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Annual Survey of Virginia Law: Wills, Trusts, and Estates

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WILLS, TRUSTS, AND ESTATES

*J. Rodney Johnson**

I. INTRODUCTION

The 1995 Session of the General Assembly enacted legislation dealing with wills, trusts, and estates that added, amended, or repealed a number of sections of the Code of Virginia. In addition to this legislation, there were five Supreme Court of Virginia opinions and one Fourth Circuit opinion in the year ending June 1, 1995 that involved issues of interest to both the general practitioner and the specialist in wills, trusts, and estates. This article analyzes each of these legislative and judicial developments.¹

II. 1994 LEGISLATION

A. Durable Power of Attorney

The 1994 Session expressed its concern for certain victims of financial exploitation by passing House Joint Resolution No. 84, requesting the Virginia Bar Association (VBA) "to conduct a study to (i) examine the use and potential abuse of powers of attorney and (ii) explore methods for strengthening civil remedies to enhance the protection of vulnerable adults from financial exploitation."² The first installment of the VBA study was

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1. In order to facilitate the discussion of numerous Code of Virginia sections, they will generally be referred to in the text by their section numbers only. Unless otherwise stated, those section numbers will refer to the latest printing of the old sections and to the 1995 supplement for the new sections.

2. H.J. Res. 84, Va. Gen. Assembly, (Reg. Sess. 1994). The resolution also provided for the Virginia Departments of Social Services and Aging to assist the VBA in

presented to the 1995 Session³ and resulted in the enactment of two statutes and the amendment of a third, all dealing with the durable power of attorney,⁴ as discussed in the following paragraphs.

1. Non-Judicial Accounting

Prior Virginia law provided that an agent under a durable power of attorney, for whose principal a guardian had been appointed, "shall, during the continuance of such appointment, account to such guardian . . . as he would otherwise be obligated to account to the principal."⁵ But, no accounting could be demanded in those cases where, although the principal was functionally incompetent and could not personally act, no guardian had been appointed.⁶ New section 11-9.6 creates a simple accounting remedy for cases in which a principal, though not adjudicated incompetent, nevertheless "is unable to properly attend to his affairs,"⁷ by giving standing to a "person interest-

conducting this study.

3. Report of the Virginia Bar Association on Financial Abuse of Vulnerable Adults and the Durable Power of Attorney, H. Doc. No. 13 at 1 (1995).

4. At common law, a power of attorney was automatically revoked by operation of law upon the principal's incompetence and thus it could be of no use in managing an incompetent principal's affairs. Virginia created an alternative to this rule in 1954 by enacting legislation providing that if the principal expressly stated a contrary intent in the power, it would remain effective during "any subsequent disability, incompetence, or incapacity of the principal." VA. CODE ANN. § 11-9.1 (Repl. Vol. 1993 & Cum. Supp. 1995). This Virginia innovation, now referred to as the "durable" power of attorney, has since spread in one form or another to all fifty states and the District of Columbia. See, JONATHAN FEDERMAN & MEG REED, GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL, ABUSE AND THE DURABLE POWER OF ATTORNEY: OPTIONS FOR REFORM 12-17 (1994).

5. VA. CODE ANN. § 11-9.1 (Repl. Vol. 1993 & Cum. Supp. 1995).

6. Anecdotal evidence indicates that the family will resist initiation of incompetency proceedings as long as possible in the typical case because of the need to litigate a loved one's incapacity in a public forum. And, when a functionally incompetent person has previously executed a durable power of attorney, thereby eliminating the need for a guardian in almost all instances, this tends to guarantee that no incompetency proceedings will be initiated.

7. New § 37.1-132.1, enacted along with the section under consideration, provides that

[a] 'principal believed to be unable to properly attend to his affairs' means an individual believed in good faith by the petitioner to be a person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other causes to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.

ed in the welfare"⁸ of this principal to demand an accounting from the agent under the principal's durable power of attorney.⁹ This statute provides that upon receiving a reasonable written request in such a case, the agent "shall" account for the agent's actions during the immediately preceding two-year period and allow inspection of related records unless such action "is specifically prohibited by the terms of the instrument under which he acts."¹⁰ This new accounting remedy should be an important first step in addressing some of the problems caused by the misuse of the durable power of attorney. However, as the standard power of attorney is typically a form document consisting of a collection of boilerplate provisions, there is some apprehension that a certain number of attorneys, out of a misplaced concern for client privacy, may routinely include the permissible prohibition against informal accountings in every client's power without even discussing the issue with the client.

2. Judicial Discovery

The second remedy provided by the 1995 legislation provides a remedy for those cases in which relief is not possible under the new accounting remedy because the power contains the permissible prohibiting language, but it is not limited to such cases.¹¹ This judicial discovery remedy authorizes the initiation of circuit court discovery proceedings against an agent under a

VA. CODE ANN. § 37.1-132.1(C) (Cum. Supp. 1995). This language appears to have been inspired by the functional definition of "incapacitated" found in the Virginia Uniform Custodial Trust Act. See VA. CODE ANN. § 55-34.1 (Repl. Vol. 1995).

8. New § 37.1-132.1, enacted along with the section under consideration, provides that

[a] 'person interested in the welfare of a principal' includes any member of the principal's family, persons who are co-agents or co-attorneys-in-fact and alternate and successor agents and attorneys-in-fact designated under the power of attorney or other writing described in § 11-9.1 and; if none of the preceding individuals are reasonably available and willing to act, the adult protective services unit of the local social services board for the city or county where the principal resides or is located at the time of the request.

VA. CODE ANN. § 37.1-132.1(C) (Cum. Supp. 1995). The term "member of the principal's family," as used in the preceding definition, is itself defined as including "an adult parent, brother or sister, child or other descendant, spouse of a child of the principal, spouse or surviving spouse of the principal." *Id.*

9. VA. CODE ANN. § 11-9.6 (Cum. Supp. 1995).

10. *Id.* § 11-9.1.

