2022-23 VIRGINIA DEVELOPMENTS IN ESTATE PLANNING AND ADMINISTRATION

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I. SUPREME COURT DECISIONS

A. EFFECT OF TRUST ARBITRATION CLAUSE. Boyle, *et al.* v. Anderson, Record No. 210382, 871 S.E.2d 226 (April 14, 2022).

In this case, the Virginia Supreme Court confirmed that neither the Virginia Uniform Arbitration Act (Va. Code §§ 8.01-581.01 *et seq.*) nor the Federal Arbitration Act (9 U.S.C. §§ 1 *et seq.*) apply to a trust dispute, even if the trust instrument contains a mandatory arbitration provision.

1. Mr. Anderson created a trust for the benefit of two children and the children of another child. After his death, a disagreement arose between one of the children (in her role as trustee) and the others.

2. Citing the unambiguous trust language, the trustee sought to compel arbitration of the dispute, but at least one beneficiary opposed it on the grounds that the trust was not a contract and that she had not agreed to resolve the dispute by arbitration.

    (a) The lower court sided with the beneficiary, and denied the trustee's motion to compel.

3. On appeal, the Supreme Court found that a party cannot be compelled to waive his or her constitutional right to legal redress.

4. Although recognizing Virginia's public policy in favor of arbitration, the court held that the trust was not an "agreement" between the parties to submit their existing dispute, or a "contract" to submit any future controversy, to arbitration (as required by the Virginia statute).

5. Citing the Second Restatement of Trusts, the court concluded, "Trusts are generally conceived as donative instruments," and not as contracts.

    (a) A trust does not require an offer and acceptance; it is only a conveyance of an equitable interest.

    (b) The creation of a trust does not require the exchange of consideration. It is usually in the nature of a gratuitous transfer.

    (c) The duties owed by a trustee to the beneficiary are different than the duties owed by contracting parties.

    (d) A trust divides legal and equitable ownership, unlike a contract.

    (e) The parties to a contract may usually their rights and duties to others, whereas a trustee cannot assign its position or responsibilities.

6. The Supreme Court also concluded that a trust is not an agreement that can be enforced against a beneficiary because there is no mutual assent to their respective rights and duties.

   (a) Although the trustee may be said to have agreed to the trust's terms, the beneficiaries are not parties to it.

Although the court did not address it, the outcome would likely be different if the trust terms require the beneficiaries to accept the arbitration clause as a condition to receiving any benefits under the trust.

B. RECOGNITION OF FOREIGN CERTIFICATE OF HEIRSHIP. Taylor v. Aids-Hilfe Koln e.V., *et al.*, Record No. 210935, 878 S.E.2d 385, 2022 WL 7205747 (October 13, 2022).

This case involved a dispute between a German charity (Aids-Hilfe Koln e.V., or "AHK") and a named transfer-on-death (TOD) beneficiary of a brokerage account in Richmond.

1. The decedent lived in Germany. Upon his death, his German will left his entire estate to AHK. However, almost two years prior to his passing, he had signed a TOD designation naming his nephew (Taylor) and Taylor's wife as the beneficiaries of a brokerage account located in Richmond.

2. AHK first obtained a judgment in Germany recognizing it as the decedent's sole heir.

3. It then asked the Virginia circuit court for summary judgment on its motion to admit the German will to probate, appoint an administrator *c.t.a.* to administer the Virginia estate, declare the TOD designation invalid on the basis of the decedent's alleged incapacity.

   (a) In support of its request to invalidate the TOD designation, AHK invoked the Uniform Foreign-Currency Money Judgments Recognition Act (Va. Code §§ 8.01-465.13:1 *et seq*.), arguing that the German court's determination that AHK was the sole heir of the estate included the brokerage account.

   (b) Taylor demurred, responding, *inter alia*, that the Act did not apply because the German court's "certificate of heirship" did not serve to grant or deny recovery of a sum of money, as required by the statute, and that the court had not, in fact, found the TOD designation to be invalid.

4. The Richmond circuit court overruled Taylor's demurrer and admitted the will to probate, appointed an administrator, recognized the German judgment and awarded the brokerage account to AHK on the basis thereof.

(a) The court apparently based its probate jurisdiction upon the fact that the decedent would have an estate in Richmond if the TOD designation was invalid.

(b) On appeal, the Supreme Court confirmed the lower court's jurisdiction and its finding that AHK's claim to be the sole heir of the Virginia estate was sufficient to qualify it as a "substantial legatee" under the will and therefore it could designate someone to serve as administrator, *c.t.a*.

5. However, on the question of the applicability of the Uniform Foreign-Currency Money Judgments Recognition Act, the Supreme Court sided with Taylor, holding that the German court only declared AHK to be the decedent's heir, which is not the same as granting or denying "recovery of a sum of money."

6. The Supreme Court also agreed that the German court had not determined ownership of the brokerage account and that, as a beneficiary, AHK did not have standing to challenge the TOD designation. It therefore reversed the lower court and entered final judgment in favor of Taylor.

C. RESOLVING TESTATOR'S INTENT. Dagvadorj v. Aljabi, *et al.*, Record No. 210785, 2022 WL 11469898 (October 31, 2022).

While this aid and direction suit does not set new precedent or include an insightful discussion of the law, it does serve as a reminder of the problems internet wills and boilerplate language can cause.

1. At the time of his death, Mr. Gabi was married to the plaintiff. He had two children from a prior marriage. He drafted his own will using a template from an internet site. The will named his brother (Mr. Aljabi) as executor, but the family disputed how the will's provisions should be interpreted.

2. On the one hand, Mr. Gabi's will specifically identified his wife and children, but did not expressly name them as beneficiaries. A boilerplate "general provision" provided that any failure to provide for "one or more of my heirs as named above" was intentional.

3. On the other hand, the paragraph captioned "Distribution of My Estate" failed to identify any specific beneficiary, although it did appear to contemplate multiple beneficiaries. Also, the "Wipeout Provision," which left any "remaining residue of my estate" to a nephew, only applied by its terms if the plaintiff and Mr. Gabi's children and other descendants did not survive him.

4. In "Additional Provisions," Mr. Gabi directed that "[a]ll my properties, assets, bank accounts, 401k, and everything I own will be given to [Aljabi] where he can administer my wishes after my death."

   (a) Mr. Aljabi argued, and the circuit court seems to have agreed, that this provision, together with the lack of any specific mention in the will of the wife or children as beneficiaries, clearly showed Mr. Gabi's intent to leave everything to his brother as the sole beneficiary.

5. The Supreme Court ruled that the terms of Mr. Gabi's will were susceptible to more than one interpretation.

   (a) The "Additional Provisions" leaving all of the decedent's assets to Mr. Aljabi could be seen as creating a trust for eventual distribution to Mr. Gabi's wife and daughters.

   (b) Therefore, while certain language supported the claim that Mr. Gabi intended to disinherit the plaintiff and his children and leave everything to his brother, other language could be read as an attempt to create a trust for their benefit.

6. The case was remanded back to the circuit court for further proceedings to establish the testator's intent and resolve the ambiguity.

D. EFFECT OF VOID BEQUEST. Anderson v. Bowen, *et al.*, Record No. 210798, 2022 WL 17491463 (December 8, 2022).

1. The decedent directed his executor to give a specific number of guns to certain individuals, and then to give "such guns as he deems appropriate to my close friends and family," before selling the rest. The will did not specify how any sale proceeds were to be distributed.

2. The circuit court ruled the language granting the executor the power to give away guns in his discretion to be "void for vagueness," and thus the executor was required to sell all remaining guns This ruling was not challenged on appeal.

3. The circuit court ordered the sale proceeds to be distributed to the same specific beneficiaries who received the other guns.

4. On appeal, however, the Virginia Supreme Court cited Virginia Code § 64.2-416(B) to hold that the proceeds should instead be added to the residuary estate as a result of the will's failure to dispose of them in another manner.

II. COURT OF APPEALS DECISIONS

As of January 1, 2022, all litigants in a civil case have the right to appeal the outcome to the Virginia Court of Appeals. This change will likely result in more appeals than in the past, when an appeal had to be granted by the Virginia Supreme Court.

A. ESTABLISHMENT OF LOST WILL. Glynn, *et al.* v. Kenney, Record No. 0327-22-1, 2023 WL 2575544 (Va. Ct. App., March 21, 2023).

Glynn is the first reported case out of the Court of Appeals that is directly relevant to estate planners. It deals with the requirements to overcome the presumption that a lost will last possessed by the testator was destroyed.

1. After the decedent's death, her executrix filed a bill in equity to probate a copy of her will, which the testatrix had kept at home but which could not be found after her death.

2. The executrix produced evidence to support her claim that the will had been either lost, destroyed by rodents or taken, but not intentionally destroyed by the testatrix. This included:

   (a) Testimony by the decedent's estate planning attorney, whom the decedent had used several times to revise her estate planning documents, most recently within the year before her death;

   (b) The decedent's renewal of her participation a "maintenance plan" with the attorney, whereby she could have her documents amended for free;

   (c) The chaotic condition of the decedent's home, which made finding any documents impossible; and

   (d) Her specific disinheritance in her last will of those (the plaintiffs, her sons) who would take in the absence thereof.

3. The decedent's sons argued that the executrix had failed to overcome the presumption of intentional destruction because she had failed to prove what had happened to the lost will.

4. The Court of Appeals affirmed the circuit court's decision to probate the copy of the will.

   (a) The presumption that a lost will was destroyed if it was last in the testator's possession can be rebutted by proving, by clear and convincing evidence, that there was some other cause for its disappearance, *i.e.,* that the will was not revoked.

(b) The proponent of the will does not have to prove specifically what happened to the will, just that it was not destroyed by the testator with the intention to revoke.

(c) The proponent cannot meet this burden with evidence that is susceptible to equally probable inferences, but she can offer multiple theories of how the will may have come to be lost.

B. NO-CONTEST CLAUSE - GOOD FAITH EXCEPTION. Butler v. Stegmaier, *et al.*, Record No. 0584-22-2, 2023 WL 2655509 (Va. Ct. App., March 28, 2023).

This Court of Appeals case resolves a significant question, namely whether there is a "good faith" exception to the strict enforcement of a no-contest clause in Virginia.

1. Mr. Helton, who was elderly, made three wills, one in 2012, another in 2016 and the final one in 2017.

   (a) The 2012 will left $40,000 to each of his step-grandchildren, including the plaintiff (Butler). It also split the residuary estate between them. At some point in 2012, Mr. Helton's wife died and his neighbors, the Stegmaiers, began to help him

   (b) In 2016, Mr. Helton added Mrs. Stegmaier to certain bank accounts as a joint owner with rights of survivorship, and as a POD beneficiary of others.

   (c) A few months later, he signed his 2016 will, which reduced the grandchildren's gifts to $20,000 each. It also left a small specific bequest to the Stegmaiers, and named Mrs. Stegmaier as the beneficiary of all tangible personal property and the residuary estate.

   (d) A few months after that, Mr. Helton executed the 2017 will, which reduced Butler's gift to $10,000, and added Mrs. Stegmaier's husband and sister as contingent beneficiaries of the residuary estate It also named Mrs. Stegmaier as executor. Lastly, this will included a "no contest" clause revoking the interest of any beneficiary who challenged the validity of the 2017 will or any of its provisions.

2. Eight months after signing the 2017 will, Mr. Helton died. Mrs. Stegmaier probated the 2017 will and qualified as executor.

   (a) Butler unsuccessfully sought, *inter alia*, to (i) impeach the 2017 will and establish the one signed in 2012, and (ii) set aside the POD and joint account designations for the bank accounts.

(b) In response, Mrs. Stegmaier asked the court to find that Butler had violated the no-contest clause.

(c) Butler acknowledged his actions violated the clause, but argued that it should not be held against him because he had acted in good faith and with probable cause. The circuit court did not agree.

3. On appeal, after addressing various procedural and evidentiary challenges, the Virginia Court of Appeals held that, as a matter of law, Virginia did not recognize the "good faith and probable cause" exception to the enforcement of the 2017 no-contest clause.

(a) Citing Womble v. Gunter, 198 Va. 522 (1956), the court reviewed the competing public policies for and against the good faith exception.

(1) On the one hand, there is sound public policy in favor of ascertaining the "true" will (and uncovering fraud, forgery, etc.) by permitting good faith challenges, and not punishing those who seek justice.

(2) On the other hand, it would not be in the public's interest to encourage frequent will contests and the bitter, public family disputes that frequently accompany them. Such contests can also harm the testator's reputation, therefore he or she should be allowed to prevent them.

(b) The court went on to acknowledge that the Restatement (Third) of Property, the Uniform Probate Code and a significant majority of states recognize a good faith exception, while a few other states do not enforce certain types of no-contest clauses. However, it noted that over 60% of those states did so through a statute.

(c) The Court of Appeals concluded that it was properly up to the General Assembly to weigh the competing public policies and decide whether to adopt the good faith exception.

(d) The court also dismissed Butler's claim that English common law established a good faith and probable cause exception, which Virginia was required to follow.

(1) In dicta, the court noted that Virginia Code § 1-200 does adopt English common law to the extent it does not conflict with Virginia law, but that common law and equity were considered to be different bodies of law when § 1-200 was enacted. Therefore, it is not clear whether English equity cases, such as those relied upon by Butler, were covered by the statute.

(2) In any event, the court went on to find that the two cases cited by Butler from 1688 and 1737 were insufficient to establish a good faith and probable cause exception as a long-standing feature of English common law.

(3) The court also noted that the U.S. Supreme Court previously found in *Smithsonian Inst. v. Meech*, 169 U.S. 398, 413-414 (1989), that English common law recognized a probable cause exception if the no-contest clause did not include a gift over to another beneficiary (i.e., it was an empty threat). But most states (including Virginia) no longer distinguish between clauses with a gift-over and those without, and therefore the distinction relied upon in the English cases no longer existed.

III. LEGISLATION ENACTED[1]

A. GUARDIANSHIPS

1. **Privacy Protections**. House Bill 2383 requires the respondent's financial information and any evaluation report to be filed via separate confidential addendum rather than included in any document filed with the court, and restricts who may access the confidential addendum.

   (a) Any petition, pleading, motion, order, report or transcript filed in a guardianship or conservatorship proceeding may not contain any financial information relating to the respondent's resources, such as his or her anticipated annual gross income, other receipts or debts, nor any identifying account numbers. *See* Va. Code § 64.2-2000.1.

