

11-1-2013

Wills, Trusts, and Estates

J. William Gray Jr.

Hunton & Williams, L.L.P., Richmond, Virginia

Katherine E. Ramsey

Hunton & Williams, L.L.P., Richmond, Virginia

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



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

Recommended Citation

J. W. Gray Jr. & Katherine E. Ramsey, *Wills, Trusts, and Estates*, 48 U. Rich. L. Rev. 189 (2013).

Available at: <https://scholarship.richmond.edu/lawreview/vol48/iss1/9>

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

WILLS, TRUSTS, AND ESTATES

J. William Gray, Jr. *

Katherine E. Ramsey **

I. INTRODUCTION

Although meeting in short session, the 2013 Virginia General Assembly produced an unusually large number of new laws affecting wills, trusts, and estates. Among the nine legislative enactments were those that (1) enabled a real property owner to designate in a revocable deed those who will take the property upon the owner's death, (2) authorized members of a Virginia limited liability company to permit the transfer of both their economic interests and their management interests in the company when assigning membership, (3) imposed possible criminal penalties on anyone who financially exploits a mentally incapacitated person, (4) confirmed and clarified the effect of Virginia's statutory exception to the Rule Against Perpetuities for personal property, (5) expanded the category of trustees whose discretionary distribution powers are limited to an ascertainable standard by default, (6) permitted the personal representative of a deceased minor child to access the child's online accounts, and (7) required anyone seeking court permission to exhume a dead body in order to establish inheritance rights to first cite sufficient facts to establish a reasonable possibility that the claimed biological relationship exists. In addition, June 1, 2013 marked the end of a twelve-month period during which the Supreme Court of Virginia issued five noteworthy opinions. The Supreme Court of the United States rounded out a busy year in the field with an opinion on June 3, 2013.

* Partner, Hunton & Williams LLP, Richmond, Virginia. J.D., 1977, University of Virginia; B.S.I.E., B.A., 1973, Rutgers University.

** Partner, Hunton & Williams LLP, Richmond, Virginia. J.D., 1998, University of Virginia; M.S., 1988, Boston University; B.A., 1986, Virginia Polytechnic Institute and State University.

II. LEGISLATION

A. *Uniform Real Property Transfer on Death Act*

Virginia law has long permitted individuals to avoid probate by designating one or more beneficiaries to receive property upon the owner's death.¹ While technically Virginia Code section 64.2-620 would seem to permit nontestamentary transfers of any kind of property, many practitioners have been hesitant to rely on its authority with respect to real estate. The 2013 General Assembly's enactment of the Uniform Real Property Transfer on Death Act (the "Act") resolved this uncertainty and clearly established real property transfer on death ("TOD") deeds as nontestamentary devices.² TOD deeds therefore promise to become a fixture of estate planning in the Commonwealth.

The new Act allows a property owner who dies on or after July 1, 2013 to transfer title by a TOD deed, provided the deed meets the requirements of the statute and is recorded before the transferor's death in the jurisdiction where the property is located.³ Such a deed is exempt from recordation taxes unless it was made for consideration.⁴ Although the statute expressly validates a TOD deed executed (and presumably recorded) before the Act's effective date, the recordation tax exemption would not apply to such a preenactment deed.⁵

1. VA. CODE ANN. § 64.2-620 (authorizing nonprobate transfers on death); *see also id.* § 6.2-614 (Cum. Supp. 2013) (payment of payable on death bank accounts); *id.* § 64.2-616 (Repl. Vol. 2012) (ownership of transfer on death securities accounts).

2. VA. CODE ANN. § 64.2-626 (Supp. 2013); Act of Mar. 14, 2013, ch. 390, 2013 Va. Acts ___, __ (codified at VA. CODE ANN. §§ 64.2-621 to -638 (Supp. 2013)). Thirteen other states have enacted similar statutes, eight of which, like Virginia, follow the model act promulgated by the Uniform Law Commission ("ULC") in 2009. *See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT 1* (2009), available at www.uniformlaws.org/shared/docs/real%20property%20tod/urptoda_final_09.pdf; *Legislative Fact Sheet—Real Property Transfer on Death Act*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Real%20Property%20Transfer%20on%20Death%20Act> (last visited Oct. 15, 2013). Although Virginia did not formally adopt the ULC's Comments, they are instructive in interpreting the law. *Cf.* VA. CODE ANN. § 64.2-637 (Supp. 2013).

3. *See* VA. CODE ANN. §§ 64.2-622, 64.2-628(3) (Supp. 2013).

4. *See id.* § 64.2-628(5) (Supp. 2013); *id.* § 58.1-811(J) (Repl. Vol. 2013).

5. *See id.* § 64.2-622 (Supp. 2013). Because the Act does not affect any other means of transferring property under Virginia law, a deed that fails to meet one or more of the statutory requirements for a TOD nevertheless may be effective under the general nonprobate transfers statute. *See id.* § 64.2-623 (Supp. 2013).

To qualify as a TOD deed of Virginia real property, the instrument must contain the essential elements and formalities of a properly recordable inter vivos deed, except that it must expressly state that the transfer to the designated beneficiary is to occur at the transferor's death.⁶ A TOD deed for property held by tenants by the entireties or by joint tenants with rights of survivorship (but not property held by tenants in common) must be executed by all owners.⁷

The Act includes an optional form TOD deed.⁸ While the form is helpful in that it restates many key points of the Act such as recordation requirements, revocability procedures, and lifetime effects, it also exceeds the actual statutory requirements in several respects and does not include all of the elements of a properly recordable deed.⁹ The drafter therefore is cautioned when using the form deed to ensure that it also meets any other applicable requirements.¹⁰

6. *See id.* § 64.2-628(1)–(2) (Supp. 2013). It must be recordable pursuant to chapter 6 of title 55, VA. CODE ANN. §§ 55-106 to -142.15 (Repl. Vol. 2012 & Supp. 2013), and is considered a deed for purposes of determining the authority and duties of the circuit court clerk. *See id.* § 64.2-628(4), (7) (Supp. 2013).

7. *See id.* §§ 64.2-621, -628(6) (Supp. 2013).

8. *See id.* § 64.2-635 (Supp. 2013).

9. For example, the statutory form of TOD deed includes a notice regarding the need to record the deed before the owner's death. *See id.* It also details the manner in which the owner may revoke the deed. *See id.* § 64.2-636 (Supp. 2013). While it may be desirable to include this information as a reminder for those viewing the deed at a later date, it is not necessary.

10. For example, Virginia Code section 17.1-223(A) requires, inter alia, that the drafter's name be included on the first page, that each page be numbered and that the names of all "grantors" and "grantees" be listed "as required by § 55-48." *Id.* § 17.1-223(A) (Cum. Supp. 2013). Section 55-48 in turn requires that the "grantor[s]" and "grantee[s]" be listed in the first clause of the deed, which the statutory TOD form technically does not do. *Id.* § 55-48 (Repl. Vol. 2012). Virginia Code section 17.1-223(B) also requires that a deed conveying not more than four residential dwelling units state on the first page (1) the name of the title insurance underwriter insuring such instrument or a statement that the existence of title insurance is unknown to the preparer, and (2) that it was prepared by the owner of the real property or by an attorney licensed to practice law in the Commonwealth, in which latter case the attorney's statement shall include the preparer's name and Virginia State Bar number. *Id.* § 17.1-223 (Cum. Supp. 2013).