11. VA. CODE ANN. § 37.1-132.1 (Cum. Supp. 1995).

durable power of attorney "for the purpose of obtaining information pertinent to the need or propriety of (i) instituting a proceeding under this chapter¹² or (ii) terminating, suspending or limiting the authority" of the agent.¹³ This discovery remedy, like the new accounting remedy, is (i) created in favor of a "person interested in the welfare of a principal believed to be unable to properly attend to his affairs,"¹⁴ and (ii) limited in scope to a two-year period. Lastly, the new discovery remedy contains a provision designed to encourage voluntary sharing of information under the new accounting remedy by authorizing the imposition of a costs' penalty against an agent who unreasonably fails to comply with a request for an accounting.¹⁵ And, as this penalty provision speaks in terms of the agent "paying" rather than the petitioner "recovering" these costs, it is clear that the General Assembly intended to impose a personal liability upon the agent, which would preclude the paying agent from thereafter obtaining reimbursement out of the principal's funds under the agent's control.

3. Revocation

Virginia's original durable power of attorney legislation authorized a guardian or committee of an incompetent or incapacitated principal to unilaterally revoke, suspend or terminate the principal's durable power of attorney in whole or in part.¹⁶ This provision was amended in 1984 to restrict such powers to cases where they were specifically granted to the fiduciary by

12. This reference is to Chapter 4 of Title 37.1, Committees and Trustees (Repl. Vol. 1990 & Cum. Supp. 1995), which contains the procedures for the appointment of guardians, committees and trustees for incapacitated and incompetent persons.

13. VA. CODE ANN. § 37.1-132.1(A) (Cum. Supp. 1995).

14. See *supra* notes 7-8 (defining "person interested in the welfare of a principal" and "principal believed to be unable to properly attend to his affairs").

15. This portion of the remedy provides that upon completion of discovery, the court, if satisfied that prior to filing the petition, the petitioner had requested the information or records that are the subject of ordered discovery, and the attorney-in-fact or agent had been informed of the intention of the petitioner to file a petition hereunder if the request were not fully honored, may, in its discretion upon finding that the failure to comply with the request for information was unreasonable, order the attorney-in-fact or agent to pay the petitioner's expenses in obtaining discovery, including reasonable attorney fees.

VA. CODE ANN. § 37.1-132.1(B) (Cum. Supp. 1995).

16. Act of Apr. 5, 1954, ch. 486, 1954 Va. Acts 581.

the circuit court in a proceeding in which the agent was also made a party.¹⁷ The 1995 amendment to section 11-9.1 rewrites this 1984 language by providing for the circuit court to take whatever revoking action, if any, may be in the principal's best interests, instead of the circuit court empowering its fiduciary to take such action.¹⁸ In addition, in those instances where no guardian or committee has been appointed for the principal, the 1995 amendment gives "a person interested in the welfare of the principal"¹⁹ standing to request revocation, suspension or termination of the agent's authority from the circuit court.²⁰ Interestingly, the revocation remedy's parallelism with the accounting and discovery remedies ends at this point because there is no restriction in the new revocation provision to a principal "who is unable to properly attend to his affairs," but only a reference to "the principal." Read literally, then, the revocation remedy may be initiated by any person interested in the welfare of a principal who has no guardian or committee, whether or not the principal is legally or factually incapacitated. As a practical matter, however, the likelihood of a proceeding being brought on behalf of an unadjudicated principal who is factually capacitated is remote. However, there may be instances where the principal has disappeared, or is being detained by a foreign power, etc., in which cases the fact that it is not necessary to establish the principal's functional incapacity as a condition precedent to a revocation, suspension or termination of the agent's authority will be very helpful.²¹

17. VA. CODE ANN. § 11-9.1 (Repl. Vol. 1993).

18. *Id.* § 11-9.1 (Cum. Supp. 1995).

19. See *supra* note 8 (defining "person interested in the welfare of the principal").

20. VA. CODE ANN. § 11-9.1 (Repl. Vol. 1993 & Cum. Supp. 1995).

21. The definition of an "incapacitated" person found in the Virginia Uniform Custodial Trust Act includes "detention by a foreign power, disappearance . . . or other disabling cause." VA. CODE ANN. § 55-34.1 (Cum. Supp. 1995).

B. *Uniform Custodial Trust Act—Facility of Payment*

Virginia adopted the Uniform Custodial Trust Act (UCTA) in 1990,²² and made its provisions more available in 1992 by including it in the statutory fiduciary powers that may be incorporated by reference into wills and trusts.²³ Section 55-34.5 is UCTA's facility of payment clause which allows the debtor of an incapacitated person who has no conservator to make an effective payment of the debt to an adult member of the beneficiary's family or a trust company as custodial trustee, with court approval being required if the debt exceeds \$10,000.²⁴ The problem addressed by the 1995 legislation related to instances in which the amount owed was so small that a trust company would not be interested in serving, and either no adult member of the beneficiary's family could be located or such as could be located were not thought appropriate to serve as custodial trustee. Thus, section 55-34.5 was amended by designating its existing provision as Paragraph A and adding a Paragraph B to provide that, with court approval, any debtor may make a valid payment to "any person" as custodial trustee for an incapacitated person.²⁵ Although this amendment was motivated by a perceived need in small cases, it will be noted that the General Assembly refrained from imposing any such limitation in the statute. In addition, it should be noted that the amendment includes a reference to a "guardian" within the class of indebted parties who may make use of the new facility of payment provision. This will be good news to many guardians and their attorneys who are currently administering low-asset guardianships where the time and cost involved is quite

22. *Id.* § 55-34.1 to .19 (Repl. Vol. 1995). See J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 24 U. RICH. L. REV. 827, 829-30 (1990).

23. VA. CODE ANN. § 64.1-57(1)(P)(5) (Repl. Vol. 1995) (providing that during the incapacity of a beneficiary, a personal representative or trustee may distribute income or principal to an adult person or bank with trust powers as custodial trustee for the beneficiary under UCTA). See J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 26 U. RICH. L. REV. 873, 892 (1992).

24. VA. CODE ANN. § 55-34.5 (Repl. Vol. 1995). The terms "adult," "beneficiary," "conservator," "court," "custodial trustee," "incapacitated," "member of the beneficiary's family," and "trust company," used in this sentence are defined terms found in VA. CODE ANN. § 55-34.1 (Repl. Vol. 1995). The term "debt" is used in the text to refer to the holding of another's property as well as owing a sum to another.

