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**MEMORANDUM**

**QUESTIONS PRESENTED**

1. Can devisees of land contaminated with pollutants be held liable for clean-up costs under CERCLA where they accept the devise?

**Conclusion**

The federal courts deciding this issue have held with seeming unanimity that devisees of contaminated property are not "responsible parties" under CERCLA liability criteria. As long as devisees or heirs did not actively participate in the contaminating activity, they will not be held to be responsible parties. Were the legatees to disclaim their interest in the land, under Virginia law, they would be treated legally as if they never received it.

A handful of cases have extended CERCLA clean-up liability to the estates of "responsible persons." In the present case, the Testator was formerly a partner-owner and operator of the facility, and so he is likely a "responsible person," and CERCLA may be able to reach his estate assets. Liability would be limited to the value of the estate, unless the executors or beneficiaries were themselves "responsible persons" under

CERCLA.

Executors can be held liable where they exhibit ownership above bare legal title to estate assets. Here, presumably, executors who are also beneficiaries of the estate hold both legal and equitable title to those assets. Ordinarily, executor liability will be limited to the assets of the estate unless the executor is found to have been personally involved in causing the wrongdoing during estate administration, in which case an executor may be held personally liable as well.

While the devisees in the present action would seemingly be shielded from CERCLA liability under the "innocent owner" defense, it should be noted that there are a handful of cases interpreting the statutory language of this defense which indicate that "innocent owners" may lose their CERCLA liability immunity if they fail to take adequate steps to prevent leakage of contaminants from storage containers already on-site when they took ownership, or where the existing contamination passively migrates into neighboring property or water features.

2. Can the devisees in the present action avoid liability under CERCLA for the potential clean-up costs of the landfill site if they disclaim their testamentary interest in it? If so, what constitutes a valid disclaimer under Virginia law, and what would happen to the landfill property?

### **Conclusion**

Valid disclaimer under Virginia law would treat the devisees in the present action as if they predeceased the testator, following the legal fiction that no beneficial title ever vested in them pursuant to the devise in the will. To be effective, a valid disclaimer must

(1) be in writing; (2) declare the disclaimer; (3) describe the interest disclaimed; (4) be signed; and (5) be delivered to the personal representative of the estate. A valid disclaimer becomes irrevocable upon delivery.

If the devisees of the contaminated property disclaim their interest, the property would fall into the residual estate, unless the will expressly named alternate takers, or unless the antilapse statute applied. If all antilapse and residuary takers also disclaimed their interest in the property, then the property would descend according to the course of intestate succession. If all potential intestate takers disclaimed as well, then the property would escheat to the Commonwealth of Virginia. It should be noted that, by statute, the estate can be held liable for any environmental clean-up costs incurred by the Commonwealth of Virginia.

## **DISCUSSION OF AUTHORITY**

### **I. CERCLA Liability Generally.**

Recipients of contaminated property through testamentary transfer have to consider their potential liability as owners of the property under federal and state environmental clean-up statutes, as well as under state common-law liability through the doctrines of nuisance or trespass.

The federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675, is a sweeping statute which imposes strict joint and several liability for hazardous-waste clean-up on former and current owners of contaminated property, often regardless of actual involvement in the polluting activities. CERCLA's broad reach was intended to combat the difficulty in

determining individual culpability regarding often clandestine releases of pollutants, and to spread the substantial costs associated with contaminated-site clean-up among as many potentially responsible persons as possible.

Under CERCLA, four classes of "responsible persons" may be held liable for the costs of cleaning up contaminated real estate: (1) current owners and operators of a facility; (2) owners or operators at the time of contamination; (3) any party that arranges to dispose of or treat the pollutants; and (4) any person who accepts such hazardous substances for transport for disposal or treatment. 42 U.S.C. § 9607(a). Responsible persons are liable for all clean-up costs incurred by federal and state governments or third parties, loss of natural resources, assessments of related health impact, and interest on the above liabilities. 42 U.S.C. § 9607(a)(4)(A)-(D).

