INTERIM REPORT OF THE
JOINT SUBCOMMITTEE

Studying Virginia Laws as it Affects Transfers of Property Upon Death

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

Senate Document No. 9

COMMONWEALTH OF VIRGINIA
RICHMOND
1984

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Willis A. Woods, Vice-Chairman
Dudley J. Emick, Jr.
J. Samuel Glasscock
Clinton Miller
Wiley F. Mitchell, Jr.
Thomas W. Moss, Jr.
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Interim Report of the

Joint Subcommittee Studying Virginia Law

as it Affects Transfers of Property Upon Death

To

The Governor and the General Assembly of Virginia

Richmond, Virginia

December, 1983

To: The Honorable Charles S. Robb, Governor of Virginia
and
The General Assembly of Virginia

INTRODUCTION

By resolution sponsored by Senator Evelyn M. Hailey and passed by the 1983 Session, the General Assembly called for a study of Virginia law as it affects transfers of property upon death. The purpose of the study was to determine whether the rights and interests of the surviving spouse are adequately protected (Senate Joint Resolution No. 51 - Appendix A). Specifically, the resolution called for the creation of a twelve-member joint subcommittee to study (i) the effects of the current dower and curtesy provisions during life and upon the death of a spouse, (ii) the concept of providing a surviving spouse with a right to claim an elective share in an augmented estate as a means to protect a surviving spouse from disinheritance or depletion of the probate estate by the decedent, and (iii) the various means of affording protections to a surviving spouse as provided in the model acts pertaining to the probate of wills and distribution of estates.

Senators William F. Parkerson, Jr., Dudley J. Emick, Jr. and Wiley F. Mitchell, Jr., were appointed by the Senate Committee on Privileges and Elections to serve as members of the joint subcommittee. Delegates J. Samuel Glasscock, Clinton Miller, Thomas W. Moss, Jr., W. Tayloe Murphy, Jr., and Mary Sue Terry were appointed by the Chairman of the House Committee for Courts of Justice. Additionally, two citizen members with experience in the area of wills, trusts and estates were appointed by the Senate Committee on Privileges and Elections and two citizen members with similar experience were appointed by the Speaker of the House of Delegates. The four citizen members were: Carle E. Davis, Esquire, and J. William Gray, Jr., Esquire, of Richmond, Carroll Kem Shackelford, Esquire, of Orange Virginia, and Willis A. Woods, Esquire, of Wytheville, Virginia. Delegate Murphy was elected chairman of the joint subcommittee; Mr. Woods was elected vice-chairman.

SUMMARY

Following a comprehensive review of the current provisions of Virginia law governing the disposition of property upon death and the various alternatives available to protect a surviving spouse by providing certain minimum interests in property upon the death of the other spouse, the joint subcommittee makes the following findings and recommendations:

1. That various methods are used to transfer or hold title to property during life which exempt such property from inclusion in the probate estate, thereby restricting the surviving

spouse's rights of election upon renunciation.

2. That because individuals are less likely to hold a major portion of their wealth in real property a surviving spouse's dower or curtesy interest does not attach to a significant portion of the decedent's assets.

3. That the laws pertaining to dower and curtesy are confusing and in some cases inconsistent and may, due to the fee interest created, cause significant titling problems in the future.

4. That in those rare situations where a surviving spouse is not adequately provided for during the life or upon the death of the other spouse, the laws pertaining to dower and curtesy and renunciation do not afford sufficient minimum protections for the survivor.

5. That the issues involved in any revision of current law in this area are extraordinarily complex and, therefore, a majority of the joint subcommittee believes that the study of these issues should be continued with additional input and participation from various experts in the field.

BACKGROUND

The joint subcommittee met on five occasions between June 20, 1983, and October 25, 1983. In order to facilitate the work of the joint subcommittee, a drafting subcommittee consisting of members of the joint subcommittee and representatives of the Virginia Bar Association worked with staff to prepare and refine optional proposals for consideration. The members of the drafting subcommittee were Mr. Murphy, Mr. Gray, Ms. Shackelford, Professor J. Rodney Johnson and C. Daniel Stevens, Esquire. The drafting subcommittee met on five separate occasions. The joint subcommittee reviewed and discussed a number of alternative methods for providing minimum financial protections for a surviving spouse. The lengthy discussions on each of these proposals served to highlight the specific problems associated with current law and any modifications of the law as it pertains to the disposition of the property of a married person upon death.

CONSIDERATIONS AND FINDINGS

The members of the joint subcommittee began their deliberations with a detailed review of the dower, curtesy and renunciation statutes. (See Chapter 2 of Title 64.1, § 64.1-19 et seq., and § 64.1-13 of the Code of Virginia). Specific problems were identified regarding the nature and extent of the protections afforded under these provisions. The ease with which one spouse could deplete his potential probate estate was noted. For example, a spouse may hold all or substantially all of his personal property in trust for another or in trust for for himself with remainder to another and make no provision for the other spouse in his will. Similarly, one spouse may simply give all his personal property to another. The other spouse's right to elect would be defeated. There would be no probate estate against which to elect.

A surviving spouse's dower or curtesy interest in real property may similiarly be defeated, provided such methods are used to take title before dower or curtesy vests. Real property originally titled in a corporation, even though one spouse is the only stockholder, or a partnership in which one spouse is a partner, is not subject to the other spouse's dower or curtesy interest. The joint subcommittee noted too that, in general, the major portion of a person's wealth is no longer held in real property. Dower and curtesy had greater meaning and provided greater protection to more people in a time when the owned family home constituted the greatest asset of a decedent's estate.

A number of technical problems were identified in regard to dower and curtesy. Many of the current provisions of the Code of Virginia pertaining to dower or curtesy do not reflect the change from a life estate to a fee simple interest. It was suggested that transition to a one-third fee simple interest had complicated the procedures governing assignment of dower or curtesy. Additionally, as a fee simple, the dower or curtesy interest is passed to heirs of the surviving spouse. Extensive inquiries into a prospective grantor's marital status are required to avoid

taking a clouded title. Clouds on title created by a spouse's inchoate dower or curtesy will continue indefinitely.

The joint subcommittee recognized that disinheritance by depletion of the probate estate and continuing clouds on title resulting from unilateral transfers of real property during marriage occur relatively infrequently. In the majority of cases a surviving spouse is adequately provided for by the decedent. However, the subcommittee believed the laws of the Commonwealth should reflect a policy providing some minimum financial protections to the survivor. A majority believed that such protection is no longer provided under current law.