As another example, if the owner wishes to execute a TOD deed that will transfer real property to someone other than the owner's spouse, the spouse should join in the deed to waive his or her right to include the property in the owner's augmented estate. *See id.* § 55-41 (Repl. Vol. 2012). If the TOD deed will transfer title to a trust upon the owner's death, it is also advisable to include the trustee's powers in the deed itself so as not to have to provide a copy of the trust to third parties at a later date. *Cf. id.* § 55-17.1 (Repl. Vol. 2012 & Supp. 2013).

Consistent with other probate avoidance techniques, a TOD deed can be revoked during the transferor's lifetime.¹¹ Unlike other methods, however, the TOD deed remains revocable even if it or another instrument (such as a contract between the parties) contains a contrary provision.¹²

The transferor must use one of two specific methods to revoke a previously recorded TOD deed in whole or in part. The transferor must execute either (1) a TOD deed, an inter vivos deed, or an instrument of revocation that expressly revokes all or part of the earlier TOD deed; or (2) a later TOD deed that designates a different beneficiary.¹³ Simply destroying or marking the original TOD is insufficient.¹⁴ The Act includes an optional form of revocation instrument.¹⁵ The transferor must acknowledge the revoking document after making the earlier TOD deed, and it must be recorded before the transferor's death.¹⁶ The deed or revocation instrument is effective without consideration and without notice or delivery to, or acceptance by, the designated beneficiary during the transferor's lifetime.¹⁷

In the case of a TOD deed executed by multiple transferors, revocation by one with respect to his or her interest will not affect the TOD deed as to the interest of another transferor.¹⁸ However, tenants by the entirety or joint owners with rights of survivorship may revoke a TOD deed with respect to their joint interest only by an instrument executed by all of the then living owners.¹⁹

Like the TOD deed itself, a revocation instrument is not subject to recordation tax if no consideration passed between the parties.²⁰ Also, it is important to note that the requirements for revoking a TOD deed do not prevent the transferor from actually conveying title to the property by inter vivos deed to a third party.²¹

11. *See id.* § 64.2-625 (Supp. 2013).

12. *See id.*

13. *See id.* § 64.2-630(A)(1) (Supp. 2013).

14. *See id.* § 64.2-630(C) (Supp. 2013).

15. *See id.* § 64.2-636 (Supp. 2013).

16. *See id.* § 64.2-630(A)(2) (Supp. 2013).

17. *See id.* § 64.2-629 (Supp. 2013).

18. *See id.* § 64.2-630(B)(1) (Supp. 2013).

19. *See id.* § 64.2-630(B)(2) (Supp. 2013).

20. *See id.* § 58.1-811(J) (Repl. Vol. 2013).

21. *See id.* §§ 64.2-630(D), -631(1) (Supp. 2013).

Although a TOD deed is nontestamentary in nature, the capacity required to make or revoke one is the same as the capacity required to make a will.²² Unlike a will, however, a TOD deed may be executed on behalf of an incapacitated person by a duly appointed agent under a durable power of attorney, provided the power of attorney expressly empowers the agent to create or change beneficiary designations.²³

A TOD deed generally has no effect on the property, the transferor, the beneficiary, or third parties during the transferor's lifetime.²⁴ In the case of tenants by the entirety or joint owners with rights of survivorship, there is no effect until the death of the last surviving joint owner.²⁵ Upon the transferor's death (or the death of the last remaining joint owner), the TOD deed automatically transfers title to the property, if it is then owned by the transferor, to the designated beneficiary, unless (1) the designated beneficiary did not survive the transferor, or (2) the designated beneficiary is the transferor's former spouse and the TOD deed was made prior to the transferor's divorce or the annulment of his or her marriage.²⁶ If the TOD deed designates multiple concurrent beneficiaries, they receive their interests in equal and undivided shares with no right of survivorship, except that anyone's share that lapses or fails for any reason is transferred to the others in proportion to their respective interests.²⁷

The foregoing rules are subject to any contrary provision in the TOD deed itself, the augmented estate, or simultaneous death and slayer statutes.²⁸ A beneficiary also may disclaim all or part of an interest passing by a TOD deed in accordance with generally applicable Virginia disclaimer rules.²⁹

22. See *id.* § 64.2-627 (Supp. 2013).

23. See UNIF. REAL PROP. TRANSFER ON DEATH ACT § 9 cmt., 8B U.L.A. 138, 147-48 (Cum. Supp. 2013) ("An individual's agent may execute a transfer on death deed on the individual's behalf to the extent permitted by other law, such as the Uniform Power of Attorney Act."). See also VA. CODE ANN. § 64.2-1622(A)(4) (Repl. Vol. 2012), which includes beneficiary designations among the "hot powers" that must be expressly granted in a power of attorney.

24. See VA. CODE ANN. § 64.2-631 (Supp. 2013).

25. See *id.* § 64.2-632(C) (Supp. 2013).

26. See *id.* § 64.2-632(A)(1)-(2), (5) (Supp. 2013).

27. See *id.* § 64.2-632(A)(3)-(4) (Supp. 2013).

28. See *id.* § 64.2-632(A) (Supp. 2013).

29. *Id.* § 64.2-633 (Supp. 2013).

Even if the TOD deed provides otherwise, the designated beneficiary takes the property (1) without covenant or warranty of title, and (2) subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests existing at the transferor's death.³⁰ Unless the TOD deed or the transferor's will provides otherwise, the beneficiary does not have a right of exoneration, and the property remains subject to the transferor's creditors' claims, estate administration expenses, funeral and burial expenses, and statutory allowances to the extent the transferor's probate estate is inadequate for those purposes.³¹ If the transferor transfers more than one property by one or more TOD deeds, any such liability is apportioned among the properties based on their net values at the transferor's death.³² A proceeding to enforce any such liability against the property must be commenced no later than one year after the transferor's death.³³

While many will likely find the ability to designate a TOD beneficiary for real property useful, personal representatives and those advising them must now use extra care if the decedent owned real property. The only way to know if a decedent's real property interests are part of the probate estate will be to conduct a title search for each parcel to determine if there is a TOD deed of record. Even when presented with a duly recorded TOD deed, the personal representative will need to conduct a search to confirm that it was not revoked prior to the decedent's death.

B. *Transferability of LLC Interests*

In *Ott v. Monroe*, the Supreme Court of Virginia held that a member of a Virginia limited liability company ("LLC") is dissociated from the LLC at death and that an assignee, whether designated by will or other means, is entitled to receive only the former member's financial interest.³⁴ The court construed the Virginia Limited Liability Company Act as flatly prohibiting an assignee

30. See *id.* § 64.2-632(B), (D) (Supp. 2013).

31. See *id.* §§ 64.2-531, -634(A) (Supp. 2013).

32. See *id.* § 64.2-634(B) (Supp. 2013). It would appear this rule is "subject to the transferor's right to direct the source from which liabilities will be paid," although the wording leaves room for doubt. *Id.* § 64.2-634(A) (Supp. 2013).

33. *Id.* § 64.2-634(C) (Supp. 2013).

