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Property

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PROPERTY

*W. Wade Berryhill**

The General Assembly made several minor changes affecting property law in Virginia. The most significant of these changes was the amendment of the Code's provisions regarding a spouse's dower and curtesy interests in the separate estate of a deceased spouse. In addition to this legislation, the Virginia Supreme Court decided several cases dealing with varied property issues. The decisions discussed below are those which should have the most interest to the general practitioner. The real estate specialist, no doubt, is already aware of most of them.

In the majority of the cases which follow, the Virginia Supreme Court affirms and reinforces long-standing judicial precedent in Virginia. The most significant development deals with zoning regulations and residential restrictive covenants which affect group homes for the mentally handicapped. In another decision, the court had the opportunity to recognize tortious interference with a prospective contract for the sale of real estate as a cause of action for the first time.

I. 1985 LEGISLATION

Although the 1985 session of the General Assembly made many minor changes affecting several aspects of property law,¹ possibly the most significant change was the codification of *Jacobs v.*

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1. For examples of some areas affected, see VA. CODE ANN. §§ 15.1-1511, -1513 (Cum. Supp. 1985) (agricultural and forest districts); *id.* §§ 55-248.5, -248.9:1, -248.11, -248.39 (the Virginia Residential Landlord and Tenant Act); *id.* § 55-66.4:2 (certificates of satisfaction); *id.* §§ 58.1-3928, -3929 (repealed by Acts of 1985), -3930 (place of recording); *id.* §§ 55-318, -321 (division of fences); *id.* § 17.59 (authorizing the clerk of court to refuse any writing for recordation unless (i) each person's surname, where it first appears is either underscored or in capital letters, (ii) each page is numbered, and (iii) the code section under which any exemption from recordation taxes is clearly set forth). This list is not intended to be comprehensive, but merely to highlight a few of the changes.

Meade.² In that decision, the Virginia Supreme Court interpreted a provision in the Virginia Code³ which purported to exclude a husband's right to curtesy in his deceased wife's sole separate equitable estate. The court, in construing the statute so as to avoid a constitutional attack,⁴ relied upon a code provision which states that dower and curtesy are to be "synonymous . . . for all purposes,"⁵ and concluded that the "interchange of 'curtesy' and 'dower' requires substitution of 'husband' for 'wife' and 'him' for 'her.'"⁶ Thus, the court held that a surviving wife's right to dower shall not attach to her husband's sole separate equitable estate.

The legislature codified this decision by eliminating all references to husband or wife and instead using the word "spouse."⁷

II. JUDICIAL DECISIONS

A. *Brokers' Commissions*

In *Burruss Timber Co. v. Frith*,⁸ the Virginia Supreme Court found that a sale of stock and subsequent corporate merger which transferred the total assets of a timber company was not a "sale of land." Since the transaction was not "substantially the equivalent" of the sales which the broker was authorized to make, the broker was not entitled to receive a commission. Frith, the plaintiff broker, entered into an exclusive listing agreement with Burruss Land and Lumber Company covering thirty-two parcels of land in Southwest Virginia. Approximately three months later, Burruss

2. 227 Va. 284, 315 S.E.2d 383 (1984).

3. See VA. CODE ANN. § 64.1-21 (Repl. Vol. 1980). Prior to amendment that provision read as follows:

When no curtesy in separate estate. —A surviving husband shall not be entitled to curtesy in the equitable separate estate of the deceased wife if such right thereto has been expressly excluded by the instrument creating the same, or if such instrument, executed heretofore or hereafter, describes the estate as her sole and separate equitable estate.

Id.

4. See *Jacobs*, 227 Va. at 287, 315 S.E.2d at 385.

5. See VA. CODE ANN. § 64.1-19.1 (Repl. Vol. 1980).

6. 227 Va. at 288, 315 S.E.2d at 385.

7. See VA. CODE ANN. § 64.1-21 (Cum. Supp. 1985), which now reads:

When no dower or curtesy in separate estate.—A surviving spouse shall not be entitled to dower or curtesy in the equitable separate estate of the deceased spouse if such right thereto has been expressly excluded by the instrument creating the same, or if such instrument, executed heretofore or hereafter, describes the estate as his or her sole and separate equitable estate.

