COMMISSIONERS OF ACCOUNTS AND FIDUCIARIES

REPORT OF THE

VIRGINIA ADVISORY LEGISLATIVE COUNCIL

To

THE GOVERNOR

And

THE GENERAL ASSEMBLY OF VIRGINIA

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supply
Richmond
1970

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COMMISSIONERS OF ACCOUNTS AND FIDUCIARIES

REPORT OF THE

VIRGINIA ADVISORY LEGISLATIVE COUNCIL

Richmond, Virginia
December 29, 1969

To:

HONORABLE MILLS E. GODWIN, JR., *Governor of Virginia*
and
THE GENERAL ASSEMBLY OF VIRGINIA

During the two-year interims between, respectively, the 1964 and 1966 Regular Sessions of the General Assembly, and between the 1966 and 1968 Regular Sessions, the Virginia Advisory Legislative Council has conducted studies of the laws concerning commissioners of accounts and fiduciaries, pursuant to directives of the General Assembly at the 1964 and 1966 Sessions. In its reports resulting from these two studies, the Council made many recommendations concerning statutes relating to this subject. One of the recommendations in the 1968 Report urged a further continuation of the study because of the vast scope of the laws pertinent to this subject. The General Assembly, accordingly, at its 1968 Regular Session adopted Senate Joint Resolution No. 33, directing the Council to continue this study. The text of this Resolution follows:

SENATE JOINT RESOLUTION NO. 33

Directing the Virginia Advisory Legislative Council to continue its study concerning commissioners of accounts and fiduciaries.

Whereas, the Virginia Advisory Legislative Council made a study and report upon the laws relating to personal representatives of deceased persons and other fiduciaries and commissioners of accounts; and

Whereas, because of time limitations and the complexity of the matters involved in the study, the Council had to confine its study to commissioners of accounts and their relationships with fiduciaries; and

Whereas, the Council was unable to give full attention to other essential and related matters; now, therefore, be it

Resolved by the Senate of Virginia, the House of Delegates concurring, That the Virginia Advisory Legislative Council is hereby directed to continue its study concerning commissioners of accounts and fiduciaries and related matters giving particular attention to such matters as the distinctions between real and personal property in the administration of estates and the advisability and feasibility of consolidating all laws relating to fiduciaries. The Council shall complete its study and make its report to the Governor and the General Assembly not later than November one, nineteen hundred sixty-nine.

J. C. Hutcheson, of Lawrenceville, a member of the Senate of Virginia and a member of the Council, was again selected as Chairman of the Committee to make the preliminary study and report to the Council. Senator Hutcheson served as Chairman of the two previous committees which made the preliminary studies and reports to the Council. The following persons were chosen to serve as members of the Committee with Senator Hutcheson: Edward L. Breeden, Jr., Attorney at Law, and Assistant Commissioner of Accounts and a member of the Senate of Virginia, Norfolk; Hale Collins, Attorney at Law and a former member of the Senate of Virginia, Covington; William P. Dickson, Jr., Attorney at Law, Norfolk;

George T. Ellis, Senior Vice-President and Trust Officer, First National Exchange Bank of Virginia, Roanoke; Brockenbrough Lamb, former Judge of the Chancery Court of the City of Richmond, now retired, Richmond; Robert J. McCandlish, Jr., Attorney at Law and Commissioner of Accounts, Fairfax; Miles Poindexter, II, Vice-President and Trust Officer, American National Bank and Trust Company, Danville; Charles H. Ryland, Attorney at Law and Commissioner of Accounts, Warsaw; Virginius R. Shackelford, Jr., Attorney at Law and Commissioner of Accounts, Orange; Ken McFarlane Smith, Attorney at Law, Arlington; and McDonald Wellford, Attorney at Law and Commissioner of Accounts, Richmond. All of these individuals served on the two previous committees.

The Division of Statutory Research and Drafting, represented by Wildman S. Kincheloe, Jr., served as Secretariat for the Committee.

At the first meeting of the Committee, the Chairman presented the resignation of Judge Lamb from the membership of the Committee, which resignation was tendered by Judge Lamb on account of illness. The Committee was reluctant to accept this resignation and instead gave Judge Lamb a leave of absence. However, at the next meeting Mr. Wellford, who had communicated to Judge Lamb in person the Committee's action on his resignation, reported that Judge Lamb, although appreciative of the Committee's attitude, nevertheless preferred and desired to resign. The Committee then reluctantly accepted Judge Lamb's resignation.

The Committee held several meetings and thoroughly considered suggestions for changes in many of the sections of the Code of Virginia relating to the subject under study. Some of these suggestions were presented to the Committee by individuals outside of the membership of the Committee. This report will reflect only those suggestions which resulted in the recommendations set forth herein.

As to the far-reaching issues of whether dower and curtesy should be abolished and whether the distinctions between real and personal property in the administration of estates should be abandoned, the Committee was fortunate in being able to retain, as Consultant, Karl Schwartz, III, Vice-President and Trust Officer of the Virginia National Bank, Norfolk. Mr. Schwartz, in the relatively short period of time available to him for this assignment, engaged in considerable research. On the basis of this research, Mr. Schwartz drafted and furnished the Committee an excellent report, which is included in this Report as an appendix.

The Committee, after completing its deliberations, made its Report to the Council. Having reviewed the Committee's Report, the Council now makes the following recommendations.

RECOMMENDATIONS

The section numbers hereinafter set forth are in reference to section numbers in the Code of Virginia.

1. That a new section, numbered 6.1-2.1, be added in the Code so as to require financial institutions to make available to any fiduciary, upon request, all information concerning assets or liabilities in which his decedent or ward had or has any interest.