   (b) Instead, the information must be provided via a separate confidential addendum filed by the guardian *ad litem* (GAL), an attorney or a party to the proceeding. *Id.*

   (c) The attorney, party or GAL who prepares the filing must ensure that all protected information is removed and that the separate confidential memorandum is incorporated by reference into the filing. *Id.*

   (d) The separate confidential addendum may be distributed as required by law, and otherwise it is to be made available only to the parties, their attorneys, the GAL, the commissioner of accounts (or

[1] Unless otherwise noted, all 2023 legislation becomes effective July 1, 2023.

assistant commissioner of accounts) and such other persons as the court in its discretion may allow for good cause shown. *See id.*

Conforming amendments are made to Virginia Code §§ 64.2-2002(B)(11) (contents of petition) and 64.2-2005(A) (GAL's evaluation report).

2. **Primary Health Care Provider to be Consulted**. House Bill 1860 slightly revises the process for appointing a guardian or conservator to ensure the respondent's health care provider, if any, is involved.

   (a) The petition for the appointment of a guardian and/or conservator must include the name, location and post office address of the respondent's primary health care provider, if any. *See* Va. Code. § 64.2-2002(B)(5a).

      (1) This requirement ensures the health care provider receives notice of the hearing and a copy of the petition and may become a party to the proceeding. *See* Va. Code § 64.2-2004(C), (D).

   (b) The guardian *ad litem* must make a good faith effort to consult directly with the primary health care provider, if any, unless the provider prepared, in whole or in part, the required report evaluating the respondent's condition before the hearing. *See* Va. Code § 64.2-2003(B).

   (c) If the GAL is unable to consult directly with the respondent's primary health care provider, he or she must disclose that fact in his or her report to the court. Va. Code § 64.2-2003(C).

3. **Communications Between Incapacitated Person and Others**. House Bill 2027 establishes procedures for situations where a guardian wishes to restrict communications, visitations or other interactions between the incapacitated person and someone with whom he or she has an established relationship.

   (a) A guardian may reasonably restrict the ability of someone with whom the incapacitated person has an established relationship to communicate, visit or otherwise interact with him or her to prevent harm or financial exploitation, but only after considering the incapacitated person's expressed wishes. Va. Code §§ 64.2-2019(E), 64.2-2019.1(A).

      (1) Any restriction imposed must be the least restrictive possible. *Id.*

   (b) The guardian must notify the restricted person and the incapacitated person in writing of the nature and terms of the

restriction, the reasons why the guardian believes they are necessary and how the restricted person or incapacitated person may challenge them in court. *See* Va. Code § 64.2-2019.1(B).

(1) Notice to the incapacitated person is not required if the guardian believes in good faith that it would be detrimental to his or her health or safety. *Id*.

(2) The guardian must also provide a copy of the notice to the local department of social services and to the circuit court that appointed him or her. *Id*.

(3) Where applicable, the guardian must also notify (but not necessarily provide a copy of the written notice) to the hospital, convalescent home, assisted living facility or similar institution in which the incapacitated person is staying. *Id*.

(c) The court may continue, modify or terminate the restrictions in its discretion. *See* Va. Code § 64.2-2019.1(C), (D).

(1) If the court finds that the guardian imposed, or the restricted person challenged, a restriction in bad faith, primarily for the purposes of harassment, or that was clearly frivolous or vexation, it may award costs and attorney fees to the other side. *See* Va. Code § 64.2-2019.1(E), (F).

(2) A copy of any court order continuing, modifying or terminating the restrictions will be sent to the local department of social services. Va. Code § 64.2-2019.1(G).

(d) All orders appointing a guardian must include a statement of the guardian's duty not to restrict the incapacitated person's ability to interact with others beyond what may be permitted under the § 64.2-2019.1 procedure. The required form and content of the statement may be found in the statute. *See* Va. Code § 64.2-2009(E).

A conforming amendment makes it clear that a guardian may restrict patient visitation pursuant to the above procedures when the incapacitated person is hospitalized, even in the absence of an advance medical directive authorizing the same. *See* Va. Code § 54.1-2986.1.

4. **Guardian's Duty to Visit Incapacitated Person**. A guardian must "maintain sufficient contact with the incapacitated person to know of his capabilities, limitations, needs, and opportunities," and must "visit the

incapacitated person as often as necessary." Va. Code § 64.2-2019(C). House Bill 2028 adds other specific requirements to this general duty.

(a) The guardian must visit with the incapacitated person at least three times per year (i.e., at least once every 120 days). Va. Code § 64.2-2019(C).

(1) At least one of the visits must be conducted by the guardian in person.

i. If a guardian cannot make the required in-person visit for reasons outside of his or her control, the visit may be made in person by a family member or friend monitored by the guardian or a skilled professional retained by the guardian and who is experienced in the care of older or incapacitated adults. Va. Code § 64.2-2019(C)(1).

(2) The second visit must be made by the guardian, but may be conducted in person or remotely via video conference.

(3) The third visit may be conducted, either in person or by video conference, by the guardian, a family member or friend monitored by the guardian, or a skilled professional retained by the guardian and who is experienced in the care of older or incapacitated adults.

(b) If the required in-person visit is not possible, it may be conducted by video conference, if sufficient technology is readily available. *See* Va. Code § 64.2-2019(C)(1), (C)(2).

(c) Where sufficient technology is not readily available, any visit that could otherwise be made by video conference may be conducted via telephone. *See* Va. Code § 64.2-2019(C), (C)(1), (C)(2).

(d) If any visit is conducted by someone other than the guardian, he or she must provide a written report of the visit to the guardian. *See* Va. Code § 64.2-2019(C).

(e) The guardian's annual report to the local department of social services must describe the reasons for any failure to make a visit within a given 120-day period. Va. Code § 64.2-2020(B).

B. DUTY TO DISCLOSE INFORMATION TO GUARDIAN *AD LITEM*

Senate Bill 1144 and House Bill 2063 create and, in some cases, expand the duty to disclose relevant personal and financial information to a court-appointed guardian *ad litem* (GAL).

1. Any individual or entity with information, records or reports relevant to a guardianship or conservatorship proceeding must share the information with the GAL upon request if the GAL determines it necessary to perform his or her duties. Va. Code § 64.2-2003(D).

   (a) The GAL's request must be accompanied by the court order appointing him or her and authorizing the release of the respondent's nonpublic personal information.

   (b) The statute expressly applies to healthcare providers, schools, social services, police (unless the disclosure would impede an ongoing criminal investigation or proceeding), financial institutions, investment advisors and other financial services providers, but is not limited to them.

   (c) The requested information must be provided at no charge, although an invoice may be included for consideration by the court.

2. Financial institutions are also subject to the same duty in the case of any investigation of alleged adult abuse, neglect or exploitation. *See* Va. Code § 6.2-103.1.

   (a) Currently, financial institutions are required only to disclose such information to the local department of social services.

3. In all cases, the duty to disclose is subject to the financial privacy protections found in the Gramm-Leach-Bliley Act (15 U.S.C. § 6801 *et seq*.) and 12 U.S.C. § 3403.

4. Absent gross negligence or willful misconduct, the disclosing party is immune from civil and criminal liability for providing the requested information or records.

C. REPEAL OF DOCTRINE OF NECESSARIES – SPOUSE'S MEDICAL CARE.

House Bill 2343 repeals Virginia Code § 8.01-220.2 (spousal liability for emergency medical care) and amends § 55.1-202 to prevent a spouse from being held liable under the "doctrine of necessaries" for the other spouse's medical care expenses, provided the care was furnished by a physician licensed to practice medicine in Virginia or by a hospital located in the state while the spouses were living together.

1. Prior to the 2023 amendment, § 55.1-202 protected spouses from liability under the doctrine only if the expense was incurred while they were living apart.

2. Medical care expenses furnished outside of Virginia may continue to be subject to the doctrine, subject to governing law.

3. The spouses' principal residence continues to be protected from claims arising under the doctrine if it is (or was at the first spouse's death) titled as tenants by the entireties.

4. *NOTE: At the time of publication, Gov. Youngkin has offered amendments to this bill. The amendments, if accepted, would expand the repeal to include all "health care expenses" (vs. medical care expenses) provided by any person (vs. a physician or hospital in Virginia), but only if "the patient spouse predeceases the nonpatient spouse."*

D. DELIVERY OF SMALL ASSET TO FUNERAL SERVICES PROVIDER

Senate Bill 870 and House Bill 2128 create a procedure under Virginia Code § 64.2-604 by which someone who possesses a small asset belonging to the decedent may be required (rather than merely permitted, as under current law) to pay or deliver to the licensed funeral service establishment handling the disposition of the body so much of the small asset as does not exceed "the amount given priority under § 64.2-528" (currently, $4000), less any amount already paid.

1. The payment must be made at the request of a successor. *See* Va. Code § 64.2-604(A).

2. The licensed funeral services establishment must provide an affidavit stating:

   (a) that it is the licensed funeral service establishment handling the funeral, if there is one, and the disposition of the decedent;

   (b) the legal name and business address of the licensed funeral service establishment;

   (c) the amount given priority by § 64.2-528, or the amount due to it for the funeral, if there is one, and the disposition of the decedent, reduced by any other payments it has received or expects to receive;

   (d) the reasons and supporting evidence that the person to whom the affidavit will be presented is in possession of a small asset belonging to the decedent; and

   (e) that a successor has represented to it in writing that at least 30 days have elapsed since the decedent's death and no application for the appointment of a personal representative is pending, has been granted, or is expected in any jurisdiction. *Id.*

3. If the person holding the small asset refuses to pay or deliver the required amount to the licensed funeral services provider after being presented with the affidavit, it may be recovered, or its payment or delivery compelled, and damages may be recovered, through court. However, no damages may be recovered if the refusal is found to have been in good faith. *See* Va. Code § 64.2-604(B)(2).

4. The person paying or delivering a small asset as required is discharged and released to the same extent as if he or she had dealt with the personal representative, and a receipt of the payee shall be a full and final release of the payor as to the amount paid or delivered. Va. Code § 64.2-604(B)(1).

   (a) The payor is not required to see to the application of the small asset or to inquire into the truth of any statement in the funeral service establishment's affidavit. *Id.*

5. Consistent with the payment or delivery of a small asset to a designated successor by affidavit, the licensed funeral service establishment is answerable and accountable to any personal representative of the decedent's estate, or to any successor having an equal or superior right, for any amount paid or delivered. *See* Va. Code § 64.2-604(C).

6. Might this bill inadvertently give funeral expenses greater priority than currently exists under § 64.2-528?

E. SEIZURE OF NON-PROBATE ASSETS TO PAY FOR DISPOSAL OF UNCLAIMED BODY

In addition to assets included in the decedent's probate estate, House Bill 1817 now permits non-probate assets to be seized for the purpose of paying the costs of disposing of an unclaimed body. Va. Code § 32.1-309.2(E).

F. PARTITION OF REAL PROPERTY

At the recommendation of the Boyd-Graves Conference, House Bill 1755 makes several clarifying changes to Virginia's partition rules.

1. If the court orders partition in kind, Virginia Code § 8.01-81(B) requires it to expressly consider:

   (a) Evidence of the collective duration of ownership or possession of any portion of the property by a party and one or more predecessors in title or predecessors in possession of the property who are or were related to the party;

   (b) A party's sentimental attachment to any portion of the property, including any attachment arising because such portion of the property has ancestral or other unique or special value to the party;

(c) The lawful use being made of any portion of the property by a party and the degree to which the party would be harmed if the party could not continue the same use of such portion of the property;

(d) The degree to which a party has contributed to the physical improvement, maintenance, or upkeep of any portion of the property; and

(e) Any other relevant factor.

2. The cost of any court-ordered appraisal shall be advanced by the plaintiff (and the other parties, in the court's discretion), but will ultimately be borne by all of the owners proportionately. *See* Va. Code § 8.01-81.1(A).

The other amendments made by H.B. 1755 are non-substantive.

G. CONSOLIDATED TAX REPORTING FOR ALL PASS-THROUGH ENTITIES

In 2022, the General Assembly enacted a law permitting certain pass-through entities to elect to pay Virginia income tax at the entity level on behalf of all owners for tax years beginning in 2021 through 2025. *See* Va. Code §§ 58.1-390.1 through 58.1-390.3 (2022).

1. As originally drafted, the election was available only to pass-through entities that were 100% owned by natural persons or, in the case of an S corporation, other eligible S corporation shareholders. *See* Va. Code § 58.1-390.1 (definition of "qualifying pass-through entity).

2. However, as amended in 2023 by Senate Bill 1476 and House Bill 1456, the election is now available to all pass-through entities, regardless of ownership, retroactively effective to January 1, 2021.

   (a) If a pass-through entity makes the election, its tax is calculated by taking into account only the amount of income, gain, loss or deduction allocable to its "eligible owners". *See* Va. Code § 58.1-390.3(B), (C).

   (b) To be an "eligible owner," one must be a natural person, estate or trust that (i) owns a direct interest in the pass-through entity and (ii) is subject to Virginia income tax, whether as a resident or nonresident. *See* Va. Code § 68.1-390.1.

3. Similarly, only eligible owners are entitled to the corresponding Virginia tax credit. *See* Va. Code § 68.1-390.3(E).

4. The changes are retroactive to tax years beginning on and after January 1, 2021.

H. CHARITABLE GAMING

Senate Bill 1235 and House Bill 2125 amend the registration and reporting rules applicable to certain organizations that conduct charitable gaming.

1. An organizations that reasonably expects (based on some quantifiable method) to realize gross receipts of $40,000 or less from charitable gaming other than raffles over no more than seven days per calendar year must register beforehand through a simplified process with the Department of Agriculture and Consumer Services (the "Department"). *See* Va. Code §§ 18.2-340.23(B), 18.2-340.24:1.

    (a) If the organization exceeds the $40,000 threshold, it must obtain a charitable gaming permit under Virginia Code § 18.2-340.25 and file a report of its receipts and disbursements with the Department under Virginia Code § 18.2-340.30. *See* Va. Code § 18.2-340.23(C).

    (b) Under current law, such an organization would have to obtain the permit before it could conduct any charitable games. *See* Va. Code § 18.2-340.25.

2. An organization that reasonably expects (based on some quantifiable method) to realize gross receipts of $40,000 or less from raffles in any 12-month period continues not to need to register, obtain a charitable gaming permit or file any report. Va. Code § 18.2-340.23(A).

    (a) But as with non-raffle activity, the organization must now obtain both a permit and file a report of its receipts and disbursements if it exceeded the $40,000 threshold.

