

WILLS, TRUSTS, AND ESTATES

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INTRODUCTION

After an unusually busy year in 2013, Virginia's General Assembly and state courts were relatively quiet in 2014 in the area of wills, trusts, and estates. Legislation was generally limited to clarifications and technical corrections to existing law, with the most extensive bills devoted to adjusting various statutory amounts to reflect cost-of-living adjustments and consolidating the rules governing the disposition of dead bodies. Four cases dealt with questions of charitable immunity, presumption of undue influence, inheritance rights of half-blood collateral heirs, and contracts to make a will.

I. LEGISLATION¹

A. *Defenses Available to Trust Directors*

A trust director is someone, often a family member, who is given the power by the settlor to direct a trustee in specific matters, such as when to sell the family business or terminate a child's trust.² Once the unique province of English common law, the use of third-party trust directors (also sometimes known as "trust protectors") in the United States has increased significantly in recent years.³

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1. Except as otherwise noted, all 2014 legislation becomes effective July 1, 2014.

2. VA. CODE ANN. § 64.2-770(E)(1) (Supp. 2014).

3. See Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27

Following a 2012 amendment to Virginia Code section 64.2-770, a settlor may relieve a trustee from liability for following the directions of a trust director, provided that the trust instrument requires the director to act as a fiduciary and expressly invokes the statute.⁴ However, that statute could be read to impose absolute liability on the trust director for any loss resulting from a breach of fiduciary duty, even if defenses would be available to a trustee in the same circumstances.⁵

The 2014 General Assembly eliminated the possibility for confusion by amending the flush language in section 64.2-770(E)(1) to confirm that, when a settlor has relieved the trustee from liability for following the directions of the trust director, the trust director is liable as a fiduciary only to the same extent as a trustee and is entitled to the same defenses as a trustee, for example, an exculpation clause, reasonable reliance on trust terms, running of the statute of limitations, or consent or ratification by the beneficiaries.⁶ The amendment also invalidates any exculpation clause that either purports to excuse a trust director for a breach of trust committed in bad faith or with reckless indifference to the trust purposes or the beneficiaries' interests, or that resulted from an abuse of a fiduciary or confidential relationship with the settlor.⁷

B. *Increases in Outdated Statutory Sums*

In face of the relative scarcity of wills, trusts, and estates legislation in the 2014 session, the General Assembly took the opportunity to update many of the statutory dollar amounts in Title 64.2 (Wills, Trusts & Fiduciaries) that had not recently been ad-

CARDOZO L. REV. 2761, 2764–66 (2006).

4. VA. CODE ANN. § 64.2-770(E)(1) (Supp. 2014); see J. William Gray, Jr. & Katherine E. Ramsey, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 47 U. RICH. L. REV. 343, 346–49 (2012) (discussing liability of trust directors under the 2012 amendments).

5. See VA. CODE ANN. § 64.2-770(E)(1) (Supp. 2014) (“Notwithstanding anything in the trust instrument to the contrary, the trust director shall be deemed a fiduciary who, as such, is . . . liable for any loss that results from a breach of [a] . . . fiduciary duty.”).

6. Act of Apr. 7, 2014, ch. 749, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 64.2-770(E)(1) (Supp. 2014)); see VA. CODE ANN. §§ 64.2-796, -797, -799, -800 (Repl. Vol. 2012).

7. Ch. 749, 2014 Va. Acts ___. This portion of the amendment closely parallels section 64.2-799, which prohibits exculpation of trustees in comparable circumstances. See VA. CODE ANN. § 64.2-799 (Repl. Vol. 2012).

justed for inflation.⁸ Most of the affected amounts were last updated in the 1980s or 1990s; one amount had not been updated since 1887.⁹

Among the more significant changes:

* Virginia Code section 64.2-305 was amended to replace the \$10,000 threshold for including prior gifts in the augmented estate (which was based on the federal gift tax annual exclusion in effect when the augmented estate statute was originally enacted) with a formula based on the annual exclusion available under federal gift tax law at the time of the gift;¹⁰

* The maximum family allowance that a personal representative can award without court approval under Virginia Code section 64.2-309 was increased from \$18,000 to \$24,000 (or monthly installments of \$2000 for up to one year).¹¹ Sections 64.2-310 and 64.2-311 were amended to increase the exempt property and homestead allowances in a decedent's estate from \$15,000 to \$20,000;¹² and

* The maximum value of an asset that can be delivered to a claiming successor under Virginia's Small Estate Act without the prescribed affidavit was raised from \$15,000 to \$25,000, as was the aggregate value of a decedent's assets that can be paid over to a foreign personal representative without Virginia qualification or public notice.¹³

The General Assembly also updated a number of statutes in Title 64.2 dealing with small estate matters similar to those addressed by Virginia Code section 8.01-606.¹⁴ Section 8.01-606 was amended in 2012 to increase, inter alia, the limit on amounts

8. Act of Apr. 3, 2014, ch. 532, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. §§ 64.2-305, -309, -310, -311, -416, -424, -528, -537, -602, -609, -904, -1302, -1311, -1313, -1411, -1802, -1905, -1906, -2017, -2023, -2026 (Supp. 2014)).

9. See VA. CODE ANN. § 64.2-537 (Supp. 2014); *id.* § 64.1-186 (Repl. Vol. 1991); *id.* § 2669 (1887).

10. Ch. 532, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. § 64.2-305(3)(d) (Supp. 2014)); see 26 U.S.C. § 2503(b)(1) (2012); VA. CODE ANN. § 64.1-16.1 (Repl. Vol. 1991).

11. Ch. 532, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. § 68.2-309(A) (Supp. 2014)).

12. *Id.* (codified as amended at VA. CODE ANN. §§ 64.2-310(A), -311(A) (Supp. 2014)).

