REPORT OF THE
VIRGINIA STATE BAR AND VIRGINIA STATE BAR ASSOCIATION ON CERTAIN SUBJECTS
H. J. R. 109, 1958 and H. J. R. 95, 1960
to
THE GOVERNOR
and
THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 18

NOTE: These reports were to be made to the Committees for Courts of Justice of the House of Delegates and the Senate of Virginia.

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supply
Richmond
1962

TO:

THE HONORABLE, THE MEMBERS OF THE COMMITTEES FOR COURTS OF JUSTICE OF THE HOUSE OF DELEGATES AND THE SENATE OF VIRGINIA:

The studies requested by House Joint Resolution No. 95, adopted by the General Assembly at the 1960 Session, have been duly conducted by the Virginia State Bar and The Virginia State Bar Association and these organizations, hereafter referred to as the Bar Organizations, now respectfully report their conclusions as to each inquiry in the order prescribed by the resolution.

1.

"Whether any changes should be made in the statutes relating to enforcement of a duty of support when the obligor and the obligee are not within the boundaries of the same state, with the view of seeking uniformity between the states but at the same time protecting the rights of individuals."

At the 1960 Session of the General Assembly, H.B. No. 94 was introduced to carry out the recommendations of the National Conference of Commissioners on Uniform State Laws for amendments to the Uniform Enforcement of Support Act (Title 20, Chapter 5.2 of the Code). Opposition focused upon the provisions of the bill which imposed many additional burdens upon Commonwealth's Attorneys without corresponding compensation. The Bar Organizations believe that Title 20, Chapter 5.2 in its present form provides workable machinery for reciprocal enforcement of the duty of support and recommend that the proposed amendments be not revived at this time.

2.

"Whether changes should be made in the law of Virginia relating to garnishment, with a view to simplifying the procedures involved in lessening the burden imposed on garnishees while at the same time protecting those seeking to enforce judgments by garnishment."

This inquiry may have been prompted by the introduction at the last Session of the General Assembly of H.B. No. 205, which sought to repeal Article 7, Chapter 19, Title 8, of the Code and to substitute in its place a new Article 7.1, containing numerous changes. Studies indicate that some sentiment for change still exists, but because the subject was apparently given thorough consideration when various amendments were adopted both in 1960 and at the preceding Session in 1958, the Bar Organizations are of the opinion that no further changes should be made until the present law has been tested for a longer time.

3.

"Whether the interest in real estate, in whole or in part, held by a tenant by the entireties should be subjected to satisfaction of a judgment against one of the tenants."

"Whether the law as it affects a tenant by the entireties of personal property should be changed."

Since these inquiries both relate to incidents of the tenancy by the entireties, it seems appropriate that they be discussed jointly. The study of this subject has been materially aided by the generous comments of Professor Emerson G. Spies of the University of Virginia Law Faculty and William C. Worthington, Esquire, of the Norfolk Bar, both of whom have made lengthy and careful studies of the various incidents of and objections to estates by the entireties. These gentlemen feel that the best solution of the problem involved would be to abolish the estate as to both real and personal property. Mr. Spies advocates such abolition in his review of the Law of Property in The Annual Survey of Virginia Law, 47 Va. Law Review 1483, 1492. Mr. Worthington suggests, on the other hand, that complete abolition might be considered so abrupt as to merit resistance. The possibilities of abusive or prejudicial employment of the estate are apparent, but the Bar Organizations feel that its widespread popularity as a device for transferring real property to a surviving spouse without the delay or expense of probate should not be lightly dismissed. Accordingly, and despite the very reasonable and persuasive arguments of Mr. Spies to the contrary, it is recommended that in the case of real property the estate be not abolished but be placed within the reach of separate creditors. It is felt, also, that it would not be an undue extension of the philosophy of the homestead laws to exempt from separate creditor attack property held by the entireties and occupied as the principal residence of the owners or either of them.

As to personal property, it appears that no Virginia statute or decision specifically sanctions tenancy by the entireties, but in the recent case of *Moore* v. *Glotzbach,* 188 F. Supp. 267 (E.D. Va., 1960), Judge Hoffman expressed the opinion that certain statutes "carry an inference that Virginia recognizes the right to hold personality as tenants by the entireties." Mr. Spies suggests that if the Supreme Court of Appeals should agree with this view, there may follow an upsurging effort to immunize large and varied segments of wealth from the claims of separate creditors. The Bar Organizations view any such prospect with alarm, and, therefore, recommend the enactment of legislation prohibiting the creation of tenancies joint or by the entireties in personality.

It is believed that both of the objectives just discussed may be accomplished by amending Section 55-21 of the Code as follows:

"The preceding section shall not apply to any estate which joint tenants have as executors or trustees, nor to an estate *in real property* conveyed or devised to persons in their own right when it manifestly appears from the tenor of the instrument that it was intended the part of the one dying should then belong to the other. Neither shall it affect the mode of proceeding on any joint judgment or decree in favor of or on any contract with two or more one of whom dies.