    (b) Currently, only the report would be required if the $40,000 threshold was exceeded. *See* Va. Code § 18.2-340.23(C).

3. The 2023 bill also permits an organization, as part of its annual fundraising event, to sell instant bingo, pull tabs or seal cards during a single public event of no more than seven days per calendar year without registering or obtaining a charitable gaming permit in advance, provided (i) the cards are dispensed by mechanical equipment only and (ii) the organization does not realize actual gross receipts of more than $40,000 from the conduct of all charitable gaming other than raffles on no more than seven days per calendar year. *See* Va. Code § 18.2-340.26:2.

    (a) Under current law, only athletic associations, booster clubs, or band booster clubs may, as part of their annual fundraising event,

sell instant bingo, pull tabs or seal cards. *See* Va. Code § 18.2-340.26:2.

4. Finally, the bill prohibits the Department from exercising its regulatory authority to require an organization that realizes annual gross receipts of $40,000 or less to file a report of its receipts and disbursements. Va. Code § 18.2-340.30(A)(2).

I. TIMELY FILING OF VIRGINIA TAX RETURNS

In light of continued post office delivery delays, House Bill 1927 provides taxpayers with relief in certain cases.

1. Generally, Virginia considers a tax return to have been timely filed, and a tax payment to have been timely made, if the postmark or shipping confirmation shows the return or payment was mailed or shipped on or before midnight on the due date. *See* Va. Code § 58.1-9(A).

2. However, if through no fault of the taxpayer (i) there is no postmark or the postmark is illegible or does not include a date, the return or payment will now be deemed to have been timely filed or made if it is received through the U.S. mail before the close of business on the fifth day following the due date. *See* Va. Code § 58.1-9(A).

3. Additionally, even if the return or payment is not received with the new five-day grace period, there will be no penalty or interest imposed if the taxpayer can show the tax return or payment was timely filed or made by producing a Certificate of Mailing or other proof of mailing. *See id.*

4. Virginia Code § 58.1-3916 provides similar relief in the case of local taxes.

J. ROLLING INCOME TAX CONFORMITY

Since 2003, the General Assembly has decided on an annual basis whether Virginia will conform to the then existing federal tax laws, subject to one or more exceptions ("fixed date conformity"). However, Senate Bill 1405 and House Bill 2193 changes this practice by adopting rolling conformity.

1. Effective July 1, 2023, Virginia will incorporate all changes to federal tax law when made, subject to both the existing enumerated exceptions and two new exceptions. *See* Virginia Code § 58.1-301(B).

2. As amended, Virginia will <u>not</u> conform automatically to any federal amendment enacted on or after January 1, 2023, that:

(a) has a projected impact on Virginia's general fund revenues of more than $15,000,000 in the fiscal year in which the amendment was enacted or any of the succeeding four fiscal years; or

(b) occurs after final adjournment of the General Assembly's previous regular session and the first day of its subsequent regular session, if the cumulative impact of all such amendments would increase or decrease the general fund revenues by more than $75,000,000 in the fiscal year in which the amendment was enacted or any of the succeeding four fiscal years. Va. Code § 58.1-301(B)(11)(a)(1), (2).

3. For any amendment enacted after 2023, the $15,000,000 and $75,000,000 ceilings described above will be adjusted for inflation automatically each year, based on the chained Consumer Price Index for All Urban Consumers (C-CPI-U). *See* Va. Code § 58.1-301(B)(11)(a)(3).

4. The new conformity exceptions do not apply to (i) any federal tax amendment that is subsequently adopted by the General Assembly, (ii) any federal tax extender to which Virginia currently conforms or has previously conformed or (iii) any federal tax amendment or extender enacted outside of the General Assembly's regular session if the $75,000,000 cap has not yet been reached (but the fiscal effect of the amendment or extender will be included when determining whether the threshold has been met). *See* Va. Code § 58.1-301(B)(11)(a)(2).

NOTE: At the time of publication, Gov. Youngkin has offered amendments to this bill. The amendments, if accepted, would clarify that rolling conformity will have no effect on tax years beginning January 1, 2023.

IV. VIRGINIA ACTS OF ASSEMBLY

VIRGINIA ACTS OF ASSEMBLY -- 2023 SESSION

CHAPTER 16

An Act to amend and reenact §§ 64.2-2002 and 64.2-2005 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 64.2-2000.1, relating to guardianship and conservatorship; identifying information; separate confidential addendum.

[H 2383]

Approved March 16, 2023

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.2-2002 and 64.2-2005 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 64.2-2000.1 as follows:

§ 64.2-2000.1. Identifying information; separate confidential addendum.

Any petition, pleading, motion, order, or report filed under this chapter, including any transcripts, shall not contain any financial information relating to the financial resources of the respondent, including the respondent's anticipated annual gross income, other receipts, or debts, nor any other financial information that provides identifying account numbers for any asset, liability, account, or credit card of the respondent. Such information shall be contained in a separate confidential addendum filed by (i) a guardian ad litem appointed pursuant to § 64.2-2003, (ii) an attorney, or (iii) a party.

Such separate confidential addendum shall be used to distribute the information only as required by law. Such addendum shall otherwise be made available only to the parties, including any adult individual or entity that becomes a party by filing a pleading with the circuit court in which the guardianship or conservatorship case is pending; their attorneys; the guardian ad litem appointed pursuant to § 64.2-2003 to represent the respondent; the commissioner of accounts or assistant commissioner of accounts for the circuit court that has jurisdiction over the guardianship or conservatorship; and such other persons as the court in its discretion may allow for good cause shown. The attorney, party, or guardian ad litem who prepares or submits a petition, pleading, motion, order, or report shall ensure that any information protected pursuant to this section is removed prior to filing with the clerk and that any separate confidential addendum is incorporated by reference into the petition, pleading, motion, order, or report.

§ 64.2-2002. Who may file petition; contents.

A. Any person, including a community services board and any other local or state governmental agency, may file a petition for the appointment of a guardian, a conservator, or both.

B. A petition for the appointment of a guardian, a conservator, or both, shall state the petitioner's name, place of residence, post office address, and relationship, if any, to the respondent and, to the extent known as of the date of filing, shall include the following:

1. The respondent's name, date of birth, place of residence or location, post office address, and the sealed filing of the social security number;

2. The basis for the court's jurisdiction under the provisions of Article 2 (§ 64.2-2105 et seq.) of Chapter 21;

3. The names and post office addresses of the respondent's spouse, adult children, parents, and adult siblings or, if no such relatives are known to the petitioner, at least three other known relatives of the respondent, including stepchildren. If a total of three such persons cannot be identified and located, the petitioner shall certify that fact in the petition, and the court shall set forth such finding in the final order;

4. The name, place of residence or location, and post office address of the individual or facility, if any, that is responsible for or has assumed responsibility for the respondent's care or custody;

5. The name, place of residence or location, and post office address of any agent designated under a durable power of attorney or an advance directive of which the respondent is the principal, and any guardian, committee, or conservator currently acting, whether in this state or elsewhere, and the petitioner shall attach a copy of any such durable power of attorney, advance directive, or order appointing the guardian, committee, or conservator, if available;

6. The type of guardianship or conservatorship requested and a brief description of the nature and extent of the respondent's alleged incapacity;

7. When the petition requests appointment of a guardian, a brief description of the services currently being provided for the respondent's health, care, safety, or rehabilitation and, where appropriate, a recommendation as to living arrangements and treatment plan;

8. If the appointment of a limited guardian is requested, the specific areas of protection and assistance to be included in the order of appointment and, if the appointment of a limited conservator is requested, the specific areas of management and assistance to be included in the order of appointment;

9. The name and post office address of any proposed guardian or conservator or any guardian or

conservator nominated by the respondent and that person's relationship to the respondent;

10. The native language of the respondent and any necessary alternative mode of communication;

11. A statement of the financial resources of the respondent that shall, to the extent known, list the approximate value of the respondent's property and the respondent's anticipated annual gross income, other receipts, and debts, *contained in a separate confidential addendum, pursuant to § 64.2-2000.1*;

12. A statement of whether the petitioner believes that the respondent's attendance at the hearing would be detrimental to the respondent's health, care, or safety; and

13. A request for appointment of a guardian ad litem.

§ 64.2-2005. Evaluation report; filed in separate confidential addendum.

A. A report evaluating the condition of the respondent shall be filed~~, under seal,~~ with the court *in a separate confidential addendum* and provided*, within a reasonable time prior to the hearing on the petition,* to the guardian ad litem, the respondent, and ~~all adult individuals and all entities to whom notice is required under subsection C of § 64.2-2004 within a reasonable time prior to the hearing on the petition~~ *any other person or entity that becomes a party to the action*. The report shall be prepared by one or more licensed physicians or psychologists or licensed professionals skilled in the assessment and treatment of the physical or mental conditions of the respondent as alleged in the petition. If a report is not available, the court may proceed to hold the hearing without the report for good cause shown, absent any objection by the guardian ad litem, or may order a report and delay the hearing until the report is prepared, filed, and provided.

B. The report shall evaluate the condition of the respondent and shall contain, to the best information and belief of its signatory:

1. A description of the nature, type, and extent of the respondent's incapacity, including the respondent's specific functional impairments;

2. A diagnosis or assessment of the respondent's mental and physical condition, including a statement as to whether the individual is on any medications that may affect his actions or demeanor, and, where appropriate and consistent with the scope of the evaluator's license, an evaluation of the respondent's ability to learn self-care skills, adaptive behavior, and social skills and a prognosis for improvement;

3. The date or dates of the examinations, evaluations, and assessments upon which the report is based; and

4. The signature of the person conducting the evaluation and the nature of the professional license held by that person.

C. In the absence of bad faith or malicious intent, a person performing the evaluation shall be immune from civil liability for any breach of patient confidentiality made in furtherance of his duties under this section.

D. A report prepared pursuant to this section shall be admissible as evidence in open court of the facts stated in the report and the results of the examination or evaluation referred to in the report, unless counsel for the respondent or the guardian ad litem objects.

VIRGINIA ACTS OF ASSEMBLY -- 2023 SESSION

CHAPTER 176

An Act to amend and reenact §§ 64.2-2002 and 64.2-2003 of the Code of Virginia, relating to guardianship or conservatorship; primary health care provider of respondent.

[H 1860]

Approved March 22, 2023

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.2-2002 and 64.2-2003 of the Code of Virginia are amended and reenacted as follows:

§ 64.2-2002. Who may file petition; contents.

A. Any person, including a community services board and any other local or state governmental agency, may file a petition for the appointment of a guardian, a conservator, or both.

B. A petition for the appointment of a guardian, a conservator, or both, shall state the petitioner's name, place of residence, post office address, and relationship, if any, to the respondent and, to the extent known as of the date of filing, shall include the following:

1. The respondent's name, date of birth, place of residence or location, post office address, and the sealed filing of the social security number;

2. The basis for the court's jurisdiction under the provisions of Article 2 (§ 64.2-2105 et seq.) of Chapter 21;

3. The names and post office addresses of the respondent's spouse, adult children, parents, and adult siblings or, if no such relatives are known to the petitioner, at least three other known relatives of the respondent, including stepchildren. If a total of three such persons cannot be identified and located, the petitioner shall certify that fact in the petition, and the court shall set forth such finding in the final order;

4. The name, place of residence or location, and post office address of the individual or facility, if any, that is responsible for or has assumed responsibility for the respondent's care or custody;

5. The name, place of residence or location, and post office address of any agent designated under a durable power of attorney or an advance directive of which the respondent is the principal, and any guardian, committee, or conservator currently acting, whether in this state or elsewhere, and the petitioner shall attach a copy of any such durable power of attorney, advance directive, or order appointing the guardian, committee, or conservator, if available;

5a. The name, location, and post office address of the respondent's primary health care provider, if any;

6. The type of guardianship or conservatorship requested and a brief description of the nature and extent of the respondent's alleged incapacity;

7. When the petition requests appointment of a guardian, a brief description of the services currently being provided for the respondent's health, care, safety, or rehabilitation and, where appropriate, a recommendation as to living arrangements and treatment plan;

8. If the appointment of a limited guardian is requested, the specific areas of protection and assistance to be included in the order of appointment and, if the appointment of a limited conservator is requested, the specific areas of management and assistance to be included in the order of appointment;

9. The name and post office address of any proposed guardian or conservator or any guardian or conservator nominated by the respondent and that person's relationship to the respondent;

10. The native language of the respondent and any necessary alternative mode of communication;

11. A statement of the financial resources of the respondent that shall, to the extent known, list the approximate value of the respondent's property and the respondent's anticipated annual gross income, other receipts, and debts;

12. A statement of whether the petitioner believes that the respondent's attendance at the hearing would be detrimental to the respondent's health, care, or safety; and

13. A request for appointment of a guardian ad litem.

§ 64.2-2003. Appointment of guardian ad litem.

A. On the filing of every petition for guardianship or conservatorship, the court shall appoint a guardian ad litem to represent the interests of the respondent. The guardian ad litem shall be paid a fee that is fixed by the court to be paid by the petitioner or taxed as costs, as the court directs.

B. Duties of the guardian ad litem include (i) personally visiting the respondent; (ii) advising the respondent of rights pursuant to §§ 64.2-2006 and 64.2-2007 and certifying to the court that the respondent has been so advised; (iii) recommending that legal counsel be appointed for the respondent, pursuant to § 64.2-2006, if the guardian ad litem believes that counsel for the respondent is necessary; (iv) notifying the court as soon as practicable if the respondent requests counsel regardless of whether the guardian ad litem recommends counsel; (v) investigating the petition and evidence, requesting

additional evaluation if necessary, considering whether a less restrictive alternative to guardianship or conservatorship is available, including the use of an advance directive, supported decision-making agreement, or durable power of attorney, and filing a report pursuant to subsection C; ~~and~~ (vi) *making a good faith effort to consult directly with the respondent's primary health care provider, if any, unless the evaluation report required by § 64.2-2005 is prepared in whole or in part by such provider; and (vii)* personally appearing at all court proceedings and conferences. If the respondent is between 17 and a half and 21 years of age and has an Individualized Education Plan (IEP) and transition plan, the guardian ad litem shall review such IEP and transition plan and include the results of his review in the report required by clause (v).

