

# Virginia Update

2017

## Developments in Estates, Trusts and Probate Law

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### **District of Columbia, Maryland and Virginia Update**

Luncheon Program

*Co-Sponsored by the D.C. Bar Estates, Trusts and Probate Law Section and the Estate Planning Committee of D.C. Bar Taxation Section*

June 8, 2017, 12:00 to 1:45 PM

District of Columbia Conference Center

**SPECIAL NEEDS TRUST/ABLE ACCOUNTS**

**HB 1492 Child support orders; special needs trust or ABLE savings trust account**

Amended VA Code §§ 16.1-278.15 and 20-124.2

Provides that, upon the request of either party, a court may order that support payments be made to a special needs trust or an ABLE savings trust account.

**TRUST DECANTING**

**SB 913 Uniform Trust Decanting Act; creation**

Amended VA Code § 64.2-701; enacted VA Code §§ 64.2-779.1 through 64.2-779.25; repeals § 64.2-778.1.

Codifies the Uniform Trust Decanting Act (the “Act”). The Act governs a trustee's ability to distribute assets from one trust into a second trust. Trust decanting is a nonjudicial method for modifying an irrevocable trust. The Uniform Trust Decanting Act allows a trustee to reform an irrevocable trust document within reasonable limits that ensure the trust will achieve the settlor’s original intent. The act prevents decanting when it would defeat a charitable or tax-related purpose of the settlor.

**MEDICAL DIRECTIVES**

**HB 1548/SB 1511 Advance directives; admission of person for mental health treatment, capacity determinations.**

Amended VA Code §§ 54.1-2983.2 and 54.1-2986.2. Discharge of individuals from a licensed hospital.

Provides that in cases in which a person has executed an advance directive granting an agent the authority to consent to the person's admission to a facility for mental health treatment and the advance directive so authorizes, the person's agent may exercise such authority after a determination that the person is incapable of making an informed decision regarding such admission has been made by certain certified medical professionals. The law also provides that a person's agent may make a health care decision over the protest of the person if, in addition to other factors, at the time the advance directive was made, a licensed physician, licensed clinical psychologist, licensed physician assistant, licensed nurse practitioner, licensed professional counselor, or licensed clinical social worker who is familiar with the person attested in writing that the person was capable of making an informed decision and understood the consequences of the provision.

**HB 1747/SB 1242** Advance directives; persons authorized to provide assistance in completing, training programs.

Amended VA Code §§ 54.1-2982 and 54.1-2988; adding VA Code §§54.1-2988.1 and 54.1-2993.1.

Defines "qualified advance directive facilitator" as a person who has successfully completed a training program approved by the Department of Health for providing assistance in completing and executing a written advance directive; establishes requirements for training programs for qualified advance directive facilitators; and provides that distribution of a form for an advance directive that meets the requirements of § 54.1-2984 and the provision of ministerial assistance to a person with regard to the completion or execution of such form shall not constitute the unauthorized practice of law.

### **PROBATE PROCEDURES**

**HB1654** Examining and approving a statement in lieu of the settlement of accounts; fee for commissioner.

Repealed VA Code § 64.2-1314(D)

Removes the provision that allows the commissioner of accounts to charge a fee of up to \$75 for the examination and approval of a statement in lieu of the settlement of accounts.

**HB 1618/SB 1176** Nonexoneration of debts on property of decedent; notice to creditor and beneficiaries.

Amended VA Code § 64.2-53

Provides a procedure by which a personal representative of a decedent's estate may notify a creditor of a debt on certain property in the decedent's estate that such property passes without the right of exoneration. The law provides the method by which such notice shall be sent. If such nonexoneration procedure is used, the creditor may file a claim for such debt with the commissioner of accounts, and if the creditor does not timely file such claim, the personal representative shall be liable for the debt up to an amount not exceeding the assets of the decedent remaining in possession of the personal representative and available for application to the debt. This law does not have an effect on either the liability of the estate for such debt to the extent of the decedent's assets remaining at the time a claim is filed or the liability of the beneficiaries that receive the decedent's assets to the extent of such receipt.

### **AUGMENTED ESTATE; ELECTIVE SHARE OF SURVIVING SPOUSE**

**HB 1516/SB 1177** Surviving spouse's elective share; homestead allowance benefit.

Amended VA Code §§ 64.2-311.

