

## WILLS, TRUSTS, AND ESTATES

*J. William Gray, Jr.* \*  
*Katherine E. Ramsey* \*\*

### I. INTRODUCTION

The 2012 session of the Virginia General Assembly enacted wills, trusts, and estates legislation that (i) clarified the fiduciary responsibilities of a directed trustee, (ii) authorized individuals to create trusts for their own benefit and protect the trust assets from their creditors, (iii) permits the trustee of a grantor trust to pay the grantor's income tax without causing the trust assets to be included in the grantor's gross estate for federal estate tax purposes, (iv) allows a trustee to exercise a distribution power in favor of a beneficiary by adding the trust assets to another trust for the beneficiary's benefit, and (v) allows an out-of-state executor or testamentary trustee to deal with the decedent's Virginia real property without an ancillary administrator. In addition, Virginia's statutes relating to wills, trusts, estates, and fiduciaries were recodified, effective October 1, 2012. Eight other legislative enactments and six opinions of the Supreme Court of Virginia during the twelve months ended June 1, 2012, rounded out a busy year in this field.

### II. LEGISLATION

#### A. *Re-Codification of Title 64.1*

Perhaps the most significant development of the 2012 General Assembly session occurred almost without comment when the

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\* Partner, Hunton & Williams LLP, Richmond, Virginia. J.D., 1977, University of Virginia; B.S., B.A., 1973, Rutgers University.

\*\* Partner, Hunton & Williams LLP, Richmond, Virginia. J.D., 1998, University of Virginia; M.S., 1988, Boston University; B.A., 1986, Virginia Polytechnic Institute and State University.

legislature approved the Virginia Code Commission's recommendation to consolidate all statutory provisions relating to wills, trusts, estates, and fiduciaries into a single new Virginia Code volume: title 64.2, "Wills, Trusts and Fiduciaries."<sup>1</sup>

The new title 64.2 combines the provisions of current title 64.1 (wills and estates) with those in current title 26 (fiduciaries generally), title 31 (guardian and ward), and selected portions of title 37.2 (medical directives and other health care issues) and title 55 (Uniform Acts and other statutes generally applicable to fiduciaries). The new title consists of twenty-seven chapters grouped into five subtitles:

Subtitle I: General Provisions (containing definitions applicable throughout the title and provisions that apply broadly to wills, trusts, estates, and fiduciaries), Virginia Code sections 64.2-100 through 64.2-108;

Subtitle II: Wills and Decedents' Estates (addressing the passage of property by intestacy, will, or nonprobate means), Virginia Code sections 64.2-200 through 64.2-620;

Subtitle III: Trusts (containing various Uniform Acts that govern the creation and management of Virginia trusts, including those dealing with trusts, principal and income, and institutional funds), Virginia Code sections 64.2-700 through 64.2-1108;

Subtitle IV: Fiduciaries and Guardians (containing rules applicable to fiduciary relationships such as powers of attorney and guardianships and to the Commissioner of Accounts), Virginia Code sections 64.2-1200 through 64.2-2120; and,

Subtitle V: Provisions Applicable to Probate and Nonprobate Transfers (including simultaneous death, persons presumed dead, slayers, disclaimers, and releases of powers of appointment), Virginia Code sections 64.2-2200 through 64.2-2704.<sup>2</sup>

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1. Act of Apr. 4, 2012, ch. 614, 2012 Va. Acts \_\_\_ (codified at VA. CODE ANN. §§ 64.2-100 to -2704 (Repl. Vol. 2012)).

2. *Id.*

The stated intent of the Code Commission recommendation was to modernize and consolidate those related provisions of Virginia law without making other substantive changes in the law.<sup>3</sup> The legislation contains several rules designed to assure that renumbering and relocating the various statutes will not adversely affect existing documents or the rights or responsibilities arising from them:

1. All references to a former statute will be construed to apply to its new or renumbered counterpart dealing with the same issues;
2. Agency and departmental regulations will continue in effect to the extent not inconsistent with the recodified legislation and will be deemed to be regulations adopted under that legislation;

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3. In recommending the first re-codification of these provisions since 1968, the Virginia Code Commission stated that it intended “to (i) organize the laws in more logical manner; (ii) remove obsolete and duplicative provisions; and (iii) improve the structure and clarity of the laws pertaining to wills, succession, descent of property, trusts, and fiduciaries.” REPORT OF THE VA. CODE COMM’N, RECODIFICATION OF TITLE 64.1 OF THE CODE OF VA., S. Doc. No. 15, at 1 (2011). For example, the statute governing passage of title to intestate real estate is revised to eliminate such archaic terms as “real estate of inheritance,” “in parcenary,” and “moiety.” The relevant provision currently reads in part as follows:

When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to such of his kindred, male and female, in the following course:

First. To the surviving spouse of the intestate, unless the intestate is survived by children or their descendants, one or more of whom are not children or their descendants of the surviving spouse, in which case two-thirds of such estate shall pass to all the intestate’s children and their descendants and the remaining one-third of such estate shall pass to the intestate’s surviving spouse. . . . [provisions for more remote successors]

Fifth. If there be none such, then one moiety shall go to the paternal, the other to the maternal kindred, of the intestate . . . .

VA. CODE ANN. § 64.1-1 (Repl. Vol. 2007 & Cum. Supp. 2011). The recodified statute will read:

A. The real estate of any decedent not effectively disposed of by will descends and passes by intestate succession in the following course:

1. To the surviving spouse of the decedent, unless the decedent is survived by children or their descendants, one or more of whom are not children or their descendants of the surviving spouse, in which case, two-thirds of the estate descends and passes to the decedent’s children and their descendants, and one-third of the estate descends and passes to the surviving spouse. . . . [provisions for more remote successors]

. . . .

5. If there is none of the foregoing, then one-half of the estate descends and passes to the paternal kindred and one-half descends and passes to the maternal kindred of the decedent . . . .

*Id.* § 64.2-200 (Repl. Vol. 2012).

3. The Virginia Code Commission will have authority to revise other acts of the 2012 General Assembly to conform to the new numbering;

4. The repeal of the prior provisions will not affect any act or offense done or committed, any penalty incurred, or any right established, accrued, or accruing on or before the effective date of title 64.2 nor any proceeding, prosecution, suit, or action pending then. Despite the repeal, current law is continued in effect for the prosecution of any offense if an essential element occurred before the repeal date;

5. Any notice given, recognizance taken, or process or writ issued before the effective date but given, taken, or to be returned to a day after the effective date will be as valid as if title 64.2 had been effective during the entire period;

6. A judgment invalidating any portion of title 64.2 will not affect, impair, or invalidate the remainder of the statute; and,

7. The legislation will not affect the validity, enforceability, or legality of any instrument that existed prior to the effective date or of any fiduciary relationship or right established or accrued under the instrument or by the relationship that existed before the repeal.<sup>4</sup>

Title 64.2 became effective October 1, 2012, three months later than the normal effective date for 2012 legislation.<sup>5</sup> For convenience and ease of understanding, current statutory references in this article parenthetically refer to the previous organizational system.

#### B. *Directed Trustees*

Settlors often want to name someone to oversee or direct the actions of the trustee in one or more areas of trust administration (e.g., investments, distributions, retention/sale of specific trust assets, voting of stock held in trust). This can be for a variety of reasons, but often the settlor simply wishes to employ the services of a professional trustee to administer the trust, while leav-

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4. Ch. 614, cls. 2–7, 9–10, 2012 Va. Acts \_\_\_\_.

5. *Id.*, cl. 12.

ing certain sensitive decisions to a family member or friend without imposing the normal fiduciary constraints applicable to trustees.

However, the existence of such a trust director (also sometimes called a trust protector or trust advisor) can place the trustee in a difficult position under current Virginia law. The trust director is only presumptively a fiduciary; if the trust terms allow, she need not act in good faith or in the beneficiaries' best interests.<sup>6</sup> On the other hand, the trustee must follow the trust director's instructions, even if they are contrary to the trustee's own fiduciary duties, unless the direction is "manifestly contrary" to the terms of the trust instrument or following the direction would constitute a "serious" breach of a fiduciary duty.<sup>7</sup> In other words, each time the trustee receives a direction from the trust director, the trustee must determine whether it can be followed. If there is any doubt as to the proper course of action, a cautious trustee will seek aid and guidance from the court in order to protect itself, particularly if the trust director is not a fiduciary. Not only does this burden the court system, but it can cause tension between the trustee, trust director, and beneficiaries.

Several states already had statutes addressing this problem.<sup>8</sup> Virginia followed their lead in 2012 by substantially revising its directed trustee statute.<sup>9</sup> Under the new law, trustees can be completely protected from fiduciary liability when following the directions of a "trust director," that is, any person other than a trustee who is given power by the trust instrument to direct the trustee on any matter.<sup>10</sup>

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6. See VA. CODE ANN. § 64.2-770(D) (Repl. Vol. 2012) (formerly *id.* § 55-548.08(D) (Interim Supp. 2012)).

7. *Id.* § 64.2-770(B) (Repl. Vol. 2012) (formerly *id.* § 55-548.08(B) (Interim Supp. 2012)).

8. See, e.g., ARIZ. REV. STAT. ANN. § 14-10808 (2012); DEL. CODE ANN. tit. 12, § 3313 (2007 & Cum. Supp. 2010); MICH. COMP. LAWS § 700.7809 (2012); IDAHO CODE ANN. § 15-7-501 (2009); IND. CODE § 30-4-3-9 (Repl. Vol. 2011); KY. REV. STAT. ANN. § 286.3-275 (LexisNexis Repl. Vol. 2011); NEV. REV. STAT. § 163.554 to -5553 (Repl. Vol. 2009 & Cum. Supp. 2011); OHIO REV. CODE ANN. §§ 5808.08, 5815.25 (LexisNexis 2006); OR. REV. STAT. § 130.735 (2012); S.D. CODIFIED LAWS § 55-1B-1 to -7. (2004); TENN. CODE ANN. §§ 35-15-808, 35-3-122, 35-3-123 (2007 & Supp. 2011); WYO. STAT. ANN. §§ 4-10-808(b), 4-10-715 to -718 (2011).

9. Act of Apr. 4, 2012, ch. 562, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 55-548.08 (Interim Supp. 2012) (recodified effective Oct. 1, 2012, at *id.* § 64.2-770 (Repl. Vol. 2012))).

