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## Wills, Trusts, and Estates

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# WILLS, TRUSTS, AND ESTATES

*J. Rodney Johnson* \*

## I. INTRODUCTION

The 2010 Session of the General Assembly enacted wills, trusts, and estates legislation (i) adopting the Uniform Power of Attorney Act, (ii) passing emergency legislation for the construction of tax-oriented wills and trusts of persons who die during 2010 with documents drafted prior thereto, (iii) revising the small-estate statutes, and (iv) clarifying the burial power of attorney. In addition, there were six other enactments, and seven opinions from the Supreme Court of Virginia during the one-year period ending June 1, 2010 that present issues of interest in this area. This article reports on all of these legislative and judicial developments, along with a Supreme Court of Virginia case decided ten days after the normal cutoff date for the *Annual Survey of Virginia Law* because it addresses an issue of significant interest to the bar—the retroactivity of Virginia’s 2007 dispensation statute.<sup>1</sup>

## II. LEGISLATION

### A. *Virginia Uniform Power of Attorney Act*

In response to a multi-year project of the Virginia Bar Association’s (“VBA’s”) Section on Wills, Trusts, and Estates, the 2009 General Assembly enacted the Virginia Uniform Power of Attorney Act (“UPOAA”) in order to significantly update and clarify existing Virginia law related to durable powers of attorney and to

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

make the same more uniform with that found in other jurisdictions.<sup>2</sup> Thereafter, the Chair of the VBA's Drafting Committee, Andrew H. Hook,<sup>3</sup> and his associate, Lisa V. Johnson,<sup>4</sup> presented a thorough overview of this legislation in this publication's 2009 *Annual Survey of Virginia Law*.<sup>5</sup> As the 2009 passage of the UPOAA was made subject to a reenactment clause,<sup>6</sup> this legislation was also introduced into and enacted by the 2010 Session.<sup>7</sup> Although the 2010 UPOAA is largely the same as the 2009 version, it does contain some important changes. The present writer is indebted to Mr. Hook and Ms. Johnson, the authors of the 2009 article, for contributing the following text to explain these 2010 changes in the context of their original 2009 article.

### 1. Acceptance of and Reliance Upon Acknowledged Power of Attorney<sup>8</sup>

a. Virginia Code section 26-90(B) protects third parties who in good faith accept a purportedly acknowledged power of attorney.<sup>9</sup> To promote the acceptance of powers of attorney, the UPOAA places the risk that a power of attorney is invalid upon the principal rather than the third party asked to accept the document.<sup>10</sup> However, due to concerns that placing the risk upon the principal may reduce due diligence by third parties and increase the number of cases involving forged powers of attorney, section 26-90(B) was amended to provide that the risk of loss for acceptance of a

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2. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts 2634 (codified at VA. CODE ANN. §§ 26-72 to -115 (Supp. 2010)). The Virginia Code Commission renumbered the Uniform Power of Attorney Act to Code sections 26-72 to -116. See VA. CODE ANN. § 26-72 note (Cum. Supp. 2010).

3. Officer, Oast & Hook, P.C., Virginia Beach, Virginia.

4. Associate, Oast & Hook, P.C., Virginia Beach, Virginia.

5. Andrew H. Hook & Lisa V. Johnson, *Annual Survey of Virginia Law: The Virginia Uniform Power of Attorney Act*, 44 U. RICH. L. REV. 107, 112-45 (2009).

6. Ch. 830, 2009 Va. Acts at 2653 ("[T]he provisions of this Act shall not become effective unless reenacted by the 2010 Session of the General Assembly.").

7. Act of Apr. 11, 2010, ch. 632, 2010 Va. Acts \_\_\_ (codified at VA. CODE ANN. §§ 26-72 to -115 (Supp. 2010)); Act of Apr. 11, 2010, ch. 455, 2010 Va. Acts \_\_\_ (codified at VA. CODE ANN. §§ 26-72 to -115 (Supp. 2010)).

8. VA. CODE ANN. § 26-90 (Supp. 2010).

9. *Id.* § 26-90(B) (Supp. 2010).

10. *Id.*

*forged* power of attorney will rest with the third party who accepted it rather than with the purported principal.<sup>11</sup>

Virginia's position on this issue is consistent with the current state of the common law, which places the risk of forgeries on third parties.<sup>12</sup> Virginia did not, however, amend section 26-90(C), which allows a third party to request and rely on, without further investigation, "[a]n agent's certification under oath of any factual matter concerning the principal, agent, or power of attorney."<sup>13</sup> Thus, it appears that under the Virginia UPOAA, a third party that accepts a power of attorney with an agent's certification would be protected from liability under section 26-90(C), despite Virginia's amendment of section 26-90(B).<sup>14</sup> The interplay between these two provisions is unclear in Virginia and should be clarified by the General Assembly.

b. Section 26-90(F) rejects an imputed knowledge standard for those individuals who conduct activities through employees.<sup>15</sup> "[T]hird persons who conduct activities through employees are held to be without actual knowledge of a fact 'if the employee conducting the transaction involving the power of attorney is without actual knowledge of a fact.'"<sup>16</sup> Due to concerns that third parties may remain willfully uninformed in order to hide behind the protections of the UPOAA, section 26-90(F) was amended to state:

For purposes of this section and § 26-91, a person that conducts activities through employees and exercises commercially reasonable procedures to communicate information concerning powers of attorney among its employees is without actual knowledge of a fact relating to a power of attorney, a principal, or an agent if the employee

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11. *Id.*

12. *See Kern v. Barksdale Furniture Corp.*, 224 Va. 682, 685, 299 S.E.2d 365, 367 (1983) ("One who deals with an agent does so at his own peril and has the duty of ascertaining the agent's authority. If the agent exceeds his authority, the principal is not bound by the agent's act." (citing *Kern v. Freed Co.*, 224 Va. 678, 680, 299 S.E.2d 363, 364 (1983))).

13. *See* VA. CODE ANN. § 26-90(C) (Cum. Supp. 2010).

14. *See id.* §§ 26-90(B), (C) (Cum. Supp. 2010).

15. *Id.* § 26-90(F) (Supp. 2010).

16. Linda S. Whitton, *The Uniform Power of Attorney Act and Financial Institutions* (Sept. 1, 2008) (unpublished manuscript), [http://uniformlaws.net/Update/Docs/UPOAA%20and%20Financial%20Institutions\(9-1-08\).pdf](http://uniformlaws.net/Update/Docs/UPOAA%20and%20Financial%20Institutions(9-1-08).pdf) (emphasis omitted) (citing UNIF. POWER ATT'Y ACT § 119(f) (2006), <http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2006final.pdf>).

conducting the transaction involving the power of attorney has followed such procedures and is nonetheless without actual knowledge of the fact.<sup>17</sup>

Thus, knowledge will be imputed unless the employer implements reasonable procedures to disseminate information among its employees and the employee uses the procedure and is without knowledge of the fact.<sup>18</sup>

## 2. Applicability<sup>19</sup>

Language was added to section 26-74 to clarify that the UPOAA does not apply to a power to make arrangements for burial or disposition of remains pursuant to section 54.1-2825.<sup>20</sup>

## 3. Validity of Power of Attorney<sup>21</sup>

The original UPOAA was silent on whether a power of attorney must be delivered to the agent in order for it to be valid.<sup>22</sup> The Virginia Code addressed this concern with a statute that eliminated the delivery requirement.<sup>23</sup> The General Assembly retained this Virginia distinction, as codified in section 26-77(E) of the UPOAA.<sup>24</sup>

## 4. Execution of Power of Attorney<sup>25</sup>

The following language was added to section 26-76: "A power of attorney in order to be recordable shall satisfy the requirements of § 55-106."<sup>26</sup> Section 55-106 generally provides that you can record a document only if it has been (i) acknowledged and notarized or (ii) proved by the signer or two witnesses in front of the

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17. VA. CODE ANN. § 26-90(F) (Supp. 2010).

18. *Id.*

19. *Id.* § 26-74 (Supp. 2010).

20. *Id.* § 26-74(5) (Supp. 2010).

21. *Id.* § 26-77 (Supp. 2010).