Provides that if a surviving spouse of a decedent dying on or after January 1, 2017, claims and receives an elective share, the homestead allowance available to the spouse shall be in addition to any benefit or elective share passing to such surviving spouse. This amendment makes the law consistent with § 64.2-308.1 *et seq.* Effective on date of signing by governor: February 17, 2017

## **DIGITAL ASSET ACCESS**

**HB 1608/SB 903** Uniform Fiduciary Access to Digital Assets Act.

Repealed VA Code §§ 64.2-109 through 64.2-115; Amended VA Code §64.1-1622; Added VA Code §§ 64.2-116 through 64.2-132.

Adopted the Uniform Fiduciary Access to Digital Assets Act supported by the Uniform Law Commission. The law allows fiduciaries to manage digital property such as computer files, web domains, and virtual currency, and restricts a fiduciary's access to electronic communications such as email, text messages, and social media accounts unless the original user consented to such access in a will, trust, power of attorney, or other record. The law repeals the Privacy Expectation Afterlife and Choices Act, which was enacted in 2015.

## **ADULT EXPLOITATION**

**HB 1922/SB 1462** Financial exploitation of adults; reporting to local law enforcement and State Police.

Amended § 63.2-1605.

Clarifies that all cases involving suspected financial exploitation of an adult shall be immediately referred to a local law-enforcement agency for investigation.

**HB 1945** Adult exploitation; broadens definition for purposes of social services laws.

Amended VA Code §§ 63.2-100 and 63.2-1606.

Broadens the definition of "adult exploitation" for the purposes of social services laws to include the unauthorized, improper, or fraudulent use of an adult 60 years of age or older, or 18 years of age or older who is incapacitated, or his funds, property, benefits, or other assets for the benefit of another, including a caregiver or person serving in a fiduciary capacity, or that deprives the adult of his rightful use of or access to such funds, property, benefits, or other assets. "Adult exploitation" definition now includes (i) an intentional breach of a fiduciary obligation to an adult to his detriment or an intentional failure to use the financial resources of an adult in a manner that results in neglect of such adult; (ii) the acquisition, possession, or control of an adult's financial resources or property through the use of undue influence, coercion, or duress; and (iii) forcing or coercing an adult to pay for goods or services or perform services against his will for another's profit, benefit, or advantage if the adult did not agree, or was tricked, misled, or defrauded into agreeing, to pay for such goods or services or to perform such services.

In addition, the requirement that such adult 60 years of age or older be incapacitated is removed from the definition, and the bill amends the definitions of "adult abuse," "adult neglect," and "adult protective services" to apply to adults 60 years of age or older, or 18 years of age or older who are incapacitated.

The law also broadens the definition of "financial institution staff" for the purposes of protecting aged or incapacitated adults to include any employee, agent, qualified individual, or representative of a bank, trust company, savings institution, loan association, consumer finance company, credit union, investment company, investment advisor, securities firm, accounting firm, or insurance company.

## **PROPERTY OWNERSHIP**

**HB 2050** Tenancy; severance by the entireties by written instrument

Amended VA Code § 55-20.2.

Clarifies that a husband and wife may own real or personal property as tenants by the entirety for as long as they are married. Law provides that, in order to sever a tenancy by the entireties by written instrument, the instrument must be a deed that is signed by both spouses as grantors of the property. Law's passage was in response to ruling in *Evans v. Evans*, S.E.2d 576, (VA., 2015).

## **LEGAL MALPRACTICE**

**HB 1617/SB1140** Legal malpractice; estate planning

Amended VA Code § 64.2-250; Added § 64.2-520.1.

Provides that the statute of limitations for legal malpractice related to estate planning is five years if the legal representation was based on a written contract and three years if the legal representation was based on an unwritten contract. The law provides that the accrual date for such an action is the date of completion of the representation. The law further provides that a person who is not party to the representation shall have standing to maintain such an action only if there is a written agreement between the individual who is the subject of the estate planning and the defendant that expressly grants standing to such person.

### **Selected Cases Related to Estates, Trusts and Probate**

## **LEGAL MALPRACTICE/ESTATE PLANNING**

### **Supreme Court of Virginia**

**Thorsen et al. v. Richmond Society for the Prevention of Cruelty to Animals**, Record No. 150528, 292 Va. 710, 792 S.E.2d 269 (Va., 2016), Senior Justice Leroy F. Millette, Jr., June 2, 2016

Background: Alice Dumville met with her attorney James Thorsen to prepare her will. Dumville wanted a will that would convey all of her property to her mother if her mother survived her, and, if her mother predeceased her, her estate would go to the Richmond Society for the Prevention of Cruelty to Animals ("RSPCA"). Dumville died in 2008 and her mother predeceased her. Thorsen, as co-executor of the estate, notified RSPCA that it was the sole beneficiary. Thorsen was informed by title insurance company that Dumville's will only left the tangible estate to the RSPCA and not the real estate. The value of the tangible property was \$72,015.60 and the value of what RSPCA would have received but the error was \$675,425.50. Thorsen brought a suit in a collateral proceeding to correct the scrivener's error based on Dumville's clear original intent.