C. In the report required by clause (v) of subsection B, the guardian ad litem shall address the following major areas of concern: (i) whether the court has jurisdiction; (ii) whether a guardian or conservator is needed based on evaluations and reviews conducted pursuant to subsection B; (iii) the extent of the duties and powers of the guardian or conservator; (iv) the propriety and suitability of the person selected as guardian or conservator after consideration of the person's geographic location, familial or other relationship with the respondent, ability to carry out the powers and duties of the office, commitment to promoting the respondent's welfare, any potential conflicts of interests, wishes of the respondent, and recommendations of relatives; (v) a recommendation as to the amount of surety on the conservator's bond, if any; and (vi) consideration of proper residential placement of the respondent. The report shall also contain an explanation by the guardian ad litem as to any (a) decision not to recommend the appointment of counsel for the respondent, (b) determination that a less restrictive alternative to guardianship or conservatorship is not advisable, and (c) determination that appointment of a limited guardian or conservator is not appropriate. *If the guardian ad litem was unable to consult directly with the respondent's primary health care provider, such information shall also be included in such report.*

D. A health care provider and local school division shall disclose or make available to the guardian ad litem, upon request, any information, records, and reports concerning the respondent that the guardian ad litem determines necessary to perform his duties under this section.

VIRGINIA ACTS OF ASSEMBLY -- 2023 SESSION

CHAPTER 460

An Act to amend and reenact §§ 54.1-2986.1, 64.2-2009, and 64.2-2019 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 64.2-2019.1, relating to guardianship; restricted communication procedures.

[H 2027]

Approved March 24, 2023

Be it enacted by the General Assembly of Virginia:

1. That §§ 54.1-2986.1, 64.2-2009, and 64.2-2019 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 64.2-2019.1 as follows:

§ 54.1-2986.1. Duties and authority of agent or person identified in § 54.1-2986.

A. If the declarant appoints an agent in an advance directive, that agent shall have (i) the authority to make health care decisions for the declarant as specified in the advance directive if the declarant is determined to be incapable of making an informed decision and (ii) decision-making priority over any person identified in § 54.1-2986. In no case shall the agent refuse or fail to honor the declarant's wishes in relation to anatomical gifts or organ, tissue or eye donation. Decisions to restrict visitation of the patient may be made by an agent only if the declarant has expressly included provisions for visitation in his advance directive; such visitation decisions shall be subject to physician orders and policies of the institution to which the declarant is admitted. No person authorized to make decisions for a patient under § 54.1-2986 shall have authority to restrict visitation of the patient, *unless such visitation was restricted by a guardian pursuant to the procedures prescribed by § 64.2-2019.1*.

B. Any agent or person authorized to make health care decisions pursuant to this article shall (i) undertake a good faith effort to ascertain the risks and benefits of, and alternatives to any proposed health care, (ii) make a good faith effort to ascertain the religious values, basic values, and previously expressed preferences of the patient, and (iii) to the extent possible, base his decisions on the beliefs, values, and preferences of the patient, or if they are unknown, on the patient's best interests.

§ 64.2-2009. Court order of appointment; limited guardianships and conservatorships.

A. The court's order appointing a guardian or conservator shall (i) state the nature and extent of the person's incapacity; (ii) define the powers and duties of the guardian or conservator so as to permit the incapacitated person to care for himself and manage property to the extent he is capable; (iii) specify whether the appointment of a guardian or conservator is limited to a specified length of time, as the court in its discretion may determine; (iv) specify the legal disabilities, if any, of the person in connection with the finding of incapacity, including but not limited to mental competency for purposes of Article II, § 1 of the Constitution of Virginia or Title 24.2; (v) include any limitations deemed appropriate following consideration of the factors specified in § 64.2-2007; (vi) set the bond of the guardian and the bond and surety, if any, of the conservator; and (vii) where a petition is brought prior to the incapacitated person's eighteenth birthday, pursuant to subsection C of § 64.2-2001, whether the order shall take effect immediately upon entry or on the incapacitated person's eighteenth birthday.

B. The court may appoint a limited guardian for an incapacitated person who is capable of addressing some of the essential requirements for his care for the limited purpose of medical decision making, decisions about place of residency, or other specific decisions regarding his personal affairs. The court may appoint a limited conservator for an incapacitated person who is capable of managing some of his property and financial affairs for limited purposes that are specified in the order.

C. Unless the guardian has a professional relationship with the incapacitated person or is employed by or affiliated with a facility where the person resides, the court's order may authorize the guardian to consent to the admission of the person to a facility pursuant to § 37.2-805.1, upon finding by clear and convincing evidence that (i) the person has severe and persistent mental illness that significantly impairs the person's capacity to exercise judgment or self-control, as confirmed by the evaluation of a licensed psychiatrist; (ii) such condition is unlikely to improve in the foreseeable future; and (iii) the guardian has formulated a plan for providing ongoing treatment of the person's illness in the least restrictive setting suitable for the person's condition.

D. A guardian need not be appointed for a person who has appointed an agent under an advance directive executed in accordance with the provisions of Article 8 (§ 54.1-2981 et seq.) of Chapter 29 of Title 54.1, 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. A guardian need not be appointed for a person where a health care decision is made pursuant to, and within the scope of, the Health Care Decisions Act (§ 54.1-2981 et seq.).

A conservator need not be appointed for a person (i) who has appointed an agent under a durable

power of attorney, unless the court determines pursuant to the Uniform Power of Attorney Act (§ 64.2-1600 et seq.) that the agent is not acting in the best interests of the principal or there is a need for decision making outside the purview of the durable power of attorney or (ii) whose only or major source of income is from the Social Security Administration or other government program and who has a representative payee.

E. All orders appointing a guardian shall include the following statements in conspicuous bold print in at least 14-point type:

"1. Pursuant to § 64.2-2009 of the Code of Virginia, _____ (name of guardian), is hereby appointed as guardian of _____ (name of respondent) with all duties and powers granted to a guardian pursuant to § 64.2-2019 of the Code of Virginia, including but not limited to: (enter a statement of the rights removed and retained, if any, at the time of appointment; whether the appointment of a guardian is a full guardianship, public guardianship pursuant to § 64.2-2010 of the Code of Virginia, limited guardianship pursuant to § 64.2-2009 of the Code of Virginia, or temporary guardianship; and the duration of the appointment).

2. Pursuant to the provisions of subsection E of § 64.2-2019 of the Code of Virginia, a guardian, to the extent possible, shall encourage the incapacitated person to participate in decisions, shall consider the expressed desires and personal values of the incapacitated person to the extent known, and shall not ~~unreasonably~~ restrict an incapacitated person's ability to communicate with, visit, or interact with other persons with whom the incapacitated person has an established relationship, *unless such restriction is reasonable to prevent physical, mental, or emotional harm to or financial exploitation of such incapacitated person and after consideration of the expressed wishes of the incapacitated person. Such restrictions shall only be imposed pursuant to § 64.2-2019.1*.

3. Pursuant to § 64.2-2020 of the Code of Virginia, an annual report shall be filed by the guardian with the local department of social services for the jurisdiction where the incapacitated person resides.

4. Pursuant to § 64.2-2012 of the Code of Virginia, all guardianship orders are subject to petition for restoration of the incapacitated person to capacity; modification of the type of appointment or areas of protection, management, or assistance granted; or termination of the guardianship."

§ 64.2-2019. Duties and powers of guardian.

A. A guardian stands in a fiduciary relationship to the incapacitated person for whom he was appointed guardian and may be held personally liable for a breach of any fiduciary duty to the incapacitated person. A guardian shall not be liable for the acts of the incapacitated person unless the guardian is personally negligent. A guardian shall not be required to expend personal funds on behalf of the incapacitated person.

B. A guardian's duties and authority shall not extend to decisions addressed in a valid advance directive or durable power of attorney previously executed by the incapacitated person. A guardian may seek court authorization to revoke, suspend, or otherwise modify a durable power of attorney, as provided by the Uniform Power of Attorney Act (§ 64.2-1600 et seq.). Notwithstanding the provisions of the Health Care Decisions Act (§ 54.1-2981 et seq.) and in accordance with the procedures of § 64.2-2012, a guardian may seek court authorization to modify the designation of an agent under an advance directive, but the modification shall not in any way affect the incapacitated person's directives concerning the provision or refusal of specific medical treatments or procedures.

C. A guardian shall maintain sufficient contact with the incapacitated person to know of his capabilities, limitations, needs, and opportunities. The guardian shall visit the incapacitated person as often as necessary.

D. A guardian shall be required to seek prior court authorization to change the incapacitated person's residence to another state, to terminate or consent to a termination of the person's parental rights, or to initiate a change in the person's marital status.

E. A guardian shall, to the extent feasible, encourage the incapacitated person to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the incapacitated person to the extent known and shall otherwise act in the incapacitated person's best interest and exercise reasonable care, diligence, and prudence. A guardian shall not ~~unreasonably~~ restrict an incapacitated person's ability to communicate with, visit, or interact with other persons with whom the incapacitated person has an established relationship, *unless such restriction is reasonable to prevent physical, mental, or emotional harm to or financial exploitation of such incapacitated person and after consideration of the expressed wishes of the incapacitated person. Such restrictions shall only be imposed pursuant to § 64.2-2019.1*.

F. A guardian shall have authority to make arrangements for the funeral and disposition of remains, including cremation, interment, entombment, memorialization, inurnment, or scattering of the cremains, or some combination thereof, if the guardian is not aware of any person that has been otherwise designated to make such arrangements as set forth in § 54.1-2825. A guardian shall have authority to make arrangements for the funeral and disposition of remains after the death of an incapacitated person if, after the guardian has made a good faith effort to locate the next of kin of the incapacitated person to determine if the next of kin wishes to make such arrangements, the next of kin does not wish to make

the arrangements or the next of kin cannot be located. Good faith effort shall include contacting the next of kin identified in the petition for appointment of a guardian. The funeral service licensee, funeral service establishment, registered crematory, cemetery, cemetery operator, or guardian shall be immune from civil liability for any act, decision, or omission resulting from acceptance of any dead body for burial, cremation, or other disposition when the provisions of this section are met, unless such acts, decisions, or omissions resulted from bad faith or malicious intent.

§ 64.2-2019.1. Procedures to restrict communication, visitation, or interaction.

A. A guardian may restrict the ability of a person with whom the incapacitated person has an established relationship to communicate with, visit, or interact with such incapacitated person only when such restriction is reasonable to prevent physical, mental, or emotional harm to or financial exploitation of such incapacitated person and after consideration of the expressed wishes of such incapacitated person. Any such restriction may include (i) limitations on time, duration, location, or method of visits or communication, (ii) supervised visitation, or (iii) prohibition of in-person visitation, and shall be the least restrictive means possible to prevent any such harm or exploitation.

B. The guardian shall provide written notice to the restricted person, on a form developed by the Office of the Executive Secretary of the Supreme Court of Virginia, stating (i) the nature and terms of the restriction, (ii) the reasons why the guardian believes the restriction is necessary, and (iii) how the restricted person or incapacitated person may challenge such restriction in court pursuant to § 64.2-2012. The guardian shall also inform the incapacitated person of such restriction and provide a copy of such written notice to the incapacitated person, unless the guardian has a good faith belief that such information would be detrimental to the health or safety of such incapacitated person. The guardian shall provide a copy of such written notice to the local department of social services of the jurisdiction where the incapacitated person resides and shall file a copy of such written notice with the circuit court that appointed the guardian. If the incapacitated person is in a hospital, convalescent home, or certified nursing facility licensed by the Department of Health pursuant to § 32.1-123, an assisted living facility as defined in § 63.2-100, or any other similar institution, the guardian shall also inform such hospital, home, facility, or institution of such restriction.

C. If the court finds that a restriction is reasonable to prevent harm to or financial exploitation of such incapacitated person, the court may continue or modify such restriction in its discretion.

D. If the court does not find that a restriction is reasonable to prevent harm to or financial exploitation of such incapacitated person, the court may issue an order terminating, continuing, or modifying any restriction the guardian imposed on the person challenging such restriction.

E. If the court finds that a guardian imposed a restriction in bad faith, primarily for the purposes of harassment, or that was clearly frivolous or vexatious, the court may require the guardian to pay or reimburse, from the guardian's personal funds, all or some of the costs and fees, including attorney fees, incurred by the restricted person in connection with such motion.

F. If the court finds that the claim of a restricted person who filed a motion pursuant to this section was made in bad faith, was brought primarily for the purposes of harassment, or was clearly frivolous or vexatious, the court may require such restricted person to pay or reimburse the guardian all or some of the costs and fees, including attorney fees, incurred by the guardian in connection with such claim.

G. Any court order issued pursuant to the provisions of this section shall be provided to the local department of social services of the jurisdiction where the incapacitated person resides.

VIRGINIA ACTS OF ASSEMBLY -- 2023 SESSION

CHAPTER 540

An Act to amend and reenact §§ 64.2-2019 and 64.2-2020 of the Code of Virginia, relating to guardianship; duties of guardian; visitation requirements.

[H 2028]

Approved March 26, 2023

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.2-2019 and 64.2-2020 of the Code of Virginia are amended and reenacted as follows:

§ 64.2-2019. Duties and powers of guardian.

A. A guardian stands in a fiduciary relationship to the incapacitated person for whom he was appointed guardian and may be held personally liable for a breach of any fiduciary duty to the incapacitated person. A guardian shall not be liable for the acts of the incapacitated person unless the guardian is personally negligent. A guardian shall not be required to expend personal funds on behalf of the incapacitated person.

B. A guardian's duties and authority shall not extend to decisions addressed in a valid advance directive or durable power of attorney previously executed by the incapacitated person. A guardian may seek court authorization to revoke, suspend, or otherwise modify a durable power of attorney, as provided by the Uniform Power of Attorney Act (§ 64.2-1600 et seq.). Notwithstanding the provisions of the Health Care Decisions Act (§ 54.1-2981 et seq.) and in accordance with the procedures of § 64.2-2012, a guardian may seek court authorization to modify the designation of an agent under an advance directive, but the modification shall not in any way affect the incapacitated person's directives concerning the provision or refusal of specific medical treatments or procedures.