2. That § 8-751 be amended to confer certain authority upon commissioners of accounts. This section empowers judges to cause distribution, without the intervention of a guardian or committee, of funds and property, of a value not more than $2,500, to be made to certain individuals on behalf of an incompetent person or an infant, and directly to an infant if he be of sufficient age and discretion. We recommend that this section be broadened to authorize commissioners of accounts to approve such distribution of funds and property of a value not more than $500 in the same manner and to the extent of the authority presently conferred upon judges by this section, when such assets are distributable by a fiduciary settling his accounts before such commissioner.

3. That § 26-36.1, which provides an optional form for accounting by a fiduciary, be amended so as to delete the requirement that assets be inventoried and to require itemization of receipts and disbursements.

4. That § 64.1-9, which sets the course of descent from an infant who leaves no heirs in certain classes, be repealed.

5. That § 64.1-56, permitting wills to be lodged for safekeeping with clerks of courts be amended so as to permit banks and trust companies, as well as attorneys at law, to lodge wills with such clerks under certain circumstances. Under the provisions of this section, an attorney at law who has for seven years or more held a will lodged with him for safekeeping by a client and who after such time has no knowledge of whether the client is alive or dead, may then lodge the will with such clerk. We recommend that a bank or trust company be permitted to lodge a will, held by it under similar circumstances, with the clerk.

6. That § 64.1-121 be amended to confer upon the clerk of court the same authority presently conferred therein upon the court. This section provides that a personal representative of an estate shall not be required to give security under certain circumstances, except upon the application of any person who has a pecuniary interest or upon the motion of the court.

7. That § 64.1-140 be amended so as to include therein a limitation period of six months. This section provides that a personal representative, or other fiduciary, administering the estate of a decedent is under no obligation to assert a claim on behalf of the estate to any funds on deposit in a joint account in a bank, trust company or other depository in the name of the decedent and others, unless requested to do so in writing by someone in interest. We recommend inclusion of a requirement that such request must be made within six months from the date of the initial qualification on the estate. We also recommend that the reference to "personal representatives or other fiduciaries" be changed to "a fiduciary", and that the reference to "bank, trust company or other depository" be changed to "financial institution." We further recommend that the phrase "in accordance with the terms of the will" in the last paragraph of the section be changed to "according to law."

8. That the Virginia Advisory Legislative Council be directed to continue this study, giving particular attention to the feasibility of abolishing curtesy and dower and the distinctions between real and personal property in the administration of estates, and to study and make recommendations as to the advisability of the adoption of the Uniform Probate Code of the National Conference of Commissioners on Uniform State Laws, or parts thereof.

REASONS FOR RECOMMENDATIONS

1. In the administration of estates, it is customary to ask financial institutions in the locality where a decedent died to disclose any and all accounts that the decedent may have had with such institution, including accounts in the decedent's individual name and any accounts that he may have carried in his name and that of another person or other persons. Under a strict interpretation of § 6.1-114, relating to banks, and § 6.1-169, relating to savings and loan associations, it might be decided that a bank or savings and loan association should not give a fiduciary this information as to a joint account unless the surviving joint owner or owners consent. In fact, an instance in which counsel for a savings and loan association so advised the association as to § 6.1-169 was brought to the attention of the Committee. This would seem to be contrary to the general purposes of the fiduciary laws. Proposed new § 6.1-2.1 would clarify this situation as to any financial institution subject to the provisions of Title 6.1.

2. This proposed amendment of § 8-751 would relieve the courts of the burden of entering orders on small amounts and properties of small value payable

and distributable to infants and incompetents, and would expedite the settlement of accounts where such items of small value are concerned.

3. § 26-36.1 provides a form which may be used by a fiduciary for accounting, that is, an optional form. The second part of the form leads off with "inventoried assets." The assets requested to be identified are already matters of record either in the original inventory or listed as assets on hand at the terminal date of the former account. The items calling for principal cash receipts and disbursements, and income cash receipts and disbursements, may indicate that only totals of the particular categories are requested. It is noted that the use of the form is not mandatory but permissive. However, where a permissive form is set forth in the statutes, the commissioner of accounts will probably be under a duty to accept the statutory form submitted. Therefore, it is our opinion that this section should be amended in the above-mentioned respects.

4. Until 1968, § 64-9 provided that if an infant die without issue, any real estate which he had received by gift, devise or descent from one of his parents should descend and pass to his kindred on the side of the parent from whom it was derived. This section was reenacted by the General Assembly in 1968 as § 64.1-9 and amended by substituting for the word "issue" the language "an heir in the first three classes of descendants (sic) under § 64.1-1."

These three classes include (First) children and descendants, (Second) surviving consort, (Third) father and mother or the survivor. If the infant is survived by either or both parents, the real estate of the infant, in the absence of heirs in the first two classes, now passes to both parents or the survivor and not solely to the kindred on the side of the parent from whom it was derived. We are of the opinion that by virtue of the substantial changes made by the 1968 amendment, § 64.1-9 has become largely ineffective in accomplishing its original purpose. We see no persuasive reason for a limitation to the first three classes of descent and believe that the real estate of an infant should descend as that of an adult through the remaining course of descents as provided in § 64.1-1.

To avoid confusion and to promote uniformity in settling estates, we recommend that § 64.1-9 be repealed and, as is presently the law in the distribution of intestate personal property (§ 64.1-11), that there be no distinction between an infant and an adult in the course of descents, generally.

5. In modern practice, banks and trust companies are frequently named as executors in attested wills, and in such instances wills are usually lodged with such institution for safekeeping. This is in contrast to the practice more prevalent in the past when the attorney at law who drafted the will was frequently named executor therein and the instrument was lodged with him for safekeeping. Therefore, we think, as a matter of practicality, the permissive provision in favor of attorneys at law, included in § 64.1-56, should be extended to banks and trust companies.

