

***LOVE AND DEATH:
FUNDAMENTAL ISSUES AFFECTING THE INTERPLAY BETWEEN
DOMESTIC RELATIONS AND ESTATE PLANNING PRACTICES***

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This Outline is intended to highlight for the practitioner certain of the most important considerations for the attorney dealing with a client considering a divorce or separation and the effect such a decision had on estate planning considerations for the client. For a more thorough discussion of many of these issues and other important estate planning and estate administration issues, the practitioners should consult the two-volume handbook, Virginia CLE Estate Planning in Virginia, Third Edition (2007) and the one-volume handbook, Virginia CLE Estate and Trust Administration in Virginia, Third Edition (2007) .

I. RIGHTS OF SPOUSE IN DECEDENT'S ESTATE

- A. Introduction. A spouse when considering a separation or divorce might initially overlook the rights of the surviving spouse to have an interest in or assert a claim against his or her estate in the event of death prior to divorce or the execution of a binding separation agreement. At the outset of any such discussions in a domestic relations context, the spouse should consider and an attorney should advise the client of the effect of a change in the status of the marriage on the following:
1. Right of inheritance under the laws of the state.
 2. Rights under estate planning documents such as a last will and testament or trusts
 3. The possible disposition at death of assets held with the right of survivorship or with beneficiary designations.
 4. Financial powers of attorneys
 5. Medical decisions
 6. Burial decisions

B. Rights of Surviving Spouse under Intestate Succession.

1. A client often desires to know or should be made aware of what happens to his or her property and estate if the client dies prior to the finalization of a divorce.
2. The order of inheritance when a decedent dies without a will is determined by establishing the heirs at law under Va. Code §§ 64.1-1 and 64.1-11 as follows:
 - a. the surviving spouse takes all, unless there are children or their descendants of the decedent surviving who are not also descendants of the surviving spouse.
 - b. if there are children or their descendants of the decedent who are not descendants of the surviving spouse, the surviving spouse takes one-third (1/3) and the descendants of the decedent take two-thirds (2/3).
 - c. if there is no spouse, then to the children or their descendants.
 - d. if there is no spouse or the children or their descendants, then to the parents of the decedent.
 - e. if there are no parents, then to the brothers and sisters of the decedent and their descendants.
3. Right of Surviving Spouse to Family Residence in Intestacy.
 - a. Under Va. Code § 64.1-16.4, until the surviving spouse's rights in the principal family residence have been determined and satisfied by an agreement between the parties or a final court decree, where the principal family residence passes by intestacy and the deceased spouse is survived by children or their descendants, one or more of whom are not children or their descendants of the surviving spouse, the surviving spouse may hold, occupy, and enjoy the principal family residence and curtilage without charge for rent, repairs, taxes, or insurance.
 - b. If such surviving spouse is deprived of the principal 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.

- c. This right to the family residence also applies where the surviving spouse claims an elective share in the deceased spouse's augmented estate

C. Rights of Surviving Spouse under Will.

1. If an individual leaves a validly executed last will and testament, the provisions of the will control the disposition of the decedent's estate.
 - a. The will does not operate on "non-probate" assets such as assets titled jointly with the right of survivorship or assets with beneficiary designations.
 - b. Va. Code § 64.1-49.1, enacted effective July 1, 2007, relaxed the standards for a document to be admitted to probate as a will by permitting a document, or a writing added upon a document, which was not executed in compliance with § 64.1-49 to be treated as a will if the proponent of the document or writing establishes in a proceeding brought in circuit court by clear and convincing evidence that the decedent intended the document or writing to constitute the decedent's will, codicil or revocation of a will.
2. The provisions of a will in favor of a spouse are given effect in accordance with the terms of the will unless a divorce is final or a valid separation agreement waiving such rights is in effect.
3. Importantly, Va. Code § 64.1-69.1 provides that a "omitted" spouse under a will shall take the intestate portion if a testator fails to provide by will for a surviving spouse who married the testator *after the execution of the will*, unless it appears from the will or from the provisions of a premarital or marital agreement executed or validated under the Premarital Agreement Act (§ 20-147 et seq.) that the omission was intentional.
4. **Practice Point.** If you are preparing a will for a client who is married or is intending to marry and is not providing for his spouse, consider including the following provision in the will:

For reasons deemed satisfactory to me, I am making no provisions in this will for my spouse.

Or

In event I am married subsequent to the execution of this last will

and testament, I intend that my spouse shall be excluded from any interest or rights passing under this will and I specifically provide that the provisions of Va. Code § 64.1-69.1 shall not apply for the benefit of my spouse.

5. Effect of Mutual or Reciprocal Wills. Many spouses (during happier times of their marriage) may execute separate last will and testaments which “mirror” each other. This may raise a concern that the couple entered into a binding arrangement to execute mutual and reciprocal wills.
 - a. In *Black v. Edwards*, 248 Va. 90, 445 S.E.2d 127 (1994), the Virginia Supreme Court ruled that the enforceability of a contract to make mutual wills and reciprocal wills has been recognized in Virginia since *Williams v. Williams*, 123 Va. 643, 96 S.E. 749 (1918).
 - b. The contract must be proved by competent witnesses, or by implications from circumstances in relation to the parties without the need of direct evidence; however, such proof must be clear and satisfactory.
 - c. In *Black*, the uncontradicted direct testimony of the attorney was consistent with the facts in the case and was sufficient to establish reciprocal wills. *NOTE*: the attorney did not draw a joint will or separate contract reflecting the agreement nor recitation in the wills because he thought the spouses had a clear understanding of how the ultimate beneficiaries would take the property.
 - d. ***Practice Point.*** To avoid the possible claim of a contract to make mutual wills, consider utilizing the following provision in a will:

At the time of the execution of this will, my spouse has executed a will with similar or even identical dispositive provisions. Although it is our respective hope and expectation that the surviving spouse will consider and honor the testamentary wishes of the first spouse to die, the execution of these wills shall not be construed to impose any contractual or enforceable obligation on either of us or to limit the ability of either of us to change the provisions of our respective wills at any time.

- e. See also *Plunkett v. Plunkett*, 271 Va. 162;624 SE2d 39624 S.E.2d 39 (2006) for a recent case concerning the proper construction of a marital agreement and two mutual and reciprocal wills, all of which were executed simultaneously.
 - i. General proposition is that an agreement to make mutual and reciprocal wills, where properly proven, will be enforced against a breach of the agreement by a subsequent non-conforming will.
 - ii. Court cannot ignore the language in a an agreement requiring the simultaneous execution of the wills and the circumstances under which this was accomplished.

D. Right of Surviving Spouse to Qualify as Administrator of Intestate Estate.

- 1. If a decedent dies intestate, the Clerk of Circuit Court in the jurisdiction in which the decedent resided, upon motion of the appropriate person, appoints an administrator as personal representative of the estate.
- 2. The preferred order of selection in choosing an administrator is set forth in Va. Code § 64.1-118, which as of July, 1, 2002, has been revised as follows:
 - a. During the first thirty days, the clerk may grant administration (i) to a sole distributee or his designee (which would generally be the spouse if no children by a prior marriage) or (ii) in the absence of a sole distributee, to any distributee or his designee who presents written waivers of right to qualify from all other competent distributees.
 - b. After thirty days have passed, the clerk may grant administration to the first distributee, or his designee, who applies, without either waiting for any further period of time or requiring the consent or waiver of any other distributee; provided, however, that if, during the first thirty days following the intestate's death, more than one distributee notifies the clerk of an intent to qualify after the thirty-day period has elapsed, the clerk shall not appoint any distributee, or his designee, until the clerk has given all such distributees an opportunity to be heard.
- 3. So, in many situations, the surviving spouse will be the administrator in

charge of distribution of the estate of the decedent's spouse. While the surviving spouse will be under court supervision and have fiduciary responsibilities to other heirs and creditors, this may not be of great comfort to other members of the decedent spouse's family.

E. Right to Property Jointly Titled with Survivorship.

1. Use of Joint Tenancy with Survivorship. This type of ownership is usually found between husbands and wives, but can exist with other individuals. With this type of ownership, each person has an equal interest in the entire property, and on the death of a co-owner, his interest in the property passes automatically to the surviving co-owner(s).
2. Language Required. If the expression "joint tenants with survivorship," or any equivalent language, is employed in the titling, registering or endorsing of any real or personal property, it shall be presumed that such persons are intended to own the property as joint tenants with the right of survivorship as at common law. Va. Code § 55-20.1.
3. Tenancy by Entireties Property
 - a. Tenancy by the entireties is a joint tenancy titled with survivorship that applies only to married persons.
 - b. Va. Code § 55-20.1, effective July 1, 1999, clarified that any husband and wife may own real or personal property as tenants by the entireties. Such personal property need not be limited only to the proceeds of the sale of real estate. Furthermore, any person having an estate or interest in real or personal property can convey the same to himself and to his spouse as tenants by the entireties.
 - c. In 1999, the General Assembly also amended Va. Code § 55-21 to provide that an intent that the part of one dying should belong to the other shall be manifest from the designation of a husband and wife as "tenants by the entireties" or "tenants by the entireties" without including the reference to survivorship. In the past, this failure to include the words "survivorship" was fatal to establishing tenancy by the entireties property.
 - d. In *Sprouse v. Griffin*, 250 Va. 46 (1995), the Supreme Court considered whether escrow funds held in escrow during a divorce proceeding were held as entireties property or tenancy in common. Husband and wife were involved in a divorce action in which property held as tenants by the entirety was sold by agreement and

proceeds held in escrow "until further order of the trial court." During the pendency of the hearing before any divorce was entered, the husband died. Supreme Court ruled that the escrow funds retained their character as to tenants by the entireties with the right of survivorship when they were deposited in the escrow account. The Court recognized in Virginia that personal property as well as realty may be held by husband and wife as tenants by the entirety.

- e. Upon divorce, a tenancy by the entireties property is converted into tenancy in common property without survivorship.