13. *Id.* (codified as amended at VA. CODE ANN. §§ 64.2-602(A), -609(A) (Supp. 2014)).

14. See *infra*, notes 15–21 and accompanying text.

payable through court without the intervention of a fiduciary or formal accountings from \$15,000 to \$25,000, but the statutes in Title 64.2 were not conformed at the time.¹⁵ The current legislation, however, increased the following statutory limits or thresholds to \$25,000 to mirror the provisions for small estates in section 8.01-606:

* The maximum amount a person holding property for an incapacitated individual can transfer for that individual's benefit without court approval (formerly \$10,000);¹⁶

* The maximum value of a decedent's estate for which a personal representative can qualify without inventory or accounting (formerly \$15,000);¹⁷

* The estate value on which a fiduciary will be permitted to provide an accounting to the commissioner of accounts only every three years (formerly \$15,000);¹⁸

* The estate value below which a fiduciary may qualify without surety (formerly \$15,000);¹⁹

* The amount a personal representative, trustee, conservator, or other person holding property for a minor may transfer to a custodian under the Uniform Transfers to Minors Act without court approval (formerly \$10,000);²⁰ and

* The maximum value of a deceased ward's personal estate that a conservator can distribute to successors without requiring a personal representative to qualify (formerly \$15,000).²¹

In two instances, the General Assembly deemed an adjustment of less than inflation appropriate in the interest of due process. First, the General Assembly increased the minimum value of a claim that may be brought against a decedent's real estate with-

15. *E.g.*, VA. CODE ANN. § 64.2-310 (Supp. 2014); *see* Act of Mar. 1, 2012, ch. 43, 2012 Va. Acts 60 (codified as amended at VA. CODE ANN. § 8.01-606 (Cum. Supp. 2014)).

16. Ch. 532, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. § 64.2-904 (Supp. 2014)).

17. *Id.* (codified as amended at VA. CODE ANN. § 64.2-1302 (Supp. 2014)).

18. *Id.* (codified as amended at VA. CODE ANN. § 64.2-1313 (Supp. 2014)).

19. *Id.* (codified as amended at VA. CODE ANN. § 64.2-1411 (Supp. 2014)). The amendment also added trustees to the list of fiduciaries covered by the statute. *Id.* (codified as amended at VA. CODE ANN. § 64.2-1411 (Supp. 2014)).

20. *Id.* (codified as amended at VA. CODE ANN. §§ 64.2-1905, -1906 (Supp. 2014)).

21. *Id.* (codified as amended at VA. CODE ANN. § 64.2-2026 (Supp. 2014)).

out prior notice under Virginia Code section 64.2-537 from \$20 to \$100, even though a true cost-of-living adjustment would have increased it to approximately \$500.²² Second, the General Assembly did not increase the \$5000 threshold at which a beneficiary is entitled to notice of probate under section 64.2-508.²³

The legislation included additional amendments intended to reduce the workload of courts and commissioners of accounts:²⁴

* The aggregate annual amount a commissioner may authorize a guardian to distribute from a minor's account to satisfy a parent's support obligation when the parent cannot or will not do so, or when the payment is beyond the scope of the parent's support obligation, was increased from \$3000 to \$5000;²⁵

* The maximum amount of gifts a conservator may make to a single donee without prior approval was increased from \$100 to \$150, and the maximum amount allowed for all such gifts was increased from \$500 to \$750 per year;²⁶ and

* Commissioners of accounts were given the power to authorize a conservator to make annual gifts of no more than \$25,000 to facilitate a ward's estate plan.²⁷

Other miscellaneous increases included:

* The maximum value of a refused bequest that will become part of the residuary estate (from \$25 to \$100);²⁸

22. *Id.* (codified as amended at VA. CODE ANN. § 64.2-537 (Supp. 2014)); CPI INFLATION CALCULATOR, <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=20&year1=1913&year2=2013> (last visited Oct. 10, 2014) (exact results are impossible due to inflation since the legislation was drafted). The higher amount may not have been considered sufficiently de minimis to justify imposing the additional notice requirement on the claimant.

23. *See* VA. CODE ANN. § 64.2-508 (Repl. Vol. 2012).

24. *See infra*, notes 25–26.

25. Ch. 532, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. § 64.2-1802 (Supp. 2014)). A true cost-of-living adjustment would have increased the amount to only \$4250. CPI INFLATION CALCULATOR, *supra* note 22 (exact results are impossible due to inflation since the legislation was drafted).

26. Ch. 532, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. § 64.2-2023 (Supp. 2014)).

27. *Id.* Prior to amendment, only courts could authorize a conservator to make large gifts. VA. CODE ANN. § 64.2-2023 (Repl. Vol. 2012).

28. Ch. 532, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. § 64.2-416 (Supp. 2014)).

* The minimum value of a bequest for the purchase of an annuity that must be so used (from \$10 per month to \$100 per month);²⁹

* The priority amounts payable by an insolvent estate for funeral expenses (from \$3500 to \$4000), medical and hospital expenses (from \$400 to \$2150), and persons furnishing medical or hospital services or goods (from \$150 to \$425);³⁰

* The maximum amount of a refused legacy that need not be supported by a voucher in the fiduciary's accounting (from \$25 to \$50);³¹ and

* The minimum amount of accumulated monthly veterans' benefits that a fiduciary's accounting can carry over and treat as principal (from \$200 to \$2000).³²

Hopefully, the General Assembly will continue to adjust these amounts in the future in a coordinated and timely manner to maintain their consistency and usefulness.

