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Law Reform – Suggested Revisions to Virginia's Wills Statutes: Part 2

John E. Donaldson
*William & Mary Law School*

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Part Two

PART One of this article, which was published in the spring, 1983 issue of The Virginia Bar Journal, noted that the Executive Committee of the Virginia Bar Association has requested the Committee on Wills, Trusts and Estates to undertake a study of Virginia law relating to succession to property and administration of estates. The Committee, in its work to date, has examined the adequacy of Virginia law in a number of areas and has carefully considered statutory approaches employed in other states, including those which have adopted the Uniform Probate Code. The Committee’s efforts thus far have contributed to the enactment of a number of statutory changes over the last several years.

The first installment of this article discussed several proposed revisions to Virginia’s wills statutes which are under consideration by the Committee on Wills, Trusts and Estates. The remaining proposals currently under active consideration are presented in this segment, which, like the first, is intended to inform the bar of proposed changes and to invite comments and suggestions. The Committee hopes to report its recommendations to the Executive Committee prior to the 1984 session of the General Assembly.

D. Effect of Marriage of Testator after Execution of Will

Because of recent changes in the intestate succession statutes, §64.1-1 and §64.1-11, additional statutory changes are needed to better implement the presumed intent of a testator who executes a will and subsequently marries. Virginia law, set forth in §64.1-58, provides that neither the subsequent marriage of a testator nor birth of a child to a testator, or both, shall operate to revoke a will previously executed by the testator. Although the marriage of a testator does not revoke his will, the renunciation statutes provide relief to a surviving spouse aggrieved by the provisions of the will.

The inadequacy of Virginia law may be illustrated by the following examples: Suppose that a bachelor executes a will leaving his entire estate to his brother, and that he subsequently marries, and fails, for whatever reason, to execute a new will prior to death. Under current law, if there are no children, the surviving spouse may renounce the will and pursuant to §64.1-16 claim one-half of the net personalty, and pursuant to §64.1-19, claim one-third of the realty as dower. Brother will get the residue. Suppose, however, that there is a child born of the marriage. The results differ. Where the testator is survived by both his spouse and child, the spouse’s share upon repudiation drops from one-half to one-third of the net personalty and the spouse remains entitled to one-third of the realty as dower. Brother again gets the residue, which is larger than it would have been had there been no afterborn child. The child gets nothing, notwithstanding that he is seemingly a “pretermitted heir.” Under §64.1-70 the child’s share as a “pretermitted heir” is exactly zero because of the effect of 1982 amendments to §64.1-1 and §64.1-11. Section 64.1-70 purports to give the “pretermitted heir” the share that he would have taken had the decedent died intestate. However, by reason of the 1982 amendments, if the decedent had died intestate, his surviving spouse, being a parent of all of his issue, would have succeeded to the entire estate. Suppose further, however, that after the marriage and birth of the child, the testator’s spouse dies or divorces occurs, and testator dies survived by the child. Here, notwithstanding the will provision leaving everything to brother, brother gets nothing and child gets the entire estate by force of §64.1-70, the entire estate being the child’s intestate portion in such circumstance.

The divergent results that flow from current statutes cannot be defended on policy grounds. Such results are unintended consequences of the 1982 amendments to §64.1-1 and §64.1-11. Sounder results would obtain if Virginia followed a rule which treated the “pretermitted spouse” as being entitled to an intestate portion. Where there are no children or where the surviving spouse is the parent of all of the testator’s children, the intestate portion of the surviving spouse would be the entire estate. Where the surviving spouse is not the parent of all the decedent’s children, the intestate portion would be one-third of the net personalty plus one-third of the realty as...
dower. The Uniform Probate Code at § 2-301 provides an intestate portion to the surviving spouse who married the testator after the execution of his will.

Legislative proposal 5 adds new section 64.1-69.1. It is set forth in the Appendix and borrows heavily from the U.P.C.

E. Effect of Divorce on a Will; Other Changes of Circumstances

Where a testator becomes divorced a vinculo matri monii after the execution of a will, all provisions in the will in favor of the divorced spouse are thereby revoked, but not the will itself, by force of § 64.1-59. This statute does not address the possibility that the testator may subsequently remarry the divorced spouse. A number of other states, including those which have adopted U.P.C. § 2-508, anticipate this event and provide that upon remarriage to the divorced spouse the testator's will, if otherwise in effect, is automatically revived.

Legislative proposal 6, set forth in the Appendix, amends § 64.1-59. In addition to following the approach of the U.P.C. set forth above, the draft legislation shifts from § 64.1-58 to § 64.1-59 the rule that the subsequent marriage of a testator or birth of a child to him does not operate to revoke a will. This rule is better set forth in a “change of status” type of statute than in a “revocation generally” type of statute. Also, the revised statute codifies the rule in Jones v. Brown, 219 Va. 599, 248 S.E.2d 812 (1978) that, for purposes of construction, a divorced spouse is treated as having predeceased the testator.

