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## Virginia Survey of Law: Property Section; Trusts and Estates Section

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## PROPERTY

### I. JUDICIAL DECISIONS

#### A. *Eminent Domain*

In two cases involving disputes over the value of condemned property, the Supreme Court of Virginia discussed judicial review of a commissioner's award. The first case, *State Highway Commissioner v. Foster*,<sup>1</sup> interpreted Section 46.21<sup>2</sup> of the condemnation statute<sup>3</sup> to require a commissioner to base his award both on his own view of the property and on testimonial evidence.<sup>4</sup> The Court addressed the issue of how closely related the final award must be to these two types of evidence, concluding that an award cannot be arbitrary and capricious, but must bear a "reasonable relationship" to both types of evidence presented. The Court explained that what constitutes a "reasonable relationship" depends upon the facts and circumstances of the particular case.<sup>5</sup> As a general guideline, however, a commissioner will not be held strictly to testimonial evidence, even though it may include appraisals of expert witnesses.<sup>6</sup> The second case, *State Highway & Transportation Commissioner v. Carter*,<sup>7</sup> adhered to the established standard of judicial review of a commissioner's award, stating that "'the report of the commissioners is entitled to great weight, is *prima facie* correct, and must be confirmed unless 'good cause be shown against it.'"<sup>8</sup>

Although *Foster* and *Carter* impose no new limits on commissioners' freedom, the two cases are important in revealing a great deference to the findings of the commissioners. Such deference is evidenced by the use of the "arbitrary and capricious" and "prima facie" standards noted above, both of which place a greater burden of proof on the party contesting the commissioner's award.<sup>9</sup> The affirmations of the awards in *Foster* and *Carter* are further evidence of this deference. The practical effect of the Court's ap-

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<sup>1</sup> 216 Va. 745, 222 S.E.2d 780 (1976).

<sup>2</sup> VA. CODE ANN. § 25-46.21 (Repl. Vol. 1973).

<sup>3</sup> VA. CODE ANN. §§ 25-46.1 *et seq.* (Repl. Vol. 1973).

<sup>4</sup> 216 Va. at 747-48, 222 S.E.2d at 782.

<sup>5</sup> *Id.* at 748, 222 S.E.2d at 782. *State Highway & Transp. Comm'r v. Carter*, 216 Va. 639, 222 S.E.2d 776 (1976), also used this standard of review. *See* note 7 *infra* and accompanying text.

<sup>6</sup> 216 Va. at 748-49, 222 S.E.2d at 782-83.

<sup>7</sup> 216 Va. 639, 222 S.E.2d 776 (1976).

<sup>8</sup> *Id.* at 641, 222 S.E.2d at 777, *citing* *Kornegay v. City of Richmond*, 185 Va. 1013, 1024, 41 S.E.2d 45, 50 (1947).

<sup>9</sup> *See generally* 9 WIGMORE ON EVIDENCE § 2494 (3d ed. 1940).

proach, therefore, may be to insulate the commissioners' awards from meaningful appellate review.<sup>10</sup>

### B. Landlord-Tenant

In *Monterey Corp. v. Hart*<sup>11</sup> the Supreme Court of Virginia held a tenant not liable for loss due to fire where the lease did not reveal a clear intention by the tenant to assume such risk. In so ruling, the Court clarified the relationship among common law rules, a state exculpatory statute, and lease provisions allocating liability between landlord and tenant for losses to the leasehold resulting from fire. Plaintiff, the landlord, sued the tenant for fire damages to the leased premises allegedly caused by tenant's negligence. A clause in the lease provided that the "[l]essee will keep . . . the premises in as good order and condition as the same now are, reasonable wear and tear and damages by accidental fire excepted."<sup>12</sup> The Court held that the lease provision exempted the tenant from any liability for damages caused by a fire not intentionally and unlawfully started by him.<sup>13</sup> In reaching its conclusion, the Court examined Section 55-226 of the Virginia Code<sup>14</sup> to decide whether it overrode the allocation of liability provided in the lease. Recognizing that the purpose of Section 55-226 was "to abrogate the harsh common law rule which placed liability for all loss or damage to the leased premises on the lessee, regardless of fault,"<sup>15</sup> the Court concluded that the statute did not impose upon the tenant any additional liability.<sup>16</sup> Evaluating the intent of the parties in defining their obligations, the Court determined that the phrase "accidental fire" as employed in the lease included those fires negligently started, thus relieving the lessee from responsibility for his own negligence.<sup>17</sup>

*Hart* demonstrates that the Supreme Court of Virginia has shifted its analytical approach to leases from traditional estate notions to contract principles.<sup>18</sup> Instead of perceiving the lease as an estate, the Court em-

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<sup>10</sup> See 216 Va. at 642-44, 222 S.E.2d at 779-80 (Carrico, J., dissenting).

<sup>11</sup> 216 Va. 843, 224 S.E.2d 142 (1976).

<sup>12</sup> *Id.* at 844, 224 S.E.2d at 143.

<sup>13</sup> *Id.* at 851, 224 S.E.2d at 147.

<sup>14</sup> VA. CODE ANN. § 55-226 (Repl. Vol. 1974) (lessee who covenants to pay rent or keep premises in good repair need not do so when fire destroys premises unless fire is due to fault or negligence of lessee and unless lease manifests a different intent).

<sup>15</sup> 216 Va. at 845, 224 S.E.2d at 144.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 850-51, 224 S.E.2d at 147.

<sup>18</sup> Traditional property analysis would have placed liability on the tenant, no matter what caused the fire, unless the lease explicitly stated otherwise. Under the traditional analysis courts perceived the lease as a conveyance of an interest in land; thus, they viewed a fire as damaging the tenant's present, possessory estate and the landlord's non-possessory future interest. For a discussion of the traditional and modern approaches to leaseholds, see *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

ployed contractual notions in its construction of the lease, such as the reasonable expectations of laymen.<sup>19</sup> The result of this change in approach is a shift of liability from the tenant to the landlord.<sup>20</sup> A contrary construction of the lease, which would have required both lessor and lessee to carry fire insurance,<sup>21</sup> would have fostered inefficiency. *Hart* thus reflects one of the main rationales for relieving the tenant of liability: the need to achieve a more economical allocation of risk.

### C. Nonpossessory Interests

During the survey period, several cases restated traditional rules of property in the area of non-possessory interests.<sup>22</sup> In *Phipps v. Leftwich*,<sup>23</sup> the most significant case, the Supreme Court of Virginia decided that a grant of mineral rights did not permit the owner of those rights to strip mine the property, absent explicit authorization. Because strip mining was unknown in the county where the property was located at the time the original parties executed the deed, the Court concluded that these parties only contemplated the use of underground mining.<sup>24</sup> Although recognizing that appellants could exploit developments in modern technology, the Court declared that “[a] change . . . from underground mining, which leaves the

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<sup>19</sup> 216 Va. at 850-51, 224 S.E.2d at 147.