C. *Disposition of Dead Bodies*

Following piecemeal amendments in 2011 and 2013,³³ the General Assembly enacted a new, comprehensive chapter 8.1 to title 32.1 of the Virginia Code, which expands, coordinates, and clarifies the rules governing the disposition of dead bodies in the Commonwealth.³⁴ An emergency clause made the legislation effective as of March 7, 2014.³⁵

29. *Id.* (codified as amended at VA. CODE ANN. § 64.2-424 (Supp. 2014)).

30. *Id.* (codified as amended at VA. CODE ANN. § 64.2-528 (Supp. 2014)).

31. *Id.* (codified as amended at VA. CODE ANN. § 64.2-1311 (Supp. 2014)).

32. *Id.* (codified as amended at VA. CODE ANN. § 64.2-2017 (Supp. 2014)).

33. *See* Act of Mar. 14, 2013, ch. 373, 2013 Va. Acts 620, 621 (codified as amended at VA. CODE ANN. § 32.1-288(B)–(F) (Cum. Supp. 2013)); Act of Mar. 25, 2011, ch. 567, 2011 Va. Acts 904, 904 (codified as amended at VA. CODE ANN. § 32.1-288(D) (Repl. Vol. 2011)); Act of Mar. 25, 2011, ch. 569, 2011 Va. Acts 905, 905–06 (codified as amended at VA. CODE ANN. § 32.1-288(A)–(B) (Repl. Vol. 2011)); *see* J. William Gray, Jr. & Katherine E. Ramsey, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 48 U. RICH. L. REV. 189, 200 (2013).

34. Act of Mar. 7, 2014, ch. 228, 2014 Va. Acts ___ (codified at VA. CODE ANN. §§ 32.1-309.1 to -309.4 (Cum. Supp. 2014)). Conforming amendments were made to sections 32.1-298, 32.1-299, 54.1-2807, and 54.1-2818.1. *Id.* (codified as amended in scattered sections of VA. CODE ANN. tit. 32.1 (Supp. 2014)).

35. *Id.*

Upon an individual's death, the person or institution having initial custody of the body must make a good faith effort to identify the decedent and to identify and notify any of the decedent's next of kin.³⁶ The next of kin then has ten days from receipt of notice to claim the body and to assume the expenses of disposition.³⁷

If there is no next of kin, person designated to make disposition arrangements, the agent under an advance medical directive, or the guardian able and willing to accept responsibility for the disposition of the decedent's body, any adult who can positively identify the decedent and is willing to pay the associated costs may arrange for the disposition of the body.³⁸ A funeral service establishment or licensee dealing with such person will be immune from civil liability except for acts, decisions, or omissions resulting from bad faith or malicious intent.³⁹ A similar rule applies for purposes of making funeral arrangements.⁴⁰

If efforts to identify the body or to identify and notify the next of kin are unsuccessful, the person or institution having initial custody of the body must notify the primary local law enforcement agency, which will then assume responsibility for identifying the decedent and/or identifying and locating the next of kin.⁴¹ If the search is unsuccessful, or if the next of kin does not claim the body within the prescribed ten days, the local city or county attorney, or if none, the Commonwealth's attorney, will obtain a court order to have the unclaimed body transferred to a funeral service establishment for disposition.⁴²

36. *Id.* (codified as amended at VA. CODE ANN. § 32.1-309.1(B) (Cum. Supp. 2014)). As used in Chapter 8.1, the term "next of kin" has the same meaning provided in Virginia Code section § 54.1-2800, which includes a person designated to make disposition arrangements but *not* an agent under an advance medical directive or a guardian. *Id.* (codified as amended at VA. CODE ANN. § 32.1-309.1(A) (Cum. Supp. 2014)).

37. *Id.* (codified as amended at VA. CODE ANN. § 3.21-309.1(B) (Cum. Supp. 2014)).

38. *Id.* (codified as amended at VA. CODE ANN. § 32.1-309.1(A) (Cum. Supp. 2014)). Given that the definition of "next of kin" in section 54.1-2800 includes a person designated to make disposition arrangements, references in the new statute to the decedent's next of kin and a person designated to make disposition arrangements are redundant.

39. *Id.* (codified as amended at VA. CODE ANN. § 32.1-309.1 (Cum. Supp. 2014)).

40. Act of Mar. 27, 2014, ch. 355, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 54.1-2807.02 (Cum. Supp. 2014)).

41. Ch. 228, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. § 32.1-309.1(C) (Cum. Supp. 2014)).

42. *Id.* (codified as amended at VA. CODE ANN. §§ 32.1-309.1(C), -309.2(A) (Cum. Supp. 2014)).

In the case of cremation, the dead body must first be identified by the next of kin or other designated person, the agent, or the guardian.⁴³ If no such person is willing to do so, then a member of the primary local law enforcement agency may identify the body, pursuant to a court order.⁴⁴ However, unlike the rules governing the general disposition of a dead body as described, there is no provision in cases of cremation for the identification to be made by an adult other than the next of kin, designated person, agent, or guardian.⁴⁵ Funeral and cremation officials and law enforcement personnel are immune from civil liability for any act, decision, or omission resulting from cremation, unless it was in bad faith or with malicious intent.⁴⁶

The person who claims the body generally assumes responsibility for the costs of disposing of it.⁴⁷ However, if the decedent's next of kin claims the body but is unable to pay for its disposition, or if a body remains unclaimed, the jurisdiction in which the decedent resided, or in the case of a non-resident or a decedent whose residence cannot be reasonably determined, the jurisdiction in which the decedent died must pay for the body's disposition.⁴⁸ There is an exception to this rule for a decedent who was incarcerated or was a committed patient at the time of death; in such cases, if no one claims the body, the Department of Corrections or the Department of Behavioral Health and Developmental Services, as the case may be, must pay the disposition costs.⁴⁹ If a locality or a government agency pays to dispose of a body, it may seize assets of the decedent's estate to reimburse itself for the reasonable costs of disposition.⁵⁰

No body may be transferred until any related investigation or autopsy has been completed.⁵¹ Similarly, no body may be cremated or buried at sea until a medical examiner has certified that there is no need for further inquiry into the death.⁵²

43. VA. CODE ANN. § 54.1-2818.1 (Supp. 2014).

44. *Id.*

45. *Id.* § 32.1-309.1(A) (Cum. Supp. 2014).