25. *Id.* § 55-34.5(B).

disproportionate to the funds or property being supervised. Now they may request the conversion of these guardianships into custodianships which will not only be more efficient to operate generally, but which will also give the guardian, as custodial trustee, the power to disburse principal for the beneficiary's benefit and control over any real estate. Because the 1995 legislation significantly enlarges the scope of UCTA's facility of payment provisions, the 1995 amendments further provide that the court authorizing any payments may also require the posting of a bond with surety in appropriate cases.²⁶

C. *Disbursements and Accountings in Small Estates*

Section 8.01-606, dealing with the payment of small amounts to certain persons through a court without the intervention of a fiduciary, and the authority of circuit courts and commissioners of accounts who have a limited value of assets under their supervision (i) to have a facility of payment power over these assets, and (ii) to excuse any fiduciary from filing further accountings, has been amended to adopt \$10,000 as the uniform amount or value to be applicable in all cases.²⁷ This is the third time in the past decade that this statute has been amended to increase certain of its monetary amounts,²⁸ and so long as this provision is retained, it can safely be predicted that this ritual will have to continue as long as inflation continues. However, it is submitted that in the light of the 1995 amendments to the Virginia Uniform Custodial Trust Act,²⁹ its enhanced facility of payment provisions eliminate any future need for this statute and section 8.01-606 could safely be repealed.

26. *Id.* This bond with security provision is actually surplusage because the Uniform Custodial Trust Act already gives the court authority to require any custodial trustee to "furnish a bond or other security for the faithful performance of fiduciary duties." *Id.* § 55-34.14.

27. VA. CODE ANN. § 8.01-606 (Cum. Supp. 1995).

28. See J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 19 U. RICH. L. REV. 779, 789 (1985); J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 21 U. RICH. L. REV. 855, 860 (1987).

29. See discussion *supra* part II.B.

D. *Guardians of Minors—Bonds, Surety and Court's Liability*

Section 31-6, dealing with the requirement that guardians of minors give their personal bond as a part of their qualification, the potential liability of the court or clerk that fails to require such a bond, and the necessity of surety on the bond unless excused by will or statute, was entirely rewritten for the purpose of clarity by the 1995 Session.³⁰ The only addition to the statute is its penultimate sentence "Every order appointing a guardian shall state whether or not surety is required."³¹

E. *Probate Avoidance—Ward's Estate*

Section 37.1-144, dealing with the disposition of a ward's estate upon death, has provided for the surrender of any realty to the ward's heirs and any personalty to the ward's personal representative in all cases.³² The 1995 amendment to section 37.1-144 creates a permissive facility of payment provision restricted to personalty in the fiduciary's possession.³³ It is available when (i) the amount is \$5,000 or less, (ii) there is no qualification on the ward's estate within sixty days of death, and (iii) no qualification is anticipated.³⁴ This provision authorizes the fiduciary to pay such sum over to "the ward's surviving spouse, or if there is no surviving spouse, to the distributees of the ward or other persons entitled thereto, including any person or entity entitled to payment for funeral or burial services provided."³⁵

F. *Non-Resident Fiduciaries*

1. Personal Representatives and Testamentary Trustees

Prior to 1983, non-Virginians were prohibited from serving as a sole executor or administrator of a decedent's estate, even if

30. VA. CODE ANN. § 31-6 (Cum. Supp. 1995).

31. *Id.*

32. VA. CODE ANN. § 37.1-144 (Repl. Vol. 1990).

33. *Id.* § 37.1-144 (Cum. Supp. 1995).

34. *Id.*

35. *Id.*

the non-Virginian was the only beneficiary, or as trustee of a testamentary trust.³⁶ In 1983 this rule was relaxed in regard to the office of personal representative for a limited class of close relatives and beneficiaries;³⁷ in 1986 this class was enlarged slightly and the enlarged rule was also made applicable to testamentary trustees;³⁸ and in 1991 this rule was further extended to trustees of an inter vivos trust that serves as a receptacle to receive a pour-over from a decedent's estate.³⁹ The 1995 legislation adds "niece or nephew" of the decedent to the class in all three of these cases.⁴⁰ Both the 1986 addition of brother and sister, and the 1995 addition of niece and nephew, arose because the original class formulation was too restrictive. And, when testimony of legitimate constituent desire to name other "outsiders" is given to subsequent Sessions further additions can reasonably be expected.⁴¹ Perhaps the time has come for Virginia to completely reject its fiduciary xenophobia and allow a testator to select any non-Virginian to serve, without regard to relation or beneficiary status.⁴² Although there has been some genuine concern about judicial con-

36. VA. CODE ANN. § 26-59 (Cum. Supp. 1978).

37. Act of Mar. 27, 1983, ch. 467, 1983 Va. Acts 605. As of July 1, 1983, the non-residents permitted to serve as executor, administrator, or testamentary trustee without having a resident to serve as a co-fiduciary were

a parent, a child or other descendant of a decedent, the spouse of a child of the decedent, the surviving spouse of a decedent, or a person or all such persons otherwise eligible to file a statement in lieu of an accounting pursuant to § 26-20.1, or any combination of them.

Id.

38. The 1986 legislation added "brother, or sister of a decedent" to the class. Act of Mar. 4, 1986, ch. 53, 1986 Va. Acts 66 (codified at VA. CODE ANN. § 26-59 (Repl. Vol. 1992)). These developments are discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 20 U. RICH. L. REV. 955, 959-60 (1986).

39. Act of Mar. 20, 1991, ch. 343, 1991 Va. Acts 482 (codified at VA. CODE ANN. § 64.1-73 (Repl. Vol. 1991 & Cum. Supp. 1995)). These developments are discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 25 U. RICH. L. REV. 925, 930 (1991).

40. VA. CODE ANN. § 26-59 (Cum. Supp. 1995); VA. CODE ANN. § 64.1-73 (Repl. Vol. 1995).

41. The non-covered case that is most often encountered at present is that of a couple who wish to choose a sibling of the husband or wife to serve as successor executor in both wills. If the husband's sister is chosen, no problem will arise if the husband is the second of the couple to die, but the husband's sister will not fit within the class if the wife is the second of the couple to die, unless the sister happens to be the sole beneficiary.