The question of how the policy of the Commonwealth should properly balance the rights and interests of married people in the property of each other was debated at length. The discussions focused on recent policy changes reflected in the laws pertaining to distribution of property upon divorce and ownership rights in joint bank accounts. Some members of the subcommittee felt the laws pertaining to distribution of property upon death should refect the same policy. However, the subcommittee could not agree on how to best implement a policy designed to provide adequate minimum protections to a surviving spouse while protecting the sanctity of marriage and the rights of individuals to freely deal with their own property.

Senate Bill No. 337, introduced by Senator Hailey in 1983, was used by the joint subcommittee members to familiarize themselves with the augmented estate concept (See Appendix B). Senate Bill No. 337 was based primarily on the Uniform Probate Code provisions. The bill called for repeal of dower and curtesy and expansion of a surviving spouse's rights upon renunciation. A surviving spouse would be granted a right to elect to take a one-third interest in the decedent's "augmented estate" in lieu of any testamentary provision or intestate distribution. The "augmented estate" would include the value of the decedent's probate estate plus the value of certain property which the decedent transferred to another while retaining some interest in or right to control of the property until his death, and the value of certain gifts made by the decedent.

Extended discussions were held concerning the proper method for treating property of the surviving spouse under the augmented estate. Specific problems were noted in connection with including the value of transfers made by the decedent to the surviving spouse during marriage. Also discussed at great length were the issues of whether to charge the value of such transfers against the survivors elective share and how to properly value property held jointly by the spouses.

The subcommittee recognized that Senate Bill 337 contained some technical inconsistencies and certain provisions which were not consistent with the philosophy of a majority of members of the joint subcommittee. The drafting subcommittee provided a revised augmented estate bill. A copy of the last draft of that bill and a list of the policy issues raised during discussion are attached as Appendix C.

Upon further reflection, it was noted that adoption of a traditional augmented estate concept would result in a loss of unique protections provided by dower and curtesy. These protections were identified as: 1) a restraint on unilateral alienation of real property by one spouse during the marriage due to the inchoate nature of dower and curtesy; and 2) the priority granted a surviving spouse's dower or curtesy interest over claims of general creditors of the decedent. The subcommittee explored the possibility of retaining dower and curtesy in order to preserve these unique protections, while creating a right to elect in an augmented personal estate of the decedent. A copy of the draft bill incorporating these suggestions is attached as Appendix D.

At the last meeting on October 28, Harry Warthen addressed the joint subcommittee. Speaking as chairman of the Committee on Wills, Trust and Estates of the Virginia Bar Association, he advised the joint subcommittee of the Bar Association's findings and recommendations. Mr. Warthen stated that the Bar Association found existing law provided little protection for a surviving spouse. A scheme which afforded a surviving spouse a right to elect to take a forced share in some form of augmented estate would be preferred. However, the Bar Association was unable to support a proposal which would leave real property out of the augmented estate. Mr. Warthen indicated that although the Bar Association generally recommends the abolition of dower and curtesy, it would support an augmented estate proposal which included (i) real and personal property, (ii) a prohibition against unilateral alienation of

real property during marriage and (iii) a priority for the elective share over claims of general creditors of the decedent. Additionally, the Bar Association suggested that if an augmented estate concept is adopted, in order to ensure that married persons are able to deal freely and fairly with each other and their respective property, the laws of the Commonwealth should be amended to statutorily recognize antenuptial agreements and property settlement agreements between married persons.

Mr. Warthen noted the Bar Association's suggestion that § 64.11-23 of the Code of Virginia be amended. He indicated this should be done even if no other changes in current law were recommended by the joint subcommittee. The suggested amendment would include a surviving spouse's right to elect, right to exempt property, and right to the family and homestead allowances within the rights barred upon willful desertion or abandonment. The members of the joint subcommittee agreed that such a proposal would be desirable.

Ultimately, a minority of the subcommittee remained unconvinced that existing law did not provide adequate protection in the majority of cases. The remaining members of the joint subcommittee agreed that there were problems with existing law, but could not agree on the best method to correct them. Some felt that the augmented estate (Appendix C) went too far and complicated the law too much. Others noted that the augmented personal estate (Appendix D) retained the complexities associated with dower and curtesy and added the additional complexities associated with augmenting the probate estate.

Some members suggested granting a limited right to elect in cases involving an actual or presumed intent by the decedent to disinherit the surviving spouse. Under this proposal, an intent to disinherit would be presumed where the decedent retained substantial interests in property which he had transferred to another during life or where he transferred property to another within a certain limited period prior to death. If the survivor sought to include the value of other property in the augmented estate, he would have to establish that the property was transferred by the decedent with an intent to disinherit. The members of the joint subcommittee who expressed concern over the broad scope of a traditional augmented estate concept believed a proposal such as this should be given further consideration. It was believed that a more limited augmented estate would effect the least violence upon the deceased spouse's testamentary plan, while providing increased protections to the surviving spouse.

CONCLUSION

Recognizing that the substantial work done during the course of this study had not resulted in a concrete legislative proposal for protecting the surviving spouse, on a 6-4 vote of the members present, the joint subcommittee recommends that the study continue. The joint subcommittee further recommends that the suggestions of the Virginia Bar Association Committee on Wills, Trusts and Estates be given further consideration. The joint subcommittee suggests that the Bar continue its study of these issues and present the joint subcommittee with its legislative recommendations in the spring of 1984. A copy of the resolution continuing the study is attached as Appendix E.

Respectfully submitted,

W. Tayloe Murphy, Jr.
Willis A. Woods
Dudley J. Emick, Jr.*
J. Samuel Glasscock
Clinton Miller
Wiley F. Mitchell, Jr.
Thomas W. Moss, Jr.
William F. Parkerson, Jr.
Mary Sue Terry
Carle E. Davis
J. William Gray, Jr.
Carroll Kem Shackelford

*(Senator Dudley J. Emick, Jr. dissents from this report. A copy of his letter is attached.)

COMMONWEALTH OF VIRGINIA

DUDLEY J. EMICK, JR.
22ND SENATORIAL DISTRICT
ALLEGHANY, BATH AND BOTETOURT;
WESTERN PART OF ROANOKE COUNTY;
CITIES OF CLIFTON FORGE,
COVINGTON AND SALEM
P. O. BOX 158
FINCASTLE, VIRGINIA 24090

SENATE

COMMITTEE ASSIGNMENTS:
COURTS OF JUSTICE
FINANCE
REHABILITATION AND SOCIAL SERVICES
TRANSPORTATION
RULES

December 6, 1983

Mrs. Mary P. Devine
General Assembly Building
910 Capitol Street
Richmond, Virginia 23208

Dear Mary:

The following is my dissent to the study of Transfers of Property Upon Death:

> I believe that there are some inequities in our present law, and likely will always be some inequities under future revisions. For the vast majority of Virginians the present law carries out the public policy which best meets the needs of our citizens.

With best personal wishes, I am

Sincerely,

Dudley J. Emick, Jr.