C. A guardian shall maintain sufficient contact with the incapacitated person to know of his capabilities, limitations, needs, and opportunities *and as needed to comply with the duties imposed upon him pursuant to the order of appointment and this section and any other provision of law*. The guardian shall visit the incapacitated person as often as necessary *and at least three times per year, with at least one visit occurring every 120 days. Except as otherwise provided in subsection C1, of the three required visits, at least two visits shall be conducted by the guardian. The guardian shall conduct at least one of such visits in person; the second such visit may be conducted by the guardian via virtual conference or video call between the guardian and incapacitated person, provided that the technological means by which such conference or call can take place are readily available.*

The remaining visit may be conducted (i) by the guardian; (ii) by a person other than the guardian, including (a) a family member or friend monitored by the guardian or (b) a skilled professional retained by the guardian to perform guardianship duties on behalf of the guardian and who is experienced in the care of individuals, including older adults or adults with disabilities; or (iii) via virtual conference or video call between either the guardian or such family member or friend monitored by the guardian or skilled professional and the incapacitated person, provided that the technological means by which such conference or call can take place are readily available. If a person other than the guardian conducts any such visit, he shall provide a written report to the guardian regarding any visit conducted by such person.

A telephone call shall meet the requirements of this subsection only if such technological means are not readily available.

C1. If for reasons outside the guardian's control the guardian cannot make an in-person visit to an incapacitated person, then such visit may be conducted in person by an individual designated by the guardian pursuant to subsection C. If either the guardian or such individual designated by the guardian is unable to conduct an in-person visit, then such visit may be conducted virtually through electronic means such as a virtual conference or video call, or, if such technological means are not readily available, by telephone.

C2. In the event of a state of emergency or public health crisis in which a facility in which the incapacitated person resides is not allowing in-person visitation, visitation requirements required pursuant to subsection C may be met via a virtual conference or video call between the guardian and incapacitated person, to the extent feasible for the facility to provide the technological means by which such conference or call can take place. A telephone call shall meet the requirements of this subsection only if such technological means are not readily available.

D. A guardian shall be required to seek prior court authorization to change the incapacitated person's residence to another state, to terminate or consent to a termination of the person's parental rights, or to initiate a change in the person's marital status.

E. A guardian shall, to the extent feasible, encourage the incapacitated person to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs. A

guardian, in making decisions, shall consider the expressed desires and personal values of the incapacitated person to the extent known and shall otherwise act in the incapacitated person's best interest and exercise reasonable care, diligence, and prudence. A guardian shall not unreasonably restrict an incapacitated person's ability to communicate with, visit, or interact with other persons with whom the incapacitated person has an established relationship.

F. A guardian shall have authority to make arrangements for the funeral and disposition of remains, including cremation, interment, entombment, memorialization, inurnment, or scattering of the cremains, or some combination thereof, if the guardian is not aware of any person that has been otherwise designated to make such arrangements as set forth in § 54.1-2825. A guardian shall have authority to make arrangements for the funeral and disposition of remains after the death of an incapacitated person if, after the guardian has made a good faith effort to locate the next of kin of the incapacitated person to determine if the next of kin wishes to make such arrangements, the next of kin does not wish to make the arrangements or the next of kin cannot be located. Good faith effort shall include contacting the next of kin identified in the petition for appointment of a guardian. The funeral service licensee, funeral service establishment, registered crematory, cemetery, cemetery operator, or guardian shall be immune from civil liability for any act, decision, or omission resulting from acceptance of any dead body for burial, cremation, or other disposition when the provisions of this section are met, unless such acts, decisions, or omissions resulted from bad faith or malicious intent.

§ 64.2-2020. Annual reports by guardians.

A. A guardian shall file an annual report in compliance with the filing deadlines in § 64.2-1305 with the local department of social services for the jurisdiction where the incapacitated person then resides. The annual report shall be on a form prepared by the Office of the Executive Secretary of the Supreme Court and shall be accompanied by a filing fee of $5. To the extent practicable, the annual report shall be formatted in a manner to encourage standardized and detailed responses from guardians. The local department shall retain the fee in the jurisdiction where the fee is collected for use in the provision of services to adults in need of protection. Within 60 days of receipt of the annual report, the local department shall file a copy of the annual report with the clerk of the circuit court that appointed the guardian, to be placed with the court papers pertaining to the guardianship case. Twice each year the local department shall file with the clerk of the circuit court a list of all guardians who are more than 90 days delinquent in filing an annual report as required by this section. If the guardian is also a conservator, a settlement of accounts shall also be filed with the commissioner of accounts as provided in § 64.2-1305.

B. The annual report to the local department of social services shall include:

1. A description of the current mental, physical, and social condition of the incapacitated person, including any change in diagnosis or assessment of any such condition of such incapacitated person by any medical provider since the last report;

2. A description of the incapacitated person's living arrangements during the reported period, including a specific assessment of the adequacy of such living arrangement;

3. The medical, educational, vocational, social, recreational, and any other professional services and activities provided to the incapacitated person and the guardian's opinion as to the adequacy of the incapacitated person's care. The information required by this subdivision shall include (i) the specific names of the medical providers that have treated the incapacitated person and a description of the frequency or number of times the incapacitated person was seen by such providers; (ii) the date and location of and reason for any hospitalization of such incapacitated person; and (iii) a description of the educational, vocational, social, and recreational activities in which such incapacitated person participated;

4. A statement of whether the guardian agrees with the current treatment or habilitation plan;

5. A statement of whether the incapacitated person has been an alleged victim in a report of abuse, neglect, or exploitation made pursuant to Article 2 (§ 63.2-1603 et seq.) of Chapter 16 of Title 63.2, to the extent known, and whether there are any other indications of abuse, neglect, or exploitation of such incapacitated person;

6. A recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship;

7. The name of any persons whose access to communicate, visit, or interact with the incapacitated person has been restricted and the reasons for such restriction;

8. A self-assessment by the guardian as to whether he feels he is able to continue to carry out the powers and duties imposed upon him by § 64.2-2019 and as specified in the court's order of appointment pursuant to § 64.2-2009;

9. Unless the incapacitated person resides with the guardian, a statement of the frequency and nature of any (i) in-person visits from the guardian with the incapacitated person over the course of the previous year and (ii) visits over the course of the previous year from a designee who is directly supervised or contracted by the guardian, including the name of the designee performing such visit. If any visit described in this section is made virtually, the guardian shall include such information in the annual report;

10. If no visit is made within a ~~six-month~~ *120-day* period, the guardian shall describe any challenges

or limitations in completing such visit;

11. A general description of the activities taken on by the guardian for the benefit of the incapacitated person during the past year;

12. Any other information deemed necessary by the Office of the Executive Secretary of the Supreme Court of Virginia or the Department for Aging and Rehabilitative Services to understand the condition, treatment, and well-being of the incapacitated person;

13. Any other information useful in the opinion of the guardian; and

14. The compensation requested and the reasonable and necessary expenses incurred by the guardian.

The guardian shall certify by signing under oath that the information contained in the annual report is true and correct to the best of his knowledge. If a guardian makes a false entry or statement in the annual report, he shall be subject to a civil penalty of not more than $500. Such penalty shall be collected by the attorney for the Commonwealth or the county or city attorney, and the proceeds shall be deposited into the general fund.

C. If the local department of social services files notice that the annual report has not been timely filed in accordance with subsection A with the clerk of the circuit court, the court may issue a summons or rule to show cause why the guardian has failed to file such annual report.

VIRGINIA ACTS OF ASSEMBLY -- 2023 SESSION

CHAPTER 260

An Act to amend and reenact §§ 6.2-103.1 and 64.2-2003 of the Code of Virginia, relating to appointment of guardian ad litem; requested information, records, or reports from an individual or entity.

[H 2063]

Approved March 22, 2023

Be it enacted by the General Assembly of Virginia:

1. That §§ 6.2-103.1 and 64.2-2003 of the Code of Virginia are amended and reenacted as follows:

§ 6.2-103.1. Financial institutions to furnish certain information as part of adult protective services investigation.

Notwithstanding any other provision of law, any financial institution subject to the provisions of this title shall cooperate in any investigation of alleged adult abuse, neglect, or exploitation conducted by a local department of social services pursuant to Chapter 16 (§ 63.2-1600 et seq.) of Title 63.2 and shall make any financial records or information relevant to such investigation available to the local department *and to any court-appointed guardian ad litem for the adult who is the subject of such adult protective services investigation* upon request to the extent allowed under the Gramm-Leach-Bliley Act (15 U.S.C. § 6801 et seq.) and 12 U.S.C. § 3403. *Absent gross negligence or willful misconduct, any financial institution and its staff shall be immune from civil or criminal liability for providing information or records to the local department of social services or to a court-appointed guardian ad litem pursuant to this section.*

§ 64.2-2003. Appointment of guardian ad litem.

A. On the filing of every petition for guardianship or conservatorship, the court shall appoint a guardian ad litem to represent the interests of the respondent. The guardian ad litem shall be paid a fee that is fixed by the court to be paid by the petitioner or taxed as costs, as the court directs.

B. Duties of the guardian ad litem include (i) personally visiting the respondent; (ii) advising the respondent of rights pursuant to §§ 64.2-2006 and 64.2-2007 and certifying to the court that the respondent has been so advised; (iii) recommending that legal counsel be appointed for the respondent, pursuant to § 64.2-2006, if the guardian ad litem believes that counsel for the respondent is necessary; (iv) notifying the court as soon as practicable if the respondent requests counsel regardless of whether the guardian ad litem recommends counsel; (v) investigating the petition and evidence, requesting additional evaluation if necessary, considering whether a less restrictive alternative to guardianship or conservatorship is available, including the use of an advance directive, supported decision-making agreement, or durable power of attorney, and filing a report pursuant to subsection C; and (vi) personally appearing at all court proceedings and conferences. If the respondent is between 17 and a half and 21 years of age and has an Individualized Education Plan (IEP) and transition plan, the guardian ad litem shall review such IEP and transition plan and include the results of his review in the report required by clause (v).

C. In the report required by clause (v) of subsection B, the guardian ad litem shall address the following major areas of concern: (i) whether the court has jurisdiction; (ii) whether a guardian or conservator is needed based on evaluations and reviews conducted pursuant to subsection B; (iii) the extent of the duties and powers of the guardian or conservator; (iv) the propriety and suitability of the person selected as guardian or conservator after consideration of the person's geographic location, familial or other relationship with the respondent, ability to carry out the powers and duties of the office, commitment to promoting the respondent's welfare, any potential conflicts of interests, wishes of the respondent, and recommendations of relatives; (v) a recommendation as to the amount of surety on the conservator's bond, if any; and (vi) consideration of proper residential placement of the respondent. The report shall also contain an explanation by the guardian ad litem as to any (a) decision not to recommend the appointment of counsel for the respondent, (b) determination that a less restrictive alternative to guardianship or conservatorship is not advisable, and (c) determination that appointment of a limited guardian or conservator is not appropriate.

D. ~~A~~ *Any individual or entity with information, records, or reports relevant to a guardianship or conservatorship proceeding, including any (i)* health care provider ~~and~~, local school division, *or local department of social services; (ii) criminal justice agency as that term is defined in § 9.1-101, unless the disclosure of such information, records, or reports would impede an ongoing criminal investigation or proceeding; and (iii) financial institution as that term is defined in § 6.2-100, investment advisor as that term is defined in § 13.1-501, or other financial service provider* shall disclose or make available to the guardian ad litem, upon request, any information, records, and reports concerning the respondent that the guardian ad litem determines necessary to perform his duties under this section *to the extent allowed*

under the Gramm-Leach-Bliley Act (15 U.S.C. § 6801 et seq.) and 12 U.S.C. § 3403. The request from the guardian ad litem shall be accompanied by a copy of the court order (a) appointing the guardian ad litem for the respondent and (b) that allows the release of the respondent's nonpublic personal information to the guardian ad litem. All such information, records, and reports shall be provided to the guardian ad litem at no charge. Disclosures, records, and reports can be provided in electronic form to the guardian ad litem and may be accompanied by a statement of expenses or an invoice, which shall be filed with the report of the guardian ad litem to be considered by the court when awarding costs among the parties pursuant to § 64.2-2008. Absent gross negligence or willful misconduct, the person or entity making disclosures, and their staff, shall be immune from civil or criminal liability for providing information or records to a court-appointed guardian ad litem pursuant to this section.

VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act to amend and reenact § 55.1-202 of the Code of Virginia and to repeal § 8.01-220.2 of the Code of Virginia, relating to mutual liability for necessaries; furnishing of medical care.

[H 2343]

Approved

Be it enacted by the General Assembly of Virginia:

1. That § 55.1-202 of the Code of Virginia is amended and reenacted as follows:

§ 55.1-202. Spouse not responsible for other spouse's contracts, etc.; mutual liability for necessaries; exception; responsibility of personal representative.

Except as otherwise provided in this section, 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. The doctrine of necessaries 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. *For the purposes of this section, liability shall not be imposed upon one spouse for medical care furnished to the other spouse by a physician licensed to practice medicine in the Commonwealth or by a hospital located in the Commonwealth while the spouses are living together.* No lien arising out of a judgment under this section shall attach to the judgment debtors' principal residence held by them as tenants by the entirety or that was held by them as tenants by the entirety prior to the death of either spouse where the tenancy terminated as a result of the death of either spouse.

2. That § 8.01-220.2 of the Code of Virginia is repealed.

2023 SESSION
(HB2343)

GOVERNOR'S RECOMMENDATION

1. Line 15, enrolled, after *for*

strike

medical

insert

health

2. Line 15, enrolled, after *the*

strike

the remainder of line 15 and through *together* on line 16

insert

patient spouse who predeceases the nonpatient spouse

VIRGINIA ACTS OF ASSEMBLY -- 2023 SESSION

CHAPTER 494

An Act to amend and reenact § 64.2-604 of the Code of Virginia, relating to Virginia Small Estate Act; funeral expenses and disposition.

[H 2128]

Approved March 24, 2023

Be it enacted by the General Assembly of Virginia:

1. That § 64.2-604 of the Code of Virginia is amended and reenacted as follows:

§ 64.2-604. Payment or delivery of small asset; funeral expenses and disposition.

~~Thirty~~ *A. Notwithstanding the provisions of this article, 30* days after the death of a decedent upon whose estate there shall have been no application for the appointment of a personal representative pending or granted in any jurisdiction, any person ~~holding~~ *having possession of* a small asset belonging to the decedent ~~may~~ *shall*, at the request of a successor, pay or deliver *to the licensed funeral service establishment handling the funeral, if there is one, and the disposition of the decedent* so much of the small asset as does not exceed the amount given priority by § 64.2-528 ~~to the undertaker or mortuary handling the funeral of the decedent, and a receipt of the payee shall be a full and final release of the payor as to such sum~~ *and has not already been so paid upon being presented an affidavit made by the licensed funeral service establishment, at the request of a successor, stating:*

1. That it is the licensed funeral service establishment handling the funeral, if there is one, and the disposition of the decedent;

2. The legal name and business address of the licensed funeral service establishment;

3. The amount given priority by § 64.2-528, or the amount due to it for the funeral, if there is one, and the disposition of the decedent reduced by any other payments it has received or expects to receive;

4. The reasons and supporting evidence that the person to whom the affidavit will be presented is in possession of a small asset belonging to the decedent; and

5. That a successor has represented to it in writing that at least 30 days have elapsed since the decedent's death and no application for the appointment of a personal representative is pending, has been granted, or is expected in any jurisdiction.

