id.* at 62–63, 630 S.E.2d at 746.

137. 272 Va. 170, 174, 630 S.E.2d 293, 296 (2006).

138. *Id.* at 172, 630 S.E.2d at 295.

139. *Id.* at 175, 630 S.E.2d at 296.

140. *Id.* at 175–76, 630 S.E.2d at 297.

141. *Id.* at 176, 680 S.E.2d at 297.

D. *Augmented Estate—Election—No Acknowledgment—Strict Construction*

In order for a surviving spouse to claim an elective share in a deceased spouse's augmented estate, Virginia Code section 64.1-13 requires that the claim "shall be made either in person before the court . . . or by writing recorded in such court, or the clerk's office thereof, upon such acknowledgment or proof as would authorize a writing to be admitted to record under Chapter 6 (§ 55-106 et seq.) of Title 55."¹⁴² In *Haley v. Haley*, Wife's attorney purported to make an election on her behalf by filing a document in the appropriate clerk's office that was signed on her behalf by the attorney but not acknowledged.¹⁴³ Affirming the decision below, the Supreme Court of Virginia held that one seeking to elect under section 64.1-13 "must strictly comply with [its] requirements" and thus, as the document in question was not acknowledged, it was ineffective as a matter of law.¹⁴⁴ For this same reason, the court did not reach one part of an issue that has long been debated among Virginia lawyers—whether an augmented estate election can be made on a surviving spouse's behalf by the spouse's attorney.¹⁴⁵

E. *Deeds—Rescission—Undue Influence—Family Relationship*

The facts in *Bailey v. Turnbow* showed that, following her husband's death in 1989, Annerbell's closest kindred were twelve nieces and nephews, one of whom, Mary, "handled her financial affairs from 1993 until [Annerbell's] death" in 1997, and another of whom, Gilbert, with whom she "also had a close relationship" and who, along with Mary, "resided near her and helped her in various ways during her widowhood."¹⁴⁶ Within the last two months of her life, Annerbell, who had just recently signed herself out of the nursing home she had voluntarily entered two months earlier, and who was generally in a physically weakened condition, conveyed her home to Gilbert by deed of gift with the reser-

142. VA. CODE ANN. § 64.1-13 (Repl. Vol. 2007).

143. 272 Va. 703, 705, 636 S.E.2d 400, 401 (2006).

144. *Id.* at 707, 636 S.E.2d at 402.

145. *Id.* at 708 n.*, 636 S.E.2d at 403 n.* ("[W]e . . . express no opinion in that regard." The other half of the issue is whether an augmented estate election can be made on a surviving spouse's behalf by the spouse's attorney in fact.

146. 273 Va. 262, 264, 639 S.E.2d 291, 291–92 (2007).

vation of a life estate.¹⁴⁷ The deed of gift was prepared by Gilbert's attorney, at Gilbert's request, and executed by Annerbell in Gilbert's home before a notary public who worked there as an employee of Gilbert and his wife.¹⁴⁸

Annerbell's executor brought suit against Gilbert seeking rescission of the deed of gift based upon a number of grounds, only one of which, undue influence, was not dismissed following a five-day trial.¹⁴⁹ On this point, the chancellor ruled that the evidence had established a confidential relationship between Annerbell and Gilbert, "giving rise to a presumption of undue influence, which [Gilbert] had failed to rebut, in the procurement of the challenged deed."¹⁵⁰ Noting the absence of either a principal/agent or an attorney/client relationship between Annerbell and Gilbert, the Supreme Court of Virginia concluded that the only remaining possibility of raising a presumption of undue influence was "when one family member provides *financial advice or handles the finances* of another family member."¹⁵¹ However, the evidence showed that Mary was the one who provided this advice and rendered these services and thus the court held that, "[t]ested by that standard, the evidence in the present case is insufficient to support the chancellor's finding."¹⁵²

F. *Decedent's Personal Injury Action—Not Wrongful Death— Statute of Limitations*

In *Harmon v. Sadjadi*, "a personal injury action for damages allegedly sustained by James [in Virginia] prior to his death from other causes," the Supreme Court of Virginia held that, notwithstanding Harmon's earlier qualification as James' personal representative in another state, the one-year statute of limitations for Harmon to bring this action in Virginia did not begin until he qualified in Virginia.¹⁵³ This decision overruled the court's prior holding in *McDaniel v. North Carolina Pulp Co.*,¹⁵⁴ which was

147. *Id.* at 265–66, 639 S.E.2d at 292.