22. See UNIF. POWER ATT'Y ACT § 106 (2008), [http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2008\\_final.pdf](http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2008_final.pdf).

23. VA. CODE ANN. § 11-9.7 (Cum. Supp. 2009).

24. Act of Apr. 11, 2010, ch. 455, 2010 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 26-77(E) (Supp. 2010)).

25. VA. CODE ANN. § 26-76 (Supp. 2010).

26. *Id.*

court or the clerk.<sup>27</sup> The addition of section 26-76 is intended to clarify that while only certain powers of attorney can be recorded, one can record a power of attorney that is not notarized.<sup>28</sup>

#### 5. Statutory Form Power of Attorney<sup>29</sup>

The statutory short form power of attorney section 26-112 was deleted entirely from the UPOAA due to concerns that it was too powerful and that it may be used by consumers without adequate representation by counsel.<sup>30</sup> Although the statutory short form has been deleted, the General Assembly has reserved a Code section for its potential incorporation at a later date.<sup>31</sup>

#### 6. Uniformity of Application and Construction<sup>32</sup>

The uniformity of application and construction section 26-114 provides: "In applying and construing this uniform act, consideration should be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it."<sup>33</sup> The General Assembly deleted this section from the UPOAA in the 2009 Session; however, it was restored by the General Assembly in the 2010 Session.<sup>34</sup> The Virginia Uniform Trust Code, Uniform Principal and Income Act, and Uniform Simultaneous Death Act, contain this same provision.<sup>35</sup>

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27. *Id.* § 55-106 (Repl. Vol. 2007 & Cum. Supp. 2010).

28. *Id.* § 26-76 (Supp. 2010).

29. *See id.* § 26-112 (Supp. 2010).

30. *Compare* Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts 2646 (including the statutory form), *with* VA. CODE ANN. § 26-112 (Supp. 2010) (omitting the statutory form).

31. *See* VA. CODE ANN. § 26-112 (Supp. 2010).

32. *Id.* § 26-114 (Supp. 2010).

33. *Id.*

34. *Compare* Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts 2634, 2650 (codified at VA. CODE ANN. § 26-74.01 (Cum. Supp. 2009)) (omitting uniformity of application and construction clause), *with* Act of Apr. 11, 2010, ch. 632, 2010 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 26-114 (Cum. Supp. 2010)) (including uniformity clause).

35. *See, e.g.*, § 55-277.32 (Repl. Vol. 2007) (Virginia Uniform Principal and Income Act); *id.* § 55-551.01 (Repl. Vol. 2007) (Virginia Uniform Trust Code); *id.* § 64.1-104.8 (Repl. Vol. 2007) (Virginia Simultaneous Death Act).

B. *Estate & Generation-Skipping Taxes—Repeal—Construction of Pre-2010 Documents*

One part of the Economic Growth and Tax Relief Reconciliation Act of 2001 provided for the complete repeal of all federal estate and generation-skipping taxes effective January 1, 2010 and, absent further legislative action, for their resurrection effective January 1, 2011.<sup>36</sup> The absence of any further federal action prior to January 1, 2010, and the consequent automatic repeal of these taxes, led the VBA's Section on Wills, Trusts, and Estates to seek an emergency constructional rule in the 2010 Session for estates of persons with pre-2010 tax-drafted wills and trusts who die during 2010 in order to ameliorate significant interpretive problems and the possible disinheritance of some beneficiaries.<sup>37</sup> For example, a pre-2010 tax will might have sought to optimize the estate tax marital deduction by bequeathing "the maximum amount that can pass free of federal estate taxes" to a family trust for the benefit of testator's children, with the residue passing to a marital trust for testator's spouse. This testator's death in 2009 would have resulted in \$3.5 million, the federal "exemption equivalent," going to the children via the family trust and the remainder of testator's estate passing to the marital trust for the spouse.<sup>38</sup> However, if testator dies in 2010, when there is no estate tax, this language would literally result in testator's entire estate passing to the children via the family trust and nothing passing to testator's spouse. The VBA believed that such a result in this and similar cases where federal "formula language" was used to quantify a taxable estate's division would frustrate the typical testator's substantive intent regarding division of the estate among the testator's family and thus it sought remedial legislation from the General Assembly.<sup>39</sup> In response to the VBA initiative, the 2010 Session enacted a constructional rule stating that the use of formula language<sup>40</sup> in these cases "shall be deemed to refer to the

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36. Pub. L. 107-16, § 501, 115 Stat. 38 (2001). For an excellent explanation of this legislation written from a practitioner's standpoint, see Charles F. Newlin & Andrea C. Chomakas, *The 2001 Tax Act: Uncharted Waters for Estate Planners*, PROB. & PROP., Sept.–Oct. 2001, at 32.

37. Va. Bar Ass'n, *VBA 2010 Legislative Highlights*, VA. BAR. ASS'N NEWS J., Summer 2010, at 17.

38. See § 521, 115 Stat. at 71.

39. See Va. Bar Ass'n, *supra* note 37, at 17.

40. The specific formula-language references in the 2010 remedial legislation were:

federal estate tax and generation-skipping transfer tax laws as they applied with respect to estates of decedents dying on December 31, 2009.”<sup>41</sup> As there is a possibility that Congress might act to restore these taxes prior to their scheduled return on January 1, 2011, the Virginia legislation also provides that, should this occur, its reference to January 1, 2011 “shall refer instead to the first date on which such tax becomes legally effective.”<sup>42</sup> Notwithstanding the new constructional rule’s provision that these formula references “shall be deemed” to refer to prior law, the rule is expressly made not applicable to documents where the decedent has expressed a contrary intent,<sup>43</sup> and it authorizes the decedent’s “personal representative or any affected beneficiary” to initiate a proceeding within twelve months of decedent’s death to determine such intent.<sup>44</sup> Although the general rule would call for this legislation to become effective on July 1, 2010, along with all other legislation enacted by the 2010 Session, it was passed as an emergency bill, which means that its effective date is the date signed by the Governor, which was April 7, 2010.<sup>45</sup> Lastly, to cover the gap between January 1st and April 7th, the legislation also states that its provisions “are effective retroactive to December 31, 2009.”<sup>46</sup>

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“[U]nified credit,” “estate tax exemption,” “applicable exemption amount,” “applicable credit amount,” “applicable exclusion amount,” “generation-skipping transfer tax exemption,” “GST exemption,” “marital deduction,” “maximum marital deduction,” “unlimited marital deduction,” “inclusion ratio,” “applicable fraction,” or any section of the Internal Revenue Code relating to the federal estate tax or generation-skipping transfer tax, or that measures a share of an estate or trust based on the amount that can pass free of federal estate taxes or the amount that can pass free of federal generation-skipping transfer taxes, or that is otherwise based on a similar provision of federal estate tax or generation-skipping transfer tax law. . . .

VA. CODE ANN. § 64.1-62.4(A) (Cum. Supp. 2010).

41. Act of Apr. 7, 2010, ch. 238, 2010 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 64.1-62.4 (Cum. Supp. 2010)).

42. *Id.*

43. VA. CODE ANN. § 64.1-62.4 (Cum. Supp. 2010).

44. *Id.* § 64.1-62.4(B) (Cum. Supp. 2010).

45. Ch. 238, 2010 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 64.1-62.4 note (Cum. Supp. 2010)).

46. *Id.*



C. *Probate Avoidance—Small Estate Act—Collection of Small Amounts*

Although the probate process is the traditional method for transferring title to personal property from deceased former owners to their successors, and although this process is rather simple and economical in Virginia, nevertheless it can result in a disproportionate expenditure of time and money in cases where there is little to transfer and no questions regarding the decedent's ownership thereof. In order to provide alternative remedies in such cases, the Virginia Code has long contained a number of sections focusing on simplified, non-probate transfers of specific assets, such as bank accounts,<sup>47</sup> as well as a Small Estate Act,<sup>48</sup> which contains an umbrella rule applicable to any personal property.<sup>49</sup> The 2010 Session revised and reformed the Small Estate Act and incorporated a generic small-asset provision therein, as described in the following paragraphs.