B. 1. Any person paying or delivering a small asset pursuant to this section is discharged and released to the same extent as if that person dealt with the personal representative of the decedent and a receipt of the payee shall be a full and final release of the payor as to such sum. Such person is not required to see the application of the small asset or to inquire into the truth of any statement in any affidavit presented pursuant to subsection A.

2. If any person to whom an affidavit is presented pursuant to subsection A refuses to pay or deliver any small asset belonging to the decedent of which he is in possession pursuant to this section, it may be recovered, or its payment or delivery compelled, and damages may be recovered, on proof of rightful claim in a proceeding brought for that purpose by or on behalf of the licensed funeral service establishment. However, no such damages may be recovered if it is established in such proceeding that the refusal to pay or deliver the small asset was made in good faith.

C. Any licensed funeral service establishment to whom payment or delivery of a small asset has been made under this section is answerable and accountable therefor to any personal representative of the decedent's estate or to any successor having an equal or superior right.

VIRGINIA ACTS OF ASSEMBLY -- 2023 SESSION

CHAPTER 486

An Act to amend and reenact § 32.1-309.2 of the Code of Virginia, relating to disposition of unclaimed bodies; how disposition expenses paid; seizure of assets.

[H 1817]

Approved March 24, 2023

Be it enacted by the General Assembly of Virginia:

1. That § 32.1-309.2 of the Code of Virginia is amended and reenacted as follows:

§ 32.1-309.2. Disposition of unclaimed dead body; how expenses paid.

A. In any case in which (i) the primary law-enforcement agency of the county or city in which the person or institution having initial custody of the dead body of the decedent is located or the county or city in which the decedent resided, as may be appropriate pursuant to § 32.1-309.1, is unable to identify and notify the next of kin of the decedent or other person authorized by law to make arrangements for disposition of the decedent's remains within 10 days of the date of contact by the person or institution having initial custody of the dead body despite good faith efforts to do so or (ii) the next of kin of the decedent or other person authorized by law to make arrangements for disposition of the decedent's remains fails or refuses to claim the body within 10 days of receipt of notice of the decedent's death, the primary law-enforcement agency shall notify (a) the attorney for the county or city in which the decedent resided at the time of death, if known, or (b) if the decedent's county or city of residence at the time of death is not known, the attorney for the county or city in which the person or institution having initial custody of the dead body is located or, if there is no county or city attorney, the attorney for the Commonwealth in such county or city, and such attorney shall forthwith and without delay request an order to be entered by the court within one business day of receiving such request authorizing the person or institution having initial custody of the dead body to transfer custody of the body to a funeral service establishment for final disposition. Such request shall contain transportation and disposition instructions for the unclaimed dead body. Upon entry of a final order for disposition of the dead body, the person or institution having initial custody of the body shall transfer custody of the body to a funeral service establishment, which shall take possession of the dead body for disposition in accordance with the provisions of such order. In such final order, the court may direct the clerk to forthwith provide a copy of the final order to the attorney who has submitted the request for a final order authorizing the person or institution having initial custody of the dead body to transfer custody of the dead body to a funeral service establishment for final disposition in accordance with this subsection. Except as provided in subsection B or C, the reasonable expenses of disposition of the body shall be borne (1) by the county or city in which the decedent resided at the time of death if the decedent was a resident of Virginia or (2) by the county or city where death occurred if the decedent was not a resident of Virginia or the location of the decedent's residence cannot reasonably be determined. However, no such expenses shall be paid by such county or city until allowed by an appropriate court in such county or city.

B. In the case of a person who has been received into the state corrections system and died prior to his release, whose body is unclaimed, the Department of Corrections shall accept the body for proper disposition and shall bear the reasonable expenses for cremation or other disposition of the body. In the case of a person who has been received into the state corrections system and died prior to his release and whose claimant is financially unable to pay reasonable expenses of disposition, the expenses shall be borne by the county or city where the claimant resides.

C. In the case of a person who has been committed to the custody of the Department of Behavioral Health and Developmental Services and died prior to his release, whose body is unclaimed, the Department of Behavioral Health and Developmental Services shall bear the reasonable expenses for cremation or other disposition of the body. In the case of a person who has been committed to the custody of the Department of Behavioral Health and Developmental Services and died prior to his release and whose claimant is financially unable to pay reasonable expenses of disposition, the expenses shall be borne by the county or city where the claimant resides.

D. Any person or institution having initial custody of a dead body may enter into an agreement with a local funeral service establishment whereby the funeral service establishment shall take possession of the dead body for the purpose of storing the dead body during such time as the person or institution having initial custody of the body or the primary local law-enforcement agency is engaged in identifying the decedent, attempting to identify and contact the next of kin of the decedent, and making arrangements for the final disposition of the body in accordance with this section, provided that at all times during which the funeral service establishment is providing storage of the body, the person or institution having initial custody of the dead body shall continue to have legal custody of the body until

such time as custody is transferred in accordance with this chapter.

E. In cases in which a decedent whose remains are disposed of in accordance with this section has an estate out of which disposition expenses may be paid, in whole or in part, *or the decedent has any nonprobate assets listed in § 64.2-620 out of which disposition expenses may be paid*, such assets shall be seized for such purpose.

F. No dead body that is the subject of an investigation pursuant to § 32.1-283 or autopsy pursuant to § 32.1-285 shall be transferred for purposes of disposition until such investigation or autopsy has been completed.

G. Any sheriff or primary law-enforcement officer, county, city, health care provider, funeral service establishment, or funeral service licensee; the Department of Corrections; or any other person or institution that acts in accordance with the requirements of this chapter shall be immune from civil liability for any act, decision, or omission resulting from acceptance and disposition of the dead body in accordance with this section, unless such act, decision, or omission resulted from bad faith or malicious intent.

H. Nothing in this section shall prevent a law-enforcement agency other than the primary law-enforcement agency from performing the duties established by this section if so requested by the primary law-enforcement agency and agreed to by the other law-enforcement agency.

CHAPTER 333

An Act to amend and reenact §§ 8.01-81, 8.01-81.1, 8.01-83.3, and 8.01-92 of the Code of Virginia, relating to partition of property.

[H 1755]

Approved March 23, 2023

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-81, 8.01-81.1, 8.01-83.3, and 8.01-92 of the Code of Virginia are amended and reenacted as follows:

§ 8.01-81. Who may compel partition of land; jurisdiction; validation of certain partitions of mineral rights; when shares of two or more laid off together.

A. Tenants in common, joint tenants, executors with the power to sell, and coparceners of real property, including mineral rights east and south of the Clinch River, shall be compellable to make partition and may compel partition, but in the case of an executor only if the power of sale is properly exercisable at that time under the circumstances; and a lien creditor or any owner of undivided estate in real estate may also compel partition for the purpose of subjecting the estate of his debtor or the rents and profits thereof to the satisfaction of his lien. Any court having general equity jurisdiction ~~shall have~~ *has* jurisdiction in cases of partition, and in the exercise of such jurisdiction, shall order partition in kind if the real property in question is susceptible to a practicable division and may take cognizance of all questions of law affecting the legal title that may arise in any proceedings, between such tenants in common, joint tenants, executors with the power to sell, coparceners, and lien creditors.

Any two or more of the parties, if they so elect, may have their shares laid off together when partition can be conveniently made in that way. If the court orders partition in kind, the court may require that one or more parties pay one or more parties' amounts so that the payments, taken together with the court-determined value of the in-kind distributions to the parties, will make the partition in kind just and proportionate in value to the fractional interests held. If the court orders partition in kind, the court shall allocate to the parties that are unknown, unlocatable, or the subject of a default judgment a part of the property representing the combined interests of such parties as determined by the court, and such part of the property shall remain undivided.

B. If the court orders partition in kind, it shall consider:

1. Evidence of the collective duration of ownership or possession of any portion of the property by a party and one or more predecessors in title or predecessors in possession of the property who are or were related to the party;

2. A party's sentimental attachment to any portion of the property, including any attachment arising because such portion of the property has ancestral or other unique or special value to the party;

3. The lawful use being made of any portion of the property by a party and the degree to which the party would be harmed if the party could not continue the same use of such portion of the property;

4. The degree to which a party has contributed to the physical improvement, maintenance, or upkeep of any portion of the property; and

5. Any other relevant factor.

C. All partitions of mineral rights heretofore had are hereby validated.

D. Unless displaced by a provision of this article, the established principles of Virginia partition law supplement this article.

§ 8.01-81.1. Determination of value.

A. Except as otherwise provided in subsections B and C, the court in every partition action shall order an appraisal pursuant to subsection D, and such appraisal shall inform the court's determination of fair market value under subsection F. The expense of the appraisal shall be *advanced by the plaintiff, and such other parties as the court may determine in its discretion, and* taxed as costs *so that such expenses will be shared by the parties to the extent of their respective interest in the property*.

B. If all parties have agreed to the value of the property or to another method of valuation, the court shall adopt such value or the value produced by the agreed-upon method of valuation.

C. If the court determines that the evidentiary value of an appraisal is outweighed by the cost of the appraisal, the court, after an evidentiary hearing, shall enter an order to determine the fair market value for the property.

D. If the court orders an appraisal, the court shall appoint a disinterested real estate appraiser licensed in the Commonwealth to assist the court in determining the fair market value of the property assuming sole ownership of the fee simple estate. Upon completion of the appraisal, the appraiser shall file a sworn or verified appraisal with the court and shall, within three business days of such filing, mail a notice of filing to all counsel of record stating:

1. The appraised fair market value of the property;

2. That the appraisal is available at the clerk's office; and

3. That a party may file with the court an objection to the appraisal not later than 30 days after the notice is sent, stating the grounds for the objection.

E. If an appraisal is filed with the court pursuant to subsection D, the court shall conduct a hearing to determine the fair market value of the property not sooner than 31 days after a copy of the notice of the appraisal is sent to each party under subsection D, whether or not an objection to the appraisal is filed under subdivision D 3. In addition to the court-ordered appraisal, the court may consider any other evidence of value offered by a party, *which may include the opinions of other appraisers retained by a party*.

F. After a hearing under subsection E, but before considering the merits of the partition action, the court shall enter an order determining the fair market value of the property.

§ 8.01-83.3. Commissioners.

If the court appoints commissioners pursuant to Article 11 (§ 8.01-96 et seq.), each commissioner, in addition to the requirements and disqualifications applicable to commissioners in Article 11, shall be disinterested and impartial and not a party to or participant in the action*; however, any counsel for a party may serve as a commissioner unless there is an objection by another party*.

§ 8.01-92. Allowance of attorney fees out of unrepresented shares.

In any partition suit when there are unrepresented shares, the court shall allow reasonable fees to the attorney or attorneys bringing the action on account of the services rendered to the parceners unrepresented by counsel *of record*.

VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act to amend and reenact §§ 58.1-390.1 and 58.1-390.3 of the Code of Virginia, relating to income tax; pass-through entities.

[H 1456]

Approved

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-390.1 and 58.1-390.3 of the Code of Virginia are amended and reenacted as follows:

§ 58.1-390.1. Definitions.

The following words and terms, when used in this article, shall have the following meanings unless the context clearly indicates otherwise:

"Eligible owner" means a direct owner of a pass-through entity who is a natural person subject to the tax imposed by Article 2 (§ 58.1-320 et seq.) or an estate or trust subject to the tax imposed by Article 6 (§ 58.1-360 et seq.).

"Owner" means any individual or entity who is treated as a partner, member, or shareholder of a pass-through entity for federal income tax purposes.

"Pass-through entity" means any entity, including a limited partnership, a limited liability partnership, a general partnership, a limited liability company, a professional limited liability company, a business trust, or a Subchapter S corporation, that is recognized as a separate entity for federal income tax purposes, in which the partners, members, or shareholders report their share of the income, gains, losses, deductions, and credits from the entity on their federal income tax returns or make the election and pay the tax levied pursuant to § 58.1-390.3.

~~"Qualifying pass-through entity" means a pass-through entity that is 100 percent owned by natural persons or, in the case of a Subchapter S corporation, 100 percent owned by natural persons or other persons eligible to be shareholders in an S corporation.~~

§ 58.1-390.3. Elective income tax on pass-through entities.

A. 1. For taxable years beginning on and after January 1, 2021, but before January 1, 2022, a ~~qualifying~~ pass-through entity may make an election, in a format and according to such requirements and procedures to be established by the Department, to pay the tax levied by this section at the entity level for the taxable year. Such election shall be made on or before a date to be determined by the Department, which shall be set no earlier than one year after the extended due date for filing the applicable return. Notwithstanding §§ 58.1-1812 and 58.1-1833, no interest shall accrue on underpayments or overpayments solely attributable to such election.

2. For taxable years beginning on and after January 1, 2022, but before January 1, 2026, a ~~qualifying~~ pass-through entity may make an annual election, on its timely filed return pursuant to § 58.1-392, to pay the tax levied by this section at the entity level for the taxable period covered by such return. Such election shall be made on or before the due date for filing the applicable return, including any extensions that have been granted.

B. A tax at the rate of 5.75 percent is hereby annually imposed on the Virginia taxable income, as calculated pursuant to § 58.1-391 *but taking into account only the pro rata or distributive share of each item of income, gain, loss, or deduction attributable to eligible owners*, for each taxable year of every ~~qualifying~~ pass-through entity that makes the election provided under subsection A.

C. *In computing the tax imposed by this section, the pro rata or distributive share of the Virginia taxable income of each nonresident eligible owner shall be limited to income that is attributable to Virginia sources and shall be subject to the modifications to income as described in §§ 58.1-322.01 through 58.1-322.04.*

D. A ~~qualifying~~ pass-through entity that elects to pay the tax levied by subsection B shall be eligible for all credits, deductions, or other adjustments to taxable income under § 58.1-391, provided that a ~~qualifying~~ pass-through entity's taxable income shall be adjusted to eliminate any federal deduction for state and local income taxes.