148. *Id.* at 266, 639 S.E.2d at 292.

149. *Id.*, 639 S.E.2d at 293.

150. *Id.*

151. *Id.* at 268 & n.*, 639 S.E.2d at 294 & n.* (2007) (quoting *Friendly Ice Cream Corp. v. Beckner*, 268 Va. 23, 34, 597 S.E.2d 34, 40 (2004)).

152. *Bailey*, 273 Va. at 268, 639 S.E.2d at 294.

153. 273 Va. 184, 188 n.2, 198, 639 S.E.2d 294, 296 n.2, 302 (2007).

154. 198 Va. 612, 95 S.E.2d 201 (1956).

“clearly a mistake and a flagrant error that we will not perpetuate.”¹⁵⁵

G. *Illegitimacy—Action To Ascertain Parental Relationship—No Tolling*

One of the steps required by statute before an illegitimate person’s claim to intestate succession based upon biological parentage can be recognized is that “an action seeking adjudication of parenthood is filed in an appropriate circuit court within [one year of the alleged parent’s death].”¹⁵⁶ In *Belton v. Crudup*, the decedent died on September 13, 1999; his administrator filed a list of heirs with the court on December 21, 1999 naming the claimant, the decedent’s alleged illegitimate daughter, as an heir; and his administrator filed an amended list of heirs on July 17, 2001 on which the claimant’s name no longer appeared.¹⁵⁷ The claimant, whose action seeking adjudication of parenthood was not filed until January 16, 2002, maintained that the one-year statute of limitations should be tolled “during the time her name appeared on the original list of heirs filed by the Administratrix.”¹⁵⁸ In affirming the trial court’s denial, the Supreme Court of Virginia noted that the General Assembly had provided only three exceptions to the one-year rule,¹⁵⁹ none of which were applicable in this case, and “we decline to carve out others.”¹⁶⁰

H. *Illegitimacy—Exhumation To Prove Biological Relationship—No Defenses*

In *Martin v. Howard*, Decedent was survived by Wife, by their two children, and by Tracey, who maintained that she was his il-

155. *Harmon*, 273 Va. at 197, 639 S.E.2d at 301.

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

157. 273 Va. 368, 370, 641 S.E.2d 74, 75 (2007).

158. *Id.* at 370, 372, 641 S.E.2d at 75, 76 (2007).

159. These exceptions apply when the relationship is

(i) established by a birth record prepared upon information given by or at the request of such parent; or (ii) by admission by such parent of parenthood before any court or in writing under oath; or (iii) by a previously concluded proceeding to determine parentage pursuant to the provisions of former § 20-61.1 or Chapter 3.1 (§ 20-49.1 et seq.) of Title 20.

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

160. *Belton*, 273 Va. at 373, 641 S.E.2d 76-77.

legitimate daughter.¹⁶¹ When Tracey sought the exhumation of Decedent's body for biological testing in furtherance of her claim, she was opposed by Wife who maintained that the exhumation statute should be read as requiring a showing of "good cause,"¹⁶² which would require Tracey to show "that DNA sufficient for a definitive paternity test could be retrieved in the specific circumstances here, e.g., embalming and the lapse of time since burial."¹⁶³ In rejecting this claim, and affirming the trial court, the Supreme Court of Virginia traced the history of the exhumation legislation and noted that in the present statute "the General Assembly expressly provided that the need of a qualified illegitimate child to prove parentage for the purpose of inheritance is sufficient cause for exhumation. No other cause need be shown."¹⁶⁴

I. *Power of Attorney—Gift vs. Contract—Payable on Death Authority*

In *Jones v. Brandt*, Principal ("P") told Agent ("A") on August 4, 2004 to make a friend ("F") the payable on death ("POD") beneficiary on a certain \$250,000 certificate of deposit.¹⁶⁵ A, who was also P's lawyer, did so that same day and advised P thereof by letter on the following day.¹⁶⁶ The written power of attorney held by A did not expressly grant A the power to make a POD designation.¹⁶⁷ Following P's death on September 30, 2004, F, as P's executor, brought suit to determine the validity of this transaction.¹⁶⁸ The Supreme Court of Virginia first decided that Virginia law relating to an agent's power "to make a gift" was not applicable because the POD designation "did not become a final disposition of [P's] certificate until his death on September 30, 2004 and conveyed no present interest in the certificate, but only at best an expectancy."¹⁶⁹ Instead, the court decided that the case concerned

161. 273 Va. 722, 724, 643 S.E.2d 229, 230 (2007).