DJEjr./btl

SENATE JOINT RESOLUTION NO. 51

Requesting the establishment of a joint subcommittee to study Virginia law as it affects the transfer of property at death.

Agreed to by the Senate, February 2, 1983
Agreed to by the House of Delegates, February 24, 1983

WHEREAS, new statutory provisions pertaining to the transfer of property, real and personal, at death have recently been enacted in Virginia; and

WHEREAS, dower and curtesy in Virginia have been elevated from life estates to fee simple estates; and

WHEREAS, under present law, the right of a surviving spouse to share, whether by will or intestacy, in the property of a decedent are limited to the probate estate; and

WHEREAS, the concept of an elective share and an augmented estate have been adopted by many states as a means of assuring protection of a surviving spouse; and

WHEREAS, such statutory revisions and such proposals affect the rights of both decedents and surviving spouses; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That a joint subcommittee is hereby created to study the body of present Virginia law as it affects the transfer of property at death, whether by will or intestacy, to determine whether the rights of a surviving spouse are adequately protected, to study the effect during lifetime and at death of the present dower and curtesy provisions, and to study the concept of an elective share and an augmented estate as a means to protect a surviving spouse from disinheritance by will or by elimination of property from the probate estate, and to investigate the various model acts pertaining to probate of wills and the administration of estates; and, be it

RESOLVED FURTHER, That the joint subcommittee shall consist of twelve members. Three members from the Senate Courts of Justice Committee shall be appointed by the Committee on Privileges and Elections of the Senate and five members of the House Courts of Justice Committee shall be appointed by its chairman. Four members shall be appointed from the citizenry of the Commonwealth at large, two each by the Committee on Privileges and Elections of the Senate and the Speaker of the House of Delegates. The citizen members shall include persons with legal, banking, business, or academic experience in the field of wills, trusts and estates. The joint subcommittee, during the course of this study, shall also avail itself of the services of the Virginia Bar Association; and be it

RESOLVED FINALLY, That the joint subcommittee shall complete its work and submit its recommendations, if any, to the Governor and General Assembly by December 1, 1983.

The cost of this study shall not exceed $3,840.

LD6109141

1983 SESSION

SENATE BILL NO. 337

Offered January 24, 1983

A BILL to amend and reenact §§ 64.1-1, 64.1-13, 64.1-14, 64.1-16 and 64.1-23 of the Code of Virginia, and to amend the Code of Virginia by adding sections numbered 64.1-16.1 through 64.1-16.3, and to repeal Chapter 2 of Title 64.1, consisting of sections numbered 64.1-19 through 64.1-44, of the Code of Virginia, all relating generally to descent and distribution of estates; curtesy, dower and jointure; augmented estate.

Patrons—Hailey and Babalas

Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.1-1, 64.1-13, 64.1-14, 64.1-16 and 64.1-23 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding sections numbered 64.1-16.1 through 64.1-16.3 as follows:

§ 64.1-1. Course of descents generally.—When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to such of his kindred, male and female, in the following course:

First. To the surviving spouse of the intestate, unless the intestate is survived by children or their descendants, one or more of whom are not children or their descendants of the surviving spouse, in which case *two-thirds of* such estate shall pass to the intestate's children and their descendants ~~subject to the provisions of § 64.1-19~~ *and the remaining one-third of such estate shall pass to the intestate's surviving spouse* .

Second. If there be no surviving spouse, then the whole shall go to the intestate's children and their descendants.

Third. If there be none such, then to his or her father and mother or the survivor.

Fourth. If there be none such, then to his or her brothers and sisters, and their descendants.

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

Sixth. First to the grandfather and grandmother or the survivor.

Seventh. If there be none, then to the uncles and aunts, and their descendants.

Eighth. If there be none such, then to the great grandfathers or great grandfather, and great grandmothers or great grandmother.

Ninth. If there be none, then to the brothers and sisters of the grandfathers and grandmothers, and their descendants.

Tenth. And so on, in other cases, without end, passing to the nearest lineal ancestors, and the descendants of such ancestors.

Eleventh. If there be no paternal kindred the whole shall go to the maternal kindred; and if there be no maternal kindred, the whole shall go to the paternal kindred. If there be neither maternal nor paternal kindred, the whole shall go to the kindred of the husband or wife, in the like course as if such husband or wife had died entitled to the estate.

§ 64.1-13. When and how elective share may be claimed.—Whether or not *(i)* any

provision for a husband or wife is made in the ~~consort's~~ *spouse's* will, *or (ii) the spouse dies intestate,* the survivor may, *(i)* within one year from the time of the admission of the will to probate, ~~renounce~~ ~~the~~ ~~will~~ *or (ii) within one year from the qualification of an administrator on the intestate estate, claim an elective share in the spouse's estate* . The ~~renunciation~~ *claim to an elective share* shall be made either in person before the court in which the ~~will~~ ~~is~~ ~~recorded~~ *spouse's estate is being administered* , or by writing recorded in the court, or the clerk's office thereof, upon such acknowledgment or proof as would authorize a writing to be admitted to record under ~~chapter~~ *Chapter* 6 (§ 55-106 et seq.) of Title 55.

§ 64.1-14. Extension of time until after determination of suit for construction of will or valuation of augmented estate.–If ~~the~~ *(i) a* will is of doubtful import as to the amount or value of the property the husband or wife of the testator is to receive thereunder *or, (ii) the value of the augmented estate is uncertain,* and a suit in equity is pending wherein ~~it~~ ~~will~~ ~~be~~ ~~construed~~ ~~in~~ ~~that~~ ~~respect~~ *such issue will be resolved* , the court in which the suit is pending shall, within the year, on the application of the surviving husband or wife, enter an order extending the time within which the survivor is to make ~~renunciation~~ *claim for an elective share* for such additional period beyond the year as will allow the survivor reasonable time, not exceeding six months, for making the ~~renunciation~~ *claim for an elective share* after a final order has been entered in the suit *(i)* construing the will in such respect *or (ii) valuing the augmented estate* , either by a trial court or any appellate court to which it is appealed.

§ 64.1-16. Rights upon claiming an elective share.–If ~~renunciation~~ *claim for an elective share* be made, the surviving spouse shall, if the decedent left surviving children or their descendants, have one - third ~~of~~ ~~the~~ ~~surplus~~ of the decedent's ~~personal~~ ~~estate~~ ~~mentioned~~ ~~in~~ § ~~64.1-11~~ *augmented estate* ; or if no children or their descendants survive, the surviving spouse shall have one - half of such ~~surplus;~~ ~~otherwise~~ ~~the~~ ~~surviving~~ ~~spouse~~ ~~shall~~ ~~have~~ ~~no~~ ~~more~~ ~~of~~ ~~the~~ ~~surplus~~ ~~than~~ ~~is~~ ~~given~~ ~~him~~ ~~or~~ ~~her~~ ~~by~~ ~~the~~ ~~will~~ *augmented estate* .