1. Small Estate Act—The \$50,000 Umbrella Rule

The revised Virginia Small Estate Act retains much of its original non-probate, affidavit-based process for the collection of any of a decedent's personal property from third parties in cases where the value of the decedent's entire personal probate estate does not exceed \$50,000, and for insulating these third parties from any liability for making transfers pursuant thereto to the same extent as if they had dealt with a personal representative in the standard probate process.<sup>50</sup> However, in addition to a number of ministerial changes, the 2010 amendments (i) create a mechanism whereby a decedent's successors can appoint a "designated successor" to represent them before a third party,<sup>51</sup> (ii) impose a fiduciary duty on the designated successor in connection with the small asset and the other successors,<sup>52</sup> (iii) change the nature of

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47. § 6.1-71 (Cum. Supp. 2009).

48. *Id.* §§ 64.132.1 to -132.4 (Repl. Vol. 2007); see also J. Rodney Johnson, *Wills, Trusts, and Estates*, 68 VA. L. REV. 521, 529-30 (1982).

49. § 64.1-132.1 (Repl. Vol. 2007).

50. Act of Apr. 8, 2010, ch. 269, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 64.1-132.1 to -132.4 (Cum. Supp. 2010)).

51. *Id.*, 2010 Va. Acts at \_\_\_ (codified as amended at VA. CODE ANN. § 64.1-132.1 (Cum. Supp. 2010)).

52. *Id.*, 2010 Va. Acts at \_\_\_ (codified as amended at VA. CODE ANN. § 64.1-132.2(A)(8)).

this remedy from permissive to mandatory,<sup>53</sup> (iv) clarify that the \$50,000 limitation is a date of death value,<sup>54</sup> (v) incorporate the principle of virtual representation,<sup>55</sup> (vi) guarantee a consistent scheme of distribution among a decedent's successors,<sup>56</sup> and (vii) include a variety of facility of payment clauses for the designated successor's use in making distribution to successors under a disability.<sup>57</sup>

## 2. Small Estate Act—The \$15,000 Generic Rule

The common denominator of the various specific-asset probate-avoidance statutes under prior law was their applicability to cases where sixty days had passed since the decedent's death and no probate proceedings had been initiated. These permissive statutes, which protected third parties who elected to rely thereon, typically, though not universally, (i) were restricted to cases where the personalty in question was under \$15,000; (ii) provided for payment to the decedent's spouse or, if none, to the decedent's distributees; and (iii) required only a receipt, not an affidavit, from the claiming successor.<sup>58</sup> The 2010 legislation repealed ten of these specific-asset statutes<sup>59</sup> and added a statute creating a generic non-affidavit remedy for cases in which the specific personalty is worth no more than \$15,000, sixty days have passed since the decedent's death, and no proceeding for the appointment of a personal representative has been initiated.<sup>60</sup> This remedy continues to be permissive in nature, and a third party who elects to rely thereon is still protected to the same extent as if the transfer

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(Cum. Supp. 2010)).

53. *Id.* (codified as amended at VA. CODE ANN. § 64.1-132.2(A) (Cum. Supp. 2010)).

54. *Id.* (codified as amended at VA. CODE ANN. § 64.1-132.2(A)(1) (Cum. Supp. 2010)).

55. *Id.*, 2010 Va. Acts at \_\_\_ (codified as amended at VA. CODE ANN. § 64.1-132.2(C) (Cum. Supp. 2010)).

56. *See id.*, 2010 Va. Acts at \_\_\_ (codified as amended at VA. CODE ANN. § 64.1-132.2(A)(8) (Cum. Supp. 2010)). Presumably, the reference to payment or delivery of the small asset "as required by the laws of the Commonwealth" means the decedent's distributees in an intestacy and the decedent's residuary legatees if the decedent died testate. *See id.*

57. *Id.*, 2010 Va. Acts at \_\_\_ (codified as amended at VA. CODE ANN. § 64.1-132.2(B) (Cum. Supp. 2010)).

58. *E.g.*, VA. CODE ANN. § 6.1-71 (Cum. Supp. 2009).

59. Act of Apr. 8, 2010, ch. 269, 2010 Va. Acts 247 (codified as amended at VA. CODE ANN. §§ 64.1-132.5 to -132.6 (Cum. Supp. 2010); repealing *id.* §§ 6.1-71, 6.1-194.58, 6.1-225.49, 51.1-164, 64.1-123, 64.1-123.1 & 64.1-123.3 to -125).

60. § 64.1-132.3(A) (Cum. Supp. 2010).

had been made to a personal representative.<sup>61</sup> However, a new provision provides that, if payment is made pursuant to this statute, “[t]he designated successor shall have a fiduciary duty to safeguard and promptly pay or deliver the small asset as required by the laws of the Commonwealth to the other successors, if any.”<sup>62</sup>

#### D. *Funeral and Burial Matters—Priorities—Power of Attorney*

Virginia law identifying the ones who have the right to make the funeral and burial arrangements for a decedent has no provision establishing any order of decision-making priority among these persons. This problem is illustrated by the case of *Mazur v. Woodson*, in which the widower and adult children of a decedent sought to recover damages from the decedent’s brother, who had authorized her funeral and burial arrangements without their knowledge or consent, and others for intentional and negligent mishandling of the decedent’s body under Virginia common law.<sup>63</sup> In response to their claim, the court noted that in Virginia “the right to bury and preserve the remains is recognized and protected as a quasi-property right,” and that “an action *ex delicto* will lie against a wrongdoer for the wrongful invasion of a near-relative’s rights with respect to a dead body . . . or for a breach of duty in respect to it.”<sup>64</sup> However, the court concluded that such a cause of action is a right that exists only in favor of a decedent’s next of kin against a third party, *that all of a decedent’s next of kin have equal rights and standing*<sup>65</sup> and that, as the decedent’s

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61. *Id.* § 64.1-132.4 (Cum. Supp. 2010).

62. *Id.* § 64.1-132.3(B) (Cum. Supp. 2010).

63. 191 F. Supp. 2d 676, 679 (E.D. Va. 2002). This case is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 37 U. RICH. L. REV. 357, 385–88 (2002).

64. *Mazur*, 191 F. Supp. 2d at 681 (quoting *Sanford v. Ware*, 191 Va. 43, 48, 60 S.E.2d 10, 12 (1950)).

65. It should be noted that the term “next of kin,” as used in the funeral laws, does not refer to those who are the next of kin for the purpose of succession to a decedent’s estate. Instead, it refers to the following unique definition of that term found in section 54.1-2800, which applies only in funeral-related matters:

“*Next of kin*” means any of the following persons, regardless of the relationship to the decedent: any person designated to make arrangements for the disposition of the decedent’s remains upon his death pursuant to § 54.1-2825, the legal spouse, child over 18 years of age, custodial parent, noncustodial parent, siblings over 18 years of age, guardian of minor child, guardian of minor siblings, maternal grandparents, paternal grandparents, maternal

brother was one of her next of kin, “he is not subject to suit from other members of that class for withholding the body from them.”<sup>66</sup> This absence of any priorities among a decedent’s “successors” (to use a neutral term) has already created too many problems,<sup>67</sup> and it is likely to lead to an increasing number of problems in the future because of the increasing incidence of cultural intermarriage, religious conversions, population mobility, family division following divorce, etc. Believing that the time spent, fees paid, and grief suffered in such cases could be avoided if Virginia had a statutory order of priority among a decedent’s successors, the VBA sought a statute in the 2009 Session to (i) identify those who have the right to make funeral and burial arrangements for a decedent, (ii) establish an appropriate order of priority among such persons,<sup>68</sup> and (iii) protect those in the funer-

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siblings over 18 years of age and paternal siblings over 18 years of age, or any other relative in the descending order of blood relationship.

§ 54.1-2800 (Repl. Vol. 2009).

66. *Mazur*, 191 F. Supp. 2d at 682. The court reached this conclusion based upon the language of section 54.1-2807(B), which, at that time, provided in part as follows:

Except as provided in §§ 32.1-288 and 32.1-301, funeral service establishments shall not accept a dead human body from any public officer except a medical examiner, or from any public or private facility or person having a professional relationship with the decedent without having first inquired about the desires of the next of kin and the persons liable for the funeral expenses of the decedent. *The authority and directions of any next of kin shall govern the disposal of the body.*

§ 54.1-2807(B) (Repl. Vol. 2009) (emphasis added).