162. *Id.* at 726, 643 S.E.2d at 231.

163. *Id.*

164. *Id.* On another point, the court held that "the word 'may' [in the exhumation statute] is jurisdictional and directional, rather than discretionary The court's only discretion is limited to determining whether the petitioner is a 'party attempting to prove' parentage for inheritance purposes in accordance with Code §§ 64.1-5.1 and -5.2." *Id.* at 727, 643 S.E.2d at 232.

165. 274 Va. 131, 135, 645 S.E.2d 312, 314 (2007).

166. *Id.* at 134, 135, 645 S.E.2d at 313, 314.

167. *Id.* at 134, 645 S.E.2d at 313.

168. *Id.* at 134, 135, 645 S.E.2d at 313, 314.

169. *Id.* at 137, 645 S.E.2d at 315.

A's "power to contract on behalf of [P]"¹⁷⁰ and, although "[i]n Virginia, powers of attorney have been strictly construed for over a century,"¹⁷¹ the court, after considering three contract-related paragraphs of the power of attorney "in concert," concluded in a four-to-three decision that P "sufficiently expressed the intent to authorize [A]" to make the change in question.¹⁷²

The majority opinion's determination that the POD designation in F's favor was not a gift because it was not a "final disposition" during P's lifetime "and conveyed no present interest in the certificate, but only at best an expectancy"¹⁷³ appears to be based upon the fact that P had the power to revoke this designation until the moment of his death.¹⁷⁴ However, looking at another body of law where this issue has long been settled, when Grantor creates a revocable inter vivos trust reserving a life estate and giving the remainder thereafter to Beneficiary, there is no doubt that Beneficiary receives a present interest upon the trust's creation, notwithstanding that it is not a "final disposition" until Grantor's death.¹⁷⁵ And, drawing closer to a POD transaction, one of the required elements of the somewhat similar gift *causa mortis* is its revocability by the donor up to the moment of death.¹⁷⁶ Thus, it is submitted that whether the POD designation in this case was a "gift" should have been determined by the presence of donative intent on P's part and the absence of any consideration flowing from F—not by the fact that the designation was revocable until P's death. A further troubling aspect of this decision relates to the precedent it establishes for the interpretation of other powers of attorney circulating in Virginia. It is believed that the typical

170. *Id.* at 138, 645 S.E.2d at 315.

171. *Id.* at 137, 645 S.E.2d at 315.

172. *Id.* at 138, 645 S.E.2d at 315–16. In a footnote to its conclusion, the Supreme Court also noted:

Although not addressed by the circuit court or raised by the parties in this appeal, we note that the doctrine of ratification would apply on the facts of this case even if the language of the power of attorney was not sufficiently specific to have permitted [A] to make the change in beneficiary on the certificate. The record plainly shows that [P] orally directed [A] to act as his agent in the matter, and that [P], when advised by [A] that he had carried out that direction, accepted the fact of performance without objection.

Id. at 139 n.2, 645 S.E.2d at 316 n.2 (citing *Higginbotham v. May*, 90 Va. 233, 238–39, 17 S.E. 941, 943 (1893)).

173. *Jones*, 274 Va. at 137, 645 S.E.2d at 315.

174. *See id.* at 142, 645 S.E.2d at 318 (Russell, J., dissenting).

175. RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. b (2003).

176. For a listing of the required elements for a gift *causa mortis*, see *Woo v. Smart*, 247 Va. 365, 368–69, 442 S.E.2d 690, 692 (1994).

consumer would think that placing another's name on a bank account as a POD beneficiary would be a method for making a gift, and that the typical consumer executing a durable power of attorney does not wish the agent to be able to make gifts. However, the typical durable general power of attorney confers broad and comprehensive contracting powers upon the agent and it concludes with an all-inclusive "do whatever I could do" authorization. Do the agents under such documents have the power¹⁷⁷ to make POD designations? And, what are the implications for transfer on death ("TOD") security registrations? Although these are issues that lawyers can address as they draft documents for future clients, what about existing documents—particularly those of incapacitated persons who are unable to change their powers? Absent legislation, it is difficult to see how this problem might be resolved.

On another point, the majority opinion's statement of facts recites that "[P] orally directed [A] to designate [F] as the beneficiary 'payable on death' (POD) of a certificate of deposit in the amount of \$250,000, which was in [P's] name at the Pungo branch of Wachovia Bank."¹⁷⁸ One wonders why this oral direction was not seen as a sufficient grant of authority for the transaction in question. According to section 3.01 of the Restatement (Third) of Agency, "[a]ctual authority, as defined in § 2.01¹⁷⁹ is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf."¹⁸⁰ In amplification of this rule, the comments to the following section, section 3.02, state that in the absence of a statutory "equal-dignity" rule,¹⁸¹ "[c]reating actual authority under § 3.01 does not require a writing or other formality."¹⁸²

177. The only question being posed here is whether an agent possesses such a power. The rightful exercise of the power is another issue.

178. *Jones*, 274 Va. at 135, 645 S.E.2d at 314.

179. RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006), states that "[a]n agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act."

180. RESTATEMENT (THIRD) OF AGENCY § 3.01 (2006).

181. VA. CODE ANN. § 11-9.5 (Repl. Vol. 2006 & Cum. Supp. 2008), entitled "Gifts under power of attorney," deals with the contents of a "power of attorney or other writing," but it does not impose a writing requirement upon a principal's direction to an agent to make a particular transfer.

182. RESTATEMENT (THIRD) OF AGENCY § 3.02, cmt. b (2006).

J. *Augmented Estate—Abandonment Defined—Voluntary Separation*

In *Purce v. Patterson*, Husband (“H”) and Wife (“W”) voluntarily separated in June 2000; W filed an action for divorce in January 2003, based upon living separate and apart for over a year, but no divorce decree was ever entered; and H, following W’s death in January 2005, claimed an elective share in W’s augmented estate.¹⁸³ One of the statutes governing the augmented estate bars the survivor’s right to an elective share if the survivor “willfully deserts or abandons his or her spouse and such desertion or abandonment continues until the death of the spouse.”¹⁸⁴ In passing upon H’s claim, the Supreme Court of Virginia (1) determined that “[i]n an elective share analysis, an agreed separation or petition for divorce . . . is not evidence which defeats a finding of *willful* abandonment;”¹⁸⁵ (2) concluded that H’s conduct following the couple’s agreed-upon separation was relevant in determining whether there was an abandonment that continued until W’s death;¹⁸⁶ (3) defined “abandonment” for elective share matters “to mean a termination of the normal indicia of a marital relationship combined with an intent to abandon the marital relationship;”¹⁸⁷ and (4) held “that the evidence [was] sufficient to support the trial court’s holding that [H] abandoned [W] prior to and continuing until the time of her death.”¹⁸⁸

Although Virginia lawyers may be pleased upon first hearing that they have been provided with a definition of “abandonment” for elective share purposes in cases where there has been a voluntary separation and one of the parties has filed for divorce, this pleasure is likely to be short-lived because it would appear that outcomes thereunder may very well vary “with the length of the chancellor’s foot.” Until the General Assembly or another Supreme Court of Virginia decision further defines “the normal indicia of a marital relationship” and “intent to abandon the marital relationship” in cases where the parties thereto have voluntarily separated, it will not be possible for lawyers to advise affected clients regarding the appropriate course of action to take, due to

183. 275 Va. 190, 192–93, 654 S.E.2d 885, 886 (2008).

184. VA. CODE ANN. § 64.1-16.3(A) (Repl. Vol. 2007).

185. *Purce*, 275 Va. at 195, 654 S.E.2d at 887.

186. *Id.* at 194, 654 S.E.2d at 887.

187. *Id.* at 195, 654 S.E.2d at 887.