10. VA. CODE ANN. § 64.2-770(E)(1) (Repl. Vol. 2012) (formerly *id.* § 55-548.08(E)(1)

To afford this protection, (i) the settlor must specifically incorporate Virginia Code section 64.2-770(E) (formerly section 55-548.08(E)) into the trust instrument (or all interested parties must agree to incorporate the provisions by specific reference in a nonjudicial settlement agreement),<sup>11</sup> and (ii) the trustee must not be guilty of willful misconduct or gross negligence in following the trust director's direction.<sup>12</sup> In that event, unless the trust provides otherwise, the trustee's only fiduciary obligations are to ensure that the requisite language is in the document, that the trust director is acting within the scope of his authority, and, in cases where the trustee may act only with the trust director's consent or direction, to request that consent or direction.<sup>13</sup>

As a matter of general trust law, a directed trustee may be relieved of liability only on the condition and to the extent that the trust director assumes fiduciary responsibility.<sup>14</sup> Therefore, if Virginia Code section 64.2-770(E) is invoked (and in all other cases if the instrument does not expressly provide otherwise), the trust

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(Interim Supp. 2012)). This relationship can take several forms. For example, the trustee may be free to act except as otherwise directed by the trust director, or the trustee may be prohibited from acting without the trust director's express consent or direction. *See id.* § 64.2-770(E)(2) (Repl. Vol. 2012) (formerly *id.* § 55-548.08(E)(2) (Interim Supp. 2012)). However, a person is not a trust director merely by holding a power of appointment over trust assets. *Id.* § 64.2-770(E)(1) (Repl. Vol. 2012) (formerly *id.* § 55-548.08(E)(1) (Interim Supp. 2012)).

11. *Id.* § 64.2-770(E) (Repl. Vol. 2012) (formerly *id.* § 55-548.08(E) (Interim Supp. 2012)). Virginia is one, if not the only, state to expressly allow incorporation of the statute by nonjudicial settlement agreement. This ability will be an important tool in the administration of trusts that became irrevocable before July 1, 2012.

12. *Id.* § 64.2-770(E)(2) (Repl. Vol. 2012) (formerly *id.* § 55-548.08(E)(2) (Interim Supp. 2012)).

13. *See id.* The trustee is not liable for any loss resulting directly or indirectly from the trust director's failure to respond. *Id.* The directed trustee has no separate duty to (i) monitor the trust director's conduct; (ii) provide the trust director with information, other than material facts related to the trust administration that the trust director expressly requests in writing; (iii) inform or warn anyone (including the trust director) of any disagreement between the trustee and the trust director regarding any action or direction by the trust director; (iv) attempt to prevent the trust director from directing or acting; or (v) compel the trust director to redress any perceived breach of fiduciary duty arising from any action or direction. *See id.* § 64.2-770(E)(3) (Repl. Vol. 2012) (formerly *id.* § 55-548.08(E)(3) (Interim Supp. 2012)).

14. *Cf.* RESTATEMENT (THIRD) OF TRUSTS § 75 cmt. B (1959) (stating that, when directed, trustees "ordinarily will be liable for a loss resulting from failure to comply with the trust provision, and ordinarily will not be liable for action or inaction resulting from compliance."). *See generally* Richard W. Nenno, *Directed Trusts: Can Directed Trustees Limit Their Liability?*, PROB. & PROP., November/December 2007, at 45 (outlining the various approaches to directed trustee liability and concluding that while "[s]erving as a directed trustee is fraught with peril . . . directed trustees can do much to limit their liability.").

director has a fiduciary duty to act in good faith with regard to the trust purposes and the interests of the beneficiaries and is liable for any loss that results from a breach of that duty.<sup>15</sup>

In sum, Virginia settlors now have two options. They may follow the current statutory default rule, authorizing the trustee to follow a third party's directions only after determining independently that the direction is not manifestly contrary to the trust terms and does not constitute a serious breach of trust. As an alternative, they may expressly incorporate the new statute into the trust document to shift fiduciary responsibility and potential liability from the trustee to the trust director. If a beneficiary objects to any directed action under the new rule, the claim will lie solely against the trust director, not the trustee.<sup>16</sup>

The new statute is an improvement over the uncertainty that existed under prior law. It maintains the settlor's ability to decide with whom the fiduciary responsibility for certain decisions should lie and better ensures that the trust director's instructions will be followed, while reducing the number of aid and guidance suits filed by trustees and generally improving relations between the parties.

### C. *Self-Settled Spendthrift Trusts*

Virginia law has long permitted a settlor to create an irrevocable discretionary trust for a third party and have the trust assets protected from the beneficiary's creditors.<sup>17</sup> Similar treatment historically has not been available for so-called "self-settled" trusts where the settlor is also a trust beneficiary.<sup>18</sup> Over the years, however, several important exceptions have developed in Virgin-

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15. VA. CODE ANN. § 64.2-770(D), (E)(1) (Repl. Vol. 2012) (formerly *id.* § 55-548.08(D), (E)(1) (Interim Supp. 2012)).

16. *See id.* Absent clear and convincing evidence to the contrary, any actions taken by the directed trustee pertaining to matters within the scope of the trust director's authority, "including confirming that the trust director's directions have been carried out and recording and reporting actions taken pursuant to the trust director's direction," are presumptively considered administrative and are not to be considered as either monitoring or participating in the trust director's actions. *Id.* § 64.2-770(E)(4) (Repl. Vol. 2012) (formerly *id.* § 55-548.08(E)(4) (Interim Supp. 2012)).

17. *Id.* §§ 64.2-742, -743, -746 (Repl. Vol. 2012) (formerly *id.* §§ 55-545.01, .02, .04 (Interim Supp. 2012)).

18. *See id.* § 64.2-747 (Repl. Vol. 2012) (formerly *id.* § 55-545.05 (Cum. Supp. 2011)).

ia,<sup>19</sup> and other states have enacted statutes offering such protection.<sup>20</sup> Commentators questioned whether any continuing prohibition on creditor protection for self-settled trusts was justified.<sup>21</sup>

Against this background, the 2012 General Assembly authorized creditor protection for self-settled trusts.<sup>22</sup> As of July 1, 2012, a settlor may transfer assets to a “qualified self-settled spendthrift trust” in Virginia and retain the right to receive future distributions from the trust at the discretion of an independent trustee without exposing the assets to claims of the settlor’s creditors.<sup>23</sup> If certain requirements are met, the settlor’s creditors may not set aside the transfer under section 55-80 on the theory it was intended to delay, hinder, or defraud creditors<sup>24</sup> or assert a claim “against any trustee, trust adviser, trust director, or any

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19. For example, the prohibition excludes individual retirement accounts, which are merely a tax-favored form of self-settled revocable spendthrift trust. *See id.* § 34-34 (Repl. Vol. 2011). Another exception protects a settlor’s contingent remainder interest in certain inter vivos trusts created for a spouse when the spouse subsequently predeceased the settlor. *See id.* § 64.2-747 (Repl. Vol. 2012) (formerly *id.* § 55-545.05(B)(3) (Cum. Supp. 2011)) (discussed in J. William Gray, Jr. & Katherine E. Ramsey, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 46 U. RICH. L. REV. 243, 243–45 (2011) [hereinafter Gray & Ramsey]). Section 55-545.05 was recodified effective October 1, 2012, at Virginia Code section 64.2-747, but subsection (B)(3) was omitted inadvertently. The authors expect this error to be corrected through a technical bill in 2013. A settlor also can protect assets from his creditors simply by retitling them with a spouse as tenants by the entireties or by creating a self-settled spendthrift trust in another state that permits it. In addition, the current law frustrates many settlors’ estate planning goals. A person considering a large gift for estate tax planning purposes might hesitate out of concern that he could need the property unexpectedly at a later date. If the donor retains so much as a remote discretionary interest, however, current law exposes the entire trust to the claims of the donor’s creditors. That result under state law would cause all of the trust assets to be subject to federal estate tax at the donor’s death, thus defeating the original tax purpose behind setting up the trust. *See infra* notes 37–39 and accompanying text; *see also* *Outwin v. Comm’r*, 76 T.C. 153 (1981), *acq.*, 1982-1 C.B. 2; *Paolozzi v. Comm’r*, 23 T.C. 182 (1954), *acq.* 1962-1 C.B. 4; Rev. Rul. 76-103, 1976-1 C.B. 293.

20. *See, e.g.*, DEL. CODE ANN. tit. 12, §§ 3570 to 3576 (2007 & Cum. Supp. 2010); ALASKA STAT. § 34.40.110 (2008).

21. *See, e.g.*, Robert T. Danforth, *Rethinking the Law of Creditors’ Rights in Trusts*, 53 HASTINGS L. J. 287 (2001–02).

22. *See* Act of Apr. 4, 2012, ch. 555, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 55-545.03:2, -545.03:3, -545.05 (Repl. Vol. 2012)) (recodified effective Oct. 1, 2012, at *id.* §§ 64.2-745.1, -745.2, -747 (Repl. Vol. 2012)).

23. VA. CODE ANN. § 64.2-745.1(A) (Repl. Vol. 2012) (formerly *id.* § 55-545.03:2(A) (Interim Supp. 2012)).

24. *Id.* § 64.2-745.1(C) (Repl. Vol. 2012) (formerly *id.* § 55-545.03:2(C) (Interim Supp. 2012)). Existing creditors, however, may bring a challenge under sections 55-80 or 55-81 on the ground that the transfer to the trust rendered the settlor insolvent. *Id.*



person involved in the counseling, drafting, preparation, or execution of, or transfers” of property to, the trust.<sup>25</sup>

In order to be recognized as a “qualified self-settled spendthrift trust,” a trust must have the following characteristics:

1. It must be an irrevocable trust created during the settlor’s lifetime;
2. The instrument must expressly incorporate Virginia law to govern the validity, construction, and administration of the trust; and it must include a spendthrift provision that restrains both voluntary and involuntary transfer of the settlor’s “qualified interest;”
3. There must be at least one “qualified trustee” at all times;
4. At all times when distributions may be made to the settlor pursuant to the settlor’s qualified interest there must be at least one other beneficiary to whom distributions may be made;<sup>26</sup> and
5. The settlor may not have the right to disapprove trust distributions.<sup>27</sup>

Only the settlor’s qualified interest is protected from creditor claims.<sup>28</sup> A “qualified interest” includes only the settlor’s entitlement “to receive distributions of income, principal, or both, in the sole discretion of an independent qualified trustee.”<sup>29</sup> A “qualified trustee” must (i) be either a Virginia resident individual or a legal entity authorized to engage in trust business in Virginia; and (ii) materially participate in the trust’s administration in Virginia.<sup>30</sup>

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25. *Id.* § 64.2-745.1(E) (Repl. Vol. 2012) (formerly *id.* § 55-545.03:2(E) (Interim Supp. 2012)).

26. Presumably, the additional beneficiary would prevent the trustee from abusing his or her distribution discretion in favor of the settlor.

27. *See* VA. CODE ANN. § 64.2-745.2(A) (Repl. Vol. 2012) (formerly *id.* § 55-545.03:3(A) (Interim Supp. 2012)).