8. 228 Va. 701, 324 S.E.2d 679 (1985).

Land and Lumber Company entered into an "open" listing agreement with another broker for the sale of all its assets in all states. Frith assisted this broker by showing the Virginia parcels to Boston/Lyme Timber Company. Nearly three years later, Boston/Lyme Timber Company purchased all of the shares of Burruss Land and Lumber Company and merged with it to form Burruss Timber Company, the defendant.

Frith brought an action against Burruss Timber Company for a commission on the sale of the Virginia parcels. The trial court made three findings: first, that although Frith's listing agreement had no time frame, it had expired; second, that the stock transfer and merger did amount to a sale of land; and finally, that Frith was entitled to \$80,000 in *quantum meruit* for procuring the sale.

The supreme court reversed the decision, distinguishing the four out-of-state cases upon which Frith relied.⁹ In each of those cases the broker was employed to sell all of the corporation's assets. As such, the stock sale, exchange, or merger was the "substantial equivalent" of the sale for which the broker was employed. In the instant case, however, Frith was employed to sell thirty-two tracts of land in Virginia—only one-sixth of Burruss Land's total assets. Transfer of all of its assets in four states was not the "substantial equivalent" of the sales that Frith was authorized to make. Consequently, the court concluded that there was no sale of land entitling Frith to a commission.¹⁰

B. *Contracts*

1. Tortious Interference with Prospective Contractual Relations

In *Allen Realty Corp. v. Holbert*,¹¹ a case of first impression,¹² the Virginia Supreme Court found that the plaintiff, Allen Realty Corporation (Allen) had stated a cause of action against Holbert based upon tortious interference with a prospective contract. Allen hired Rawlings, a firm of certified public accountants, to assist in its liquidation, as well as to provide tax and accounting services

9. See *Seward v. M. Seward & Son Co.*, 91 Conn. 190, 99 A. 887 (1916); *Kingston Dev. Co. v. Kenerly*, 132 Ga. App. 346, 110 S.E.2d 118 (1974); *Benedict v. Dakin*, 243 Ill. 384, 90 N.E. 712 (1910); *Morad v. Haddad*, 329 Mass. 730, 110 N.E.2d 364 (1953).

10. 228 Va. at 705-06, 324 S.E.2d at 682.

11. 227 Va. 441, 318 S.E.2d 592 (1984).

12. 227 Va. at 449, 318 S.E.2d at 597. The court noted that other jurisdictions had previously recognized the cause of action in question. See *Annot.*, 6 A.L.R. 4th 195 (1981).

and business advice. Holbert, the defendant and Rawlings' agent, received several offers to buy Allen's real property but failed to disclose an offer from the Norfolk Redevelopment and Housing Authority.¹³

Allen brought suit claiming, among other things, tortious interference with contractual relations on the part of Holbert. Holbert demurred, and the trial court dismissed the action. The supreme court reversed and found that Allen's motion for judgment sufficiently alleged Holbert's interference with Allen's prospective contractual relations. The court explained that "[t]he cause of action arises from an intentional, improper interference with another's contract relations, and this interference must (1) induce or otherwise cause a third-party not to enter into prospective contract with the plaintiff, or (2) prevent the plaintiff from entering into a contract."¹⁴

2. Anticipatory Repudiation of a Contract

In *Link v. Weizenbaum*,¹⁵ the Virginia Supreme Court ruled that where only one of two joint obligors to a contract anticipatorily repudiates, there is no breach of contract since the remaining obligor is bound to perform. The defendants, Mr. and Mrs. Weizenbaum, jointly executed a contract to purchase property from the plaintiffs, Mr. and Mrs. Link. Prior to the closing, Mr. Weizenbaum informed the Links' agent that he did not intend to close on the property.

The Links filed suit against the Weizenbaums two days before the scheduled closing, alleging anticipatory repudiation. No evidence was presented that Mrs. Weizenbaum was not willing to close. The jury found for the Links, but the trial court set aside the verdict as to Mrs. Weizenbaum. Subsequently, the trial court granted Mr. Weizenbaum's motion to dismiss on the ground that there was no breach of contract because his wife, being a joint obligor, was bound to close.