<sup>20</sup> See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. Ct. App. 1968); *Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). The Court's interpretation of Section 55-226 further illustrates the shift in liability from the tenant to the landlord. See notes 14-17 *supra* and accompanying text.

<sup>21</sup> 216 Va. at 846-47, 224 S.E.2d at 145.

<sup>22</sup> In *Janel Corp. v. Coastal Inv. Corp.*, No. 75-1600 (4th Cir., Feb. 10, 1976), the Fourth Circuit restated the traditional formula for measuring damages when an encumbrance breaches a covenant in a deed. In *Haynie v. Brenner*, 216 Va. 722, 222 S.E.2d 546 (1976), the Supreme Court of Virginia, after restating the requirements necessary for the creation of an easement by implication, focused on the requirement that the easement be reasonably necessary for the enjoyment of the dominant estate. Because convenience is not tantamount to reasonable necessity, the Court decided that no easement by implication arose. *Id.* at 724, 222 S.E.2d at 548. In a third case, *Bruton v. Wolter*, 216 Va. 311, 218 S.E.2d 438 (1975), the Court applied the established rule that restrictive covenants should be strictly construed against those trying to enforce them. *Bruton* exemplifies the modern trend to allow free, unimpeded use of land in order to achieve maximum utilization of resources. In *Bunn v. Offutt*, 216 Va. 681, 222 S.E.2d 522 (1976), the Court ruled that language included in the land sales contract, but not in the deed of conveyance, created a revocable license, not an easement. Because licenses are not assignable, subsequent purchasers from the licensee could not enforce the right granted in the sales contract to use a swimming pool. The Court reasoned that because the deed was silent about the right of use, the grantor never intended the right to extend to subsequent purchasers.

<sup>23</sup> 216 Va. 706, 222 S.E.2d 536 (1976).

<sup>24</sup> *Id.* at 711, 222 S.E.2d at 540.

surface substantially usable by the owner of the freehold, to surface mining, which destroys what was reserved by the grantor, is not permissible."<sup>25</sup>

Because of the increase in demand for coal as an energy source, *Phipps* is a significant decision. By limiting strip mining, *Phipps* represents a victory for conservationists.<sup>26</sup> This triumph, however, may prove hollow. The Court in *Phipps* applied in its analysis of grants of mineral rights the ad hoc test employed in Pennsylvania and Kentucky.<sup>27</sup> Under this approach courts construe the grant by determining the intent of the parties according to the particular circumstances of each case.<sup>28</sup> Whether the original parties knew of the practice of strip mining would be one of the circumstances that the court would consider.<sup>29</sup> Unfortunately, the Court did not reconcile one of this test's possible outcomes—that strip mining would be allowed—with the conflicting philosophy, expressed in the opinion, that the owner of mineral rights should not destroy the grantor's reserved estate. This problem must await future resolution.<sup>30</sup>

In *Mid-State Equipment Co. v. Bell*<sup>31</sup> the Supreme Court of Virginia held that the equitable doctrine of implied restrictive covenants precluded the owner of a parcel of land from using the property commercially. The deed conveying the land to the defendant-appellant had declared that the

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<sup>25</sup> *Id.* at 713, 222 S.E.2d at 541.

<sup>26</sup> *See, e.g.*, 216 Va. at 711-12, 222 S.E.2d at 540:

We have been unwilling to construe a deed so as to hold that the owner of a mineral estate has the right to destroy the surface, unless such right has been expressed in unmistakably plain terms.

This language is indicative of a strong policy to conserve the land.

<sup>27</sup> *Compare, e.g.*, *Buchanan v. Watson*, 290 S.W.2d 40 (Ky. 1956), and *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968), with *Rochez Bros. v. Duricka*, 374 Pa. 262, 97 A.2d 825 (1953). *Department of Forests & Parks v. George's Creek Coal & Land Co.*, 250 Md. 125, 242 A.2d 165, *cert. denied*, 393 U.S. 935 (1968), is a good example of a court construing a deed by considering the totality of the circumstances surrounding the execution of the instrument. Although the deed did not expressly grant the right to strip mine, the Maryland court ruled that the parties did not intend to exclude it because the process was a known, practical method. Another reason for the decision was the condition of the land; it was rocky, remote, unfit for agriculture, unimproved, and generally valueless once the defendant removed the coal and timber.

<sup>28</sup> 216 Va. at 714-15, 222 S.E.2d at 542.

<sup>29</sup> *Id.* at 713, 222 S.E.2d at 541, *citing, e.g.*, *Department of Forests & Parks v. George's Creek Coal & Land Co.*, 250 Md. 125, 242 A.2d 165, *cert. denied*, 393 U.S. 935 (1968).

<sup>30</sup> For an unusual solution to this balancing question see *Commonwealth v. Fitzmartin*, 376 Pa. 390, 102 A.2d 893 (1954). In *Fitzmartin* the court reasoned that the damage caused by strip mining would be only temporary because the mountainous terrain would fall within coverage of the Bituminous Coal Open Pit Mining Conservation Act, Pamphlet L. 1198, No. 418 (1945), as amended PA. STAT. ANN. tit. 52, §§ 1396.1 *et seq.* (1949), which required the miner to fill in the open pit within one year and plant trees, shrubs, and grass within three years after the operation was completed. Therefore, the court held that strip mining was permitted. 376 Pa. at 398, 102 A.2d at 896-97.

<sup>31</sup> 217 Va. 133, 225 S.E.2d 877 (1976).

parcel was not subject to the residential use restrictions affecting a neighboring subdivision.<sup>32</sup> Moreover, in response to a request from the defendant-appellant, a realtor had advised that the residential restrictions did not apply to the land.<sup>33</sup> Nevertheless, the Court concluded that the parcel in question was subject to the residential use limitations. In reaching this decision, the Court reaffirmed the long-established doctrine that

“when, on a transfer of land, there is a covenant or even an informal contract or understanding that certain restrictions in the use of the land conveyed shall be observed, the restrictions will be enforced by equity, at the suit of the party or parties intended to be benefited thereby, against any subsequent owner of the land except a purchaser for value without notice of the agreement.”<sup>34</sup>

According to the Court, the intent of the original grantor determines the existence of an equitable right to enforce the restrictive covenants. To ascertain this intent the Court considered “the words used in the restriction, the plats, the deeds, such surrounding circumstances as the parties are presumed to have considered when their minds met, the purpose to be achieved by the covenant, and the use of the property . . .”<sup>35</sup> The Court concluded that the facts demonstrated an intent by the original grantor to create a general scheme of residential development including the parcel in controversy.<sup>36</sup> Moreover, the Court determined that the defendant-appellant at least had inquiry notice of these restrictions because of the information discoverable by a ground view of the property. The fact that in the instant case the inquiry had led to an erroneous conclusion did not establish lack of notice.<sup>37</sup>

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<sup>32</sup> The deed stated: “This land is specifically not subject to subdivision restrictions of record of Jefferson Manor.” *Id.* at 139, 225 S.E.2d at 883.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 140-41, 225 S.E.2d at 884, quoting *Cheatham v. Taylor*, 148 Va. 26, 37-38, 138 S.E. 545, 548 (1927). The doctrine of reciprocal servitudes or negative easements originated with *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (Ch. 1848).