4. Multi-Party Bank Accounts.

- a. Multiple-Party Accounts Statute, Va. Code §§ 6.1-125.1 through 6.1-125.16, governs the ownership of joint bank accounts.
- b. Va. Code § 6.1-125.15 requires financial institutions to provide signature cards which are clearly labeled to show whether survivorship is intended. Disclosures in a form substantially similar to the following shall satisfy the requirements of the statute:

Joint Account With Survivorship - On the death of a party to the account, the deceased party's ownership in the account passes to the surviving party or parties to the account.

Joint Account - No Survivorship - On the death of a party to the account, the deceased party's ownership in the account passes as a part of the party's estate under the party's will, trust, or by intestacy.

- c. Under Va. Code § 6.1-125.5 any sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent ***unless there is clear and convincing evidence*** of a different intention at the time the account is created.
- d. Va. Code § 6.1-125.15:1. provides that parties to a joint account in a financial institution occupy the relation of principal and agent as to each other, with each standing as a principal in regard to his ownership interest in the joint account and as agent in regard to the ownership interest of the other party.

5. Nontestamentary in Nature. Va. Code §64.1-45.3 authorizes the non-

probate transfer of assets by various written instruments. The statute provides that the transfer of assets such as insurance policies, individual retirement plans, trusts, deeds of gift, and marital property agreements that have a transfer-on-death designation shall, upon the decedent's death, be given effect as a nontestamentary disposition. Such dispositions need not satisfy the requirements of the execution of a will.

6. Payable on death provision.
 - a. With this type of titling, on the death of the individual or last survivor, the asset is paid to a designated beneficiary.
 - b. In 1994, the General Assembly adopted the Uniform Transfers on Death Security Registration Act. Va. Code §§ 64.1-206.1 through 64.1-206.8. The Act extends the benefit of the payable on death designation to stocks, bonds, and mutual funds.
7. Interplay between Titling of Assets and Status as Marital Assets.
 - a. Although the designation of property as jointly owned with survivorship may effect the transfer of ownership to the surviving joint tenant at the death of one joint tenant, the titling of assets has different implications for the equitable distributions of property for a divorce.
 - b. In equitable distribution proceedings, the determination of title to property is a separate inquiry from the classification of property for the purposes of making an award pursuant to Va, Code § 20-107.3.
 - c. Va. Code § 20-107.3(A)(2) provides in part that marital property consists of "all property titled in the names of both parties, whether as joint tenants, tenants by the entirety or otherwise, except as provided by subdivision A 3."
 - d. Va. Code § 20-107.3(A)(3)(f) provides the following:

“When separate property is retitled in the joint names of the parties, the retitled property shall be deemed transmuted to marital property. However, to the extent the property is retraceable by a preponderance of the evidence and was not a gift, the retitled property shall retain its original classification.”
 - e. The act of retitling creates no presumption of a gift. *Utsch v.*

Utsch, 266 Va. 124, 128, 581 S.E.2d 507, 508 (2003).

- f. The party seeking to establish a gift bears the burden of proving by clear and convincing evidence that the transfer was a gift. To establish a gift, the party must prove:
 - i. the intention on the part of the donor to make the gift;
 - ii. delivery or transfer of the gift; and
 - iii. acceptance of the gift by the donee. See, *Robinson v. Robinson*, 46 Va. App. 652, 665-66, 621 S.E.2d 147, 154 (2005) (en banc)
- g. In *Utsch*, the husband conveyed the marital residence from his name solely to himself and his wife as tenants by the entirety. The conveyance was made by deed of gift and recited "love and affection" as consideration for the transfer. Additionally, the deed of gift recited that the conveyance was exempt from recordation taxes under Code § 58.1-811(D).
- h. The Supreme Court of Virginia reversing a judgment of the Court of Appeals held in *Utsch* that since the deed of gift was unambiguous on its face, both for the purpose of retitling and proof of donative intent, parol evidence surrounding its execution was not admissible.
- i. See recent Unpublished Opinion in *Jones v. Jones*, Record No. 2428-08-1 (Va. App. 4/28/2009) (Va. App., 2009) ruled that the fact that husband titled the property as a tenancy by the entirety establishes only that husband and wife were joint owners of the property with survivorship. Since the wife neither testified nor proved by clear and convincing evidence that husband gifted the property to her, the assets at issue were not gifts under the facts of this case, and husband successfully traced them to his separate property.

F. Appointment of Guardian and Conservator.

- 1. Under § 37.2-1000 et seq. a "Conservator" can be appointed to manage the estate and financial affairs of an incapacitated person and a "Guardian" can be appointed to handle the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person's

support, care, health, safety, habilitation, education, therapeutic treatment, and, if not inconsistent with an order of involuntary admission, residence.

2. Importantly, under Va. Code § 37.2-1009:

- a. A guardian need not be appointed for a person who has appointed an agent under an advance directive unless the court determines that the agent is not acting in accordance with the wishes of the principal or there is a need for decision making outside the purview of the advance directive.
- b. A conservator need not be appointed for a person who has appointed an agent under a durable power of attorney, unless the court determines pursuant to § 37.2-1018 that the agent is not acting in the best interests of the principal.
- c. Under Va. Code § 37.2-1007 (as amended effective July 1, 2009), if a guardian or conservator is needed, the court shall appoint a suitable person, *who may be the spouse of the respondent*, to be the guardian or the conservator or both, giving due deference to the wishes of the respondent.

NOTE: House Bill 1657 as introduced, but not passed, tried to amend statute to provide: *If the court determines that a guardian or conservator, or both, is necessary and the court finds that the respondent is married, the respondent's spouse shall be considered for appointment as guardian or conservator, or both, before any other person.*

G. Powers of Attorneys

1. General Durable Power of Attorney.

- a. Importance of Power of Attorney. In some ways the general power of attorney is more important to a client and their particular concerns than a will and a trust. A general power of attorney tends to affect for good or bad how the assets of a client are to be handled during the most important and difficult time of their lives, a period of the client's disability, incapacity or inability to act for himself.
2. Durable Power of Attorney. A durable power of attorney is a writing vesting any power or authority in an attorney-in-fact or other agent, that contains the words "This power of attorney (or his

authority) shall not terminate on disability of the principal" or other words showing the intent of the principal that such power or authority shall not terminate upon his disability. Va. Code § 11-9.1.

- b. Under a durable power of attorney, all power and authority vested in the agent shall continue and be exercisable by the agent on behalf of the principal notwithstanding any subsequent disability, incompetence, or incapacity of the principal.

2. Revocation of Power of Attorney.

- a. There does not exist any statutory provision regarding the revocation of a power of attorney upon divorce or separation.
- b. Va. Code § 11-9.2 provides that no agency created by a power of attorney in writing given by a principal shall be revoked or terminated by the death or disability of the principal as to the agent or other person who, without actual knowledge or actual notice of the death of the principal, has acted or acts, in good faith, under or in reliance upon such power of attorney or agency.

3. Uniform General Power of Attorney Act.

- a. SB 855 Uniform Power of Attorney Act; establishes in the Code of Virginia the Uniform Act that was adopted by the National Conference of Commissioners on Uniform State Laws in 2006.
- b. The Act consists of default rules that can be modified if the principal desires.
- c. Powers of attorney will be durable unless drafted to expire upon a specified date or event.
- d. The UPOAA addresses creation and use, good faith reliance, limitations of agent's powers, refusal to recognize, judicial review, notification of resignation, and other matters.
- e. The Act contains an optional statutory form.
- f. Importantly, the bill contains a reenactment clause and will not be effective, if passed again by the General Assembly in 2010, until July 1, 2010.

- g. The full text of the bill can be found on the Virginia General Assembly website at:

<http://leg1.state.va.us/cgi-bin/legp504.exe?091+ful+CHAP0830>

H. Medical Decisions.

1. Advance Medical Directive is an expression of an individual's wishes relating to medical and personal matters, typically end of life medical decisions. It can include:
 - a. A living will,
 - b. A designation of a medical agent; and/or
 - c. An authorization for anatomical gifts.
2. Statutory Authority. The provisions governing Advance Medical Directives are set forth in the Health Care Decisions Act, Va. Code §§ 54.1-2981 et seq.
3. Va. Code § 54.1-2986 provides that in absence of an advance directive, without a designation of an agent, the decision to, withhold or withdraw from such patient medical or surgical care or treatment, including, but not limited to, life-prolonging procedures, may be authorized by any of the following persons, in the specified order of priority, if the physician is not aware of any available, willing and competent person in a higher class:
 - a. A guardian for the patient if one has been appointed; or
 - b. The patient's spouse except where a divorce action has been filed and the divorce is not final; or
 - c. An adult child of the patient; or
 - d. A parent of the patient; or
 - e. An adult brother or sister of the patient; or
 - f. Any other relative of the patient in the descending order of blood relationship.
4. **NOTE:** HB 2396 passed in the 2009 General Assembly, effective

July 1, 2009, revised the Health Care Decisions Act to clarify process.

See Form Advance Medical Directive under new statute attached as Appendix A

I. Burial Decisions.

1. The one important point which is often overlooked by estate planners is the designation of burial decisions by a testator. Often a provision is set forth in the will providing for the payment of funeral arrangements and burial or cremation services without any specific designation of what is intended.
2. In Virginia, in accordance with Va. Code § 54.1-2825, any person may designate in a signed and notarized writing an individual who shall make arrangements for his burial or the disposition of his remains, including cremation, upon his death. The person so selected must accept the designation in writing.

See Form Designation of Agent for Disposition of Remains attached as Appendix B

3. There are no property rights in the bodies of the dead, but their survivors have a right to their possession and the right to make final disposition thereof, decently and in order. But this right carries with it corresponding obligations; disposition when made must be seemly and proper. The case of *Goldman v. Mollen* 168 Va. 345, 191 S.E. 627 (1937) recognized that it is the duty of the court to see to it that the decedent's expressed burial wishes are given effect.
4. Va Code § 57-27.3 provides authorization for a cemetery may accept the notarized signature of one next of kin of a decedent for the purpose of authorizing the interment or entombment, and for erecting a memorial on the grave, crypt or niche, unless the cemetery is on written notice that there exists a dispute between next of kin over such internment, entombment or memorialization.