34. 282 Va. 403, 410, 719 S.E.2d 309, 312 (2011). For a detailed discussion of the case, see J. William Gray, Jr. & Katherine E. Ramsey, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 47 U. RICH. L. REV. 343, 364-67 (2012).

from participating in the company management, becoming a member, or exercising membership rights without the consent of a majority of members, even if the articles of organization or operating agreement purported to permit those actions.³⁵ This ruling created a potential trap for the unwary drafter. In response, the General Assembly amended Virginia Code section 13.1-1039 to allow the members of an LLC to provide in the company's articles of organization or operating agreement that the assignee of a member's interest will be entitled to participate in the company's governance, become a member, exercise a member's rights, or enjoy other economic rights beyond receiving the assignor's share of profits, losses, and distributions.³⁶

C. *Financial Abuse of the Mentally Incapacitated*

In response to repeated calls for more explicit laws to protect vulnerable individuals from predatory behavior, the General Assembly enacted Virginia Code section 18.2-178.1 to provide criminal penalties for those who financially exploit mentally incapacitated individuals.³⁷

If a person knows, or should know, that another person suffers from mental incapacity and uses that other person's incapacity to take, obtain, or convert anything of value belonging to the other person with the intent to permanently deprive him or her of it, the person so acting will be guilty of larceny.³⁸ The term "mental incapacity" means a condition that prevents the affected person from understanding the nature or consequences of a transaction or disposition of money or other item of value involved in the offense.³⁹ To protect agents under valid powers of attorney and "Good Samaritans," an exception is made for those who acted for the benefit of the mentally incapacitated person or made a good

35. See *Ott*, 282 Va. at 409–10, 719 S.E.2d at 312.

36. Act of Apr. 3, 2013, ch. 772, 2013 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 13.1-1039 (Cum. Supp. 2013)).

37. Act of Mar. 16, 2013, chs. 419, 452, 2013 Va. Acts ___, ___ (codified at VA. CODE ANN. § 18.2-178.1 (Cum. Supp. 2013)).

38. VA. CODE ANN. § 18.2-178.1(A) (Cum. Supp. 2013). The accused may be tried in any jurisdiction where an act was performed in furtherance of the offense or where the accused resided at the time of the offense. See *id.* § 18.2-178.1(B) (Cum. Supp. 2013).

39. See *id.* § 18.2-178.1(D) (Cum. Supp. 2013).

faith effort to assist the person with managing his or her money or other valuables.⁴⁰

D. Exclusions from Statutory Rule Against Perpetuities

Long the bane of every law student's existence, the common law rule against perpetuities limits the duration of trusts and property interests.⁴¹ In 2000, Virginia adopted the Uniform Statutory Rule Against Perpetuities, which modified the common law rule by providing that an interest in property is void only if (1) at its creation the interest is uncertain to vest or terminate within twenty-one years after the death of a life or lives in being, or (2) the interest does not actually vest or terminate within ninety years.⁴² In a separate bill that same year, the General Assembly also amended Virginia Code section 55-13.3 to provide generally that the rule against perpetuities would not apply to any personal property held in trust if the trust instrument expressly waived the rule.⁴³

Due to the difficulty of enacting two separate bills that dealt with the same section of the Virginia Code, the resulting opt-out provision in section 55-13.3 had several technical errors that limited its usefulness.⁴⁴ In response, the 2013 General Assembly amended both Virginia Code sections 55-12.4 and 55-13.3.⁴⁵ The

40. See *id.* § 18.2-178.1(C) (Cum. Supp. 2013).

41. At common law, a property interest (whether outright or in trust) is valid only if it must vest within a period of twenty-one years and ten months after some life or lives in being at the creation of the interest. See *Ryland Grp. v. Willis*, 229 Va. 459, 463, 331 S.E.2d 399, 402 (1985); *Bel-Aire, Inc. v. RB Trexlertown, L.L.C.*, 68 Va. Cir. 108, 112 (2005) (City of Virginia Beach).

42. Act of Apr. 8, 2000, ch. 714, 2000 Va. Acts 1411, 1411 (codified at VA. CODE ANN. § 55-12.1(A) (Cum. Supp. 2000)).

43. Act of Apr. 8, 2000, ch. 658, 2000 Va. Acts 1261, 1261 (codified as amended at VA. CODE ANN. § 55-13.3(C) (Cum. Supp. 2000)).

44. The amended section heading, "Application of the rule against perpetuities to nondonative transfers," was confusing because the opt-out rule was clearly designed to apply primarily to donative transfers. Moreover, it was not clear whether a trust's interest in a corporation, partnership, LLC, business trust, or similar entity that invests in real estate would be treated as personal property or as an interest in real estate for purposes of the opt-out rule. The opt-out rule also did not address the situation in which a trustee of a trust that contained the opt-out language later acquired an interest in real property. VA. CODE ANN. § 55-13.3(C) (Cum. Supp. 2000).

45. Act of Mar. 13, 2013, ch. 323, 2013 Va. Acts ____, ____ (codified at VA. CODE ANN. § 55-12.4(A)(8), (B) (Supp. 2013)). The amendments move the opt-out rule from section 55-13.3 to a more appropriate location in section 55-12.4 ("Exclusions from statutory rule against perpetuities"). They also confirm that a trust's interest in any entity that owns

amended sections confirm that a nonvested interest in, or power of appointment over, personal property held in trust or a power of appointment over personal property granted under a trust is not subject to the Uniform Statutory Rule Against Perpetuities if the trust instrument, by its terms, provides that the rule is not to apply.⁴⁶ The opt-out applies to the trust's interest in a corporation, limited liability company, partnership, business trust, or other entity even if that entity owns an interest in real property; but it does not extend to any real property held directly by the trust.⁴⁷

Since the changes were considered clarifying rather than substantive and were related to trusts already in existence, the General Assembly provided that they were declarative of existing law.⁴⁸

E. *Uniform Trust Code: Ascertainable Standard for Trustee's Distributions*

A trustee who may make discretionary distributions for his or her own personal benefit or to satisfy his or her personal legal obligation of support is deemed for federal estate tax purposes to have a general power of appointment over the part of the trust that is subject to that discretion.⁴⁹ Such a power causes that part of the trust to be includable in the trustee's gross estate for federal estate tax purposes.⁵⁰ This rule does not apply, however, if the trustee's discretion is limited by an ascertainable standard.⁵¹

To avoid inadvertently exposing the trustee's estate to tax on the trust assets at the trustee's death, Virginia law automatically limits any such discretionary powers to an ascertainable standard

real estate is considered personal property, not real property, and that the trustee's subsequent acquisition of real property does not affect the exempt nature of the portion of the trust that holds personal property. *Id.*

46. VA. CODE ANN. § 55-12.4(A)(8) (Supp. 2013).

47. *Id.* § 55-12.4(B) (Supp. 2013).

48. Ch. 323, 2013 Va. Acts at ___, cl. 2.

49. See Treas. Reg. § 20.2041-1(c) (2013).

50. See I.R.C. § 2041(a) (2006).

51. See Treas. Reg. § 20.2041-1(c)(2) (2013). For federal transfer tax purposes, an "ascertainable standard" is generally one that relates to an individual's "health, education, support, or maintenance." I.R.C. §§ 2041(b)(1)(A), 2514(c)(1) (2006). Virginia law incorporates this concept into the Uniform Trust Code by reference to those federal tax provisions. See VA. CODE ANN. § 64.2-701 (Repl. Vol. 2012) (defining "ascertainable standard").

unless the trust instrument expressly declares otherwise.⁵² However, individuals who are not designated as trustees also may risk estate tax exposure if they are deemed, for tax purposes, to hold the powers of a trustee.⁵³ To address the problem, the General Assembly expanded the definition of “trustee” in Virginia Code section 64.2-776 to include those who are deemed to hold any power of a trustee, whether because the person has a right to remove or replace the trustee or because a reciprocal trust or power doctrine applies.⁵⁴

F. Access to Minors’ Digital Accounts

Amid concern that personal representatives or family members may be denied access and control of a decedent’s online accounts, the 2013 General Assembly considered the status of such “digital assets.” Its response was a limited bill allowing access to a deceased minor’s blogs, e-mail, and other online accounts.⁵⁵ The personal representative of a deceased minor domiciled in Virginia may now assume the minor’s terms of service agreement for a digital account with an online account service provider for purposes of consenting to and obtaining disclosure of the contents of communications and subscriber records.⁵⁶

An online account service provider is required to grant access to a minor’s personal representative unless (1) “access is contrary to the express provisions of a will, trust instrument, power of attorney, or court order;” (2) the provider has received notice of a claim or dispute regarding providing access to the minor’s com-

52. VA. CODE ANN. § 64.2-776(B) (Supp. 2013).

53. See I.R.S. Priv. Ltr. Rul. 9235025 (May 29, 1992) (explaining that a trustee who holds power to make distributions to a beneficiary is deemed to hold a power to benefit himself if the beneficiary holds an identical power over another trust to benefit the trustee). An individual who can remove and replace a trustee with a related or subordinate person is treated as having the trustee’s distribution powers for federal transfer tax purposes. See Rev. Rul. 95-58, 1995-2 C.B. 191; I.R.S. Priv. Ltr. Rul. 200531004 (Apr. 21, 2005).