46. *Id.* § 54.1-2818.1 (Supp. 2014).

47. *Id.* § 32.1-309.1(A)-(C) (Supp. 2014).

48. *Id.* §§ 32.1-309.1(D), -309.2(A) (Cum. Supp. 2014).

49. *Id.* § 32.1-309.2(B)-(C) (Cum. Supp. 2014).

50. *Id.* § 32.1-309.2(E) (Cum. Supp. 2014).

51. *Id.* §§ 32.1-309.1(E), -309.2(F) (Cum. Supp. 2014).

52. *Id.* § 32.1-309.3 (Cum. Supp. 2014); *see id.* §§ 54.1-2807, -2818.1 (Supp. 2014).

If a dead body is contaminated with an infectious, radiologic, chemical, or other dangerous agent, the Commonwealth is charged with its safe handling, identification, and disposition, and is tasked with erecting an appropriate memorial at any disposition site.⁵³

D. *Qualification Without Surety in Clerk's Discretion*

An executor or other personal representative must generally provide surety on his or her bond when qualifying to administer a decedent's estate.⁵⁴ The purpose of surety is to protect the beneficiaries of the estate against loss should the personal representative breach his or her fiduciary duty.⁵⁵ The accompanying surety premium is paid from the estate as an additional administration expense, but it is often unnecessary or relatively disproportionate to the underlying risk.⁵⁶ Therefore, the court or clerk may waive the surety requirement if a Virginia bank or trust company qualifies as co-personal representative or if the value of the probate estate is \$25,000 or less.⁵⁷

However, unless someone with a financial interest in the estate objects, the court or the clerk must allow personal representatives to qualify without surety if the testator has expressly waived the protection in his or her will, or if all estate beneficiaries serve together as co-personal representatives (whether or not others also serve in that capacity).⁵⁸ The 2014 General Assembly effectively changed this mandatory exception to a discretionary one by amending Virginia Code section 64.2-505 to empower the court or clerk to require a personal representative to furnish surety on

53. *Id.* § 32.1-309.4 (Cum. Supp. 2014).

54. *See id.* § 64.2-505(A) (Supp. 2014).

55. *See* Glens Falls Indem. Co. v. Wall 163 Va. 635, 639–41, 177 S.E. 901, 902–03 (1934). *See generally* First Am. Title Ins. v. W. Sur. Co., 283 Va. 389, 400, 722 S.E.2d 637, 642 (2012) (noting surety bonds exist to protect potential parties holding interest in a real estate transaction).

56. *See* J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 28 U. RICH. L. REV. 1145, 1158 (1964); PROBATE HANDBOOK § 2:3 (2013–14 ed.).

57. *See* VA. CODE ANN. § 64.2-1411 (Supp. 2014). Note, though, that surety will always be required if all persons qualifying are non-Virginia residents. *See id.* § 64.2-1426(A) (Repl. Vol. 2012).

58. *See id.* § 64.2-505(A)–(B) (Supp. 2014).

his or her bond even though no legatee, devisee, distributee, or other interested party has requested it.⁵⁹

As a result, all exceptions to the surety requirement may now be denied by the court or the clerk.

E. *Qualification of Wrongful Death Administrator*

Most advisors are familiar with Virginia Code section 64.2-500, which authorizes a court or clerk to qualify a personal representative for the purpose of collecting a decedent's assets, paying debts, and then distributing the net probate estate to the appropriate beneficiaries.⁶⁰ In the case of a personal injury or wrongful death claim, the personal representative so appointed also has the power to pursue or defend against it under section 64.2-519.⁶¹

However, if no one has qualified to administer the decedent's estate generally (for example, if there is no probate estate in Virginia), section 64.2-454 permits the appointment of an administrator solely for the purpose of pursuing or defending the personal injury or wrongful death action in Virginia under section 8.01-50.⁶² The person so named has no other powers over the estate, nor discretion over how any award is to be distributed.⁶³

By precluding the appointment of a special, personal injury/wrongful death administrator when another personal representative had already been appointed for the general administration of the estate, section 64.2-454 avoids the problem of two personal representatives with authority for the same estate. However, it creates a potential problem in situations where a personal representative had previously qualified in another state to administer a non-Virginia domiciliary's estate. The Virginia statute would appear in such cases to require the qualification of an ancillary administrator in Virginia under section 64.2-500, even if

59. Act of Mar. 24, 2014, ch. 291, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 64.2-505 (Supp. 2014)).

60. VA. CODE ANN. § 64.2-500 (Repl. Vol. 2012).

61. *Id.* § 64.2-519 (Repl. Vol. 2012).

62. *Id.* § 64.2-454 (Supp. 2014).