42. Senate Bill 1077 which would have done so, was left in the Senate Courts of Justice Committee. S.B. 1077, Va. Gen. Assembly (Reg. Sess. 1995).

trol over non-residents in the past, the present requirement of a mandatory bond with surety for non-residents would appear to be a sufficient tether to provide ample protection for Virginia beneficiaries and creditors.⁴³

2. Guardians for Incompetent or Incapacitated Adults

Section 26-59, prohibiting non-residents from serving as sole guardian of an incapacitated or incompetent adult, is amended by the addition of a provision that parallels the rule presently applicable to non-residents seeking to qualify as sole personal representative or testamentary trustee.⁴⁴ However, the class of permitted persons is somewhat smaller, the spouse of a child of the person under a disability is omitted, and instead of the guardian having to appoint a resident agent for service of process, the guardian may alternatively designate the clerk of court to serve pursuant to sections 26-7.1 to -7.3.⁴⁵ This 1995 amendment is a great step forward, but again, as noted in discussing non-residents serving as personal representative or testamentary trustee, why not open the door to all non-residents? Shouldn't the selection of a guardian for an incapacitated or incompetent person be a function of "who is best" in the absolute sense, instead of who is the best within a narrow class?⁴⁶ For example, one might focus on the only person who is permitted to serve as sole personal representative or testamentary trustee, but omitted from the present provision—a child-in-law of the person under a disability. It requires little

43. The requirement of a surety bond in all of these cases is absolute, notwithstanding any provision in a will purporting to waive surety or the statutory waiver provision contained in § 64.1-121, otherwise applicable when all of the beneficiaries are also serving as personal representative.

44. VA. CODE ANN. § 26-59(B)(2) (Cum. Supp. 1995).

45. *Id.* The last word in the last sentence of this new provision is an erroneous citation. "Notwithstanding § 37.1-135, when any nonresident qualifies pursuant to this subsection, bond with surety shall be required in every case, unless a resident fiduciary qualifies at the same time or the court making the appointment waives surety under the provisions of § 26-7.1 [sic]." The correct reference should be to VA. CODE ANN. § 26-4 (Repl. Vol. 1992).

46. This question has been answered affirmatively, *vis-a-vis* the guardian of the person of a minor. Section 26-59(D) provides that "[t]he fact that an individual nominated or appointed as the guardian of the person of an infant is not a resident of this Commonwealth shall not prevent the qualification of the individual to serve as the sole guardian of the person of the infant." VA. CODE ANN. § 26-59(D) (Cum. Supp. 1995). See also J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 28 U. RICH. L. REV. 859, 860 (1989).

effort to envision the case of a surviving parent who is predeceased by an only child, with which non-resident child and child's spouse the surviving parent had an exceptionally close relationship (and, if one wishes to imagine further, the hypothetical could add that there are no other family members, or none who will serve, or none who can be trusted, etc.). Why should the non-resident child-in-law be precluded from qualifying as sole guardian, as a matter of law, instead of the decision being based on the best interests of the incapacitated parent-in-law?

G. Wills—*List of Tangible Personal Property*

A certain number of persons writing wills will have a generalized idea of possible bequests of tangible personal property to various friends or relatives as a token of their affection, by way of remembrance, etc. However, a testator being asked about this possibility during an attorney's will interview is unlikely to have a completely formulated intent regarding persons and gifts, and in those instances where the testator does, it is not unusual for such intent to change in the interval prior to death. The practical problems presented by this natural desire have resulted in a variety of responses as attorneys have struggled for the best solution.⁴⁷ New section 64.1-45.1 is a legislative response to this problem that seeks to accomplish its goal by declaring the statute of wills and the common law doctrines of incorporation by reference and facts of independent significance nonapplicable to a list of tangible personalty gifts prepared by the testator.⁴⁸ Its general rule provides that

[i]f a will refers to a written statement or list to dispose of items of tangible personal property not otherwise specifically bequeathed, the statement or list shall be given effect to the extent that it describes items of tangible personal property and their intended recipients with reasonable certainty and is signed by the testator. . . .⁴⁹

47. Perhaps the best drafting approach to date is the creation of a special power of appointment over the testator's tangible personal property in a trustworthy person, in favor of the testator's family and friends, with the testator keeping the donee of the power informally advised of changing wishes.

48. VA. CODE ANN. § 64.1-45.1 (Repl. Vol. 1995).

49. *Id.*

Happily the new statute is drafted in such a way as to not interfere with the traditional practice of distributing testator's tangible personal property shortly after testator's death in most cases. This practice may continue, notwithstanding the possibility of a list of gifts surfacing thereafter, because the statute declares that a personal representative who distributes to an apparent legatee under the will without actual notice of such list's existence has no personal liability therefor nor any duty to recover the distribution.⁵⁰ A substantive problem to be anticipated in the use of such lists will be due to the layperson's failure to understand what is not included in the term "tangible personal property," and the consequent attempt to make "list" dispositions of stocks, bonds, notes, checks, money, bank deposits and other forms of intangible personal property. An administrative problem to be anticipated will arise in those cases where the testator executes the list in such a way that it satisfies the requirements for a holographic will.⁵¹ In such cases, even though the will is accompanied by a self-proving certificate which would otherwise eliminate the need for any attesting witness to attend probate,⁵² the presence of a holographic codicil will require the attendance and testimony of "two disinterested witnesses" in order to prove the holographic codicil.⁵³

50. *Id.* This type of problem will not arise when there is a specific bequest of an article under a will because the statute only allows a list to dispose of property not specifically bequeathed. Where a list surfaces after a distribution has been made pursuant to a residuary provision, the statute permits the person on the list to pursue the property (or its value if it no longer exists) in the hands of the apparent legatee for one year after the testator's will is probated.

51. A holographic will is one that is signed by, and wholly in the handwriting of, the testator. *Id.* § 64.1-49.

52. *Id.* §§ 64.1-87.1 to -87.2 (Repl. Vol. 1995).