~~D.~~ *E.* Any person that is subject to the tax imposed under § 58.1-320 or 58.1-360 and is an *eligible* owner of a ~~qualifying~~ pass-through entity making the election pursuant to this section shall be entitled to a credit against the tax imposed, provided that taxable income has been adjusted to add back any deduction for state and local income taxes paid by the ~~qualifying~~ pass-through entity. Such credit shall be in an amount equal to such person's pro rata share of the tax paid under this section by any ~~qualifying~~ pass-through entity of which such person is an owner. If the amount of the credit allowed

pursuant to this subsection exceeds such person's tax liability for the tax imposed under § 58.1-320 or 58.1-360, as applicable, such excess shall be treated as an overpayment and refundable pursuant to § 58.1-499.

~~E.~~ *F.* If any ~~qualifying~~ pass-through entity makes an election pursuant to this section, the Department shall assess and collect tax, interest, and penalties as if such tax is a corporate income tax imposed pursuant to the provisions of Article 10 (§ 58.1-400 et seq.).

~~F.~~ *G.* The Department shall develop and make publicly available guidelines implementing the provisions of this section and the credit authorized by subdivision C 2 of § 58.1-332.

2. That the provisions of this act shall apply only to taxable years beginning on and after January 1, 2021.

CHAPTER 592

An Act to amend and reenact §§ 18.2-340.23, 18.2-340.26:2, 18.2-340.30, and 18.2-340.36 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 18.2-340.24:1, relating to charitable gaming; exemptions from certain requirements for specified organizations.

[H 2125]

Approved March 26, 2023

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-340.23, 18.2-340.26:2, 18.2-340.30, and 18.2-340.36 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 18.2-340.24:1 as follows:

§ 18.2-340.23. Organizations exempt from certain fees and reports.

A. No organization that reasonably expects, ~~based~~ on *the basis of* prior charitable gaming annual results or any other quantifiable method, to realize gross receipts of $40,000 or less in any 12-month period from raffles conducted in accordance with the provisions of this article shall be required to (i) notify the Department of its intention to conduct raffles or (ii) comply with Department regulations governing raffles. ~~If any organization's actual gross receipts from raffles for the 12-month period exceed $40,000, the Department shall require the organization to file by a specified date the report required by § 18.2-340.30.~~

B. *Any organization that reasonably expects, on the basis of prior charitable gaming annual results or any other quantifiable method, to realize gross receipts of $40,000 or less from all charitable gaming other than raffles on a total of no more than seven days per calendar year shall be required to register with the Department pursuant to the provisions of § 18.2-340.24:1.*

C. If any organization's actual gross receipts from raffles for the 12-month period exceed $40,000 as described in subsection A or actual gross receipts from all charitable gaming other than raffles conducted on a total of no more than seven days per calendar year exceed $40,000 as described in subsection B, the Department shall require the organization to obtain a permit pursuant to the provisions of § 18.2-340.25 and file by a specified date the report required by § 18.2-340.30.

D. Any (i) organization described in subdivision 15 of the definition of "organization" in § 18.2-340.16 or (ii) volunteer fire department or volunteer emergency medical services agency or auxiliary unit thereof that has been recognized in accordance with § 15.2-955 by an ordinance or resolution of the political subdivision where the volunteer fire department or volunteer emergency medical services agency is located as being part of the safety program of such political subdivision shall be exempt from the payment of application fees required by § 18.2-340.25 and the payment of audit fees required by § 18.2-340.31. Any such organization, department, agency, or unit that conducts electronic gaming shall be subject to such application fees and audit fees for its electronic gaming activities; however, in accordance with the provisions of § 18.2-340.31, any audit fees may be paid by either the organization or the electronic gaming manufacturer whose electronic gaming devices are present on the premises of the organization, department, agency, or unit. Nothing in this subsection shall be construed as exempting any organizations described in subdivision 15 of the definition of "organization" in § 18.2-340.16, volunteer fire departments, or volunteer emergency medical services agencies from any other provisions of this article or other Department regulations.

~~C.~~ *E.* Nothing in this section shall prevent the Department from conducting any investigation or audit it deems appropriate to ensure an organization's compliance with the provisions of this article and, to the extent applicable, Department regulations.

§ 18.2-340.24:1. Registration requirements; certain organizations.

A. Any organization seeking to conduct charitable gaming in accordance with subsection B of § 18.2-340.23 shall first register with the Department on a form prescribed by the Department. The Department shall only require the organization to provide (i) proof of the organization's nonprofit status; (ii) contact information for the chief executive officer of the organization or his designee; (iii) the location, dates, and times of any expected charitable gaming activity; (iv) a description of the general nature of the anticipated charitable gaming activity; and (v) a signed attestation that the organization (a) does not reasonably expect to realize more than $40,000 in gross receipts on a total of no more than seven days per calendar year for the charitable gaming activities listed on the registration form, (b) understands that should the organization exceed the $40,000 threshold, it will be required to file the report in accordance with § 18.2-340.30, and (c) understands it shall be required to comply with the provisions of this article and Department regulations.

B. Any organization that registers with the Department pursuant to this section is subject to random audits of its charitable gaming activities by the Department and is subject to the penalties specified in

§§ 18.2-340.36 and 18.2-340.37 for gross violations of this article.

C. The Department may deny, suspend, or revoke the registration of any organization found not to be in compliance with the provisions of this article and Department regulations. The action of the Department in denying, suspending, or revoking any registration shall be subject to the Administrative Process Act (§ 2.2-4000 et seq.).

D. Any person aggrieved by the denial, suspension, or revocation of a registration or any other action of the Department may seek review of such action in accordance with Article 5 (§ 2.2-4025 et seq.) of the Administrative Process Act.

§ 18.2-340.26:2. Sale of instant bingo, pull tabs, or seal cards dispensed by mechanical equipment.

As a part of its annual ~~fund-raising~~ *fundraising* event, any qualified organization ~~that is an athletic association or booster club or a band booster club~~ may sell instant bingo, pull tabs, or seal cards, provided that (i) *any such instant bingo, pull tabs, or seal cards are dispensed by mechanical equipment only; (ii)* the sale *of the same* is limited to a single event ~~in a~~ *of no more than seven days per* calendar year ~~and (ii) the~~*; (iii) any such* event is open to the public*; and (iv) no such organization realizes actual gross receipts of more than $40,000 from the conduct of all charitable gaming other than raffles on a total of no more than seven days per calendar year. Notwithstanding the provisions of § 18.2-340.28, an organization authorized under this section shall not be required to sell such instant bingo, pull tabs, or seal cards at such times designated in the permit for regular bingo games or at a location at which the organization is authorized to conduct regular bingo games pursuant to subsections E and F of § 18.2-340.27. If any organization's actual gross receipts from the sale of instant bingo, pull tabs, or seal cards pursuant to this section exceed $40,000, the Department shall require the organization to obtain a permit pursuant to the provisions of § 18.2-340.25 and file by a specified date the report required by § 18.2-340.30.* The Department may require organizations authorized under this section to make such financial reporting as it deems necessary.

Nothing in this section shall be construed as exempting organizations authorized to sell instant bingo, pull tabs, or seal cards under this section from any other provisions of this article or other Department regulations.

§ 18.2-340.30. Reports of gross receipts, electronic gaming adjusted gross receipts, and disbursements required; form of reports; failure to file.

A. 1. Each qualified organization shall keep a complete record of all:

a. Inventory of charitable gaming supplies purchased.

b. Receipts from its charitable gaming operation, including a breakdown of receipts attributable to each type of game offered.

c. Electronic gaming adjusted gross receipts.

d. Disbursements related to charitable gaming and electronic gaming operations, including a breakdown of disbursements for each purpose specified in subdivision 1 of § 18.2-340.33.

2. Except as provided in §§ 18.2-340.23 and 18.2-340.30:2, each qualified organization shall file under penalty of perjury and at least annually, on a form prescribed by the Department, a report of all receipts and disbursements specified in subdivision 1, the amount of money on hand attributable to charitable gaming as of the end of the period covered by the report, and any other information related to its charitable gaming operation that the Department may require. In addition, the Commissioner, by regulation, may require any qualified organization*, except any qualified organization that realizes annual gross receipts of $40,000 or less,* whose net receipts exceed a specified amount during any three-month period to file a report of its receipts and disbursements for such period. All reports filed pursuant to this section shall be a matter of public record.

B. All reports required by this section shall be filed on or before the date prescribed by the Department. The Commissioner, by regulation, shall establish a schedule of late fees to be assessed for any organization that fails to submit required reports by the due date.

C. Except as provided in § 18.2-340.23, each qualified organization shall designate or compensate an outside individual or group who shall be responsible for filing an annual, and, if required, quarterly, financial report if the organization goes out of business or otherwise ceases to conduct charitable gaming activities. The Department shall require such reports as it deems necessary until all proceeds of any charitable gaming have been used for the purposes specified in § 18.2-340.19 or have been disbursed in a manner approved by the Department.

D. Each qualified organization shall maintain for three years a complete written record of (i) all charitable gaming sessions using Department prescribed forms or reasonable facsimiles thereof approved by the Department; (ii) the name and address of each individual to whom is awarded any charitable gaming prize or jackpot that meets or exceeds the requirements of Internal Revenue Service Publication 3079, as well as the amount of the award; and (iii) an itemized record of all receipts and disbursements, including operating costs and use of proceeds incurred in operating bingo games.

E. The failure to file reports within 30 days of the time such reports are due shall cause the automatic revocation of the permit, and no organization shall conduct any bingo game or raffle thereafter until the report is properly filed and a new permit is obtained. However, the Department may

grant an extension of time for filing such reports for a period not to exceed 45 days if requested by an organization, provided the organization requests an extension within 15 days of the time such reports are due and all projected fees are paid. For the term of any such extension, the organization's permit shall not be automatically revoked, such organization may continue to conduct charitable gaming, or electronic gaming if authorized to do so pursuant to the provisions of this article, and no new permit shall be required.

F. For purposes of this section, the requirement to file a report shall also include the payment of any applicable fees required to accompany such report.

§ 18.2-340.36. Suspension of permit and registration.

A. When any officer charged with the enforcement of the charitable gaming laws of the Commonwealth has reasonable cause to believe that the conduct of charitable gaming is being conducted by an organization in violation of this article or Department regulations, he may apply to any judge, magistrate, or other person having authority to issue criminal warrants for the immediate suspension of the permit *or registration* of the organization conducting ~~the bingo game or raffle~~ *charitable gaming*. If the judge, magistrate, or person to whom such application is presented is satisfied that probable cause exists to suspend the permit *or registration*, he shall suspend the permit *or registration*. Immediately upon such suspension, the officer shall notify the organization in writing of such suspension.

B. Written notice specifying the particular basis for the immediate suspension shall be provided by the officer to the organization within one business day of the suspension and a hearing held thereon by the Department or its designated hearing officer within 10 days of the suspension unless the organization consents to a later date. No charitable gaming shall be conducted by the organization until the suspension has been lifted by the Department or a court of competent jurisdiction.

VIRGINIA ACTS OF ASSEMBLY -- 2023 SESSION

CHAPTER 163

An Act to amend and reenact §§ 58.1-9 and 58.1-3916 of the Code of Virginia, relating to filing of tax returns or payment of taxes by mail.

[H 1927]

Approved March 22, 2023

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-9 and 58.1-3916 of the Code of Virginia are amended and reenacted as follows:

§ 58.1-9. Filing of tax returns or payment of taxes by mail or otherwise; penalty.

A. When remittance of a tax return or a tax payment is made by mail or by means of a recognized commercial delivery service, receipt of such return or payment by the person with whom such return is required to be filed or to whom such payment is required to be made, in a sealed envelope or container bearing a postmark or a confirmation of shipment on or before midnight of the day such return is required to be filed or such payment made without penalty or interest, shall constitute filing and payment as if such return had been filed or such payment made before the close of business on the last day on which such return may be filed or such tax may be paid without penalty or interest. *However, if through no fault of the taxpayer (i) no such postmark is affixed or (ii) the postmark affixed by the United States Postal Service is illegible or bears no date, such remittance of a tax return or a tax payment shall be deemed to have been timely if received through the United States mail no later than five days following the time of the close of business on the last day on which such return may be filed or such tax may be paid without penalty or interest. Additionally, no penalty or interest shall be imposed if a taxpayer provides evidence that remittance of a tax return or a tax payment was timely by producing a United States Postal Service Certificate of Mailing, or other proof of mailing, showing such return was filed or such payment was made before the close of business on the last day such return may be filed or such tax may be paid without penalty or interest.*

B. When remittance of a tax payment is made by electronic funds transfer, receipt of funds available for withdrawal, in a bank account designated to receive such payments by the person to whom such payment is required to be made, on or before midnight of the day such payment is required to be made without penalty or interest, shall constitute payment as if such payment had been made before the close of business on the last day on which such tax may be paid without penalty or interest.

C. Notwithstanding any provision of law, the Tax Commissioner may allow the electronic filing of any state tax return, statement or document. For purposes of this subsection, the Tax Commissioner may determine alternative methods for the signing, subscribing or verifying of a state tax return, statement or document that shall have the same validity and consequences as the actual signing by the taxpayer. The Tax Commissioner may prescribe methods of execution, recording, reproduction and certification of electronically filed information pursuant § 59.1-496.

The Tax Commissioner shall devise a method by which a taxpayer will only receive bulletins, publications, or other information provided by the Department electronically upon request.

D. If an income tax return preparer prepared 100 or more individual income tax returns for a taxable year that began on or after January 1, 2004, or 50 or more such returns for a taxable year that began on or after January 1, 2010, then for every taxable year thereafter, all individual income tax returns for taxable years prepared by that income tax return preparer shall be filed using electronic means. If an individual tax return shall be accompanied by attachments or schedules that cannot be accepted through electronic means, the income tax preparer shall file the return using software that produces a two dimensional barcode using 2D technology reflecting information contained in the return in a standard format as prescribed by the Tax Commissioner. This subsection shall not apply to an individual income tax return for a taxpayer who has indicated that he does not want his individual income tax return filed using electronic means or 2D technology.

The Tax Commissioner shall have the authority to waive the requirement to file by electronic means upon finding that the requirement would cause an undue hardship. The income tax return preparer otherwise required to file individual income tax returns using electronic means shall request in writing the waiver from the Tax Commissioner and clearly demonstrate the nature of the undue hardship. The Tax Commissioner shall respond to the income tax return preparer within 45 days after receiving the request for waiver.