63. *See id.* § 8.01-53 (Supp. 2014).

the sole purpose for qualification was to participate in a Virginia personal injury/wrongful death action.⁶⁴

To address this issue, the Boyd-Graves Conference recommended, and the General Assembly approved, revisions to section 64.2-454 to clarify that the appointment of a personal representative in a foreign jurisdiction does not prevent someone from qualifying in Virginia for the sole purpose of pursuing or defending the personal injury or wrongful death claim in the Commonwealth.⁶⁵

F. *Real Estate Taxes: Elderly and Handicapped*

The 2014 General Assembly clarified the terms of exemptions from, or deferrals of, local real estate taxes on the sole dwelling of an elderly or permanently and totally disabled resident.⁶⁶

The exemption or deferral is available whether the resident owns the property outright as joint tenants or tenants by the entirety with a spouse, as tenants for life or joint lives, in a revocable trust over which the eligible resident (alone or in conjunction with a spouse) holds a power of revocation, or in an irrevocable trust under which the resident (alone or with a spouse) holds an estate for life or joint lives or enjoys a continuing right of use or support.⁶⁷ The exemption or deferral is not available to the holder of a leasehold or term-of-years interest.⁶⁸

64. *See id.* § 64.2-454 (Supp. 2014).

65. Act of Apr. 3, 2014, ch. 528, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 64.2-454 (Supp. 2014)).

66. Act of Apr. 7, 2014, ch. 767, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. §§ 58.1-3210(B), -3211.1(B), -3212 (Supp. 2014)). This legislation follows the pattern of 2012 legislation relating to residential real estate tax exemptions or deferrals for disabled veterans. *See* Act of Apr. 18, 2012, ch. 806, 2012 Va. Acts 1932, 1932-33 (codified as amended at VA. CODE ANN. § 58.1-3219.5 (Cum. Supp. 2012)); Act of Apr. 18, 2012, ch. 782, 2012 Va. Acts 1682, 1682-83 (codified as amended at VA. CODE ANN. §§ 58.1-3219.5, -3219.8, -3360, -3360.1, -3360.2 (Cum. Supp. 2012)); Act of Mar. 13, 2012, ch. 263, 2012 Va. Acts 454, 454 (codified as amended at VA. CODE ANN. § 58.1-3219.5(D), (E) (Cum. Supp. 2012)); Act of Mar. 6, 2012, ch. 75, 2012 Va. Acts 105, 105 (codified as amended at VA. CODE ANN. § 58.1-3219.5(D) (Cum. Supp. 2012)).

67. *See* VA. CODE ANN. §§ 58.1-3210(B), -3211.1(B) (Supp. 2014).

68. *Id.*

In applying any income limitations on eligibility, the locality may not consider the income of residents of the dwelling who provide bona fide caregiving services to the owner, whether or not they are compensated or related to the owner.⁶⁹

G. *Real Estate Taxes: Soldiers' Surviving Spouses*

In tandem with the amendments to the local real estate tax statutes for the elderly and disabled, the General Assembly proposed an amendment to the Virginia Constitution that would exempt from real estate tax the principal residence of the surviving spouse of a United States soldier killed in action.⁷⁰ The exemption would be available beginning January 1, 2015, regardless of when the soldier was killed and regardless of whether the spouse resided in Virginia at that time, and would be transferable if the spouse moved to a different principal residence.⁷¹ The exemption would continue until the spouse's death or remarriage.⁷²

The exemption would be available for a dwelling and up to one acre of land on which it is situated, but only if the assessed value of the dwelling does not exceed the average assessed value of homes situated in that locality on land zoned as "single family residential."⁷³ It would appear that any principal residence valued at more than the average local assessed value would be disqualified entirely.

The exemption would be available whether the spouse owns the property outright, as a tenant for life, in a revocable trust over which the spouse holds a power of revocation, or in an irrevocable trust under which the spouse holds an estate for life or enjoys a continuing right of use or support.⁷⁴ The exemption would not be available to a spouse who holds only a leasehold or term-of-years

69. *See id.* § 58.1-3212 (Supp. 2014).

70. Act of Apr. 7, 2014, ch. 757, 2014 Va. Acts ___, ___ (to be codified at VA. CODE ANN. §§ 58.1-3219.9 to -3219.12, -3360, effective Jan. 1, 2015, if the necessary authorizing amendment to the Constitution of Virginia is approved by voters in November 2014); *see* H.J. Res. 8, Va. Gen. Assembly (Reg. Sess. 2014).

71. Ch. 757, 2014 Acts ___ (to be codified at VA. CODE ANN. §§ 58.1-3219.9 to -3219.12, -3360 (Supp. 2014) authorizing amendment to the Constitution of Virginia is approved by voters in November 2014).

72. *Id.* (codified as amended at VA. CODE ANN. § 58.1-3219.9(C) (Supp. 2014)).

73. *Id.* (codified as amended at VA. CODE ANN. § 58.1-3219.9(B) (Supp. 2014)).

74. *Id.* (codified as amended at VA. CODE ANN. § 58.1-3219.9(E) (Supp. 2014)).

interest.⁷⁵ If other owners have interests in the property, the exemption would be prorated.⁷⁶

Extended periods of residence in a hospital, nursing home, convalescent home, or other facility for physical or mental care would not affect the spouse's eligibility for the exemption so long as the property is not used by or leased to others for consideration.⁷⁷

H. *Recordation of Health Care Directives*

Virginia created the Advance Health Care Directive Registry in 2008 as a convenient online repository for the safekeeping of advance medical directives, certain other health care documents, and revocations of any of those documents, so that multiple authorized persons might access them quickly.⁷⁸ However, only the person who executed the document could file it in the registry.⁷⁹ This limited the usefulness of the registry, since many people do not file the documents before becoming incapacitated. To address this issue, the 2014 General Assembly amended Virginia Code section 54.1-2995(B) to permit an individual's advance medical directives, healthcare powers of attorney, anatomical gift declarations, and revocations to be recorded in the Advance Health Care Directive Registry by the individual's legal representative or designee.⁸⁰

I. *Trust Decanting*

Virginia's decanting statute requires, in part, that any interest created in a second trust to which a trustee appoints assets from a trust that originally qualified for the federal gift tax exclusion under Internal Revenue Code ("IRC") § 2503(b) or § 2503(c) must vest and become distributable no later than the date on which the beneficiary's interest in the first trust would have vested and be-

75. *Id.*

76. *Id.* (codified as amended at VA. CODE ANN. § 58.1-3219.9(F) (Supp. 2014)).