28. *See id.*; *id.* § 64.2-745.1(A) (Repl. Vol. 2012) (formerly *id.* § 55-545.03:2(A) (Interim Supp. 2012)).

29. *Id.* § 64.2-745.2(A) (Repl. Vol. 2012) (formerly *id.* § 55-545.03:3(A) (Interim Supp. 2012)). Mandatory distributions are not protected, nor are distributions made in the discretion of a non-independent qualified trustee. *See id.* A settlor may have both a qualified interest, which is protected from creditors, and another interest, which is not protected, in the same trust. *Id.*

30. *Id.* Examples include maintaining or arranging for custody of at least some trust property within the state, maintaining at least a portion of the trust records in Virginia, or preparing or arranging for the preparation of the trust’s fiduciary income tax returns in Virginia. *Id.* A qualified trustee’s distribution authority cannot be subject to the direction

An “independent qualified trustee” (who may make discretionary distributions to the settlor) is a qualified trustee who is not, and whose actions are not, subject to direction by: (i) an individual not residing in Virginia; (ii) an entity not authorized under Virginia law to engage in trust business within the state; (iii) the settlor; (iv) the settlor’s spouse, parent, issue, sibling, employee, or subordinate employee;<sup>31</sup> (v) a business entity in which the settlor holds at least thirty percent of all voting interests; or (vi) a subordinate employee of a business entity in which the settlor is an executive.<sup>32</sup>

If a qualified trustee or qualified independent trustee ceases to serve for any reason, the position must be filled by an eligible successor designated pursuant to the trust agreement or, if none, by an eligible person designated by all of the qualified beneficiaries of the trust, or otherwise by an eligible person appointed by the court pursuant to its statutory authority.<sup>33</sup>

The new statute also contains provisions to protect the claims of the settlor’s existing creditors,<sup>34</sup> to prevent future creditors

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of a third party (such as a trust protector or trust director) who would not also meet the requirements of a qualified trustee if he were a trustee. *Id.* If one of the reasons behind this requirement was to ensure trust distribution decisions are made, directly or indirectly, in Virginia, it does not go far enough. The statute requires only that the trust have at least one qualified trustee at all times; it does not require that the qualified trustee participate in distribution decisions at all. Thus, it should be possible for the agreement to provide that all distribution decisions will be made by one or more nonqualified trustees or trust directors outside of Virginia until distributions to the settlor may be desired, at which time an independent qualified trustee would assume control over the distribution decisions with respect to the settlor.

31. The distinction between employee and subordinate employee for this purpose is not clear.

32. VA. CODE ANN. § 64.2-745.2(A) (Repl. Vol. 2012) (formerly *id.* § 55-545.03:3(A) (Interim Supp. 2012)).

33. *Id.* § 64.2-745.2(B), (C) (Repl. Vol. 2012) (formerly *id.* § 55-545.03:3(B), (C) (Interim Supp. 2012)). The qualified trustee who makes the trust eligible for self-settled spendthrift protection may, but need not, also be an independent qualified trustee. As a practical matter, this means a settlor who would like to retain only the possibility of future distributions might create an irrevocable trust for the benefit of others and name an initial qualified trustee only for administrative purposes in order to obtain spendthrift protection, while reserving all current distribution decisions to non-qualified trustees. An independent qualified trustee could be appointed at a later date pursuant to the terms of the trust, if and when distributions to the settlor become desirable.

34. As is the case under current law, pre-existing claims may be enforced against the trust under section 55-82 for five years after the date of funding. *See id.* § 64.2-745.1(D) (Repl. Vol. 2012) (formerly *id.* § 55-545.03:2(D) (Interim Supp. 2012)). If the settlor makes more than one transfer to the same trust, a separate five-year limitations period begins on the date of each transfer, and each distribution to a beneficiary is deemed to have been made from the latest transfer. *See id.* § 64.2-745.1(F) (Repl. Vol. 2012) (formerly *id.* § 55-

from claiming that the settlor's interest makes the trust revocable,<sup>35</sup> and to avoid federal transfer tax problems that would arise if the settlor were treated as the owner of part, but not all, of his qualified interest.<sup>36</sup>

Only time will tell if the new self-settled spendthrift trust rules will be embraced by planners and their clients. At first glance, they appear most useful to those Virginia residents who are only mildly concerned about potential future creditors or who wish only to make large gifts for tax purposes while retaining the possibility of benefiting from the assets in the future if needed. These individuals now should be able to establish trusts in Virginia rather than be forced either to deal with advisors and trustees in

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545.03:2(F) (Interim Supp. 2012)). If an existing trust first meets the requirements of a qualified self-settled spendthrift trust when its administration is moved to Virginia, the five-year period for all prior transfers will begin on the date Virginia administration commences. *See id.* § 64.2-745.1(G) (Repl. Vol. 2012) (formerly *id.* § 55-545.03:2(G) (Interim Supp. 2012)). Note, it is difficult to reconcile this trust domestication rule with the plain language of section 55-545.03:3(A), which defines a qualified self-settled spendthrift trust as one that has "at all times" had a qualified trustee (i.e., a Virginia resident who conducts at least a material portion of the trust's administration in this state) and that is governed by a trust instrument that "expressly incorporates" Virginia law. *See id.* § 64.2-745.2(A) (Repl. Vol. 2012) (formerly *id.* § 55-545.03:3(A) (Interim Supp. 2012)).

35. *See id.* § 64.2-747(A)(1) (Repl. Vol. 2012) (formerly *id.* § 55-545.05(A)(1) (Cum. Supp. 2012)). A self-settled spendthrift trust will not be deemed revocable because the settlor has:

1. a qualified interest,
2. a power, effective only upon death, to appoint to anyone other than the settlor's estate or its creditors,
3. a right to receive distributions pursuant to an ascertainable standard,
4. a right to receive a specific annual percentage (not greater than five percent) of the initial trust value or the value determined periodically pursuant to the instrument,
5. a right to remove and replace trustees, or
6. an interest in a qualified charitable remainder trust or personal residence trust or a qualified annuity interest;

or because a trustee has the ability to pay:

1. the settlor's debts, estate administration expenses, and any estate or inheritance tax after the settlor's death, or
2. the settlor's income tax liability on trust income.

*See id.* § 64.2-745.2(D) (Repl. Vol. 2012) (formerly *id.* § 55-545.03:3(D) (Interim Supp. 2012)).

36. For purposes of the self-settled spendthrift trust rules, a beneficiary who has the right to withdraw his entire beneficial interest in the trust will be treated as its settlor to the extent of that interest once the withdrawal right lapses. *See id.* § 64.2-744(E) (Repl. Vol. 2012) (formerly *id.* § 55-545.03(E) (Interim Supp. 2012)). This provides creditor protection for the beneficiary's entire interest rather than only for the portion that does not exceed the "five and five" power exclusion or gift tax annual exclusion, as would be the case under former section 55-545.05(B)(2). *See id.*

more debtor-friendly states or, more likely, to forgo the associated planning opportunities entirely. However, those with significant financial worries most likely will continue to seek the greater protection afforded by the laws of more established “haven” states or off-shore jurisdictions.

#### D. *Tax Reimbursement by Grantor Trust*

If the settlor of an irrevocable trust is treated as the owner of the trust assets for federal income tax purposes, the trust's income and capital gains are taxed to the settlor even if he or she has not retained any beneficial interest in the trust.<sup>37</sup> The resulting tax liability can work a significant hardship on a settlor who does not have other resources with which to pay it. Virginia law had no provision allowing the trustee to reimburse the settlor for any portion of that liability unless the trust instrument expressly authorized reimbursement. The 2012 General Assembly, however, amended the Virginia Uniform Principal and Income Act to change the default rule.<sup>38</sup> A trustee now generally may make discretionary distributions of principal to pay the settlor's income tax attributable to the trust income, unless the trust agreement provides otherwise or unless the trustee's action would reduce or limit any charitable income, estate, or gift tax deduction allowed for contributions to the trust.<sup>39</sup>

Ordinarily a settlor's creditors may reach the maximum amount that can be distributed to or for the settlor's benefit from any irrevocable trust he has created.<sup>40</sup> So that a trustee's exercise of its new discretionary power would not cause creditor problems for the settlor, the General Assembly also amended the self-settled spendthrift trust provisions of the Virginia Uniform Trust Code to confirm that a trustee's ability to pay, or reimburse the

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37. See I.R.C. §§ 671 to 677 (2006).

38. Act of Apr. 9, 2012, ch. 718, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 55-277.26, -545.05 (Interim Supp. 2012)) (recodified effective Oct. 1, 2012, at *id.* §§ 64.2-1025, -747 (Repl. Vol. 2012)).

39. VA. CODE ANN. § 64.2-1025(C) (Repl. Vol. 2012) (formerly *id.* § 55-277.26(C) (Interim Supp. 2012)).

40. *Id.* § 64.2-747(A)(2) (Repl. Vol. 2012) (formerly *id.* § 55-545.05(A)(2) (Repl. Vol. 2007)).

settlor for, tax on trust income or principal will not, without more, entitle a creditor or assignee of the settlor to reach any portion of the trust.<sup>41</sup>

### E. *Decanting of Trust Assets*

A trustee with discretionary distribution power over income or principal “decants” a trust when it distributes trust assets to a new trust for the beneficiary. Though decanting can be seen as a trustee’s exercise of a special power of appointment, it had not been statutorily authorized in Virginia.<sup>42</sup> In 2012, however, the General Assembly followed the lead of several other states and adopted its own decanting statute.<sup>43</sup> Unless the trust instrument expressly provides otherwise, the trustee of any irrevocable trust administered under Virginia law may exercise a discretionary power to make distributions to or for the benefit of a current trust beneficiary by appointing all or part of the principal or income of the original trust in favor of a trustee of a second trust.<sup>44</sup>

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41. Act of Apr. 9, 2012, ch. 718, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 55-545.05(A)(2) (Interim Supp. 2012)) (recodified effective Oct. 1, 2012, at *id.* § 64.2-747(A)(2) (Repl. Vol. 2012)). This amendment also may help to avoid any claim that a trust in which the settlor retains no other interest should nevertheless be includable in the settlor’s gross estate for federal tax purposes because a portion of it is available to pay claims of the settlor’s creditors. *See generally* I.R.C. § 2036(a)(1) (2006); Treas. Reg. § 20.2036-1(b)(2) (2012); Rev. Rul. 2004-64, 2004-27 I.R.B. 7.