54. Act of Mar. 13, 2013, ch. 324, 2013 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 64.2-776 (Supp. 2013)); see examples cited *supra* note 53.

55. Act of Mar. 14, 2013, ch. 369, 2013 Va. Acts ___, ___ (codified at VA. CODE ANN. §§ 64.2-109 to -110 (Supp. 2013)).

56. VA. CODE ANN. § 64.2-110(A) (Supp. 2013). “Digital accounts” include “blogging, e-mail, multimedia, personal, social networking, and other online accounts or comparable items as technology develops;” but the term does not include bank, brokerage, or other accounts to which a financial institution or its affiliate is a party. *Id.* § 64.2-109 (Supp. 2013).

munications and subscriber records, and a final nonappealable judgment has not yet been entered in the matter; or (3) disclosure would violate any applicable state or federal law.⁵⁷ No one may maintain an action against an online account service provider for acting in compliance with the statute.⁵⁸

It remains to be seen how enforceable this new statute will be given that many providers and their digital account agreements are not subject to Virginia law.

G. *Basis for Exhumation*

Issues of blood relationship are often critical in determining the proper beneficiaries under a will, trust, deed, or other instrument. When someone seeks to establish an out-of-wedlock relationship through a male family member, exhumation is sometimes necessary for purposes of genetic testing.⁵⁹ Prior Virginia law authorized a court to order the exhumation of a body for genetic testing to prove a biological relationship whenever a plaintiff was attempting to prove parentage in accordance with Virginia Code sections 64.1-5.1 and 64.1-5.2.⁶⁰ However, in 2007, the Supreme Court of Virginia held that the statute was directional, not discretionary, and did not require a plaintiff to show “good cause” for the requested exhumation.⁶¹ As a result, someone could seek exhumation merely by claiming to be a descendant of the decedent. This opened the door for an unscrupulous claimant to threaten exhumation unless the family, wishing to prevent desecration of their relative’s grave, “settled” by paying the claimant a sufficient amount.

The General Assembly eliminated such opportunities for extortion by requiring that before a court may order exhumation, the party seeking to prove descent from the decedent must set forth

57. *Id.* § 64.2-110(A)–(C) (Supp. 2013).

58. *Id.* § 64.2-110(D) (Supp. 2013).

59. *Cf. id.* § 64.2-102(3)(b) (Repl. Vol. 2012) (providing that a person born out of wedlock is a child of the father if paternity is established, inter alia, by genetic testing).

60. *See id.* § 32.1-286(C) (Repl. Vol. 2009). In 2012, the Virginia General Assembly recodified Virginia Code sections 64.1-5.1 and 64.1-5.2 as sections 64.2-102 and 64.2-103, respectively. Act of Apr. 4, 2012, ch. 614, 2012 Va. Acts 1167, 1174 (codified at VA. CODE ANN. §§ 64.2-102, -103 (Repl. Vol. 2012)).

61. *Martin v. Howard*, 273 Va. 722, 726–27, 643 S.E.2d 229, 231–32 (2007). For a detailed discussion of the case, see J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 43 U. RICH. L. REV. 435, 464–65 (2008).

in a sworn statement sufficient facts to establish “a reasonable possibility of a biological relationship between the petitioner and his alleged ancestors.”⁶² The statute continues to declare, however, that substantive proof of parentage is not required to obtain the exhumation order.⁶³ The costs of exhumation, testing, and reinterment usually are to be paid by the petitioner; but the court, for good cause shown, may order them to be paid from the estate in which the petitioner is claiming an interest.⁶⁴

H. *Disposition of Unclaimed Bodies*

Virginia law has long required “the sheriff or other person or institution having initial custody of [a] dead body” to make good faith efforts to identify the next of kin, and any relative or friend may claim the body for disposition.⁶⁵ An unclaimed body may be used for scientific study or otherwise disposed of if no one claims it; but the statute set no time period within which a claimant must appear.⁶⁶ The General Assembly amended Virginia Code section 32.1-288 to specify that the next of kin of a deceased person will have thirty days to claim the body for disposition after receiving notice of their right to do so.⁶⁷ It also extended civil liability protection to any sheriff who accepts a dead body for disposition, except for any act, decision, or omission resulting from bad faith or malicious intent.⁶⁸

Read literally, the amendment may have inadvertently eliminated the ability to dispose of an unclaimed body in cases where the next of kin cannot be located. Disposition is allowed only after the next of kin has been given thirty days to claim the body after notice, but this thirty-day period may never start to run if the custodian cannot locate the next of kin.

62. Act of Mar. 14, 2013, ch. 370, 2013 Va. Acts, ___, ___ (codified as amended at VA. CODE ANN. § 32.1-286(C) (Cum. Supp. 2013)).

63. VA. CODE ANN. § 32.1-286(C) (Cum. Supp. 2013).

64. *Id.* As amended, the statute is now consistent with the rules applicable to court-ordered genetic testing in paternity cases involving a living defendant. *See id.* § 20-49.3(A) (Repl. Vol. 2008).

65. *Id.* § 32.1-288(A) (Cum. Supp. 2013).

66. *See id.* § 32.1-288(B) (Repl. Vol. 2011).

67. Act of Mar. 14, 2013, ch. 373, 2013 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 32.1-288(B) (Cum. Supp. 2013)).

68. *See id.* (codified as amended at VA. CODE ANN. § 32.1-288(F) (Cum. Supp. 2013)).

I. *Guardians and Conservators: Appointment and Powers*

In 2011, the General Assembly enacted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.⁶⁹ By 2013, gaps in the statutory procedure for appointing guardians and conservators, and in the powers they may exercise, had become apparent. Several were addressed by the 2013 legislature.⁷⁰

A petition for appointment of a guardian or conservator must now state the basis for the court's jurisdiction and include a copy of the order appointing any currently serving guardian, committee, or conservator, if available.⁷¹ A hearing must be conducted within 120 days after a petition is filed unless the court postpones it for cause.⁷² The court is expressly required to consider the best interests of the respondent in determining the need for, and powers and duties of, a guardian or conservator.⁷³

The statute continues to allow the parent or guardian of a minor to petition for appointment of a guardian or conservator no earlier than six months before the respondent's eighteenth birthday, while any other person generally may bring a petition no earlier than the respondent's eighteenth birthday.⁷⁴ However, if there is no living parent or guardian, the amendment permits any person to bring a petition up to six months before the respondent's eighteenth birthday, as a living parent could have done.⁷⁵

The court may now order the respondent's estate to reimburse the petitioner for costs and fees associated with the petition if (1) the costs and fees are reasonable and (2) the court finds that the petition was brought in good faith and for the benefit of the respondent.⁷⁶ The court also may order the petitioner to pay some

69. Act of Mar. 25, 2011, ch. 518, 2011 Va. Acts 815, 815 (codified at VA. CODE ANN. §§ 37.2-1031 to -1052, recodified as VA. CODE ANN. §§ 64.2-2100 to -2120 by Act of Apr. 4, 2012, ch. 614, 2012 Va. Acts 1167).