6. §§ 26-3 and 37.1-136 confer certain powers upon clerks of court wherein are concerned the bonds of fiduciaries in the circumstances covered by these sections. In order that § 64.1-121 coincide with §§ 26-3 and 37.1-136, we feel that the power conferred by § 64.1-121 upon the court to require security on its own motion should be extended to the clerk of the court.

7. It is appropriate that a period of limitation be imposed within which a party in interest may request a fiduciary to assert a claim on behalf of the estate to a joint account in the names of the decedent and one or more other persons, or be thereafter precluded from making such request. The six-months' period herein recommended affords sufficient time. The inclusion of a period of limitation in § 64.1-140 will enable a fiduciary to safely settle his accounts.

8. The Committee gave consideration to the feasibility of abolishing curtesy and dower, and of abandoning the distinctions between real and personal property

in the administration of estates. As previously recited herein, the Committee retained a Consultant for this purpose, and received a most informative report from him. However, the lack of time for giving the necessarily thorough consideration to such far-reaching departures from time-honored and basic principles of the State's probate laws prevented the Committee from attempting to make recommendations in this respect. Furthermore, even if time had permitted the making of such recommendations, there would not have been time enough for preparing the necessary legislation for introduction at the 1970 Regular Session of the General Assembly. The lack of time for the accomplishment of the foregoing objectives was occasioned, in part, by the two-months' Extra Session of the General Assembly on Constitutional Revision in the early part of 1969, which Session necessitated a temporary suspension of the conduct of interim studies. We, therefore, recommend a continuation of this study.

CONCLUSION

Bills and joint resolution to carry out the recommendations in this Report are attached. We urge passage of these bills and adoption of this joint resolution by the General Assembly at its 1970 Regular Session.

We express our appreciation to the members of the Committee for the time and effort which they devoted to this study.

Respectfully submitted,

C. W. CLEATON, *Chairman*

J. C. HUTCHESON, *Vice-Chairman*

RUSSELL M. CARNEAL

ROBERT C. FITZGERALD

J. D. HAGOOD

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WILLIAM F. STONE

*JAMES M. THOMSON

EDWARD E. WILLEY

A BILL to amend the Code of Virginia by adding in Chapter 1 of Title 6.1 a section numbered 6.1-2.1, requiring financial institutions to furnish certain information to fiduciaries.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia be amended by adding in Chapter 1 of Title 6.1 a section numbered 6.1-2.1, as follows:

§ 6.1-2.1. The provisions of Title 6.1 and any other provisions of law notwithstanding, any financial institution subject to the provisions of said title shall

*James M. Thomson does not concur in the recommendation that this study be continued.

make available to any fiduciary, upon request, all information concerning assets or liabilities in which his decedent or ward had or has any interest.

A BILL to amend and reenact § 8-751, as amended, of the Code of Virginia, relating to limited disbursements to certain incompetent persons and infants so as to confer certain authority upon commissioners of accounts.

Be it enacted by the General Assembly of Virginia.

1. That § 8-751, as amended, of the Code of Virginia be amended and reenacted, as follows:

§ 8-751. Payment of small amounts to infants or certain incompetent persons without intervention of guardian or committee, *authority of commissioners of accounts.*—Whenever it appears to a court or to the judge in vacation, having control of a fund, tangible personal property or intangible personal property or supervision of its administration, whether a suit be pending therefor or not, that an incompetent person who has no guardian or committee, or an infant is entitled to a fund arising from the sale of lands for a division or otherwise, or a fund, tangible personal property or intangible personal property as distributee of any estate, or from any other source, or whenever a judgment, decree, or order for the payment of a sum of money or for delivery of tangible personal property or intangible personal property to such incompetent person or infant is rendered by any court, and the amount to which such incompetent person or infant is entitled or the value of the tangible personal property or intangible personal property is not more than twenty-five hundred dollars, or whenever such incompetent person or infant is entitled to receive payments of income, tangible personal property or intangible personal property and the amount of the income payments is not more than twenty-five hundred dollars in any one year, or the value of the tangible personal property is not more than twenty-five hundred dollars, or the current market value of the intangible personal property is not more than twenty-five hundred dollars, the court or judge in vacation may, in its discretion, and without the intervention of a committee or guardian, cause such fund, property or income to be paid or delivered to one of the parents of such incompetent person or infant, if any such parent be living and be deemed by the court or judge capable of properly handling the same, and if there be no such parent, then to any person deemed by the court or judge capable of properly handling same, to be used by such parent or other person solely for the education, maintenance and support of the incompetent person or infant; and in any case in which an infant is entitled to such fund, property or income, the court or judge in vacation may, upon its being made to appear that the infant is of sufficient age and discretion to use the fund, property or income judiciously, cause the same to be paid or delivered directly to the infant.

Whenever such an incompetent person or infant is entitled to a fund or such property distributable by a fiduciary settling his accounts before the commissioner of accounts of the court in which such fiduciary qualified, and the amount or value of such fund or property, or the value of any combination thereof, is not more than five hundred dollars, the commissioner of accounts may approve distribution thereof in the same manner and to the extent of the authority hereinabove conferred upon a court or the judge in vacation.

A BILL to amend and reenact § 26-36.1 of the Code of Virginia, which provides an optional form for accounting by a fiduciary.

Be it enacted by the General Assembly of Virginia:

1. That § 26-36.1 of the Code of Virginia, be amended and reenacted as follows:

§ **26-36.1. Form of accounting.**—Any accounting by a fiduciary may be substa tially in the following form:

VIRGINIA:

IN THE CORPORATION COURT FOR THE CITY/COUNTY CHANCERY CIRCUIT
OF .....

In Re ..... { (No. of Accounting:
Deceased — First and Final Accounting
Incompetent — First Accounting
Ward, etc. — ..... and Final Accounting, etc.).