- a. Unfortunately, Va. Code § 57-27.3 does not establish an order of priority for next of kin: "next of kin" means any person designated to make arrangements for the disposition of the decedent's remains, the spouse, adult child, parents, siblings, etc.
 - b. House Bill 1484 which would provide for a priority of persons who have the ability to make all necessary arrangements for a decedent's funeral and the disposition of his remains failed in the 2009 General Assembly.
5. Divorced husband has no interest in burial decisions.
- a. The divorced husband of a decedent who had maintained a close relationship with his ex-wife petitioned the court to have his ex-wife's body disinterred and reburied in a lot he had purchased since the decedent had made no testamentary provision regarding her desired final resting place and did not make a designation under Code § 54.1-2825.
 - b. Under such circumstances, the proper determination of the place of her burial rested with her personal representative, her surviving spouse, or her next of kin, in this case her daughter.
 - c. The former husband did not have a sufficient legal interest in the decedent's wish regarding her final resting place so as to permit the court to invoke its equity authority to grant his petition. *See, Grisso v. Nolen*, 262 Va. 688, 554 S.E.2d 91 (2002).

J. Liability for Contracts.

- 1. Under Va. Code § 55-37, a spouse shall not be responsible for the other spouse's contract or tort liability to a third party, whether such liability arose before or after the marriage.
- 2. Doctrine of necessities still applies. Va. Code § 55-37 states the doctrine of necessities as it existed at common law shall apply equally to both spouses, *except where they are permanently living separate and apart*, but shall in no event create any liability between such spouses as to each other. No lien arising out of a judgment under this statute shall attach to the judgment debtors' principal residence held by them as tenants by the entireties.

II. CLAIMS/RIGHTS OF SURVIVING SPOUSES AGAINST ESTATE.

A. Augmented Estate Election. The "augmented estate" is the statutory scheme for determining the elective share of a surviving spouse in the estate of a deceased spouse

1. Purpose. The legislation, modeled on the Uniform Probate Code, is designed to prevent an individual from depriving the surviving spouse of an inheritance through the use of various probate avoidance techniques.
2. Amount of Claim.
 - a. The surviving spouse shall, if the decedent left surviving children or their descendants, have one-third of the decedent's augmented estate; or
 - b. if no children or their descendants survive, the surviving spouse shall have one-half of such augmented estate.
 - c. The surviving spouse shall be entitled to interest at the legal rate specified in § 6.1-330.53 from the date of the decedent's death to the date of satisfaction of the elective share. Va. Code § 64.1-16.
3. Election. The election may be made whether or not a provision for the surviving spouse is made in the decedent's will or whether the decedent died intestate. Va. Code § 64.1-13.
 - a. The election may be made within six (6) months of the later of the time of admission of the decedent's will to probate or the qualification of an administrator on an intestate decedent's estate. Va. Code § 64.1-13.
 - b. The election is made either in person before the court having jurisdiction over the administration of the decedent's estate or in an appropriately acknowledged writing recorded in the court or the office of the clerk. Va. Code § 64.1-13.
 - c. The time for election may be extended if there is a suit in equity in which there is at issue either (1) the construction of the decedent's will, or (2) the amount or value of the property the surviving spouse will receive, or (3) the value or composition of the augmented estate, and the court orders the extension before the expiration of the initial six (6) month period. The extension may not exceed ninety (90) days from the entry of a final order in the suit. Va. Code § 64.1-14.

4. Competency to Execute Notice of Claim for Augmented Estate. In *Jones v. Peacock*, 267 Va. 16, 591 S.E. 2d 83 (2004), the Supreme Court ruled:
 - a. The distinct nature of an election warrants a level of competency uniquely connected to that act.
 - b. At the time an election is made under Code § 64.1-13, the surviving spouse must have the capacity to understand his right to elect against the will and receive a share of the estate established by law and to know that he is making such an election.
 - c. Competency to execute the notice of claim does not require a surviving spouse to know the specific amount that will be received as a result of such an election.

5. Composition of Augmented Estate.
 - a. The augmented estate includes all the decedent's probate assets (whether by testate or intestate succession), real and personal, remaining after payment of all allowances, exemptions, funeral expenses, charges of administration (excluding federal or state transfer taxes) and debts, plus certain categories of included assets set forth in Va. Code § 64.1-16.1(1) to (4).
 - b. Excludes certain categories of excluded assets, principally:
 - i. any assets transferred with the written consent or joinder of the surviving spouse and
 - ii. any asset inherited or given to the surviving spouse whether before or during the marriage and maintained as separate property. Code § 64.1-16.1B
 - c. Burden of Proof for Claim for Augmented Estate. Supreme Court in *Chappell v. Perkins*, 266 Va. 413, 587 S.E.2d 584 (2003), ruled:
 - i. Regardless of who files the petition invoking judicial intervention, the Court concludes that the party seeking inclusion of property under Subsection A of Code § 64.1-16.1 has the burden of proof under that subsection;
 - ii. the party seeking exclusion of property under Subsection B of that section carries the burden of establishing such exclusion

6. Augmented Estate-VRS Insurance Policies.

- a. In *Sexton v. Cornett*, 623 S.E.2d 898 (2006), the Supreme Court ruled that legislative policy of exempting VRS life insurance proceeds and retirement benefits, in the hands of their designated beneficiaries, from attack of any kind, excluded those policies from the application of the augmented estate laws. The beneficiaries to the proceeds of the decedent's VRS life insurance and retirement benefits are unaffected by the augmented estate laws, that those exempt assets did not become a part of the augmented estate, that their value should not be added to it, and that the beneficiaries are not subject to any claims for contribution.
- b. In response to the *Sexton* case, §§ 64.1-16.1 and 64.1-16.2 of the Code of Virginia are amended to expand the definition of “estate” and “property” as follows

As used in this section, the terms "estate" and "property" shall include insurance policies, retirement benefits exclusive of federal social security benefits, annuities, pension plans, deferred compensation arrangements, and employee benefit plans to the extent owned by, vested in, or subject to the control of the decedent on the date of his death or the date of an irrevocable transfer by him during his lifetime. *All such insurance policies and other benefits are included in the terms "estate" and "property" notwithstanding the presence of language contained in any statute otherwise providing that neither they nor their proceeds shall be liable to attachment, garnishment, levy, execution, or other legal process or be seized, taken, appropriated, or applied by any legal or equitable process or operation of law or any other such similar language.*

5. Defenses.

- i. Waivers. A spouse may waive his or her right to an elective share of the augmented estate in a pre-marital agreement or marital agreement. Va. Code § 20-150.
- ii. Desertion. The surviving spouse's elective share is absolutely barred by willful desertion or abandonment of the decedent, if the desertion or abandonment continued unabated to the date of the decedent's death. Va. Code

§64.1-16.3. See *Purce v. Patterson*, 275 Va. 190, 654 S.E.2d 885 (2008) discussed below.

- iii. Failure to make the forced share election within six (6) months from the decedent's death or the extended election period, as provided by Va. Code §§64.1-13 and 64.1-14, is a bar to the satisfaction of a late election.
- iv. If the surviving spouse makes the homestead election under §64.1-151.3, the augmented estate election will be precluded.

B. Allowance elections. §§ 64.1-151.1 et seq. set forth certain allowance available to eligible family members of the decedent in order to protect them.

- 1. Allowance elections can be particularly advantageous to the surviving spouse in the event of a small probate estate.

NOTE: These claims are allowed to the surviving spouse and minor children.

- 2. Family allowance. Claim of support for surviving spouse and minor children. § 64.1-151.1.

- a. Family allowance equals lump sum of \$18,000 or monthly payments of \$1,500 for a year. NOTE: this sum is not necessarily a limitation but the amount that can be disbursed without court approval---spouse and minors entitled to a “reasonable allowance”

- b. This Family allowance has priority over all claims against the estate except costs and expenses of administration.

- c. The Family allowance is *in addition* to the augmented estate elective share and to amounts passing to spouse under will or by intestacy.

- d. The death of a person eligible to receive the family allowance terminates that person's right to further distributions.

- 3. Exempt property. Claim of surviving spouse if domiciled in Virginia, or if no spouse, minor children. § 64.1-151.2.

- a. Entitled to claim up to \$15,000 in household furniture,

automobiles, furnishings, appliances and personal effects of decedent's estate as exempt property, or if personal property is not sufficient to satisfy exempt property, may use other assets to satisfy exempt property.

- b. This right has priority over all claims (other than administrative expenses) except family allowance.
 - c. Exempt property right is *in addition* to augmented estate elective share and to amounts passing to spouse under will or by intestacy.
4. Homestead allowance. Claim of surviving spouse, or if no spouse, minor children. § 64.1-151.3.
 - a. Homestead allowance equals \$15,000.
 - b. This right has priority over all claims (other than administrative expenses) except family allowance and exempt property.
 - c. Unlike other allowances, homestead allowance is *in lieu* of amounts passing to such persons by elective share, under will or by intestacy unless the amount passing by those means is less than \$15,000 in which case the Homestead allowance can make up the deficiency.
5. Claiming an Allowance. Each allowance must be made within one year of decedent's death and made in person before the court or in a writing filed with the clerk's office.
6. Waiver.
 - a. The right to a family allowance and exempt property allowance may be only waived by a valid marital or premarital agreement made pursuant to Va. Code § 20-147 et seq. during the deceased spouse's lifetime.
 - b. The homestead allowance may be waived by a marital or premarital agreement or a separate, specific written waiver executed by the surviving spouse.
7. Effect of Desertion or Abandonment. If a husband or wife willfully deserted or abandoned his or her spouse and such desertion or abandonment continues until the death of the spouse, the deserting spouse is barred in all interest of the deceased spouse by intestate succession,

elective share, family allowance, exempt property, and homestead allowance. § 64.1-16.3.