F. Specific Bequests and Devises of Encumbered Property

Virginia follows a common law rule that all debts for which the testator is personally liable, including a debt secured by property that is the subject of a specific devise or bequest, are to be paid from personalty in the residue. See Ocen v. Lee, 185 Va. 160, 37 S.E.2d 848 (1946). The legatee or devisee thus possesses a right to exoneration, that is, the right to require the executor to pay off the encumbrance. Under U.P.C. § 2-609 the common law rule is reversed and the encumbered property passes to the legatee or devisee subject to the encumbrance.

The U.P.C. approach, with modifications, is preferable. The best rule to follow is one that implements the intention of the hypothetical “typical” testator. Experience reveals that testators, when interviewed by attorneys preparing their wills and questioned regarding their wishes as to encumbered property that is the subject of specific devises and bequests, usually express a preference that the legatee or devisee take the property with the burden of the encumbrance. They generally do not wish their executors to be under a duty to pay off encumbrances during the period of administration.

Although the U.P.C. does not make it, an important distinction can be drawn between encumbered land and tangible personalty, on the one hand, and encumbered intangibles such as stocks and bonds on the other. Debts secured by land and tangible personalty are usually incurred in connection with the acquisition of, or an improvement to, the property and are generally payable in installments over a period of years. Hence, in the mind of the “typical” testator, the debt secured by real estate or tangible property is closely associated with the property. He is more likely to regard a specific bequest or devise of such property as embracing only his “equity” in the property. How-
ever, where a debt is secured by stocks or bonds it is less likely that the debt was incurred in connection with the acquisition of the particular securities. Often stocks and bonds are pledged as security for lines of credit or other forms of short-term borrowing. A testator, having executed a will that specifically bequeaths his securities to a particular legatee, probably does not intend, when he pledges the securities as collateral for a loan, to impair the value of the legacy in the event that he dies before the loan is repaid.

Legislative proposal 7, which would add new § 64.1-62.2, is set forth in the Appendix. The draft follows the approach of the U.P.C. as to realty and tangible personality, but not as to intangibles, and draws upon features of applicable New York law.

G. Exercise of Power of Appointment; Effect of Residuary Clause

Virginia law respecting the circumstances under which a will is regarded as exercising a power of appointment possessed by a testator is not adequate. Section 64.1-67 requires that a will, otherwise silent on the testator’s intention to exercise a general power of appointment, be construed as if its dispositive provisions embraced the appointive property. Thus, a residuary clause is construed as exercising such a power of appointment. See Machir v. Funk, 99 Va. 284, 18 S.E.2d 197 (1933). It is unclear whether a special power of appointment is exercised by a residuary clause. See Note, 47 Va. L. Rev. 711 (1961). If, however, the instrument creating the power requires that specific reference be made to the power before it can be exercised, the requirement will be given effect. See Holtzbach v. United Va. Bank, 216 Va. 482, 219 S.E.2d 868 (1975).

The use of powers of appointment in estate planning has changed significantly since 1948, when the estate tax marital deduction first became available. The most frequent use of the general power of appointment today occurs in connection with marital deduction trusts. A typical decedent who gives his spouse general appointive power over the corpus of a trust is more likely to be motivated by the tax advantage than by the likelihood that his spouse will exercise control over the devolution of his property. He typically anticipates the non-exercise of the power by designating takers in default of appointment and more often than not requires a specific reference to the power be made in the instrument exercising the power for the exercise to be effective.

A majority of American jurisdictions have rejected the Virginia approach and resolve the policy issue by deferring to the presumed intent of the donor of the power. The U.P.C. at § 2-610 is typical of the majority position in requiring a will to make specific reference to a power of appointment to exercise the power. The majority position is thus one of implementing a presumption that the donor of a power of appointment would prefer the appointive property to pass under the terms of his trust instrument or will except where the donee has affirmatively manifested an intent to exercise the power. Because such a presumption is correct in most cases, the approach of the U.P.C. is preferred.

Legislative proposal 8, patterned on the U.P.C., amends § 64.1-67 and is set forth in the Appendix. It applies to both special and general powers of appointment.

H. Ademption by Satisfaction

Where a testator makes provision in his will for a legatee, and thereafter makes gifts to the legatee, it is possible that he intends the gifts to be in reduction of the legacy and also possible that he intends the gifts to be additional bounty. Virginia, at § 64.1-63, provides that a provision for or advancement to a devisee or legatee is in satisfaction of a devise or bequest if it appears from parol or other evidence to have been so intended. Presumably, in the absence of evidence of intent, a gift to a legatee is not in reduction of the legacy.

