

# Virginia Update

2018

## 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*

DATE, 12:00 to 1:45 PM

District of Columbia Conference Center

### **WILLS AND REVOCABLE TRUSTS**

**HB 746** Wills and revocable trusts; eliminating certain inconsistencies.

Amended VA Code §§ 64.2-412, 64.2-415, 64.2-416, and 64.2-418 and enacted VA Code § 64.2-404.1.

Eliminates certain inconsistencies between wills and revocable trusts by extending to revocable trusts (i) revocation of benefits to a spouse and appointments to a spouse as a fiduciary upon divorce or annulment, (ii) the default rules for nonademption of certain bequests, (iii) the default rules related to the lapsing of a failed devise or bequest to the residue, and (iv) the anti-lapse rule that provides that a testamentary disposition fails when the taker predeceases the testator. The law also provides that a court may modify the terms of a decedent's will to correct a mistake to conform to the decedent's intent, as proved by clear and convincing evidence. The law further provides that, if shown by clear and convincing evidence, a court may modify the terms of a decedent's will to achieve the decedent's tax objectives in a manner that is not contrary to the decedent's probable intention. The provisions of the law related to modification of a will apply retroactively to wills executed prior to July 1, 2018, and judicial proceedings commenced prior to July 1, 2018, except under certain circumstances.

### **GUARDIAN AD LITEM COMPENSATION**

**HB 278** Compensation of guardian ad litem appointed to represent a child; adjustment by the court.

Amended VA Code §§ 16.1-267

Allows the court to adjust the costs of a GAL's services for good cause shown or upon the failure by the GAL to substantially comply with the standards adopted for attorneys appointed as GAL.

### **TRUST DECANTING**

**SB 78** Uniform Trust Decanting Act; Authorized Fiduciary

Amended VA Code § 64.2-701;

Reinstates the restriction in Virginia's former trust decanting law that limits the type of fiduciary who may exercise the decanting power to a disinterested trustee. The law also reinstates the former provisions that state that the decanting power may be exercised by a majority of the authorized fiduciaries and that the court has the power to appoint a special fiduciary to exercise the decanting power.

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

**HB 754** Elective share claim; calculation of the augmented estate.

Amended VA Code § 64.2-308.9 and § 64.2-308.10

Provides that a surviving spouse claiming an elective share does not have the right to claim a share of the decedent spouse's separate property at death but that the decedent spouse may satisfy the surviving spouse's right to claim a share of marital property with such separate property.

## **PROBATE PROCEDURES**

**HB 1142** Qualification of fiduciary without security.

Amended VA Code § 64.2-1411

Provides that a circuit court or circuit court clerk may allow a fiduciary to qualify by giving bond without surety when there are no assets or the asset or amount coming into the possession of such fiduciary does not exceed \$25,000.

## **MEDICAL CARE**

**SB 222/HB 226** Patients; medically or ethically inappropriate care not required.

Amended VA Code §32.1-127 and § 54.1-2990.

Establishes a process whereby a physician may cease to provide health care that has been determined to be medically or ethically inappropriate for a patient.

## **FORECLOSURE**

**HB 755/SB 422** Foreclosure; notice of sale when owner is deceased.

Amended VA Code § 55-55.59.1 and § 55-54.

Provides that when the owner of a property to be sold by a trustee pursuant to a deed of trust is deceased, the notice of the sale shall be delivered to the last known address of the deceased owner, any personal representative of the deceased's estate, and any heirs of the deceased as recorded in the land records where the property is located. The law provides that the trustee of a deed of trust for a property that is sold after the death of the owner shall include (i) any remaining subsequent debts and obligations secured by the deed and (ii) any liens of record inferior to the deed of trust under which the sale is made in the list of debts to be paid off using any surplus from the sale prior to paying the remainder of the surplus to the decedent's personal representative.

## **ELECTRONIC WILLS - FAILED**

### **HB 1403 Electronic wills;**

The bill would have provided a process for the execution of an electronic will, which has the same force and effect as a traditional, written will. The bill would have required that the electronic will would have to be kept under the control of a qualified custodian who is not an heir to the testator or a beneficiary or devisee under the will. To be valid the electronic will must contain the electronic signature of the testator and the electronic signatures of either two witnesses or a notary public and there must be a visual record of the execution of the will.