On appeal, the Virginia Supreme Court set out the requirements for an anticipatory repudiation action, stating that "the repudiation must be clear and unequivocal, and it must cover the entire

13. The authority's offer, had it been accepted, would have amounted to a savings of over \$35,000 to Allen. *Holbert*, 227 Va. at 445, 318 S.E.2d at 594.

14. *Id.* at 449, 318 S.E.2d at 597.

15. 229 Va. 201, 326 S.E.2d 667 (1985).

performance of the contract.”¹⁶ Although Mr. Weizenbaum’s repudiation was clear and unequivocal, it could not serve as a basis for the action because Mrs. Weizenbaum did not join in the repudiation. Thus, the repudiation did not cover the entire performance of the contract.

C. Deeds

In *Amos v. Coffey*,¹⁷ the supreme court affirmed the trial court’s decision which held that a “Mother Hubbard” clause following a metes and bounds description effectively conveyed the grantor’s one-twelfth remainder interest in real estate located in Pittsylvania County which was not intended to be included in the metes and bounds description. The plaintiff, Mrs. Amos, executed a deed to the defendant, Mr. Coffey, to convey “all of those certain tracts or parcels of land—in or near the Town of Gretna.”¹⁸ Following a metes and bounds description of the parcels in Gretna, the deed explicitly provided that it was the plaintiff’s intention to convey all of her real estate in Pittsylvania County.¹⁹

The plaintiff filed a bill of complaint asking the trial court to construe the deed as having conveyed only the real estate located in Gretna and not the one-twelfth remainder interest in her father’s Pittsylvania County farm. The trial court held for the defendant, and the plaintiff appealed because the trial court refused to use extrinsic evidence in determining the meaning of the terms of the deed. The supreme court, applying the “plain meaning” rule, held that the deed was unambiguous on its face and affirmed. The plaintiff contended that the broad, general language making up the “Mother Hubbard” clause should be construed as merely a reference to the metes and bounds description. However, the supreme court, relying on an earlier interpretation of the *ejusdem generis* doctrine which they had adopted in *Stephen Putney Shoe Co. v. Richmond, Fredericksburg & Potomac Railroad Co.*,²⁰ found that the metes and bounds description exhausted the particular class of property in Gretna. Moreover, the supreme court ruled that the

16. *Id.* at 203, 326 S.E.2d at 668.

17. 228 Va. 88, 320 S.E.2d 335 (1984).

18. *Id.* at 90, 320 S.E.2d at 336.

19. The deed provided: “It is the intention of the party of the first part to convey to the party of the second part all the real estate which they now own in Pittsylvania County, Virginia, including but not restricted to the lands described above.” *Id.*

20. 116 Va. 211, 220, 81 S.E. 93, 97 (1914).

general description in the "Mother Hubbard" clause was effective to convey the plaintiff's one-twelfth remainder interest in her father's Pittsylvania County farm.

D. *Group Homes for the Mentally Retarded*

1. Zoning

In *City of Cleburne v. Cleburne Living Center*,²¹ the United States Supreme Court struck down a local zoning ordinance which required that a "special use" permit be obtained by the Cleburne Living Center (CLC), a group home for the mentally retarded.²² The Cleburne City Council refused to issue CLC the permit citing, inter alia, property owners' attitudes, the location of a junior high school, fears of elderly residents, and the size of the home and number of people to be housed.²³

After the United States District Court for the Northern District of Texas denied CLC relief, CLC appealed the case to the Fifth Circuit Court of Appeals and successfully argued that the zoning ordinance violated the equal protection clause of the United States Constitution.²⁴ The Fifth Circuit chose to view this as a case of first impression, stating "we can find no appellate opinions directly deciding the proper characterization of mentally retarded persons for Equal Protection analysis."²⁵ The court of appeals concluded that while mental retardates were not a suspect class, they did share enough characteristics with a suspect class to be viewed as a "quasi-suspect" class.²⁶ The court of appeals declared that laws discriminating against a "quasi-suspect" class warranted intermediate scrutiny.²⁷ This level of judicial scrutiny rendered the ordinance invalid for want of substantially furthering an important

21. 105 S. Ct. 3249 (1985).