The Virginia statute is deficient in several respects. It does not address the quality of the evidence required, nor the burden of proof. Is the evidence to be "clear and convincing?" The term "other evidence" is vague. For example, does the fact that the value of gifts made to the legatee is substantial in relation to the amount of the legacy constitute evidence that the gifts are intended to be in reduction of the legacy? Also, the statute, in permitting the use of parol evidence, invites the use of the most unreliable kinds of testimony. If a will provides a legacy to son of $25,000 with the residue to daughter, and testator gave son $15,000 after executing the will, daughter apparently is permitted to testify self-servingly that testator privately told her that the gifts to son were intended as reductions in his legacy. Because in the usual case a testator making a gift to a legatee intends additional bounty, reliable evidence should be required if that intent is not to be presumed.

The approach of the U.P.C. at § 2-612 is preferred. That section imposes high evidentiary requirements in providing that a gift to a legatee does not reduce a legacy unless the will so provides, or unless declared by the testator in a contemporary writing or unless
the legatee acknowledges in writing that the gift is in satisfaction of the legacy.

Legislative proposal 9, which amends § 64.1-63, is set forth in the Appendix.

I. Construction of Certain Legacies and Devises; Non-Ademption in Certain Cases

After the execution of a will, and prior to the death of a testator, property that is the subject of a specific bequest or devise may be transformed, altered or enlarged, often without affirmative action by the testator. In addition, such property may cease to exist or may be disposed of without affirmative action by him. Of course, where the testator voluntarily conveys property that is subject to a specific bequest, the conveyance effects an ademption of the property by extinction and the legacy is in effect revoked. Should a legacy be revoked, however, when it is described as ten shares of stock of a particular corporation, and the corporation changes its name, or where, by reason of a reorganization, the corporation is absorbed in a larger company and the ten shares have been surrendered and replaced by stock of the acquiring corporation? If there is a two for one stock split, should the legacy be construed as embracing twenty shares? What result should obtain if, after executing his will, the testator becomes incompetent and the shares are sold by his committee?

The common law developed a “mere change in form” doctrine which has been applied to save many of these troublesome legacies. The trend of recent decisions has been enlargement of the doctrine. Although the few decisions applying the doctrine in Virginia are sound, the case law in this state is not sufficiently extensive to adequately resolve a number of issues. Other than § 8.01-77, which, by giving the devisee the proceeds, prevents ademption where lands of a person under a disability, but competent at the execution of his will, are sold pursuant to a judicial sale, there is no statutory law on the subject. On ademption generally, see G. SMITH, HARRISON ON WILLS AND ADMINISTRATION (2d Ed.) §§ 397-402.

Because the case law is not sufficiently developed, legislative treatment of the problem is needed. The U.P.C. at § 2-607 and § 2-608 seeks to implement the presumed intent of a testator in a number of situations involving transformation, alteration and enlargement of the subject property, and the destruction or involuntary disposition of property. In so doing it requires that the legacy be construed as embracing the transformed or enlarged property, certain insurance proceeds, and proceeds from certain sales. The approach of the U.P.C. is sound except where it includes in a legacy of stock additional mutual fund shares acquired pursuant to a plan of reinvestment and where it embraces the proceeds unpaid at death when the testator has voluntarily sold the property which is the subject of the specific bequest or devise.

Legislative proposal 10, which, drawing from the U.P.C., adds 64.1-62.1, is set forth in the Appendix.

J. Testimentary Additions to Trusts Having Non-Resident Trustees

In 1979 the American College of Probate Counsel released a study which found that in thrity-nine states and the District of Columbia there are no significant limitations on the use of non-resident trustees in connection with testamentary pour-overs. A 1982 study by that organization also found that the majority of jurisdictions impose no substantial restrictions on the use of non-resident fiduciaries as executors, guardians or testamentary trustees. However, by § 26-59 and § 64.1-73 Virginia prohibits, in the case of corporations, and severely restricts, in the case of individuals, the use of non-resident fiduciaries. The Committee on Wills, Trusts and Estates is considering the general matter of restrictions on the use of such fiduciaries. However, in the discussion that follows, the focus is on restrictions applicable to testamentary additions to established trusts that have non-resident trustees. Different policy considerations may be involved in the questions of whether non-resident individuals or corporations can properly serve as executors, administrators, guardians, committees, etc.

Section 64.1-73(a)(3) prohibits a testamentary pour-over to an established trust unless at least one trustee is a resident individual or is a corporation authorized to do a trust business in this state, and provided that the trust has no corporate trustee not so authorized. However, § 64.1-73(h) provides that a pour-over to a disqualified trust is not to fail, but a proper trustee is to be appointed. These restrictions on use of non-resident trustees appear to serve no useful purpose other than that of aiding the Virginia financial community. This aid comes at the expense of frustrating the decedent’s choice of trustees. Such frustration of a decedent’s choice requires a compelling reason, which is lacking. The policy of Virginia’s legislation on wills should be to implement, wherever possible, the decedent’s validly expressed testamentary wishes. If a testator establishes a lifetime trust for a child, with testator’s brother as trustee, and brother moves from Virginia to Maryland and is a Maryland resident at testator’s death, there is no sound reason why a pour-over legacy to brother, as trustee, should not be per-
mitted. Seemingly, § 64.1-73(h) will require a Virginia court to appoint a Virginia trustee to administer the pour-over amount as a separate trust, thus causing the existence of two identical trusts for the same beneficiary.