53. *Id.* § 64.1-49 (Repl. Vol. 1995).

H. *Augmented Estate—Virginia Property of Non-Domiciliaries*

In order to provide certain minimum rights for a surviving spouse, Virginia adopted a form of augmented estate law in 1990,⁵⁴ and further modified and clarified this law in 1992.⁵⁵ One issue left unresolved by this legislation concerned the rights of the electing spouse of a non-domiciliary as to realty in Virginia. The 1995 legislation eliminated this uncertainty by amending section 64.1-13 (i) to restrict the applicability of its original provision to domiciliaries,⁵⁶ and (ii) to provide that "[t]he right, if any, of the surviving husband or wife of a decedent who dies domiciled outside this Commonwealth to take an elective share amount based upon the value of property in this Commonwealth is governed by the law of the decedent's domicile at death."⁵⁷ With one exception, the quoted language is taken from the corresponding provision of the Uniform Probate Code (UPC).⁵⁸ Where the Virginia version speaks of an "elective share amount based on the value of property in this Commonwealth," the UPC version speaks of an "elective share in property in this state."⁵⁹ The Virginia change was made to emphasize that the right of the surviving spouse is in the value of the property in question and is not an interest in the property itself, which would have the undesirable effect of making the electing spouse a tenant in common with the decedent's successors in interest.⁶⁰

54. Act of Apr. 9, 1990, ch. 831, 1990 Va. Acts 1354 (codified at VA. CODE ANN. § 64.1-16.1 (Repl. Vol. 1995)). For a detailed contemporary discussion of this enactment, see J. William Gray, Jr., *Annual Survey of Virginia Law: Virginia's Augmented Estate System* 24 U. RICH. L. REV. 513 (1990). This enactment is briefly noted in Johnson, *supra* note 22, at 827.

55. Act of Apr. 3, 1992, ch. 617, 1992 Va. Acts 897 (codified at VA. CODE ANN. § 64.1-16.1 (Repl. Vol. 1995)); Act of Apr. 3, 1992, ch. 647, 1992 Va. Acts 953 (codified at VA. CODE ANN. § 64.1-16.1 (Repl. Vol. 1995)). These amendments are discussed in Johnson, *supra* note 23, at 873-86.

56. VA. CODE ANN. § 64.1-13(A) (Repl. Vol. 1995).

57. *Id.* § 64.1-13(B).

58. See UNIF. PROBATE CODE § 2-202(d), 8 U.L.A. 97 (1995).

59. Compare UNIF. PROBATE CODE § 2-202(d), 8 U.L.A. 97 (1995) with VA. CODE ANN. § 64.1-13(B) (Repl. Vol. 1995).

60. The failure to make this change might also have resulted in the prudent conveyancer requiring a married foreign grantor of Virginia realty to supply a spousal signature as a matter of standard practice, out of a concern that such a conveyance might otherwise be subject to dower or curtesy rights, or their equivalent, in the

I. *Wills—Ademption by Extinction—Sales by Agents*

The common law provided that if property specifically devised or bequeathed to a beneficiary was not in testator's estate at death the gift would "adeem" or fail. In Virginia, however, if the property was disposed of during the testator's incapacity, the specific beneficiary would be entitled to any proceeds from this property that might be remaining at the testator's death.⁶¹ In 1985, Virginia further modified the common law rule by providing a pecuniary legacy for the intended beneficiary in those cases where, during the testator's disability, the property in question is (i) sold by a court appointed fiduciary, or (ii) proceeds of fire or casualty insurance on the property are paid to such fiduciary.⁶² The 1995 legislation, responding to a significant gap noted a decade earlier,⁶³ extends the 1985 substituted legacy concept to cases where, during the testator's incapacity, the property in question is (i) sold by an agent under a durable power of attorney, or (ii) proceeds of fire or casualty insurance on the property are paid to such agent.⁶⁴ As there will not likely be an adjudication of incapacity in the typical case where one's affairs are being managed pursuant to a durable power of attorney, the statute further provides that "the acts of an agent within the authority of a durable power of attorney are rebuttably presumed to be for an incapacitated testator."⁶⁵ The definition of "incapacity" for the purposes of this non-ademption statute⁶⁶ is the same as the definition of "principal believed to be

foreign jurisdiction.

61. *Bryson v. Turnbull*, 194 Va. 528, 74 S.E.2d 180 (1953).

62. Act of Mar. 21, 1985, ch. 429, 1985 Va. Acts 597 (codified at VA. CODE ANN. § 64.1-62.3(3) (Repl. Vol. 1995)). The amount of the pecuniary legacy is the net sales price or the amount of insurance proceeds received minus the amount of any condemnation awards or insurance proceeds unpaid at testator's death which are later received by the specific beneficiary. This legislation is discussed in Johnson, 1985 *Annual Survey of Virginia Law*, *supra* note 28, at 782-84.

63. Johnson, 1985 *Annual Survey of Virginia Law*, *supra* note 28, at 784.

64. VA. CODE ANN. § 64.1-62.3(4) (Repl. Vol. 1995) (providing that the general rule is not applicable to a power of attorney "limited to one or more specific purposes").

65. *Id.*

66. Section 64.1-62.3(4) provides in part that "an 'incapacitated' person is one who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions."

unable to properly attend to his affairs" contained in the 1995 legislation creating the nonjudicial accounting and the judicial discovery remedies in agency cases, discussed in Paragraph A, *supra*.

J. *Fiduciary Accountings*

Section 26-18, dealing with the failure of judicially appointed fiduciaries to make the required accountings with the commissioner of accounts, is amended to further provide that

[w]henver the commissioner reports to the court that a fiduciary, who is an attorney-at-law licensed to practice in the Commonwealth, has failed to make the required settlement within thirty days after the date of service of a summons, the commissioner shall also mail a copy of his report to the Virginia State Bar.⁶⁷

The rather obvious purpose of this amendment is to provide additional encouragement to attorneys to complete their work on time by increasing the likelihood of an ethical inquiry in cases where they do not.