This section was amended in the 2010 Session by adding the following language at the end: “subject to the provisions of § 54.1-2807.01 or 54.1-2825.” Act of April 10, 2010, ch. 383, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 54.1-2807(B) (Supp. 2010)). The first of these added references identifies a new Code section, “[w]hen next of kin disagree,” that is discussed in Part II.D.2, *infra*, and the second reference identifies the funeral/burial power of attorney that is discussed in Part II.D.1, *infra*.

67. In addition to family problems, a further concern is the creation of an economic conflict of interest for funeral providers who, in the absence of any established priority, have too much flexibility in determining which of the competing next of kin they will deal with when some of the next of kin have differing wishes concerning the amount to be spent on a decedent’s final arrangements. It is submitted that the existence of this conflict of interest is unacceptable. According to the Federal Trade Commission, “[m]ost funeral providers are professionals who strive to serve their clients’ needs and best interests. But some aren’t. They may take advantage of their clients through inflated prices, overcharges, double charges or unnecessary services.” FUNERALS: A CONSUMER GUIDE, 4 FED. TRADE COMM’N, <http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro19.pdf> (last visited Oct. 30, 2010).

68. This priority was based in large part upon section 54.1-2986(A), which serves the corresponding function when it is necessary to identify the appropriate person to make health care and end of life decisions for a person who is unable to make them personally and who has not executed an advance directive. See § 54.1-2986(A) (Repl. Vol. 2009).

al industry who rely upon the directions of the authorized person.<sup>69</sup> Regrettably, this 2009 burial-priority proposal was defeated by the almost unanimous opposition of the funeral industry.<sup>70</sup> However, the 2010 Session did enact legislation (i) partially addressing the absence-of-priority issue, and (ii) responding to an unfortunate Attorney General Opinion interpreting Virginia's "burial power of attorney" statute, both of which are described in the following text.

### 1. The Funeral/Burial Power of Attorney Legislation

Prior to the 2010 Session, Virginia's burial power of attorney was a one-sentence statute that read in full as follows: "Any person may designate in a signed and notarized writing, which has been accepted in writing by the person so designated, an individual who shall make arrangements for his burial or the disposition of his remains, including cremation, upon his death."<sup>71</sup> As written, this section's provision for both "burial" and "disposition of remains" was somewhat overlapping and the section was also too narrow because it made no express reference to the designee's authority in regard to the designor's "funeral" arrangements.<sup>72</sup> Nevertheless, it was generally believed that the General Assembly intended to provide a complete remedy in these cases, instead of addressing only half of the problem, and thus the statute was regularly interpreted as applying to all funeral and disposition matters.<sup>73</sup> However, a recent opinion of the Virginia Attorney

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69. H.B. 1909, Va. Gen. Assembly (Reg. Sess. 2009). The writer actively participated in the drafting and promotion of this legislation, as well as that introduced in the 2010 Session, on behalf of the Virginia Bar Association.

70. Cf. I J. HOUSE DELEGATE COMMONWEALTH VA. 1359 (Reg. Sess. 2009) (indicating that H.B. 1909 was left in committee). The funeral industry lobbyists were opposed to the creation of any priority list. In addition, several delegates on a House subcommittee expressed a concern about the relative priority between a surviving spouse and adult children of the decedent when the children are not children of the surviving spouse. There are two responses to this latter concern. First, it should be noted that putting the decedent's spouse ahead of the decedent's children is the same rule found in section 54.1-2986(A) which identifies the appropriate person to make health-care and end-of-life decisions for a person who has not executed an advance directive. § 54.1-2986(A) (Repl. Vol. 2009). Second, in cases where a person does not want the default rules to control, the simple remedy is to select the desired person via an advance directive (for health care and end-of-life decisionmaking) or a power of attorney (for funeral and burial decisionmaking).

71. § 54.1-2825 (Repl. Vol. 2009).

72. See *id.*

73. See, e.g., *Grisso v. Nolen*, 262 Va. 688, 693, 554 S.E.2d 91, 94 (2001).

General held to the contrary and concluded that this statutory power of attorney was, in fact, restricted to the disposition of the decedent's remains and did not deal with "funeral" matters.<sup>74</sup> Moreover, the Attorney General further concluded that a decedent's designation of another to make the arrangements for the disposition of the decedent's remains, pursuant to this statute, only gave the designee coequal status with the decedent's next of kin and not priority over any of them.<sup>75</sup> In response to this opinion, the 2010 Session amended the statute to expressly include provision for the designee's "funeral" authority and to further provide that the "designee shall have priority over all persons otherwise entitled to make such arrangements" for 48 hours.<sup>76</sup> A final amendment to this statute recognizes the unique position of military personnel and provides for the absolute priority of a service member's designee made pursuant to the appropriate federal form.<sup>77</sup>

## 2. The Funeral/Burial Priority Legislation

In addition to Virginia law not providing for any funeral/burial priority among a decedent's next of kin, it has also failed to provide any procedure for the resolution of the disputes which arise among the next of kin because of this deficiency. The 2010 Session partially responded to this vacuum by adding a new Code section which provides that, in the absence of a funeral/burial power of attorney, any of the decedent's next of kin<sup>78</sup> may petition

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74. 2009 Op. Va. Att'y Gen. 135.

75. *Id.*

76. Act of Apr. 10, 2010, ch. 324, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 54.1-2825(A) (Supp. 2010)). The designee's priority is subject to the express condition "that a copy of the signed and notarized writing is provided to the funeral service establishment and to the cemetery, if any, no later than 48 hours after the funeral service establishment has received the remains." § 54.1-2825(A) (Supp. 2010). In addition, the amendment clarified that the term "disposition of his remains" not only includes cremation but also "interment, entombment, or memorialization, or some combination thereof." *Id.*

77. § 54.1-2825(B) (Supp. 2010). This amendment reads in full as follows:

In cases in which a person has designated in a U.S. Department of Defense Record of Emergency Data (DD Form 93) or any successor form an individual to make arrangements for his funeral and disposition of his remains, and such person dies while serving in any branch of the United States Armed Forces as defined in 10 U.S.C. § 1481, such designee shall be responsible for making such arrangements.

*Id.*

78. See *supra* note 65 for the unique definition of "next of kin" in funeral-related mat-

the circuit court to determine which of them will have the power to make the decedent's final arrangements.<sup>79</sup> The statute's complete provision for the resolution of such a case reads as follows:

In determining the matter before it, the court shall consider the expressed wishes, if any, of the decedent, the legal and factual relationship between or among the disputing next of kin and between each of the disputing next of kin and the decedent, and any other factor the court considers relevant to determine who should be authorized to make the arrangements for the decedent's funeral or the disposition of his remains.<sup>80</sup>

Although the foregoing legislation will be of some help in resolving cases arising due to the absence of a priority rule, it is respectfully submitted that it is patently defective because it fails to take into account those cases where the evidence before the court is insufficient or hopelessly conflicting. What is the court to do in such a case? Is Virginia back to the days (and to the corresponding problems) when a case's outcome was measured by "the length of the chancellor's foot"? It is submitted that the only answer for such cases is a back-up priority provision. Although the legislation that was introduced did contain such a back-up priority provision, it was stricken because of opposition from lobbyists for the funeral/burial industry.<sup>81</sup> It is respectfully submitted that this problem needs to be corrected in the 2011 Session. The better solution would be the adoption of a burial priority statute similar

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79. Act of Apr. 10, 2010, ch. 383, 2010 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 54.1-2807.01(A) (Supp. 2010)). The statute further provides that "[t]he court may require notice to and the convening of such of the next of kin as it deems proper." § 54.1-2807.01(A) (Supp. 2010).

80. § 54.1-2807.01(B) (Supp. 2010).