Other problems are created by § 64.1-73(a)(3). For example, a Virginia testator may wish to make a split interest gift to Duke University (income to son for life, remainder to charity) and choose the device of a legacy to the Duke University Pooled Income Fund in the expectation of enjoying an estate tax charitable deduction for the value of the remainder interest. Under the Virginia statute, if the trustees of the Fund are non-residents, they are prohibited from receiving the testamentary pour-over. The curative provisions of 64.1-73(h), even in the light of 26-64 et seq., which permit court ordered transfers to non-resident trustees in certain cases, may be inadequate to salvage the charitable deduction. See I.R.C. § 2055(e)(2)(A) and Treas. Reg. 1.642(c)-5(b)(5). The regulation provisions defining a qualified “pooled income fund” require that the charity have power to replace or remove the trustee or trustees, a power not contemplated in 64.1-73(h).

It may be argued that there are two reasons for requiring at least one “pour-over” trustee to be a resident or a corporation authorized to do business in this state. These are (1) to assure a Virginia forum for the enforcement of the trustee’s fiduciary duties and (2) to assure the existence of a potential defendant trustee who is likely to have assets subject to writ of execution in this state. However, these reasons do not explain the absolute prohibition contained in § 64.1-73(a)(3) against having as one of several trustees a trustee that is a corporation not authorized to do business in this state. In any event, if these are the reasons for the current state of Virginia law, they are not sufficiently compelling to justify the frustration of freedom of testation resulting from the application of the statute.

Presumably, a testator who creates during his lifetime, and while a resident of Indiana, a trust with an Indiana trustee and executes a will providing a testamentary pour-over to the trust is content in the knowledge that the beneficiaries of the trust will generally have to look to Indiana courts to prevent a breach of fiduciary duty. Should he become a domiciliary of Virginia and die with the same arrangements in effect, he presumably remains content in that knowledge. The testator having chosen to use an Indiana trust as the vehicle to implement his disposition scheme, thus subjecting the interests of the trust beneficiaries to the protection of Indiana courts and law, why should Virginia not be content with the protections afforded to the beneficiaries by the courts and law of Indiana? Is the focal point of Virginia policy the fact that the testator, at time of death was a domiciliary of Virginia? Apparently not! If the trust has no beneficiaries who are Virginia Residents, § 64.1-73(h) and § 26-64 et seq. permit, through a somewhat cumbersome procedure, the amounts to be transferred to a non-resident trustee. It thus appears that the primary focal point of the policy of Virginia law in requiring at least one resident trustee for testamentary pour-overs is not the domiciliary status of the testator, but the present existence of one or more Virginia residents as beneficiaries of the trust.

Assuming, however, it to be valid policy for Virginia to assure to resident beneficiaries of trusts receiving testamentary pour-overs the availability of a Virginia forum, this policy could be furthered by a bonding requirement in the non-resident trustee situation pursuant to which the surety on the bond consents to in personam jurisdiction in Virginia. The implementation of such policy through the device of requiring at least one trustee to be a resident and prohibiting altogether non-resident corporate trustees which are not authorized to do business in this state is overly restrictive and unduly harsh.

However, the imposition of a “bonding” requirement is not recommended. The apparent Virginia policy of assuring to Virginia residents who are beneficiaries of trusts receiving testamentary pour-overs access to Virginia courts to remedy breaches of fiduciary duty is unsound. Virginia can properly assume that the courts and law of the state of residence of non-Virginia trustees will adequately remedy any breach of fiduciary duty that may occur. The convenience afforded by a Virginia forum does not offset the stronger policy of promoting freedom of testation. Due regard should be given to the wishes of the testator. One’s freedom of testation should not be compromised merely because assets intended to pour-over into an existing trust are located in a state of which the trustee is not a resident.

The fact that § 64.1-73 contemplates the appointment of a substitute trustee when the “resident trustee” proviso is violated is not sufficiently curative. The non-resident trustee of the existing trust as to which the pour-over amount is intended to flow may be a family member of the settlor-testator who is related to the beneficiary class and has special knowledge of family circumstances and interests. He may have been selected by the settlor-testator because of such knowledge and relationships and given very broad discretion to act by reason of those qualities. In such circumstances a substitute trustee appointed pursuant to § 64.1-73(h) would likely be a very poor
substitute for the trustee selected by the settlor-testator. Strong considerations of policy and state interest are required to justify rejection of a trustee selected by the settlor-testator. Rejection solely because of non-residence is not such a consideration.

Legislative proposal 11, which amends § 64.1-73, is set forth in the Appendix.