Collateral Proceeding decision: A Circuit Court of Chesterfield County denied Thorsen's suit finding that the language in the will was unambiguous and limited RSPCA bequest to the tangible property and the intangible estate passed intestate to Dumville's heirs at law.

RSPCA brought suit against Thorsen for breach of contract-professional negligence, as a third-party of the contract between Thorsen and Dumville. Thorsen demurred arguing that (1) RSPCA was not an intended third-party beneficiary of the contract and Thorsen undertook no obligation on RSPCA's behalf; and (2) an action by a third-party beneficiary arises under VA Code Sec.55-22 requires a written agreement.

RSPCA Trial Court: The court denied Thorsen's demur. At trial, the parties stipulated that Thorsen had a duty to incorporate Dumville's intent into her will accurately. Thorsen's testimony from the collateral proceeding was admitted showing that Thorsen understood Dumville's intent. The Circuit Court found in favor of RSPCA and found damages in the amount of \$603,409.90. Thorsen appealed.

Supreme Court of Virginia: In a 6-1 decision, the Supreme Court of Virginia agreed with the RSPCA answering the question as to whether a third-party beneficiary has a cause of action for breach of contract against an attorney in the affirmative. The Court found that an injured third-party beneficiary may enforce a contract that creates (or should create) the beneficiary's interest as long as the beneficiary was "clearly and definitely" the intended beneficiary of the contract. The majority found that a contract between an attorney and a client to draw a will for the benefit of a particular beneficiary meets the third party beneficiary requirement.

The Court found that a beneficiary is "clearly and definitely" an intended beneficiary is determined by the client's intent and the attorney's assent to the representation. In the case at hand, the RSPCA was "clearly and definitely" an intended beneficiary of the contract between Ms. Dumville and Mr. Thorsen based on the evidence presented in the lower courts. The Court also found that residuary or contingent beneficiary can be a "clear and definitely" intended beneficiary, however, whether a class of beneficiary meets the standard is a fact-intensive review.

The Court also found that the statute of limitations does not run from the time of the breach but runs from the time of injury (i.e. at or after the testator's death).

Judge McClanahan's dissent was based on the fact that strict privity in legal malpractices has not been abolished in Virginia and would find that the RSPCA does not have standing to sue for breach of legal services agreement between Dumville and Thorsen. The dissent focuses on the Pandora box aspect of allowing such a third-party beneficiary tort to sue on legal malpractice in this matter and its applicability beyond estate planning like family law such that this decision may detrimental impact the attorney-client relationship.

## **POWER OF ATTORNEY**

### **Supreme Court of Virginia**

**Reineck, Curator v. Lemen.**, Civil Action No. 15-1917, 292 Va. 710, 792 S.E.2d 269 (Va., 2016) Judge McCullough, November 23, 2016.

Background: Husband and wife, Frank Still and Jane Still created trusts in 1991. Frank children, LaVerne Lemen and Jeffrey Still would receive 40% of the assets of both trusts. Jane didn't have any children but the trusts called for her relatives to receive 60% of both trusts. The trusts were amended in 1999 to reduce the amount to Jane's relatives to 55% and Still and Lemen would receive 45%. Also in 1999, Frank executed a durable power of attorney

designating Jane as his attorney-in-fact and Lemen, as his successor attorney-in-fact. Frank started to show signs of dementia in the early 2000s. In 2011, Jane died, and Lemen and Still received nothing from Jane's estate. Upon Jane's death, Lemen became Frank's attorney-in-fact, and Lemen and Still became co-trustees of Frank's trust and the executors of his will. Lemen and Still relied on the broad power of attorney to create an *inter vivos* trust that disinherited Jane's heirs and provided for Lemen and Still to receive Frank's entire estate at his death. William Reineck, Jane's heir, filed suit against Lemen and Still, alleging breach of fiduciary duty.