<sup>35</sup> 217 Va. at 141, 225 S.E.2d at 884.

<sup>36</sup> *Id.* at 142, 225 S.E.2d at 885. Of particular importance to the Court were the facts that the grantor had previously used the property in question for residential purposes and had intended the property to be reserved for such use, that the restrictions were substantially uniform, and that even though the parcel appeared as two unnumbered lots on the plat of the subdivision the residential restrictions on the plat referred to “[a]ll lots in this subdivision,” not all numbered lots. In addition, a previous conveyance by the original grantor to the defendant-appellant’s seller had referred specifically to the plat with the restrictions. *Id.*

<sup>37</sup> *Id.* at 143, 225 S.E.2d at 885. See also *Sanborn v. McLean*, 233 Mich. 227, 232-33, 206 N.W. 496, 498 (1925). The dissent in *Mid-State Equipment* reasoned that the deliberate exclusion of the land in question from the numbered lots on the plat implied that the grantor did not intend to subject the land to the residential restrictions. It also concluded that the purchaser should not be put on inquiry notice because the probability of

*Mid-State Equipment* restates Virginia's law on implied negative easements.<sup>38</sup> The decision is important because of its application of this theory to a situation involving performance by the purchaser of his duty to inquire. Since the purchaser in *Mid-State Equipment* exhausted all precautionary measures before buying the land, the case serves as a warning to attorneys to be cautious in similar situations.

#### D. Land Sales

Two cases during the survey period dealt with option contracts for the sale of land. The first, *Pruner v. Brown*,<sup>39</sup> stated Virginia's position on the interpretation of the lease phrase "first right to purchase." There are two lines of authority on the proper construction of this phrase.<sup>40</sup> One theory holds that the word "first" is a term of art creating an option (a right of first refusal). According to this theory, if the lessor plans to sell, he must offer the realty to the lessee first.<sup>41</sup> A second theory refuses to accept "first" as a term having one established legal meaning. Instead, it determines the meaning of the phrase from an examination of the circumstances and facts surrounding the whole document.<sup>42</sup>

In *Pruner* the lease contained more than the phrase "first right to purchase." It specified the purchase price, the terms and manner of financing, and the period during which the right could be exercised.<sup>43</sup> Believing that the second line of cases was more likely to ratify the true intentions of the parties, the Court applied that approach and concluded that the specificity of the lease revealed an intention to sell, thus creating an option.<sup>44</sup>

The second case, *Wood v. Wood*,<sup>45</sup> differentiated an option contract from a contract to sell with a condition precedent. Holding that the agreement in issue was a bilateral sales contract rather than an option contract, the

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discovering that the restrictive easement applied to the parcel was too low. 217 Va. at 143-44, 225 S.E.2d at 885-86 (Cochran, J., dissenting).

<sup>38</sup> The Virginia law on reciprocal negative easements is similar to the established law in other jurisdictions. See, e.g., *Snow v. Van Dam*, 291 Mass. 477, 197 N.E. 224 (1935). See generally RESTATEMENT OF PROPERTY §§ 539, 541-f (1944); 2 AMERICAN LAW OF PROPERTY §§ 9.24-40 (A. J. Casner ed. 1952); Reno, *The Enforcement of Equitable Servitudes in Land*, 28 VA. L. REV. 951 (1942).

<sup>39</sup> 216 Va. 885, 223 S.E.2d 890 (1976).

<sup>40</sup> For a discussion of these two divergent lines of cases, see Annot., 34 A.L.R.2d 1158 (1954).

<sup>41</sup> *Id.* at 1160 & n.6, citing, e.g., *Stein v. Reising*, 359 Mo. 804, 224 S.W.2d 80 (1949), *R.I. Realty Co. v. Terrell*, 254 N.Y. 121, 172 N.E. 262 (1930).

<sup>42</sup> 216 Va. at 887, 223 S.E.2d at 892, citing *Tantum v. Keller*, 95 N.J. Eq. 466, 123 A. 299 (Ch.), *aff'd*, 96 N.J. Eq. 672, 126 A. 925 (1924). See also Annot., 34 A.L.R.2d at 1161.

<sup>43</sup> 216 Va. at 886, 223 S.E.2d at 891.

<sup>44</sup> *Id.* at 887, 223 S.E.2d at 892.

<sup>45</sup> 216 Va. 922, 224 S.E.2d 159 (1976).

Court decided that a provision allowing the purchaser to rescind the contract "at his sole option" if he were unable to have the property rezoned merely created a condition precedent.<sup>46</sup> According to the Court, "[t]he whole tenor of the instrument [was] one of sale . . . ." <sup>47</sup> *Wood* reveals the Court's preference for interpreting ambiguous land sale documents as bilateral contracts rather than as options.<sup>48</sup>

In another land sales case, *Miller v. Reynolds*,<sup>49</sup> the Supreme Court of Virginia decided that a condition in the sales contract did not merge into the deed. The dispute arose when the sellers refused to cancel the conveyance after a condition contained in the sales contract failed.<sup>50</sup> The deed made no mention of the condition, but the sellers had made an express representation, orally and in writing, that the condition would be fulfilled easily. Despite the general rule that the provisions of a sales contract merge into the deed and do not survive the closing,<sup>51</sup> the Court recognized that deeds seldom contain all the provisions customarily found in contracts to convey, that the condition was the main inducement to buy, and that the condition did not qualify or affect the title to the land.<sup>52</sup> Thus, the Court affirmed the equitable decree of the trial court granting rescission and cancellation of the conveyance.

Two cases during the survey period discussed remedies for breach of a land sales contract. The first, *Reid v. Allen*,<sup>53</sup> analyzed specific performance as a remedy. Three of four tenants in common had executed a sales agreement for their land. When the fourth refused to execute the same contract, the purchaser sought specific performance from two of the original tenants for one-half interest in the land. In denying the purchasers' request for specific performance, the Court found that a sale of one-half of the land was never contemplated by any of the parties to the agreement<sup>54</sup> and observed that specific performance should have been sought against all of the vendors.<sup>55</sup> Though a traditional remedy for breach of a contract to sell land, specific performance is not available to force parties to do what they never contemplated.

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<sup>46</sup> *Id.* at 925, 224 S.E.2d at 161.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*, citing *Shirley v. Van Every*, 159 Va. 762, 167 S.E. 345 (1933).