The undersigned, ... qualified as (Admr., Execr., Trustee, Guardian, etc.) in the Clerk's Office of the ..... Court for the City/County of ....., Virginia, on the ..... day of ....., 19....., has duly posted bond in the amount of $..... with ..... as surety thereon, showing all the assets coming into its hands on date of qualification for the estate of said ....., and the disbursements and distributions made thereof for the period beginning on ....., 19..... and ending on ....., 19.....

~~INVENTORIED ASSETS (or assets on hand as of ....., 19.....)~~

ASSETS ON HAND AS OF ....., 19.....		$.....
PRINCIPAL CASH RECEIPTS (*ITEMIZE*)		$.....
PRINCIPAL CASH DISBURSEMENTS (*ITEMIZE*)	$.....	
INCOME CASH RECEIPTS (*ITEMIZE*)		$.....
INCOME CASH DISBURSEMENTS (*ITEMIZE*)	$.....	
ASSETS ON HAND AS OF ....., 19..... (End of Accounting period)	$.....	
	$.....	$.....

Vouchers covering the above disbursements and distributions are submitted herewith.

The undersigned certifies that the foregoing is a true accounting of the Estate of ....., and that all taxes assessed or assessable against the Estate have been paid or are provided for.

Respectfully submitted,

.....

Administrator
Executor
Trustee
Guardian

A BILL to repeal § 64.1-9 of the Code of Virginia, relating to descents from infants without heir in certain classes.

Be it enacted by the General Assembly of Virginia:

1. § 64.1-9 of the Code of Virginia is repealed.

A BILL to amend and reenact § 64.1-56 of the Code of Virginia, relating to lodging wills of living persons with clerks of courts.

Be it enacted by the General Assembly of Virginia:

1. That § 64.1-56 of the Code of Virginia be amended and reenacted, as follows:

§ **64.1-56. Wills of living persons lodged for safekeeping with clerks of certain courts.**—Any person or his attorney for him may, during his lifetime, lodge for safekeeping with the clerk of a court having probate jurisdiction in the county or city of his residence any will executed by such person; and the clerk shall thereupon receive such will and give the person lodging it a receipt therefor. The clerk shall then place the will in an envelope and seal it securely, numbering the envelop and endorsing thereon the name of the testator and the date on which it is so lodged, and shall index the same alphabetically in a permanent index kept for the purpose, showing therein the number and date such will is so deposited. The fee for such lodging, indexing and preserving shall be two dollars, which shall be paid to the clerk when the will is received.

Any attorney at law, *bank or trust company* may, upon holding a will lodged with him *or it* for safekeeping by a client for seven years or more, and having no knowledge of whether the said client is alive or dead after such time, lodge such will with the clerk as provided in the preceding paragraph for which the clerk shall be paid two dollars for such lodging, indexing and preserving.

The clerk shall carefully preserve the envelope containing the will unopened until it is returned to the testator or his nominee in his lifetime upon his request in writing therefor or until the death of the testator. Should such will be returned in the testator's lifetime as hereinbefore provided and later returned to the clerk it shall be considered as a separate lodging under the provisions of this section.

Upon notice of the testator's death, the clerk shall open the will and deliver the same to any person entitled to offer it for probate.

Provided, the provisions of this section shall be applicable only to the clerk's office of a court wherein theretofore has been entered, by the judge or judges of such court, an order authorizing the use of its clerk's office for such purpose.

A BILL to amend and reenact § 64.1-421 of the Code of Virginia, relating to when security not required of a personal representative.

Be it enacted by the General Assembly of Virginia:

1. That § 64.1-121 of the Code of Virginia be amended and reenacted, as follows:

§ **64.1-121. When security not required.**—Where the personal representative of an estate is the sole distributee or sole beneficiary thereof, the court or clerk shall not require security of him, nor shall security be required of an executor when the will waives security of an executor nominated therein, unless, in either case, upon the application of any person who has a pecuniary interest *or* upon ~~its own~~ motion *of* the court *or clerk* such fiduciary may ~~to require~~ *be required* to provide security in an amount deemed sufficient. If at any time any person with an interest, or a legatee, devisee or distributee of an estate shall file with the court a motion in writing suggesting that surety upon the bond should be required of a fiduciary for the protection of the estate, a copy of such motion shall be served upon the fiduciary and the court shall hear the matter and may require the fiduciary to furnish surety upon his bond in the amount it deems necessary and, in addition, award to the movant reasonable attorney's fees and costs which shall be paid out of the estate.

A BILL to amend and reenact § 64.1-140 of the Code of Virginia, relating to duty of fiduciaries as to joint accounts.

Be it enacted by the General Assembly of Virginia:

1. That § 64.1-140 of the Code of Virginia be amended and reenacted, as follows:

§ 64.1-140. Duty of fiduciaries as to joint ~~bank~~ accounts. ~~Personal representatives, or other fiduciaries.~~ *A fiduciary* charged with the administration of the estate of a decedent shall be under no obligation unless requested in writing by someone in interest, *within six months from the date of the initial qualification on the estate,* to assert a claim on behalf of ~~their~~ *the* decedent's estate to any funds which may, at the time of his death, be on deposit in any ~~bank, trust company, or other depository~~, *financial institution* in the name of said decedent and one or more other persons when the terms of the contract of deposit, or the laws of the state in which such funds are deposited, permit such bank, ~~trust company or other depository~~ *financial institution* to pay (1) to either of such persons, whether the other, or others, be living or not, or (2) to a named survivor or survivors.