C. No Implied Contracts Between Spouses for Health Care.

1. In *Dade v. Anderson*, 247 Va. 3, 439 S.E.2d 353 (1994), Supreme Court considered whether a spouse may recover on a theory of implied contract or unjust enrichment for the value of healthcare services provided to the other spouse.
2. Supreme Court in 4-3 decision upheld prior case of *Alexander v. Kuykendall*, 192 Va. 8, 63 S.E.2d 746 (1951) which held one spouse may not recover in implied contract for services rendered to another.
3. Court rejected unjust enrichment claim too based on *Alexander* and the concern that such a ruling would place marriage on too much of a "commercial basis."

III. LIMITING CLAIMS AND RIGHTS OF SURVIVING SPOUSE IN ESTATE OF DECEDENT SPOUSE

A. The Use of Premarital Agreement.

1. Authorization of Premarital Agreement. Virginia Code Section 20-147 et seq. set forth the Virginia Premarital Agreement Act.
2. Formalities of premarital agreement. A premarital agreement shall be:
 - a. in writing and
 - b. signed by both parties.
 - c. Such agreement shall be enforceable without consideration and shall become effective upon marriage. § 20-149.
3. Contents of agreement: The parties to a premarital agreement may make binding agreements concerning:
 - a. The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;

- b. The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
 - c. The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
 - d. Spousal support;
 - e. The making of a will, trust, or other arrangement to carry out the provisions of the agreement;
 - f. The ownership rights in and disposition of the death benefit from a life insurance policy;
 - g. The choice of law governing the construction of the agreement; and
 - h. Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.
4. A premarital agreement is not enforceable if the person against whom enforcement is sought proves that:
- a. That person did not execute the agreement voluntarily; or
 - b. The agreement was unconscionable when it was executed and, before execution of the agreement, that person
 - i. was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; and
 - ii. did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided. Va. Code § 20-151.

5. Agreement prior to Effective date of Act. All written agreements entered into prior to the enactment of this chapter between prospective spouses for the purpose affecting any of the subjects specified in § 20-150 shall be valid and enforceable if otherwise valid as contracts.
- B. Marital Agreements. Va Code § 20-155 provides that married persons may enter into agreements with each other for the purpose of settling the rights and obligations of either or both of them, to the same extent, with the same effect, and subject to the same conditions, as provided in §§ 20-147 through 20-154 for agreements between prospective spouses,
1. Marital agreements shall become effective immediately upon their execution.
 2. If the terms of such agreement are (i) contained in a court order endorsed by counsel or the parties or (ii) recorded and transcribed by a court reporter and affirmed by the parties on the record personally, the agreement is not required to be in writing and is considered to be executed.
 3. A reconciliation of the parties after the signing of a separation or property settlement agreement shall abrogate such agreement unless otherwise expressly set forth in the agreement.
- C. Waiver of Claims in Premarital or Marital Agreement.
1. Requirements of Waiver of Elective Share.
 - a. In *Pysell v. Keck*, 263 Va. 457, 559 S.E. 2d 677 (2002), the Virginia Supreme Court considered the effect of a one-page premarital agreement on the surviving spouse's right to claim an augmented estate elective share, together with the family allowance and exempt property claims.
 - b. Applying rules of construction applicable to contracts generally, the Court in *Pysell* ruled that a waiver of such spousal rights must be express or, if implied, must be established by clear and convincing evidence. Since the agreement contained no express references to either spouse's rights in the assets of a decedent spouse's estate, the Court concluded that the surviving spouse had not waived her marital rights in her husband's estate.

- b. In *Flanary v. Milton*, 263 Va. 20, 556 S.E.2d 767 (2002), the Supreme Court ruled that an oral agreement made in conjunction with a deposition in a divorce proceedings did not qualify as a marital agreement and therefore the surviving spouse was not barred from asserting an elective share and family allowance and exempt property claims in the deceased spouse's estate.
- c. In *Caine v. Freier*, 264 Va. 251, 564 S.E.2d 122 (2002), the Supreme Court also rejected an attempt to claim that the decedent and the surviving spouse had entered into an "enforceable general oral agreement regarding the decedent's estate distribution plans" in a case where the surviving spouse had executed a marital agreement but the decedent died before signing the agreement.
- d. In *Haley v. Haley*, 272 Va. 703, 636 S.E.2d 400 (2006), Supreme Court found the elective claim was not validly filed:
 - i. the original document did not bear the requisite acknowledgment or proof to be admitted to record under Va. Code § 55-106. Consequently, it was ineffective to make a claim of an elective share because it failed to comply with the Va. Code § 64.1-13 acknowledgment requirement.
 - ii. A later filing was also ineffective because it was not timely filed.
 - iii. The Court did need not address the argument that an attorney can make a claim of an election under Code § 64.1-13 for his or her client and expressed no opinion in that regard.

2. For a Form of a Waiver of Spousal Claims see Appendix C.

D. Statutory Provisions Defeating Spousal Claims.

- 1. Statutory Revocation by divorce or annulment.
 - a. § 64.1-59 provides that a divorce or annulment of the marriage revokes any disposition or appointment of property made by the will to the former spouse.
 - b. Property prevented from passing to a former spouse because of

revocation by divorce or annulment shall pass as if the former spouse failed to survive the testator.

- c. Any provision designating the former spouse as a fiduciary shall be interpreted as if the spouse failed to survive the testator.
- d. NOTE: This statute does not apply to dispositions in a trust agreement in favor of a spouse.

Practice Point. When drafting using revocable trust, be careful not to rely on the default provisions of Title 64.1 since many of the provisions of Title 64.1 apply only to wills and not to trusts.

2. Beneficiary Designation for Insurance Policy and Retirement Account.

- a. Va. Code § 20-111.1, for a divorce on and after July 1, 1993, revokes any revocable beneficiary designation contained in a life insurance policy or retirement account to a former spouse.
- b. Va. Code § 38.2-305 provided that insurance contracts or annuities owned by one spouse which revocably name the other spouse as the policy beneficiary now must contain the following conspicuous warning:

"BENEFICIARY DESIGNATION MAY NOT APPLY IN THE EVENT OF ANNULMENT OR DIVORCE"

- c. In *Faulknier v. Shafer*, 264 Va. 210, 563 S.E.2d 755 (2002), the Supreme Court approved a claim for a constructive trust by a former wife of the decedent against the recipient of a life insurance proceeds even though the estate was solvent.
 - i. Although under the terms of their separation agreement the former wife was to receive the proceeds of the life insurance policy at issue, the decedent had named his new wife as beneficiary and upon his death, she received the proceeds.
 - ii. The Court reiterated that equity will impose a constructive trust upon property in the hands of a recipient even though (1) the transfer is not the result of a breach of fiduciary duty or fraud, and (2) the recipient had no knowledge of the wrongdoing or breach of contract.

iii. In *Faulknier*, the Court noted that neither party addressed the issue of preemption of federal law as it related to the insurance policy at issue.

3. Deserting Spouse May Be Barred as Personal Representative.

a. In 2000, the General Assembly amended § 64.1-116 and § 64.1-118 to provide specifically that if any beneficiary of the estate objects, no husband, wife or parent who is barred from the interest in the decedent's estate because of desertion or abandonment as provided under § 64.1-16.3, shall be suitable to serve as administrator of the estate of the intestate deceased spouse or child or as administrator c.t.a. in the event the executor named does not qualify.

E. Effect of Beneficiary Designations on ERISA Plans.

1. The failure promptly to change the beneficiary designations on ERISA covered plans upon divorce or separation can prove disastrous in light of federal preemption.
2. The U.S. Supreme Court in *Egelhoff v. Egelhoff*, 121 U.S. 1322 (2001) ruled that federal preemption prevented application of a Washington state statute which revoked beneficiary designation for former spouse.
3. In *Dugan v. Childers*, 261 Va. 3, 539 S.E.2d 723 (2001), the Virginia Supreme Court considered the determination of beneficiary of husband's federal military retirement benefits. Upon divorce, the separation agreement provided first wife was entitled to one-half of retirement benefits. Husband remarried and named second wife as beneficiary of all retirement benefits. A circuit court directed him to change beneficiary designation. First wife denied right to impose a constructive trust on benefits due to federal preemption.
4. In *Crawford v. Haddock*, 270 Va. 524, 528, 621 S.E.2d 127, 129 (2005), the Virginia Supreme Court ruled, as a matter of law, a constructive trust may not be imposed on a decedent's Virginia Retirement System group life insurance proceeds. Virginia Code § 51.1-510, which specifically addresses the "Group Insurance Program" of the VRS in Chapter 5 of Title 51.1, states that "the insurance provided for in this chapter, including any optional insurance, and all proceeds therefrom shall be exempt from levy, garnishment, and other legal process." The language employed by the General Assembly evidences a clear intent to protect an individual's assets from any claim even claims arising from spousal or child support.

5. Va. Code § 20-111.1 was amended to address the preemption issue by giving private cause of action if § 20-111.1 is preempted by federal law with respect to the payment of any death benefit.
 - a. a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under this section is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted.
 - b. Dicta in the U.S. Supreme Court *Kennedy* case reference below indicates such a private right of action may be effective.

6. U. S. Supreme Court case of *Kennedy v. Plan Administrator for DuPont Sav. And Investment Plan*, 555 U. S. ____ (2009) reemphasized the dangers of not revising beneficiary designations following divorce.
 - a. Case dealt with an ERISA plan and a divorce decree which did not qualify as a Qualified Domestic Relations Order.
 - b. In the divorce decree, the wife waived her right to inherit under and through the plan.
 - c. Former husband died without changing the former beneficiary designation on the savings and investment plan held under the plan.
 - d. Since the beneficiary designation for the former wife was made in accordance with the terms of the plan but the wife's waiver of the interest in the plan was not, the plan properly paid the savings funds to the former wife in accordance with the plan documents.
 - e. Supreme Court clearly concerned in all these ERISA cases with imposing on the plan administrator an obligation to check with differing state statutes and case law in paying out plan benefits.