<sup>49</sup> 216 Va. 852, 223 S.E.2d 883 (1976).

<sup>50</sup> In the real estate purchase contract, the sale had been conditioned upon the buyer obtaining a building permit and percolation for a septic system. *Id.* at 853, 223 S.E.2d at 884.

<sup>51</sup> *Id.* at 854, 223 S.E.2d at 885, citing 8A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 4458 (Repl. Vol. 1963).

<sup>52</sup> 216 Va. at 855-56, 223 S.E.2d at 885.

<sup>53</sup> 216 Va. 630, 221 S.E.2d 166 (1976).

<sup>54</sup> *Id.* at 632, 221 S.E.2d at 168-69.

<sup>55</sup> *Id.* at 633, 221 S.E.2d at 169.

The second case, *Ingram, Inc. v. Lunsford*,<sup>56</sup> suggested that an award of damages would be an appropriate remedy for breach of a sales agreement resulting from subsequent inability to perform. Seller, a tenant by the entirety, executed a contract to sell his real estate. When the seller's wife refused to sign the deed, the buyer sued the seller for contract damages. The Court concluded that although the seller could not convey good title without his wife's signature, he was, nevertheless, answerable in damages for his failure to perform because legally he could contract to sell that which he did not own.<sup>57</sup>

#### E. Miscellaneous<sup>58</sup>

In *McCauley v. Phillips*<sup>59</sup> the Supreme Court of Virginia addressed the problem of allocating liability for the natural consequences of land development. The dispute arose when the appellee improved his land by installing a drain pipe, which subjected the appellants' lower land to drainage from surface water. The Court affirmed the lower court ruling that the appellants must bear the loss for damages to their property. Asserting that surface water was a "common enemy" against which each landowner could protect,<sup>60</sup> the Court noted that there was no evidence of substantial damage to appellants' land.<sup>61</sup> Although recognizing "that a landowner may not collect surface water into an artificial channel and discharge it in concentrated form upon the land of another to his injury,"<sup>62</sup> the Court upheld the right of every property owner reasonably to develop his property without being liable for the natural consequences of such development.<sup>63</sup> *McCauley*, however, neglected to define what constitutes reasonable development of property, an essential question that now must await future resolution.

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<sup>56</sup> 216 Va. 785, 224 S.E.2d 129 (1976).

<sup>57</sup> *Id.* at 786, 224 S.E.2d at 130. The Court precluded the possibility of specific performance as a remedy. *Id.* at 787, 224 S.E.2d at 130.

<sup>58</sup> For a recent restatement of Virginia's law on adverse possession, see *Walton v. Rosson*, 216 Va. 732, 222 S.E.2d 553 (1976).

<sup>59</sup> 216 Va. 450, 219 S.E.2d 854 (1976).

<sup>60</sup> *Id.* at 453, 219 S.E.2d at 858. Virginia has adopted a modified version of the common enemy doctrine. Under this rule surface water is considered to be a common enemy against which each landowner may guard, provided that the protection used does not unnecessarily or wantonly damage the property of another. 6A AMERICAN LAW OF PROPERTY § 28.63, at 189 (A. J. Casner ed. 1954). For a recent reaffirmation of Virginia's stance on the surface water drainage problem see *Seventeen, Inc. v. Pilot Life Ins. Co.*, 215 Va. 74, 205 S.E.2d 648 (1974). A substantial number of states, however, follow one of two other rules. For a thoughtful discussion of all three rules see *Keys v. Romley*, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966).

<sup>61</sup> 216 Va. at 455, 219 S.E.2d at 859.

<sup>62</sup> *Id.* at 454, 219 S.E.2d at 858.

<sup>63</sup> *Id.* at 453-54, 219 S.E.2d at 858.

## II. LEGISLATION

A. *Eminent Domain*

The General Assembly made several important changes in the eminent domain statutes.<sup>64</sup> First, the legislature amended Section 33.1-89<sup>65</sup> by explicitly imposing an affirmative duty on the State Highway and Transportation Commissioner to disclose to property owners all foreseeable property damage or enhancement resulting from highway construction. The amendments provide specific standards for evaluating the adequacy of information disclosed in a briefing with the property owner.<sup>66</sup> The amended statute also implicitly requires the commissioner to negotiate, though not necessarily agree to, a settlement with owners of property not taken under eminent domain, but subject, nevertheless, to prospective damage from highway construction.<sup>67</sup> By imposing an affirmative duty on a state official, the General Assembly has taken a bold step towards protecting property owners who heretofore may have been unaware of the full consequences of highway construction.

Another change in an eminent domain statute<sup>68</sup> lessens the requirements for exchanging property with a railroad or a public utility. The amended statute permits the Department of Highways and Transportation to acquire land to exchange for land owned *or occupied* by any railroad or utility under a claim of right or with the apparent acquiescence of the private landowner. Prior to the amendment, the Department could execute an exchange of land only if the utility or railroad had a property interest in the land. Moreover, the Supreme Court of Virginia previously had ruled that a power company could not be reimbursed for relocating transmission lines from condemned land when those lines had been erected merely with the landowner's permission. In reaching this decision, the Court reasoned that the company's permits were licenses, not property interests, which were

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<sup>64</sup> VA. CODE ANN. §§ 33.1-89 *et seq.* (Repl. Vol. 1976).

<sup>65</sup> Va. Acts of Assembly 1976, ch. 430, *codified at* VA. CODE ANN. § 33.1-89 (Repl. Vol. 1976).

<sup>66</sup> Adequate briefing includes:

- (i) the giving of plats and profiles of the project, showing cuts and fills, together with elevations and grades; (ii) explanation, in lay terms, of all proposed changes in profile, elevation and grade of highway and entrances, including the elevations of proposed pavement and shoulders . . . .

VA. CODE ANN. § 33.1-89 (Repl. Vol. 1976).

<sup>67</sup> Compare VA. CODE ANN. § 33.1-89 (Repl. Vol. 1976) ("In negotiating with a property owner with respect to payment for prospective damage to property not taken incident to the purposes of this section . . . ."), *with id.* ("[T]he requirements of this section . . . shall in no way be construed . . . to create any right to compensation.")

<sup>68</sup> Va. Acts of Assembly 1976, ch. 380, *codified at* VA. CODE ANN. § 33.1-96 (Repl. Vol. 1976).

revoked by the condemnor.<sup>69</sup> The amendment remedies this situation by allowing reimbursement for the loss of mere occupancy.

### B. Land Sales

The General Assembly amended Section 11-2<sup>70</sup> to require a writing by the party to be charged for brokerage contracts. The Supreme Court of Virginia previously had held that oral brokerage contracts for the sale of realty were service contracts and therefore not within the Statute of Frauds provisions governing the sale of land.<sup>71</sup> In rejecting the Court's approach, this amendment supplies the same protection against fraudulent, perjured claims that the Statute of Frauds normally provides.

