

VIRGINIA CODE COMMISSION

Monday, October 16, 2017 - 10:00 a.m.

Pocahontas Building, 6th Floor

Speaker's Conference Room

Richmond, Virginia 23219

1 **MEMBERS PRESENT:** John S. Edwards; James M. LeMunyon; Ryan T. McDougle; Gregory
2 D. Habeeb; Robert L. Calhoun; Charles S. Sharp; Leslie L. Lilley; E.M. Miller, Jr.; Thomas M.
3 Moncure, Jr.; G. Timothy Oksman; Mark Vucci; Noah Sullivan

4 **MEMBERS ABSENT:** Chris Nolen

5 **STAFF PRESENT:** Ryan Brimmer, David Cotter, Scott Meacham, Amigo Wade, Kristen Walsh,
6 Brittany Olwine, Jane Chaffin, Karen Perrine, Anne Bloomsburg, Lilli Hausenfluck, Division of
7 Legislative Services (DLS)

8 **OTHERS PRESENT:** Brian Kennedy, LexisNexis; Robin Lind, Virginia Electoral Board
9 Association; Kirk Showalter, General Registrar for the City of Richmond; David Bailey, David
10 Bailey Associates

11 **Call to order:** Senator Edwards, chair, called the meeting to order at 10:05 a.m.

12 **Approval of minutes:** The minutes of the August 14, 2017, meeting of the Commission as printed
13 and distributed to the members were approved without objection.

14 **Proposed bill draft to correct Title 23.1 (Higher Education) recodification:** Ryan Brimmer
15 presented a draft bill to correct a drafting error in the Title 23.1 recodification bill regarding
16 succession of nonlegislative citizen members of the State Council of Higher Education for
17 Virginia. In §§ 23.1-200 and 23.1-3002 of the Code of Virginia, the phrase "appointed and
18 qualified" was changed to "appointed and confirmed." Mr. Brimmer explained that qualification
19 is a simpler process and "qualified" is used throughout Title 23.1 except for one instance. The
20 change allows the newly appointed council member to serve on the council prior to confirmation,
21 but the General Assembly still retains authority for confirmation.

22 On motion of Mr. Miller and seconded by Judge Lilley, the Commission approved the draft bill as
23 presented.

24 With the agreement of the Commission, Senator Edwards delayed consideration of the agenda item
25 regarding the description of the Commission's Executive Committee responsibilities until the
26 arrival of Delegate LeMunyon.

27 **Report on study of use of gender-specific terms in the Code of Virginia:** David Cotter reported
28 on the status of the project to identify all Code of Virginia sections with gender-specific terms. He
29 advised the Commission that the work group did not reach a consensus on a recommendation on
30 how to proceed. He presented the results of the study divided into the following categories:

31 Category 1: "Section 1-216 of the Code of Virginia Conforming Amendments." Section
32 1-216 is a rule of construction providing that a word used in the masculine includes the
33 feminine and neuter. An example of the changes to the Code of Virginia provisions in
34 this category is striking "or her" in "him or her."

35 Category 2: "Group I," which consists of nonsubstantive revisions that substitute a
36 gender-specific term with a gender-neutral term. An example of the changes to the Code
37 of Virginia in this category is replacing "son" or "daughter" with "child."

38 Category 3: "Group II," which, like the sections in Category 2, consists of revisions that
39 substitute a gender-specific term with a gender-neutral term. However, some of the
40 revisions in this category may be considered substantive. Additionally, this category
41 includes sections where the work group could not reach a consensus as to the revisions.
42 An example of changes to the Code of Virginia in this category is a provision dealing
43 with assisted conception, because the case law is not settled.

44 Category 4: Sections with no changes recommended. The Code of Virginia sections in
45 this category should not be amended because a gender-specific term is necessary. An
46 example is "pregnant woman."

47 Mr. Cotter stated that the current internal DLS drafting practice is to make technical changes in
48 relation to § 1-216 as a section is being amended or recodified, so there is an ongoing effort to
49 change terms such as "he or she" to "he" throughout the Code of Virginia. The main question
50 regarding Category 1 is the utility of a bill for Category 1 changes due to the drafting policy.