81. See H.B. 650, Va. Gen. Assembly (Reg. Sess. 2010). The backup order-of-priority paragraph in the VBA-sponsored legislation read in full as follows:

C. If the court concludes that there is insufficient evidence to determine the issue before it by clear and convincing evidence, the court shall authorize the decedent's next of kin in the following order of priority to make all arrangement for the decedent's funeral or the disposition of his remains:

1. The decedent's spouse, except where a divorce action has been filed;
2. The decedent's adult children;
3. The decedent's parents;
4. The decedent's adult siblings; or
5. The decedent's adult kindred as set forth in § 64.1-1, in the priority established therein.

If there is division within the members of the priority category, the court shall grant the authority to such of them as in the exercise of its discretion it deems appropriate.

*Id.*

to that introduced in the 2009 Session,<sup>82</sup> which would eliminate the need for the statute in question dealing with disputes among the next of kin. In the absence thereof, the only solution is a back-up priority provision for those cases where the court determines that the evidence of decedent's intent is insufficient or hopelessly conflicting.

E. *Testamentary Trusts—Annual Accounts—Waiver with Beneficiaries' Consent*

The default rule of Virginia fiduciary accounting law requires testamentary trustees to file annual accounts of all trust receipts and disbursements with the commissioner of accounts.<sup>83</sup> This requirement is intended to protect the trust's beneficiaries by verifying that the trustee has (i) carried out the will's instructions, (ii) invested correctly, (iii) handled trust property appropriately, and (iv) not charged an unreasonable fee.<sup>84</sup> As some testators wished to eliminate the expense associated with these accountings, the 1993 Session authorized testators to eliminate this requirement by including express waiver language in their wills.<sup>85</sup> This matter came before the General Assembly for the second time in 2001 when it amended (i) a notice requirement relating to post-June 30, 1993 trusts, and (ii) section 26-12 to provide that a testamentary trustee "shall be exempted from the duty to file an inventory for so long as there remains no duty to file annual accounts."<sup>86</sup> The 2005 Session addressed this matter a third time by extending the waiver statute's application to testamentary trusts where a sole beneficiary is also a trustee.<sup>87</sup>

The fourth act in this continuing drama occurred in the 2010 Session when the waiver statute was amended to eliminate the

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82. See *supra* notes 65–67 and accompanying text.

83. § 26-17.6(A) (Repl. Vol. 2009).

84. Cf. *id.* § 26-17.3 to -17.6 (Repl. Vol. 2009).

85. Act of Mar. 28, 1993, ch. 689, 1993 Va. Acts 969 (codified at VA. CODE ANN. § 26-17.7(B) (Cum. Supp. 1993)); see also J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 27 U. RICH. L. REV. 833, 840–41 (1993).

86. Act of Mar. 6, 2001, ch. 73, 2001 Va. Acts 48 (codified as amended at VA. CODE ANN. §§ 26-12, -17.7 (Repl. Vol. 2001)); J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 35 U. RICH. L. REV. 845, 851–52 (2001).

87. Act of Mar. 26, 2005, ch. 821, 2005 Va. Acts 1355 (codified as amended at VA. CODE ANN. § 26-17.7 (Cum. Supp. 2005)); see also J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 40 U. RICH. L. REV. 381, 386–89 (2005).



duty of trustees to file inventories and annual accounts for trusts under any will probated after June 30, 2010, if all beneficiaries other than the trustee consent to such non-filing, unless the decedent's will directs to the contrary.<sup>88</sup> To provide guidance for practitioners whose clients do wish to direct to the contrary, the 2010 amendment further provides as follows: "Language substantially in form and effect as follows will be sufficient to constitute a direction in the will of the decedent of the trustee's obligation to account: I hereby direct that my trustee(s) shall be required to file annual accounts with a court as otherwise required by Virginia law."<sup>89</sup>

The most significant problem with this amendment is its applicability to wills written during the seventeen-year period between July 1, 1993 (when the provision for testator's express waiver became effective) and July 1, 2010. Lawyers following minimum professional standards during this period would have explained the option to waive accountings in testamentary trusts during the typical will interview and, in cases where waiver was desired, would have provided expressly therefore. And where, for reasons similar to those expressed earlier in this section, clients wanted the accounting requirement to be applicable to their trustee, the drafting attorney would assure the client that silence would obtain the desired result pursuant to the default rule of Virginia statutory law. Now, however, with the requisite beneficiary consent, the accounting requirement that these latter clients specifically wanted to apply can instead be eliminated in all of the wills that were executed during this seventeen-year period which are probated after June 30, 2010.<sup>90</sup> Although some of these clients will come in for a will review during which this problem will be

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88. Act of Apr. 7, 2010, ch. 197, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 26-17.7(E) (Supp. 2010)). Only beneficiaries "to whom income or principal of the trust could be currently distributed" are required to consent, and provision is made for representatives of incapacitated beneficiaries to consent on their behalf." § 26-17.7(E) (Supp. 2010).

89. § 26-17.7(E) (Supp. 2010). Note the constructional issue presented by the amendment's provision for waiver of "the duty to file an inventory or annual accounts . . . if the will of the decedent does not direct the filing of such inventory or accounts" and the suggested language quoted in the text which refers only to annual accounts. *Id.* Will the use of this language, which is silent in regard to filing an inventory, nevertheless result in preventing the waiver of the inventory requirement as well as the accounting requirement? Regardless of one's answer, should the prudent attorney expand the statutory language to include an express reference to "inventory" until the statute is clarified?

90. *See id.*

caught and remedied by “a direction to the contrary,” it is obvious that some will not come in and others, because of incapacity, cannot come in. The clear frustration of testamentary intent in such cases is not good law or good policy. Moreover, the cumulative effect of the multiple amendments to the waiver section has resulted in a cumbersome, convoluted, and confusing Code section that would profit greatly from revision. It is respectfully submitted that both of these problems should be corrected by the 2011 Session.

#### F. *Trusts—Car Tax—Multiple Beneficiaries*

Under prior law, a motor vehicle held in a private trust was not a “qualifying vehicle” for purposes of car-tax relief unless it was held for nonbusiness purposes by an “individual beneficiary.”<sup>91</sup> The 2010 Session eliminated the “individual beneficiary” requirement.<sup>92</sup>

#### G. *Probate—List of Heirs*

Section 64.1-134 requires every personal representative who qualifies in the clerk’s office, and the proponent of every will in cases where there is no qualification, to file a list of heirs for the decedent.<sup>93</sup> The 2010 amendment to this section, stating what by definition is already existing law, provides that this list “shall reflect the heirs in existence on the date of the decedent’s death.”<sup>94</sup>

#### H. *Probate—List of Heirs—Fee in Lieu of Probate Tax*

The Commonwealth imposes a state probate tax of ten cents per hundred dollars (or fraction thereof) of estate value upon the probate of a decedent’s will or the qualification of a personal representative on the decedent’s estate;<sup>95</sup> and cities and counties are

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91. *Id.* § 58.1-3523 (Repl. Vol. 2009).

92. Act of Apr. 11, 2010, ch. 499, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-3523 (Cum. Supp. 2010)) (redefining “qualifying vehicle”).

93. § 64.1-134 (Repl. Vol. 2007 & Cum. Supp. 2009).

94. Act of Apr. 11, 2010, ch. 585, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 64.1-134 (Cum. Supp. 2010)). This amendment further provides that “[i]f there are any changes as to who should be included on the list of heirs, an additional list of heirs shall be filed that includes such changes.” § 64.1-134 (Cum. Supp. 2010).

