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JOHN DONALDSON: LAW REFORMER

JAYNE W. BARNARD*

A lawyer in a free country, should have all the requisites of Quintillian's orator. He should be a person of irreproachable virtue and goodness. He should be well read in the whole circle of the arts and sciences. He should be fit for the administration of public affairs, and to govern the commonwealth by his councils, establish it by his laws, and correct it by his example.¹

In 1997, John Donaldson was recognized with the Law School's Citizen Lawyer Award. His citation recounted his many public exploits, including: service on the Board of Supervisors of James City County, Virginia; his long years of service with the Virginia Bar Association and other law reform groups; and his enduring commitment to protection of disabled persons.

I want to say a little more about John's work as a law reformer—in this case, as a persistent agitator for the improvement of Virginia's laws regarding guardianship, succession, probate, and matters related to trusts. Much of John's work in this area came in his role as a member of the legislative committee of the Wills, Trusts and Estates Section of the Virginia Bar Association; he also served on the Executive Committee (the governing body) of that Association.

Over the years, John was involved in a number of encounters with the General Assembly. Frank Thomas of Orange, Virginia, a former chairman of the Wills, Trusts and Estates Section, recounts one of John's successes:

* Professor of Law, William & Mary Law School. Thanks to the many correspondents who made this tribute possible.

1. Herbert A. Johnson, *Thomas Jefferson and Legal Education in Revolutionary America*, in THOMAS JEFFERSON AND THE EDUCATION OF A CITIZEN 103, 110-11 (James Gilreath ed., 1999) (quoting James Kent, An Introductory Lecture to a Course of Law Lectures, Columbia College (Nov. 17, 1794), in *Kent's Introductory Lecture*, 3 COLUM. L. REV. 330, 338 (1903)).

John chaired our section's committee on the reform of adult guardianship laws. While the committee was in part a function of a larger coalition brought together by Senator Gartlan to address the comprehensive reform of Virginia adult guardianship laws, I think it is a fair statement that the committee and John carried the laboring oar in this work and that without his work these reforms would not have occurred. The work of the committee involved numerous trips to Richmond to participate in legislative drafting sessions. John was ever present and added immeasurably to the final legislative product.²

Waller Horsley of Richmond, Virginia, a former President of the American College of Trust and Estate Counsel, recounts another, more complicated, success:

John was the taxpayer's counsel in a landmark case questioning the authority of an attorney-in-fact to continue a pattern of annual gifts, initially decided in the taxpayer's favor in 1989. *Estate of Olive D. Casey v. Commissioner of Internal Revenue*, 58 TCM 176 (1989), *rev'd* 948 F.2d 895 (4th Cir. 1991) (2-1). Although the taxpayer lost the government's appeal in a split decision in the Fourth Circuit, the equities of her case, so eloquently presented by John, persuaded the General Assembly of Virginia to amend the Code of Virginia (§ 11-9.5) to overrule the Fourth Circuit's conclusion. By stating that its Act was "declaratory of existing law," this legislation saved at least one other subsequent taxpayer from the same fate (on facts even less favorable to the taxpayer than in *Casey*). See *Estate of Ridenour v. Commissioner*, 36 F.3d 332 (4th Cir. 1994).³

2. Letter from Frank A. Thomas, III, Attorney, Shackelford, Thomas, Willis & Gregg, P.L.C., to Jayne W. Barnard, Professor of Law, William & Mary Law School (July 11, 2000) [hereinafter Letter from Thomas] (on file with the William and Mary Law Review). For a description of the results of these efforts, see generally John E. Donaldson, *Reform of Adult Guardianship Law*, 32 U. RICH. L. REV. 1273 (1998). According to Donaldson, "[t]he new system is more rational, coherent, unified and sensitive to the needs and rights of incapacitated adults than the system it replaces." *Id.* at 1273.

3. Letter from Waller H. Horsley, Attorney, Horsley & Horsley, to Jayne W. Barnard, Professor of Law, William & Mary Law School (June 22, 2000) [hereinafter Letter from Horsley] (on file with the William and Mary Law Review).

