

*Report of the
Virginia Code Commission
The Revision of Title 64.1 of the Code of Virginia*

**Richmond, Virginia
December 2011**

**To: The Honorable Robert F. McDonnell, Governor of Virginia
and
The General Assembly of Virginia**

In accordance with its authority granted pursuant to § 30-152 of the Code of Virginia, the Virginia Code Commission undertook the revision of Title 64.1 (Wills and Decedents' Estates) in June 2009. Since the title has not been revised since 1968, the current revision presents an opportunity to (i) organize the laws in more logical manner; (ii) remove obsolete and duplicative provisions; and (iii) improve the structure and clarity of the laws pertaining to wills, succession, and the descent of property. Additionally, as a part of this opportunity, laws dealing with the closely related subject matters of trusts and fiduciaries located in other parts of the Code have been included in the current revision. Thus, Titles 26 (Fiduciaries Generally) and 31 (Guardian and Ward), neither of which have ever been revised, as well as significant portions of Title 55 (Property and Conveyances) and Title 37.2 (Behavioral Health and Developmental Services) have been included in the revision of Title 64.1.

The Commission was assisted by a Work Group comprised of Gary W. Lonergan, Esq., Assistant Commissioner of Accounts, City of Alexandria; John H. Rust, Jr., Esq., Commissioner of Accounts, County of Fairfax; Philip R. Trapani, Jr., Esq., Commissioner of Accounts, City of Norfolk; the Honorable Tommy L. Moore, Clerk, Botetourt County Circuit Court; James P. Cox, III, Esq., of MichieHamlett; Helen Lewis Kemp, Esq., of Virginia Estate Plans; Dana G. Fitzsimons, Jr., Esq., of McGuireWoods; John T. Midgett, Esq., of Midgett & Preti; Martha L. Sotelo, Esq., of Vaughan, Fincher & Sotelo; and Joseph E. Spruill, III, General Counsel to the Virginia Bankers Association, and later Matt Bruning, Director of Government Relations for the Virginia Bankers Association. The contributions by the Work Group were invaluable and the Commission wishes to express its sincere gratitude to the Work Group members for all of the time and effort they contributed to the revision of Title 64.1. The Commission also wants to extend its appreciation to members of the project's mailing list. These contributors represent a cross section of stakeholders and interested groups and their expertise proved to be an invaluable resource to the Commission and its staff.

The Virginia Code Commission recommends that the General Assembly enact legislation during the 2012 Session to implement the revisions proposed in this report.

Respectfully submitted,

EXECUTIVE SUMMARY

INTRODUCTION

Title 64.1 (Wills and Decedents' Estates) contains provisions of the Code of Virginia that address the function of wills, succession, and the descent of property in the Commonwealth. Closely related to these provisions are the laws governing trusts and fiduciary relationships that can be found in Titles 26 (Fiduciaries Generally) and 31 (Guardian and Ward), as well as certain chapters in Titles 55 (Property and Conveyances) and 37.2 (Behavioral Health and Developmental Services).

In June 1967, the Virginia Code Commission submitted its report on the proposed revision of Title 64, which was published as House Document 5 of the 1968 Session. The Code Commission's draft for the new Title 64.1 was enacted as Chapter 656 of the Acts of 1968. When Title 64.1 was enacted in 1968, it contained seven chapters. In the ensuing 43 General Assembly Sessions, four chapters have been added and one repealed, resulting in the existing title comprised of 10 chapters (of which one chapter—Curtesy, Dower and Jointure—has had all its provisions except one repealed). When the Code of 1950 was adopted, Title 26 contained six chapters with one chapter being added, resulting in the existing title comprised of seven chapters, and Title 31 contained four chapters, to which two were added and two were repealed, resulting in the existing title still being comprised of four chapters. Of the six chapters or parts of chapters relocated from Title 55, only one was in existence when the Code of 1950 was adopted. Of the two chapters from Title 37.2, only one was in existence when the Code of 1950 was adopted and the second was added during the 2011 Session. In the intervening years, chapters often have been added at the end of the title, which has compromised any previous organizational scheme. It has become appropriate to (i) organize the laws in more logical manner, (ii) remove obsolete and duplicative provisions, and (iii) improve the structure and clarity of statutes pertaining to wills, succession, descent of property, trusts, and fiduciaries.

ORGANIZATION OF TITLE 64.2

The title is renamed from Wills and Decedents' Estates to Wills, Trusts, and Fiduciaries to more accurately describe the title's scope. Title 64.2 consists of 27 chapters divided into five subtitles: Subtitle I (General Provisions); Subtitle II (Wills and Decedent's Estates); Subtitle III (Trusts); Subtitle IV (Fiduciaries and Guardians); and Subtitle V (Provisions Applicable to Probate and Nonprobate Transfers).