### C. Mortgage and Foreclosure

During the survey period, the General Assembly increased the flexibility in the statutes governing mortgage and foreclosure. One amendment<sup>72</sup> grants new discretion to the trustee under a deed of trust in the event of a default on a debt secured by property. Before the amendment, the trustee was required to take possession of the property and sell it if so requested by any beneficiary. The amendment now permits the trustee to exercise discretion in deciding whether to allow a debtor to remain in possession. The amendment also insulates the trustee from unintentional waiver of an acceleration clause by allowing the written notice of a proposed sale to operate as an exercise of the right of acceleration.

Amendments to Section 55-60<sup>73</sup> also increase flexibility by providing that the phrase "reinstatement permitted" as used in any deed of sale shall be construed to permit the creditor to accept delinquent payments or other cure of default even after he has exercised his right of acceleration. The amendments grant creditors more leeway.

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<sup>69</sup> *Potomac Elec. Power Co. v. Fugate*, 211 Va. 745, 180 S.E.2d 657 (1971), discussed in *Property, 1970-1971 Virginia Survey*, 57 VA. L. REV. 1552, 1552-53 (1971).

<sup>70</sup> Va. Acts of Assembly 1976, ch. 157, codified at VA. CODE ANN. § 11-2(6a) (Supp. 1976).

<sup>71</sup> *Reich v. Kimnach*, 216 Va. 109, 216 S.E.2d 58 (1975), discussed in *Property, 1974-1975 Virginia Survey*, 61 VA. L. REV. 1834, 1839 (1975).

<sup>72</sup> Va. Acts of Assembly 1976, ch. 257, codified at VA. CODE ANN. § 55-59(6) (Supp. 1976).

<sup>73</sup> Va. Acts of Assembly 1976, ch. 155, codified at VA. CODE ANN. § 55-60(5a) (Supp. 1976).

## TRUSTS AND ESTATES

### I. JUDICIAL DECISIONS

#### A. Powers of Appointment

In *Holzbach v. United Virginia Bank*<sup>1</sup> the Supreme Court of Virginia held that the donee of a power of appointment must comply strictly with the donor's requirement that the donee refer specifically to the power when executing it. The trustee of the deceased donor's estate requested the Court to decide whether the power of appointment over the corpus of a marital trust had been exercised effectively by the will of the donee.<sup>2</sup> The trust, established by the donor's will, paid the income from its corpus to the donee (the donor's wife) for life.<sup>3</sup> With respect to disposition of the corpus the donor's will provided:

My wife . . . is hereby given . . . a general power of appointment, by specific reference to the powers granted herein, in her will, in favor of her estate, or, at her election, in favor of any other party. . . .<sup>4</sup>

The donor's will stated further that if the donee failed to execute the appointment, the unappointed corpus was to become part of the residual trust to be distributed among the issue of the donor's brothers.<sup>5</sup>

The will of the donee, prepared when she was fully cognizant of her power of appointment,<sup>6</sup> bequeathed all of her estate to her sister, "be it real, personal or mixed, or in which I may have a power of appointment of

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<sup>1</sup> 216 Va. 482, 219 S.E.2d 868 (1975).

<sup>2</sup> *Id.* at 483, 219 S.E.2d at 870.

<sup>3</sup> The Court explained the purpose of the arrangement:

Donor's will, read against the background of death tax laws, indicates that his purpose was to provide for his wife during her lifetime and, thereafter, for the remaindermen he named. For the benefit of both, he wanted to avail his estate of the maximum marital deduction permitted by federal estate tax laws and regulations. To accomplish this, it was necessary to couple his wife's life estate with a general power of appointment. INT. REV. CODE OF 1954, § 2056(b)(5). To validate the deduction, the power of appointment must be tailored to fit the rules prescribed by the tax regulations. A donor's requirement that the power must be exercised "by specific reference to the power" does not defeat the deduction. Treas. Reg. § 20.2056(b)-5(g)(4). Donor adopted this requirement and then designated the beneficiaries to whom his property would pass in the event his wife failed to exercise the power in the manner required.

*Id.* at 486, 219 S.E.2d at 872.

<sup>4</sup> *Id.* at 483, 219 S.E.2d at 870.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 483-84, 219 S.E.2d at 870.

whatsoever nature . . . ." <sup>7</sup> In analyzing whether this provision of the donee's will effectively exercised the power of appointment, the Court first evaluated the effect of the donor's requirement that specific reference to the power be made in the donee's will. The general rule in Virginia has been that a donor may impose special requirements on the manner in which a donee must execute a power of appointment.<sup>8</sup> The Court rejected the appellant's argument that the General Assembly had modified this general rule by statute.<sup>9</sup> The Court concluded that the requirement that the donee make specific reference to the power of appointment did "not entail 'some additional or other form of execution' within the intendment of Code § 64.1-50."<sup>10</sup> Thus, noncompliance with the particular requirement invalidated the appointment.

The appellant also contended that by operation of law the residuary clause of the donee's will constituted a valid exercise of the power to appoint.<sup>11</sup> In response the Court narrowed Section 64.1-67 of the Virginia Code to exclude situations where the donor explicitly imposes special requirements upon the exercise of the general power to appoint.<sup>12</sup> The

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<sup>7</sup> *Id.* at 483, 219 S.E.2d at 870.

<sup>8</sup> *Id.* at 484, 219 S.E.2d at 871.

<sup>9</sup> See VA. CODE ANN. § 64.1-50 (Repl. Vol. 1973), providing:

No appointment made by will, in exercise of any power, shall be valid unless the same be so executed that it would be valid for the disposition of the property to which the power applies, if it belonged to the testator; and every will so executed shall be a valid execution of a power of appointment by will, notwithstanding the instrument creating the power expressly require that a will made in execution of such power shall be executed with some additional or other form of execution or solemnity.

<sup>10</sup> 216 Va. at 486, 219 S.E.2d at 872. The Court interpreted Section 64.1-50 to mean that an exercise of the power of appointment by will is effective if the donee exercises his will in accordance with all the formalities required by law. Furthermore, if the donee complies with these formalities, the appointment is valid even though the donee failed to fulfill some additional form of execution. The Court decided, without explanation, that the requirement of specific reference was not "some additional or other form of execution" as intended by the statute. *Id.* at 485-86, 219 S.E.2d at 871-72.

<sup>11</sup> *Id.* at 485, 219 S.E.2d at 871, citing VA. CODE ANN. § 64.1-67 (Repl. Vol. 1973), which provides:

A devise or bequest shall extend to any real or personal estate . . . which the testator has power to appoint as he may think proper and to which it would apply if the estate were his own property, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

<sup>12</sup> 216 Va. at 485, 219 S.E.2d at 871. The Court construed Section 64.1-67 to mean that a general residuary clause in the donee's will effectively exercises a general testamentary power of appointment, unless a contrary intention exists in the donor's will. Although the Court failed to explain why it concluded that the statute was inapplicable to the *Holzbach* facts, it probably reasoned that the imposition of a special requirement on the general power was sufficient evidence of a contrary intention.