An "owner" under § 9601(20)(A) is defined as "any person owning . . . such facility." Ownership is indicated by possession of title to the facility, excluding lenders who hold title solely as a security interest. 42 U.S.C. § 9601(20)(E)(i). "Mere ownership of the property on which the release took place is sufficient to impose liability . . . , regardless of any control or lack of control over the disposal activities." *United States v. A&N Cleaners & Launderers, Inc.*, 788 F. Supp. 1317, 1332 (S.D.N.Y. 1992), *overruled on other grounds by Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 327 (2d Cir. 2000).

Even nontitleholders may be deemed liable under CERCLA if they exercised control or authority over the facility. According to § 9607(a)(2), an "operator" is defined as any person who "operated a facility at the time of disposal." The term "operator" has been construed broadly by most courts, following the "well-settled rule that operator

liability only attaches where a person had *authority to control* the cause of the contamination at the time the hazardous substances were released into the environment." *Kaiser Aluminum v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341-42 (9th Cir. 1992) (emphasis added); *Nurad, Inc. v. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir. 1992); *Castlerock Estates, Inc. v. Estate of Markham*, 871 F. Supp. 360, 368 (N.D. Cal. 1994). In the instant case, there is no allegation that the devisees had any involvement with the company prior to the devise of the realty from the estate, so they cannot be deemed "operators" under CERCLA.

The CERCLA statute does not explicitly include devisees of land or legatees of personalty in its definitions of "responsible persons," except in reference to a potential defense to liability: the innocent landowner defense.

## **II. CERCLA Liability Regarding Devisees And Intestate Heirs Of Contaminated Property.**

### **A. Liability for Past Contamination.**

The innocent landowner defense is elaborated under §§ 9607(b)(3) and 9601(35). Under this doctrine, otherwise potentially liable persons can escape liability if they can show, by a preponderance of the evidence, that they acquired the property *after the date of discharge* of contaminants, and (1) the contamination occurred solely due to the acts or omissions of third parties who were not agents or employees of the defendants (the purported innocent landowners), (2) the acts or omissions of the third party did not arise through a contractual relationship with the defendants, (3) defendants exercised due care regarding the release of contaminants, and (4) defendants took precautions against the foreseeable acts or omissions by those third parties, or the foreseeable consequences of those acts and omissions. 42 U.S.C. § 9607(b)(3). "Contractual relationship" by definition does *NOT* include acquisition of a "facility by inheritance or bequest." 42 U.S.C. § 9601(35)(A)(iii).

Examining the legislative history of this CERCLA provision, the Supreme Court of Connecticut observed that the innocent landowner defense was "intended to protect people who have the ownership of polluted property involuntarily thrust upon them, *such as those who inherit property.*" *Starr v. Comm'r of Env'tl. Prot.*, 675 A.2d 430, 438 (Conn. 1996) (emphasis added). Even where a land transfer by will necessitated a transfer of stock to the devisee as well, the court in *Starr* held that the innocent landowner defense applied because the beneficiary had "acquired the property [solely] through the decedent's estate." *Id.* at 440. In the case at bar, the contaminated land itself

was transferred by testamentary devise, so there is no need to discuss shareholder liability further.

A number of federal and state court opinions have upheld the application of the innocent owner defense in the context of the testamentary devise or intestate succession of contaminated realty. *See, e.g., Witco Corp. v. Beekhuis*, 38 F.3d 682, 689 (3d Cir. 1994) ("Under the 'innocent landowner defense,' a person who inherits contaminated property thereby becoming an owner and a potentially responsible party under CERCLA, is entitled to assert the innocent landowner defense and escapes liability."); *Taylor Farm LLC v. Viacom, Inc.*, 234 F. Supp. 2d 950, 966 (S.D. Ind. 2002) ("CERCLA does not consider a transfer 'by inheritance or bequest' to be the type of land transfer that requires a new analysis under [the innocent owner defense]."); *Illinois v. Grigoleit Co.*, 104 F. Supp. 2d 967, 982 (C.D. Ill. 2000) ("This court therefore concludes that, because [the] estate was distributed and closed long ago, any assets received by the [beneficiaries] are not subject to the imposition of a trust for the purpose of satisfying [the testator's] environmental liabilities under CERCLA."); *Norfolk S. Ry. v. Shulimson Bros. Co.*, 1 F. Supp. 2d 553, 558 (W.D.N.C. 1998) ("[F]ully distributed and closed estates whose beneficiaries have not been involved in the activities which gave rise to the CERCLA liability by any method other than inheritance are not subject to liability under the statute."); *Chesapeake & Potomac Tel. Co. of Va. v. Peck Iron & Metal Co.*, 814 F. Supp. 1285, 1292 (E.D. Va. 1993) ("Fully disseminated and closed estates, whose beneficiaries do not remain involved in the decedent's activities which gave rise to CERCLA liability—except by virtue of the inheritance—are not covered under CERCLA and are not subject to liability."); *United States v. Pac. Hide & Fur Depot, Inc.*, 716 F. Supp. 1341,