Subtitle I, containing proposed Chapter 1 (Definitions and General Provisions), consists of title-wide definitions and provisions that are broadly applicable to wills, trusts, and fiduciaries.

Subtitle II contains proposed Chapters 2 through 6, which pertain to the descent of property either through intestate succession or by will. Proposed Chapter 2 (Descent and Distribution) includes provisions from existing Chapter 1 that govern generally intestate succession. Proposed Chapter 3 (Rights of Married Persons) collects provisions that pertain to the rights of married persons, including the right of a surviving spouse to take an elective share

of the decedent's estate, from existing Chapter 1, existing Chapter 2, existing Article 5.1 of Chapter 6, and existing Chapter 9. Proposed Chapter 4 (Wills) contains the provisions from existing Chapter 3 dealing with the execution, construction, probate, and effect of wills. Proposed Chapter 5 (Personal Representatives and Administration of Estates) pertains to the appointment and duties of personal representatives administering a decedent's estate from existing Chapter 6. Proposed Chapter 6 (Transfers without Qualification) collects various provisions taken from existing Chapter 3, existing Articles 2 and 2.1 of Chapter 6, and existing Chapter 10 allowing for nonprobate transfers of assets of a decedent's estate or transfers without the need for the qualification of a personal representative.

Subtitle III contains proposed Chapters 7 through 11 and collects various uniform acts enacted in Virginia dealing with the creation and management of trusts. With one exception, the provisions in Subtitle III are all taken from Title 55. Proposed Chapter 7 (Uniform Trust Code) relocates the Uniform Trust Code (UTC) from existing Chapter 31. In addition, the Uniform Prudent Investor Act (UPIA), existing Article 2 of Chapter 3 of Title 26, has been incorporated into proposed Chapter 7. Although the UPIA was promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) prior to the promulgation of the UTC, NCCUSL incorporated the UPIA into the UTC and a similar incorporation has been made in proposed Chapter 7. Proposed Chapter 9 (Uniform Custodial Trust Act) relocates the Act from existing Chapter 2.1. Proposed Chapter 10 (Uniform Principal and Income Act) relocates the Act from existing Chapter 15.1. Proposed Chapter 11 (Uniform Prudent Management of Institutional Funds Act) relocates the Act from existing Article 1.2 of Chapter 15.

Subtitle IV is divided into four parts and contains proposed Chapters 12 through 21, which pertain to various fiduciary relationships. Part A (Fiduciaries) consists of proposed Chapters 12 through 15 that consist of the bulk of the provisions relocated from Title 26. Proposed Chapters 12 (Commissioners of Accounts) and 13 (Inventories and Accounts) are made up primarily of sections from existing Chapter 2 and deal with the office of the commissioner of accounts and the commissioner's duties in administering estates. Proposed Chapter 14 (Fiduciaries Generally) deals with the qualifications, appointments, duties, and removal or resignation of fiduciaries in general and consists of provisions from existing Chapters 1, 4, and 5. Proposed Chapter 15 (Investments) controls how a fiduciary may invest the property in his possession and is taken from existing Chapter 3.

Part B (Powers of Attorney) contains proposed Chapter 16 (Uniform Power of Attorney Act), which relocates the Act from existing Chapter 7 of Title 26.

Part C (Guardianship of Minor) contains proposed Chapters 17 through 19, which pertain to the appointment and duties of guardians for minors. Proposed Chapter 17 (Appointment of Guardian) includes provisions from existing Chapters 1 and 2 of Title 31 dealing with the appointment of guardians. Proposed Chapter 18 (Custody and Care of Ward and Estate) consists of sections from existing Chapter 3 and sets forth the duties of such guardians. Proposed Chapter 19 (Virginia Uniform Transfers to Minors Act) relocates the Act from existing Chapter 6.

Part D (Guardianship of Incapacitated Persons) contains proposed Chapters 20 and 21 that address the appointment and duties of guardians and conservators for incapacitated adults. Proposed Chapter 20 (Guardianship and Conservatorship) contains the provisions from existing Chapter 10 of Title 37.2 and deals with the appointment of guardians and conservators and sets forth their duties. Proposed Chapter 21 (Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act) relocates the Act from existing Chapter 10.1.

Subtitle V contains proposed Chapters 22 through 27 and collects various provisions that are applicable to both probate and nonprobate transfers. Proposed Chapter 22 (Uniform Simultaneous Death Act), which establishes a default rules addressing survivors to avoid disputes caused by simultaneous or quickly successive deaths of persons between whom rights pass upon death, was relocated from existing Chapter 4. Proposed Chapter 23 (Persons Presumed Dead) includes provisions from existing Chapter 5 establishing the rules for determining when a presumption of death may apply to a person who cannot be located and whose death cannot be proved. Proposed Chapter 24 (Conservators of Property of Absentees) contains provisions from existing Chapter 6 of Title 26 setting forth when a conservator for the property of an absentee may be appointed. Proposed Chapter 25 (Acts Barring Property Rights) consists of the provisions that make up Virginia's slayer statute from existing Chapter 22 of Title 55. Proposed Chapter 26 (Uniform Disclaimer of Property Interests Act) relocates the Act that sets out rules governing the effect of refusals to take property by gift or inheritance from existing Chapter 8.1. Proposed Chapter 27 (Release of Powers of Appointment) contains provisions from existing Chapter 16 of Title 55 establishing how a person granted a power of appointment may release such power.