51 Mr. Miller moved that staff develop a written policy regarding an ongoing process for new and
52 existing language to conform with § 1-216. In addition, the policy should also address terms such
53 as "husband" or "wife." Staff will present the draft policy to the Commission at its next meeting.
54 The motion was seconded by Delegate Habeeb and passed.

55 For Category 1 and Category 2 changes, Mr. Cotter stated that the legwork has been done, so any
56 legislator could use the study report as a draft bill for what are considered to be nonsubstantive
57 and noncontroversial changes. A legislator could also use the draft bill for Category 3 changes,
58 with the understanding that these may be considered controversial.

59 Delegate Simon referenced his bill that amended § 1-216 by adding a rule of construction stating
60 that as used in the Code of Virginia, "father" and "mother" mean any parent of a child, "husband"
61 and "wife" mean either spouse to a marriage, and "maternal" or "paternal" when describing any
62 familial relationship may be used interchangeably. Delegate Habeeb stated that there are many
63 places in the Code of Virginia where the study analysis shows "husband" or "wife" could be
64 changed to "spouse" but there are places where this replacement would not work. Delegate Habeeb
65 stated that the work done by Mr. Cotter and DLS staff could be used by any legislator to introduce
66 a bill for the Category 1 and 2 changes.

67 Senator Ebbin requested that the Commission recommend a bill that makes the changes identified
68 as noncontroversial and nonsubstantive.

69 After discussion, the Commission took no action regarding recommending a bill for consideration
70 by the General Assembly.

71 **Referral of Senate Bill 782 and Senate Joint Resolution 216 and review of Attorney General**
72 **Opinion 17-021 relating to laws limiting marriage to one man and one woman:** Mr. Vucci
73 stated that this matter is before the Commission to review the response to the Commission's request
74 to Attorney General Mark Herring for an official advisory opinion as to whether §§ 20-45.2 and
75 20-45.3 of the Code of Virginia are obsolete within the compass of § 30-151. Mr. Vucci reminded
76 the Commission that the constitutional amendment in SJR 216 has to go before the voters.

77 Delegate Habeeb stated that the question is whether §§ 20-45.2 and 20-45.3 are obsolete under §
78 30-151 of the Code of Virginia and should be repealed as provided for in SB 782. In regard to SJR

79 216, he advised that the House of Delegates will not hear any constitutional amendments this year
80 and asked if the Commission should endorse the bill, the resolution, or both.

81 Mr. Sullivan moved to recommend Senate Bill 782 and Senate Joint Resolution 216. Delegate
82 LeMunyon seconded the motion. The summary should state that the bill is a recommendation of
83 the Code Commission, as the provisions are obsolete on the basis of § 30-151 of the Code of
84 Virginia.

85 Senator Edwards opened the floor for public comment. Chris Freund with the Family Foundation
86 stated that the foundation's position is that marriage is between one man and one woman regardless
87 of the Supreme Court decision. Jeff Caruso of the Virginia Catholic Conference stated that the
88 conference's position is that the provisions under review are dormant, not obsolete, and could
89 change again under federal law; therefore, defining marriage as between one man and one woman
90 is the correct policy for Virginia.

91 Speaking to the motion, Delegate Habeeb stated that the Code Commission has the responsibility
92 to identify obsolete statutory provisions and make recommendations to the General Assembly,
93 even if the Commission disagrees with the substance of the change. He supports the motion as it
94 applies to SB 782, and he asked if SJR 216 should be handled separately because it involves a
95 constitutional amendment.

96 Senator McDougle stated that the two should be handled separately, with a decision on the
97 constitutional amendment by the Commission next spring since resolutions will not be taken up
98 this year. He supports moving forward with SB 782.

99 Senator Edwards stated that the motion will be voted on in two parts. The first vote is to have a
100 draft bill come before the Commission at its November meeting similar to SB 782 to repeal §§ 20-
101 45.2 and 20-45.3 of the Code of Virginia. Senator McDougle stated that the motion should be
102 worded to indicate that the provisions are obsolete. The motion was seconded and passed.

103 The Commission discussed how to proceed on SJR 216 in light of the procedural policy of the
104 House of Delegates that the House does not consider constitutional amendment resolutions in short
105 sessions. Senator Ebbin asked the Commission to send a letter to the General Assembly endorsing
106 the resolution when constitutional amendments are considered.