Court's statutory interpretations combine to mandate strict compliance with the donor's requirement. In considering whether such compliance existed in the donee's will, the Court announced that the test was "not whether donee intended to appoint but rather whether donee *manifested* her intent in the manner prescribed by the donor, *i.e.*, by making specific reference 'in her will' to the power granted by donor's will."<sup>13</sup> Applying this test to the facts, the Court concluded that the donee's will made only a general reference to powers of appointment and thus failed to comply with the donor's requirement.<sup>14</sup>

In a strong dissent two justices contended that strict adherence to the donor's directions is not always required and often is undesirable.<sup>15</sup> The dissent argued that the Treasury did not intend its regulation permitting a donor to require specific reference to the power of appointment<sup>16</sup> to be a technical tool depriving the donee of the power, but rather intended it to assure the donor that the donee would exercise the power consciously and knowingly. The dissent asserted that the language of the donee's will manifested such a consciousness.<sup>17</sup>

One can criticize the Court for failing to justify its statutory interpretations. First, the Court's interpretation of Section 64.1-50 does not clarify what "additional or other form of execution" is within the intendment of that section. The Court's construction may be explained only as an attempt to ease a rather recent tension between the section and the marital deduction provision of the federal estate tax laws.<sup>18</sup> Though for tax purposes a husband or wife might give his or her spouse a general power of appointment, the donor frequently encumbers that power in the hope that the encumbrance will thwart a valid execution of the power.<sup>19</sup> The donor thus gains a tax advantage but assures ultimate delivery of his estate to the intended recipient. Jurisdictions having statutes such as Section 64.1-50, which increase the flexibility of the donee in exercising the power of appointment, therefore must decide whether this increased flexibility should apply to donors attempting to exploit the tax break allowed by the marital trust

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<sup>13</sup> *Id.* at 485-86, 219 S.E.2d at 871 (emphasis in original).

<sup>14</sup> *Id.* at 487, 219 S.E.2d at 872.

<sup>15</sup> *Id.* at 488, 219 S.E.2d at 873 (Harrison and Cochran, JJ., dissenting).

<sup>16</sup> Treas. Reg. § 20.2056(b)-5(g)(4) (1939).

<sup>17</sup> 216 Va. at 487, 219 S.E.2d at 872-73. The dissent reasoned that the donee's language deliberately distinguished between her property and the appointive property. The dissent also pointed out that powers of appointment are favored in Virginia and that a general power of appointment is designed to be a flexible tool, the use of which should be encouraged. *Id.* at 488, 219 S.E.2d at 873.

<sup>18</sup> INT. REV. CODE OF 1954, § 2056.

<sup>19</sup> See Sparks, *A Decade of Transition in Future Interests*, 45 VA. L. REV. 339, 373 (1959).

provision.<sup>20</sup> Apparently the Supreme Court of Virginia has concluded that such a statute should not limit the donor's power.

A second difficulty inheres in the Court's interpretation of Section 64.1-67. This statute, as well as its forerunner in case law, *Machir v. Funk*,<sup>21</sup> allows a general power of appointment to be executed by a residuary clause of the donee's will. Commentators have criticized this rule<sup>22</sup> because it presumes not only that the donee intended to exercise the power, but also that he intended to appoint to the residuary devisee or legatee of his estate a general testamentary power.<sup>23</sup> The rule also leads to theoretical inconsistencies in the law of power of appointment.<sup>24</sup> Unfortunately, *Holzbach* leaves unclear the scope and continued validity of the rule in Virginia.

*Holzbach's* statutory interpretations permit several power of appointment problems to linger. The opinion injects formal stumbling blocks into the drafting of wills by requiring strict compliance with the donor's conditions. Because of this holding practitioners in Virginia should review the power of appointment provisions in the wills of their clients to insure compliance with *Holzbach's* insistence on form as well as substance.

### B. Resulting Trusts

Two cases during the survey period reviewed Virginia's requirements for the creation of a resulting trust. In *Salyer v. Salyer*<sup>25</sup> the Supreme Court of Virginia found that a resulting trust had been created; in *Muth v. Gamble*<sup>26</sup> the Court held otherwise. Both cases applied the "clear and

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<sup>20</sup> *Id.*

<sup>21</sup> 90 Va. 284, 18 S.E. 197 (1893), cited in *Holzbach v. United Virginia Bank*, 216 Va. 482, 485, 219 S.E.2d 868, 871 (1975). *Machir* held that a residuary clause in the will of a donee of a power of appointment operates as an execution of that power, unless the will evidences contrary intention.

<sup>22</sup> See L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 973, at 430 (2d ed. 1956); Note, *Powers of Appointment in Virginia*, 47 VA. L. REV. 711, 721-22 (1961). Apparently this principle is the minority rule.

<sup>23</sup> See, e.g., Note, *supra* note 22, at 721-22.

<sup>24</sup> For example, in *Shriners Hosp. for Crippled Children v. Citizens Nat'l Bank*, 198 Va. 130, 92 S.E.2d 503 (1956), cited in *Holzbach v. United Virginia Bank*, 216 Va. 482, 484, 219 S.E.2d 868, 871 (1975), the Supreme Court of Virginia refused to presume that a donee intended to blend his assets with the appointive property; the residuary clause rule, however, necessarily presumes this. See Note, *supra* note 22, at 722; see generally Sparks, *supra* note 19, at 370-72.

<sup>25</sup> 216 Va. 521, 219 S.E.2d 889 (1975). In this case two brothers purchased two parcels of real estate; although the two had agreed that each would farm separately, they recorded the title for each tract in both names so they could more easily obtain a loan. The equities clearly were with the surviving brother rather than with the heirs of the deceased brother.

<sup>26</sup> 216 Va. 436, 219 S.E.2d 894 (1975). This case involved a suit brought by two of the deceased's grandchildren over some real property conveyed by their mother to their

convincing evidence" standard to the question of whether a resulting trust existed.<sup>27</sup>

Several important factors influenced the Court's determinations in *Salyer* and *Gamble* as to whether the evidence was clear and convincing. First, the Court noted that if a deceased person holds legal title to disputed realty, Section 8-286 of the Virginia Code<sup>28</sup> requires corroboration of any evidence purporting to establish a resulting trust.<sup>29</sup> Second, the Court determined whether any facts contradicted the evidence offered as proof of the establishment of a resulting trust and considered the strength of that contradicting evidence.<sup>30</sup> Third, the Court considered the equities of the particular case, taking into account the character and behavior of the parties involved.<sup>31</sup> These three factors clarify some of the aspects of the "clear and convincing" standard.