§ 64.1-16.1. Augmented estate.–The augmented estate means the estate, real and personal, subject to the provisions of Article 5.1 (§ 64.1-151.1 et seq.) of Chapter 6 of Title 64.1, after payment of funeral expenses, charges of administration and debts, to which is added the sum of the following amounts:

1. The value of property transferred to anyone other than a bona fide purchaser by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

a. Any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;

b. Any transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;

c. Any transfer whereby property is held at the time of the decedent's death by the decedent and another with right of survivorship;

d. Any transfer made to a donee within two years of death by the decedent to the

extent that the aggregate transfers to any one donee in either of the years exceed $3,000.

Any transfer is excluded if made with the written consent or joinder of the surviving spouse. Property is valued as of the decedent's death except that property given irrevocably to a donee during the lifetime of the decedent is valued as of the date the donee came into possession or enjoyment if that occurs first. Nothing herein shall cause to be included in the augmented estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.

2. The value of property owned by the surviving spouse at the decedent's death, plus the value of property transferred by the spouse at any time during the marriage to any person other than the decedent which would have been includible in the spouse's augmented estate if the surviving spouse had predeceased the decedent, to the extent the owned or transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth.

§ 64.1-16.2. Waiver of right to elect and other rights.—The right of election of a surviving spouse and the rights of the surviving spouse to a homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" or equivalent language in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

64.1-16.3. Charging spouse with gifts received; liability of others for balance of elective share.—A. In determining the elective share, values included in the augmented estate which pass or have passed to the surviving spouse, or which would have passed to the spouse but were disclaimed, are applied first to satisfy the elective share and to reduce any contributions due from other recipients of transfers included in the augmented estate.

B. Remaining property of the augmented estate is so applied that liability for the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein.

C. Only orginal tranferees from, or appointees of, the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time it is considered in computing the augmented estate.

§ 64.1-23. Inheritance and right to elective share barred by desertion.—If a husband or wife wilfully desert or abandon his or her ~~consort~~ *spouse* and such desertion or abandonment continues until the death of the ~~consort~~ *spouse* , the party who deserted the deceased ~~consort~~ *spouse* shall be barred of all interest in the estate of the other as a ~~tenant by dower, tenant by the curtesy~~ *taker of an elective share* , distributee or heir.

2. That Chapter 2 of Title 64.1, consisting of sections numbered 64.1-19 through 64.1-44, of

the Code of Virginia is repealed.

Official Use By Clerks

Passed By The Senate		Passed By The House of Delegates	
without amendment	☐	without amendment	☐
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐

Date: _____ Date: _____

_____ _____

Clerk of the Senate Clerk of the House of Delegates

Appendix C

A BILL to amend and reenact §§ 64.1-1, 64.1-13, 64.1-14, 64.1-16, 64.1-23 and 64.1-33 of the Code of Virginia, to amend the Code of Virginia by adding sections numbered 64.1-16.1 through 64.1-16.3, and to repeal §§ 64.1-19, 64.1-19.1, 64.1-20, 64.1-21, 64.1-22, 64.1-24, 64.1-25, 64.1-26, 64.1-27, 64.1-28, 64.1-29, 64.1-30, 64.1-31, 64.1-32, 64.1-33, 64.1-34, 64.1-35, 64.1-36, 64.1-37, 64.1-38, 64.1-39, 64.1-40, 64.1-41, 64.1-42, 64.1-43 and 64.1-44 of the Code of Virginia, all relating generally to descent and distribution of estates; curtesy, dower and jointure; augmented estate.

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.1-1, 64.1-13, 64.1-14, 64.1-16, 64.1-23 and 64.1-33 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding sections numbered 64.1-16.1 through 64.1-16.3 as follows:

§ 64.1-1. Course of descents generally.—When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to such of his kindred, male and female, in the following course:

First. To the surviving spouse of the intestate, unless the intestate is survived by children or their descendants, one or more of whom are not children or their descendants of the surviving spouse, in which case *two-thirds of* such estate shall pass to the intestate's children and their descendants ~~subject to the provisions of § 64.1-10~~ *and the remaining one-third of such estate shall pass to the intestate's surviving spouse* .

Second. If there be no surviving spouse, then the whole shall go to the intestate's children and their descendants.

Third. If there be none such, then to his or her father and mother or the survivor.

Fourth. If there be none such, then to his or her brothers and sisters, and their descendants.

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

Sixth. First to the grandfather and grandmother or the survivor.

Seventh. If there be none, then to the uncles and aunts, and their descendants.

Eighth. If there be none such, then to the great grandfathers or great grandfather, and great grandmothers or great grandmother.

Ninth. If there be none, then to the brothers and sisters of the grandfathers and grandmothers, and their descendants.

Tenth. And so on, in other cases, without end, passing to the nearest lineal ancestors, and the descendants of such ancestors.

Eleventh. If there be no paternal kindred the whole shall go to the maternal kindred; and if there be no maternal kindred, the whole shall go to the paternal kindred. If there be neither maternal nor paternal kindred, the whole shall go to the kindred of the husband or wife, in the like course as if such husband or wife had died entitled to the estate.

§ 64.1-13. When and how elective share may be claimed.—Whether or not *(i)* any provision for a husband or wife is made in the ~~consort's~~ *spouse's* will, *or (ii) the spouse dies intestate,* the survivor may, within one year from *the later of (i)* the time of the admission of the will to probate, ~~renounce the will~~ *or (ii) the qualification of an administrator on the intestate estate, claim an elective share in the spouse's augmented estate* . The ~~renunciation~~ *claim to an elective share* shall be made either in person before the court ~~in which the will is recorded~~ *having jurisdiction over administration of the deceased spouse's estate* , or by writing recorded in ~~the~~ *such* court, or the clerk's office thereof, upon such acknowledgment or proof as would authorize

a writing to be admitted to record under ~~chapter~~ *Chapter* 6 (§ 55-106 et seq.) of Title 55.

§ 64.1-14. Extension of time until after determination of suit for construction of will or extent of augmented estate.–If ~~the~~ *(i) a* will is of doubtful import as to the amount or value of the property the husband or wife of the testator is to receive thereunder *or, (ii) the composition or value of the augmented estate is uncertain,* and a suit in equity is pending wherein ~~it will be construed in that respect~~ *such issues will be resolved* , the court in which the suit is pending shall, within the year, on the application of the surviving ~~husband or wife~~ *spouse* , enter an order extending the time within which the survivor is to make ~~renunciation~~ *claim for an elective share* for such additional period beyond the year as will allow the survivor reasonable time, not ~~exceeding six months~~ *to exceed ninety days* , for making the ~~renunciation~~ *claim for an elective share* after a final order has been entered in ~~the~~ *such* suit ~~construing the will in such respect~~ , either by a trial court or any appellate court to which it is appealed.