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

### **SLAYER STATUTE**

#### **E.D.VA - NORFOLK**

**The Prudential Insurance Co. of America v. Can Chau Nguyen**, Civil Action No. 2:16cv670, (E.D. Va. Jan. 31, 2018).

Background: Laura T. Ngo (the “Insured”) had \$1.25 million life insurance policy that include several types of death benefits broken down into “Basic,” “Optional,” and Accidental Death and Dismemberment (“ADD”) that paid out to husband “Nguyen” and another family member beneficiary. The Insured was killed in a hit and run accident. Prudential paid out Basic and Optional death benefits but did not distribute the ADD benefits out to husband on grounds that husband was not ruled out as a suspect. Prudential invoked Va. Code §64.2-2508 that precludes Prudential from distributing death benefits to any individual convicted of murder or voluntary manslaughter.

Proceedings: Prudential files Complaint in Interpleader naming husband and other beneficiary as Defendants seeking Court direction in designating who is entitled to the ADD benefits on the grounds that husband had not been ruled out as a suspect in the “hit and run.”

Findings: The District Court rejected Prudential’s assertion that it is unclear which of the defendants are entitled to the proceeds and finds that husband is legally entitled to the proceeds because Prudential’s basis, the lack of closing of the “hit and run” matter, didn’t imply that husband was suspect. Court finds that husband would not fall under the definition of “slayer” because he has not been charged in two years and there is no foreseeable conviction of murder to voluntary murder of the Insured against anyone much less the husband. Court award husband his remaining share of ADD. Court awards 50% of Prudential’s costs and \$500 in attorney’s fee.

### **FIDUCIARY DUTY/SANCTIONS**

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

**Jordan et al. v. Osmun, et al.**, Civil Action No. 1:16-cv-501 (E.D. Va. June 29, 2017).

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 and falsified bank statement 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 – Jordan as new POA. In 2016, District Court denies defendant's motion to dismiss Complaint for lack of diversity of citizenship and imposes a constructive trust and moves forward with claim of breach of fiduciary duty against Osman, conversion against Osman, fraud against Osman and unjust enrichment against Osman and Osman's husband.

District Court: Plaintiff attempted to conduct discovery but Osman failed to respond to any discovery request. Plaintiff filed a motion for sanctions against Osman and summary judgment for all claims against Osman. Osmun files numerous motions in opposition of discovery and opposition to the summary judgment with the position that Osman "was easily owed close to \$200,000." Court finds that Osman breached her fiduciary duty that she owed to Kelly by self-dealing. The Court further found that Osman's position that fund transfers from Kelly's account to Osman's accounts on the grounds that it was appropriate compensation lacked any evidentiary support and fell short of clear and convincing evidence to rebut the fraud presumption. Court agrees with plaintiff that Osman's transfers constitute conversion of Kelly's funds. Court finds that Osman committed fraud when she sent false bank statements to Kelly. Court finds that unjust enrichment arose including payment of Osman's credit cards that also enriched Osman's husband. While the Court stated that they don't like to award punitive damages, in this case, where "tricking the elderly out of their life savings" is among one of the most serious kinds of misrepresentation and warranted punitive damages. The Court rejects the plaintiff's position that attorney's fees should be awarded based on VA. Code §64.2-1615 on the grounds that adversarial proceedings undertaken against the agent are not undertaken on the agent's behalf, but, the Court does award attorney's fees and costs as sanctions under Fed. R. Civ. P. 37 due to the lack of response in plaintiff's discovery requests.

District Court granted Jordan's Summary Judgement finding compensatory damages in the amount of \$560,965.43, punitive damages in the amount of \$100,000 and awards plaintiff's their attorney's fees and costs in the amount of \$64,222.51 as sanctions for violations of Fed. R. Civ. P. 37.

### **Supreme Court of Virginia**

**Mangrum, Jr. v. Chavis et al.**, Record No. 160782, Cir. Ct. No. CL 14-1485(March 1, 2018) (unpublished)

Background: Bobbie F. Wynder appointed Leroy Mangrum, Jr. to be her attorney-in-fact by a general power of attorney. Wynder dies in June of 2013. Wynder's four step-children and beneficiaries under Wynder's will filed suit against Mangrum under VA. Code §64.2-1612(H) seeking disclosure of all transactions Mangrum took on behalf of Wynder. At issue were two transactions (1) a withdrawal by Mangrum's wife ("Doris") of \$36,000 from a savings account jointly owned by Wynder, Doris and Brenda Chavis, one of the plaintiffs; and (2) Mangrum's surrendering of annuity Wynder owned valued at \$116,330.64, the proceeds from which

Mangrum initially deposited into Wynder's account, but then subsequently withdrew and deposited into Mangrum's sole bank account.