95. § 58.1-1712 (Repl. Vol. 2009). Estates of \$15,000 or less are exempt from this tax.

authorized to impose a local probate tax “in an amount equal to one-third of the amount of the state tax.”<sup>96</sup> In some cases where a person dies intestate owning real estate but not leaving any personal estate that requires administration, the decedent’s heirs elect to skip the standard probate process and simply record a list of heirs<sup>97</sup> or an affidavit relating to real estate of an intestate decedent<sup>98</sup> in order to establish in the clerk’s official records a link in the chain of title from the decedent to them. A side benefit of this informal procedure has been the complete avoidance of the probate tax. However, the 2010 Session has partially reduced this side benefit by imposing a twenty-five dollar fee in such cases, and by authorizing cities and counties to do the same.<sup>99</sup>

### I. *Litigation—Style of Case—Amendment—Relation Back*

The 2010 Session clarified the style rules for fiduciary litigation with a new Code section providing that in any litigation brought by or against a fiduciary, “the style of the case in regard to the fiduciary shall be substantially in the following form: ‘(Name of fiduciary), (type of fiduciary relationship), (Name of the subject of the fiduciary relationship).’”<sup>100</sup> This legislation further provides that (i) any pleading that fails to follow this format “but otherwise identifies the proper parties shall be amended on the motion of any party or by the court on its own motion,” (ii) “[s]uch amendment relates back to the date of the original pleading,” and (iii) “the provisions of this act shall apply to any action or suit pending as of the effective date of this act.”<sup>101</sup>

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*Id.*

96. *Id.* § 58.1-1718 (Cum. Supp. 2010).

97. *Id.* § 64.1-134 (Cum. Supp. 2010).

98. *Id.* § 64.1-135 (Repl. Vol. 2007 & Cum. Supp. 2010).

99. Act of Apr. 8, 2010, ch. 266, 2010 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. §§ 58.1-1717.1, -1718, -3805 (Cum. Supp. 2010)).

100. Act of Apr. 11, 2010, ch. 437, 2010 Va. Acts \_\_\_\_ (codified at VA. CODE ANN. § 8.01-6.3(A) (Cum. Supp. 2010)).

101. § 8.01-6.3(B) & note (Cum. Supp. 2010). Although this enactment was signed by the Governor on April 11, 2010, it did not become effective until July 1, 2010, along with all other non-emergency legislation enacted by the 2010 Session. *See id.* note. For a case illustrating the perceived need for this legislation, see *infra* Part III.E.

## III. CASES

A. *Will Interpretation—Declaratory Judgment—Justiciable Motion*

In *Bell v. Saunders*, Testator's will, which was probated on August 31, 1999, created a trust providing for the equal distribution of income to his sons for life and, upon the death of either, a division of the trust into two equal shares, whereupon "[s]hould the wife of a deceased son of mine survive him, then so long as she shall live, Trustee shall pay the net annual income from said one-half of the Trust Estate to his wife so long as she shall live."<sup>102</sup> Linda, who was married to one of Testator's sons, filed a motion for declaratory judgment against Trustee<sup>103</sup> alleging that her husband died in 2004, that since her husband's death Trustee "has failed and/or refused to pay to [her] the net annual income from the said one-half of the Trust," and that Trustee has informed her attorney "that he does not believe that he has to disburse any of the estate until [she] dies."<sup>104</sup> Linda's action requested the court to interpret Testator's will, to determine her rights thereunder, and to provide other relief.<sup>105</sup> Trustee's demurrer was sustained by the circuit court.<sup>106</sup>

Virginia Code section 8.01-184, the declaratory judgment statute, expressly provides for its application to "[c]ontroversies involving the interpretation of . . . wills."<sup>107</sup> After examining Linda's pleading, the Supreme Court of Virginia determined that she "has pled a justiciable controversy which includes specific adverse claims based on present facts that are ripe for adjudication" under the declaratory judgment statute.<sup>108</sup> Accordingly, the court

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102. 278 Va. 49, 51-52, 677 S.E.2d 39, 40 (2009) (internal quotation marks omitted).

103. *Id.* at 51, 677 S.E.2d at 40. The plaintiffs in this matter "filed their complaint against N. Leslie Saunders, Jr., Esq., as executor and trustee of the estate of Edward J. Bell, Sr. . . . [and alleged, among other things, that] Saunders qualified as the executor of the estate of Edward J. Bell, Sr." *Id.* at 51, 677 S.E.2d at 40. There is no claim that Saunders ever officially qualified as trustee, and a review of the record in this case discloses no evidence thereof. The Supreme Court of Virginia's opinion is silent on this point. *See id.* However, as the opinion treats Mr. Saunders as trustee, so does the present writer.

104. *Id.* at 52, 677 S.E.2d at 40.

105. *Id.* at 52-53, 677 S.E.2d at 40.

106. *Id.* at 53, 677 S.E.2d at 40.

107. VA. CODE ANN. § 8.01-184 (Repl. Vol. 2007 & Cum. Supp. 2010).

108. *Bell*, 278 Va. at 55, 677 S.E.2d at 42.

concluded that “[a]pplying Code § 8.01-184 and our well established precedent, we hold that the circuit court erred in sustaining the demurrer against Linda Bell’s complaint.”<sup>109</sup>

### B. *Inter Vivos Trusts*—“No-Contest” Clause—*First Impression*

In *Keener v. Keener*, Father disposed of his estate via a pour-over will and an inter vivos trust that contained the following forfeiture clause: “Any person that objects to or contests any provision of this Trust, in whole or in part, shall forfeit his or her entire distribution otherwise payable under this Trust and receive only \$1.00 under this Trust and will receive no other distribution from my Trust nor from my estate.”<sup>110</sup> Debra, a trust beneficiary and one of Father’s children, who testified that two of her siblings “told her that [t]here is no Will,” sought, and was granted, appointment as administratrix of Father’s estate.<sup>111</sup> Thereafter, three of Debra’s siblings petitioned the court for admission of Father’s will to probate and removal of Debra as administratrix, and they “alleged that Debra’s acts amounted to a contest of the provisions of the trust.”<sup>112</sup> The trial court granted the requested relief, concluding on the latter point that “Debra’s conduct triggered the forfeiture clause . . . [and] that she had thereby forfeited her interest [in the trust].”<sup>113</sup>

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109. *Id.* This action also included a claim brought by Linda’s son, David, against the same defendant, who was also nominated as the executor of Linda’s husband’s estate. *Id.* at 51–52, 677 S.E.2d at 40. However, as the nominee had not yet qualified as such, he could not exercise an executor’s powers. *Id.* at 55–56, 677 S.E.2d at 42. Accordingly, the supreme court concluded that, although David alleged he was entitled to receive certain benefits from his father’s estate, he had not pleaded an actual controversy. *Id.* Accordingly, it sustained the circuit court’s demurrer against his complaint. *Id.* at 55–56, 677 S.E.2d at 42.

110. 278 Va. 435, 437, 439, 682 S.E.2d 545, 546 (2009) (internal quotation marks omitted).

111. *Id.* at 439–40, 682 S.E.2d at 547 (alteration in original).

112. *Id.* at 440, 682 S.E.2d at 547.

113. *Id.* at 441, 682 S.E.2d at 547–48.

[T]he court ruled that her action in qualifying as administratrix was, in effect, a contest of all the provisions of the trust because, if it had been successful, it would have resulted in the distribution of all assets remaining in the testator’s ownership at the time of his death directly to his statutory heirs at law, and not to the trust as provided for in his will.

*Id.*

The validity of no-contest clauses in wills is a settled aspect of Virginia law.<sup>114</sup> In this case of first impression, the Supreme Court of Virginia held that “[b]ecause the testator relied on the trust for the disposition of his property, we consider it appropriate to give full effect to no-contest provisions in such trusts for the same reasons that support the enforcement of such provisions when they appear in wills.”<sup>115</sup> However, applying the principles of strict construction that are applicable to no-contest provisions, the court “conclude[d] that Debra’s acts did not bring her within the trust’s language . . . [because] Debra made no objection to, or contest of, any provision of the trust.”<sup>116</sup>

### C. *Inter Vivos Trust—Remainder—Vesting—Plain Meaning*

In *Harbour v. Suntrust Bank*, Grantor’s inter vivos trust provided for herself for life, then for her husband for life, and then for division into four equal shares, with one share for each of her three siblings, Herbert, James, and Hazel, and one for a church trust fund, with the following stipulation: “If any of my brothers or sister shall fail to survive me, his or her share shall lapse and such share shall be added to the trust fund for [the church.]”<sup>117</sup> Herbert predeceased Grantor.<sup>118</sup> James and Hazel survived Grantor but predeceased Grantor’s husband.<sup>119</sup> The trustee filed a suit for aid and guidance in interpreting the trust, wherein the church claimed the entirety of the trust fund because all of Grantor’s siblings predeceased her husband.<sup>120</sup> The trial court agreed with the church because its position was “more compelling [from] review [of] the instrument in its entirety.”<sup>121</sup> However, the Supreme Court of Virginia, following a plain language analysis, concluded that the unambiguous “language chosen by the grantor refer-

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114. See *Womble v. Gunter*, 198 Va. 522, 527, 95 S.E.2d 213, 217 (1956).