1349 (D. Idaho 1989) (holding that owner who took land through inheritance with no involvement of contaminating activities of prior owner, and with no knowledge of the discharge until the EPA action, was an innocent owner under 42 U.S.C. § 9601(35)(A)).

Thus, it is likely that should the devisees in the present action accept their testamentary gift of the realty, they will be immune (at least initially) from CERCLA liability. However, there is a troubling lack of precedent interpreting precisely what liability innocent owners may face if existing contaminants continue to leak after they assume ownership, or where they fail to control the migration of existing pollution onto neighboring property or into the water table.

#### **B. Liability for Continuing or Future Contamination.**

Unfortunately, the issue of owner-by-inheritance liability for such continuing releases of existing contaminants on a parcel has not been developed in the existing case law, though the relevant authority strongly suggests that owners by inheritance may be held liable as potentially responsible parties for the passive release of existing contaminants onto the inherited land, or neighboring land or water.

The language of the statutory defense shielding innocent owners from CERCLA liability contains important conditional language, potentially transforming initially innocent owners into responsible persons. While innocent owners do not assume CERCLA liability due to the actions or omissions of third parties, a defendant only maintains innocent owner status so long as he or she establishes by a preponderance of the evidence that

(a) he *exercised due care* with respect to the hazardous substance

concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he *took precautions against foreseeable acts or omissions* of any such third party and the *consequences* that could foreseeably result from such acts or omissions[.]

42 U.S.C. § 9607(b)(3) (emphasis added).

The Sixth Circuit Court of Appeals, in construing the language of the statutory innocent owner defense in the context of inherited property, made a distinction between "disposal" of contaminants, and the "release" of them, suggesting that the passive entry of existing contaminants, disposed on the land by prior owners, after possession of the property was assumed by owners through inheritance potentially left these presumptive innocent owners liable for CERCLA clean-up costs:

CERCLA defines "release" as follows: "The term 'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)." 42 U.S.C. § 9601(22). Therefore, to prevail in their assertion of the "innocent landowner" defense, the Bohatys must prove that all spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) was "caused solely by" the acts or omissions of third parties who were neither employees nor persons in a contractual relationship with the Bohatys.

....

... The question is whether "release" continued after [the innocent owners'] acquisition.

*United States v. 150 Acres of Land*, 204 F.3d 698, 705-06 (6th Cir. 2000). This opinion addressed whether the current owners of contaminated property had asserted sufficient evidence in their pleadings to survive a motion for summary judgment on the issue of the

innocent owner defense, so the Court never reached the question of whether innocent owner status can be lost due to the continued leaking or migration of contaminants disposed on the property by prior owner or other third parties. However, the statutory language of the innocent owner defense appears sufficiently clear that presumptive innocent owners have an affirmative duty to take "*precautions against foreseeable acts or omissions*" of third-party responsible parties, as well as any "*consequences that could foreseeably result from such acts or omissions,*" presumably requiring innocent owners to assure that no leakage or migration of existing contaminants continues after they take possession. 42 U.S.C. § 9607(b)(3)(b) (emphasis added).

Similarly, several federal district court decisions have held that the beneficiaries of estates of decedent CERCLA-responsible parties take their bequests and legacies in trust, so as to meet any potential environmental liabilities imposed on the estate.