K. Pour-Over Trusts; Effect of Remainderman Predeceasing Testator

The Virginia anti-lapse statute, § 64.1-64, is deficient in its application to beneficiaries of trusts which receive testamentary pour-overs. This particular deficiency arises from a 1980 amendment that applies the section to “the interest passing upon a termination of a testamentary trust or of an inter vivos trust which receives a devise or bequest such as contemplated in § 64.1-73” (testamentary additions to trusts). As applied to remaindermen under testamentary trusts, the amendment seems unnecessary. See Hester v. Sammons, 171 Va. 142, 198 S.E. 406 (1938).

Presumably the “interest passing upon a termination” is a remainder interest free of trust. If so, consider the following hypothetical:

Testator, while alive establishes a revocable trust funded with $100,000, income to spouse for life, remainder to brother. Brother executes a will leaving his entire estate to brother’s wife and nothing to son and dies. One day after brother’s death, testator dies having executed a will which leaves a pour-over amount of $200,000 to the lifetime trust, which became irrevocable at his death. Assume that the trust corpus, as enlarged by the pour-over, is $300,000 and that testator’s spouse dies shortly after testator.

Who takes the remainder in the trust corpus? In the absence of a statute, it is probable that the $100,000 that initially funded the revocable trust is regarded as vested beneficially in the trust beneficiaries subject to defeasance by exercise of the power of revocation, and since revocation did not occur during the life of the settlor, the $100,000 that initially funded the trust would be a descendable interest which passes under brother’s will to his wife. See Annotation, Anti-lapse Statute as Applicable to Interest of Beneficiary Under Inter Vivos Trust Who Predeceases Life-Tenant Settlor, 47 ALR 3d 358. It is unclear whether the 1980 amendment to § 64.1-64, which embraces both revocable and irrevocable trusts, is intended to change that result. What is the meaning of the term “interest” as used in § 64.1-64 in the phrase “the interest passing upon a termination . . .”? Does it refer to the entire amount held in trust, or only to that portion of the trust attributable to the testamentary pour-over? It if means the entire interest, including the pour-over amount, then the entire $300,000 would pass to the brother’s son, a result inconsistent with the theory that a revocable trust creates interests that are vested subject to defeasance by revocation. It is that theory, pursuant to which lifetime gifts to revocable trusts are regarded as gifts in praesentae, that permits the law to regard the revocable trust as a non-testamentary instrument not required to be executed in accordance with the statute of wills. Also, if the term “interest” refers to the entire corpus as enlarged by the pour-over amount, then an unusual result can occur in the context of our above hypothetical. If brother predeceases testator by one day, then under § 64.1-64 brother’s son takes the entire remainder, but if brother survives the decedent by one day brother’s wife gets the entire remainder. Also, had there been no testamentary pour-over, brother’s wife would have received $100,000. See Annotation, 47 ALR 3d 358. Why should she be deprived of that amount simply because testator bequeathed the residue of his estate to the trust? Should an anti-lapse statute enacted to implement the presumed intent of a testator presume such divergent treatment is intended? If, however, the term “interest” refers only to that part of the trust attributable to the pour-over amount, different results obtain. In our hypothetical, if brother predeceases testator by one day then under § 64.1-64 brother’s wife gets one-third of the remainder and brother’s son gets two-thirds. However, if brother’s wife survives the testator by one day, brother’s wife gets all. Yet the language from which we infer the intent of the testator, the words in the trust and the will, are the same in both instances.

If Virginia’s anti-lapse statute were silent on the question of application to testamentary pour-overs, seemingly the pour-over amount would devolve in accordance with § 64.1-73(d)(2) which provides in relevant part that the pour-over amount shall “be administered and disposed of in accordance with the terms of the trust as they appear in writing at the testator’s death.” Presumably, that language is intended simply to enlarge the trust by the pour-over amount and to require the trust corpus, so enlarged, to be administered in accordance with the terms of the trust. Arguably, in our example where brother predeceases testator by one day, the entire corpus, including the pour-over amount, would pass in remainder to brother’s wife. It is, however, possible that courts would hold that in the absence of an anti-lapse statute of the present Virginia variety, the pour-over amount passes either under the residuary clause in testator’s will or by intestacy.
The subject language in § 64.1-64 is not satisfactory for several reasons. It is vague, as has already been noted. In this regard, it has been suggested that the 1980 amendment was intended to "save" the remainder in a situation where testator during life gives $100,000 in trust, to "A" for life, remainder to "B," and life tenant dies while testator is alive followed by the death of "B," the remainderman, while testator is alive. Assuming that testator's will leaves a pour-over amount to the lifetime trust, does the 1980 amendment to § 64.1-64 save the pour-over from lapse? If it was intended to do that, it apparently fails in the effort because the amendment is applicable only where the lifetime trust receives a pour-over contemplated by § 64.1-73 and § 64.1-73(f) by its terms permits a pour-over only if the trust is operative at the testator's death. The trust is not, however, operative at death because it terminated at the earlier death of the life-tenant. The subject language is also objectionable because in its application it causes unsatisfactorily divergent patterns of distribution of remainder interests.