42. In theory, this falls within the trustee’s discretionary power to make distributions and can be seen as the exercise of a special power of appointment in a fiduciary capacity. Decanting can be a very useful tool, particularly for older trusts with antiquated language or where a change in law or circumstances not anticipated by the settlor makes continued administration of the original trust difficult. Decanting also can be seen as contrary to a trustee’s fiduciary duties and a possible violation of the settlor’s intent. *See generally* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.14 cmt. f (2011) (endorsing decanting as an inherent fiduciary power). *See also* Phipps v. Palm Beach Trust Co., 196 So. 299, 301 (Fla. 1940) (“The power vested in a trustee to create an estate in fee includes the power to create or appoint any estate less than a fee unless the donor clearly indicates a contrary intent.”).

43. Act of Apr. 4, 2012, ch. 559, 2012 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 55-548.16:1) (Interim Supp. 2012) (recodified effective Oct. 1, 2012, at *id.* § 64.2-778.1 (Repl. Vol. 2012)).

44. VA. CODE ANN. § 64.2-778.1(B) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(B) (Interim Supp. 2012)). The trustee need not seek court approval to exercise this decanting power. *Id.* The trustee may exercise a decanting power whether or not there is a current need to make distributions under the terms of the original trust, and the second trust may be created specifically to receive decanted assets. *Id.*

The second trust must be created by an irrevocable lifetime or testamentary instrument<sup>45</sup> that meets the following requirements:

1. Its beneficiaries may include only beneficiaries of the original trust. The trustee's distribution power must be exercisable in favor of the same current beneficiaries and, unless the court approves otherwise, subject to the same ascertainable standard as in the original trust;<sup>46</sup>

2. A beneficiary who has only a future interest in the original trust may not have that interest converted to a present interest in the second trust;<sup>47</sup>

3. The second trust may not "reduce any fixed income, annuity, or unitrust interest of a beneficiary in the original trust;"<sup>48</sup>

4. The second trust may not contain any provision that would have prevented a contribution to the original trust from qualifying for the marital or charitable deduction for federal tax purposes or would have reduced the amount deductible;<sup>49</sup>

5. If contributions to the original trust qualified for the gift tax annual per-donee exclusion or the "age 21" exclusion, the second trust may not delay vesting of those contributions in the beneficiary;<sup>50</sup>

6. If a beneficiary has a power of withdrawal over the original trust, either the second trust must provide an identical withdrawal power or sufficient property must remain in the original trust to satisfy the power;<sup>51</sup> and,

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45. *Id.* § 64.2-778.1(A) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(A) (Interim Supp. 2012)).

46. *Id.* § 64.2-778.1(C)(1), (2) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(C)(1), (2) (Interim Supp. 2012)).

47. *Id.* § 64.2-778.1(C)(3) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(C)(3) (Interim Supp. 2012)).

48. *Id.* § 64.2-778.1(C)(4) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(C)(4) (Interim Supp. 2012)).

49. *Id.* § 64.2-778.1(C)(5) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(C)(5) (Interim Supp. 2012)).

50. *Id.* § 64.2-778.1(C)(6) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(C)(6) (Interim Supp. 2012)). The "age 21" exclusion is codified at 26 U.S.C. sections 2503(b) and 2503(c).

51. *Id.* § 64.2-778.1(C)(7) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(C)(7) (Interim

7. The second trust may give a current beneficiary of the original trust a power of appointment, including the power to appoint to persons who were not beneficiaries of either trust.<sup>52</sup>

A trustee may not exercise a decanting power if the trustee is (i) an individual eligible to receive distributions of income or principal currently or upon termination of the trust, (ii) an individual whose legal obligation to support a beneficiary may be satisfied by such current distributions, or (iii) a trustee who may be removed by a current trust beneficiary and replaced with a successor trustee who is a “related or subordinate party” with respect to that beneficiary under federal tax rules.<sup>53</sup> The power must be exercised by majority action of the eligible trustees or by a special fiduciary appointed by the court if no trustee is eligible to act or if any trustee so requests.<sup>54</sup>

Eligible trustees may exercise a decanting power by (i) signing and acknowledging a written instrument setting forth the manner of exercising the power, the terms of the second trust, and its effective date; and (ii) filing the instrument with the records of the original trust.<sup>55</sup> Unless all qualified beneficiaries of the original trust waive notice, the trustee must notify the grantor of the original trust, its qualified beneficiaries (except the attorney general) or their representatives under normal Uniform Trust Code rules, and all advisors or protectors of the original trust at least sixty days before the effective date.<sup>56</sup>

A trustee or beneficiary may seek court approval or disapproval of a proposed decanting.<sup>57</sup> If the original trust was subject to the jurisdiction of the commissioner of accounts, the second trust also

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Supp. 2012)).

52. *Id.* § 64.2-778.1(C)(8) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(C)(8) (Interim Supp. 2012)).

53. *Id.* § 64.2-778.1(A), (D) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(A), (D) (Interim Supp. 2012)).

54. *Id.* § 64.2-778.1(D) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(D) (Interim Supp. 2012)).

55. *Id.* § 64.2-778.1(F) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(F) (Interim Supp. 2012)).

56. *Id.* § 64.2-778.1(G) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(G) (Interim Supp. 2012)).

57. *See id.* § 64.2-778.1(I) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(I) (Interim Supp. 2012)).

must account to the commissioner unless the court orders otherwise.<sup>58</sup>

A decanting must be consistent with the fiduciary duties of the trustee of the original trust.<sup>59</sup> It will be treated for all purposes as an exercise of a power not exercisable in favor of the trustee individually or the trustee's creditors, estate, or estate creditors.<sup>60</sup> Decanting is permissible even if the trust instrument prohibits amendment or revocation or contains a spendthrift provision.<sup>61</sup> Normal provisions of the rule against perpetuities under Virginia Code sections 55-12.1 through 55-13.3 continue to apply.<sup>62</sup>

The new Virginia decanting statute, which incorporates many of the same provisions enacted by other states, is intended to balance the flexibility of decanting with safeguards for trust beneficiaries and trustees. Despite the relative clarity that the new statute brings to state law, it seems unlikely that decanting will be widely used until the Internal Revenue Service completes a project, currently underway, to examine the income and transfer tax effects of decanting and issues clear guidance on those points.<sup>63</sup>

#### F. *Real Estate Conveyance by Nonresident Fiduciary*

Personal representatives and testamentary trustees generally can exercise their powers only within the jurisdiction of the court that appointed them. Thus, at least since June 30, 1986, fiduciaries appointed by courts outside of Virginia have been unable to

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58. *Id.* § 64.2-778.1(J) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(J) (Interim Supp. 2012)).

59. *Id.* § 64.2-778.1(E)(1) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(E)(1) (Interim Supp. 2012)).

60. *Id.* § 64.2-778.1(E)(2) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(E)(2) (Interim Supp. 2012)).

61. *Id.* § 64.2-778.1(E)(4) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(E)(4) (Interim Supp. 2012)).

62. *Id.* § 64.2-778.1(E)(3) (Repl. Vol. 2012) (formerly *id.* § 55-548.16:1(E)(3) (Interim Supp. 2012)).

63. I.R.S. Notice 2011-101, 2011-52 I.R.B. 932. The IRS will continue to issue private letter rulings on proposed decantings that do not change beneficial interests or the applicable rule against perpetuities. *Id.* It is seeking comments on issues such as the federal transfer tax effects of changes in the identities of trust beneficiaries or their respective interests, changes in situs or governing law, transfers from grantor trusts to non-grantor trusts or vice versa, changes that affect generation-skipping transfer tax exemption, and requirements for consent of beneficiaries or government officials. *Id.*



deal with Virginia real estate without the involvement of an ancillary administrator qualified in the court where the real estate is located.<sup>64</sup>

As of July 1, 2012, however, an executor or trustee under a will probated according to the laws of another state can convey valid title to the decedent's Virginia real estate without the signature of a Virginia ancillary fiduciary if (i) the executor or trustee is duly qualified in the state where the will was probated, (ii) the will was duly executed in accordance with Virginia law, and (iii) an authenticated copy is admitted to probate in the county or city in which all or any part of the real estate is situated.<sup>65</sup> The rule expressly validates transfers occurring as long ago as June 30, 1986.<sup>66</sup>

### G. *Out-of-State Trust Institutions*

The 2011 General Assembly amended Virginia Code sections 6.2-1001 and 6.2-1014 to expressly authorize a national banking association supervised by the federal comptroller of the currency to engage in trust business and serve as a fiduciary in the Commonwealth, even if the association did not have an office within the Commonwealth.<sup>67</sup> That legislation was intended to contradict a 2003 attorney general's opinion holding that the Federal National Bank Act did not preempt a Virginia law purporting to bar

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64. Virginia Code section 64.1-149 validates sales of Virginia real property made before June 30, 1986, by nonresident executors who did not first qualify in this state, provided the decedent's will was executed in accordance with Virginia law, conferred a power of sale on the executor, and was duly probated in the other state, and an authenticated copy of the will was probated in Virginia. VA. CODE ANN. § 64.2-524(A) (Repl. Vol. 2012) (formerly *id.* § 64.1-149 (Repl. Vol. 2007)). However, any sale entered into on or after June 30, 1986, required someone to qualify as ancillary administrator in Virginia in order to sign the deed of conveyance. *Id.* § 64.1-150 (Repl. Vol. 2007).

65. Act of Mar. 1, 2012, ch. 61, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 64.1-150 (Interim Supp. 2012)) (recodified effective Oct. 1, 2012, at *id.* § 64.2-524(B) (Repl. Vol. 2012)).

66. *Id.* Note, though, that like section 64.1-149, the new rule expressly applies to "any conveyance of real estate," but also refers to "such sale," a phrase that can be read to limit its application to transfers for valuable consideration. *Id.* This could exclude, for example, a conveyance of property by an executor in satisfaction of a formula bequest or an authorized distribution by a testamentary trustee to a beneficiary. In addition, neither the prior law nor the new version addresses the authority of the administrator of an intestate estate to deal with property in the Commonwealth without qualifying here. These gaps should be addressed in future legislative sessions.