"Except as to real estate held as the principal residence of tenants by the entiretics or either of them, this section shall not apply to nor affect the attachment or enforcement of judgment liens in favor of the separate creditors of joint tenants."

5.

"Whether charitable institutions should retain immunity from civil liability in tort cases, and whether it is necessary or desirable to provide insurance coverage, by virtue of mandatory insurance endorsements, to adequately protect such institutions and to prevent depletion of its (sic) resources by the negligence of its (sic) employees resulting in liability claims."

Study indicates wide divergence of views on this subject but the Bar Organizations are of the opinion that the suggestion of mandatory insurance coverage is too radical a departure from traditional Virginia legislative concepts to provide any workable solution. It is the further view of the Bar Organizations that any modification of the existing law in this field should await the completion of studies evaluating the experiences of other states which have sanctioned partial or complete departure from the immunity doctrine.

6.

"Whether changes should be made in the law of Virginia pertaining to fiduciaries, giving particular consideration to the provisions of Title 26 of the Code."

The following legislation pertaining to fiduciaries was introduced and defeated in the 1960 Session of the General Assembly:

1. H.B. No. 91, relating to inventories and appraisements. This bill, which would have amended Section 26-12 and repealed Section 64-126 of the Code, was designed to eliminate the requirement that three persons be appointed by the court or clerk to appraise the estate of a decedent.

The Bar Organizations are of the opinion that outright repeal of Section 64-126 is inadvisable but recommend endorsement of an amendment in the following language:

"Appraisement of estate of decedent.—On application of the personal representative or other interested person, the court which, or the clerk of which, authorized the personal representative to act as such, shall, if the court deems proper, appoint three or more distinterested persons as appraisers of the estate of the decedent. After taking an oath for the purpose they shall appraise such personal property as may be produced to them and also such real estate as the personal representative is authorized to sell or of which he is authorized to receive the rents and profits, or such portion thereof as the court may direct. The court may require the applicant to give reasonable notice of the application to such interested person or persons as the court deems proper, and shall require that reasonable notice be given to the personal representative, if the applicant is someone else. The appraisers shall receive reasonable compensation for their services, the amount thereof to be subject to the approval of the commissioner of accounts, with right of appeal to the court. The appraisement shall be signed by the appraisers and returned to the commissioner of accounts of the court, who shall inspect the same, see that it is in proper form and, within ten days after it is received and approved by him, deliver it to the clerk of the court, who shall record the same and the certificate of approval in the current book in which fiduciary accounts are recorded. Every such appraisement shall be prima facie evidence of the value of the assets embraced therein. Compensation allowed the appraisers, commissioner and clerk for their services respecting such appraisement shall be expenses of administration."

2. H.B. No. 720 relating to the settlement of fiduciaries' accounts. The bill would have amended Section 26-17 of the Code to make it mandatory that fiduciaries annually exhibit to commissioners of accounts all securities held by them.

The Bar Organizations believe this requirement impracticable, particularly as it would apply to institutional or other fiduciaries holding valuable negotiable securities which might have to be transported some distance from security vaults to the offices of commissioners. It is believed that the present law, which in effect provides that securities need be exhibited only upon request of the commissioner, is sufficiently protective and accordingly it is recommended that no attempt be made to revive H.B. No. 720.

3. S.J.R. No. 27 which would have directed the V.A.L.C. to make a comprehensive study of the laws pertaining to fiduciaries and particularly those contained in Title 26 of the Code. Presumably, item number 6 of H.J.R. No. 95 covered the same ground.

The Bar Organizations reluctantly report that the scope of this item No. 6, with the exceptions above noted, is so broad that it has not been possible in the available time to make an intelligent study and report thereon. It is recommended that a study of the problem should be referred to a special commission, with time for proper inquiry, and that appropriate funds be provided for such study.

7.

"Whether changes should be made in the law of Virginia relating to judgments by confession, giving particular consideration to such laws as are included in Article 2 of Chapter 18 in Title 8 of the Code of Virginia."

At the 1960 Session, the General Assembly rewrote Section 8-386 of the Code in such form as to make every money judgment, whether rendered in court or by confession, a lien on real estate from the time of recordation in the judgment lien docket. The section so amended is at variance (as to the lien on real estate, at least) with Sections 8-355 and 8-358, which provide that the lien of a judgment by confession shall run from the time of the day of the confession. The Bar Organizations recommend that Sections 8-355 and 8-358 be brought into line with Section 8-386. The Bar Organizations also recommend that Section 8-357 be amended to make provision for proper notation on the records when a judgment by confession is set aside.

8.

"Whether the laws pertaining to the property rights of the surviving spouse should be changed, and if so, in what respect."