188. *Id.* at 196, 654 S.E.2d at 888.

the varying interpretations that may be reached by circuit court judges. Fortunately, the problem will exist only in cases where the separated parties have not entered into an agreement that, among other things, addresses the elective share issue, and one would expect there to be such an agreement in the typical case.

K. *Wills—Execution—Witnesses' Signatures Only on Self-Proving Affidavit*

The issue before the Supreme Court of Virginia in *Hampton Roads Seventh-Day Adventist Church v. Stevens* was “whether a will was subscribed by two witnesses as required by Code § 64.1-49.”¹⁸⁹ The writing in question consisted of five pages, numbered one through five.¹⁹⁰ The first three pages contained will provisions, with page three containing a testimonium clause (referring to “my Last Will and Testament, consisting of five pages”); Testatrix’s signature; and spaces for witnesses to sign.¹⁹¹ However, instead of the witnesses signing in these spaces, the notary printed their names therein, wrote their addresses next to their names, and then the witnesses placed their initials by their addresses.¹⁹² Page four of the writing contained a standard self-proving affidavit, based upon the form found in Virginia Code section 64.1-87.1, with the signatures of Testatrix and the three witnesses appended thereto.¹⁹³ Page five contained the certification of the notary public to the self-proving affidavit.¹⁹⁴ The court briefly noted “the rationale for the subscription requirement,”¹⁹⁵ noted “[t]he literal meaning of the word subscribe, as used in the statute,”¹⁹⁶ and stated that, although the statutory requirements

189. 275 Va. 205, 207, 657 S.E.2d 80, 81 (2008). The referenced code section is reproduced *supra* note 2.

190. *Stevens*, 275 Va. at 207, 657 S.E.2d at 81.

191. *Id.* at 207–08, 657 S.E.2d at 81.

192. *Id.* at 208, 657 S.E.2d at 81.

193. *Id.* at 208–09, 657 S.E.2d at 81–82; *see also* VA. CODE ANN. § 64.1-87.1 (Repl. Vol. 2007).

194. *See Stevens*, 275 Va. at 211, 657 S.E.2d at 83.

195. *Id.* at 210–11, 657 S.E.2d at 83. The court quoted *Robinson v. Ward*, 239 Va. 36, 41–42, 387 S.E.2d 735, 738 (1990), a case notable as one of the few instances where the Supreme Court of Virginia (in a four-to-three decision) applied “substantial compliance” instead of “strict adherence” to one of the statutory formalities. For a detailed discussion of *Robinson*, see J. Rodney Johnson, *Dispensing with Wills Act Formalities for Substantively Valid Wills*, 18 VA. B. ASS’N J. 10 (1992).

196. *Stevens*, 275 Va. at 211, 657 S.E.2d at 83 (quoting *French v. Beville*, 191 Va. 842, 850, 62 S.E.2d 883, 886 (1951)). This literal meaning is “to write underneath; sub, under; scribere, to write.” *Id.* (quoting *French*, 191 Va. at 850, 62 S.E.2d 886).

“must be strictly followed, the statute must not be construed in a manner that would ‘increase the difficulty of the transaction to such an extent as to practically destroy’ an uninformed layperson’s right to dispose of property by will.”¹⁹⁷ Moving on to the facts, the court noted that Testatrix referred to her will as consisting of five pages; she signed below this reference on page three; and she signed the self-proving affidavit on page four, “which, in this instance, is a part of her will. . . . [and two witnesses] placed their signatures below the testatrix’ signature on that page. . . . [which] satisfies the statutory requirement of subscription contained in Code § 64.1-49.”¹⁹⁸

There is no doubt that the correct result was reached in this case, but one wonders why the court did not simply hold that witnesses’ signing a self-proving affidavit to a will amounts to “substantial compliance” with the requirement for witnesses to sign the will to which it is appended,¹⁹⁹ instead of holding that the self-proving affidavit was a part of the will²⁰⁰—which it really was not,²⁰¹ a fact that is not changed by the testatrix’s reference to her three-page will as consisting of five pages.²⁰² Imagine, for instance, a future case otherwise identical to the present one, except for the page numbering and “five-page” reference: how would it be resolved, based upon this precedent?²⁰³ On a more basic

197. *Stevens*, 275 Va. at 211, 657 S.E.2d at 83 (quoting *Savage v. Bowen*, 103 Va. 540, 546, 49 S.E. 668, 669–70 (1905)). However, the opinion in *Savage* was not focusing on the construction of the statute but on its judicial supplementation. The complete sentence from *Savage* reads as follows:

It is, however, quite as important that these statutory requirements should not be supplemented by the courts with others that might tend to increase the difficulty of the transaction to such an extent as to practically destroy the right of the uninformed layman to dispose of his property by will.