### G. *Cy Pres*

In *United States v. Hughes Memorial Home*<sup>32</sup> the U.S. District Court for the Western District of Virginia concluded that racially discriminatory terms of a trust benefiting an orphanage violated the Fair Housing Act of 1968,<sup>33</sup> but permitted the dominant intent of the trust to survive by removing the racial restrictions. The settlor established the trust in 1922 to organize and maintain "an orphanage for the white children of the States of Virginia and North Carolina . . ." <sup>34</sup> Acting in good faith the trustees interpreted this provision to preclude non-whites from becoming residents.<sup>35</sup> Subsequently, the United States brought suit, alleging that the children's home violated the Fair Housing Act of 1968 by making dwellings unavailable to black children.

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grandmother, and then purportedly conveyed to a third grandchild. The sole question presented was whether the mother's conveyance of her property to the grandmother, which was without consideration, created a resulting trust.

<sup>27</sup> 216 Va. at 525, 219 S.E.2d at 893; 216 Va. at 440, 219 S.E.2d at 898. For a judicial definition of "clear and convincing evidence" see 216 Va. at 525 n.4, 219 S.E.2d at 893 n.4.

<sup>28</sup> VA. CODE ANN. § 8-286 (Repl. Vol. 1957).

<sup>29</sup> 216 Va. at 522-23, 219 S.E.2d at 891; 216 Va. at 439-40, 219 S.E.2d at 896-97.

<sup>30</sup> 216 Va. at 527, 219 S.E.2d at 894; 216 Va. at 440, 219 S.E.2d at 897-98.

<sup>31</sup> 216 Va. at 526-27, 219 S.E.2d at 893-94; 216 Va. at 440, 219 S.E.2d at 897-98.

<sup>32</sup> 396 F. Supp. 544 (W.D. Va. 1975).

<sup>33</sup> 42 U.S.C. §§ 3601 *et seq.* (1970), *as amended*, (Supp. V, 1975).

<sup>34</sup> 396 F. Supp. at 547 n.2.

<sup>35</sup> Because of the exclusion of non-whites from the orphanage, and in light of recent civil rights legislation, public welfare departments had to cease making referrals to the home. Also as a consequence, the home no longer received assistance from such federal programs as the milk program. Thus, the home was operating substantially below its capacity and at a loss. *Id.* at 548.

The federal district court held that although the discriminatory policies required by the trust violated the Fair Housing Act, the home could continue to operate by disregarding the racial restrictions.<sup>36</sup> In reaching this decision the court recognized that a Virginia statute<sup>37</sup> favored the application of the *cy pres* doctrine.<sup>38</sup> This doctrine is

[t]he principle under which the courts thus attempt to save a charitable trust from failure by carrying out the more general purpose of the testator and carrying out approximately though not exactly his more specific intent . . . .<sup>39</sup>

The reasoning underlying the *cy pres* doctrine is that “[t]he testator would presumably have desired that the property should be applied to purposes as nearly as may be like the purposes stated by him rather than that the trust should fail altogether.”<sup>40</sup> Only by identifying the racial restrictions as incidental to the trust’s main purpose could the court apply the *cy pres* doctrine.<sup>41</sup> *Hughes Memorial Home* apparently is the first application of Virginia’s *cy pres* doctrine to a document with racial restrictions.

#### D. Wills<sup>42</sup>

In *Papen v. Papen*<sup>43</sup> the Supreme Court of Virginia held that the statute revoking all provisions in a will in favor of a spouse divorced *a vinculo matrimonii* applied to “wills executed and divorces obtained before, as well as after, the effective date of the statute.”<sup>44</sup> The statute, Section 64.1-59,<sup>45</sup> had been enacted after the testator’s divorce but prior to his death; the will had been executed before the divorce. The plaintiff-appellee, the testator’s sister, maintained that the law in effect at the date of the testator’s death

<sup>36</sup> *Id.* at 552-53.

<sup>37</sup> VA. CODE ANN. § 55-31 (Repl. Vol. 1974).

<sup>38</sup> 396 F. Supp. at 552-53. *Accord*, *Smith v. Moore*, 225 F. Supp. 434 (E.D. Va. 1963); *see also* *Shenandoah Valley Nat’l Bank v. Taylor*, 192 Va. 135, 63 S.E.2d 786 (1951).

<sup>39</sup> IV A. SCOTT, THE LAW OF TRUSTS § 399, at 3084 (3d ed. 1967); *accord*, VA. CODE ANN. § 55-31 (Repl. Vol. 1974).

<sup>40</sup> IV A. SCOTT, *supra* note 39, § 399, at 3084.

<sup>41</sup> 396 F. Supp. at 552-53.

<sup>42</sup> Two cases during the survey period dealt with the interpretation of particular provisions in wills. In the first, *Walker v. Clements*, 216 Va. 562, 221 S.E.2d 138 (1976), the Supreme Court of Virginia interpreted the phrase “to use as he sees fit” as conveying only a life estate, not an estate in fee simple absolute, even though a layman drafted the phrase. In the second, *Maiorano v. Virginia Trust Co.*, 216 Va. 505, 219 S.E.2d 884 (1975), the Court concluded that where the plain meaning of the words in the will reveals an intent to postpone vesting of the estate, the testator’s intent governs despite general policies favoring early vesting.

<sup>43</sup> 216 Va. 879, 224 S.E.2d 153 (1976).

<sup>44</sup> *Id.* at 884, 224 S.E.2d at 156.

<sup>45</sup> VA. CODE ANN. § 64.1-59 (Repl. Vol. 1973). This statute provides: “If, after making

should determine the revocation of the will.<sup>46</sup> The defendant-appellant, the divorced spouse of the testator, argued that the law in effect at the time of the divorce should control.<sup>47</sup> The Court acknowledged the general principle that statutes apply prospectively, but held that here retroactive application would infringe no rights because rights do not vest until a will is probated.<sup>48</sup> Moreover, retroactive application would better serve the purposes of the statute by reflecting "the presumed intent of a testator that any provision in his will for the benefit of his spouse be terminated in the event of their divorce."<sup>49</sup> Practitioners should note that *Papen* places on the testator the burden of acting affirmatively to preserve provisions for a divorced spouse.

In *Harris v. Harris*<sup>50</sup> the Supreme Court of Virginia held that the disappearance of the testator's will had created a rebuttable presumption of revocation, which the advocates of the will had failed to rebut with clear and convincing evidence. Such a presumption develops when a will in the testator's possession or accessible to him cannot be found after his death.<sup>51</sup> Noting that the testator had continued to be physically active in his home long after the will's custodian had discovered the will missing from its hiding place in the testator's home, the Court concluded that the will was accessible to the testator and, therefore, that the presumption of revocation had arisen.<sup>52</sup> In reaching this conclusion the Court announced the rule to be "one of possibility, not probability, of such access by the testator."<sup>53</sup> Furthermore, the Court observed that since the custodian was the chief beneficiary, the presumption of revocation was strengthened, thus making the burden of proof upon the proponents of the will even greater. Proponents failed to meet this burden because, although they raised other possible causes for the will's disappearance, their evidence did not clearly establish their theories.<sup>54</sup>

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a will, the testator is divorced a vinculo matrimonii, all provisions in the will in favor of the testator's divorced spouse are thereby revoked."