The most satisfactory treatment of the problem is obtained by retaining the theory that revocable trusts create present interests subject to defeasance by revocation and by implementing a rule that any pour-over addition to a trust should devolve in the manner that the original corpus of such trust would devolve, as if the pour-over amount were added to the corpus of the trust during the life of the testator-settlor. The present requirement of § 64.1-73(f) that the trust be operative at death for a pour-over to be effective should be retained.

It is, of course, unnecessary to spell out a statutory solution to every conceivable testamentary problem. The problems to which the 1980 amendment to § 64.1-64 are addressed do not appear to have arisen with any frequency, perhaps because holographic wills rarely use the device of testamentary pour-overs, and trusts and wills prepared by attorneys generally address the contingencies, which left unaddressed, cause the problems. If that conclusion is drawn, the offending 1980 amendment should be repealed. This is accomplished in legislative proposal 1 at page 28 of the Spring, 1983 issue of The Virginia Bar Journal.

If a statutory solution to the problem is desired, consideration should be given to legislative proposal 12, set forth in the Appendix, which clarifies § 64.1-73.

1. Formalities of Execution

Section 64.1-49, in requiring for the due execution of a non-holographic will that the witnesses subscribe in the presence of the testator and that they be present at the same time the testator executes the will or acknowledges his prior execution, is unnecessarily restrictive. Formalities required in connection with will executions are often justified on two broad grounds. These are (1) the formality of will execution imparts a ceremony to the act of testation, thereby impressing the testator with the seriousness of his act and (2) the formalities involving the role of witnesses minimize the risks of fraud, collusion, duress, etc. The first ground appears of limited importance in states such as Virginia which permit holographic wills since the essence of the holographic will is the absence of ceremony in its execution.

The second ground is the sounder, but inherent in requiring formalities to prevent “fraudulent,” etc. testation is that failure to observe the required formalities frequently keeps non-fraudulent testamentary writings from being effective as wills. Requirements intended to prevent “fraud,” etc. often, even in the absence of a suggestion of fraud, operate to prevent valid testation. Thus, in Virginia, testamentary effectiveness has been denied where the testator, after signing a will, slipped into unconsciousness before the witnesses were able to sign in his "conscious presence." Tucker v. Sandridge, 85 Va. 546, 8 S.E. 650 (1888). Similarly, testation may be denied where there is doubt as to whether the testator’s signing or acknowledgement occurred in the simultaneous presence of both witnesses. French v. Beville, 191 Va. 842, 62 S.E.2d 883 (1951). Given the burden of proof on the proponent of a will to establish due execution, and the difficulty of proving years later that the required sequence of events and grouping of persons occurred, the Virginia courts have resorted to presumptions to prevent evidentiary problems from defeating testation. Thus, the subscription of his name by a witness in a room in which the testator is located is prima facie proof that the signing occurred in the “presence” of the testator. Neil v. Neil, 28 Va. 6 (1829). And a recitation in an attestation clause is prima facie proof thereof in certain instances. Clarke v. Dunnivant, 37 Va. 14 (1839). And regularity is often presumed where the witnesses are dead or suffer a failure of recollection. Young v. Barner, 68 Va. 96 (1876) (Dicta).

As is evident from the foregoing, each formality required for a valid will execution presents a potential source of litigation as to whether such formality was in fact observed and poses a threat that clearly expressed non-fraudulent testamentary writings may be defeated by oversight or by the will's proponent's inability to carry his burden of proof. The U.P.C. at § 2-502 undertakes to prevent "fraud," etc. by requiring only that the testator's signing or acknowledgement be witnessed by two competent persons who
subscribe their names, notwithstanding that the testator may not sign or acknowledge in the presence of two witnesses present at the same time and notwithstanding that subscription of the will by the witnesses does not occur in the presence of the testator.

It is submitted that the protection against "fraud," etc. in testament allowed by the U.P.C. is entirely adequate and that the Virginia requirements of additional formalities are unwarranted, unnecessary, invite litigation and often defeat non-fraudulent testamentary writings. It is frankly difficult to imagine circumstances where fraud, collusion, etc. could occur under the U.P.C. requirements, but would not occur under the existing Virginia requirements. Accordingly, it is recommended that the Virginia statute be amended to delete the unnecessary formalities noted above.

Virginia attorneys should, however, continue to follow established practices in will executions. These customary practices, which are described in the recitations of standard attestation clauses, are designed to assure that wills are valid under the laws of all states. Also, compliance with the practice of having the witnesses present at the same time assures convenience of probate, for where witnesses are so present, the testimony of only one witness is adequate to establish the fact of due execution. *Bruce v. Shuler,* 108 Va. 670, 62 S.E. 973 (1908).