Richard argues that as a beneficiary of the estates of [the prior owners], he cannot be said to hold the estates' assets in trust to meet the estates' environmental liabilities. He contends that plaintiffs' "trust fund" theory is one that is only applied to corporations, not estates or trusts. Other courts, however, have applied a "trust fund" theory in this context. *See Soo Line R.R.*, 797 F.Supp. at 1484-85 (allowing claims to proceed against estate beneficiaries and certain testamentary trusts of the deceased former president of a polluting corporation); *Bowen Engineering v. Estate of Reeve*, 799 F.Supp. 467 (D.N.J.1992); *Freudenberg-NOK Gen. Partnership*, 1991 WL 325290, at \*3-4, 1991 U.S.Dist. LEXIS 19421, at \*5.

*Steege Corp. v. Ravenal*, 830 F. Supp. 42, 49 (D. Mass. 1993); *accord Soo Line R.R. v. B.J. Carney & Co.*, 797 F. Supp. 1472, 1484-85 (D. Minn. 1992) ("Under the express language of CERCLA, a responsible person who has acquired property by inheritance or bequest is liable under CERCLA unless he can show by a preponderance of the evidence that (1) the release of hazardous substances was caused solely by a third party; (2) he

exercised due care with respect to the hazardous substance; and (3) he took precautions against foreseeable acts caused by the third party and the consequences that could result from those acts. 42 U.S.C. § 9607(b)(3). Contrary to defendants' position, property received by inheritance is not automatically excluded from CERCLA liability.").

As a result, based upon the plain language of the innocent owner defense, and authority such as *Steego Corp.* and *Soo Line R.R.*, the devisees in the present action, assuming they accepted the contaminated property, face potential *future* liability for any passive continuing or future leakage of contaminants into the soil on that parcel, or the migration of contaminants onto neighboring lands or water systems, as the innocent owner defense cannot be asserted where owners by inheritance fail to adequately take precautionary measures to prevent such continuing releases.

### **III. Are Estate Assets Reachable Under CERCLA?**

No provision in CERCLA directly addresses whether "responsible person" liability extends to the estate of liable parties. In addressing whether CERCLA liability could reach the assets of a decedent "responsible person," the Third Circuit held that the fact that Congress carved out the innocent landowner defense limiting the liability of devisees to the contaminated property reveals their intent to protect innocent beneficiaries from CERCLA liability:

Congress created this exception to CERCLA liability in order not to disturb state law controlling the descent and distribution of property. It would be illogical for us to conclude that Congress impliedly preempted state probate law to expand a CERCLA claimant's right to seek contribution against property of a deceased potentially responsible party, when Congress expressly narrowed CERCLA liability with regard to the contaminated facility itself (in order not to disturb the normal descent and distribution of

real property under state probate law).

*Witco Corp.*, 38 F.3d at 689.

Few cases have yet dealt with the issue of whether testamentary beneficiaries of property *other* than the contaminated property take subject to CERCLA claims against the estate of the testator. The Third Circuit, however, has held (contrary to the holdings in *Steego Corp.* and *Soo Line R.R.*) that CERCLA liability ends with the closing of a decedent's estate: "The possibility of a CERCLA claim arising long after the settlement of the estate would hang as a dark cloud over any such settlement, thereby compromising the goals of certainty and promptness in the settlement and distribution of decedent's estates." *Id.* at 690 (quoting *Witco Corp. v. Beekhuis*, 822 F. Supp. 1084, 1090 (D. Del. 1993)); *see also Grigoleit Co.*, 104 F. Supp. 2d at 982. At least two other federal cases have reached similar conclusions:

Fully disseminated and closed estates, whose beneficiaries do not remain involved in the decedent's activities which gave rise to CERCLA liability—except by virtue of the inheritance—are not covered under CERCLA and are not subject to liability.

*Chesapeake & Potomac Tel. Co.*, 814 F. Supp. at 1292; *see also Norfolk S. Ry.*, 1 F. Supp. 2d at 554; *Grigoleit Co.*, 104 F. Supp. 2d at 982. In the case at bar, the estate has not yet been fully distributed and closed, so this bar to liability would not apply.