K. *Inter Vivos Trusts—Recordation Taxes*

A 1993 Virginia Attorney General's Opinion concluded that a grantor's deed conveying real estate to a trust, in which the grantor was the trustee and initial beneficiary, was not entitled to any statutory exclusion from Virginia's recordation tax.⁶⁸ Two separate bills were passed by the 1995 Session to reverse the impact of this holding. One bill amended the "identity" exclusion of section 58.1-811 to make it applicable to such trusts if they are revocable,⁶⁹ and the other bill amended the

Id. § 64.1-62.3(4).

67. VA. CODE ANN. § 26-18 (Cum. Supp. 1995).

68. 1993 Atty. Gen. Ann. Rep. 258, discussed in J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 28 U. RICH. L. REV. 1145, 1171-72 (1994).

69. Section 58.1-811(A)(12) now extends its exemption "[t]o trustees of a revocable inter vivos trust, when the grantors in the deed and the beneficiaries of the trust are the same persons, regardless of whether other beneficiaries may also be named in the trust instrument, when no consideration has passed between the grantor and the

"deed of gift" exclusion of section 58.1-811, to make it applicable to such trusts whether they are revocable or irrevocable.⁷⁰

L. *Uniform International Wills Act*

The Uniform International Wills Act⁷¹ was adopted by the 1995 Session.⁷² This Act is the end product of a 1973 conference held in Washington, D.C. under the sponsorship of UNIDROIT, attended by official delegates from forty-two countries, which adopted the "Convention Providing for a Uniform Law on the Form of an International Will." In essence, each of this Convention's signatories agrees to accept the wills of other signatories for probate, as to matters of form, if such wills are executed in accordance with the provisions of the Convention. At the President's request, the U.S. Senate gave its advice and consent to the ratification of the Convention in 1991, and Congress is now moving towards adoption of the necessary implementing legislation. When Congress passes the implementing legislation, all American states will be required to accept appropriately executed wills from Convention signatories for probate, as to matters of form, but the reverse will not be automatically true. In order for an American's will to be entitled to recognition in one of the Convention's signatory countries, that American's state legislature must have enacted implementing legislation.⁷³ Thus the Act's adoption by the 1995 Session insures that Virginia wills executed in accordance with its provisions will be admitted to probate in the signatory countries without challenge as to form.

beneficiaries. . . ." VA. CODE ANN. § 58.1-811(A)(12) (Cum. Supp. 1995).

70. Section 58.1-811(D) now provides that "[n]o recordation tax shall be required for the recordation of any deed of gift between a grantor or grantors and a grantee or grantees when no consideration has passed between the parties. Such a deed shall state therein that it is a deed of gift." *Id.* § 58.1-811(D).

71. UNIF. PROBATE CODE, Art. II, Part 10, 8 U.L.A. 191 (1995).

72. VA. CODE ANN. § 64.1-96.2 to -96.11 (Repl. Vol. 1995).

73. See generally, Tim Covell, *Legislation Should Prompt States to Enact International Will Laws*, 133 TR. & EST. 42 (1994).

M. Cemetery Trusts—Limitation on Size

Sections 57-31 to -35 deal with the disposition of property for the perpetual maintenance and care of cemeteries.⁷⁴ Section 57-33, which had imposed (i) a \$30,000 limitation on the amount of any gift that a person might make for such purposes, and (ii) a \$10,000 limitation on the amount of a perpetual care fund for any single plot and its improvements, was repealed by the 1995 Session.⁷⁵ Human nature being what it is, one wonders about the possibility of an unnecessarily large fund occasionally being established and what disposition might be made, and under what theory, of a substantial excess that might develop in such a case, especially as such funds are expressly excepted from the operation of the Rule Against Perpetuities.⁷⁶

III. 1994-95 JUDICIAL OPINIONS

A. Will Contracts—Husband and Wife

Following a discussion with their attorney in which they indicated that they did not wish the survivor to have absolute control over their joint estate, the married couple (*H* and *W*) in *Black v. Edwards*⁷⁷ requested the preparation of reciprocal wills in which each left all to the other, or if the other failed to survive, to a group of eight beneficiaries, four of whom were selected by *H* and four of whom were selected by *W*. *H* and *W* were advised by their attorney that if they executed such wills, "this would be a contract between the two of them, that they would each, the ultimate survivor, would agree to leave the property as the wills were originally drawn."⁷⁸ These wills were executed on June 27; *W* died on August 31; *H* made a new will on September 10; and *H* died on November 7; all in 1991. In this action brought by the persons *W* had selected as

74. VA. CODE ANN. §§ 57-31 to -35 (Repl. Vol. 1995).

75. Act of Mar. 16, 1995, ch. 255, 1995 Va. Acts 357 (repealing VA. CODE ANN. § 57-33).

76. VA. CODE ANN. § 57-31 (Repl. Vol. 1995).

77. 248 Va. 90, 445 S.E.2d 107 (1994).

78. *Id.* at 91, 445 S.E.2d at 108.

her beneficiaries in the June 27 will, the court recognized prior authority establishing the rule that will contracts may be established by informal evidence, so long as it is "clear and satisfactory."⁷⁹ Although recognizing the deference to be accorded the decision of a trial court sitting without a jury, the supreme court nevertheless reversed the trial court in this case because "the uncontradicted testimony of [the attorney], an unimpeached witness, was 'not inherently incredible' and was consistent with the facts in the case"⁸⁰ and satisfactorily established the contract of *H* and *W*.

The questionable aspect of this case is the supreme court's response to the defense that the contract, if any, would fail because it was not in writing as required by section 20-155, which reads in full as follows:

Married persons may enter into agreements with each other *for the purpose of settling the rights and obligations of either or both of them*, to the same extent, with the same effect, and subject to the same conditions, as provided in §§ 20-147 through 20-154 [the Premarital Agreement Act] for agreements between prospective spouses, except that such premarital agreements shall become effective immediately upon their execution.⁸¹

The supreme court concluded that "the emphasized portion of Code § 20-155 clearly limits its provisions to those contracts affecting those 'rights and obligations' that arise from the marital relationship."⁸² Accordingly, the statute was held to be not

79. *Id.* at 92, 445 S.E.2d at 109 (quoting *Williams v. Williams*, 123 Va. 643, 649, 96 S.E. 749, 751 (1918)).