107 Mr. Calhoun moved that the Commission defer a decision on SJR 216 until the first Commission
108 meeting in 2018 after the legislative session. Delegate Habeeb seconded the motion. The motion
109 carried with nine members voting aye and three voting no (LeMunyon, Miller, and Edwards).

110 **Review of certain provisions in Title 24.2 (Elections) for obsolescence:** At the June
111 Commission meeting, the Voter Registrars Association of Virginia requested that Title 24.2,
112 Elections, be placed on the list of titles to be recodified. The Virginia general registrars, the
113 electoral board association, the 2014 Board of Elections work group, and the Board of Elections
114 as indicated by its vote in 2016 supported the request. After a brief discussion, the Commission
115 determined that recodification of this title could not occur until 2022; however, it could review a
116 draft bill for provisions that had become obsolete and did not involve policy matters for possible
117 introduction at the 2018 Session of the General Assembly. The association offered to present a list
118 of possibly obsolete provisions for the Commission's consideration after review by Meg Lamb.

119 Ms. Lamb reported that she had received a list and had worked with Tracy Howard to narrow the
120 list to provisions did not raise immediate questions of policy or substance. The provisions are
121 before the Commission and divided into two categories. The first category are provisions that
122 appear appropriate for an obsolete laws bill: §§ 24.2-113, 24.2-614, and 24.2-644 of the Code of
123 Virginia. The second category are provisions that could be in an obsolete laws bill or could be in
124 a standalone bill, as determined by the Commission: §§ 24.3-613, 24.2-615, 24.2-641, 24.2-644,
125 24.2-706, and 24.2-710 of the Code of Virginia. Ms. Lamb distributed a handout for § 24.2-644 to
126 replace the version in the meeting materials notebook. The change in the second sentence of
127 subsection B replaces the word "squares" with the phrase "the ballot in accordance with the
128 instructions for the type of ballot."

129 Senator McDougle suggested that the first paragraph of § 24.2-615 should be retained, rather than
130 repealed, with the word "printed" changed to "presented." Ms. Lamb indicated she would review
131 and present revisions at the next meeting.

132 After a brief discussion, the consensus was to amend § 24.2-644 as presented except that the words
133 "leaving unmarked" or words to that effect will be retained. Kirk Showalter indicated that this
134 proposed change raised no concerns. Ms. Lamb indicated that she will address this in the revised
135 draft bill at the next meeting.

136 Senator McDougle suggested that the amendments to § 24.2-706 contain policy matters because
137 the general registrars are no longer required to retain a list of absentee voters. Ms. Showalter stated
138 that the registrars do have a list through the state system, which can be generated on demand.

139 Ms. Lamb requested that the Commission not vote on the draft bill in the meeting materials. She
140 will revise the draft bill per the Commission's discussion today and present it at the next meeting.

141 Senator Edwards asked if the sections could be voted on in a block. After discussion, Mr. Miller
142 moved that §§ 24.2-706 and 24.2-710 be removed from the block and that § 24.2-644 remain in
143 the block as amended. Mr. Oksman seconded the motion, and the motion was approved.

144 Senator McDougle moved that a draft bill be presented at the next meeting and that §§ 24.2-706
145 and 24.2-710 be removed from the bill. Delegate Habeeb seconded the motion, and the motion
146 was approved.

147 **Description of responsibilities of the Executive Committee of the Code Commission:** At the
148 August 14, 2017, meeting, the Commission asked that staff prepare a written summary statement
149 of the responsibilities of the Executive Committee. Scott Meacham presented a two-page
150 document that described editorial-level changes made to enacted Code sections and codification
151 of certain Section 1 bills and enactment clauses with general applicability.

152 Delegate LeMunyon stated that his main concern is transparency in the process. He recommended
153 that the document presented by Mr. Meacham be placed on the Commission website and that
154 whenever a Section 1 bill is codified, the patron be notified. On motion of Mr. Calhoun, seconded
155 by Delegate LeMunyon, the Commission adopted the document as the official policy of the
156 Commission and directed staff to place the document on the Commission website. Delegate
157 Habeeb voted against the motion.