7. Qualified Domestic Relations Order.
- a. Kennedy decisions would have been different if QDRO was at issue.
 - b. A Qualified Domestic Relation Order (QDRO) is a limited exception to the rule an ERISA pension plan shall provide that benefits provided under the plan may not be assigned or alienated. U.S.C. § 1056(d)(3).
 - c. QDRO means a qualified domestic relations order which meets the statutory requirement and which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and such order clearly specifies:
 - i. the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,
 - ii. the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,
 - iii. the number of payments or period to which such order applies, and
 - iv. each plan to which such order applies.
 - d. A domestic relations order cannot qualify as a QDRO if:
 - i. it requires a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,
 - ii. it requires the plan to provide increased benefits (determined on the basis of actuarial value), or
 - iii. it requires the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

- e. Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders. Such procedures:
 - i. shall be in writing,
 - ii. shall provide for the notification of each person specified in a domestic relations order as entitled to payment of benefits under the plan (at the address included in the domestic relations order) of such procedures promptly upon receipt by the plan of the domestic relations order, and
 - iii. shall permit an alternate payee to designate a representative for receipt of copies of notices that are sent to the alternate payee with respect to a domestic relations order.

F. Effect of Abandonment and Desertion.

1. Statutory Waiver

- a. Va. Code § 64.1-16.3(A) specifically addresses the period of abandonment that is relevant to a claim for an elective share or other spousal allowances:

If a husband or wife willfully deserts or abandons his or her spouse and such desertion or abandonment continues until the death of the spouse, the party who deserted the deceased spouse shall be barred of all interest in the estate of the other by intestate succession, elective share, exempt property, family allowance, and homestead allowance.

- b. In *Purce v. Patterson*, 275 Va. 190, 654 S.E.2d 885 (2008), the Supreme Court ruled that the clear language of this Code section requires a court to determine whether the willful desertion or abandonment continued "until the death of the spouse" and that determination is not limited to consideration of actions occurring prior to a separation, should one have occurred."
 - i. Based on the statutory language, the trial court did not err in considering facts occurring subsequent to the separation in determining whether husband willfully abandoned wife for purposes of entitlement to an elective share of her augmented estate.

- ii. Although the term "abandonment" is not defined in the statutes governing elective share claims, the principles developed in domestic relations law relating to abandonment are helpful in determining the issue of abandonment under Code § 64.1-16.3.
- iii. In an elective share analysis, an agreed separation or petition for divorce is relevant evidence of the termination of cohabitation, but is not evidence which defeats a finding of *willful* abandonment. In contrast, such an agreed separation or divorce petition may preclude a claim of abandonment in a divorce action because a finding of abandonment in that context is based on fault which is inconsistent with parties agreeing to terminate cohabitation or to seek a divorce.
- iv. The mutual decision to cease cohabitation and wife's divorce petition based on living separately for more than a year implies that the termination of the marital relationship was not the product of willful abandonment but rather an agreement between the parties but this evidence is not dispositive in the context of an elective share claim.
- v. The relevant evidence is husband's conduct and his intent.
- vi. After the separation, husband did not communicate with wife in any meaningful way and did not acknowledge her final illness in any way. He did not support wife financially, emotionally, or physically. Nothing in the record showed husband tried or intended to reconcile with his wife. At the time of wife's death, husband had ceased to perform any marital duties.
- vii. Evidence is sufficient to support the trial court's holding that husband abandoned wife prior to and continuing until the time of her death under Code § 64.1-16.3.

2. Constructive Desertion in Domestic Relations Cases.

- a. *Seemann v. Seemann*, 233 Va. 290 (1987), provides a helpful discussion from the Virginia Supreme Court regarding justification of desertion.
 - i. The trial court, however, found "a long pattern of abusive

behavior primarily verbal on the part of the husband which undermined the stability of the marriage".

- ii. The trial court also found that there was, in fact, fault on both sides of the case but neither finding of fault rose to the level of marital fault.
 - iii. The trial court went on to say that the wife left the marital residence with justification as her flight was the result of the husband hitting her.
 - iv. Virginia Supreme Court in the *Seemann* matter reasoned that the strict rule that a spouse is not justified in leaving his or her spouse unless the conduct of the other spouse is sufficient to establish marital fault had recently been relaxed in *Breschel v. Breschel*, 221 Va. 208 (1980).
 - v. The Court reiterated the rule in Virginia, however, that a spouse is not justified in leaving merely because there has been a gradual breakdown in the marital relationship. *Sprott v. Sprott*, 233 Va. 238 (1987). The Supreme Court held that sufficient evidence existed to support the trial court's finding.
- b. The *Breschel* decision, upon which the *Seemann* Court relied, discusses the principles applicable to constructive desertion.
- i. The Court found that a spouse may not break off cohabitation and then claim constructive desertion unless the other spouse's conduct is sufficient to establish a divorce proceeding.
 - ii. Relying on *Capps v. Capps*, 216 Va. 382 (1975), and *Rowand v. Rowand*, 215 Va. 344 (1974), the Court confirmed that a spouse may be free from legal fault in breaking off cohabitation and thus entitled to spousal support even though he or she cannot establish that the other spouse's conduct constituted marital fault.
 - iii. The *Breschel* Court found that a wife is free from legal fault in leaving her husband when she believes her health is in danger while remaining in the household, and she has unsuccessfully taken whatever reasonable measures she could that might eliminate the danger without leaving the

marriage.

G. Slayer Statute.

1. The "Slayer Statute," Va. Code §§ 55-401 et seq. has been amended effective July 1, 2008.
2. Amended the definition of "slayer" to include:
 - a. a person who is convicted of murder;
 - b. a person who is convicted of voluntary manslaughter; and
 - c. a person who is acquitted of murder or involuntary manslaughter, but who is determined, by a preponderance of the evidence, either before or after his death, by a court to have committed murder or involuntary manslaughter.
3. The statute also provides that transferees or assignees claiming through a slayer cannot acquire property or benefits as a result of the slaying.
4. § 55-405 provides that as to property held by the slayer and the decedent as tenants by the entirety or any other form of ownership with right of survivorship, the resulting death of the decedent caused by the slayer thereby effects a vesting of the interest of the slayer to in the estate of the decedent as though the slayer had predeceased the decedent.
5. Insurance companies are not liable on life insurance policies acquired by the slayer for the decedent if
 - a. the policy was procured by the slayer as part of the plan to murder the decedent, and
 - b. the decedent's death from the slayer's act was within two years of the date the policy was issued.
6. The slayer statute does not serve to abrogate any common law right or remedy that prevents a slayer from profiting from his crime.

IV. ESTATE PLANNING ISSUES AFFECTING CHILDREN

A. Introduction.

1. Often one of the most important motivations for clients to have estate planning documents prepared is the desire to plan for distributions to the benefit of the minor children and name a guardian for minor children.
2. In a divorce situation, these consideration may be paramount for the client.

B. Meaning of child under the Virginia code for inheritance purposes.

1. Va. Code § 64.1-5.1 provides that for purpose of Title 64.1 or for determining rights in and to property pursuant to any deed, will, trust or other instrument, a relationship of parent and child must be established to determine succession or a taking by, through or from a person:
 - a. An adopted person is the child of an adopting parent and not of the biological parents, except that adoption of a child by the spouse of a biological parent has no effect on the relationship between the child and either biological parent.
 - b. The parentage of a child resulting from assisted conception shall be determined as provided under § 20-156 et seq. of Title 20.
 - c. A person born out of wedlock is a child of the mother.
 - d. That person is also a child of the father, if:
 - i. The biological parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage was prohibited by law, deemed null or void or dissolved by a court; or
 - ii. The paternity is established by clear and convincing evidence as set forth in § 64.1-5.2; however, the paternity establishment pursuant to this subdivision b shall be ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his and has not refused to support the child.
2. Significant litigation has arisen over the meaning of Va. Code § 64.1-5.1 4 which provides:

- a. No claim of succession based upon the relationship between a child born out of wedlock and a parent of such child shall be recognized in the settlement of any decedent's estate unless:
 - i. an affidavit by such child or by someone acting for such child alleging such parenthood has been filed within one year of the date of the death of such parent in the clerk's office of the circuit court of the jurisdiction wherein the property affected by such claim is located and
 - ii. an action seeking adjudication of parenthood is filed in an appropriate circuit court within one year of the date of death of such parent.
 - iii. The one-year period shall run notwithstanding the minority of such child.
 - iv. One year limitation period shall not apply in those cases where the relationship between the child born out of wedlock and the parent in question is:
 - (a) established by a birth record prepared upon information given by or at the request of such parent; or
 - (b) by admission by such parent of parenthood before any court or in writing under oath; or
 - (c) by a previously concluded proceeding to determine parentage pursuant to the provisions of former § 20-61.1 or § 20-49.1 et seq.) of Title 20.
- b. The Supreme Court in *Belton v. Crudup*, 273 Va. 368, 641 S.E.2d 74 (2007) stated that, except under the three particular circumstances set forth in the statute, the right of a child born out of wedlock to inherit from his or her parent is conditioned upon the satisfaction of the two statutory filing prerequisites. Without determining whether the filing of a list of heirs satisfies the affidavit filing requirement, there is an independent requirement that an action seeking adjudication of the child's alleged relationship be filed within one year of his death.
- c. The Supreme Court of Virginia, in recent case of *Jenkins v. Johnson*, 276 Va. 30, 661 S.E.2d 484 (2008) involving intestate succession to title to real estate, ruled that since the case does not

involve the administration of an estate comprised of personal property, but addresses the determination of title to real property passing by intestate succession, the parties were not bound by the requirements of Code § 64.1-5.1(4) applicable to the settlement of a decedent's estate.

- d. In response to the *Jenkins* ruling, effective July 1, 2009, the General Assembly amended the provisions of Code § 64.1-5.1(4) to require its application to assert rights as legal heirs to real property owned by a decedent by deleting the phrase , relating to "the settlement of a decedent's estate" in the prior statutory language.

C. Exhumation of Body to Prove Paternity.

1. Prior to the enactment of subsection C of Code § 32.1-286, there was no provision in the law allowing a person to seek exhumation of a body in order to obtain a sample for genetic testing to establish parentage.