77. *Id.* (codified as amended at VA. CODE ANN. § 58.1-3219.12 (Supp. 2014)).

78. Act of Mar. 4, 2008, ch. 301, 2008 Va. Acts 448, 449 (codified as amended at VA. CODE ANN. §§ 54.1-2994 to -2996 (Repl. Vol. 2013 & Supp. 2014)).

79. See VA. CODE ANN. § 54.1-2995(B) (Supp. 2014).

80. Act of Apr. 6, 2014, ch. 715, 2014 Va. Acts 448, 449 (codified as amended at VA. CODE ANN. § 54.1-2995(B) (Supp. 2014)).

come distributable.⁸¹ However, some commentators worried that the statute might be confusing in that it referred to a beneficiary's "remainder interest" in the context of a minor's trust under IRC § 2503(c), which requires the minor beneficiary's interest to vest immediately upon creation.⁸²

At the request of the Wills, Trusts, and Estates Section of the Virginia Bar Association, the General Assembly made a technical correction to clarify that the vesting requirement for a beneficiary's "remainder interest" applies only to interests that were excluded from federal gift taxation by both the gift tax annual exclusion under IRC § 2503(b) and the minor's trust exclusion under IRC § 2503(c).⁸³

J. *Evaluation Reports in Adult Guardianships*

A report evaluating the condition of the respondent in an adult guardianship proceeding must be provided not only to the guardian ad litem but also to the respondent and all other adult individuals and entities whose names and addresses appear in the petition.⁸⁴

K. *Court Orders Regarding Capacity*

Orders declaring a person incapacitated or restored to capacity, and orders appointing a conservator or guardian must be filed with the clerk of the circuit court where the hearing took place no later than the close of business on the next business day following the hearing.⁸⁵ The clerk in turn must certify and forward the order to the Central Criminal Records Exchange no later than the close of business on the following business day.⁸⁶

81. VA. CODE ANN. § 64.2-778.1(C)(6) (Supp. 2014).

82. See I.R.C. § 2503(c)(2) (2014).

83. Act of Mar. 27, 2014, ch. 378, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 64.2-778.1(C)(6) (Supp. 2014)).

84. Act of Mar. 31, 2014, ch. 402, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 64.2-2005 (Supp. 2014)).

85. VA. CODE ANN. § 64.2-2014(B) (Supp. 2014).

86. *Id.*

II. CASES

A. *Doctrine of Charitable Immunity*

Virginia's doctrine of charitable immunity reflects the Commonwealth's interest in preserving the resources of charitable organizations so that they may better pursue their charitable purposes rather than pay tort damages to their intended beneficiaries.⁸⁷ It provides that a charity is not liable to beneficiaries of its services for injuries arising from the simple negligence of its agents.⁸⁸ In *Byrd Theatre Foundation v. Barnett*, the court examined the scope of this doctrine as it applied to a tax-exempt nonprofit corporation that owned and operated a historic theater.⁸⁹

Barnett, a volunteer whose hobby was restoring historic pipe organs, was injured while repairing the Byrd Theatre Foundation's (the "Foundation") historic instrument.⁹⁰ The Foundation's primary defense in this personal injury suit was the doctrine of charitable immunity.⁹¹ The circuit court held, however, that the doctrine applies only to injuries sustained by a beneficiary of the Foundation's charitable mission and not to injuries sustained by others performing services for it, even if they derive some personal satisfaction from performing those services.⁹²

On appeal, the Supreme Court of Virginia observed that a beneficiary is one who receives something of value from the charity in fulfillment of its charitable purposes.⁹³ In this instance, the court found that the Foundation was organized to cultivate an appreciation of the performing arts by preserving a historic entertainment venue, not to provide an opportunity for organ enthusiasts to repair or restore organs.⁹⁴ When Barnett was injured, the Foundation was not providing a charitable service to him; rather, he was providing the Foundation with a service that otherwise

87. *Ola v. YMCA*, 270 Va. 550, 555, 621 S.E.2d 70, 72 (2005).

88. *See id.* at 556, 621 S.E.2d at 72.

89. 287 Va. 291, 754 S.E.2d 299 (2014).

90. *See id.* at 293–94, 754 S.E.2d at 300–01.

91. *Id.* at 296, 754 S.E.2d at 301.

92. *Id.*, 754 S.E.2d at 301–02.

93. *Id.* at 297, 754 S.E.2d at 302 (quoting *Ola*, 270 Va. at 564, 621 S.E.2d at 77).

94. *Id.*

would have been performed by a paid contractor.⁹⁵ Most volunteers receive gratification through their charitable works, but that does not make them the charity's beneficiaries for purposes of the immunity doctrine.⁹⁶

B. *Presumption of Undue Influence*

Ayers v. Shaffer considered whether inter vivos transfers that significantly reduced a decedent's estate were the result of undue influence by individuals in a confidential relationship with the decedent during her lifetime.⁹⁷ Among the issues presented was whether the confidential relationship implied by a power of attorney was relevant only to transactions carried out by the attorney-in-fact for her own benefit, or whether it also affected personal transactions by the decedent.⁹⁸