The largest single contribution that John made to legislative change in Virginia came in 1983, when he served as reporter for a VBA study that led to the introduction of several bills that collectively reformed the law of wills in the Commonwealth.⁴ He wrote extensively on the need for wills reform in the *VBA Journal*⁵ and the VBA's advocacy ultimately resulted in successful passage of the reform package.⁶

Not surprisingly, John's work with the legislative committee, as with his colleagues on matters of university governance, was thorough, articulate, reasoned, and sometimes passionate. Several of his colleagues recall that, through his relentless advocacy, John frequently changed the minds of strong-willed committee members. Once, for example, Lee Osborne of Roanoke, Virginia, recalls that "[John] resurrected the omitted spouse rule (VA Code Section 64.1-69.1) after [the] committee had voted to recommend repeal, just by virtue of his strong belief that it should remain the law!"⁷ And Dan Stevens of Richmond, Virginia, also remembers John's powers of persuasion:

Only once can I remember disagreeing with John's point of view. In 1998, the full Legislative Committee considered whether the default rule on ownership of joint bank accounts should recognize survivorship between the co-owners or not. At an earlier meeting I had proposed that the default rule be no survivorship. John gave an impassioned speech in favor of survivorship. In fact, the minutes reflect that "Professor Donaldson had strongly opposed [my] position." After the meeting Rodney Johnson, with tongue-in-cheek, congratulated me on accomplishing what no other man had been able to do—raise John Donaldson's ire. The record reflects that John's position was accepted—I may have even voted for it myself!!!!⁸

4. Telephone Interview with Harry J. Warthen, III, Attorney, Hunton & Williams (July 21, 2000) [hereinafter Telephone Interview with Warthen].

5. See, e.g., John E. Donaldson, *Law Reform-Suggested Revisions to Virginia's Wills Statutes: Part One*, VA. B. A. J., Spring 1983, at 4; John E. Donaldson, *Law Reform-Suggested Revisions to Virginia's Wills Statutes: Part Two*, VA. B. A. J., Fall 1983, at 10.

6. See Evans B. Brasfield, *President's Page*, VA. B. A. J., Summer 1985, at 2, 2-3.

7. E-mail from J. Lee E. Osborne, President, Carter, Brown & Osborne, P.C., to Jayne W. Barnard, Professor of Law, William & Mary Law School (Aug. 2, 2000, 15:51:22 EST) [hereinafter E-mail from Osborne] (on file with author).

8. E-mail from C. Daniel Stevens, Attorney, Christian & Barton, L.L.P., to Jayne W.

Part of John's skill was in the breadth of his scholarship. Frank Thomas recalls: "I can remember particularly John rising to the defense of the rule against perpetuities with an eloquent argument against dead hand control. All at once, an arcane and ancient rule of law buried in our medieval past took on a vibrant contemporary meaning."⁹ And Lee Osborne recalls:

[In 1994,] I arranged a panel discussion on various aspects of the fiduciary accounting process in Virginia as our Section's CLE program at the Annual Meeting of the VBA This was a timely topic as we (and other bar groups) were wrestling with proposed changes to our Commissioner of Accounts system. John was asked to compare our Virginia system with those of other states and countries. While meeting his assignment, John made a persuasive case for eliminating the pervasive court oversight inherent in our system in favor of a more self-directed process which would allow recourse to the courts only if needed by a party in interest (more like the European countries use).¹⁰

But part of John's success as an advocate was also traceable to his sheer tenacity. Howard Zaritsky of Rapidan, Virginia, describes John's technique:

[L]ooking back, I note that whenever John disagreed with me, I ended up adopting his viewpoint in the end, and with surprising enthusiasm. John was always careful to state that he did not believe that his viewpoint was the only reasonable one, but he never stopped explaining it to you until you understood that his was probably the right view.¹¹

Another element of John's success was his demeanor. Usually, of course, John was a soft spoken gentleman of the Virginia tradition. "He could bring to bear on short notice his considerable

Barnard, Professor of Law, William & Mary Law School (Aug. 3, 2000, 17:47:11 EST) [hereinafter E-mail from Stevens] (on file with author).