2. Code § 32.1-286 (c) reads as follows:

Upon the petition of a party attempting to prove, in accordance with the provisions of §§ 64.1-5.1 and 64.1-5.2, that he is the issue of a person dead and buried, a court may order the exhumation of the body of a dead person for the conduct of scientifically reliable genetic tests, including DNA tests, to prove a biological relationship. The costs of exhumation, testing, and reinterment shall be paid by the petitioner unless, for good cause shown, the court orders such costs paid from the estate of the exhumed deceased. This provision is intended to provide a procedural mechanism for obtaining posthumous samples for reliable genetic testing and shall not require substantive proof of parentage to obtain the exhumation order.

3. The most recent changes mandated that substantial proof of parentage is not required of a petitioner and eliminated a court's discretion to make a finding "in the interest of the furtherance of justice."
4. While use of the word "may" ordinarily imports permission, its use in this statute is jurisdictional and directional, rather than discretionary, and vests in the trial court the authority to order the exhumation.

5. There is nothing in the statute to suggest that the court has the discretion to deny exhumation to a person who meets its stated requirements and therefore the word “may” will be construed to be mandatory when it is necessary to accomplish the manifest purpose of the legislature.
6. Under the statute, the court's only discretion is limited to determining whether the petitioner is a "party attempting to prove parentage for inheritance purposes in accordance with Code §§ 64.1-5.1 and -5.2.”

D. Designating a Guardian for Minor Children.

1. Under Virginia law, each parent is the natural guardian of the couple’s children. Va. Code §31-1.
2. Designation of Guardian in Will.
 - a. Under Virginia law, every parent may by his last will and testament appoint a guardian of the person of his minor child. Va. Code § 31-2.
 - b. Time Period for Qualification. If the person appointed as guardian renounces the guardianship or fails to appear before the court within six months after the probate and declare his or her acceptance of the guardianship, and give bond, such appointment shall be void. Va. Code § 31-2.
3. Court Determination of Custody.
 - a. The appointment of guardian can not override the right of a surviving parent of the child to the custody of his or her child so long such parent is a fit and proper person to have the custody of the child.
 - b. In determining custody, the court shall give primary consideration to the best interests of the child. . . . The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest. *Florio v. Clark*, ___ Va. ___, 674 S.E.2d 845 (2009), citing Va. Code § 20-124.2 (B).

c. The principles governing a custody determination between a parent and a non-parent:

i. In all child custody cases, including those between a parent and a non-parent, the best interests of the child are paramount and form the lodestar for the guidance of the court

ii. [I]n a custody dispute between a parent and a non-parent, the law presumes that the child's best interests will be served when in the custody of its parent.

See, Florio, citing *Bailes v. Sours*, 231 Va. 96, 340 S.E.2d 824 (1986).

d. Although the presumption favoring a parent over a non-parent is a strong one, it is rebutted when certain factors are established by clear and convincing evidence. Factors include:

i. parental unfitness;

ii. a previous order of divestiture;

iii. voluntary relinquishment;

iv. abandonment; and

v. special facts and circumstances . . . constituting an extraordinary reason for taking a child from its parent, or parents.

e. Once the presumption favoring parental custody has been rebutted, the natural parent who seeks to regain custody must bear the burden of proving that custody with him is in the child's best interests. *See, Florio* citing *Shortridge v. Deel*, 224 Va. 589, 594, 299 S.E.2d 500, 503 (1983).

f. In *Florio*, the Virginia Supreme Court, concluded that the trial court's judgment awarding custody to the child's aunt and uncle was supported by clear and convincing evidence sufficient to rebut the presumption in favor of the natural father, and that the father did not carry the burden of proving that custody with him would be in the child's best interests.

4. Appointment by Court.

a. If a parent has not appointed a guardian by will, the circuit court may appoint a guardian for the person of the minor.

- b. If the minor has reached age 14, the minor may nominate his own guardian.
- c. If the person so nominated by the minor is not deemed suitable and competent by the court or if the minor is under age 14, the court may appoint a guardian.
- d. In no case shall any person not related to the infant be appointed guardian until thirty days have elapsed since the death or disqualification of the natural or testamentary guardians, and the next of kin have had an opportunity to petition the court for appointment and unless the court or clerk is satisfied that such person is competent to perform the duties of his office.

5. Appointment of Standby Gaurdian

- a. Va. Code § 16.1-352 permits that a parent may execute a written designation of a standby guardian at any time. The written designation shall state:
 - i. The name, address and birthdate of the child affected;
 - ii. The triggering event; and
 - iii. The name and address of the person designated as standby guardian or alternate.
- b. A designated standby guardian or alternate shall file a petition for approval as standby guardian.
 - i. The petition shall be filed as soon as practicable after the occurrence of the triggering event but in no event later than thirty days after the date of the commencement of his authority.
 - ii. The authority of the standby guardian shall cease upon his failure to so file, but shall recommence upon such filing.
 - iii. The petition shall be accompanied by a copy of the designation and any determinations of incapacity or debilitation or a certificate of death.

V. REVISIONS OF ESTATE PLANNING DOCUMENTS

A prudent estate planning attorney representing a client contemplating a separation or divorce should review and revise his client's estate planning documents to make sure his present financial and testamentary desires are given effect.

1. Last Will and Testament. With respect to the last will and testament considering:
 - a. Revoking any dispositive provisions for the benefit of the spouse.
 - b. Revoking any provision naming spouse as Executor or Trustee.
 - c. Stating the existence of a Premarital Agreement or Separation Agreement and that certain provisions are in satisfaction or pursuant to such agreement.
 - d. Review provisions in favor of children.
 - i. Name a Trustee and successor Trustee for any trust for a child.
 - ii. Make sure the Trust does not permit parent of child to demand distributions.
 - iii. Make sure spouse cannot inherit if child dies before trust termination date.
 - iv. Reconsider ages at which a trust ends.
 - e. Name guardian of children.
 - f. Consider adding a provision that spouse acceptance of benefits from the decedent at death constitute an election to acknowledge satisfaction of certain spousal obligations.
 - i. See case of *Pickett v. Spain*, 487 S.E.2d 233, 254 Va. 107 (1997) addressing whether the doctrine of election prevents a beneficiary named in a will from asserting a right of contribution arising from her payment of debts she and the testator owed at the time of the testator's death.
 - ii. A husband and wife owned as tenants by the entireties a home secured by deeds of trust for which they were jointly obligated. Husband dies and his will directed the executor to pay the testator's just debts, excluding any mortgage indebtedness on the home for

which his wife and he are jointly liable, even though [his] home passes to her by survivorship. The trust agreement contained a similar provision.

- iii. Court ruled that in order to make a case of election it is well settled that the *intention* of the testator to give that which is not his own must be *clear and unmistakable*.

2. Review and amend any existing Revocable Trusts

- a. Remember the provisions of a trust are not automatically revoked upon divorce.
- b. Review the definition of spouse under the Trust.
- c. Review many of the same considerations that affect the last will and testament.
- d. In drafting and funding revocable trust, keep in mind the case of *Kelln v. Kelln*, 30 Va. App. 113, 515 S.E.2d 789 (Ct. App. 1999).
 - i. Husband and wife established a Revocable Living Trust Agreement as part of their estate plan.
 - ii. Issue was whether assets which had been divided into separate shares pursuant to the terms of a revocable inter vivos trust agreement, constituted separate property and, accordingly, were not subject to equitable distribution under § 20-107.3.
 - iii. General Rule on Marital Assets. Since no evidence was presented to establish that the property transferred under the agreement was separate property, the Court treated the assets as marital at the time of the transfer because property acquired during the marriage is presumed to be marital in the absence of satisfactory evidence to the contrary.
 - iv. The equitable division of property that the parties have transferred to a revocable inter vivos trust for estate planning purposes presents a matter of first impression under Virginia divorce law, and one which few of our sister states have had an opportunity to address directly.

- v. The Court considered whether marital property can be transformed into separate property under the terms of a revocable trust agreement executed during a marriage. The Court distinguished the deed at issue in *McDavid v. McDavid*, 19 Va. App. 406, 451 S.E.2d 713 (1994) since the deed itself provided that the property was to be held by the husband as his sole and separate property.
- vi. Under Virginia law, in the absence of clear and unambiguous evidence of intent to create a separate estate in the other party, an interspousal gift is ineffective as a device to transform an asset into the separate property of the donee spouse.
- vii. The classification of property which has been the subject of interspousal gift does not depend upon the classification of the source of the property but rather upon whether one party by clear and express language intended to give the asset as the other spouse's separate property or merely intended to make a gift during the marriage, which becomes marital property.
- viii. The agreement reflects a clear purpose to establish a mechanism, using a revocable trust as the vehicle, that would enable the parties to take advantage of provisions in the Internal Revenue Code allowing married persons to minimize federal estate tax liability. Accordingly, the parties' agreement to divide and place their assets into equal shares must be viewed in light of the contemplated tax purposes that the Agreement was intended to serve.
- ix. The Trust Agreement, by its terms, affords no evidence that, at the time of the trust's formation, the parties contemplated it would govern the classification of property in the event of divorce. Indeed, the provisions of Article III regarding disposition of the trust's assets upon the death of either spouse, when coupled with the contemporaneous execution of the parties' wills, make plain that the parties' underlying expectation was the survival of their marriage, not its demise.

3. Review and Change Beneficiary Designation

- a. Make sure divorcing spouses follow through on changing beneficiary designations of retirement accounts.
- b. Make sure alternate provisions for minor children do not designate the children directly as beneficiaries.
- c. If the child is under age 18, the court will likely name a guardian for the

estate of the child and the guardian will be required to turn over the assets to the child at age 18 again frustrating the parent's testamentary intention.

- d. Proper Beneficiary Designations. In order to avoid these unintended situations, depending on the terms of the last will and testament, the parent should consider naming the beneficiaries of the assets as follows:
 - i. "To the Trustee of the Trust established under Article II of my last will and testament established for the benefit of my children."
 - ii. "My living descendants, per stirpes; provided, however, any share for a descendant under the age of 25 shall be distributed to the Trustee under my last will and testament established for that descendant."
- e. Change Payable on Death or Transfer on Death Provisions
 - i. These should pose no problem because a P.O.D. or T.O.D. account does not connote any present ownership in the asset by the named beneficiary.