The ~~personal representative~~, *fiduciary,* or his attorney, shall acknowledge receipt of such request in writing within ten days of receipt of such notice, and if the ~~personal representative~~ *fiduciary* be the same person as the surviving cotenant of such funds, said ~~personal representative~~ *fiduciary* shall segregate such funds, and place same in an interest-bearing account, awaiting an appropriate decree concerning the ultimate disposition of same, and said ~~personal representative~~ *fiduciary*-cotenant shall not use such funds for his own personal account.

If the ~~personal representative~~ *fiduciary*-cotenant accedes to the request that such funds be treated as estate funds, said ~~personal representative~~ *fiduciary* may distribute same ~~in accordance with the terms of the will~~ *according to law* without any decree of court referred to above.

SENATE JOINT RESOLUTION NO.....

Directing the Virginia Advisory Legislative Council to continue its study concerning commissioners of accounts and fiduciaries.

Whereas, the Virginia Advisory Legislative Council made a study and report upon the laws relating to commissioners of accounts and fiduciaries, such study being a continuation of previous studies; and

Whereas, in the course of this most recent study, it became apparent that consideration should be given to certain related matters of a far-reaching nature, for which time was not available; now, therefore, be it

Resolved by the Senate of Virginia, the House of Delegates concurring, That the Virginia Advisory Legislative Council is hereby directed to continue its study concerning commissioners of accounts and fiduciaries and related matters, giving particular attention to the feasibility of abolishing curtesy and dower, and the distinctions between real and personal property in the administration of estates; and to study and make recommendations as to the advisability of the adoption of the Uniform Probate Code of the National Conference of Commissioners on Uniform State Laws, or parts thereof. The Council shall complete its study and make its report to the Governor and the General Assembly not later than November one, nineteen hundred seventy-one.

APPENDIX

To: The Hon. J. C. Hutcheson, Chairman
Committee on Commissioners of Accounts and Fiduciaries

Subject: The Distinction Between Real and Personal Property in the Administration of Estates

I

The ancient distinction between real and personal property, which is preserved in the administration of Virginia decedents' estates, impedes the orderly administration of estates and deprives the people of the Commonwealth of a modern system of estate settlement. The English differences between descent of land and distribution of personalty are coming increasingly under fire in this country and deservedly so. Our statutes of descent and distribution illustrate the distinction at work, there being actually two statutes whereby the two types of property are handled differently, a spouse with issue of the marriage surviving taking no realty (but entitled to dower) and taking an outright one-third of an intestate decedent's personalty. Following are examples of the distinction in our decedents' estates law.

Our code contains a vestigial element of the doctrine of ancestral property (Section 64.1-9), a throwback to feudalism which serves no useful purpose but instead complicates the administration of a minor decedent's estate in Virginia.

The marital life estates of dower and curtesy hark back to the practice of permitting the firstborn son to inherit the father's realty, relegating the widow to a life estate in one-third of such lands. There is little to justify retention of these ancient estates in modern Virginia where the measure of wealth long ago shifted from land to personalty, and abolition of these estates should be considered.

A palpably unsatisfactory condition in our decedent's estate law today is the fact that absent instructions in a will, a decedent's personal estate is the only source of payment for debt since real estate cannot be subject to debt until personalty is exhausted. It is not difficult to find in this context the concern of the medieval lords that the integrity of the land, upon which that society depended, be preserved at all costs. But the hardship and inequities created by retaining this anachronism in our probate law can no longer be ignored.

Related to the rule that personalty be first exhausted is the common law principle that a decedent's real property descends to heirs or devisees without passing through the hands of a personal representative. Virginia is a member of a small and dwindling group of states which hold the personal representative neither entitled to control, possession or under a duty to protect the real estate of his decedent, absent specific instructions contained in a will. True, the last General Assembly changed this to permit a personal representative to bring a suit against an heir or devisee when personalty is insufficient for payment of debt, but this is a far cry from the modern American trend which is to give the personal representative right to possession and control of realty for the payment of debt, thus treating real and personal property alike.

The common law rule requiring exoneration of real estate devised by will from the payment of mortgage debt created or assumed by the testator and which obtains in Virginia through a long line of cases, should be studied. The modern thinking seems to be that few testators consider their realty and personalty as separate categories of property, and the fact a testator acquired the debt on realty doesn't necessarily mean that he intended to burden his personal estate with payment of the mortgage. It seems more reasonable that he intended the debt to go with the property and modern probate codes reflect this, providing that there shall be no exoneration of an encumbered devise.

The distinction between the types of property permits a Virginia testator to prefer creditors by charging his realty with the payment of debt although he cannot prefer general creditors out of his personal property.

Perhaps it is not surprising that Virginia should have held fast for so long to the common law in decedent's estates. Virginia was the first established English royal province, and the colony which first and most completely received the common law. Further, much of our decedent's property law is the work of Jefferson and other distinguished lawyers who revised our laws when the colony gained freedom from the Crown. Pride of ancestry, however, no longer argues retention of these archaic laws. England, in 1925, concluded its property laws were outmoded and through the Administration of Estates Act completely revised the law with regard to wills and intestate succession. Feudal concepts were abandoned. The distinction between real and personal property was abolished. The marital estates of dower and curtesy were abolished. Strange that in England, the wellspring of our own law, the common law of decedents' estates should be recognized as outmoded half a century ago while the same laws die exceedingly hard here where feudal customs never played anything more than a fleeting role in our society and economy.

The distinction between real and personal property was historically basic, functional and important. Today, the different treatment we accord the two kinds of property is questionable and warrants close examination. But the distinction is embedded in our probate law and its abolition in the scheme of Virginia decedent's estates law involves far-reaching consequences as well as many benefits.