§ 64.1-16. Rights upon claiming an elective share.–If ~~renunciation~~ *claim for an elective share* be made, the surviving spouse shall, if the decedent left surviving children or their descendants, have one - third ~~of the surplus~~ of the decedent's ~~personal estate mentioned in § 64.1-11~~ *augmented estate* ; or if no children or their descendants survive, the surviving spouse shall have one - half of such ~~surplus; otherwise the surviving spouse shall have no more of the surplus than is given him or her by the will~~ *augmented estate* .

§ 64.1-16.1. Augmented estate; exclusions; valuation.–The augmented personal estate means the estate, real and personal subject to the provisions for allowances and exemptions contained in Article 5.1 (§ 64.1-151.1 et seq.) of Chapter 6 of Title 64.1, after payment of funeral expenses, charges of administration and debts, to which is added the sum of the following amounts:

1. (a) The value of property, other than tangible personal property, owned by the surviving spouse at the decedent's death, to the extent the property is derived from the decedent, by any means other than testate or intestate succession, without a full consideration in money or money's worth.

1. (b) The value of property, other than tangible personal property, derived by the surviving spouse from the decedent, other than by testate or intestate succession, and transferred by the surviving spouse at any time during the marriage to a person other than the decedent, which would have been includible in the surviving spouse's augmented estate if the surviving spouse had predeceased the decedent.

2. The value of property transferred to anyone other than a bona fide purchaser by the decedent at any time during the marriage to the surviving spouse, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

a. Any transfer under which the decedent retained for his life, for any period not ascertainable without reference to his death or for any period which does not in fact end before his death, the possession or enjoyment of, or right to income from, the property;

b. Any transfer to the extent that the decedent retained for his life, for any period not ascertainable without reference to his death or for any period which does not in fact end before his death, a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;

c. Any transfer whereby property is held at the time of the decedent's death by the decedent and another with right of survivorship;

d. Any transfer made to or for the benefit of a donee to the extent that (i) the transfer was made causa mortis or (ii) the aggregate transfers to any donee exceed $10,000 in a year.

Nothing herein shall cause to be included in the augmented estate (i) the value of any property transferred by the decedent during marriage with the written consent or joinder of the surviving spouse, (ii) the value of any property, or proceeds of any property, received by the decedent by gift, will or intestate succession during the marriage to the surviving spouse, from

a person other than the surviving spouse to the extent such property or its proceeds were maintained by the decedent as separate property, or (iii) any transfer made to anyone other than the surviving spouse prior to July 1, 1984, to the extent that such transfer is irrevocable on that date.

Property is valued as of the decedent's death except that property transferred irrevocably during the lifetime of the decedent is valued as of the date the transferee came into possession or enjoyment if that occurs first. Life estates and remainder interests are valued in the manner prescribed in Article 2 of Chapter 15 of Title 55 (§ 55-269.1 et seq.), and deferred payments and estates for years are discounted to present value using the interest rate specified in § 55-269.1.

§ 64.1-16.2. Waiver of right to elect and other rights.—The right of election of a surviving spouse and the rights of the surviving spouse to a homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after full and fair disclosure. Unless it provides to the contrary, a waiver of "all rights" or the use of equivalent language in reference to the property or estate of a present, prospective or deceased spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

64.1-16.3. Charging spouse with gifts received; liability of others for balance of elective share; determination; satisfaction.—A. In determining the elective share, values included in the augmented estate which pass or have passed to the surviving spouse, or which would have passed to the spouse but were disclaimed, are applied first to satisfy the elective share and to reduce any contributions due from other recipients of transfers included in the augmented estate.

B. Remaining property of the augmented estate is so applied that liability for the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein.

C. Only original tranferees from or appointees of the decedent, and subsequent gratuitous inter vivos or testamentary donees, to the extent such transferees, appointees or donees have the property or its proceeds, are subject to contribution to make up the elective share of the surviving spouse.

D. Upon petition of the surviving spouse, the decedent's personal representative, or any interested party, the court having jurisdiction over administration of the decedent's estate shall determine the amount of the elective share and the ratable portion of the elective share attributable to each person liable to contribution. Such petition may be brought against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he would have been if relief had been secured against all persons subject to contribution.

E. Within ten days of the court's determination of the contributions due under paragraph D, any person liable to the surviving spouse for contribution may file with the court a written statement specifying any of the following methods for satisfying his contribution liability:

1. Conveyance of a portion of the property included in the augmented estate equal in value to his liability on the date the statement is filed; however, if, on the date of filing, the value of the property included in the augmented estate is less than his liability, he may convey the property to the surviving spouse in full satisfaction;

2. Payment of the value of his liability in cash or, upon agreement of the surviving spouse, other property; or

3. Partial conveyance and partial payment under 1 and 2 above, provided the value conveyed and paid is equal to his liability.

In the event a statement is not filed within ten days, the court shall enter an order specifying the method by which liability to the surviving spouse shall be satisfied.

§ 64.1-23. Inheritance and right to elective share barred by desertion.—If a husband or wife wilfully desert or abandon his or her ~~consort~~ *spouse* and such desertion or abandonment continues until the death of the ~~consort~~ *spouse* , the party who deserted the deceased ~~consort~~ *spouse* shall be barred of all interest in the estate of the other as a ~~tenant by dower~~, ~~tenant by the curtesy~~ *taker of an elective share, exempt property or a family or homestead allowance, or as a* distributee or heir.

§ 64.1-33. What a surviving spouse entitled to until elective share determined.—Until ~~dower or curtesy is assigned~~, *the elective share has been determined and satisfied as to the family residence by agreement between the parties or according to the provisions of a court decree,* the surviving spouse may hold, occupy and enjoy the ~~mansion house~~ *family residence* and curtilage without charge for rent, repairs, taxes or insurance ~~; and, in the meantime, such surviving spouse shall be entitled to demand of the heirs, devisees, or alienees, one third part of the issues and profits of the other real estate which descended or was devised or passed to them of which such spouse has a dower or curtesy interest after deducting the cost of necessary repairs, taxes and insurance~~. If such surviving spouse be deprived of the ~~mansion house~~ *family residence* and curtilage, he or she may on complaint of unlawful entry or detainer, recover the possession thereof, with damages for the time the surviving spouse was so deprived ~~; but~~ . *However,* nothing in this section shall be construed to impair the lien or delay the enforcement thereof of any state, city or county for the taxes assessed upon the property.