Holographic wills are allowed in Virginia by § 64.1-49. That statute requires the will to be "wholly" in the handwriting of the testator and requires that fact to be proved by two "disinterested" witnesses. The term "wholly" is ambiguous, but it probably means the "material provisions" must be in the handwriting of the testator. See *Bell v. Timmins,* 190 Va. 648, 58 S.E.2d 55 (1950) and *Gooch v. Gooch* 134 Va. 21, 113 S.E. 873 (1922). The U.P.C., which, at § 2:503, also permits holographic wills, describes the permitted document as one in which "the material provisions are in the handwriting of the testator." Because it is less ambiguous, the terminology employed in the U.P.C. is preferred.

The Virginia requirement of proof of a holographic will by two "disinterested" witnesses is unduly restrictive. Those who would take in the event of intestacy are likely to be familiar with the handwriting of the decedent and have ample opportunity to challenge probate in a formal proceeding. Although it is only a minor deficiency, the requirement that the witnesses who prove the authenticity of the handwriting be "disinterested" should be eliminated.

Legislative proposal 13 implements these recommendations by amending § 64.1-49 and is set forth in the Appendix.

### M. Self-Proved Will; Out-of-State Notarial Certificates

Virginia, by § 64.1-87.1, provides a mechanism whereby a will may be made self-proved, that is, admitted to probate without further proof of due execution. The required procedure entails the testator and the witnesses appearing before an officer authorized to administer oaths under the laws of Virginia and each signing a declaration on a prescribed form. By a 1983 amendment, an alternate method involving acknowledgment under oath is provided by § 64.1-87.2. The Virginia statutes differ from the U.P.C. counterpart, § 2-504, in that the latter gives effect to out-of-state notarial certificates while the former does not.

Virginia's various statutes with respect to out-of-state notarial acts are not consistent. By reason of a 1980 amendment, § 64.1-92 provides that an authenticated copy of any will which has been self-proved under the laws of another state shall, when offered with its authenticated certificate of probate, be admitted to probate as a will of personalty and real estate. Thus, a self-proving will with an out-of-state notarial certificate, if probated elsewhere, can be probated in Virginia with relative ease. The restrictions on out-of-state notarial certificates found in §§ 64.1-87.1 and 64.1-87.2 are also inconsistent with the Virginia version of the Uniform Recognition of Acknowledgments Act, which, at § 55-118.1 provides: "Notarial acts may be performed outside this state for use in this state with the same effect as if performed by a notary of this state."

Because of the remoteness of the possibility of fraud and the availability of opportunities under Virginia law to contest the validity of wills by formal proceedings, the limiting of §§ 64.1-87.1 and 64.1-87.2 to only wills that have been acknowledged before Virginia officials is unwarranted and unduly restrictive.

Amendments are proposed to §§ 64.1-87.1 and 64.1-87.2 and are set forth in the Appendix as legislative proposals 14 and 15.

### Conclusion

The proposals discussed in this article address perceived inadequacies in Virginia's wills statutes. They are intended to facilitate the devolution of property in a manner that more closely implements the intent of testators, correct unintended consequences flowing from recent amendments to the intestacy statutes, remove unnecessary constraints on testation, eliminate ambiguities in existing law and accommodate more fully the testator who, having formulated and
executed his estate plan in another state, acquires property or becomes domiciled in Virginia.

APPENDIX

Note: Proposals 1, 2, 3, and 4 were presented in the Spring, 1983 issue of the Virginia Bar Journal. They involve amendments to § 64.1-64, § 64.1-65, § 64.1-58 and § 64.1-60.

Proposal 5. It is proposed that new § 64.1-69.1 be enacted to read as follows:

§ 64.1-69.1 When omitted spouse to take intestate portion.—If a testator fails to provide for a surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate such spouse would have received if the decedent left no will, unless it appears from the will that the omission was intentional.

Proposal 6. It is proposed that § 64.1-59 be amended and reenacted to read as follows:

§ 64.1-59. Revocation by divorce; no revocation by other changes in circumstances.—If, after making a will, the testator is divorced a vinculo matrimonii or his marriage is annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse and any nomination of the former spouse as executor, trustee, conservator or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the testator, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the testator. If provisions are revoked solely by this section, they are revived by the testator’s remarriage to the former spouse. No change of circumstances other than as described in this section revokes a will.

Proposal 7. It is proposed that new § 64.1-62.2 be enacted to read as follows:

§ 64.1-62.2. Specific devise or bequest; burden of secured debts.—Unless a contrary intention shall appear by the will, a devise or bequest of realty or of tangible personalty shall pass to the devisee or legatee subject to any mortgage existing at the date of death, without right of exoneration, and notwithstanding a general direction in the will to pay debts. As used herein “mortgage” means deed of trust and any conveyance, agreement or arrangement in which property is used as security. Where any mortgaged realty or tangible personalty passes to two or more persons, the interest of each such person shall, only as between such persons, bear its proportionate share of the debt secured. Where two or more such properties are mortgaged to secure a single indebtedness, each such property shall, only as between the recipients thereof, bear its proportionate share of the indebtedness by reference to values at date of death.