70. See, e.g., Act of Mar. 18, 2013, ch. 523, 2013 Va. Acts ___, ___ (codified as amended in scattered sections of VA. CODE ANN. tit. 64.2 (Supp. 2013)).

71. VA. CODE ANN. § 64.2-2002(B)(2), (5) (Supp. 2013).

72. *Id.* § 64.2-2007(B) (Supp. 2013).

73. *Id.* § 64.2-2007(C) (Supp. 2013).

74. *Id.* § 64.2-2001(C) (Supp. 2013).

75. *Id.*

76. *Id.* § 64.2-2008(A) (Supp. 2013).

or all of the respondent's costs if it finds that the proceeding was initiated in bad faith or not for the benefit of the respondent.⁷⁷

Unless the court's order specifically provides otherwise, a conservator also may now claim a family allowance, exempt property allowance, or homestead allowance for the respondent under Virginia Code section 64.2-313.⁷⁸

The amendment also significantly expands a conservator's estate planning powers by authorizing the conservator to petition the court for permission to create a revocable or irrevocable trust on behalf of the incapacitated person with terms approved by the court, or to transfer assets of the incapacitated person or the incapacitated person's estate to a trust for good cause shown.⁷⁹ In determining whether to authorize gifts, disclaimers, or trust transfers, the court must consider their effect on the incapacitated person's estate plan.⁸⁰ In the case of a trust transfer, it also must determine whether the trustee should post bond, with or without surety, or provide an accounting during the incapacitated person's lifetime.⁸¹

It is expected these changes will make guardianship and conservatorship proceedings more effective, deter abuse, and provide needed flexibility for the court and conservator to engage in beneficial estate planning where appropriate.

J. *Small Estate Act*

In addition to the corrections made to the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act de-

77. *Id.*

78. *Id.* § 64.2-2022(A)(6) (Supp. 2013).

79. *Id.* § 64.2-2023(A) (Supp. 2013). Notice of a petition to make gifts, disclaim property, or create or fund a trust must be given to the incapacitated person and his spouse and children, all beneficiaries named in any known will, his heirs determined as if he had died intestate on the date the petition was filed, and all other interested persons, except to the extent that the court determines that proceeding without notice to any person would not substantially affect that person. *Id.* § 64.2-2023(B) (Supp. 2013). If the identities or locations of any persons are unknown and not reasonably ascertainable, the court may authorize them to be represented and bound by another having a substantially identical interest, to the extent there is no conflict of interests between the representative and the beneficiary. *Id.*

80. *Id.* § 64.2-2023(C)(iv) (Supp. 2013).

81. *Id.* § 64.2-2023(C)(viii) (Supp. 2013).

scribed above,⁸² two other technical amendments were necessary to clarify the applicability of Virginia's Small Estate Act to credit union accounts and negotiable instruments.⁸³ First, the cross-references found in Virginia Code section 6.2-1367 were updated to reflect the recodification of title 64.2 in 2012.⁸⁴ As amended, the statute confirms that federal credit unions in Virginia are subject to the Small Estate Act to the extent its terms are not inconsistent with applicable federal law.⁸⁵ Second, the Small Estate Act itself was amended to confirm that a designated successor who presents a proper affidavit may endorse or negotiate a check, draft, or other negotiable instrument payable to the decedent if the instrument otherwise qualifies as a small asset.⁸⁶

K. *Effects of Title 64.2 Recodification*

Effective October 1, 2012, the Virginia statutes dealing with wills and estates, fiduciaries, guardians and wards, medical directives and other health care issues, and other provisions governing fiduciaries were recodified as title 64.2 and their former counterparts in other titles of the Virginia Code were repealed.⁸⁷ With such a massive undertaking, it perhaps was expected that a few statutes would need to be corrected afterward.

Two amendments from 2011, inadvertently omitted from the recodification, were restored retroactively effective to October 1, 2012.⁸⁸ In addition, new Virginia Code section 64.2-108.1 provides

82. See *supra* Part II.I.

83. VA. CODE ANN. §§ 64.2-600 to -605 (Repl. Vol. 2012 & Supp. 2013).

84. Act of Mar. 5, 2013, ch. 95, 2013 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 6.2-1367 (Cum. Supp. 2013)).

85. VA. CODE ANN. § 6.2-1367 (Cum. Supp. 2013).

86. Act of Mar. 5, 2013, ch. 68, 2013 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 64.2-601 (Supp. 2013)). This amendment appears to remove any doubt that a person dealing with a designated successor must comply with this provision if the value of the entire personal probate estate, wherever located, did not exceed \$50,000 at the decedent's death. See VA. CODE ANN. § 64.2-601(A) (Supp. 2013). The person also may choose to comply regardless of the total estate value if the value of the instrument presented does not exceed \$15,000. See *id.* § 64.2-602(A) (Repl. Vol. 2012).

87. See Act of Apr. 4, 2012, ch. 614, 2012 Va. Acts 1167, 1167-1313 (codified at VA. CODE ANN. §§ 64.2-100 to -2704 (Repl. Vol. 2012 & Supp. 2013)).

88. See Act of Apr. 3, 2011, ch. 784, 2011 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. §§ 64.2-432, -747 (Supp. 2013)). Virginia Code section 64.2-432 (formerly section 64.1-62.4) was amended during the 2011 session to address the interpretation of formula clauses and other estate tax-related provisions in a will, trust, or other instrument of a decedent who died in 2010 in light of the personal representative's ability to elect whether or not to have the federal estate tax apply to the estate. Act of Mar. 26, 2011, ch.

that if a written instrument refers to a section of the Virginia Code that, at the time the reference is made, has been repealed and transferred in the same or a modified form to title 64.2, the instrument will be construed to refer to the new provision in the absence of any intent to the contrary.⁸⁹ The latter amendment, in particular, should reduce the potential for undesired outcomes and unnecessary litigation if a drafter inadvertently refers to a pre-title 64.2 statute in a current document.

III. CASES

A. *Effect of Divorce on Federal Insurance Beneficiary Designations*

As described in the authors' 2012 review of Virginia law, *Maretta v. Hillman* addressed whether a surviving spouse had an enforceable claim under Virginia law for an amount equal to the proceeds of the decedent's federal group life insurance policy, which were paid to the decedent's former spouse pursuant to a pre-divorce beneficiary designation.⁹⁰ Virginia Code section 20-111.1(A) purports to revoke federal insurance beneficiary designations in favor of a former spouse upon divorce.⁹¹ If the former

679, 2011 Va. Acts 1107, 1107 (codified as amended at VA. CODE ANN. § 64.2-432 (Repl. Vol. 2012)). Virginia Code section 64.2-747 (formerly section 55-545.05) was also amended during the 2011 session to protect the assets of certain trusts from the claims of the settlor's creditors or the creditors of a beneficiary holding a withdrawal power. See J. William Gray, Jr. & Katherine E. Ramsey, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 46 U. RICH. L. REV. 243, 245 (2011).