The legislative history of the 1986 amendments to CERCLA establishes that a three-tiered system of liability was intended: "Commercial transactions are held to the strictest standard; private transactions are given a little more leniency; and inheritances and bequests are treated the most leniently of these three situations." *Pac. Hide*, 716 F. Supp. at 1348 (discussing H.R. Rep. No. 99-253(I), *reprinted in* 1986 U.S.C.C.A.N.

2835, 3280). In *Pac. Hide*, the United States District Court of Idaho held that innocent family members, not involved in the corporation's decisionmaking, who acquired an interest in land and stock as the result of a gift by their father, who was adjudicated liable under CERCLA, "were simply along for the ride because of a gift made earlier by their father," and thus not liable as CERCLA-responsible persons. *Id.*

In contrast, at least one case in federal district court has found that estates may be liable as "persons" under CERCLA. In *Bowen Eng'g v. Estate of Reeve*, 799 F. Supp. 467 (D.N.J. 1992), *aff'd*, 19 F.3d 642 (3d Cir. 1994), a company sought declaratory judgment against the estate of Reeve, their former president and director, to establish liability under CERCLA for clean-up costs of their facility. The court held that Reeve was a "responsible person" under CERCLA because he was an "operator" actively involved in the waste disposal decisions, and furthermore, that "*a decedent's estate* may be held liable for cleanup costs." *Id.* at 475 (emphasis added) (following *United States v. Sharon Steel Corp.*, 681 F. Supp. 1492, 1496 (D. Utah 1987), which held that a liquidating trust established to wind up the affairs of a dissolving corporation was a "person" under CERCLA). The court here also looked to a line of analogous cases holding that CERCLA liability reaches bankruptcy estates. *Id.*

Based on the meager case law addressing this issue, it appears that CERCLA liability may extend to the estate of a decedent who is found to be a "responsible person" under the statutory definition, at least until the estate is closed. In the case at bar, the testator was a partner-owner and operator of the facility, and is almost certainly a "responsible person" under CERCLA liability criteria. As a result, CERCLA could possibly reach the assets of this estate, at least until the estate is closed.

#### **IV. Potential Executor Liability Under CERCLA.**

Ordinarily, executor liability is limited to the assets of the estate, unless the executor is found to have been personally involved in causing the wrongdoing during estate administration, in which case an executor may be held personally liable as well. Unif. Prob. Code § 3-808; *Castlerock Estates*, 871 F. Supp. at 369. This liability standard is explicitly followed by the CERCLA statutory text.

Under the language of CERCLA § 9607, "[t]he liability of a fiduciary under any provision of this chapter . . . shall not exceed the assets held in the fiduciary capacity," except that this limitation does not apply where "negligence of a fiduciary causes or contributes to the release." 42 U.S.C. § 9607(n)(1), (3). "Fiduciary" here expressly includes executors. 42 U.S.C. § 9607(n)(5)(A)(II).

The meager case law addressing executor liability under CERCLA elaborates upon this liability standard:

[T]he court has come to the conclusion that liability can extend to . . . executors so long as they hold adequate indicia of ownership over and above bare legal title. If a conservator merely holds bare legal title to real property then no liability will extend. If a[n] . . . executor holds other indicia of ownership, CERCLA liability can potentially attach for disposals that occurred during the period of ownership.

*Castlerock Estates*, 871 F. Supp. at 364.

In the case at bar, if the executor holds both legal and equitable title simultaneously (as both a fiduciary and an estate beneficiary), he or she could be held liable under CERCLA for any disposal or release occurring during their management of the estate. However, his or her liability would be limited to the estate assets unless they

personally were involved in the decisionmaking regarding waste releases at the site.

## **V. Disclaimer Of Devised Property Under Virginia Law.**

It is well settled nationally that the right of a beneficiary to disclaim a devise or inheritance is predicated upon a policy concern that donees not be forced to accept burdensome gifts. *See, e.g.*, 80 Am. Jur. 2d *Wills* § 1359 ("A testamentary transfer is considered a bilateral transaction which requires the assent of the transferee; acceptance of the offer of the legacy is essential to a valid completion of the transaction."); *In re Estate of Lamson*, 662 A.2d 287, 288 (N.H. 1995) (holding that the purpose of the common-law rule permitting a devisee to renounce a testamentary gift, intestate heir to disclaim an intestate share, and a joint tenant to disclaim a right of survivorship is that "one should not be forced to accept burdensome, unbargained for tenders").