On the face of it, preservation of feudal doctrines is not warranted in a society which is increasingly mobile, industrial, where money, not land is the measure of wealth. In 1879, F. W. Maitland, the English lawyer and historian wrote:

> "The distinction between real and personal property might be done away, without any disturbance of substantive rights or interests. There would be a savings of money, of time, of temper, of trouble; a savings of vexatious law suits and those worst of quarrels—family quarrels; vast masses of antique and unintelligible law might be forever forgotten; but beyond this, there would be little change, certainly no change which the veriest Tory could call revolutionary. A few little changes have been made—for accidents will happen in the best regulated museums—but on the whole, this interesting specimen of antiquity has been most carefully preserved."

II

In recent years a number of states have revised their probate law, sometimes in part, sometimes by entirely new probate codes. Our sister states of North Carolina and Maryland have recently enacted substantial changes. Wisconsin has before its legislature a bold modern probate code which has passed the senate. The Uniform Probate Code, now in its seventh draft, is being considered for final acceptance by the National Conference of Commissioners on Uniform State Laws and the American Bar Association. The new Maryland code, which will become effective January 1970, has its basis in the Uniform Probate Code. These codes can be of value to us in considering our own decedent's estate law, and an effort will be made to summarize the salient features and general intent of each.

North Carolina adopted an entirely new intestate successsion act, effective in 1960. Professor F. B. McCall, a prime mover of the North Carolina act afterward wrote, "The illogicality of making the right of inheritance depend upon the *nature* of the property owned by the decedent at the time of his death has been removed by the new law. In departing from the duality of the old English law North Carolina now has one system which follows the American trend of distributing both kinds of property to the same persons and in the same proportions, thus generally following the historic rules for the distribution of personalty." The act abolished all distinctions between ancestral and non-ancestral property, dower and

curtesy were abolished, and in lieu thereof a surviving spouse is provided with an intestate share of the decedent's estate. If the surviving spouse does not receive one-half or more of the property passing upon the death of a testator he or she is given the right to dissent from the will and take an intestate share. In order to protect a spouse against intentional depletion of his estate by the decedent spouse, the new law provides that the surviving spouse can elect a life estate in one-third the value of the real estate owned by the deceased spouse during the marriage. So, while dower is abolished, the husband's vendees take title thereto subject to the wife's right of election. Of course, if the wife has joined in her husband's conveyances, no right of election exists. Why would a wife elect a life estate in one-third of the decedent's realty rather than take an outright fee simple interest? The reason could be that the life estate, like dower, is not subject to the decedent's debts, except those secured by deed of trust or purchase money mortgage, while the outright fee is subject to administration costs and claims against the estate. Thus, if the estate is insolvent the surviving spouse can elect the life estate which protects against financial ruin as well as against disinheritance.

The new intestate succession statute recognizes more fully that the spouse is usually the primary object of an intestate decedent's bounty. Therefore, where there is a surviving spouse and one child or the issue of only one child the spouse is granted one-half of the net estate, the portion to be one-half personalty and one-half undivided interest in realty. Where there are two or more children and the issue of a deceased child surviving, the spouse's share is one-third the net estate, in both personalty and realty. Where the deceased left no child or lineal descendant but has one or more parents surviving, the spouse takes one-half the realty and the first $10,000 in value plus one-half of the remainder of the personal property. If the intestate is not survived by child, lineal descendents or a parent, the surviving spouse takes all the net estate. In commenting upon the share of the surviving spouse, one of the draftsmen noted that the new law was in keeping with the almost universally accepted principle that the spouse had a greater claim on the estate which he or she helped create than do lineal or collateral heirs. So, in order to prevent an intestate's estate from being cut up into infinitesimal parts among remote collaterals whose very existence might be unknown to the intestate, the North Carolina statute provides that succession by collaterals is cut off if they are more than five degrees removed from the intestate.

The North Carolina Act has had its share of criticism; no important legislation avoids this. In addition, there was in 1962, an embarrassment created when the Supreme Court of North Carolina held that that part of the statute which permitted a husband to dissent from the wife's will was unconstitutional because it deprived the wife of the right, guaranteed by the constitution, to devise her separate estate by will. This matter was set right by a constitutional change. North Carolina practitioners advise that on the whole the new legislation is a salutory replacement of an inadequate and unfair set of laws which had governed descent and distribution in that state.

Wisconsin's Probate Code is the result of a larger project, undertaken in that state six years ago, to study revision of the basic property statutes. Numerous changes were made in the substantive decedent's law, however, the basic idea was not to change radically probate procedure in Wisconsin but to modernize, clarify and reorganize present laws. For the purposes of probate, both real and personal property are handled in the same way personalty has always been handled in Wisconsin. Greater responsibility and accountability are placed on the personal representative. There is a new intestate succession statute which reflects the drafting committee's feeling in that in most small estates the decedent wants his spouse to have the bulk of his estate. Thus the spouse receives all the net estate if there are no surviving issue of the decedent; if there are surviving issue all of whom are issue of the surviving spouse also, the first $25,000 (reduced in the case of partial intestacy, by the amount given the spouse by will) plus one-half the balance if there is only one surviving child and no surviving issue of a deceased child, or

if the issue of one deceased child survives, but one-third the balance in other cases. The statute contains an unusual feature in that if there are surviving issue one or more of whom are not issue of the surviving spouse, the spouse does not take the first $25,000 of value, but one-half the net estate if there is only one such surviving child and no issue of a deceased child, or if only the issue of one deceased child survives, in all other cases the spouse takes one-third the estate. So, unless there is issue by a prior marriage, the surviving spouse will receive the first $25,000 plus a share of the excess and this the draftsmen felt would save the cost of guardianship for minor children unless, of course, the estate exceeds $25,000 after allowances. The statute restricts inheritance by remote collateral relatives (as does North Carolina's) by limiting to those claiming through grandparents and to those related in the fourth degree of kinship to the decedent according to the rules of civil law. Thus, it is hoped to simplify proof of heirship and prevent will contests by remote relatives. The statute requires that an heir survive the decedent by 20 days in order to take, the intent being to prevent double probate in the common accident situation and perhaps to keep the decedent's property in the family. This requirement of survival is an extension of the Uniform Simultaneous Death Act and is found also in the Uniform Probate Code.