22. Section 8 of Cleburne's zoning ordinance listed the permitted uses of an R-3 district, in which the Cleburne Living Center site was located. Apartment houses, multiple dwellings, boarding and lodging houses, fraternity and sorority houses, dormitories, hotels, hospitals, sanitariums, nursing homes for convalescents or the aged, private clubs and fraternal organizations were all allowed. Section 16, subdivision 9 of the same ordinance required that special use permits be obtained for "hospitals for the insane or feeble-minded, or alcoholics or drug addicts, or penal or correctional institutions to be operated anywhere in the city." *Id.* at 3252-53 n.3.

23. *Id.* at 3259.

24. 726 F.2d 191, 195 (5th Cir. 1984).

25. *Id.* at 196.

26. *Id.* at 198.

27. *Id.*

governmental purpose.²⁸

After rehearing was denied,²⁹ the United States Supreme Court granted certiorari and held that the mentally retarded were not a quasi-suspect class.³⁰ As such, no intermediate scrutiny was to be applied. Rather, "the Equal Protection Clause requires only that the classification drawn by the statute be rationally related to a legitimate state interest."³¹

Yet, even with the wide latitude given state interest under the rational relationship test, the Court further held that no rational relationship could be found by requiring the CLC to obtain a special use permit. Any differences between a group home for the mentally retarded and boarding houses or hospitals were held to be irrelevant to the city's legitimate interests.³²

2. Restrictive Covenants

In contrast to the zoning restrictions struck down by the United States Supreme Court,³³ the Virginia Supreme Court, in *Omega Corp. v. Malloy*,³⁴ addressed the issue of whether a restrictive covenant limiting the use of property to residential purposes and single-family dwellings would exclude group homes for the mentally retarded. Omega had purchased two lots, one in each of two residential subdivisions. They proposed to build a dwelling on each "to provide mentally retarded adults with normal residential housing in a community setting including the activities and life-style incident to such a setting."³⁵ Homeowners in both subdivisions

28. The city of Cleburne argued *Frontiero v. Richardson*, 411 U.S. 677 (1973) and *Doe v. Colautti*, 592 F.2d 704 (3rd Cir. 1979), pointing out the fact that no classification of heightened scrutiny was afforded the mentally retarded. The city also pointed out that heightened scrutiny had never been used in the testing of a zoning ordinance. Only a rational basis criterion should be required for a local government objective.

29. 735 F.2d 832 (5th Cir. 1984).

30. 105 S. Ct. at 3251.

31. *Id.*

32. *Id.* at 3259.

33. See *supra* notes 21-32 and accompanying text.

34. 228 Va. 12, 319 S.E.2d 728 (1984).

35. *Id.* at 14, 319 S.E.2d at 729. Testimony revealed that the homes were to be licensed by the commonwealth and that the occupants were to be supervised by counselors employed by Chesterfield County Mental Retardation Services. Each home was to be occupied by four moderately mentally retarded adults who were to "leave the homes in early morning for work, vocational training or some other day activity" and return in late afternoon. *Id.* Time at home would be supervised by the counselors and would be spent cleaning, cooking, and performing other household chores as well as engaging in various leisure activities. Although

sought injunctions to restrain Omega from using its lots for the proposed group homes on the grounds that each subdivision contained the following identical, restrictive covenant:

No lot shall be *used except for residential purposes*. No building shall be erected, altered, placed, or permitted to remain on any lot other than one detached *single-family dwelling* not to exceed two stories in height.³⁶

The chancellor granted both permanent injunctions. In his letter opinion, the chancellor stated:

I believe that the restrictive covenants in question limit the use of the buildings to single family dwellings, as well as the type of construction. I believe that a single family dwelling means what it says. Only one family can inhabit the dwelling. . . . A single family use does not include occupancy by unrelated persons who live in the home with a counselor.³⁷

On appeal Omega disagreed with the chancellor's analysis, contending that the first sentence of the covenants created a "use restriction" while the second sentence merely imposed a "structural restriction." Although the lots were restricted to residential purposes, Omega asserted that the "structural restriction" merely controls "the type of buildings that may be constructed, not the type of persons who might choose to live in them."³⁸ Thus, the "structural restriction" imposes no further "use restriction."