2. That §§ 64.1-19, 64.1-19.1, 64.1-20, 64.1-21, 64.1-22, 64.1-23, 64.1-24, 64.1-25, 64,1-26, 64.1-27, 64.1-28, 64.1-29, 64.1-30, 64.1-31, 64.1-32, 64.1-33, 64.1-34, 64.1-35, 64.1-36, 64.1-37, 64.1-38, 64.1-39, 64.1-40, 64.1-41, 64.1-42, 64.1-43 and 64.1-44 of the Code of Virginia are repealed.

Appendix C

POLICY ISSUES

MEETINGS OF JUNE 30, 1983 AND JULY 13, 1983

AUGMENTED ESTATE

(LD0024532)

1. Desirability of combining the substantive provisions of current §§ 64.1-1 and 64.1-11 so that real and personal property would be treated under the same section for purposes of intestate succession.

Note : It was suggested that this be considered regardless of the option chosen by the committee. Therefore, a bill draft is attached (Attachment 1 - LD0032532). Attachment 1 is based substantially on SB 286, introduced by Senator Michie during the 1983 Session.

2. Codification of Virginia case law regarding an election on behalf of an incompetent surviving spouse.

It was suggested that a new paragraph could be added to the end of § 64.1-13 to codify the holding in First National Bank of Roanoke v. Hughson , 194 Va. 736. The new paragraph would specify that the court having jurisdiction over the deceased spouse's estate, and not the guardian of the survivor, would decide whether an election should be made in the best interest of the surviving spouse.

3. Desirability of modifying the definition of "augmented estate" in § 64.1-16.1 to specify that estate taxes are not to be deducted .

4. Additional exemptions from augmented estate :

a) Exempt all transfers constituting testamentary substitutes to or for the benefit of a minor child of the decedent (option : minor child who is not a child of the surviving spouse). See p. 5, lines 17 through 21.

Note Effect : Decedent could disinherit surviving spouse by a transfer of all property to a minor child by any of the methods specified in § 64.1-16.1(2).

Possible Partial Solution : Do not exempt such gifts causea mortis of a substantial portion of decedent's probate estate.

b) Exempt all gifts to a minor child (option : who is not a child of the surviving spouse) from § 64.1-16.1(2)(d).

Note : Wisconsin appears to be the only state that allows a minor child to assert his right to support against the estate of a deceased parent by a process similiar to the election of a surviving spouse against the will. A copy of the Wisconsin statute is attached. (Attachment 2)

c) Exempt (i) all charitable transfers or (ii) charitable transfers above a certain amount.

Note : It was suggested that charities might find it difficult to payback portions of a gift to satisfy their contribution to the elective share. However, it was noted that a charity would be liable only to the extent the property was still available at the time contribution was to be made. (See § 64.1-16.3(c)).

d) Delete the provisions of paragraphs 1a and 1b from § 64.1-16.1 so that property of the

surviving spouse derived from the decedent would not be included in the augmented estate. (This suggestion was based upon a review of the New York provisions governing the augmented estate.)

5. Modification of subparagraph 1(d) to :

(i) limit gifts includable in the augmented estate to those made within one year of death (or some period longer than two years);

(ii) tie amount of gift to a donee excluded from augmented estate to the federal gift tax exclusion.

6. Modification of the exclusions from the augmented estate :

a) So that the proceeds of any insurance, annuity or pension plan would be excluded.

Note : A reason could not be articulated for treating these proceeds differently depending on who the beneficiary was. It was agreed that all such proceeds should either be included or excluded from the augmented estate. (LD 0024 532 and LD 0033 532 include these proceeds.)

b) It was suggested that pensions should be treated differently due to the nature of the decedent's interest in a pension.

c) Modify the "separate property" exclusion so that property received prior to the marriage by gift or inheritance would also be excluded from the augmented estate.

7. Include a provision to require satisfaction of the elective share out of probate assets first .

Arguments For :

(i) Easier than attempting to trace the property or proceeds of a tainted transfer

(ii) Fairer to innocent tranferees.

Arguments Against :

(i) Taker of a testamentray substitute would have no interest in defending against bringing the value of the subject property back into the augmented estate.

(ii) Could work to the detriment of residuary beneficiaries.

8. A question was raised regarding potential Constitutional problems arising if dower and curtesy are abolished. It was noted however, that dower is an inchoate right which does not vest until death. Further study is believed necessary.

Note : It was suggested that the augmented estate concept could be made to apply only to real property conveyed to a husband or wife after the effective date of the new act and dower and curtesy retained as to all property held prior to that date. (See, for example, the New York statutory scheme.)

Appendix C

POLICY ISSUES

JOINT SUBCOMMITTEE STUDYING

TRANSFER OF PROPERTY AT DEATH

(For meeting of September 28, 1983)

1. Time for making an election (§ 64.1-13)
   Is it desirable to put a miximum time limitation on the period allowed for claiming an elective share since there is no time limit for performing either of the acts triggering the one-year election period.

2. Fractional interest in augmented estate (§ 64.1-16)
   Should a surviving spouse's minimum elective share be one-half of the augmented personal estate, rather than one-third?

3. Nature of property of the surviving spouse included in the augmented estate (§ 64.1-16.1)
   a) Should property which the surviving spouse derived from the decendent be included in the augmented estate?
   b) If such property is included, should it be limited to intangible personal property? If this limitation is adopted as to the surviving spouse, should a corresponding limit be applied to transfers to third parties that are pulled back in?
   c) Should the provisions governing inclusion of such property received from the decedent be subject to the same monetary and time limitations as those applicable to gifts to third parties under § 64.1-16.12(d)?

4. Method for spouse to agree to decedent's inter vivos transfers (§ 64.1-16.1B(i))
   For purposes of excluding property from the augmented estate should the bill (i) authorize non-written joinder in decedent's transfers or (ii) require a signed writing as evidence of spouse's agreement (by joinder or consent) to the transfer?

5. Extent of inherited, etc. property excluded from the augmented estate (§ 64.1-16.1B(ii))
   Should such property be excluded if maintained as separate property only if it was received by the decedent during marriage?

6. Extent of survivorship property excluded from the augmented estate (§ 64.1-16.1(iii))
   (NOTE : THIS IS NEW) As a policy matter, should one half of the value of survivorship property be excluded? (i.e., a presumed 50-50 split)

7. Pre-effective date transfers (§ 64.1-16.1(b)(iv))
   Should all transfers, including those to the surviving spouse, prior to the effective date be exempt from pull-back into the augmented estate?

8. Effect of waiver by surviving spouse (§ 64.1-16.3)
   It is necessary to include language specifically limiting the effect of the waiver as to transactions not involving the spouses or the deceased spouse's personal representative?