89. Act of Mar. 5, 2013, ch. 89, 2013 Va. Acts ___, ___ (codified at VA. CODE ANN. § 64.2-108.1 (Supp. 2013)). The 2012 legislation that enacted new title 64.2 contained a transitional rule confirming that the repeal of statutory provisions recodified in new title 64.2 would "not affect the validity, enforceability, or legality of any will, trust instrument, power of attorney, or other instrument or of any fiduciary relationship, or any right established or accrued under such instrument or by such relationship, that existed prior to such repeal." Ch. 614, 2012 Va. Acts at 1313, cl. 10. That legislation, however, did not contain a corresponding provision to interpret a reference to a repealed statute in a document drafted on or after October 1, 2012, the effective date of title 64.2. See, Ch. 614, 2012 Va. Acts 1167. Examples include a will or trust that attempts to incorporate fiduciary powers by reference to repealed section 64.1-57, a durable power of attorney that grants the agent the powers listed in repealed sections 26-98 through -111, a nonjudicial settlement agreement pursuant to repealed section 55-541.11, a memorandum of tangibles that refers to repealed section 64.1-45.1, or a statement in lieu of account that recites it is filed pursuant to repealed section 26-20.1.

90. 283 Va. 34, 37, 722 S.E.2d 32, 33 (2012). For a detailed discussion of *Maretta v. Hillman*, see Gray & Ramsey, *supra* note 34, at 367-69.

91. VA. CODE ANN. § 20-111.1(A) (Cum. Supp. 2013).

spouse, not for value, subsequently receives proceeds pursuant to that designation, section 20-111.1(D) makes the spouse personally liable for that amount to the person otherwise entitled to the proceeds under Virginia law.⁹² The latter rule was enacted in 2007 as a legislative response to *Egelhoff v. Egelhoff*, which held that federal law preempted certain state laws automatically revoking beneficiary designations in favor of a former spouse.⁹³

On appeal, the Supreme Court of Virginia concluded in *Maretta* that Virginia domestic relations law could not require a former spouse, who received insurance proceeds under the decedent's pre-divorce beneficiary designation, to pay over the benefits to the person who would be entitled to them under the statute.⁹⁴ The surviving spouse, Mrs. Hillman, was granted a writ of certiorari by the Supreme Court of the United States on January 11, 2013, and oral argument was held on Monday, April 22, 2013.⁹⁵

In the meantime, the United States Court of Appeals for the Fourth Circuit issued its decision in *Andochick v. Byrd*, holding that an individual named as beneficiary of his ex-wife's retirement benefits could not invoke the Employee Retirement Income Security Act ("ERISA") preemption to avoid a Maryland state court order requiring him to turn those benefits over to the ex-wife's estate pursuant to the terms of their property settlement agreement.⁹⁶ The Fourth Circuit found that its decision did not conflict with *Egelhoff* because the instant case was a post-distribution suit that did not interfere with a plan administrator's ability to pay benefits to the named beneficiary.⁹⁷

On June 3, 2013, the Supreme Court of the United States weighed in, holding that the Virginia statute was preempted by federal law.⁹⁸ Citing two prior cases dealing with federal statutes similar to the Federal Employees' Group Life Insurance Act of

92. *Id.* § 20-111.1(D) (Cum. Supp. 2013).

93. 532 U.S. 141, 143 (2001); Act of Mar. 12, 2007, ch. 306, 2007 Va. Acts 432, 432 (codified as amended at VA. CODE ANN. § 20-111.1 (Cum. Supp. 2013)). The preempted statute in *Egelhoff* was substantially similar to Virginia Code section 20-111.1. *See* 532 U.S. at 143.

94. *Maretta*, 283 Va. at 38–39, 722 S.E.2d at 33.

95. *Id.*, cert. granted, 80 U.S.L.W. 3598 (U.S. Jan. 11, 2013) (No. 11-1221); *see also* *Hillman v. Maretta*, ___ U.S. ___, ___, 133 S. Ct. 1943, 1943 (2013).

96. 709 F.3d. 296, 297, 301 (4th Cir. 2013).

97. *Id.* at 301.

98. *Hillman*, ___ U.S. at ___, 133 S. Ct. at 1947.

1954 (“FEGLIA”) at issue in *Maretta*,⁹⁹ the Court reasoned that Congress had “spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other.”¹⁰⁰ The Court found that section 20-111.1(D) interfered with the employee’s right under FEGLIA to designate a beneficiary, because “it directs that the proceeds actually ‘belong’ to someone other than the named beneficiary by creating a cause of action for their recovery by a third party.”¹⁰¹

B. *Composition of Augmented Estates*

The appeal in *Tuttle v. Webb* considered two issues: (1) whether a decedent’s augmented estate included cash that her husband had given to her and that she had subsequently given to her son without her husband’s written consent or joinder; and (2) whether the husband’s use of proceeds from their joint loan made him liable to the wife’s estate for more than half of the balance outstanding at her death.¹⁰²

The wife’s gift to her son, made within five years of her death, was includible in her augmented estate unless made with her husband’s “written consent or joinder.”¹⁰³ In a suit to determine the value of the husband’s interest in the augmented estate, the wife’s executor pointed out that the gift was made with cash her husband had previously transferred to her and argued that the husband’s gift check to her was his written consent or joinder to her subsequent transfer to her son.¹⁰⁴ Reiterating its holding in *Chappell v. Perkins*, the court rejected that argument.¹⁰⁵ A conveyance from one spouse to another does not remove the property from, or decrease the value of, the recipient spouse’s augmented

99. See *Ridgway v. Ridgway*, 454 U.S. 46, 47 (1981) (addressing the federal Service-men’s Group Life Insurance Act of 1965); *Wissner v. Wissner*, 338 U.S. 655, 656 (1950) (addressing the federal National Service Life Insurance Act of 1940).

100. *Hillman*, ___ U.S. at ___, 133 S. Ct. at 1951 (quoting *Wissner*, 338 U.S. at 658) (internal quotation marks omitted).

101. *Id.* at ___, 133 S. Ct. at 1952 (citing *Ridgway*, 454 U. S. at 55).

102. 284 Va. 319, 322, 731 S.E.2d 909, 910 (2012).

103. See VA. CODE ANN. § 64.1-16.1(A)(3)(d) (Repl. Vol. 2002) (codified as amended at § 64.2-305(A)(3)(d) (Repl. Vol. 2012 & Supp. 2013)); *id.* § 64.1-16.1(B) (Repl. Vol. 2002) (codified as amended at § 64.2-305(B) (Repl. Vol. 2012 & Supp. 2013)).

104. *Tuttle*, 284 Va. at 326, 731 S.E.2d at 912.

105. *Id.* at 326–27, 731 S.E.2d at 912–13; *Chappell v. Perkins*, 266 Va. 413, 422, 587 S.E.2d 584, 589 (2003).

estate.¹⁰⁶ The recipient spouse's subsequent gift to a third party likewise does not remove the property from that spouse's augmented estate unless the non-donor spouse has consented to that specific gift.¹⁰⁷

The couple were co-makers of a note secured by a deed of trust on a residence titled in the wife's sole name.¹⁰⁸ The wife's executor argued that the husband's augmented estate share should be reduced by three fourths of the note balance—one half that he retained in a separate account and half of the other half, which the couple used to repair the residence.¹⁰⁹ The court, however, looked not at the uses of loan proceeds but rather at the nature of the obligation.¹¹⁰ As co-makers, the couple were primarily liable, jointly and severally.¹¹¹ Principles of equity imply a contract between them to contribute ratably, so each was liable for half of the note balance.¹¹²

C. Assisted Conception: Establishing Parentage

L.F. v. Breit considered whether an unmarried biological father may use a voluntary written agreement to establish legal parentage of his child conceived through assisted conception.¹¹³

An unmarried couple conceived a child through in vitro fertilization and executed a written agreement acknowledging the man as the child's legal and biological father.¹¹⁴ The couple separated a few months after their daughter was born, but the father continued to provide financial support and to visit consistently on weekends and holidays until the mother unilaterally terminated all contact.¹¹⁵

106. *Tuttle*, 284 Va. at 326, 731 S.E.2d at 912.