Virginia has codified the Uniform Disclaimer of Property Interests Act, which expressly allows recipients of unwanted gifts to disclaim their interest in them:

A person may disclaim in whole or in part, any interest in or power over property, including a power of appointment. A person may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim.

Va. Code Ann. § 64.1-196.4(A). While this provision expressly empowers recipients to disclaim unwanted gifts, another Code section indicates that this statutory right merely supplements, and does not abrogate, any common-law rules governing disclaimer so long as they do not conflict with the Uniform Disclaimer of Property Interests Act. V.C.A. § 64.1-196.3.

In order for a disclaimer to be legally binding, five requirements must be met by

the disclaiming party:

To be effective, a disclaimer shall [1] *be in writing* or other record, [2] *declare the disclaimer*, [3] *describe the interest* or power *disclaimed*, [4] *be signed* by the person making the disclaimer, and [5] *be delivered* or filed in the manner provided in § 64.1-196.11. In this subsection, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

V.C.A. § 64.1-196.4(D) (emphasis added). As indicated by the provision quoted above, delivery of a disclaimer must be accomplished pursuant to statutory requirements as well:

C. In the case of an interest created . . . by will . . . (i) a disclaimer shall be delivered to the personal representative of the decedent's estate or (ii) if no personal representative is then serving, it shall be filed with a court having jurisdiction to appoint the personal representative.

D. In the case of an interest in a testamentary trust (i) a disclaimer shall be delivered to the trustee then serving, or if no trustee is then serving, to the personal representative of the decedent's estate or (ii) if no personal representative is then serving, it shall be filed with a court having jurisdiction to enforce the trust.

V.C.A. § 64.1-196.11(C), (D); *see also In re Farrior*, 344 B.R. 483, 486 n.4 (Bankr. W.D. Va. 2006) ("A disclaimer is not effective until a signed, written record of the disclaimer is delivered to the personal representative of the trustee or filed with the probate court.").

Beneficial title to devised or bequeathed property vests under Virginia law at the instant of the testator or intestate's death:

"Where a bequest or devise is made . . . [the devised property] will, where no special intent to the contrary is manifested in the will, be held to be vested in interest *immediately on the death* of the testator, rather than contingent upon the state of things which may happen to exist at the period when the legatees or devisees are entitled to the possession of the property given."

*Am. Nat'l Bank & Trust Co. of Danville v. Herndon*, 181 Va. 17, 22-23, 23 S.E.2d 768, 771 (1943) (emphasis added) (quoting *French v. Logan's Adm'r*, 108 Va. 67, 60 S.E. 622,

623 (1908)); *see also Bird v. Newcomb*, 170 Va. 208, 218, 196 S.E. 605, 609 (1938) ("[It is a] well established rule of construction that all devises and bequests are to be construed as vesting at the testator's death, unless the intention to postpone the vesting is clearly indicated by the will.").

Despite this early vesting rule, a successful disclaimer relates back to the date of the donor's death, so that legally, once effective disclaimer is made, the disclaiming donee is treated as if he or she never owned any vested interest in the property disclaimed. V.C.A. § 64.1-196.5(B)(1) ("The disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable, or, if the interest arose under the law of intestate succession, as of the time of the intestate's death."). This doctrine is also supported under the common-law of the Commonwealth:

If a trust is created without notice to the beneficiary or the beneficiary has not accepted the beneficial interest under the trust, he can disclaim. Although the beneficial interest vests in him without his knowledge or consent, he cannot be compelled to retain it. The effect of his disclaimer is to put him in the same position as though the beneficial interest had never vested in him, his disclaimer operating retroactively.

1. William F. Fratcher and Austin W. Scott, *The Law of Trusts* § 36.1, pp. 389-92 (4th ed. 1987) (footnotes omitted). . . . Applying this rationale, we hold that the beneficial interest in the real property did not vest in [the devisee] because when it disclaimed the property, the disclaimer operated retroactively.