The Wisconsin law which gave the spouse the homestead for life or remarriage was thought to be unsatisfactory in several ways and is replaced in the new code by a right to the home in fee by applying the value of the home against the spouse's share in the total estate. This gives the spouse a marketable interest, the title to the real estate is not tied up, and the spouse does not receive a greater share of the estate by reason of the presence or absence of a home. Dower is made an elective share (one-third) in the probate estate without regard to the type of property involved. Inchoate dower was abolished after 1968. The husband is given the same rights as the wife. In the event of election the testamentary scheme is preserved as much as possible. The electing spouse does not necessarily receive one-third outright, but the value of such interests as life estates under the will are deducted from the elective share if capable of valuation. Thus, election to avoid a trust is no longer possible. The elective share is reduced by the value of the following property given the spouse under the decedent's will: (a) property given outright; (b) the value of life estates; (c) the value of the spouse's right to income or annuity from any property transferred in trust by the will and capable of valuation. If the will gives the spouse a power of appointment, the spouse, by electing retains the power only if it is a special power. The elective share can be barred by written agreement between the spouses (without a showing of consideration) either before or after marriage. Such agreements can, of course, be set aside for lack of capacity, duress, undue influence or misrepresentation. The idea is to facilitate family planning by recognizing agreements settling property rights in cases involving second marriages. The committee in considering the dower-elective share statute observed that under the old law it was possible for a widow to receive her statutory rights in the probate estate even though the deceased husband gave her the majority of his assets through non-probate arrangements such as life insurance, or joint ownership passing by survivorship. This obviously unfair result is now avoided. There is a section creating the order in which property shall be applied to satisfy the elective share so as to preserve the testator's plan and spread the burden as equitably as possible. There is a further section which permits a surviving spouse to reach lifetime transfers made in fraud of the elective right. It is sought in this section to protect transfer agents, banks, as well as innocent purchasers for value, the interest of the surviving spouse being asserted primarily against the person receiving the property from the decedent by reason of the fraudulent transfer. The action must be brought within three years of the decedent's death, but can be barred earlier by laches. The code provides for an allowance to the family during the period of administration, permits the surviving spouse to select certain items of personalty such as a car, household furniture, etc., so as to make available to the spouse some of those items necessary to life as the spouse knew it, exempt up to a stated value, from debts. The purpose would be somewhat

similar to our rather outdated Sections 34-26 and 34-27 exempting from levy or distress a catalog of items, mostly such as would be found on a farm.

Maryland has enacted new legislation, effective January, 1970, restating and recodifying entirely decedents' estates law upon the report of a Governor's Commission appointed in 1965 to study the testamentary laws of the state. The commission recommended the abolition of the distinction between real and personal property as it applies to the testamentary law. It concluded that the distinction was clearly a trapping of early English law when landed estates were the basic feature of a feudal economy, and has no place in a modern economy where assets other than land are now the primary source of wealth. Therefore, they saw no reason for continuing to exclude a decedent's real estate from the assets comprising his probate estate. Under the new law title to *all* property is subject to the control of the personal representative and there is no priority between real and personal property for the payment of debts. Dower and curtesy are abolished, the spouse being entitled to elect the share he would take in intestacy. The new intestacy statute gives a surviving spouse one-third the net estate if there is surviving issue; one-half if there is no surviving issue but a surviving parent; $4,000 plus one-half the net estate if there are no surviving issue, parent, but a surviving brother, sister or their issue; the whole of the net estate if no issue, parents, brothers or sisters or their issue, survive. The statute is interesting in that the order of distribution places collaterals up to the tenth degree before surviving grandparents. Like the Wisconsin code and the Uniform Probate Code, Maryland provides that heirs must survive the decedent, in this case for 30 days, in order to take. The provision is designed to protect against the risks of modern transportation where the heir dies with or shortly after the decedent. This concept is also applied where there is a will, and a legatee who fails to survive a testator for 30 days is presumed to have predeceased him unless the will says otherwise. In determining the spouse's right to an elective share of the decedent's estate, the Maryland commission considered and rejected the concept of the "augmented net estate" under which certain property which does form a part of the estate passing under the will is taken into consideration in determining the elective share of the surviving spouse. The "augmented net estate" concept which is part of the Uniform Probate Code was deemed to be unworkable and too detailed. Among the other major changes in the Maryland decedent's estates law are the elimination of the need for ancillary administration; consolidation of the various forms of special administrators, administrators d.b.n., etc.; simplification of probate of wills; elimination of appraisers; and establishment of conditions under which a personal representative can administer the estate without obtaining perfunctory orders of the court. The Maryland testamentary law was formerly scattered through at least fifteen articles of their code and, according to the commission, was almost unintelligible through disorganization and years of random change. Today it is restated and contained in one new article, the first significant attempt to deal comprehensively with the testamentary law since 1798.