An elderly widow in poor health came to depend on a neighbor couple, the Shaffers, to manage her financial affairs and provide daily living assistance.⁹⁹ The widow named them as her attorneys-in-fact.¹⁰⁰ Over the next several months, with the couple's assistance, she personally added her sister and one or more of the Shaffers as joint owners or pay-on-death beneficiaries of several bank accounts and certificates of deposit.¹⁰¹ During this period, she also signed a will naming Mrs. Shaffer as her executor and directing her estate to compensate the Shaffers for the care they had provided.¹⁰² In this manner, approximately \$400,000 was re-directed away from the widow's residuary beneficiaries.¹⁰³

95. *Id.*

96. *Id.* at 298, 754 S.E.2d at 303. While the court found that the charitable immunity doctrine did not apply to Barnett's claim, it expressly declined to rule that anyone who provides a service or other benefit to a charity cannot be deemed a beneficiary of the charity's mission. *Id.* at 298 & n.5, 754 S.E.2d at 302-03 & n.5. That determination must be driven by the specific facts of the case, particularly the activity in which the tort claimant was engaged. *Id.*

97. 286 Va. 212, 212, 748 S.E.2d 83, 83 (2013).

98. *See id.* at 220, 748 S.E.2d at 89.

99. *Id.* at 218, 748 S.E.2d at 86.

100. *Id.*, 748 S.E.2d at 86-87.

101. *Id.* at 219-20, 748 S.E.2d at 87-88.

102. *Id.* at 218-19, 748 S.E.2d at 87.

103. *See id.* at 219, 748 S.E.2d at 87.

After the widow's death, several of the residuary beneficiaries filed a complaint that alleged these transactions occurred after Mrs. Shaffer had been named as attorney-in-fact and "were the result of [the widow]'s complete dependence upon, and justified trust in [Mrs. Shaffer] and the strong confidential relationship that existed between [the widow] and [the defendants]. . . ." ¹⁰⁴ The circuit court, however, sustained the Shaffers' demurrer, ruling that the existence of the power of attorney did not raise a presumption of undue influence as to the bank accounts and certificates of deposit because they were retitled by the widow herself and not by Mrs. Shaffer in her capacity as attorney-in-fact. ¹⁰⁵

On appeal, the Supreme Court of Virginia noted that a presumption of undue influence can arise in two separate types of dealings between principal and agent: (i) when great weakness of mind concurs with grossly inadequate consideration, and (ii) when one person stands in a relationship of special confidence toward another, "so as to acquire an habitual influence over him." ¹⁰⁶ In the latter instance, whenever a fiduciary relationship exists, any transaction that benefits the dominant party to the detriment of the other is presumably fraudulent, whether or not accomplished directly as a result of the fiduciary relationship. ¹⁰⁷

In addition to the fiduciary relationship created by the power of the attorney relationship, the court explained that the widow's creation of the joint accounts themselves was sufficient to create a confidential relationship with the Shaffers. ¹⁰⁸ Virginia Code section 6.2-619(A) declares that parties to joint accounts share a principal-agent relationship, with each standing as a principal in regard to his ownership interest and as an agent in regard to the ownership interest of the others. ¹⁰⁹ Thus the existence of joint accounts funded entirely by the widow imposed a fiduciary duty on the defendants and, with regard to subsequent transactions, shifted to them the burden of proving bona fides. ¹¹⁰

104. *Id.* (internal quotations omitted).

105. *Id.* at 222, 748 S.E.2d at 89.

106. *Id.* at 224, 748 S.E.2d at 90.

107. *Id.* at 225–26, 748 S.E.2d at 91 (internal citations omitted).

108. *Id.* at 228, 748 S.E.2d at 92.

109. VA. CODE ANN. § 6.2-619(A) (Cum. Supp. 2014).

110. 286 Va. at 228, 748 S.E.2d at 92.

The court also found that a confidential relationship existed between the widow and the Shaffers due to her substantial reliance on them for assistance with financial matters and daily needs.¹¹¹

C. *Inheritance Rights of Half-Blood Collateral Heirs*

With facts worthy of a bar exam question, *Sheppard v. Junes* provides a useful review of the rules of statutory interpretation and the intestacy statutes.¹¹² In *Sheppard*, the Supreme Court of Virginia considered the question of the proper distribution of the paternal half of an intestate estate for which there was only a single, half-blood collateral heir.¹¹³

An intestate decedent's next of kin comprised of fourteen second cousins on his mother's side and a half-uncle on his father's side.¹¹⁴ Under the intestacy statute, Virginia Code section 64.2-200, each side was entitled to one half of the decedent's estate.¹¹⁵ The parties agreed that the cousins should divide the maternal share, but the administrator sought aid and direction as to the proper distribution of the paternal share.¹¹⁶ The circuit court had held that, as a collateral of the half blood, the uncle was entitled to only one half of the paternal share and that the other half should therefore be divided among the maternal kindred.¹¹⁷

In reversing the lower court's decision, the supreme court pointed out that section 64.2-200 is to be applied sequentially, and that section 64.2-200(A)(5) divides an intestate estate into two equal shares (moieties) when all of the heirs are neither direct descendants nor ancestors of the decedent but instead are related through a collateral line.¹¹⁸ Each share is treated as separate from the other so long as each passes to statutorily identified kindred.¹¹⁹ As the only member of the class to which the statute

111. *Id.* at 229, 748 S.E.2d at 93.

112. 287 Va. 397, 756 S.E.2d 409 (2014).

113. *Id.* at 401, 756 S.E.2d at 410.

114. *Id.* at 401-02, 756 S.E.2d at 410-11.

115. *Id.* at 404-05, 756 S.E.2d at 412 (citing VA. CODE. ANN. § 64.2-200 (Repl. Vol. 2012)).

116. *Id.* at 401-02, 405, 756 S.E.2d at 410-12.

117. *Id.* at 402, 756 S.E.2d at 411.