67. Act of Mar. 14, 2011, ch. 67, 2011 Va. Acts 130 (codified as amended at VA. CODE ANN. §§ 6.2-1001, -1014 (Cum. Supp. 2011)).

out-of-state national banks from engaging in trust business in Virginia without maintaining a Virginia office.<sup>68</sup> Unfortunately, the 2011 amendment did not make clear whether the term “national banking association” included both national banks and federal savings banks. A 2012 amendment confirms that both types of federal institutions are indeed authorized to engage in trust business in Virginia even if they have no offices in the Commonwealth.<sup>69</sup>

#### H. *Sums Distributed By/Through Court*

Administering an estate, trust, or conservatorship can be a time-consuming and expensive process, regardless of the amount involved. If a beneficiary cannot be found, refuses to accept a distribution, or cannot accept the distribution due to minority or incapacity, the fiduciary might find it necessary to continue the administration for as long as a single asset remains. Fortunately, in certain situations, Virginia Code section 8.01-606 permits fiduciaries and others to pay small amounts into the circuit court for eventual distribution, or to make the distributions themselves without the intervention of a guardian or further accounting.<sup>70</sup> The maximum amount that could be handled in this fashion has increased over the years. In 1995, it was \$10,000;<sup>71</sup> in 2003, it became \$15,000.<sup>72</sup> The General Assembly increased it once more in 2012 to \$25,000, effective July 1, 2012.<sup>73</sup>

#### I. *Mutual Liability for Necessaries*

A Virginia spouse generally is not personally liable for the other spouse's debts, even those that arose during the marriage.<sup>74</sup> However, unless the couple is permanently living separate and apart, the common law doctrine of necessaries makes a spouse li-

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68. See generally Gray & Ramsey, *supra* note 19, at 251–52 (discussing out-of-state institutions as trustees).

69. Act of Apr. 4, 2012, ch. 608, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 6.2-1001, -1014, -1067 (Cum. Supp. 2012)).

70. VA. CODE ANN. § 8.01-606 (Cum. Supp. 2012).

71. *Id.* (Cum. Supp. 1995).

72. *Id.* (Cum. Supp. 2003).

73. Act of Mar. 1, 2012, ch. 43, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-606 (Cum. Supp. 2012)).

74. See VA. CODE ANN. § 55-37 (Repl. Vol. 2012).

able for the other spouse's debts that were incurred for that spouse's own sustenance or support.<sup>75</sup> Virginia Code section 55-37 protects a married couple's principal residence from debtor claims under the doctrine of necessities so long as they own it as tenants by the entirety.<sup>76</sup> The 2012 General Assembly amended section 55-37 to continue that protection after either spouse's death, so long as the tenancy by the entirety terminated as a result of the death.<sup>77</sup>

#### J. Notice About Death Benefits After Divorce

Spouses who divorce sometimes neglect to update their respective beneficiary designations to remove the former spouse. In 1993, the General Assembly decided to help by automatically revoking any revocable designation naming a former spouse as the beneficiary of a death benefit under any written contract when the divorce or annulment decree is entered.<sup>78</sup> Although effective for life insurance contracts, annuities, deferred compensation agreements, and the like, the state law was preempted by specific requirements for changing beneficiary designations under applicable federal laws.<sup>79</sup>

After a previous attempt to circumvent the preemption problem failed,<sup>80</sup> the General Assembly amended Virginia Code section 20-

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75. *Id.*; see also BLACK'S LAW DICTIONARY 554 (9th ed. 2009).

76. VA. CODE ANN. § 55-37 (Repl. Vol. 2012).

77. Act of Mar. 1, 2012, ch. 45, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 55-37 (Repl. Vol. 2012)). Clearly, a rule that is intended to ensure one spouse provides for the other's basic needs should not allow a creditor to force the "poor" spouse from his home when attempting to collect. The continued statutory protection is available, however, regardless of which spouse is the survivor. While the equities depend on the facts of each case, the General Assembly appears to have concluded that a bright line rule was best.

78. Act of Mar. 22, 1993, ch. 417, 1993 Va. Acts 487 (codified at VA. CODE ANN. § 20-111.1 (Cum. Supp. 1993)).

79. See, e.g., *Egelhoff v. Egelhoff, ex rel. Breiner*, 532 U.S. 141, 143 (2001) (finding a similar Washington statute preempted "to the extent it applie[d] to ERISA plans").

80. See Act of Mar. 12, 2007, ch. 306, 2007 Va. Acts 432 (codified as amended at VA. CODE ANN. § 20-111.1 (Cum. Supp. 2007)) (providing that, in the case of federal preemption, a former spouse—who receives payment of any death benefit to which he would not otherwise be entitled if section 20-111.1 were given effect—is personally liable for the same amount to the person(s) who would have been entitled to the benefit if the statute had not been preempted). The Supreme Court of Virginia recently held that this statute, which is not entirely displaced by federal law, is nevertheless preempted because it actually conflicts with the federal law. See *Maretta v. Hillman*, 283 Va. 34, 45, 722 S.E.2d 32, 37 (2012); *infra* Part III.B.

111.1 in 2012 to require decrees of divorce or annulment to contain a specific statutory notice about beneficiary designations.<sup>81</sup> In conspicuous, bold print, every decree entered on or after July 1, 2012, must advise the parties that entry of the decree may or may not revoke any designation of the former spouse as beneficiary of a death benefit and that the parties are responsible for following all beneficiary-change instructions given by the provider of the benefit.<sup>82</sup>

#### K. *Agent's Authority Under Power of Attorney*

The Virginia Uniform Power of Attorney Act specifies several events that, unless the power of attorney provides otherwise, automatically terminate an agent's authority to deal with the principal's property, including the filing of an action for divorce or annulment of the agent's marriage to the principal or their legal separation.<sup>83</sup> The list of terminating events was extended in 2012 to include the filing of an action by either agent or principal for separate maintenance or for custody of a child in common with the other, as presumably these events would be equal evidence of a breakdown in the agency relationship.<sup>84</sup>

#### L. *Land Trust Successor Trustees*

By a 2011 amendment to Virginia Code section 55-17.1, the beneficiaries of a land trust were empowered to name a successor trustee when the trustee named in the deed conveying property to the land trust declines to serve, resigns, is disqualified or removed, or is adjudicated incapacitated and the deed does not name a successor trustee.<sup>85</sup> However, this amendment overlooked the possibility that the relevant trust instrument might specify another method for choosing a successor trustee. A 2012 amendment confirms that in such an instance, the trust beneficiaries

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81. Act of Apr. 4, 2012, ch. 493, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 20-111.1 (Cum. Supp. 2012)).

82. VA. CODE ANN. § 20-111.1(E) (Cum. Supp. 2012).

83. *Id.* § 64.2-1608(B)(3) (Repl. Vol. 2012) (formerly *id.* § 26-81(B)(3) (Repl. Vol. 2011)).

84. Act of Mar. 1, 2012, ch. 57, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 26-81(B)(3) (Supp. 2012) (recodified effective Oct. 1, 2012, at *id.* § 64.2-1608(B)(3) (Repl. Vol. 2012)).

85. See Gray & Ramsey, *supra* note 19, at 251 (citing Act of Mar. 26, 2011, ch. 661, 2011 Va. Acts 1076 (codified as amended at VA. CODE ANN. § 55-17.1 (Cum. Supp. 2011))).

may name a successor only if the trust instrument does not name a successor and neither the deed nor the trust instrument specifies the procedure for doing so.<sup>86</sup>

#### M. *Notary Conflicts of Interests*

The 2011 General Assembly also amended Virginia Code section 47.1-30 to prohibit a notary from notarizing a document where the notary “is a signatory or is named in the document.”<sup>87</sup> But in doing so, it created an ambiguity as to whether someone who is nominated only as a fiduciary in a will, trust, power of attorney, or otherwise specifically identified by name in any way, could act as notary.<sup>88</sup> A 2012 amendment partially corrected the problem by confirming that an individual named in a document for the purpose of receiving notices or named as executor, trustee or other fiduciary is not, for that reason alone, precluded from performing notarial acts with respect to the document.<sup>89</sup>

Unfortunately, whether intentional or not, the change would seem to make it more likely that a person who is named in the document for some other reason (such as to serve as trust advisor or merely to provide a recommendation to the executor or trustee as to someone who might provide future services to the estate or trust) may not serve as a notary.

#### N. *Tax Exemption for Principal Residence of Disabled Veteran*

Perhaps in a sign of the times, the 2012 General Assembly passed not one but two separate bills addressing real property tax issues for disabled veterans.<sup>90</sup> Although not directly related to wills, trusts, or estates, at least one of the changes is worth noting because it responds to a Virginia attorney general’s opinion which held that the property tax exemption under section 58.1-3219.5 was available only to veterans who own their residences

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86. Act of Apr. 4, 2012, ch. 558, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 55-17.1 (Cum. Supp. 2012)).

87. Act of Mar. 28, 2011 ch. 746, 2011 Va. Acts 1249 (codified as amended at VA. CODE ANN. § 47.1-30 (Cum. Supp. 2011)).

88. See Gray & Ramsey, *supra* note 19, at 252–53.

89. Act of Apr. 4, 2012, ch. 566, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 47.1-30 (Cum. Supp. 2012)).

90. S.B. 540, Va. Gen. Assembly (Reg. Sess. 2012); H.B. 922, Va. Gen. Assembly (Reg. Sess. 2012).

outright.<sup>91</sup> The General Assembly confirmed that the tax exemption was, in fact, intended also to be available to disabled veterans and their spouses who hold their principal residence in several other forms besides fee simple, namely: (i) a tenancy for life, (ii) an inter vivos trust that the veteran or spouse can revoke, or (iii) an irrevocable trust in which the veteran or spouse has a life estate or estate for joint lives or a continuing right of use and support.<sup>92</sup> A disabled veteran (and spouse) may claim a partial exemption in certain situations if someone else who does not qualify for the exemption holds an interest in the property;<sup>93</sup> but exemption is not available for a leasehold interest or term of years.<sup>94</sup>

### III. CASES

#### A. *Transferability of LLC Interests*

Many estate planning lawyers may have assumed that a membership interest in a limited liability company (“LLC”) is personal property that can pass in its entirety under the deceased owner’s will, subject only to any transferability restrictions contained in the LLC operating agreement. The Supreme Court of Virginia’s decision in *Ott v. Monroe* serves as a reminder that such assumptions can be misplaced.<sup>95</sup>

In *Ott*, Mr. and Mrs. Monroe were the only members of a Virginia LLC.<sup>96</sup> The operating agreement that governed the LLC’s affairs declared, among other things, that Mrs. Monroe would be the managing member.<sup>97</sup> It also included a general prohibition against transferring a membership interest except as permitted by the agreement.<sup>98</sup> Permitted transfers included those made to “[o]ther Members [or] [t]he spouse, children or other descendants

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91. Op. to Hon. John M. O’Bannon, III, et al. (July 15, 2011). This ruling was of concern because it could have limited veterans’ estate planning options for what is typically one of their largest assets.

92. Act of Mar. 13, 2012, ch. 263, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-3219.5(D) (Cum. Supp. 2012)); Act of Mar. 6, 2012, ch. 75, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-3219.5(D) (Cum. Supp. 2012)).

93. VA. CODE ANN. § 58.1-3219.5(E) (Cum. Supp. 2012).

94. *Id.* § 58.1-3219.5(D) (Cum. Supp. 2012).