9. Letter from Thomas, *supra* note 2.

10. E-mail from Osborne, *supra* note 7.

11. E-mail from Howard M. Zaritsky, Attorney, Zaritsky & Zaritsky, to Jayne W. Barnard, Professor of Law, William & Mary Law School (July 27, 2000, 17:48:21 EST) (on file with author).

learning to a particular issue without being either pedantic or condescending."¹² He offered a "sweet personality [and] seldom got ruffled"¹³—he would sometimes, however, "tell us when we were wandering off the path and where we were going astray."¹⁴ According to Hume Taylor of Norfolk, Virginia, "John [was] generally pretty quiet in committee meetings; when he [spoke] he [was] careful, level, and generally moderate in his expressions. Perhaps for this reason he [was] invariably carefully listened to."¹⁵

The fourth reason John was so effective as a reformer was that he was so often right about the law. Tim Dimos of Middleburg, Virginia, recalls that once the committee was discussing the need for a "notice probate" system, which would provide actual notice to creditors of the estate. The tradition in Virginia up until this time had been that a probate proceeding could be completed entirely *ex parte*. While some members of the committee regarded this change as unnecessary and meddlesome, John had a "much more enlightened view" of the issue.¹⁶ Soon, the U.S. Supreme Court clarified the matter, ruling that known creditors of an estate had the right to actual notice of a probate proceeding before their claims could be extinguished.¹⁷

Sometimes John was unsuccessful in his efforts to persuade his colleagues, at least in the short run. Hume Taylor recalls:

Over the last twenty years or so the VBA Committee has been working to bring Virginia probate law up to date. Over 150 years ago the law was substantially changed, but from that time until about 20 years ago . . . there was not a great deal of change. [In the early 1980s], there was a movement to have Virginia adopt the Uniform Probate Code. . . . John actively supported the movement, which was rejected by the VBA, and by the political powers. Since then our VBA committee has sponsored the adoption of much of the best from the [U]PC,

12. Letter from Thomas, *supra* note 2.

13. Telephone Interview with Warthen, *supra* note 4.

14. *Id.*

15. Letter from J. Hume Taylor, Jr., Of Counsel, Taylor & Walker, P.C., to Jayne W. Barnard, Professor of Law, William & Mary Law School (Aug. 2, 2000) [hereinafter Letter from Taylor] (on file with the William and Mary Law Review).

16. Telephone Interview with C.L. Dimos, Attorney (July 24, 2000).

17. See *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 491 (1988).

generally without attribution. . . . [T]his has been a particular interest of John's.¹⁸

And even when John's views did not prevail in committee, he was a good team player and contributed constructively to the outcome. Dan Stevens reports:

My most lasting impression of John's work has been that even when he disagree[d] with the results of a proposal of the majority of the subcommittee (for example, he believes that trusts should be different from wills), he still work[ed] doggedly to make the result as good a proposal as possible.¹⁹

As I write these comments in August, 2000, one area of John's interest in *national* legislative reform may now be bearing fruit. In 1993, John wrote an article critical of the "transferor-oriented" structure of the current estate tax, and arguing for repeal.²⁰ It is said to be one of the best articles available on the subject,²¹ and it has been widely cited throughout the ensuing decade.²² John's careful reasoning in this article, and the drumbeat of his criticisms of the existing system (it delivers little in the way of revenue,²³ it is "unacceptably intrusive in affecting investment decisions,"²⁴ it encourages taxpayers to adopt tax avoidance strategies that are costly in terms of attorney time and documentation,²⁵ it is "unfair and grossly inefficient,"²⁶ etc.) may well impact the current debates on the death of the so-called "death tax."

In short, John Donaldson has been a key player in legislative reform in Virginia and now, perhaps, even the nation. Generally,

18. Letter from Taylor, *supra* note 15.

19. E-mail from Stevens, *supra* note 8.

20. See John E. Donaldson, *The Future of Transfer Taxation: Repeal, Restructuring and Refinement, or Replacement*, 50 WASH. & LEE L. REV. 539 (1993).

21. See Letter from Horsley, *supra* note 3.

22. See, e.g., Joseph M. Dodge, *Simplifying Models for the Income Taxation of Trusts and Estates*, 14 AM. J. TAX POL'Y 127 (1997); Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L. J. 283 (1994); Jay A. Soled & Charles Davenport, *Cremating Transfer Taxes: Is There Hope for a Resurrection?*, 34 WAKE FOREST L. REV. 229 (1999).

23. See Donaldson, *supra* note 20, at 552.

24. *Id.*

25. See *id.*

26. *Id.*

this kind of effort receives little reward in the academic community. So, it is a particular pleasure to be able to recount some of John's activities in this area.

One of his colleagues on the VBA legislative committee has this to say about John's retirement, and I agree: "I hope that John will remain active in the area of legislative reform after his retirement because his tireless labor and his wisdom and knowledge will be sorely missed if he does not."²⁷

27. E-mail from Osborne, *supra* note 7.