158 Mr. Miller moved that Mr. Oksman be appointed to the Executive Committee. On second by
159 Delegate LeMunyon, the motion passed. The Commission also instructed staff to add the names
160 of the Executive Committee members to the website.

161 **Recodification of Title 55, Property and Conveyances:** Amigo Wade stated that, at the last
162 meeting of the Commission, staff was directed to review a Virginia Supreme Court decision that
163 may affect the recommendation to move provisions regarding mining and mineral rights to Title
164 45.1. Mr. Wade reported that staff reviewed the case and current law. He explained the import of
165 the decision in *Riddleburger v. Chesapeake Western Railway* and recommended that all exceptions
166 to exemptions be removed for the reason stated in the drafting note.

167 Mr. Wade stated that staff is presenting Chapters 1 (Creation and Limitation of Estates), 3 (Form
168 and Effect of Deeds and Covenants; Liens) and 4 (Fraudulent and Voluntary Conveyances; Writing
169 Necessary to be Recorded) of Subtitle I (Real Estate Conveyances). He noted that technical
170 changes have been made throughout the chapters that are consistent with the technical changes
171 made in the other chapters that have been reviewed by the Commission.

172 Chapter 1, Creation and Limitation of Estates:

173 Mr. Wade began the review of Article 1, Creation and Transfer of Estates. The Commission noted
174 that § 55-3 (lines 55–62) addresses personal property. The Commission questioned the inclusion
175 of this provision in the real property title and the addition of the reference to the Uniform
176 Commercial Code. Staff indicated that this section will be revisited by the work group.

177 In § 55-4 (lines 70–72), the Commission questioned the continued use of the archaic phrase
178 "corruption of blood." Mr. Wade explained that the work group recommended that this phrase be
179 retained due to the concern of changing the intent and the volume of case law regarding this term.
180 After discussion, the Commission directed staff to revisit this section with the work group and try
181 to find a way to update and clarify the text.

182 Mr. Wade suggested discontinuing the review of Article 1, as there are similar provisions in the
183 remainder of that article that should be reviewed by the work group on the basis of today's
184 discussion. The Commission agreed. Mr. Wade proceeded with the review of the remaining
185 articles of Chapter 1.

186 Chapter 3, Form and Effect of Deeds and Covenants; Liens:

187 Mr. Wade explained that § 55-60.1 (lines 646–652) is recommended for repeal, as it has not been
188 amended since 1942. Judge Lilley suggested that staff speak to bond counsel and report to the
189 Commission at the next meeting.

190 Mr. Wade stated that beginning with § 55-61, the recodification bill modernizes terms relating to
191 equitable pleading practice; for example, it changes "bill" to "complaint," "decree" to "order," and
192 "suit" to "action."

193 Chapter 4 - Fraudulent and Voluntary Conveyances; Writings Necessary to be Recorded:

194 In § 55-81, Senator Edwards questioned the continued use of "etc.," as the Commission generally
195 avoids use of "etc." in the Code of Virginia. The Commission directed staff to amend the catchline
196 of § 55-81 by replacing "etc." with all appropriate terms and to fix the text. The catchline of § 55-
197 96 also should be amended by replacing "etc." with all appropriate terms.

198 The Commission requested that staff replace the term "personal decree" with a more modern term.

199 Mr. Sullivan asked if there was another statute that addressed the matter in § 55-102 that is
200 recommended for repeal in the draft recodification bill. Mr. Wade explained that the section has
201 not been amended since 1919 and no cases have referenced the statute since 1875. At the request
202 of the Commission, staff will revisit the recommendation for repeal.

203 **Other business:** Mr. Vucci presented two titles as candidates for recodification for the
204 Commission's consideration: Titles 45.1, Mines and Mining, and 51.5, Persons with Disabilities.
205 He recommended that Title 45.1 be chosen for recodification after the Title 55 recodification
206 concludes. Mr. Miller asked if there were any recent federal rulings that could affect Title 45.1.
207 Mr. Meacham stated that there were no federal rulings. The Commission asked staff to contact the
208 Department of Mines, Minerals and Energy for its position on the possible recodification of Title
209 45.1 and deferred a decision until the next meeting.

210 **Public comment, adjournment:** Senator Edwards opened the floor for public comment. As there
211 was no public comment and no further business to discuss, the meeting was adjourned at 1:50 p.m.