9. Net Elective Share
   Should a surviving spouse's elective share be reduced by an amount equal in value to the real property the spouse derived from the decedent?
   NOTE : The Drafting Subcommitee discussed this issue in great detail. Because of various problems identified during that discussion, it was impossible to draft an option in the time allowed which would address each problem. The Ideas Subcommittee does believe that given

sufficient time, a satisfactory procedure could be developed to cover, for example, the following problems:

a) Should the surviving spouse be charged for real property received from the decedent during life?
b) If so, how should the property be valued? Date of transfer? Death?
c) If valuation is at date of inter vivos transfer, how do you account for significant appreciation? Depreciation?

10. Should the elective share be satisfied from probate assets first?
(See page 5 of "Policy Issues - Meeting of June 30 and July 13" for arguments pro and con).

11. Should a surviving spouse's elective share be immune from the claims of general creditors of the estate?

Appendix D

A BILL to amend and reenact §§ 64.1-1, 64.1-13, 64.1-14, 64.1-16 and 64.1-23 of the Code of Virginia, and to amend the Code of Virginia by adding sections numbered 64.1-16.1 through 64.1-16.4, all relating generally to descent and distribution of estates; curtesy, dower and jointure; elective share in augmented personal estate.

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.1-1, 64.1-13, 64.1-14, 64.1-16 and 64.1-23 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding sections numbered 64.1-16.1 through 64.1-16.4 as follows:

§ 64.1-1. Course of descents generally.—When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to such of his kindred, male and female, in the following course:

First. To the surviving spouse of the intestate, unless the intestate is survived by children or their descendants, one or more of whom are not children or their descendants of the surviving spouse, in which case *two-thirds of* such estate shall pass to the intestate's children and their descendants ~~subject to the provisions of § 64.1-19~~ *and the remaining one-third of such estate shall pass to the intestate's surviving spouse under § 64.1-19* .

Second. If there be no surviving spouse, then the whole shall go to the intestate's children and their descendants.

Third. If there be none such, then to his or her father and mother or the survivor.

Fourth. If there be none such, then to his or her brothers and sisters, and their descendants.

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

Sixth. First to the grandfather and grandmother or the survivor.

Seventh. If there be none, then to the uncles and aunts, and their descendants.

Eighth. If there be none such, then to the great grandfathers or great grandfather, and great grandmothers or great grandmother.

Ninth. If there be none, then to the brothers and sisters of the grandfathers and grandmothers, and their descendants.

Tenth. And so on, in other cases, without end, passing to the nearest lineal ancestors, and the descendants of such ancestors.

Eleventh. If there be no paternal kindred the whole shall go to the maternal kindred; and if there be no maternal kindred, the whole shall go to the paternal kindred. If there be neither maternal nor paternal kindred, the whole shall go to the kindred of the husband or wife, in the like course as if such husband or wife had died entitled to the estate.

§ 64.1-13. When and how elective share may be claimed.—Whether or not any provision for a ~~husband or wife~~ *surviving spouse* is made in the ~~consort's~~ *decedent's* will, *or the decedent dies intestate,* the ~~survivor~~ *surviving spouse* may *claim an elective share in the decedent's augmented personal estate* within one year from *the later of* the time of the *(i)* admission of the will to probate, ~~renounce the will~~ *or (ii) qualification of an administrator on the intestate estate* . The ~~renunciation~~ *claim to an elective share* shall be made either in person before the court ~~in which the will is recorded~~ *having jurisdiction over administration of the deceased spouse's estate* , or by writing recorded in ~~the~~ *such* court, or the clerk's office thereof, upon such acknowledgment or proof as would authorize a writing to be admitted to record under ~~chapter~~ *Chapter* 6 (§ 55-106 et seq.) of Title 55.

§ 64.1-14. Extension of time until after determination of suit for construction of will or extent of augmented estate.–If ~~the~~ *(i) a* will is of doubtful import as to the amount or value of the property the ~~husband or wife~~ *surviving spouse* of the testator is to receive thereunder *or, (ii) the composition or value of the augmented personal estate is uncertain,* and a suit in equity is pending wherein ~~it will be construed in that respect~~ *such issues will be resolved* , the court in which the suit is pending shall, within the year, on the application of the surviving ~~husband or wife~~ *spouse* , enter an order extending the time within which the survivor is to make ~~renunciation~~ *claim for an elective share* for such additional period beyond the year as will allow the survivor reasonable time, not ~~exceeding six months~~ *to exceed ninety days* , for making the ~~renunciation~~ *claim for an elective share* after a final order has been entered in ~~the~~ *such* suit ~~construing the will in such respect~~ , either by a trial court or any appellate court to which it is appealed.

§ 64.1-16. Rights upon claiming an elective share.–If ~~renunciation~~ *claim for an elective share* be made, the surviving spouse shall, if the decedent left surviving children or their descendants, have one - third ~~of the surplus~~ of the decedent's ~~personal estate mentioned in § 64.1-11~~ *augmented personal estate* ; or if no children or their descendants survive, the surviving spouse shall have one - half of such ~~surplus; otherwise the surviving spouse shall have no more of the surplus than is given him or her by the will~~ *augmented personal estate* .

§ 64.1-16.1. Augmented personal estate; exclusions.–A. The augmented personal estate means the personal estate of the decedent, subject to the provisions for allowances and exemptions contained in Article 5.1 (§ 64.1-151.1 et seq.) of Chapter 6 of Title 64.1, after payment of funeral expenses, charges of administration and debts, to which is added the sum of the following amounts:

1. The value of personal property derived by the surviving spouse from the decedent by any means other than testate or intestate succession, without a full consideration in money or money's worth, to the extent the value of the property so derived in a year exceeded $10,000, provided (i) the property is owned by the surviving spouse on the date of the decedent's death or (ii) the property, although transferred by the surviving spouse during the marriage to a person other than the decedent, would have been included in the surviving spouse's augmented personal estate if the surviving spouse had predeceased the decedent.

2. The value of personal property transferred to anyone other than a bona fide purchaser by the decedent at any time during the marriage to the surviving spouse, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

a. Any transfer of personal property under which the decedent retained for his life, for any period not ascertainable without reference to his death or for any period which does not in fact end before his death, the possession or enjoyment of, or right to income from, the property;

b. Any transfer of personal property to the extent that the decedent retained for his life, for any period not ascertainable without reference to his death or for any period which does not in fact end before his death, a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;

c. Any transfer of personal property whereby the property is held at the time of the decedent's death by the decedent and another with right of survivorship;

d. Any transfer made to or for the benefit of a donee to the extent that the aggregate transfers to the donee exceed $10,000 in a year.

3. The value of the proceeds of any life or accident insurance, annuity, pension plan or other employee benefit plan to the extent such proceeds are not otherwise included in the augmented personal estate if the decedent had voluntarily designated the beneficiary or payee or, on the date of death, had retained a right to voluntarily control such designation.