95. 282 Va. 403, 719 S.E.2d 309 (2011).

96. *Id.* at 406, 719 S.E.2d at 310.

97. *Id.*

98. *Id.*

of any Member,” as well as to any other non-member “by death, intestacy, devise, or otherwise by operation of law” or with the other members’ unanimous written consent.<sup>99</sup>

Mr. Monroe died the following year.<sup>100</sup> His will left his entire estate, including his eighty percent membership interest in the LLC, to his daughter, Janet Ott.<sup>101</sup> Ms. Ott subsequently sought a declaratory judgment that her father’s interest entitled her to participate as a member in the company’s governance.<sup>102</sup> The circuit court, however, agreed with Mrs. Monroe that her husband was dissociated from the LLC upon his death by operation of Virginia Code section 13.1-1040.1(7)(a), which terminated his right as a member to participate in the LLC’s affairs.<sup>103</sup> Consequently, Ms. Ott could inherit only her father’s economic rights in the LLC as a permitted assignee.<sup>104</sup>

On appeal, the Supreme Court of Virginia first reviewed the statutory context of the Virginia Limited Liability Company Act (the “LLC Act”),<sup>105</sup> and noted that, for tax reasons, the LLC Act was intended to avoid the free transferability of a member’s ownership interest.<sup>106</sup> Like the Virginia Uniform Partnership Act,<sup>107</sup> on which it was based, the LLC Act implicitly recognizes that a membership interest has two distinct components: (i) a control interest that entitles the holder to participate with other members in administering the LLC, and (ii) a financial interest that entitles the holder only to share profits and losses and to receive distributions.<sup>108</sup>

The court noted that while Virginia law generally allows assignment of an LLC membership interest, the statute is clear that the assignee receives only a right to share in profits, losses, and distributions, and not a right to participate in LLC manage-

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99. *Id.* (alterations in original) (internal quotation marks omitted).

100. *Id.*

101. *Id.*

102. *Id.* at 406–07, 719 S.E.2d at 310.

103. *Id.* at 407, 719 S.E.2d at 310.

104. *Id.*; *See* VA. CODE ANN. §§ 13.1-1040.1(7)(a), -1040.2 (Repl. Vol. 2011 & Supp. 2012).

105. VA. CODE ANN. §§ 13.1-1001 to -1080 (Repl. Vol. 2011 & Supp. 2012).

106. *Ott*, 282 Va. at 408, 719 S.E.2d at 311.

107. *Ott*, VA. CODE ANN. §§ 50-73.79 to -73.150 (Repl. Vol. 2009 & Cum. Supp. 2012).

108. 282 Va. at 408–09, 719 S.E.2d at 311–12.

ment.<sup>109</sup> An assignee may become a member only by consent of a majority of the member-managers, or if none, by a majority of the members, unless the LLC's articles of organization or operating agreement provides otherwise.<sup>110</sup>

Ms. Ott argued that the terms of the Monroes' operating agreement did indeed "provide otherwise" and expressly contemplated that she would become a member by inheritance.<sup>111</sup> The court observed, however, that the couple's agreement merely prohibited certain transfers while permitting others, but it did not address the effect of a member's dissociation on the nature of his or her membership interest.<sup>112</sup> Thus, the agreement did not expressly override the statutory rule that a dissociated member's successor, chosen by whatever means, is entitled only to the former member's financial interest.<sup>113</sup>

The court also noted that Virginia Code section 13.1-1023(A) prohibits operating agreement provisions that are inconsistent with state law and section 13.1-1039(A) allows assignment only of a member's economic interest.<sup>114</sup> The Monroes' operating agreement therefore could override only the statutory default restrictions on assignment of a financial interest, not the statutory rule prohibiting an assignee from participating in LLC management, becoming a member, or exercising membership rights without the consent of a majority of members.<sup>115</sup>

The *Ott* decision should prompt drafting attorneys to review current operating agreements to be sure the transfer provisions accurately reflect the client's intent regarding a permitted assignee's right to be admitted to membership in the LLC. Alt-

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109. *Id.* at 409, 719 S.E.2d at 312 (quoting VA. CODE ANN. § 13.1-1039(A) (Repl. Vol. 2011 & Supp. 2012) ("Unless otherwise provided in the articles of organization or an operating agreement, a membership interest in a limited liability company is assignable in whole or in part. . . . An assignment does not entitle the assignee to participate in the management and affairs of the limited liability company or to become or to exercise any rights of a member. Such an assignment entitles the assignee to receive, to the extent assigned, only any share of profits and losses and distributions to which the assignor would be entitled.")).

110. *Id.* at 409–10, 719 S.E.2d at 312 (citing VA. CODE ANN. § 13.1-1040(A) (Repl. Vol. 2010 & Supp. 2012)).

111. *Id.* at 410, 719 S.E.2d at 312.

112. *See id.*

113. *Id.*

114. *Id.* at 410–11, 719 S.E.2d at 312–13.

115. *Id.*



hough, as the court made clear, the agreement cannot simply override the statute in this regard, it should be possible for the members to agree to give their consent in appropriate circumstances.

### B. *Validity of Virginia's Anti-Preemption Statute*

*Maretta v. Hillman* considered on appeal whether a surviving spouse had an enforceable claim under Virginia law for an amount equal to the proceeds of the decedent's federal group life insurance policy, which were paid to the decedent's former spouse pursuant to a pre-divorce beneficiary designation.<sup>116</sup>

When Ms. Hillman's husband died, the federal government paid almost \$125,000 in group life insurance benefits to his ex-wife, Ms. Maretta, pursuant to a beneficiary designation the decedent made during their marriage and never revoked.<sup>117</sup> Ms. Hillman obtained a personal judgment against Ms. Maretta for the full amount of the proceeds based on Virginia Code sections 20-111.1(A) and 20-111.1(D), as in effect at Ms. Hillman's death.<sup>118</sup> In relevant part, those sections provided:

(A) Upon the entry of a decree of annulment or divorce from the bond of matrimony . . . any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party is revoked. A death benefit prevented from passing to a former spouse by this section shall be paid as if the former spouse had predeceased the decedent.<sup>119</sup>

(D) If this section is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under this section is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted.<sup>120</sup>

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116. 283 Va. 34, 37, 722 S.E.2d 32, 33 (2012).

117. *Id.* at 39, 722 S.E.2d at 33.

118. *Id.* at 39–40, 722 S.E.2d at 34.

119. VA. CODE ANN. § 20-111.1(A) (Repl. Vol. 2008).

120. *Id.* § 20-111.1(D) (Repl. Vol. 2008). Subsection (D) was added in 2007 as a legislative response to *Egelhoff v. Egelhoff ex rel. Briener*, 532 U.S. 141 (2001), which indicated that federal law would likely preempt the general rule stated in subsection (A), automatically revoking beneficiary designations in favor of a former spouse. *See Egelhoff*, 532 U.S. at 143 (holding that federal law preempted Washington statute similar to Virginia Code

Both parties acknowledged that federal law preempted Virginia Code section 20-111.1(A) because it would allow insurance proceeds to be paid to someone other than the designated beneficiary.<sup>121</sup> The only question, therefore, was whether Virginia Code section 20-111.1(D) similarly was preempted, even though it does not affect the direct payment of benefits but merely allows others to recover from the beneficiary an amount equal to the proceeds so paid.<sup>122</sup>

In considering Ms. Maretta's appeal of the circuit court judgment against her under section 20-111.1(D), the court first noted that the Supremacy Clause of the United States Constitution makes federal law the supreme law of the land, rendering conflicting state laws without effect.<sup>123</sup> It also noted that preemption can occur from explicit statutory language, from implied congressional intent, or where state law is an obstacle to fully accomplishing congressional purposes and objectives.<sup>124</sup> Thus, the court reasoned that section 20-111.1(D) must be preempted if Congress intended federal insurance benefits to belong to the designated beneficiary to the exclusion of all others.<sup>125</sup>

Analogizing to cases interpreting other federal insurance statutes, the court found that Congress did not intend for a named beneficiary to receive federal insurance proceeds, only then to have to pay them to a third party under state law.<sup>126</sup> By creating what was essentially a beneficial interest in someone other than the named beneficiary, the Virginia statute effectively would nullify the insured's right to name a beneficiary and frustrate the congressional purpose.<sup>127</sup> The court therefore reversed the circuit court and entered judgment for Ms. Maretta.<sup>128</sup>

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section 20-111.1).

121. See *Maretta*, 283 Va. at 41, 722 S.E.2d at 35.

122. *Id.* at 40-42, 722 S.E.2d at 34-35.

123. *Id.* at 40, 722 S.E.2d at 34 (quoting U.S. CONST. art. VI, cl. 2; *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008)).

124. See *id.* (quoting *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982)).

125. *Id.* at 42, 722 S.E.2d at 35 (citing *de la Cuesta*, 458 U.S. at 153).

126. *Id.* at 44, 722 S.E.2d at 37.

127. *Id.* at 45, 722 S.E.2d at 37 (quoting *Ridgway v. Ridgway*, 454 U.S. 46, 60 (1981); *Wissner v. Wissner*, 338 U.S. 655, 659 (1950)).

128. *Id.* at 46, 722 S.E.2d at 38.

In reaching its decision, the court did not follow other states' courts, which generally have held that the federal insurance statute does not prevent state law from imposing a constructive trust on the proceeds for the benefit of someone other than the named beneficiary.<sup>129</sup> It did not give the same weight as those courts to the fact that the federal insurance statute applicable to Ms. Hillman's claim, unlike the statutes involved in the other cases on which the court relied, did not prohibit attachment of the proceeds.<sup>130</sup>

Two justices dissented, arguing that there is a "high threshold" for preemption and that courts should start with the presumption that Congress does not intend to supplant state law, particularly where a state is exercising its police power in the area of domestic relations.<sup>131</sup> They argued that the federal rule was enacted primarily for administrative convenience and that the Virginia statute provides only an equitable remedy that does no major damage to the federal interest in facilitating payment of insurance proceeds.<sup>132</sup> Unlike the majority, the dissenters also attributed significance to the absence of an anti-attachment provision in the federal insurance statute at issue, indicating that Congress did not intend to preempt state law entirely.<sup>133</sup>

Ms. Hillman filed a petition for a writ of certiorari with the Supreme Court of the United States on April 11, 2012.<sup>134</sup>

### C. Testamentary Capacity; Undue Influence

While awaiting surgery for a life-threatening condition in 2008, Dorothy Weedon contacted the office of the lawyer who had drawn two previous wills for her. She spoke with the same legal

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129. *Id.* at 45, 722 S.E.2d at 37 (citations omitted).