4. Joint Accounts

- a. Make a list of assets held jointly
- b. Tenants by the entireties property cannot be changed by unilateral action of one spouse.
- c. Joint bank accounts need to be monitored.

5. Power of Attorney

- a. Designation of new agent under a new Power of Attorney
- b. Revoke any power of attorney in favor of spouse.
 - i. Include revocation provision in new Power of Attorney
 - ii. Execute separate Revocation of Power of Attorney.

6. Execution of New Advance Medical Directive
 - a Include language revoking prior Advance Medical Directive
7. Execution of Agent for Burial

See Appendix D for Sample Provisions

APPENDIX A

ADVANCE MEDICAL DIRECTIVE

ADVANCE MEDICAL DIRECTIVE

I, NAME OF DECLARANT, willfully and voluntarily make known my wishes in the event that I am incapable of making an informed decision, as follows:

I understand that my advance directive may include the selection of an agent as well as set forth my choices regarding health care. The term "health care" means the furnishing of services to any individual for the purpose of preventing, alleviating, curing, or healing human illness, injury or physical disability, including but not limited to, medications; surgery; blood transfusions; chemotherapy; radiation therapy; admission to a hospital, assisted living facility, or other health care facility; psychiatric or other mental health treatment; and life-prolonging procedures and palliative care.

The phrase "incapable of making an informed decision" means unable to understand the nature, extent and probable consequences of a proposed health care decision or unable to make a rational evaluation of the risks and benefits of a proposed health care decision as compared with the risks and benefits of alternatives to that decision, or unable to communicate such understanding in any way.

The determination that I am incapable of making an informed decision shall be made by my attending physician and a second physician or licensed clinical psychologist after a personal examination of me and shall be certified in writing. The second physician or licensed clinical psychologist shall not be otherwise currently involved in my treatment, unless such independent physician or licensed clinical psychologist is not reasonably available. Such certification shall be required before health care is provided, continued, withheld or withdrawn, before any named agent shall be granted authority to make health care decisions on my behalf, and before, or as soon as reasonably practicable after, health care is provided, continued, withheld or withdrawn and every 180 days thereafter while the need for health care continues.

If, at any time, I am determined to be incapable of making an informed decision, I shall be notified, to the extent I am capable of receiving such notice, that such determination has been made before health care is provided, continued, withheld, or withdrawn. Such notice shall also be provided, as soon as practical, to my named agent or person authorized by § 54.1-2986 to make health care decisions on my behalf. If I am later determined to be capable of making an informed decision by a physician, in writing, upon personal examination, any further health care decisions will require my informed consent.

(SELECT ANY OR ALL OF THE OPTIONS BELOW.)

OPTION I: APPOINTMENT OF AGENT (CROSS THROUGH OPTIONS I AND II BELOW IF YOU DO NOT WANT TO APPOINT AN AGENT TO MAKE HEALTH CARE DECISIONS FOR YOU.)

I hereby appoint _____ (primary agent), of _____ (address and telephone number), as my agent to make health care decisions on my behalf as authorized in this document. If _____ (primary agent) is not reasonably available or is unable or unwilling to act as my agent, then I appoint _____ (successor agent), of _____ (address and telephone number), to serve in that capacity.

I hereby grant to my agent, named above, full power and authority to make health care decisions on my behalf as described below whenever I have been determined to be incapable of making an informed decision. My agent's authority hereunder is effective as long as I am incapable of making an informed decision.

In exercising the power to make health care decisions on my behalf, my agent shall follow my desires and preferences as stated in this document or as otherwise known to my agent. My agent shall be guided by my medical diagnosis and prognosis and any information provided by my physicians as to the intrusiveness, pain, risks, and side effects associated with treatment or nontreatment. My agent shall not make any decision regarding my health care which he knows, or upon reasonable inquiry ought to know, is contrary to my religious beliefs or my basic values, whether expressed orally or in writing. If my agent cannot determine what health care choice I would have made on my own behalf, then my agent shall make a choice for me based upon what he believes to be in my best interests.

OPTION II: POWERS OF MY AGENT (CROSS THROUGH ANY LANGUAGE YOU DO NOT WANT AND ADD ANY LANGUAGE YOU DO WANT.)

The powers of my agent shall include the following:

A. To consent to or refuse or withdraw consent to any type of health care, treatment, surgical procedure, diagnostic procedure, medication and the use of mechanical or other procedures that affect any bodily function, including, but not limited to, artificial respiration, artificially administered nutrition and hydration, and cardiopulmonary resuscitation. This authorization specifically includes the power to consent to the administration of dosages of pain-relieving medication in excess of recommended dosages in an amount sufficient to relieve pain, even if such medication carries the risk of addiction or of inadvertently hastening my death;

B. To request, receive, and review any information, verbal or written, regarding my physical or mental health, including but not limited to, medical and hospital records, and to consent to the disclosure of this information;

C. To employ and discharge my health care providers;

D. To authorize my admission to or discharge (including transfer to another facility) from any hospital, hospice, nursing home, adult home assisted living facility or other medical care facility. If I have authorized admission to a health care facility for treatment of mental illness, that authority is stated elsewhere in this advance directive;

E. To authorize my admission to a health care facility for the treatment of mental illness for no more than 10 calendar days provided I do not protest the admission and a physician on the staff of or designated by the proposed admitting facility examines me and states in writing that I have a mental illness and I am incapable of making an informed decision about my admission, and that I need treatment in the facility; and to authorize my discharge (including transfer to another facility) from the facility;

F. To authorize my admission to a health care facility for the treatment of mental illness for no more than 10 calendar days, even over my protest, if a physician on the staff of or designated by the proposed admitting facility examines me and states in writing that I have a mental illness and I am incapable of making an informed decision about my admission, and that I need treatment in the facility; and to authorize my discharge (including transfer to another facility) from the facility. [My physician or licensed clinical psychologist hereby attests that I am capable of making an informed decision and that I understand the consequences of this provision of my advance directive: _____];

G. To authorize the specific types of health care identified in this advance directive [specify cross-reference to other sections of directive] even over my protest. [My physician or licensed clinical psychologist hereby attests that I am capable of making an informed decision and that I understand the consequences of this provision of my advance directive: _____];

H. To continue to serve as my agent even in the event that I protest the agent's authority after I have been determined to be incapable of making an informed decision;

I. To authorize my participation in any health care study approved by an institutional review board or research review committee according to applicable federal or state law that offers the prospect of direct therapeutic benefit to me;

J. To authorize my participation in any health care study approved by an institutional review board or research review committee pursuant to applicable federal or state law that aims to increase scientific understanding of any condition that I may have or otherwise to promote human well-being, even though it offers no prospect of direct benefit to me;

K. To make decisions regarding visitation during any time that I am admitted to any health care facility, consistent with the following directions: _____; and

L. To take any lawful actions that may be necessary to carry out these decisions, including the granting of releases of liability to medical providers.

Further, my agent shall not be liable for the costs of health care pursuant to his authorization, based solely on that authorization.

OPTION III: HEALTH CARE INSTRUCTIONS

(CROSS THROUGH PARAGRAPHS A AND/OR B IF YOU DO NOT WANT TO GIVE ADDITIONAL SPECIFIC INSTRUCTIONS ABOUT YOUR HEALTH CARE.)

A. I specifically direct that I receive the following health care if it is medically appropriate under the circumstances as determined by my attending physician:

B. I specifically direct that the following health care not be provided to me under the following circumstances (you may specify that certain health care not be provided under any circumstances):

OPTION IV: END OF LIFE INSTRUCTIONS

(CROSS THROUGH THIS OPTION IF YOU DO NOT WANT TO GIVE INSTRUCTIONS ABOUT YOUR HEALTH CARE IF YOU HAVE A TERMINAL CONDITION.)

If at any time my attending physician should determine that I have a terminal condition where the application of life-prolonging procedures -- including artificial respiration, cardiopulmonary resuscitation, artificially administered nutrition, and artificially administered hydration -- would serve only to artificially prolong the dying process, I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide me with comfort care or to alleviate pain.

OPTION: OTHER DIRECTIONS ABOUT LIFE-PROLONGING PROCEDURES. (If you wish to provide your own directions, or if you wish to add to the directions you have given above, you may do so here. If you wish to give specific instructions regarding certain life-prolonging procedures, such as artificial respiration, cardiopulmonary resuscitation, artificially administered nutrition, and artificially administered hydration, this is where you should write them.) I direct that:

OPTION: My other instructions regarding my care if I have a terminal condition are as follows:

_____;

In the absence of my ability to give directions regarding the use of such life-prolonging procedures, it is my intention that this advance directive shall be honored by my family and physician as the final expression of my legal right to refuse health care and acceptance of the consequences of such refusal.

OPTION V: APPOINTMENT OF AN AGENT TO MAKE AN ANATOMICAL GIFT OR ORGAN, TISSUE OR EYE DONATION (CROSS THROUGH IF YOU DO NOT WANT TO APPOINT AN AGENT TO MAKE AN ANATOMICAL GIFT OR ANY ORGAN, TISSUE OR EYE DONATION FOR YOU.)

Upon my death, I direct that an anatomical gift of all of my body or certain organ, tissue or eye donations may be made pursuant to Article 2 (§ 32.1-289.2 et seq.) of Chapter 8 of Title 32.1 and in accordance with my directions, if any. I hereby appoint _____ as my agent, of _____ (address and telephone number), to make any such anatomical gift or organ, tissue or eye donation following my death. I further direct that: _____)
(declarant's directions concerning anatomical gift or organ, tissue or eye donation).

This advance directive shall not terminate in the event of my disability.

AFFIRMATION AND RIGHT TO REVOKE: By signing below, I indicate that I am emotionally and mentally capable of making this advance directive and that I understand the purpose and effect of this document. I understand I may revoke all or any part of this document at any time (i) with a signed, dated writing; (ii) by physical cancellation or destruction of this advance directive by myself or by directing someone else to destroy it in my presence; or (iii) by my oral expression of intent to revoke.