107. *See id.* at 325, 731 S.E.2d at 912.

108. *Id.* at 323, 731 S.E.2d at 911.

109. *Id.* at 323–24, 731 S.E.2d at 911.

110. *Id.* at 327, 731 S.E.2d at 913.

111. *Id.*

112. *Id.* at 327–28, 731 S.E.2d at 913–14. The statement of facts indicates that the husband's augmented estate share may still have been reduced too much due to the note. In valuing the wife's augmented estate, the lower court included only the net value of the home. *Id.* at 323, 731 S.E.2d at 911. To charge his share then for any part of the note balance appears to be double-counting. That issue, however, was not raised in the appeal.

113. 285 Va. 163, 170–71, 736 S.E.2d 711, 715 (2013).

114. *Id.* at 171, 736 S.E.2d at 715.

115. *Id.* at 171–72, 736 S.E.2d at 715.

In considering the mother's petition to determine parentage, the court sought to reconcile Virginia Code section 20-49.1, which allows a biological father and mother to establish paternity by a voluntary written agreement made under oath, with section 20-158, which declares that a sperm donor who is not the husband of the gestational mother is not the parent of a child conceived through assisted conception.¹¹⁶ It sought to read the statutes "as a consistent and harmonious whole to give effect to the overall statutory scheme."¹¹⁷

The court found that the assisted conception statute was written to protect married couples from claims of third-party intruders who served as mere donors.¹¹⁸ It noted, however, that the male in this instance was not merely a donor; rather he was the person whom the mother chose and intended to be the child's father, whom she treated as such for an extended period, and whom she voluntarily acknowledged in a writing she intended to be legally binding.¹¹⁹ Accordingly, the court did not believe that the assisted conception statute was intended to prevent an unmarried couple from establishing parental rights to a child they conceived by artificial means.¹²⁰

The court further found that allowing the assisted conception statute to override the parties' statutorily authorized acknowledgment of paternity would interfere with the father's parent-child relationship, a constitutionally protected liberty interest.¹²¹ Any such interference must be narrowly tailored to serve a compelling state interest.¹²² The mother's reading of the assisted conception statute would absolutely foreclose any legal means for the father to establish parentage, solely because he was an unmar-

116. *Id.* at 176–80, 736 S.E.2d at 718–20; see VA. CODE ANN. § 20-49.1 (Repl. Vol. 2008 & Cum. Supp. 2013); *Id.* § 20-158 (Repl. Vol. 2008 & Cum. Supp. 2013).

117. *Breit*, 285 Va. at 178, 736 S.E.2d at 719 (quoting *Bowman v. Concepcion*, 283 Va. 552, 563, 722 S.E.2d 260, 266 (2012)) (internal quotation marks omitted).

118. *Id.* at 179, 736 S.E.2d at 720.

119. *Id.*

120. *Id.* at 179–80, 736 S.E.2d at 720.

121. *Id.* at 181–82, 736 S.E.2d at 721. The court rejected the father's other constitutional argument—that the assisted conception statute violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 180–81, 736 S.E.2d at 720–21. Its only gender-based distinction recognizes the fact that men cannot become pregnant, and its distinction based on marital status furthers the state's significant interest in encouraging the institution of marriage. *Id.* at 181, 736 S.E.2d at 720–21.

122. *Id.* at 182, 736 S.E.2d at 721.

ried donor.¹²³ The court found no compelling reason why a responsible, involved, unmarried biological parent should be completely barred from establishing legal parentage of a child born through assisted conception.¹²⁴

D. *Presumption of Testamentary Capacity*

Kiddell v. Labowitz examined the role that the presumption of testamentary capacity should play in a will contest after the plaintiff introduces evidence tending to rebut the presumption.¹²⁵

Three days prior to her death, while hospitalized with a terminal illness and after multiple discussions with her lawyer, the testator executed a will that would leave her entire estate (except for her dog) to three charities.¹²⁶ The lawyer and two paralegals from his office were present, and all three testified that she understood the document and the process.¹²⁷

When the will was admitted to probate, relatives who had been beneficiaries under an earlier will sought to impeach it on the ground that the testator lacked testamentary capacity.¹²⁸ The trial court instructed the jury that the testator's proper execution of the will raised a presumption of testamentary capacity, that the relatives were required to introduce evidence sufficient to rebut the presumption, and that, if they did so, the burden rested on the proponent to prove testamentary capacity by the greater weight of the evidence.¹²⁹ The jury ruled in favor of the proponent.¹³⁰

On appeal the relatives argued that the presumption of testamentary capacity had disappeared because they had presented

123. *Id.* at 183, 736 S.E.2d at 722.

124. *Id.* The mother also argued that acknowledgments of paternity should be unenforceable because they serve to bargain away a child's rights. *Id.* at 184, 736 S.E.2d at 722–23. The court found, however, that children have no purported right or interest in not having a father. *Id.*, 736 S.E.2d at 723. Rather, it is in a child's best interest to have the support and involvement of both a mother and a father, even if they are unmarried. *Id.* at 184–85, 736 S.E.2d at 723.

125. 284 Va. 611, 615, 733 S.E.2d 622, 624 (2012).

126. *Id.* at 616–17, 733 S.E.2d at 624–25.

127. *Id.* at 617, 733 S.E.2d at 625.

128. *Id.* at 616, 733 S.E.2d at 624–25.

129. *Id.* at 619–20, 733 S.E.2d at 626–27.

130. *Id.* at 621, 733 S.E.2d at 627.

evidence to rebut it.¹³¹ The court noted, however, that the trial court specifically declined to rule that their evidence was sufficient for that purpose; instead, it ruled only that the evidence could potentially rebut the presumption if accepted by the jury as true and given sufficient weight.¹³² It declared that a presumption does not disappear when the other party presents any evidence to the contrary.¹³³ Where the weight of evidence for and against the presumption is equal, the presumption will prevail.¹³⁴ The jury must be advised of the presumption so that the proponent is not deprived of its benefit.¹³⁵

Three Justices dissented in part, arguing that the presumption of testamentary capacity disappears when an opponent goes forward with evidence sufficient to rebut it.¹³⁶ They noted, however, that Virginia decisions provide no standard for determining when the opponent's evidence is sufficient.¹³⁷ By ultimately concurring in the result, though, they appear to conclude that the presumption should be applied in the proponent's favor if the evidence is equally balanced.¹³⁸

131. *Id.* In support of the relatives' contention, two doctors testified that the testator could not have understood what she was signing, and an acquaintance testified that the testator did not respond appropriately to his questions on the day before she signed the will. *Id.* at 618, 733 S.E.2d at 626.

132. *Id.* at 626-27, 733 S.E.2d at 630.

133. *Id.* at 627, 733 S.E.2d at 630-31 (quoting *Kavanaugh v. Wheeling*, 175 Va. 105, 113, 7 S.E.2d 125, 128 (1994)).

134. *Id.* at 628, 733 S.E.2d at 631.

135. *Id.* The relatives also argued that the trial court erroneously denied their motion to strike the proponent's evidence because the proponent had not proved that the testator knew the natural objects of her bounty when she executed the later will. *Id.* The court pointed out that the drafter, the other witness, and the notary all testified that the testator understood she was executing a will and knew her property, the natural objects of her bounty, and her wishes for her assets. *Id.* at 629-30, 733 S.E.2d at 632. In contrast, the two physician witnesses testified that the testator was not capable of making decisions about her property at that time. *Id.* at 630, 733 S.E.2d at 632. The court found that this conflicting testimony presented a jury issue, so that the trial court did not err in refusing to strike the proponent's evidence and instead submitting the issue to the jury. *Id.*

136. *Id.* at 630-32, 733 S.E.2d at 633 (Kinser, J., concurring in part and dissenting in part).