B. Nothing herein shall cause to be included in the augmented personal estate (i) the value of any personal property transferred to a third party by the decedent during marriage with the

joinder or consent of the surviving spouse, whether oral or written, or (ii) any transfer of personal property made prior to July 1, 1984, to the extent that such transfer is irrevocable on that date.

§ 64.1-16.2. Valuation.—Property included in the augmented estate is valued as of the decedent's death except that (i) property transferred irrevocably during the lifetime of the decedent is valued as of the date the transferee came into possession or enjoyment if that occurs first, (ii) life estates and remainder interests are valued in the manner prescribed in Article 2 of Chapter 15 of Title 55 (§ 55-269.1 et seq.), and (iii) deferred payments and estates for years are discounted to present value using the interest rate specified in § 55-269.1.

§ 64.1-16.3. Waiver of right to elect and other rights.—The right of election of a surviving spouse and the rights of the surviving spouse to a homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or during the marriage or after the decedent's death, by a written contract, agreement or waiver signed by the party waiving after full and fair disclosure. Unless it provides to the contrary, a waiver of "all rights" or the use of equivalent language in reference to the property or personal estate of a present, prospective or deceased spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

Nothing in this section shall be construed to authorize a spouse's waiver of the homestead allowance, exempt property or family allowance in any credit transaction or contract for goods and services.

64.1-16.4. Charging spouse with gifts received; liability of others for balance of elective share; determination; satisfaction.—A. In determining the elective share, values included in the augmented personal estate and the value of any excess real estate, which pass or have passed to the surviving spouse, or which would have passed to the spouse but were disclaimed, are applied first to satisfy the elective share and to reduce any contributions due from other recipients of transfers included in the augmented personal estate. The "value of excess real estate" means the amount by which the value of any parcel real estate or interest therein, transferred by gift, will or operation of law to or for the benefit of the surviving spouse exceeds one-third of the value of the decedent's interest in the parcel of real estate, with values determined as provided in § 64.1-16.2.

B. Remaining property of the augmented personal estate is so applied that liability for the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the property included in the augmented personal estate in proportion to the value of their interests therein.

C. Only original tranferees from or appointees of the decedent, and subsequent gratuitous inter vivos or testamentary donees, to the extent such transferees, appointees or donees have the property or its proceeds, are subject to contribution to make up the elective share of the surviving spouse.

D. Upon petition of the surviving spouse, the decedent's personal representative, or any interested party, the court having jurisdiction over administration of the decedent's estate shall determine the amount of the elective share and the ratable portion of the elective share attributable to each person liable to contribution. Such petition may be brought against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he would have been if relief had been secured against all persons subject to contribution.

E. Within ten days of the court's determination of the contributions due under paragraph D, any person liable to the surviving spouse for contribution may file with the court a written statement specifying any of the following methods for satisfying his contribution liability:

1. Conveyance of a portion of the property included in the augmented personal estate equal

in value to his liability on the date the statement is filed; however, if, on the date of filing, the value of the property included in the augmented estate is less than his liability, he may convey the property to the surviving spouse in full satisfaction;

2. Payment of the value of his liability in cash or, upon agreement of the surviving spouse, other property; or

3. Partial conveyance and partial payment under 1 and 2 above, provided the value conveyed and paid is equal to his liability.

In the event a statement is not filed within ten days, the court shall enter an order specifying the method by which liability to the surviving spouse shall be satisfied.

§ 64.1-23. Inheritance and right to elective share barred by desertion.—If a husband or wife ~~wilfully~~ ~~desert~~ *willfully deserts* or ~~abandon~~ *abandons* his or her ~~consort~~ *spouse* and such desertion or abandonment continues until the death of the ~~consort~~ *spouse* , the party who deserted the deceased ~~consort~~ *spouse* shall be barred of all interest in the estate of the other as a tenant by dower, tenant by the curtesy, *taker of an elective share, exempt property or a family or homestead allowance, or as a* distributee or heir.

Appendix E

HOUSE JOINT RESOLUTION NO.....

Continuing the study of Virginia law as it affects transfers of property on death.

WHEREAS, changes in the tax laws and the ways in which people hold the majority of their wealth have made it easier to intentionally or unintentionally disinherit one's spouse; and

WHEREAS, the provisions of Virginia law designed to provide minimum financial protections to a person upon the death of a spouse and ensure recognition of the surviving spouse's contributions to the marriage may no longer be adequate; and

WHEREAS, the recent trend in other common law jurisdictions has been to abolish the doctrines of dower and curtesy and provide a surviving spouse with a right to elect to take a statutory share in the decedent's probate estate, as augmented by certain non-probate assets; and

WHEREAS, the joint subcommittee created to study current Virginia law and alternatives for providing a surviving spouse with minimum protections (S.J.R. No. 51, 1983) concluded, after an in-depth study, that dower and curtesy alone do not provide adequate protection in regard to a survivor's interest in realty and provide no protection from disinheritance as to personalty; and

WHEREAS, a majority of the joint subcommittee and certain members of the Bar with expertise in this area believe that any modification of the law should retain certain attributes of dower and curtesy, including the restraint on unilateral alienation of real property during marriage and the priority of the survivor's fee simple interest over the claims of the decedent's general creditors ; and

WHEREAS, the joint subcommittee considered bill drafts which would, alternatively, (i) repeal dower and curtesy and grant a surviving spouse a right to elect to take a share in the decedent's augmented estate along the lines suggested by the Uniform Probate Code and (ii) retain dower and curtesy as to realty, while granting a right to elect to take a share in the decedent's augmented personal estate; and

WHEREAS, the joint subcommittee considered additional proposals which would (i) allow the survivor to augment the decedent's probate estate with the value of certain property transferred by the decedent during life within a limited time prior to death or if the decedent retained benefits from the property during life and (ii) allow augmentation only if the survivor could establish an intent by the decedent to disinherit; and

WHEREAS, the joint subcommittee did not have sufficient time to complete its deliberations due to the complexities of the issues involved, and needs additional time to consider the recommendations of the Committee on Wills, Trusts and Estates of the Virginia Bar Association and to seek additional input from others with an interest and expertise in this area; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the joint study of Virginia's laws affecting transfers of property on death is continued. The membership of the joint subcommittee shall remain the same, with any vacancy being filled in the same manner as the original appointment. The joint subcommittee is requested to seek specific legislative proposals from the Committee on Wills, Trusts and Estates of the Virginia Bar Association. The joint subcommittee shall complete its study and report its findings and recommendations, if any, to the Governor and the 1985 Session of the General Assembly.

All direct and indirect cost of this study are estimated to be $18,083.