NAME OF DECLARANT

THE DECLARANT SIGNED THE FOREGOING ADVANCE MEDICAL DIRECTIVE IN MY PRESENCE

Witness

Witness

STATE OF VIRGINIA
CITY OF CHARLOTTESVILLE, TO-WIT:

The foregoing document was acknowledged before me this _____ day of _____, 2009, by NAME OF DECLARANT.

Notary Public

My Commission Expires: _____

Registration number: _____

APPENDIX B

DESIGNATION OF PERSON TO MAKE ARRANGEMENTS
FOR DISPOSITION OF REMAINS
PURSUANT TO § 54.1-2825 OF THE CODE OF VIRGINIA

Pursuant to and in accordance with § 54.1-2825 of the Code of Virginia I, *NAME*, of _____, Virginia hereby designate *NAME OF AGENT* of _____ (my Agent) to make arrangements for my burial or the disposition of my remains, including cremation, upon my death. I direct the Executor of my estate to conclusively rely on the instructions and authorizations of my Agent.

WITNESS my signature and seal as of _____ day of _____, 2009:

_____[SEAL]
NAME

By my signature, I hereby accept my designation as Agent:

_____[SEAL]
NAME OF AGENT

STATE OF VIRGINIA
CITY OF CHARLOTTESVILLE

The foregoing instrument was acknowledged before me this _____ of _____, 2009 by *NAME*.

Notary Public

(SEAL)

My commission expires: _____, _____.

Registration number: _____

APPENDIX C

PROVISIONS FOR WAIVER OF ESTATE RIGHTS

___ . *Estate Rights.* Each party hereby waives and relinquishes any right or claim to the property, assets, estate and interest, real or personal, tangible or intangible, wheresoever located, of the other, now and hereafter acquired, and expressly forever waives any right or claim that he or she may have or hereafter acquire, whether as the spouse of the other or otherwise, under the present or future laws of any jurisdiction, to share in such estate of the other party upon his or her death, including, but not limited to, any claim :

- (a) The right to a family allowance;
- (b) The right to a probate homestead;
- (c) The right to exempt property;
- (d) The right to inherit property from the other by intestate succession;
- (e) The rights to claims of dower, curtesy or any other statutory substitute now or hereafter provided under the laws of any state in which the parties may be domiciled or in which they may own real property;
- (f) The right of election or renunciation to take against the will of the other and the right to election and to claim against the augmented estate or any rights under Virginia law to occupy the residence of the decedent spouse;
- (g) The right to take the survivor's share or statutory share of an omitted spouse;
- (h) Any right created under federal law, including but not limited to the Retirement Equity Act of 1984 and the right to receive any survivor annuity or other death or retirement benefit under any pension, profit sharing, or other employee benefit plan under which the other was, is, or may become a participant;
- (i) To act or designate someone to act as executor or administrator of the estate of the other or as trustee, personal representative, or in any fiduciary capacity with respect to the estate of the other;
- (j) The right to qualify and serve as conservator of the other's property or estate or guardian of the person of the other party, and the right to administer, control, or in any way interfere with, in a fiduciary capacity or otherwise, the other party's estate.

- (k) The right to act as a agent under a financial power of attorney, health care proxy or advance medical directive for the other;
- (l) The right to make any burial or funeral decisions on behalf of the other;
- (m) All community property, quasi-community property, and quasi-marital property rights;
- (n) The right to receive property that would pass from the decedent by testamentary disposition in a will or trust executed before this Agreement
- (o) The right to receive any assets, property, benefits, distributions, principal or income under any revocable trust established by the other spouse;
- (p) Any right, title, claim, or interest in or to the property, income, or estate of the other by reason of the parties' non-marital relationship; and
- (q) Any claim or demand in law or equity that has arisen prior to this Agreement or may arise after this Agreement.

Each party further does hereby waive and renounce, effective upon the execution of this Agreement, all rights he or she may have under any previously executed will or revocable trust agreement of the other.

Nothing herein, however, shall constitute a waiver of either party to take a voluntary bequest or bequests under a future will or estate planning documents of the other.

APPENDIX D

SAMPLE ESTATE PLANNING PROVISION

Last Will and Testament

A. Provision Emphasizing No Provisions for Spouse

At the time of the execution of this will, I am separated from my spouse, _____, and have made no provisions for him/her in this will and he/she shall have no right or ability to benefit in any way under the terms of this will or to serve as fiduciary or appoint a fiduciary under this will. All provisions of this will shall be construed and applied as if _____ has predeceased me.

B. Provision Satisfying Premarital or Separation Agreement

At the time of the execution of this will, I am divorce from my spouse, _____. We have executed a Separation Agreement, dated _____ (the "Separation Agreement") under which I have certain obligations to make testamentary disposition of certain assets. I am executing this will in part to carry out and satisfy my obligations under Paragraph _____ of the Separation Agreement.

OR

I have in effect an Premarital Agreement, dated _____, 2008 signed and acknowledged by my wife, _____, on January 12, 1993 and by me on _____, 2009 (the "Premarital Agreement"), which imposes the obligation to provide certain dispositions of property at my death to my wife _____, if at my death (i) I am married to _____, (ii) she survives me by sixty (60) days, and (iii) we are living together as husband and wife and have not separated at the date of my death. By this paragraph of this agreement, it is my intention to fulfill such obligation to my wife _____.

OR

I have in effect a Separation Agreement, dated _____, 2009 with _____ (the "Separation Agreement"). Any provisions made for _____ under this will or any other dispositions to _____ by virtue of my death are expressly in satisfaction of any of my obligations to him under the terms of the Separation Agreement. Any provision made for _____ under this will are expressly on the condition that he survives me by 120 hours.

OR

(1) Distribution to Former Wife in Satisfaction of Obligation. At my death, my Executor/Trustee shall distribute the sum of \$ _____ to my former wife, _____, if she is then living, expressly in satisfaction of any of my obligations under the terms of our separation agreement, dated _____, 2009 (the "Separation Agreement") with my former wife as confirmed by Final Order, dated _____, 2009, of the Circuit Court of Albemarle County, Virginia.

(2) Distribution Contingent on Acknowledgment of Satisfaction of Obligation. The distribution under this provision is included in order to satisfy my obligations for _____ under the Separation Agreement. If for any reason _____ or any of my children (or their successors in interests) objects to the receipt of the sum designated under this subparagraph as full and complete satisfaction of any and all claims due them under the Separation Agreement, then my Executor/Trustee shall not make such distribution to such objecting designated recipient and the designated sum shall lapse as to that designated recipient.

C. Provision Requiring Doctrine of Election to Apply

Any provisions I have made for my wife or any benefits provided for her under this will are expressly made in lieu of and on the condition that she does not make any claim for an augmented estate election or family allowance, exempt property or homestead allowance claim against my estate.

OR

I give and devise to my spouse _____ all my right, title and interest in and to the real property located at _____, if such real property is still owned by me at my death (the Residence) on the condition that my spouse _____ shall be solely responsible for and assume payment of any indebtedness secured by a lien of a deed of trust or mortgage against the Residence, without contribution from my estate or my Executor.

OR

The election of my spouse to accept a devise of real estate and the election of my spouse to accept any interest in real estate passing to my spouse by my death, whether by survivorship provisions or otherwise, shall be specifically conditioned upon the agreement and election of my spouse to be solely responsible for the payment of any indebtedness secured by a lien of a deed of trust or mortgage such real estate with contribution from my estate or my Executor.

Revocable Trust

A. Conditional Provision for Spouse.

Conditional Provisions for Wife. _____ is my wife who is living on the date of this Trust but from whom I am presently separated. Any provisions made for _____ under this Trust, under my last will and testament or any other dispositions to or for the benefit of _____ by virtue of my death, whether by survivorship provision, beneficiary designation or otherwise, are expressly in satisfaction of any obligations I may have to her under the terms of any binding, enforceable and valid premarital or marital agreement. Furthermore, any provision made for _____ under this Trust are expressly on the condition that:

1. _____ is still married to me at the time of my death;
2. There are no binding, enforceable and valid agreements by which _____ has waived her rights to any dispositions under this Trust; and
3. _____ survives me by 120 hours.

If for any reason _____ (or her successor in interest) objects to the receipt of the distributions provided to her under this Trust or otherwise by virtue of my death as full and complete satisfaction of any and all claims due her under any binding, enforceable and valid premarital or marital agreement, then my Trustee shall not make such distribution to _____ and the distributions designated for _____ shall lapse and be distributed as if she predeceased me.

Power of Attorney

A. Revocation of Power of Attorney Form

REVOCATION OF POWER OF ATTORNEY

I, _____, of _____, _____,
do hereby REVOKE any and all General Powers of Attorney or Specific or Limited Powers of
Attorney or principal-agency arrangements executed by me appointing or naming my spouse,
_____, as my attorney-in-fact, or agent.

WITNESS the following signature and seal this ____ day of _____,
_____.

_____ (SEAL)

STATE OF VIRGINIA
CITY OF CHARLOTTESVILLE

The following instrument was acknowledged before me this ____ day of
_____, _____, by _____.

Notary Public

My Commission Expires: _____

Registration number: _____

B. Provision in New Power of Attorney revoking prior Power of Attorney

THIS POWER OF ATTORNEY REVOKES, SUPERCEDES AND REPLACES ANY PRIOR OR PREVIOUSLY EXECUTED POWER OF ATTORNEY, INCLUDING, WITHOUT LIMITATION, THE PROPERTY POWER OF ATTORNEY EXECUTED BY ME DATED _____ NAMING MY SPOUSE, _____, AS MY POWER OF ATTORNEY.

Advance Medical Directive

A. Provision in Advance Medical Directive revoking prior Medical Power of Attorney

THIS ADVANCE MEDICAL DIRECTIVE REVOKES, SUPERCEDES AND REPLACES ANY PRIOR OR PREVIOUSLY EXECUTED ADVANCE MEDICAL DIRECTIVE OR MEDICAL POWER OF ATTORNEY INCLUDING, WITHOUT LIMITATION, ANY ADVANCE MEDICAL DIRECTIVE NAMING MY SPOUSE, _____, AS MY MEDICAL POWER OF ATTORNEY.