In rejecting Omega's contentions, the court noted that "Virginia precedent . . . supports the dual effect the chancellor gave the 'single-family dwelling' language,"³⁹ and ruled that the covenants must be read together.⁴⁰ When the sentences were read together, the court concluded that "the covenants specify that only dwellings designed structurally for single-family occupancy may be

this environment was to provide full-time supervision, no training of any kind would be provided to the occupants in the homes. *Id.* at 16, 319 S.E.2d at 730.

36. *Id.* at 14-15, 319 S.E.2d at 729 (emphasis added).

37. *Id.* at 16, 319 S.E.2d at 730.

38. *Id.* at 16-17, 319 S.E.2d at 730.

39. *Id.* at 17, 319 S.E.2d at 730 (relying on *Schwarzschild v. Welborne*, 186 Va. 1052, 45 S.E.2d 152 (1947)).

40. *Id.* at 17, 319 S.E.2d at 731 (relying on *Friedberg v. Building Comm.*, 218 Va. 659, 665, 239 S.E.2d 106, 110 (1977)).

erected and that the buildings may be used only for single-family residential purposes.”⁴¹

As the homeowners appeared to concede that Omega’s use of the proposed buildings would be for residential purposes,⁴² the court was ultimately faced with the question of whether a group home for the mentally retarded constituted a “single-family use.” Omega argued that restrictive covenants are to be strictly construed against the party seeking enforcement. As the covenants in no way purported to limit the definition of “family,” the term should be interpreted broadly to include mentally retarded persons in group homes.⁴³ Therefore, Omega concluded that the chancellor’s ruling that “[a] single family use does not include occupancy by unrelated persons”⁴⁴ was clearly wrong.

Although the court agreed that covenants are to be strictly construed and that “family” should be interpreted broadly,⁴⁵ it concluded that “[t]he presence of the counselors in the homes . . . would convert what might otherwise have been a single-family use into what the chancellor termed ‘a facility.’ ”⁴⁶ Thus, the court upheld the chancellor’s ruling that “[a] single family use does not include occupancy by unrelated persons *who live in the home with a counselor*.”⁴⁷ Additionally, the court rejected any applicability of the zoning cases from other jurisdictions.⁴⁸

41. *Id.* at 18, 319 S.E.2d at 731. The dissent sharply criticized the majority’s implication of a “dual effect” to the “single-family dwelling” language as being contrary to the established principle that restrictive covenants are to be construed narrowly. Justice Thomas pointed out that the *Schwarzschild* decision, upon which the majority relied to imply the “dual-effect” of the term dwelling, struck down an attempt to restrict a use. Thus, the dissent concluded, the majority’s reliance upon *Schwarzschild* was misplaced in upholding a restriction. *Id.* at 22-23, 319 S.E.2d at 734 (Thomas, J., dissenting).

42. *Id.* at 18, 319 S.E.2d at 731.

43. *Id.* at 18-19, 319 S.E.2d at 731.

44. *See supra* text accompanying note 37.

45. 228 Va. at 19, 319 S.E.2d at 732.

46. *Id.*

47. *Id.* at 18, 319 S.E.2d at 731 (emphasis in original). The dissent also criticized the majority for concluding that four unrelated mentally retarded adults and a counselor did not fall within the broad definition of “family” while giving no indication of what groups would be included. *Id.* at 23, 319 S.E.2d at 734 (Thomas, J., dissenting).

48. *Id.* at 20, 319 S.E.2d at 732. The court held that it was dealing with “private contractual rights arising from restrictive covenants, and not with provisions of zoning ordinances. . . . [Z]oning ordinances cannot relieve the lots in question from the restrictive covenants to which they are subject.” *Id.* For a discussion of a recent United States Supreme Court decision dealing with zoning restrictions on group homes for the mentally retarded, see *supra* notes 21-32 and accompanying text.