Savage, 103 Va. at 546, 49 S.E. at 669–70.

198. *Stevens*, 275 Va. at 211, 657 S.E.2d at 83.

199. See the leading case of *In re Will of Ranney*, 589 A.2d 1339 (N.J. 1991).

200. *Stevens*, 275 Va. at 211, 657 S.E.2d at 83 (“[T]he record is clear that the will consisted of five pages, including the self-proving affidavit on pages four and five.”).

201. The General Assembly recognized that these are separate documents in its 2007 enactment of the statute permitting the trial court to dispense with a testator’s signature to a will when “a person signs the self-proving certificate to a will instead of signing the will itself.” VA. CODE ANN. § 64.1-49.1 (Repl. Vol. 2007); discussion *supra*, Part II.A.; see also *Ranney*, 589 A.2d at 1341–44; 1973 Op. Va. Att’y Gen. 473.

202. One is reminded of the exercise where a goat is placed in a corner, with a sign around its neck saying, “I am a pig,” and then the question being posed, “What’s in the corner, a goat or a pig?”

203. Fortunately, due to the enactment of a dispensation statute by the 2007 Session, the hypothetical will should be probated with no real problem, notwithstanding these differences, because the trial court could dispense with the statutory requirement for the witnesses’ signatures to be on the will. See *supra* Part II.A. However, it will require an

point, one also wonders why there was no discussion of the witnesses' initials on page three of the will—which appeared in the margin opposite their printed names and addresses, below the testatrix's signature—as satisfying the statute's subscription requirement.²⁰⁴ It is settled Virginia law that initials will suffice as a signature to a will,²⁰⁵ and that a person does not have to intend to be signing a will as a witness in order for the person's name placed thereon by the person to satisfy the witnessing requirement.²⁰⁶ Moreover, in the present case, the witnesses swore under oath in the self-proving affidavit that they “did subscribe their names thereto [i.e., to the will] as attesting witnesses.”²⁰⁷

V. CONCLUSION

For the reasons recited herein, it is respectfully submitted that the 2009 Session should (1) repeal the 2008 amendment expanding the slayer statute's definition of “slayer” to include voluntary manslaughter;²⁰⁸ (2) clarify or replace the Supreme Court of Virginia's definition of “abandonment” in augmented estate cases where the parties have voluntarily separated;²⁰⁹ and (3) consider a legislative response to the question of whether contract language in a power of attorney authorizes the agent thereunder to make a POD designation on the principal's bank account.²¹⁰

inter partes circuit court proceeding to obtain this remedy, whereas a holding in the instant case that witnesses signing a self-proving affidavit was substantial compliance with the requirement for them to subscribe the will would allow the hypothetical will to be probated in the clerk's office, which would be much faster and less costly than an inter partes proceeding in circuit court.

204. It might also be noted that the initials of the witnesses and the testatrix were placed in the margin of all five pages of the writing before the court. Transcript of Record at __, *Hampton Roads Seventh-Day Adventist Church v. Stevens*, 275 Va. 205, 657 S.E.2d 80 (No. 070401) (2008).

205. See *Pilcher v. Pilcher*, 117 Va. 356, 366, 84 S.E. 667, 670 (1915). The entire holographic will of Edwin M. Pilcher read as follows: “I give to my wife, Alice McCabe Pilcher, all of my property, real and personal. E.M.P.” *Id.* at 358, 84 S.E. at 668.

206. See *Robinson v. Ward*, 239 Va. 36, 44, 387 S.E.2d 735, 739 (1990).

207. *Stevens*, 275 Va. at 208, 657 S.E.2d at 81–82.

208. See *supra* Part III.A.

209. See *supra* Part IV.J.

210. See *supra* Part IV.I.