Other Affected Titles

As noted previously, all of existing Titles 26 and 31 and chapters from existing Titles 37.2 and 55 are transferred to proposed Title 64.2. In addition, several sections (§§ 26-40 through 26-43, and parts of 26-44) have been combined into one section (proposed § 2.2-4519 (Investment of funds by the Virginia Housing Development Authority and the Virginia Resources Authority)) and relocated to Chapter 45 (Investment of Public Funds Act) of Title 2.2.

An outline of the organization of proposed Title 64.2 is included as Appendix A.

Changes Made Throughout Title 64.2

An explanation of the significant changes made in each chapter is provided in a note that precedes each chapter. Each section is followed by a drafting note describing any changes made in the section. If a section drafting note states "no change," the section contains no changes other than renumbering. If a drafting note states "technical changes," the section contains changes to the text. These technical changes may range from the insertion of clarifying punctuation to a thorough modernization of archaic writing style. When sections contain structural or substantive changes, such as the deletion or addition of language, the drafting note describes the reason for the proposed change.

Many of the technical changes arose from the Code Commission's determination that terminology should be clear, consistent, and modern. The following list provides a representative sample of the most significant.

- Short titles have been eliminated as unnecessary in light of the title-wide application of § 1-244, which states that the caption of a subtitle, chapter, or article operates as a short title citation.
- References to "court of competent jurisdiction," "appropriate court," or "court," or the clerk thereof, have been changed to "circuit court" in order to clearly set forth the court with jurisdiction over the matters included in the title.
- Where appropriate, references to "commissioner" have been changed to "commissioner of accounts" to avoid confusion with commissioners in chancery.
- References to "protective order" have been changed to "conservatorship order" in Chapter 21 (Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act) to avoid confusion with the typical way "protective order" is used in the Code, i.e., an order to protect individuals from harassment.

Substantive Changes Proposed In Title 64.2

When the Code Commission has approved a substantive change to a provision of existing law, it is noted in the drafting note for the affected section. These substantive changes include:

- Existing §§ 64.1-5.1 and 64.1-5.2 provide that a judgment determining a person's parentage entered pursuant to Virginia's current or former paternity statutes constitutes sufficient evidence of paternity. Proposed §§ 64.2-102 and 64.2-103 replace the reference to Virginia's paternity statutes and provide that a paternity judgment entered by any court of competent jurisdiction is sufficient evidence of paternity. The effect of the change is to include paternity judgments entered by other states that are entitled to full faith and credit in Virginia under the U.S. Constitution.
- Existing § 64.1-48 provides that it is unlawful for any person who is not an attorney to advertise in a newspaper an offer to draft a will. In proposed § 64.2-402, this prohibition has been expanded to include all advertisements in general, not just those made in newspapers, as the current provision seemed unduly limiting in light of modern means of communication.
- Existing § 64.1-69.1 provides that a spouse who has been omitted by the other spouse's will may still inherit unless it appears from the face of the will or from the terms of a premarital or marital agreement executed pursuant to Virginia's Premarital Agreement Act (PAA) that the omission was intentional. Proposed § 64.2-422 eliminates the reference to the PAA so as to allow valid premarital or marital agreements executed in Virginia prior to the effective date of the PAA or such agreements executed outside of the Commonwealth to be given effect.
- Existing § 64.1-77 provides that clerks of the circuit court have the authority to appoint appraisers of estates of decedents. Prior to 1998, § 64.1-133 provided that clerks would

- Existing § 64.1-138 provides that the marriage of an unmarried woman serving as a personal representative does not extinguish her authority or make the husband a personal representative in her right. This section was deleted as obsolete.
- Existing § 31-1 provides that the parents of a legitimate unmarried minor are the joint natural guardians of such child with equal legal powers and rights. Proposed § 64.2-1700 expands this provision to encompass illegitimate children. The United States Supreme Court has held that treating married and unmarried parents differently constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. *See Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208 (1972). *See also Beyah v. Shelton*, 231 Va. 432, 434, 344 S.E.2d 909 (1986) (holding that an unmarried father has standing to object to a petition to change the name of the child and that, in light of *Stanley*, the contrary conclusion “may deprive the unwed father of the equal protection of the laws guaranteed him by the Fourteenth Amendment to the United States Constitution.”).

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