80. *Id.* at 93, 445 S.E.2d at 109.

81. *Id.* 248 Va. at 94, 445 S.E.2d at 109 (emphasis added) (quoting VA. CODE ANN. § 20-155 (Repl. Vol. 1990)). Section 20-155, which incorporates by reference the writing requirement of § 20-149 is noted in Johnson, 1987 *Annual Survey of Virginia Law*, *supra* note 28, at 861-62.

82. *Black*, 248 Va. at 94, 445 S.E.2d at 110. The supreme court also noted that Virginia has no general statute requiring all will contracts to be in writing, and stated that "we do not think that the legislature intended Code § 20-155 to require that contracts between spouses be in writing, while permitting other persons to make such contracts orally." *Id.* Query: Isn't this exactly what the General Assembly obviously intended by the enactment of the Premarital Agreement Act—to require that certain contracts between persons engaged to be married must be in writing, while permitting other persons to make such contracts orally? See, e.g., VA. CODE ANN. § 20-150.6 (Repl. Vol. 1995) (dealing with the ownership rights in and disposition of the death

applicable to a will contract benefiting others after the death of *H* and *W*.⁸³

Space constraints and the nature of this survey will not permit an exhaustive analysis of the supreme court's rationale, but in addition to the comments contained in the preceding two footnotes, the following points might be noted. First, section 20-150, dealing with the content of a premarital agreement, recognizes that the parties may enter into contracts regarding

1. The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located . . . 3. The disposition of property upon . . . death . . . and 8. Any other matter, including their personal rights and obligations, not in violation of public policy . . .⁸⁴

Second, a portion of section 20-155's applicability language, not discussed by the supreme court, provides for marital agreements "*to the same extent, with the same effect, and subject to the same conditions, as provided in §§ 20-147 through 20-154. . . .*"⁸⁵ In the light of these broad provisions, it is difficult to find a restrictive legislative intent that section 20-155 be limited to "rights and obligations" that arise from the marital relationship."⁸⁶ Third, the increase in spousal protection and the certainty that was believed to be accomplished by the en-

benefit from a life insurance policy). This being so, why would legislative intent not be the same if the Premarital Agreement Act is extended to persons who are already married at the time of their contract?

83. "Here, each spouse's contractual intent to benefit third parties after the death of both spouses did not affect the 'rights and obligations' arising from [*H* and *W*'s] marital relationship." *Black*, 248 Va. at 94, 445 S.E.2d at 109. *Query*: If the first to die changed the will by excluding the surviving spouse, would the statutory writing requirement be applicable in an action brought by the surviving spouse? The quoted language, focusing on "contractual intent to benefit third parties" as a basis for non-application in the present case, would point to an affirmative response. But the opinion's "legislative intent language" would point to a negative response. ("[W]e do not think that the legislature intended Code 20-155 to require that contracts between spouses be in writing, while permitting other persons to make such contracts orally." *Id.*)

84. VA. CODE ANN. § 20-150(1), (3) (8) (Repl. Vol. 1995). The supreme court referred only to § 20-150(3) in its opinion.

85. *Id.* § 20-155 (Repl. Vol. 1995) (emphasis added).

86. *Black*, 248 Va. at 94, 445 S.E.2d at 110.

actment of section 20-155⁸⁷ have been significantly reduced as there are now two distinct classes of contracts between husbands and wives—those that arise from the marital relationship, and those that do not—with no test presently available to distinguish between them. If history is to be the guide for the future, this creation of a class of marital contracts not covered by sections 20-147 to -154 would suggest both an increased difficulty in advising married persons concerning their agreements with each other and an increase in litigation concerning these agreements.

B. *Will Contract—Corroboration of Oral Agreement*

The plaintiff in *Vaughn v. Shank*⁸⁸ filed a claim against decedent's estate alleging an oral agreement to transfer certain realty to plaintiff in return for plaintiff's assumption of increased duties in decedent's business. As Virginia's "Dead Man's Statute" precludes entry of judgment against a decedent's estate based upon a claimant's uncorroborated testimony,⁸⁹ plaintiff offered testimony of one witness that decedent "said she would 'give us [the] house,'"⁹⁰ and that of another witness that decedent "told her that the . . . house was purchased for (plaintiff) and her daughter."⁹¹ Affirming the trial court's rejection of plaintiff's claim, the supreme court concluded that the witnesses' testimony was as consistent with an intent of decedent to make a gift to the plaintiff as it was with a reference to a contract with the plaintiff and thus the required corroboration was absent.⁹²

87. See Johnson, 1987 *Annual Survey of Virginia Law*, *supra* note 28, at 861-62.

88. 248 Va. 224, 445 S.E.2d 127 (1994).

89. VA. CODE ANN. § 8.01-397 (Repl. Vol. 1992).

90. *Vaughn*, 248 Va. at 227, 445 S.E.2d at 129.

91. *Id.*

92. *Id.* at 230, 445 S.E.2d at 130.

C. Wills—Partial Revocation

In *Goriczynski v. Poston*,⁹³ the supreme court applied settled Virginia law to a multifaceted case of partial revocation by physical acts to the document. A secondary issue concerning the correct application of the doctrine of dependant relative revocation was present in the facts but not treated by the supreme court because those who sought to raise it had no standing.⁹⁴

D. Codicil—Testamentary Intent

On the same day that he made an unsuccessful attempt to take his own life, the testator in *Wolfe v. Wolfe*⁹⁵ wrote a three page letter to his former wife, the relevant portion of which provided as follows:

As executor, I am asking you to do much for me and the girls, perhaps Gordon can help. God bless you, I know you will do your best. My will is out of date, but I think it will still stand up. I want my daughters to share 1/3, 1/3, 1/3.⁹⁶

Following the testator's death by suicide fifteen days later, the above writing was admitted to probate as a codicil to testator's ten year old will. Although recognizing that this writing showed testator's intent regarding the distribution of his estate, the Supreme Court held that "[t]o qualify as a codicil, however, the letter must also reflect [testator's] intent that it take effect as a testamentary document."⁹⁷ The majority's analysis of the writing in the context of this case did not disclose the required testamentary intent, and thus the trial court's decision was reversed.⁹⁸

93. 248 Va. 271, 448 S.E.2d 423 (1994).