115. *Keener*, 278 Va. at 442, 682 S.E.2d at 548.

116. *Id.* at 443, 682 S.E.2d at 549. Commenting upon the trial court’s rationale that “Debra’s action, if successful, would have thwarted the testator’s purpose of funding the trust through the will,” the court stated, “[t]hat purpose, however, was not a provision of the trust.” *Id.* For a recent trial court decision citing the principal case and applying a no-contest clause to a will, see *In re Estate of Rohrbaugh*, No. FI 2002-68397, 2010 Va. Cir. LEXIS 57, at \*16–20 (Cir. Ct. Mar. 31, 2010) (Fairfax County).

117. 278 Va. 514, 516–17, 685 S.E.2d 838, 839 (2009).

118. *Id.* at 521, 685 S.E.2d at 842.

119. *Id.* at 517, 685 S.E.2d at 839.

120. *Id.*, 685 S.E.2d at 839–40.

121. *Id.* at 518, 685 S.E.2d at 840 (internal quotation marks omitted).

enced her own death, not the death of the husband, as the event determining whether the share of a sibling would lapse.”<sup>122</sup> Accordingly, the court held that although the share of Herbert, who predeceased Grantor, passed to the church, James and Hazel “received a vested remainder interest in the trust assets when [Grantor] died.”<sup>123</sup>

#### D. *Contract to Convey—Dead Man’s Statute—Statute of Frauds*

*Virginia Home for Boys and Girls v. Phillips* was “a dispute between a devisee under a will and a relative of the testator claiming under an oral agreement.”<sup>124</sup> The trial court ruled in favor of the relative, “finding that his part performance of the parol agreement was sufficient to take the case out of the statute of frauds and that the existence of the agreement was sufficiently corroborated by circumstantial evidence.”<sup>125</sup> Although the Supreme Court of Virginia agreed that corroborating evidence under the Dead Man’s Statute may be circumstantial, it also noted that corroborating evidence thereunder “must be independent of the surviving witness,” an essential requirement that it found to be lacking in this case.<sup>126</sup> In addition, the court further held that this failure to satisfy the Dead Man’s Statute also resulted in a failure to satisfy the Statute of Frauds’ part performance exception that applies only “when the claimant establishes that the parol agreement is ‘certain and definite in its terms’ and that his part performance was done ‘in pursuance of the agreement proved.’”<sup>127</sup>

#### E. *Litigation—Style of Case—Amendment—Relation Back*

In *Idoux v. Estate of Helou*, the Supreme Court of Virginia stated that “[t]he primary issue that we consider in this appeal is whether Code § 8.01-6.2(B) permits a plaintiff, who filed a war-

122. *Id.* at 519, 520, 685 S.E.2d at 841.

123. *Id.* at 521, 685 S.E.2d at 841.

124. 279 Va. 279, 282, 688 S.E.2d 284, 285 (2010).

125. *Id.* at 284, 688 S.E.2d at 286.

126. *Id.* at 286, 688 S.E.2d at 287–88. For a recent trial court case where an oral contract to devise the family home was upheld, based upon the corroborating evidence of five independent witnesses, see *Neese v. Neese*, CL 08-1371, 2010 Va. Cir. LEXIS 52, at \*8–10, \*12 (Cir. Ct. Apr. 28, 2010) (Roanoke County).

127. *Va. Home for Boys & Girls*, 279 Va. at 287, 688 S.E.2d at 288 (quoting *Clark v. Atkins*, 188 Va. 668, 675, 51 S.E.2d 222, 225 (1949)).

rant in debt against an estate, to file a subsequent action to add the proper defendant [(the personal representative of the estate)] after the statute of limitations had expired.”<sup>128</sup> Following a lengthy statutory analysis, the Supreme Court of Virginia affirmed the trial court’s negative answer.<sup>129</sup> However, the 2010 Session added section 8.01-6.3 to the Code to change the result of this decision, not only for cases that are initiated in the future but also for cases that are pending on this legislation’s effective date.<sup>130</sup>

#### F. *Legal Malpractice Claim—Not Assignable by Succession*

The primary question before the Supreme Court of Virginia in *Johnson v. Hart* was “whether a sole testamentary beneficiary, in her individual capacity, may maintain a legal malpractice action against the attorney for the estate for the attorney’s allegedly negligent services rendered to the estate.”<sup>131</sup> In cases of legal malpractice, Virginia follows the strict common law privity rule which requires an attorney-client relationship between the parties,<sup>132</sup> with one statutory exception,<sup>133</sup> and the court has also held that section 8.01-26, “Assignment of causes of action,”<sup>134</sup> does not permit an attorney’s client to assign a legal malpractice action to a third party.<sup>135</sup> Nevertheless, Plaintiff, the sole testamentary beneficiary of a decedent’s estate which she alleges was damaged as a result of Defendant’s negligent performance of legal services, claimed that she could proceed individually against Defendant as

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128. 279 Va. 548, 551, 691 S.E.2d 773, 774 (2010) (discussing VA. CODE ANN. § 8.01-6.2(B) (Repl. Vol. 2007)).

129. *Id.* at 556, 691 S.E.2d at 778.

130. Act of Apr. 11, 2010, ch. 437, 2010 Va. Acts \_\_ (codified at VA. CODE ANN. § 8.01-6.3(B) (Cum. Supp. 2010)); see discussion *supra*, Part II.I.

131. 279 Va. 617, 619, 692 S.E.2d 239, 240 (2010).

132. See *Rutter v. Jones, Blechman, Woltz & Kelly, P.C.*, 264 Va. 310, 313, 568 S.E.2d 693, 695 (2002).

133. In regard to irrevocable inter vivos trusts, section 64.1-145(B) provides in part as follows:

An action at law for damages, including future tax liability, to the grantor, his estate or his trust, resulting from legal malpractice concerning an irrevocable trust shall accrue upon completion of the representation in which the malpractice occurred. The action may be maintained pursuant to § 8.01-281 by the grantor, or by the grantor’s personal representative or the trustee if such damages are incurred after the grantor’s death.

VA. CODE ANN. § 64.1-145(B) (Repl. Vol. 2007).

134. *Id.* § 8.01-26 (Repl. Vol. 2007).

135. See *MNC Credit Corp. v. Sickels*, 255 Va. at 314, 318, 497 S.E.2d 331, 333 (1998).



the beneficial owner of a chose in action by virtue of section 8.01-13,<sup>136</sup> which provides in part that the “beneficial owner of any . . . chose in action . . . may maintain thereon in his own name any action which the original . . . contracting party might have brought.”<sup>137</sup> The trial court agreed that Plaintiff was the beneficial owner of the estate’s malpractice action against Defendant but, “she is the functional equivalent of an assignee,” and, as the assignment of legal malpractice actions is not allowed under section 8.01-26, public policy prevented her from proceeding under section 8.01-13.<sup>138</sup> Agreeing in result, but not in rationale, the Supreme Court of Virginia concluded that “the General Assembly did not plainly manifest an intent’ in Code § 8.01-13 to ‘abrogate the common law rule which prohibits the assignment of legal malpractice claims in this Commonwealth,” and thus it held that “Code § 8.01-13 does not permit beneficial ownership of a cause of action for legal malpractice.”<sup>139</sup>

#### G. Wills—Conditions—Construction—Early Vesting

In *Lane v. Starke*, Husband died in 1991 devising certain residuary real estate to Wife for her life or until her remarriage, and then provided that “[u]pon the death of my wife, she having survived me, or upon her remarriage . . . I give, devise and bequeath [specific realty] to [Son] upon the EXPRESS condition that he pay into my estate ONE-HALF (1/2) of the ASSESSED VALUE of such property.”<sup>140</sup> Other realty was devised to Husband’s two daughters, subject to the same condition.<sup>141</sup> Wife died in 2002, without having remarried, and Son, as executor and beneficiary, initiated this proceeding in 2006 seeking guidance of the court concerning the appropriate date for determining the realty’s assessed value.<sup>142</sup> Several of Husband’s heirs argued, and

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136. *Johnson*, 279 Va. at 622, 692 S.E.2d at 242.