For purposes of this subsection, "income tax return preparer" means a person who prepares, or employs one or more individuals to prepare, an income tax return for compensation. Preparation of a substantial portion of an individual income tax return shall be deemed preparation of the entire individual income tax return for purposes of this section.

For purposes of this subsection, "income tax return preparer" ~~shall~~ *does* not include volunteers who

prepare tax returns for the elderly or poor as part of a nonprofit organization's program.

§ 58.1-3916. Counties, cities and towns may provide dates for filing returns, set penalties, interest, etc.

Notwithstanding provisions contained in §§ 58.1-3518, 58.1-3900, 58.1-3913, 58.1-3915, and 58.1-3918, the governing body of any county, city, or town may provide by ordinance the time for filing local license applications and annual returns of taxable tangible personal property, machinery and tools, and merchants' capital. The governing body may also by ordinance establish due dates for the payment of local taxes; may provide that payment be made in a single installment or in two equal installments; may offer options, which may include coupon books and payroll deductions, which allow the taxpayer to determine whether to pay the tangible personal property tax through monthly, bimonthly, quarterly, or semiannual installments or in a lump sum, provided such taxes are paid in full by the final due date; may provide by ordinance penalties for failure to file such applications and returns and for nonpayment in time; may provide for payment of interest on delinquent taxes; and may provide for the recovery of reasonable attorney's or collection agency's fees actually contracted for, not to exceed 20 percent of the delinquent taxes and other charges so collected. A locality that provides for payment of interest on delinquent taxes shall provide for interest at the same rate on overpayments due to erroneously assessed taxes to be paid to the taxpayer, provided that no interest shall be required to be paid on such refund if (i) the amount of the refund is $10 or less or (ii) the refund is the result of proration pursuant to § 58.1-3516. A court that finds that an overpayment of local taxes has been made in an action brought pursuant to § 58.1-3984 shall award interest at the appropriate rate, notwithstanding the failure of the locality to conform its ordinance to the requirements of this section.

Notwithstanding any contrary provision of law, the local governing body shall allow an automatic extension on real property taxes imposed upon a primary residence and personal property taxes imposed upon a qualifying vehicle, as defined in § 58.1-3523, owed by members of the armed services of the United States deployed outside of the United States. Such extension shall end and the taxes shall be due 90 days following the completion of such member's deployment. For purposes of this section, "the armed services of the United States" includes active duty service with the regular Armed Forces of the United States or the National Guard or other reserve component.

No tax assessment or tax bill shall be deemed delinquent and subject to the collection procedures prescribed herein during the pendency of any administrative appeal under § 58.1-3980, so long as the appeal is filed within 90 days of the date of the assessment, and for 30 days after the date of the final determination of the appeal, provided that nothing in this paragraph shall be construed to preclude the assessment or refund, following the final determination of such appeal, of such interest as otherwise may be provided by general law as to that portion of a tax bill that has remained unpaid or was overpaid during the pendency of such appeal and is determined in such appeal to be properly due and owing.

Interest may commence not earlier than the first day following the day such taxes are due by ordinance to be filed, at a rate not to exceed 10 percent per year. The governing body may impose interest at a rate not to exceed the rate of interest established pursuant to § 6621 of the Internal Revenue Code of 1954, as amended, or 10 percent annually, whichever is greater, for the second and subsequent years of delinquency. No penalty for failure to pay a tax or installment shall exceed (i) 10 percent of the tax past due on such property; (ii) in the case of delinquent tangible personal property tax more than 30 days past due on property classified pursuant to subdivision A 15, A 16, or A 20 of § 58.1-3506, which remains unpaid after 10 days' written notice sent by United States mail to the taxpayer of the intention to impose a penalty pursuant hereto, the penalty shall not exceed an amount equal to the difference between the tax due and owing with respect to such property and the tax that would have been due and owing if the property in question had been classified as general tangible personal property pursuant to § 58.1-3503; (iii) in the case of delinquent tangible personal property tax more than 30 days past due, 25 percent of the tax past due on such tangible personal property; (iv) in the case of delinquent remittance of excise taxes on meals, lodging, or admissions collected from consumers, 10 percent for the first month the taxes are past due, and five percent for each month thereafter, up to a maximum of 25 percent of the taxes collected but not remitted; or (v) $10, whichever is greater, provided, however, that the penalty shall in no case exceed the amount of the tax assessable. No penalty for failure to file a return shall be greater than 10 percent of the tax assessable on such return or $10, whichever is greater; provided, however, that the penalty shall in no case exceed the amount of the tax assessable. The assessment of such penalty shall not be deemed a defense to any criminal prosecution for failing to make return of taxable property as may be required by law or ordinance. Penalty for failure to file an application or return may be assessed on the day after such return or application is due; penalty for failure to pay any tax may be assessed on the day after the first installment is due. Any such penalty when so assessed shall become a part of the tax.

No penalty for failure to pay any tax shall be imposed for any assessment made later than two weeks prior to the day on which the taxes are due, if such assessment is made thereafter through the fault of a local official, and if such assessment is paid within two weeks after the notice thereof is mailed.

In the event a transfer of real property ownership occurs after January 1 of a tax year and a real estate tax bill has been mailed pursuant to §§ 58.1-3281 and 58.1-3912, the treasurer or other

appropriate local official designated by ordinance of the local governing body in jurisdictions not having a treasurer, upon ascertaining that a property transfer has occurred, may invalidate a bill sent to the prior owner and reissue the bill to the new owner as permitted by § 58.1-3912, and no penalty for failure to pay any tax for any such assessment shall be imposed if the tax is paid within two weeks after the notice thereof is mailed.

Penalty and interest for failure to file a return or to pay a tax shall not be imposed if such failure was not the fault of the taxpayer, or was the fault of the commissioner of *the* revenue ~~or~~, the treasurer, *or the United States Postal Service when no postmark is properly affixed or if the postmark affixed by the United States Postal Service is illegible or bears no date, and the return or payment is received through the United States mail no later than five days following the time of the close of business on the last day on which such return may be filed or such tax may be paid without penalty or interest,* as the case may be. *No such penalty and interest shall be imposed if a taxpayer provides evidence that a tax return filing or a tax payment was timely by producing a United States Postal Service Certificate of Mailing, or other proof of mailing, showing such return was filed or such payment was made before the close of business on the last day such return may be filed or such tax may be paid without penalty or interest.* The failure to file a return or to pay a tax due to the death of the taxpayer or a medically determinable physical or mental impairment on the date the return or tax is due shall be presumptive proof of lack of fault on the taxpayer's part, provided the return is filed or the taxes are paid within 30 days of the due date; however, if there is a committee, legal guardian, conservator or other fiduciary handling the individual's affairs, such return shall be filed or such taxes paid within 120 days after the fiduciary qualifies or begins to act on behalf of the taxpayer. Interest on such taxes shall accrue until paid in full. Any such fiduciary shall, on behalf of the taxpayer, by the due date, file any required returns and pay any taxes that come due after the 120-day period. The treasurer shall make determinations of fault relating exclusively to failure to pay a tax, and the commissioner of the revenue shall make determinations of fault relating exclusively to failure to file a return. In jurisdictions not having a treasurer or commissioner of the revenue, the governing body may delegate to the appropriate local tax officials the responsibility to make the determination of fault.

The governing body may further provide by resolution for reasonable extensions of time, not to exceed 90 days, for the payment of real estate and personal property taxes and for filing returns on tangible personal property, machinery and tools, and merchants' capital, and the business, professional, and occupational license tax, whenever good cause exists. The official granting such extension shall keep a record of every such extension. If any taxpayer who has been granted an extension of time for filing his return fails to file his return within the extended time, his case shall be treated the same as if no extension had been granted.

This section shall be the sole authority for local ordinances setting due dates of local taxes and penalty and interest thereon~~,~~ and shall supersede the provisions of any charter or special act.

VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act to amend and reenact § 58.1-301 of the Code of Virginia, relating to income tax; rolling conformity; report.

[H 2193]

Approved

Be it enacted by the General Assembly of Virginia:

1. That § 58.1-301 of the Code of Virginia is amended and reenacted as follows:

§ 58.1-301. Conformity to Internal Revenue Code.

A. Any term used in this chapter shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required.

B. Any reference in this chapter to the laws of the United States relating to federal income taxes shall mean the provisions of the Internal Revenue Code of 1954, and amendments thereto, and other provisions of the laws of the United States relating to federal income taxes~~, as they existed on December 31, 2021~~, except for:

1. The special depreciation allowance for certain property provided for under §§ 168(k), 168(l), 168(m), 1400L, and 1400N of the Internal Revenue Code;

2. The carry-back of certain net operating losses for five years under § 172(b)(1)(H) of the Internal Revenue Code;

3. The original issue discount on applicable high yield discount obligations under § 163(e)(5)(F) of the Internal Revenue Code;

4. The deferral of certain income under § 108(i) of the Internal Revenue Code. For Virginia income tax purposes, income from the discharge of indebtedness in connection with the reacquisition of an "applicable debt instrument" (as defined under § 108(i) of the Internal Revenue Code) reacquired in the taxable year shall be fully included in the taxpayer's Virginia taxable income for the taxable year, unless the taxpayer elects to include such income in the taxpayer's Virginia taxable income ratably over a three-taxable-year period beginning with taxable year 2009 for transactions completed in taxable year 2009, or over a three-taxable-year period beginning with taxable year 2010 for transactions completed in taxable year 2010 on or before April 21, 2010. For purposes of such election, all other provisions of § 108(i) of the Internal Revenue Code shall apply mutatis mutandis. No other deferral shall be allowed for income from the discharge of indebtedness in connection with the reacquisition of an "applicable debt instrument";

5. For taxable years beginning on and after January 1, 2019, the suspension of the overall limitation on itemized deductions under § 68(f) of the Internal Revenue Code;

6. For taxable years beginning on and after January 1, 2017, but before January 1, 2018, and for taxable years beginning on and after January 1, 2019, the 7.5 percent of federal adjusted gross income threshold set forth in § 213(a) of the Internal Revenue Code that is used for purposes of computing the deduction allowed for expenses for medical care pursuant to § 213 of the Internal Revenue Code. For such taxable years, the threshold utilized for Virginia income tax purposes to compute the deduction allowed for expenses for medical care pursuant to § 213 of the Internal Revenue Code shall be 10 percent of federal adjusted gross income;

7. The provisions of §§ 2303(a) and 2303(b) of the federal Coronavirus Aid, Relief, and Economic Security Act, P.L. 116-136 (2020), related to the net operating loss limitation and carryback;

8. The provisions of § 2304(a) of the federal Coronavirus Aid, Relief, and Economic Security Act, P.L. 116-136 (2020), related to a loss limitation applicable to taxpayers other than corporations;

9. The provisions of § 2306 of the federal Coronavirus Aid, Relief, and Economic Security Act, P.L. 116-136 (2020), related to the limitation on business interest; ~~and~~

10. For taxable years beginning before January 1, 2021, the provisions of §§ 276(a), 276(b)(2), 276(b)(3), 278(a)(2), 278(a)(3), 278(b)(2), 278(b)(3), 278(c)(2), 278(c)(3), 278(d)(2), and 278(d)(3) of the federal Consolidated Appropriations Act, P.L. 116-260 (2020), and §§ 9673(2), 9673(3), 9672(2), and 9672(3) of the federal American Rescue Plan Act, P.L. 117-2 (2021) related to deductions, tax attributes, and basis increases for certain loan forgiveness and other business financial assistance*; and*

11. a. (1) Any amendment enacted on or after January 1, 2023, with a projected impact that would increase or decrease general fund revenues by greater than $15 million in the fiscal year in which the amendment was enacted or any of the succeeding four fiscal years. The provisions of this subdivision shall not apply to any amendment to federal income tax law that is either subsequently adopted by the

General Assembly or a federal tax extender as defined in subdivision b.

(2) All amendments enacted on or after January 1, 2023, and occurring between adjournment sine die of the previous regular session of the General Assembly and the first day of the subsequent regular session of the General Assembly if the cumulative projected impact of such amendments would increase or decrease general fund revenues by greater than $75 million in the fiscal year in which the amendments were enacted or any of the succeeding four fiscal years. The provisions of this subdivision shall not apply to any amendment to federal income tax law that is (i) subsequently adopted by the General Assembly, (ii) a federal tax extender as defined in subdivision b, or (iii) enacted before the date on which the cumulative projected impact is met. However, any amendment conformed to pursuant to clause (iii) shall be included in the calculation of the $75 million threshold for purposes of determining whether such threshold has been met.

(3) Beginning January 1, 2024, the threshold provided by subdivision (1) shall be adjusted annually based on the preceding change in the Chained Consumer Price Index for All Urban Consumers (C-CPI-U), as published by the Bureau of Labor Statistics for the U.S. Department of Labor or any successor index for the previous year.

b. For purposes of this subdivision 11, "amendment" means a single amendment to federal income tax law or a group of such amendments enacted in the same act of Congress that collectively surpass the threshold impact, and "federal tax extender" means an amendment to federal tax law that extends the expiration date of a federal tax provision to which Virginia conforms or has previously conformed.

c. The Secretary of Finance, in consultation with the Chairmen of the Senate Committee on Finance and Appropriations and the House Committees on Appropriations and Finance, shall be responsible for determining whether the criteria of subdivision a are met.

d. The Secretary of Finance shall annually provide a report on or before November 15 of each year on the fiscal impact of amendments to federal income tax law occurring since the adjournment sine die of the preceding regular session of the General Assembly to the Chairmen of the Senate Committee on Finance and Appropriations and the House Committees on Appropriations and Finance. The Secretary of Finance shall also provide updates to the same Chairmen on any further amendments to federal income tax law occurring between submission of the required report and the first day of the subsequent regular session of the General Assembly.

C. The Department of Taxation is hereby authorized to develop procedures or guidelines for implementation of the provisions of this section, which procedures or guidelines shall be exempt from the provisions of the Administrative Process Act (§ 2.2-4000 et seq.).

2023 SESSION
(HB2193)

GOVERNOR'S RECOMMENDATION

1. Line 2, enrolled, Title, after *Virginia*

insert

and to amend Chapter 1 of the Acts of Assembly of 2023 by adding a fourth enactment

2. After line 88, enrolled

insert

2. That the provisions of this act shall apply to taxable years beginning on and after January 1, 2023.

3. That Chapter 1 of the Acts of Assembly of 2023 is amended by adding a fourth enactment as follows:

4. That the provisions of the first enactment of this act shall apply only to taxable years beginning on or after January 1, 2022, but before January 1, 2023.