Trial Court: William Reineck, Jane's heir, filed suit against Lemen and Still, alleging breach of fiduciary duty. The court dismissed the case with prejudice on the basis that Reineck, as a contingent beneficiary lacked standing to bring the suit. Reineck petitioned to be appointed curator of Frank's estate and promptly filed a suit pursuant to his duties as a curator under Va Code § 64.2-451 based on the same allegations. Trial court granted Lemen and Still's motion for summary judgment finding that they "acted within the express scope of [Lemen's] authority as agent under Frank's Durable Power of Attorney" and didn't breach any fiduciary duty. The court also awarded attorney's fees against Reineck.

Supreme Court: The Supreme Court agreeing with the lower court affirmed the judgment with the exception of the award of attorney's fees against Reineck personally, holding (1) Lemen's actions were authorized by the power of attorney; and (2) the court erred in awarding attorney's fees. The court rejected Reineck's claims that Lemen's creation of trusts shifting all of Frank's assets to herself and her brother was not inconsistent with the authority granted to her under the power of attorney. The court found that while powers of attorney are construed strictly, Frank's power of attorney vested his attorney-in-fact with broad powers. Frank's power of attorney provided that his attorney-in-fact could "make, execute, endorse, acknowledge, and deliver any and all instruments...including, but not limited to...trusts...for my benefit during my lifetime and /or the benefit of my wife and my descendants after my death." The court rejected Reineck's argument that this provision would provide for the creation of trusts for Jane "and" Frank's descendants.

## **FIDUCIARY DUTY/CONSTRUCTIVE TRUST**

### **E.D.VA - Alexandria**

**Jordan et al. v. Osmun, et al.**, Civil Action No. 1:16-cv-501 (E.D. Va. Sep. 29, 2016).

Facts: Lucille Kelly, executed a durable power of attorney naming husband and her niece Susan Osmun as attorney-in-fact. Mr. Kelly passed away in March of 2015 and Osman qualifies as executor for his estate in which Ms. Kelly is the sole heir. Osmun, and her husband takes various steps including selling Kelly's home residence (November 2015) and removing personal items from home prior to sale. Ms. Kelly through her attorney starts to raise questions on the administration of the estate. Osmun doesn't respond directly to lawyer's inquiry but sent communications to the social worker at the retirement home Ms. Kelly lived in at that time. Eventually, Ms. Kelly revokes Osmun's power of attorney and appoints the plaintiffs.

Trial Court: In federal district court, plaintiffs sued Osman for fraud, conversion and breach of fiduciary duty against Osman and unjust enrichment against Osman and her husband seeking damages in the amount of \$573,729. Court denies Osman's attempt to dismiss the case

for lack of diversity of citizenship. Plaintiff's attempt at imposing liability on Osman's husband to be jointly liable for Osman's tortious conduct were dismissed on the based that Supreme Court of Virginia has not ruled on recognizing an "aiding and abetting" tort. The Court did find that plaintiffs have sufficiently stated a claim for unjust enrichment against Osman's husband and that plaintiffs have adequately stated claims for breach of fiduciary duty, conversion, fraud and unjust enrichment against Osman. The court also imposed a constructive trust in the amount of \$573,729 given that a significant portion of the money may be inaccessible at this point.

## **ABANDONMENT**

### **Circuit Court**

**Phillips et al v. Good**, Civil Action No. 16-27, Circuit Court of Loudoun County; Judge Hupp, November 22, 2016.

Wife left the marital home 6 weeks prior to husband's death to live with her daughter to avoid terminally ill husband's pressure to sign documents reducing her property rights. When husband died she filed an election against his estate for the family and homestead allowance. The Circuit Court found that she didn't abandon her husband based on *Purce v. Patterson* 275 VA 190 (2008) wherein defining desertion as "a breach of matrimonial duty – an actual breaking off of the matrimonial cohabitation couple with an intent to desert in the mind of the deserting party." The court found based on evidence that she had not reached the intent in her mind of deserting that she was entitled to her statutory allowances.

## **LAPSED GIFT**

### **Circuit Court**

**Parker, Executor v. Ward et al.**, Case No. CL16-1488, Circuit Court for Norfolk; Judge Lannetti, July 8, 2016

Testator gave husband a life estate in real property with remainder devised to daughter of testator and husband. Daughter predeceased testator and was not survived by children and executor sought aid and direction in how to distribute estate. Pursuant to VA Code § 64.2-416, where a devise fails, it becomes part of an estate's residue and if property is not effectively disposed of by will passes by intestate succession. Thus, upon testator's death, daughter's remainder interest in husband's life estate lapsed and became part of the residue of the estate and distributed as one-third going to husband and two thirds going to testator's other children from a prior relationship.