137. § 8.01-13 (Repl. Vol. 2007 & Cum. Supp. 2010).

138. *Johnson*, 279 Va. at 622, 692 S.E.2d at 242 (quoting *Johnson v. Hart*, No. CL 07-0413 (Cir. Ct. Feb. 17, 2009) (Virginia Beach City)).

139. *Id.* at 624, 626, 692 S.E.2d at 243, 244 (quoting *MNC Credit Corp.*, 255 Va. at 318, 497 S.E.2d at 333 (1998)) (construing VA. CODE ANN. § 8.01-13 (Repl. Vol. 2007 & Cum. Supp. 2010); *id.* § 8.01-26 (Repl. Vol. 2007)).

140. 279 Va. 686, 689, 692 S.E.2d 217, 218 (2010) (internal quotation marks omitted).

141. *Id.*

142. *Id.*

the trial court agreed, that the language in question was a condition precedent requiring that payment be made prior to the termination of Wife's estate and, this not having occurred, the contingent remainder failed causing the realty to revert to the residuary estate and as the residuary clause also failed because Wife was now dead, the realty therefore passed by intestate succession to Husband's heirs.<sup>143</sup>

The Supreme Court of Virginia first decided that Husband's "will is ambiguous in that it may be construed in different ways."<sup>144</sup> Accordingly, to determine his presumed intent, the court turned to constructional rules, one of which, the "early-vesting" rule, provides that "where no special intent to the contrary is manifested, the vesting of legacies shall be referred to the death of the testator."<sup>145</sup> Finding no such "special intent," the court accordingly held that the remainders in Son and the two daughters vested at Husband's death.<sup>146</sup> However, notwithstanding the early vesting of these remainders, their possession was postponed until Wife's death and therefore the court held that the amounts the remaindermen were required to pay, which "constitut[e] liens on the land devised, enforceable in equity. . . are therefore to be ascertained by the real estate assessments existing on that date."<sup>147</sup>

#### H. *Holographic Will—Dispensation Statute—Retroactivity*

In *Schilling v. Shilling*, Ora Lee Schilling (Schilling) died in 2008 leaving a writing which she had signed, dated, and acknowledged in front of a notary public in 2005, which was entirely in her own handwriting except for eight words (which are italicized to identify them for this article), and which read as follows:

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143. *Id.* at 690, 692 S.E.2d at 218–19.

144. *Id.*, 692 S.E.2d at 219.

145. *Id.* at 691, 692 S.E.2d at 219 (quoting *Catlett v. Marshall*, 37 Va. (10 Leigh) 79, 92 (1839)).

146. *Id.* at 691–92, 692 S.E.2d at 219–20. The court further stated as follows:

Similarly, when testamentary language requires that a monetary payment be made prior to the vesting of a future interest in a remainderman, the requirement will be treated as a condition precedent, but if the language does not necessarily prove that the payment must precede vesting, the condition is treated as a condition subsequent.

*Id.* at 692, 692 S.E.2d at 220 (citing *Wenner v. George*, 129 Va. 615, 618, 106 S.E. 365, 366 (1921)).

147. *Id.* at 692–93, 692 S.E.2d at 220.

LAST WILL AND TESTAMENT  
OF  
ORA LEE SCHILLING  
40 PACIFIC HAMPTON VA

All this to be my last will and testament. Money in my Bank accoun[t]s and a Condo at *40 Pacific Dr., Hampton, VA* and all of my Belongings, *I bequeath to my son David Von Schilling.*<sup>148</sup>

In David Von Schilling's ("David's") circuit court petition to have this writing admitted to probate as Schilling's holographic will, he acknowledged that he had written the italicized words but claimed that he had done so at Schilling's request.<sup>149</sup> Virginia's statute of wills requires that a holographic will "be wholly in the handwriting of the testator."<sup>150</sup> However, the General Assembly enacted a dispensation statute in 2007 which, with limitations, allows the circuit court to admit a writing to probate even though it was not executed in accordance with the statute of wills if the writing's proponent "establishes by clear and convincing evidence that the decedent intended the document . . . to constitute (i) the decedent's will."<sup>151</sup>

David's petition to have this writing admitted to probate as Schilling's holographic will pursuant to the dispensation statute was met by a demurrer filed by his siblings who argued that the retroactive application of the 2007 dispensation statute to Schilling's 2005 writing when it was offered for probate in 2008 would be improper.<sup>152</sup> The trial court agreed with their argument and David's petition was dismissed.<sup>153</sup> However, the Supreme Court of Virginia held that "a determination whether a writing offered for probate is a valid will applies the law in effect on the date of the

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148. *Schilling v. Schilling*, 280 Va. 146, 148, 695 S.E.2d 181, 182 (2010).

149. *Id.* at 148, 695 S.E.2d at 183.

150. VA. CODE ANN. § 64.1-49 (Repl. Vol. 2007 & Cum. Supp. 2010).

151. Act of Mar. 19, 2007, ch. 538, 2007 Va. Acts 735 (codified as amended at VA. CODE ANN. § 64.1-49.1 (Repl. Vol. 2007 & Cum. Supp. 2010)). This statute is discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 43 U. RICH. L. REV. 435, 436-38 (2008).

152. *Schilling*, 280 Va. at 148, 695 S.E.2d at 183.

153. *Id.*

maker's death. In this case, this is not a retroactive application of Code § 64.1-49.1."<sup>154</sup> Accordingly, the trial court's decision was reversed and the case remanded "for further proceedings to determine whether David can adduce sufficient evidence to establish that the Writing constitutes a valid will under the law in effect at the time of Schilling's death."<sup>155</sup>

The facts in this case are quite similar to those in *Bell v. Timmins*, where

in [Testatrix's] presence and with her consent [a friend] undertook to make certain alterations and deletions on the paper for the purpose, and only for the purpose, of clarifying it as respects punctuation, grammar and phraseology. . . . [And] none of these changes, nor all of them put together, make, or were intended to make, the slightest change in the meaning of the document.<sup>156</sup>

After "demonstrat[ing] that 'wholly' is not used in the Virginia statute in its absolute, utter and rigidly uncompromising sense,"<sup>157</sup> and that therefore any writing on the paper not in Testatrix's hand could be disregarded, the Court held that "[a]n order probating the will as originally written by the testatrix will be prepared and entered . . . ."<sup>158</sup> It would appear that the case in chief might have been brought and decided under the authority of *Bell v. Timmins* without the necessity of invoking the dispensation statute.

#### IV. CONCLUSION

For the reasons noted in the text, it is respectfully submitted that the 2011 Session of the General Assembly should (i) enact a statutory order of priority for funeral/burial disputes where the

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154. *Id.* at 150, 695 S.E.2d at 183.

155. *Id.*, 695 S.E.2d at 183-84.

156. 190 Va. 648, 652, 58 S.E.2d 55, 57 (1950). This case was tried before Brockenbrough Lamb, Chancellor of the Chancery Court of the City of Richmond (1942-63), who this author has heard described as "Virginia's Chancellor Kent." On appeal, the Supreme Court of Virginia declared that "[t]he pertinent facts are so concisely stated in the opinion of the Chancellor, and his reasoning is so logical and convincing, that we have decided to refuse the appeal and to adopt and publish his opinion as the opinion of this Court." *Id.* at 650, 58 S.E.2d at 56.

157. *Id.* at 654-55, 58 S.E.2d at 58-59.

158. *Id.* at 664, 58 S.E.2d at 63 (internal quotation marks omitted).

evidence before the court regarding the decedent's wishes is insufficient or hopelessly conflicting,<sup>159</sup> and (ii) clarify and correct section 26-17.7 dealing with waiver of accountings for testamentary trustees.<sup>160</sup>

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159. *See supra* Part II.D.

160. *See supra* Part II.E.