94. *Id.* at 276, 448 S.E.2d at 426. The issue was raised by the decedent's heirs who had no standing because none of the decedent's estate passed by intestate succession.

95. 248 Va. 359, 448 S.E.2d 408 (1994).

96. *Id.* at 361, 448 S.E.2d at 409. This letter was addressed to the former wife as the testator's "Ex-wife" and "Executor of my will" and was signed "Jared/Dad." *Id.* at 360-61, 448 S.E.2d at 409. The opinion contains no further quotes from the testator's three-page letter.

97. *Id.* at 361, 448 S.E.2d at 409.

98. *Id.* at 362, 448 S.E.2d at 410. Justice Whiting, dissenting, concluded that

E. *Trust—Principal Invasion—Trustees' Discretion*

In addition to owning a \$700,000 investment account, the Daughter in *NationsBank v. Grandy*⁹⁹ was the sole income beneficiary of a \$890,000 trust fund created by Father, and the trustees of this fund also had the discretion to invade its principal for her benefit.¹⁰⁰ Although the trustees had previously exercised this discretionary power in Daughter's favor, they refused to make any further invasions following the appointment of a guardian to manage her affairs because of the availability of her substantial personal estate.¹⁰¹ At the conclusion of a trial court proceeding initiated by Daughter's guardian, the trustees were directed to invade the trust's principal for her support to the extent that her needs were unmet following the consumption of the income from her investment account and the income from the trust fund.¹⁰² This action had the effect of preserving the principal of Daughter's investment account at the expense of the trust fund's principal.

The supreme court cited prior authority for the proposition that "[w]hether a beneficiary is entitled to support from the trust if other resources are available is a question of trust interpretation."¹⁰³ Examining the trust instrument in this case, the court concluded that the decision concerning invasion of principal rested in the trustee's uncontrolled discretion, that

"[g]iven the person to whom the letter was written, the circumstances under which the letter was written [fully described therein], and the clear language of disposition quoted above, I think this particular writing bears the necessary 'stamp of testamentary intent' within the document itself." *Id.* (Whiting, J., dissenting).

99. 248 Va. 557, 450 S.E.2d 140 (1994).

100. The trustee's discretionary invasion power provided as follows:

(h) If it should become necessary or desirable, in the judgment and discretion of the said Trustees, to use a part of the corpus of any of the trusts hereinabove in this item established for the benefit of any of the beneficiaries of the said trusts, then and in that event I hereby authorize and empower the said Trustees, in their uncontrolled judgment and discretion, to pay out of the corpus of the trusts any amount needed or required, in their opinion, for such purposes.

Id. at 561, 450 S.E.2d at 143.

101. *Id.* at 559, 450 S.E.2d at 142.

102. *Id.*

103. *Id.* at 561, 450 S.E.2d at 143 (citing *Smith v. Gillikin*, 201 Va. 149, 153-54, 109 S.E.2d 121, 124 (1959)).

there was no evidence that this discretion has been abused, and thus held that "the trial court impermissibly substituted its judgment for that of the trustees."¹⁰⁴

F. *Durable Power of Attorney—Agent's Power to Make Gifts*

The issue before the Fourth Circuit Court of Appeals in *Estate of Ridenour v. C.I.R.*¹⁰⁵ was whether decedent's durable general power of attorney authorized decedent's agent to make gifts under Virginia law, when the power itself made no express grant of such a power. A negative decision in a 1991 case¹⁰⁶ raising the same issue led to the enactment of legislation in 1992 recognizing the existence of an agent's implied power to make gifts in certain cases.¹⁰⁷

Although the present case arose before this 1992 legislation was enacted, the Fourth Circuit found express legislative intent that the new statute be applied retroactively.¹⁰⁸ Indeed, the court concluded that the statute could not only validate powers executed before the legislation became effective, it could also validate gifts made prior thereto.¹⁰⁹ Thus, as decedent in this case had a history of making gifts and decedent's power had the requisite general language, the court concluded that the

104. *Id.* at 562, 450 S.E.2d at 144. A further issue before the court in this case involved the necessity for contingent remainder beneficiaries as necessary parties to the proceeding. The court concluded that (i) these contingent beneficiaries were too remote to require their joinder, and (ii) they were represented anyway, under the doctrine of virtual representation, because of the joinder of others with sufficiently similar interests. *Id.* at 560, 450 S.E.2d at 142-43.

105. 36 F.3d 332 (4th Cir. 1994).

106. *Estate of Casey v. Commissioner*, 58 Tax Ct. Mem. Dec. (CCH) 176 (1989), *rev'd* 948 F.2d 895 (4th Cir. 1991). *See also* Johnson, *supra* note 23, at 901.

107. This legislation provides for an implied power

'in accordance with the principal's personal history of making or joining in the making of lifetime gifts,' if the power (i) provides that the agent can 'do, execute, or perform any act that the principal might or could do,' or (ii) 'evidences the principal's intent to give the attorney-in-fact or agent full power to handle the principal's affairs or deal with the principal's property.'

VA. CODE ANN. § 11-9.5(A) (Cum. Supp. 1995). *See also* Johnson, *supra* note 23, at 886-89.

108. "[T]he statement by the General Assembly [that § 11-9.5 was 'declaratory of existing law'] clearly evidences an intent for the statute to be applied retroactively." *Ridenour*, 36 F.3d at 335.

109. *Id.* at 336.

agent was authorized to make the irrevocable gifts in question in 1987, which occurred five years prior to the enactment of the implied power statute.¹¹⁰

IV. SUMMARY

The volume of estate-related legislation established in recent years continued without any abatement in the 1995 Session. For the most part, this legislation is good in substance and in form. The portions relating to accountings by agents under a durable power of attorney and UCTA's facility of payment provision are far reaching and may serve as examples for other jurisdictions facing the problems discussed in the text. The outcome of the cases from the Supreme Court of Virginia was predictable, with the exception of *Black's* treatment of spousal will contracts. Here it is respectfully submitted that a legislative response will be necessary to bring certainty to this area.

110. *Id.*