An intriguing and provocative commentary on the present state of the law in Virginia with respect to "Property Rights of Surviving Spouse," written by Professor Spies is to be found in 46 Va. Law Rev. 157 (January 1960). The article makes a good case for review and revision of many existing statutory provisions and gaps therein and might well serve as the starting point for the inquiry posed in item 8 of H.J.R. No. 95. The author is careful to point out, however, that "before a major revision of the Code is effected, there must be careful consideration of the specific Code sections as well as the many related sections which affect the surviving spouse's share" (p. 184) and as indicative of the scope of the undertaking he says in a footnote (p. 184) that "Any study of this field of law with a view to major legislative changes should include consideration of not only the specific sections relating to intestacy and dower but also those sections dealing with advancements . . . , ademption . . . , quarantine . . . and homestead and other exemptions . . . , all of which might indirectly affect the surviving spouse's share." Moreover, it is to be noted that despite inconsistencies and, perhaps, even conflicts in the existing law, the general subject matter is rooted deeply in tradition and any effort at comprehensive change and revision would uncover numerous conflicting viewpoints which could only be evaluated by the most expert and painstaking study and consideration.

The Bar Organizations believe, therefore, that inquiry No. 8 should be referred to a specially constituted commission of sufficient size and with special competence to undertake the extensive and time-consuming study which the subject deserves, and that appropriate funds should be provided to finance the study. Absent such a study, it is considered inadvisable to recommend changes in specific statutes.

Respectfully submitted,

VIRGINIA STATE BAR

THE VIRGINIA STATE BAR ASSOCIATION

By: George Damm

A. C. Epps

E. L. Ryan, Jr.

J. R. Tucker, Jr.

M. P. Burks, Chairman

Joint Committee on Legislation and Law Reform

REPORT OF THE JOINT COMMITTEE ON LEGISLATION AND LAW REFORM

The Legislature, by H.J.R. 109, 1958 Session, that was amended and concurred in by the Senate, requested the Virginia State Bar Association and Virginia State Bar to study the following matters:

1. Whether the limitation upon the amount of damages which may be awarded in actions for death by wrongful act should be removed or changed, and if so under what conditions.

2. Whether spendthrift trusts should be continued, and if so, what, if any limitations should be placed thereon.

3. Whether, in view of the large number of business failures in Virginia, there should be a revision of the garnishment laws or other laws pertaining to creditors' rights.

4. Whether State agencies with insurance should be required to waive immunity to the limits of coverage.

5. Whether a person should be permitted to sue his or her spouse for personal injury through negligence arising out of the operation of a motor vehicle or otherwise.

Your committee held a meeting on Dec. 2, 1958, another on March 10, 1959, and another on April 10, 1959, all in Richmond. As much publicity as possible was given to the dates of hearings, and interested parties were requested to appear before the committee. The recommendations of your committee in reference to the above proposals are as follows:

1. That the present limitation upon the amount of damages that may be awarded in actions for death by wrongful act be not changed. Only Alaska has a limit higher than Virginia. Virginia is tied with one other state, they being the second highest.

2. That Sec. 55-19 that is the subject matter of this inquiry be left as it is.

3. That the garnishment laws be amended to provide that there be a waiting period of 90 days before a garnishment can be had on a judgment. If authorized to do so, your committee will prepare a proper amendment to carry out this provision.

4. The committee needs more time to study this matter and is scheduling a hearing some time in the fall. The results of such hearing will be submitted to the Executive Committees of both Bar organizations.

5. Your committee recommends that one spouse should not be permitted to sue another for personal injury through negligence arising out of the operation of a motor vehicle or otherwise.

Your committee also gave consideration to the following:

A. Whether the four months' waiting period in a divorce case should be continued or abolished. Your committee recommends that Sec. 20-118 of the Code of Virginia be re-enacted and amended as follows:

> Sec. 20-118: *Dissolution of bond of matrimony: prohibition against remarriage:* On the dissolution of the bond of matrimony for any cause arising subsequent to the date of the marriage, the court may decree that neither party shall be permitted to marry again for four months from the date of such decree. But violation of such a prohibition shall not invalidate an otherwise valid marriage.

> Marriages heretofore celebrated in violation of any prohibition against remarriage shall not hereafter be deemed to be invalid because of the violation of such prohibition, *provided* that the parties to such a marriage have continued to reside together as husband and wife until the date of the adoption of this amendment or until the death of one of the parties.

B. Stricter regulations involving the accounts of personal representatives. Your committee recommends that Sec. 26-17 of the Code be amended by revising the next to the last sentence in that section to read as follows:

Every such fiduciary shall also exhibit to the commissioner the securities held by him together with a statement of every bank in which cash is held at the terminal date of the account.

The following matters were also considered by the committee, and it was determined that they be brought to the attention of the Bar for the purpose of ascertaining whether or not further study and action thereon should be considered:

1. The enactment of a statute to make both real and personal property equally chargeable with debts of a decedent, rather than personality first, except in cases where the will of the decedent plainly shows a contrary intention.

2. An amendment to provide that a widow's right in realty of a deceased husband be the same as in personality.

3. An enactment to permit the awarding of a divorce to either party after two years of continued separation following the entry of a decree providing for separate maintenance.

Respectfully submitted,

W. RICHARD BROADDUS, JR., *Chairman*.