The *Uniform Probate Code* had its origins in an undertaking of the Real Property, Probate and Trust Law section of the American Bar Association in 1939 which resulted in the publication of the Model Probate Code of 1947. Missouri and Pennsylvania recast their probate laws between 1947 and 1960, relying in substantial measure upon the Model Probate Code. Updating and revision of the Model Probate Code continued until in 1963 when the National Conference of Commissioners on Uniform State Laws took the initiative in producing a Uniform Probate Code. After six years of research, a drafting committee consisting of well known probate counsel and law professors, assisted by a number of working committees of the American Bar Association, have produced the seventh draft of the code which last month was presented for final approval to the National Conference. The ABA's Real Property, Probate and Trust Section, citing the current impetus for adopting the code, reported in its Journal:

"A major reason for the approval of the Uniform Probate Code at this time is the widespread public demand for the modernization of our probate laws. Substantial criticism has been levelled at our profession, particularly in recent years, and perhaps at times unfairly but at any rate vigorously, for not improving many of the ancient probate and administrative procedures which had led to both delay and expense in handling decedents' estates. A number of jurisdictions have reformed and rewritten their statutes, and today have in operation procedures which are efficient and in basic harmony with the proposed Uniform Code. But there are many other jurisdictions where little has been done, outmoded procedures prevail and efforts necessary for reform have yet to be mounted. It is, of course, in these latter jurisdictions that the Code should have its greatest impact. Its promulgation should provide the stimulus and guide to further state studies and action, and be one valid answer of the organized Bar to those who have asserted that the Bar and the courts are callous to probate reform."

The uniform Probate Code consists of seven articles, the first of which deals with the probate court and its jurisdiction. The probate court is said to resemble a court of general jurisdiction rather than the many public offices associated with the term "probate" in those jurisdictions in which probate procedures are formal and detailed. Article II covers the substantive law of intestacy and wills. In intestate succession the spouse is given the whole net estate if there are no surviving issue or parent of the decedent; if there are no surviving issue but a parent surviving, the spouse takes the first $50,000 (reduced by any amount given the spouse by will) plus one-half the balance; if there are surviving issue who are issue of the decedent and surviving spouse, the spouse again takes the first $50,000 (reduced by any amount given the spouse by will) plus one-half the balance; if there are surviving issue one or more of whom are not issue of the surviving spouse, the spouse takes one-half the net estate.

Inheritance of collaterals is limited to grandparents and those descended from grandparents, the purpose being to simplify proof of heirship and eliminate will contests by remote relatives. There is the requirement that an heir must survive the decedent for five days in order to take under the statute so as to avoid multiple administration in the event of simultaneous death. There is no distinction between real and personal property, there being one single pattern for the disposition of all property to all heirs. Dower and curtesy are abolished, the spouse being given instead a right to take an elective share consisting of one-third the "augmented net estate." The augmented net estate is a noteworthy if complicated concept, the purpose of which is to prevent the decedent spouse from deliberately disinheriting the survivor during his lifetime and to prevent the surviving spouse from electing a share of the probate estate when the spouse may have already received a great portion of the decedent's estate during the lifetime of the decedent or by non-probate arrangements such as life insurance and joint tenancy with survivorship. The reporters admit that this section is complex and may be a litigation breeder. It will be remembered that the Maryland commission rejected the augmented net estate concept of the Uniform Probate Code. Article II also covers homestead allowance ($5,000 to the surviving spouse or divided among the decedent's minor children), rules governing execution, revocation and renunciation of wills. A person eighteen years of age may make a will. There is to be no requirement of exoneration, a specific devise passing subject to the encumbrance upon it existing at the date of death. Article III, the reporters state, is the heart of the Uniform Probate Code. It is designed to be applicable to both intestate and testate estates and to provide persons interested in decedent's estates with as little or as much by way of procedural safeguards as may be deemed suitable. The whole package is called the *flexible system of administration*. It authorizes personal representatives, after appointment, to proceed with settlement of decedents' estates without further order of the court, but makes available options of more closely controlled administration up to and including a judicial proceeding amounting to a completely court supervised administration. Article IV deals with problems involving

"multi-state" estates and attempts to reduce the need for ancillary administration. Article V treats with disadvantaged persons, minors, and incompetents. Article VI deals with deposits in financial institutions involving two or more names. The purpose of this section is to clarify such matters and strengthen the popular arrangements involving deposit accounts by which funds may be transferred from one person to another upon death. Article VII covers trust procedures, and among other things seeks to eliminate procedural distinctions between testamentary and inter-vivos trusts.

III

This memorandum is not intended to be argumentative, but to convey a sense of pressing need for change. Also, there is no intent to imply inattention on the part of legislative interests insofar as our probate law is concerned. The Code Commission was active in Title 64 in 1967.

It is possible that some statutory changes could be made in our decedents' estates law in the coming legislative session. The codes discussed in Article II, above, reflect a great deal of research and deliberation, and would enable us to proceed that much faster. The writer is ready to do the bidding of the committee. Whether we should attempt limited reform of our code now, however, is debatable. We are concerned with some of the oldest and most fundamental law of the Commonwealth, which if no longer good, consistent and reasonable, is long used and acquiesced in, so change will not and should not come easily. Also, it is difficult to isolate parts of our probate code from the whole, for the code is like a fabric, the warp of which is the distinction between real and personal property.

The Maryland commission observed that their testamentary law patterned on the common law in 1798 had, through random legislative changes and change in time and circumstance, become "disorganized, illogical and sometimes unintelligible." Virginia testamentary law is by no means in this condition—not yet, but many of our testamentary laws are likewise archaic. The artificial distinction between real and personal property has created illogicalities and anachronisms which are becoming more noticeable and require our attention. Five years ago the writer urged that legislative reform be undertaken in the law of decedents' estates in Virginia and that it not be a piecemeal effort but a modern revision. This is still the position of the writer today.

It is, therefore, suggested that the General Assembly appoint a committee or commission to review and revise entirely the decedents' estates law. It is further suggested that this body be made up of members of the bench, the bar, corporate fiduciaries, possibly the life insurance industry, and that it look to the state's law schools and professors for staff and research support. A draftsman of Wisconsin advises that "full time experienced staff people are essential to a project of this kind." Such a study can be expected to require the concerted effort of these persons for a considerable period of time, perhaps several years, but a clear modern and reorganized probate code is a prize most worthy of our best efforts.

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