*Roseberry v. Moncure*, 245 Va. 436, 439, 429 S.E.2d 4, 6 (1993) (holding that will provision giving executor authority to transfer real property to another entity if named devisee violated conditions in the testamentary instrument did not authorize executor to convey property when named devisee disclaimed it); *accord Essen v. Gilmore*, 607 N.W.2d 829, 834 (Neb. 2000) ("[T]imely filed renunciation [of a devise, inheritance, or

other succession] "relates back" to the date of death of the decedent. The relation-back doctrine is based on the principle that a bequest or gift is merely an offer which can be either accepted or rejected." (internal citation omitted)).

A disclaimer becomes irrevocable once effective delivery of the requisite writing pursuant to Code § 64.1-196.4(D) occurs. V.C.A. § 64.1-196.4(F) ("A disclaimer becomes irrevocable when it is delivered or filed pursuant to § 64.1-196.11 or when it becomes effective as provided in §§ 64.1-196.5 through 64.1-196.10, whichever occurs later."). Disclaimer can no longer be asserted once the donee either (1) accepts the interest sought to be disclaimed, or (2) voluntarily conveys or encumbers the interest. V.C.A. § 64.1-196.12(B).

In the present case, based on the above authority, assuming the devisees in the present action effectively disclaim their interest in the devised contaminated property, their disclaimer will relate back to the date of death of the testator, and they will legally be treated as if beneficial title had never vested in them at all, shielding them from any CERCLA liability as owners or responsible persons.

## **VI. What Happens To The Property If All Potential Takers Under The Estate Similarly Disclaim Their Interest?**

If named devisees under the will effectively disclaim their interest in the contaminated property, then the beneficial interest in the property would vest in any alternate takers designated according to the terms of the will. If no alternate takers were named under the will, the realty would fall into the residuary estate, assuming that the antilapse statute, V.C.A. § 64.1-64.1, does not apply. V.C.A. § 64.1-65.1 ("Unless a

contrary intention appears by the will, and except as provided in § 64.1-64.1, if a devise or bequest other than a residuary devise or bequest fails for any reason, it shall become a part of the residue.").

If the residuary takers also disclaim, then the property would devolve to the heirs of the testator, following the course of descents governing intestate succession:

When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to such of his kindred, male and female, in the following course:

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

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

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

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

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

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

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

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

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

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

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

V.C.A. § 64.1-1.

If all of the potential intestate heirs similarly disclaim their interest to the parcel, then the property will escheat to the Commonwealth of Virginia. V.C.A. § 64.1-12 ("To the Commonwealth shall accrue all the personal estate of every decedent, of which there is no other distributee.").<sup>1</sup>

It is important to note that, if the contaminated property escheats to the State, this transfer will *NOT* relieve the probate estate of liability under state law for environmental clean-up costs incurred by the Commonwealth:

In addition to any other remedy provided by law, the Virginia Waste Management Board, pursuant to its authority granted in § 10.1-1402, or the Department of Waste Management, shall have recourse against any prior owner or *the estate of any prior owner* for the costs of clean-up of escheated property in or upon which any hazardous material<sup>[2]</sup> as defined in

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<sup>1</sup>"Personal estate' includes chattels real and such other estate as, upon the death of the owner intestate, would devolve upon his personal representative." V.C.A. § 1-233.

<sup>2</sup>As provided in V.C.A. § 4-146.34(B):

"Hazardous materials" means substances or materials which may pose unreasonable risks to health, safety, property, or the environment when used, transported, stored or disposed of, which may include materials which are solid, liquid or gas. Hazardous materials may include toxic substances, flammable and ignitable materials, explosives, corrosive materials, and

§ 44-146.34 is found.

V.C.A. § 55-182.2 (emphasis added).

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radioactive materials and include (i) those substances or materials in a form or quantity which may pose an unreasonable risk to health, safety, or property when transported, and which the Secretary of Transportation of the United States has so designated by regulation or order; (ii) hazardous substances as defined or designated by law or regulation of the Commonwealth or law or regulation of the United States government; and (iii) hazardous waste as defined or designated by law or regulation of the Commonwealth.