130. *Id.*

131. *Id.* at 47, 722 S.E.2d at 38 (McClanahan, J., dissenting) (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995)) (citing *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. \_\_\_, \_\_\_, 131 S. Ct. 1968, 1985 (2011)).

132. *Id.* at 50, 722 S.E.2d at 40 (citing *Rose v. Rose*, 481 U.S. 619, 625 (1987)).

133. *Id.* at 52–53, 722 S.E.2d at 41 ("The omission of an anti-attachment clause in FEGLIA should thus be viewed as answering in the negative the question of whether Congress intended to preempt a state law like Code § 20-111.1(D)—one that impacts FEGLI benefits, if at all, only after the benefits have been paid to the designated beneficiary.")

134. Petition for Writ of Certiorari, *Hillman v. Maretta*, No. 11-1221 (Va. Apr. 11, 2012), 2011 U.S. Briefs 1221.

assistant who had worked with her in each prior instance.<sup>135</sup> The lawyer, relying on his long-time assistant's judgment that Mrs. Weedon was capable of making a will, prepared a new will without speaking directly with the client.<sup>136</sup> The will left Mrs. Weedon's entire estate to her daughter, Mary Ann, while excluding her other four children.<sup>137</sup>

In the presence of Mary Ann and three hospital employees who served as witnesses and notary, Mrs. Weedon executed her new will at the hospital the day before her surgery.<sup>138</sup> She died shortly after the surgery, and the four disinherited children challenged the will on the grounds that their mother lacked testamentary capacity and that the will was a product of Mary Ann's undue influence.<sup>139</sup>

At trial, Mary Ann produced the notary and witnesses, who testified that they did not remember the specific facts surrounding the execution but that they would not have participated if they had doubted Mrs. Weedon's capacity.<sup>140</sup> One of the witnesses apparently had to convince Mary Ann to facilitate her mother's wish to amend her will before surgery so that the elderly woman's mind could be at ease.<sup>141</sup> The lawyer's assistant and a close friend of the testatrix also testified that the decedent had made it clear to them that the will reflected her intent and wishes.<sup>142</sup>

In contrast, the contestants presented evidence that their mother's health had been deteriorating, that she was occasionally disoriented in the weeks before her death, and that she frequently did not seem to recognize her children or grandchildren.<sup>143</sup> Their expert witness, a local medical examiner who had reviewed their mother's file, opined that someone with her medical history would have been confused with intervals of lucidity and would

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135. *Weedon v. Weedon*, 283 Va. 241, 245–47, 720 S.E.2d 552, 554–55 (2012).

136. *Id.* at 248, 720 S.E.2d at 555.

137. *See id.* at 247–48, 720 S.E.2d at 555.

138. *Id.* at 248–49, 720 S.E.2d at 555–56.

139. *Id.* at 247, 720 S.E.2d at 556.

140. *Id.* at 248, 720 S.E.2d at 555–56.

141. *Id.* at 247, 720 S.E.2d at 554.

142. *Id.* at 247–48, 250, 720 S.E.2d at 555–57.

143. *Id.* at 249–50, 720 S.E.2d at 556.

have been capable of only limited communication.<sup>144</sup> The contestants also produced evidence that Mary Ann had attempted to restrict her siblings' access to their mother and her doctors.<sup>145</sup> They admitted, though, that Mrs. Weedon was very concerned about and protective of Mary Ann,<sup>146</sup> and they did not claim that Mary Ann unduly influenced their mother with respect to her two prior wills, which had favored Mary Ann and omitted first one, and then two, of the other children.<sup>147</sup>

Based upon the evidence presented, the circuit court held that Mary Ann had not carried her burden as proponent of the will to prove testamentary capacity and that the contestants had proved undue influence by clear and convincing evidence.<sup>148</sup> It therefore ruled that the 2008 will had been impeached and that the latest prior will should proceed to probate.<sup>149</sup>

On appeal,<sup>150</sup> the court noted that when testamentary capacity is questioned, great weight is to be given to the testimony of the drafter, the attesting witnesses, and the attending physician.<sup>151</sup> It dismissed as unsupported by law the trial court's apparent belief that "the weight ascribed to the testimony of the professional speaking to the testatrix for the purpose of drafting the will is

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144. *Id.* at 249, 720 S.E.2d at 556.

145. *Id.* at 250, 720 S.E.2d at 556.

146. *Id.* at 249, 720 S.E.2d at 556.

147. *Id.* at 257–58, 720 S.E.2d at 561.

148. *Id.* at 251, 720 S.E.2d at 557.

149. *Id.* at 252, 720 S.E.2d at 557.

150. The court first summarized the proper legal analysis:

The proponent of a will bears the burden of proving by a preponderance of the evidence that at the time the testatrix executed her will she possessed testamentary capacity . . . [T]he proponent of the will is entitled to a presumption that testamentary capacity existed by proving compliance with all statutory requirements for the valid execution of the will. Once the presumption exists, the contestant then bears the burden of going forward with evidence to overcome this presumption, although the burden of persuasion remains with the proponent.

*Id.*, 720 S.E.2d at 558 (quoting *Gibbs v. Gibbs*, 239 Va. 197, 199–200, 387 S.E.2d 499, 500–01 (1990)). Because the parties did not question the validity of the will's execution, the court found that the burden of proof had shifted to the four children who opposed it. *Id.* at 253, 720 S.E.2d at 558. It then assumed, without deciding, that the other children's evidence was sufficient to overcome their burden and so focused on the sufficiency of Mary Ann's evidence as to capacity. *Id.*

151. *Id.* (quoting *Parish v. Parish*, 281 Va. 191, 200, 704 S.E.2d 99, 105 (2011)).

lessened if that person does not actually draft the will.”<sup>152</sup> The supreme court also found that the trial court erred in (i) placing undue weight on the fact that Mrs. Weedon did not place the call to the attorney herself, even though she did speak personally with the assistant, and (ii) favoring the testimony of the contestants and their expert witness, who were not present when the will was executed, over the testimony of those who were actually in the room at the relevant time.<sup>153</sup>

With regard to the undue influence claim, the court acknowledged that a presumption of undue influence arose against Mary Ann because Mrs. Weedon was old and infirm, stood in a relationship of confidence or dependence with Mary Ann, and had shown an intention in prior wills to dispose of her property in another manner.<sup>154</sup> It found, however, that the assistant’s testimony about Mrs. Weedon’s intent and the friend’s testimony about the decedent’s statements were sufficient to overcome the presumption.<sup>155</sup> Noting that the ultimate burden of proof is always on the party alleging fraud, the court found that the trial court improperly focused on evidence that raised the presumption, while overlooking the ultimate inquiry—whether Dorothy’s will was overridden to the extent that she was “in the attitude of saying: It is not my will but I must do it.”<sup>156</sup> Finding that Mary Ann had produced sufficient evidence to rebut the presumption, the court held that the other children had failed to carry their burden to prove the existence of undue influence by clear and convincing evidence, and ordered the contested will admitted to probate.<sup>157</sup>

Two justices filed separate dissents, each arguing that the court should have let the trial court’s finding on undue influence stand because it was neither plainly wrong nor without evidence to support it.<sup>158</sup>

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152. *Id.* at 253–54, 720 S.E.2d at 558.

153. *Id.* at 254, 720 S.E.2d at 559.

154. *Id.* at 255, 720 S.E.2d at 559.

155. *Id.* at 258, 720 S.E.2d at 561.

156. *Id.* at 256–57, 720 S.E.2d at 560 (quoting *Gill v. Gill*, 219 Va. 1101, 1105–06, 254 S.E.2d 122, 124 (1979)) (internal quotation marks omitted).

157. *Id.* at 258–59, 720 S.E.2d at 561 (quoting *Gill*, 219 Va. at 1105-06, 254 S.E.2d at 124).

158. *Id.* at 259, 720 S.E.2d at 561 (Mims, J., dissenting); *id.* at 261, 720 S.E.2d at 563 (McClanahan, J., dissenting).

#### D. *Effect of Mirror-Image Wills*

In *Keith v. Lulofs*, the Supreme Court of Virginia affirmed the circuit court's decision that a couple's execution of wills with mirror-image terms did not create a contract that prevented the survivor from amending her will after the first spouse's death.<sup>159</sup>

Mr. and Mrs. Keith executed mutual and reciprocal wills that left the estate of the first spouse to die to the surviving spouse and the estate of the survivor in equal shares to each spouse's child from a prior marriage.<sup>160</sup> Several years later, they also bought an insurance policy and named their respective children as co-beneficiaries.<sup>161</sup>

After Mr. Keith died, however, Mrs. Keith signed a new will, which left her entire estate, including assets received from Mr. Keith, to her daughter, Venocia.<sup>162</sup> She also named Venocia sole beneficiary of the insurance policy.<sup>163</sup> Not surprisingly, Mr. Keith's son, Walter, challenged the probate of his step-mother's new will after her later death.<sup>164</sup>

At trial, Walter testified that his father had told him the couple intended to divide their estates equally between the two children.<sup>165</sup> He also said Mrs. Keith had told him they had made the life insurance policy payable to both children equally so the children would not fight over money after their parents had died.<sup>166</sup> Unfortunately for Walter, the drafting attorney could not recall any of the wills or the circumstances under which they were prepared.<sup>167</sup> Venocia testified only that she remembered a conversation about the life insurance policy but could not recall its substance.<sup>168</sup> The trial court found Walter's evidence insufficient to establish a contractual agreement between Mr. and Mrs. Keith

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159. 283 Va. 768, 770–72, 724 S.E.2d 695, 696–97 (2012).

160. *Id.* at 770–71, 724 S.E.2d at 696.

161. *Id.* at 771, 724 S.E.2d at 696.

162. *Id.*

163. *Id.*, 724 S.E.2d at 696–97.

164. *Id.*, 724 S.E.2d at 696.

165. *Id.*, 724 S.E.2d at 697.

166. *Id.*

167. *Id.* at 771–72, 724 S.E.2d at 697.