118. *Id.* at 404-05, 409, 756 S.E.2d at 412, 415 (citing VA. CODE. ANN. § 64.2-200 (Repl. Vol. 2012)).

119. *See id.* (“[E]ach moiety keeps on its own side, regardless of the other, so long as

directs the paternal share, the half-uncle was entitled to that entire share.¹²⁰

The administrator, who was also one of the fourteen cousins entitled to the maternal share, argued that because the uncle was a half-blood collateral, section 64.2-202(B) entitled him to only half of the paternal share and that the other half should pass instead to the maternal heirs under section 64.2-200(B).¹²¹ The court rejected this argument, holding that the latter statute applies only if there are no kindred at all on a particular side and thus, could not affect the distribution of either share to the kindred statutorily entitled to receive it.¹²² The court explained that section 64.2-202(B) was likewise inapplicable because the uncle was the sole member of the paternal class.¹²³ Without a whole-blood collateral relative in the same class, there would be no basis for applying the statute to reduce the uncle's inheritance.¹²⁴ The existence of whole-blood collaterals on the maternal side was irrelevant because Virginia law gives them no interest in the paternal share.¹²⁵ It therefore entered final judgment for the half-uncle, awarding him the entire paternal share of the estate.¹²⁶

D. *Contract to Make a Will*

Dean v. Morris considered whether a husband and wife had entered into an oral contract for the ultimate division of their property among their respective children from prior marriages.¹²⁷

there are any kindred, however remote, on that side.”) (quoting *Williams v. Knowles*, 178 Va. 84, 99, 16 S.E.2d 316, 322 (1941)).

120. *Id.* at 405–07, 756 S.E.2d at 413.

121. *Id.* at 407, 756 S.E.2d at 414.

122. *Id.* at 407–08, 756 S.E.2d at 414.

123. *Id.* at 408, 756 S.E.2d at 414.

124. *Id.*

125. *Id.* The court also found section 64.2-203(B), which allows only a single share for an heir who is related to the decedent through two lines, inapplicable because the record showed only one line of relationship between the decedent and the half-uncle. *Id.* at 408–09, 756 S.E.2d at 414–15.

126. *Id.* at 409, 756 S.E.2d at 415.

127. 287 Va. 531, 534, 756 S.E.2d 430, 431–32 (2014).

During their marriage, the couple comingled many of their assets.¹²⁸ At the wife's death, her daughters did not probate her estate because they understood that she had an oral contract with her husband, postponing their inheritance and obligating him to provide for them in his will.¹²⁹ The daughters described several conversations in which their mother mentioned an agreement that they would inherit more if they waited until her husband's death.¹³⁰ The husband's lawyer described revising the husband's estate plan after the wife's death to create trusts that would distribute two thirds to his children and one third to his wife's children at his death.¹³¹ When the husband died, however, his wife's daughters were asked to sign a release in return for a cash payment, without seeing the husband's estate documents.¹³² They sued the estate for breach of the alleged oral contract and the circuit court ruled in their favor, finding that they were entitled to one-third of his estate.¹³³

On appeal, the Supreme Court of Virginia first considered whether an oral agreement existed between the husband and the wife regarding their estate plans.¹³⁴ The court found clear and convincing evidence in the record that there had been some sort of agreement.¹³⁵ However, "[s]imply because the evidence is clear and convincing to prove that an oral agreement existed, . . . does not mean that the evidence is sufficient to prove the terms of that agreement."¹³⁶ To constitute a contract, the agreement must embrace all material terms and express them in a sufficiently exact and definite manner.¹³⁷ The court found the record uncertain as to the particular property in which the daughters were entitled to share, and the size of that share.¹³⁸ Although the court acknowledged that the husband's estate planning documents had been amended after the wife's death to leave one-third of his estate to

128. *See id.* at 534, 756 S.E.2d at 431.

129. *Id.*

130. *Id.* at 534–35, 756 S.E.2d at 432.

131. *Id.* at 535–36, 756 S.E.2d at 432.

132. *Id.* at 534, 756 S.E.2d at 431–32.

133. *Id.* at 534–36, 756 S.E.2d at 432.

134. *Id.* at 536–37, 756 S.E.2d at 433.

135. *Id.* at 537, 756 S.E.2d at 433.

136. *Id.*

137. *Id.*

138. *Id.* at 538–39, 756 S.E.2d at 434.

the daughters, it felt the provisions simply shed light on the husband's intentions at the time, and not necessarily on the specific terms of the couple's prior agreement.¹³⁹ Therefore, it reversed the lower court's judgment.¹⁴⁰

CONCLUSION

Not all sessions of the Virginia General Assembly are created equal. After significant activity in 2012 and 2013, the 2014 session did not produce as many measures affecting the area of wills, trusts, and estates. Only two acts, one increasing various statutory amounts and the other granting the court or clerk additional power to require surety on its own initiative, are likely to have a significant impact on day-to-day practice. That is not to say, however, that the various technical corrections and clarifications made this year were unwelcome. Many will find the extensive reorganization and expansion of the rules governing the disposition of dead bodies helpful when confronted with disputes between family members, elderly or handicapped individuals, and surviving spouses of soldiers killed in action who stand to benefit from the property tax relief provisions.

The four Supreme Court of Virginia cases decided during the 2013-2014 term likewise did not plow new ground. Rather, they were well-reasoned analyses of existing law in several common areas: application of the doctrine of charitable immunity to a volunteer, presumption of undue influence arising from a fiduciary relationship, application of the intestacy statute in the context of a half-blood collateral heir, and requirements for a contract to make a will. None of the decisions should be considered controversial or require future legislative action, but all serve as a helpful review.

139. *Id.* at 539–40, 756 S.E.2d at 434–35.

140. *Id.* at 540, 756 S.E.2d at 435.