<sup>46</sup> 216 Va. at 881-82, 224 S.E.2d at 155. See *In re Ziegner's Estate*, 146 Wash. 587, 264 P. 12 (1928).

<sup>47</sup> 216 Va. at 880, 224 S.E.2d at 154. See *Wilson v. Francis*, 208 Va. 83, 155 S.E.2d 49 (1967).

<sup>48</sup> 216 Va. at 882, 224 S.E.2d at 155.

<sup>49</sup> *Id.*

<sup>50</sup> 216 Va. 716, 222 S.E.2d 543 (1976).

<sup>51</sup> *Id.* at 719, 222 S.E.2d at 545.

<sup>52</sup> *Id.* at 719-20, 222 S.E.2d at 545.

<sup>53</sup> *Id.* at 719, 222 S.E.2d at 545.

<sup>54</sup> *Id.* at 720, 222 S.E.2d at 546.

## II. LEGISLATION

## A. Powers of Personal Representative

The General Assembly significantly amended<sup>55</sup> Virginia's incorporation by reference statute.<sup>56</sup> This statute, the Commonwealth's answer to the growing problem of inadequate drafting of wills and trust provisions,<sup>57</sup> provides an extensive list of powers that may be incorporated in whole or in part by reference to the statute. One amendment, Section 64.1-57(1)(a1),<sup>58</sup> augments this list by permitting the fiduciary to accept additions to the estate from any source and to administer these additions in the same manner as the rest of the estate. This amendment follows a growing trend towards facilitating the use of inter vivos trusts and pour-over wills by allowing testamentary additions to existing trusts.<sup>59</sup> Other additions to the list include Section 64.1-57(1)(b1),<sup>60</sup> permitting incorporation of the power to grant, sell, transfer, exchange, purchase, or acquire options of any kind on property, and Section 64.1-57(1)(s),<sup>61</sup> allowing the fiduciary to exercise discretion in its choice of alternative tax schemes relating to the payment of taxes or assessments accrued to the estate.

Section 64.1-57 (3)<sup>62</sup> allows the fiduciary of an irrevocable document to disclaim the right to exercise any power incorporated by this statute. Should a fiduciary disclaim its powers, the disclaimer relates back to the moment the fiduciary assumed its duties. The disclaimer is irrevocable and therefore binding on any successor fiduciary. Finally, Section 64.1-57 (4)<sup>63</sup> provides that unless there is a contrary intention the incorporation by reference of powers listed in the incorporation by reference statute will refer to powers existing at the time the party executed the instrument, rather than to those existing at the time of the testator's death.

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<sup>55</sup> Va. Acts of Assembly 1976, ch. 419, *codified at* VA. CODE ANN. § 64.1-57 (Supp. 1976) .

<sup>56</sup> VA. CODE ANN. § 64.1-57 (Repl. Vol. 1973) .

<sup>57</sup> See generally T. SHAFFER, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS 233-35 (1972). Other states adopting this solution include Arkansas, Connecticut, North Carolina, and Tennessee. *Id.* at 235.

<sup>58</sup> Va. Acts of Assembly 1976, ch. 419, *codified at* VA. CODE ANN. § 64.1-57(1)(a1) (Supp. 1976) .

<sup>59</sup> Compare VA. CODE ANN. § 64.1-57 (a1) (Supp. 1976), with UNIFORM PROBATE CODE § 2-511 (1975). See also T. SHAFFER, *supra* note 57, at 74-76.

<sup>60</sup> Va. Acts of Assembly 1976, ch. 419, *codified at* VA. CODE ANN. § 64.1-57(1)(b1) (Supp. 1976).

<sup>61</sup> Va. Acts of Assembly 1976, ch. 419, *codified at* VA. CODE ANN. § 64.1-57(1)(s) (Supp. 1976) .

<sup>62</sup> Va. Acts of Assembly 1976, ch. 419, *codified at* VA. CODE ANN. § 64.1-57(3) (Supp. 1976).

<sup>63</sup> Va. Acts of Assembly 1976, ch. 419, *codified at* VA. CODE ANN. § 64.1-57(4) (Supp. 1976) .

An important new provision increasing the flexibility of a trust is Section 64.1-57.1,<sup>64</sup> which permits the state circuit court to grant personal representatives any or all of the trust powers that may be incorporated by reference pursuant to Section 64.1-57, provided that such grant is not contrary to the testator's intentions.<sup>65</sup> Added to salvage poorly drafted instruments that fail to give personal representatives sufficient powers, this section could serve as a progressive model for other states.<sup>66</sup>

These amendments to the incorporation by reference statute reveal Virginia's continuing efforts to compensate for inadequate draftsmanship. Although commentators have criticized incorporation by reference statutes as inviting fraud and as being too encompassing and detailed,<sup>67</sup> these statutes save time and eliminate much litigation over the interpretation of wills.<sup>68</sup>

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<sup>64</sup> Va. Acts of Assembly 1976, ch. 437, codified at VA. CODE ANN. § 64.1-57.1 (Supp. 1976).

<sup>65</sup> According to the new statute, factors that a court should consider in deciding whether to grant any powers include:

whether the personal representative was nominated by the decedent or by the beneficiaries; the number and capacity of the beneficiaries and their ability or inability to consent to the acts of the personal representative which are otherwise within the scope of § 64.1-57; the relationship of the personal representative to the beneficiaries; the character of the estate to be administered. . . .

*Id.*

<sup>66</sup> See also UNIFORM PROBATE CODE art. 7, pt. 4 (1975) (General Comment); T. SHAFFER, *supra* note 57, at 236.

<sup>67</sup> See T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 80, at 386 (2d ed. 1953); T. SHAFFER, *supra* note 57, at 235-36. Professor Shaffer has criticized such statutes as being too exhaustive in that indiscriminate incorporation of the enumerated statutory powers into the will by the draftsman may create problems for the trustees. In a Tennessee statute, TENN. CODE ANN. §§ 35-616 to -619 (Supp. 1975), for example,

investment powers and distribution powers were drawn so broadly . . . that their use in a marital-deduction trust will imperil the deduction, under both the income requirements of [Internal Revenue Code] Sec. 2056(b)(5) and the distribution-kind requirements set in Revenue Procedure 64-19.

T. SHAFFER, *supra* note 57, at 235.

<sup>68</sup> T. SHAFFER, *supra* note 57, at 235.