168. *Id.* at 771, 724 S.E.2d at 697.

regarding the ultimate disposition of their estates, and thus accepted Mrs. Keith's later will to probate.<sup>169</sup>

On appeal, Walter repeated his argument that the "mirror-image" nature of the earlier wills or, in the alternative, corroborative evidence proved that the testators intended their wills to be irrevocable.<sup>170</sup> In rejecting this claim and affirming the lower court, the Supreme Court of Virginia pointed out that wills generally are unilaterally revocable and modifiable until the testator's death.<sup>171</sup> While reciprocal provisions for third parties can be sufficient consideration for a binding contract, it first must be shown by clear and satisfactory evidence that the testators intended to make a contract.<sup>172</sup> Such evidence may be in the form of express language in the wills, competent witness testimony regarding admissions by the testators, or relevant circumstances and relationships that are sufficient to support an implied contract.<sup>173</sup> The court reasoned that:

[w]hen an estate in fee simple is devised in one part of a will, by clear and unambiguous words, such estate is not diminished nor destroyed by terms contained in another part of the instrument, unless such terms which reduce the estate be as clear and decisive as the words by which it was created.<sup>174</sup>

On the facts Walter presented, the court found no clear and convincing evidence that the Keiths intended to form a binding contract, and it refused to hold that the mirror-image nature of their wills, without more, established one.<sup>175</sup> Otherwise, the court explained, "any testator who executes a will that 'mirrors' another will and contains language similar to that contained in the [Keiths'] wills . . . would be unintentionally hamstrung by the death of the purportedly reciprocal testator," and possibly unable to provide for any future spouse or for a child born or adopted during a later marriage.<sup>176</sup>

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169. *Id.* at 771–72, 724 S.E.2d at 697.

170. *Id.* at 772, 724 S.E.2d at 697.

171. *Id.* at 772–73, 724 S.E.2d at 697 (citing *Williams v. Williams*, 123 Va. 643, 646, 96 S.E. 749, 750 (1918)).

172. *See id.* at 773, 724 S.E.2d at 698 (quoting *Salley v. Burns*, 220 Va. 123, 131, 255 S.E.2d 512, 516 (1979)).

173. *See id.* (quoting *Salley*, 220 Va. at 131–32, 255 S.E.2d at 516–17).

174. *Id.* at 774, 724 S.E.2d at 698 (quoting *Salley*, 220 Va. at 134, 255 S.E.2d at 518).

175. *Id.* at 775–76, 724 S.E.2d at 699.

176. *Id.* at 775, 724 S.E.2d at 699.



The court further held that Walter's testimony was insufficient under the so-called dead man's statute, Virginia Code section 8.01-397, which prohibits entry of a judgment or decree against a party incapable of testifying (or that party's personal representative) in favor of an adverse or interested party based on the latter's uncorroborated testimony.<sup>177</sup> While the nature and quantity of the requisite corroboration will vary from case to case, Walter failed to present any independent evidence or testimony that actually supported his own claims regarding the testators' intent when they executed their wills.<sup>178</sup>

#### E. *Effect of Adult Adoption*

The appeal in *Kummer v. Donak* considered whether the adoption of an adult has the same effect on intestate succession rights as the adoption of a minor.<sup>179</sup>

An intestate decedent had no surviving spouse, children, parents, or siblings; but she was survived by three children of a deceased sister.<sup>180</sup> The deceased sister, however, had been adopted as an adult by her aunt by marriage.<sup>181</sup> On the administrator's petition for aid and direction and motion for rule to show cause against distribution, the circuit court held that the decedent's nephews and niece were not her heirs at law because the sister's adoption had severed their legal ties to the decedent and her estate.<sup>182</sup>

On appeal by the sister's children, the Supreme Court of Virginia first noted that, for purposes of establishing a parent-child relationship under the intestate succession rules, Virginia Code section 64.1-5.1 unambiguously declares that an adopted person is to be considered the child of the adopting parent and not of the biological parents.<sup>183</sup> The children maintained that the statute did

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177. *Id.* at 775-76, 724 S.E.2d at 699.

178. *Id.* at 776, 724 S.E.2d at 699.

179. 282 Va. 301, 303, 715 S.E.2d 7, 8 (2011).

180. *Id.*

181. *Id.*

182. *Id.*

183. *See id.* at 304, 715 S.E.2d at 9.

not apply in the instant case because their inheritance rights depended only on establishing that their mother and the decedent were sisters, not parent and child.<sup>184</sup> The court pointed out, however, that the necessary sibling relationship could be established only by showing that the decedent and the deceased biological sister had a common parent.<sup>185</sup> It found the statutory language unambiguous and so concluded that the adoption established the sister as solely the child of her adopting parent, thus terminating the legal relationship between the decedent and her sister for purposes of intestate succession.<sup>186</sup>

The court found no inconsistency between the intestacy statute and Virginia Code section 63.2-1215, which delineates the legal effects of adoption.<sup>187</sup> The latter declares that blood relatives and family members of the adopted person are “divested of all legal rights” and that the person is to be “to all intents and purposes” the child of the adopting parent.<sup>188</sup> The court also rejected the children’s public policy argument that intestate succession should favor blood relatives. Explaining that public policy is the prerogative of the General Assembly, with the judiciary charged only with interpreting the words in the statute, the court held that the children’s argument must fail because there is “no ambiguity in the applicable statutes.”<sup>189</sup>

The children also attempted to convince the court that adult adoption should not be given the same legal effect as the adoption of a child because the former is motivated primarily by financial considerations.<sup>190</sup> The court was unconvinced, noting that the plain language of Virginia’s adult adoption statute declares that the “adoption of an adult shall have the same effect as adoption of a child,” and that the intestacy statute itself refers to any “adopted person” rather than distinguishing between children and adults.<sup>191</sup>

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184. *Id.* 715 S.E.2d at 9.

185. *Id.* at 304–05, 715 S.E.2d at 9.

186. *Id.* at 305, 715 S.E.2d at 9.

187. *Id.* at 305–06, 715 S.E.2d at 9–10.

188. *Id.* at 305, 715 S.E.2d at 10; *see* VA. CODE ANN. § 63.2-1215 (Repl. Vol. 2007).

189. *Id.* at 306, 715 S.E.2d at 10 (quoting *Uniwest Constr., Inc. v. Amtech Elevator Servs., Inc.*, 280 Va. 428, 440, 699 S.E.2d 223, 229 (2010)).

190. *Id.*

191. *Id.* at 306–07, 715 S.E.2d at 10 (quoting VA. CODE ANN. § 63.2-1243 (Repl. Vol. 2007)) (citing VA. CODE ANN. § 64.1-5.1 (Repl. Vol. 2007)).

### F. *Effect of Pre-2008 Slayer Statute*

The sole question before the Supreme Court of Virginia in *Bell ex rel. Bell v. Casper* and *Casper ex rel. Church v. Lynn* was whether the distribution of a decedent's estate is governed by Virginia's "slayer statute" as in effect at the decedent's death or as in effect on the date of the slayer's conviction.<sup>192</sup>

The decedent was murdered in 2005 by her only child, who also was the only beneficiary under her will.<sup>193</sup> She was survived by her son's two children and her mother.<sup>194</sup> The son was convicted of second-degree murder in 2009.<sup>195</sup> Both children brought actions seeking a declaratory judgment that the slayer statute applied to cause them to be their grandmother's sole heirs.<sup>196</sup>

The Virginia slayer statute in effect in 2005 provided that neither a slayer "nor any person claiming through him" could acquire property from a slain decedent.<sup>197</sup> Before the son was convicted, however, the statute was amended to provide that one who establishes kinship to the decedent by way of kinship to a slayer is deemed to claim "from the decedent and not through the slayer."<sup>198</sup> The children's theory was that the applicable statute should be the one in effect at the time the "slayer" is determined to be such as a result of his murder conviction.<sup>199</sup> The circuit court concluded that a conviction only designates someone as a "slayer" at the time of the murder.<sup>200</sup> Thus, it held that the decedent's mother was the rightful heir to the decedent's estate.<sup>201</sup>

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192. *Bell ex rel. Bell v. Casper*, 282 Va. 203, 209, 717 S.E.2d 783, 786 (2011).

193. *Id.* at 207, 717 S.E.2d at 784.

194. *Id.*

195. *Id.*

196. *Id.*

197. *See* VA. CODE ANN. § 55-402 (Repl. Vol. 2007).

198. Act of Apr. 11, 2008, ch. 830, 2008 Va. Acts 1627 (codified as amended at VA. CODE ANN. § 55-403 (Repl. Vol. 2011)); Act of Apr. 11, 2008, ch. 822, 2008 Va. Acts 1563 (codified as amended at VA. CODE ANN. § 55-403 (Repl. Vol. 2011)); *see also Bell*, 282 Va. at 207–08, 717 S.E.2d at 784–85.

199. *Bell*, 282 Va. at 208, 211, 717 S.E.2d at 785–86.

200. *Id.*, 717 S.E.2d at 785.

201. *Id.*

In considering the grandchildren's appeal, the Supreme Court of Virginia noted that the distribution of an estate generally is governed by the law in effect at the decedent's death.<sup>202</sup> After a lengthy analysis of the slayer statute's historical evolution and the presumption against retroactive laws absent clear legislative direction, the supreme court agreed with the trial court that the version of the statute in effect at the time of the decedent's death should govern.<sup>203</sup> Thus, it concluded that the slayer statute in effect at the decedent's death in 2005 modified the then-effective intestate succession laws to disqualify the decedent's grandchildren, who were claiming through their slayer father, and thereby worked to pass the estate to the decedent's mother.<sup>204</sup>

#### IV. CONCLUSION

The 2012 session of the Virginia General Assembly clarified and expanded existing trust rules by allowing settlors to shift fiduciary responsibility to trust directors, protect trust assets from claims of the settlor's creditors, obtain reimbursement for trust-related income taxes, and revise trust terms through decanting. These changes should provide additional tools for estate planners, although the utility of decanting in particular may be limited until its federal tax consequences become clearer. The assembly also addressed several other technical issues, including corrections to 2011 legislative actions. All were initially reflected in interim pocket parts or supplements for volumes of the Code of Virginia, and they appeared October 1, 2012, in a new title 64.2 that attempts to consolidate all statutory provisions relating to wills, trusts, estates and fiduciaries. New title 64.2 may require action

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202. *Id.* at 211–12, 717 S.E.2d at 787.

203. *Id.* at 211–13, 717 S.E.2d at 786–88.

204. *Id.* at 213–14, 717 S.E.2d at 788. The court also rejected the grandchildren's argument that application of the slayer statute was inconsistent with Virginia Code section 55-4, which declares that "[n]o suicide, nor attainder of felony, shall work a corruption of blood or forfeiture of estate." VA. CODE ANN. § 55-4 (Repl. Vol. 2007); *Bell*, 282 Va. at 214–15, 717 S.E.2d at 788. That statute confirms that a felony conviction does not affect a person's right to dispose of his own property. *See Bell*, 282 Va. at 214, 717 S.E.2d at 788. In contrast, Virginia's slayer statute does not require a slayer to forfeit his own property; rather it merely prohibits a slayer from acquiring, through wrongdoing, additional property that his heirs could subsequently claim through him. *Id.*

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in the 2013 session of the General Assembly if changes in the wording or placement of particular statutes have resulted in unintended changes in their substance.<sup>205</sup>

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205. For example, subsection (B)(3) of Virginia Code section 64.2-747 inadvertently was omitted. *See supra* note 19.