137. *Id.* at 637, 733 S.E.2d at 636 (Kinser, J., concurring in part and dissenting in part).

138. *See id.* at 635-36, 733 S.E.2d at 635-36 (Kinser, J., concurring in part and dissenting in part).

E. Definition of "Slayer"

Osman v. Osman considered whether an individual found not guilty of murder by reason of insanity was nonetheless barred from sharing in his victim's estate under the slayer statute.¹³⁹

Osman admitted to killing his mother, and her executors requested a declaratory judgment stating that allowing him to inherit a portion of her estate would violate public policy.¹⁴⁰ Osman countered that the slayer statute prevents someone only from benefiting from an intentional wrongful act and thus did not apply to him because he, being insane at the time, could not have formed the intent to commit an unlawful act.¹⁴¹

The court noted that one can be declared a slayer upon either (1) conviction of murder or voluntary manslaughter, or (2) a judicial determination by a preponderance of the evidence that the person's commission of one of those offenses resulted in the victim's death.¹⁴² The declared purpose of the statute "is to prevent one who has participated in the willful and unlawful killing of another from profiting by his wrong."¹⁴³ The court therefore examined whether the executors had proved the remaining elements of either murder or voluntary manslaughter by a preponderance of the evidence.¹⁴⁴

The court noted that the stipulated evidence in Osman's murder trial clearly demonstrated that he intended to kill his mother.¹⁴⁵ He was acquitted by reason of insanity because he lacked the required criminal intent; but for purposes of the current civil inquiry, it was sufficient to show that he intended his actions

139. 285 Va. 384, 388–89, 737 S.E.2d 876, 878 (2013).

140. *Id.* at 388, 737 S.E.2d at 878.

141. *Id.*

142. *Id.* at 389–90, 737 S.E.2d at 879 (citing VA. CODE ANN. § 55-401 (Repl. Vol. 2007) (codified as amended at VA. CODE ANN. § 64.2-2500 (Repl. Vol. 2012))). In 2012, the General Assembly recodified Virginia Code section 55-401 as section 64.2-2500. Act of Apr. 4, 2012, ch. 614, 2012 Va. Acts 1167, 1307 (codified at VA. CODE ANN. § 64.2-2500 (Repl. Vol. 2012)).

143. *Osman*, 285 Va. at 390, 737 S.E.2d at 879 (quoting VA. CODE ANN. § 55-414(A) (Repl. Vol. 2007), *repealed by* Act of Apr. 4, 2012, ch. 614, 2012 Va. Acts 1167, 1309 (codified at VA. CODE ANN. § 64.2-2511 (Repl. Vol. 2012)) (internal quotation marks omitted)). In 2012, the General Assembly recodified Virginia Code section 55-414 as section 64.2-2511. Ch. 614, 2012 Va. Acts 1167, 1309.

144. *Osman*, 285 Va. at 390–91, 737 S.E.2d at 879.

145. *Id.* at 392, 737 S.E.2d at 880.

without showing that he knew they were unlawful.¹⁴⁶ The court therefore confirmed that the slayer statute applied to deny Osman a share of his mother's estate.¹⁴⁷

F. Circuit Court's Equity Jurisdiction

Henderson v. Ayres & Hartnett, P.C. considered whether the circuit court erred in hearing a dispute over funds deposited with it pursuant to an estate settlement agreement.¹⁴⁸

When parties to estate litigation disagreed as to the expenses to be deducted from property sold pursuant to a settlement, they had the disputed funds paid into the court for future distribution as the court determined proper under the settlement agreement.¹⁴⁹ The losing party below then questioned the court's authority to decide the issue because it was collateral to the subject matter of the underlying litigation.¹⁵⁰

The court observed that, in an equity case, once a court has acquired actual jurisdiction over all of the parties, or of the *res*, it need not send the parties back to a court of law but instead can

146. *Id.*

147. *Id.* at 393, 737 S.E.2d at 881. Two justices concurred in the result but questioned the majority's formulation of the applicable standard when an individual has not been convicted of murder or manslaughter. They argued that the statute did not change the elements of the offense but instead simply reduced the burden of proof from a criminal to a civil standard. *Id.* at 393–94, 737 S.E.2d at 881 (McClanahan, J., concurring); *id.* at 397, 737 S.E.2d at 883 (Powell, J., concurring). Here, the finding that the defendant was not guilty by reason of insanity necessarily involved a finding that he had murdered his mother, thus satisfying the requirement for classification as a slayer. *Id.* at 396–97, 737 S.E.2d at 883 (McClanahan, J., concurring).

Justice Powell concurred but expressed a concern that, by replacing the mens rea element with a civil intent element, the majority inadvertently expanded the definition of "slayer" to include anyone who intentionally kills another, regardless of the circumstances. *Id.* at 398, 737 S.E.2d at 884 (Powell, J., concurring). The majority opinion expressly declined to rule on whether the slayer statute applies to a person who kills in self-defense. *Id.* at 393, 737 S.E.2d at 881.

148. 285 Va. 556, 559, 740 S.E.2d 518, 519 (2013).

149. *Id.* at 559–60, 740 S.E.2d at 519–20.

150. *Id.* at 562, 740 S.E.2d at 521. The losing party also questioned the court's failure to grant his request for a jury trial. *Id.* at 564, 740 S.E.2d at 522. The court observed that the original cases had been in equity because they were trust and estate disputes and requests for accountings and that, despite the merger of law and equity procedures, historic distinctions remain. *Id.* at 564–65, 740 S.E.2d at 522. Among them is the absence of a general right to a jury trial in suits in equity. *Id.* at 565, 740 S.E.2d at 522. Two specific statutory provisions allow jury trials in certain instances, but the appellant had not complied with their requirements. *See id.* at 565, 740 S.E.2d at 522 (citing VA. CODE ANN. § 8.01-336(D), (E) (Repl. Vol. 2007 & Cum. Supp. 2013)).

retain jurisdiction for all purposes, so as to do complete justice between the parties.¹⁵¹ Here, the parties had agreed to give the court jurisdiction over the *res*, the contested funds; accordingly it could decide their proper distribution.¹⁵²

IV. CONCLUSION

The short 2013 session of the Virginia General Assembly, while busy, produced mostly corrective and clarifying measures rather than significant changes in the law. The most notable exception is the Uniform Real Property Transfer on Death Act, which promises to become a very important tool for those seeking to avoid unnecessary probate. Unfortunately, however, its effective use will require familiarity with the statute's many technical details. Even if properly used, transfer on death deeds and revocation instruments may make life more difficult for any personal representative who qualifies to administer the estate. It will become necessary to search the title of every parcel the decedent owned to determine its status. Given this, only time will tell whether the law proves to be beneficial in fact.

Similarly, the relatively few court decisions issued during the 2012–2013 term were largely non-controversial: the treatment of joint debt in calculating the augmented estate, the operation of the presumption of testamentary capacity, the rights of fathers under the assisted conception statute, the application of the slayer statute to those found not guilty by reason of insanity, and the jurisdiction of the circuit court in equity matters were all clarified. The only decision likely to prompt additional legislative action is *Maretta v. Hillman*, in which the United States Supreme Court struck down Virginia Code section 20-111.1(D) as unconstitutional. It should therefore be repealed in the next legislative term.

151. *Id.* at 563, 740 S.E.2d at 521.

152. *Id.* at 564, 740 S.E.2d at 522.