Proposal 8. It is proposed that § 64.1-67 be amended and reenacted to read as follows:

§ 64.1-67. Exercise of power of appointment.—Unless a contrary intention shall appear in the will, a residuary clause in a will or a will making general disposition of all the testator’s property does not exercise a power of appointment held by the testator.

Proposal 9. It is proposed that § 64.1-63 be amended and reenacted to read as follows:

§ 64.1-63. When advancement deemed satisfaction of devise or bequest.—Property which a testator gave in his lifetime to a person is not treated as a satisfaction of a devise or bequest to that person, in whole or in part, unless the will provides for deduction of the lifetime gift, or the testator declares in a contemporaneous writing that the gift is to be deducted from the devise or bequest or is in satisfaction thereof, or the devisee or legatee acknowledges in writing that the gift is in satisfaction.

Proposal 10. It is proposed that new § 64.1-62.1 be enacted to read as follows:

§ 64.1-62.1. How certain legacies and devise to be construed; nonademption in certain cases.—Unless a contrary intention shall appear in the will:

a) a bequest of specific securities whether or not expressed in number of shares shall include as much of the bequeathed securities as is part of the estate at time of the testator’s death, any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity, (but excluding any acquired by exercise of purchase options) and any securities of another entity acquired with respect to the specific securities mentioned in the bequest as a result of a merger, consolidation, reorganization or other similar action initiated by the entity;

b) a bequest or devise of specific property shall include any amount of a condemnation award for the taking of the property unpaid at death and any proceeds unpaid at death on fire and casualty insurance on the property.

c) a devise or bequest of specific property shall, in addition to such property as is part of the estate of the testator, be deemed to be a legacy of a pecuniary amount if such specific property shall, during the life of the testator and while he is under a disability, be sold by a conservator, guardian, or committee for
the testator, or by judicial sale, or if a condemnation award or proceeds of fire or casualty insurance as to such property are paid to such fiduciary. For this purpose, the pecuniary amount shall be the net sale price, condemnation award or insurance proceeds, reduced by such sums received under subsection (b). This subsection shall not apply if, after the sale, condemnation, or casualty, it is adjudicated that the disability of the testator has ceased and the testator survives the adjudication by one year.

Proposal 11. It is proposed that § 64.1-73 (Devise or bequest to trustee of an established trust) be amended and reenacted to delete subsection (a)(3) and (h), which subsections pertain to non-resident trustees.

Proposal 12. It is proposed to amend and reenact § 64.1-7:1 (Devise or bequest to trustee of an established trust) by adding new subsection (d)(3) to read as follows:

§ 64.1-7,3 (d)(3). Any interest in remainder under such trust as to property so devised or bequeathed and not otherwise conditioned on survival of the testator shall not be defeated by reason of the death of the remainderman prior to that of the testator. In such event, the interest in remainder shall pass as if the remainderman had survived the testator.

Proposal 13. It is proposed that § 64.1-49 be amended and reenacted to read as follows:

§ 64.1-49. Will must be in writing, etc; mode of execution; witnesses, and proof of handwriting.—No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless the material provisions thereof be in the handwriting of the testator, such will must be signed by at least two competent witnesses each of whom witnessed either the signing or the testator’s acknowledgement of the signature or of the will. If the material provisions of the will be in the handwriting of the testator, that fact shall be proved by at least two competent witnesses.

Proposal 14. It is proposed that § 64.1-87.1 be amended and reenacted by revising the first and last paragraphs thereof to read as follows:

§ 64.1-87.1. How will may be made self-proved.—A will, at the time of its execution or at any subsequent date, may be made self-proved by the acknowledgement thereof by the testator and the affidavits of two or more attesting witnesses, each made before an officer authorized to administer oaths under the laws of this Commonwealth, or of the state where the acknowledgement occurred, and evidenced by the officer’s certificate, attached or annexed to the will in form and content substantially as follows: ... (omitted portions of statute)...

All certificates to wills made pursuant to this section and executed by the officer before June 1, 1977 shall be held, and the same are hereby declared valid and effective in all respects if otherwise in accordance with the provisions of this section, notwithstanding that such officer did not attach or affix his official seal thereto, and notwithstanding that the acknowledgement was before an officer authorized to administer oaths under the laws of another state. Any codicil which is self-proved under the provisions of this section which also, by its terms, expressly confirms, ratifies and republishes a will except as altered by the codicil shall have the effect of self-proving the will whether or not the will was so executed originally.

Proposal 15. It is proposed that § 64.1-87.2 be amended and reenacted by revising the first paragraph to read the same as the first paragraph in § 64.1-87.1, set forth in Proposal 14 above.