Circuit Court Proceeding: The Circuit Court for the City of Hampton found that Doris's withdrawal was improper, that Mangrum improperly surrendered the annuity, ordered that an accounting be made and awarded a monetary judgment in the amount of \$152,330.64 to Wynder's estate and pay \$19,284.75 in attorney's fees.

Mangrum appealed asserting that the circuit court erred by ordering him to restore \$36,000.00 based on Doris's withdrawal, that the financial instrument was never admitted into evidence and that only remedy plaintiff's sought was restoration to the estate and not to themselves in their individual capacities, that the circuit court's order was ambiguous and could be interpreted as imposing an equitable remedy creating an action under contempt and not creating a lien for damages; and the circuit erred by awarding attorney's fees to the plaintiffs.

Supreme Court of Virginia: In an unpublished opinion, the SCV addressed all four appoint of Mangrum's appeal. The SCV agreed that the circuit court erred by ordering Mangrum to restore the \$36,000.00 based on the fact that Doris was Wynder's agent for purposes of the jointly owned funds and that such a relationship is separate from and forecloses Mangrum's liability under an agency theory. Further, there is no evidence that Mangrum directed or participated in the withdrawal that would find allow Mangrum liable for Doris's actions. VA. Code §64.2-1612(B) imposes no liability on Mangrum. The Court disagrees with Mangrum with respect to the financial instrument on the grounds that the beneficiary of the annuity was also a plaintiff in the matter and the court may infer that said beneficiary-plaintiff assigned the issue to the estate. The court found that in light of the circuit court's interpretation of the statute that a money judgment was ordered against Mangrum rather than decreeing equitable relief. Final the SCV agreed that awarding of attorney's fees under VA. Code §64.2-1615 on the grounds that adversarial proceedings undertaken against the agent are not undertaken on the agent's behalf.

## **WILL LIMITS/LIFE ESTATE**

**Feeney v. Feeney**, Record Nos. 170031 and 170032, (April 12, 2018), Justice William C. Mims

Background: Decedent was married to Marjorie Feeney ("Marjorie") and had two sons from a prior marriage: Sean Feeney ("Sean") and James Feeney ("James") when he died in 2012 and at issue is the terms of the residuary clause. The residuary clause bequeathed everything in his estate to Marjorie for her health and support, and to "continue providing for the health, support and education of my son SEAN while he is a minor, and matters past the age of eighteen at her discretion" and upon Marjorie's death any remaining assets "of this estate pass to [SEAN]. IN TRUST." The residuary clause further had provisions that stated that at the time of their respective deaths, any assets remaining from their estates would go to the care and welfare of their respective children and that they should be kept separate. After the will was probated James filed a complaint to construe the residuary clause granted Marjorie a life estate, any property remaining at Marjorie's death would pass to Sean in Trust until divided equally to James and Sean when Sean reached 35 (per terms of the will) and sought that Marjorie be removed as executor and trustee and order Marjorie to reimburse the estate for any assets wrongfully converted for her own use and sought attorney's fees.

Circuit Court findings: After the parties agreed that the residuary clause was unambiguous, the court found in favor of Marjorie's motion for summary judgment stating the "language of the will is clear and that the intent of the testator was to devise and bequeath all of the rest and residue of the estate to Marjorie" and that a life estate was not created. Sean and James appealed. After the circuit court ruling, Sean and James moved the circuit court to tax their attorney's fees against the estate on the ground that the meaning of the residuary clause required judicial instructions. The circuit court denied this motion, noting that the doctrine of judicial instructions justifying recovery of legal fees has not been adopted in Virginia. Sean and James appealed all of the circuit court rulings.

Superior Court of Virginia: The main issue the SCV wrestled with in this matter was whether the language of the residuary clause in the testator's will provided Marjorie with a fee simple in the residual estate or a life estate. When reviewing a will the Court's role is to construe the will the testator made and the testator's intention is determined from the language of the will in its entirety. Unless a contrary intention appears, the SCV acknowledged that a will is construed to pass the greatest estate possible to an heir, which the language employed is capable of conveying. In this matter, the Court found that the testator's will did not grant the residual estate to Marjorie in fee simple. The residual clause provided what the testator's intention was with respect to the residual estate upon Marjorie's death. In this case, the Court notes that assets were being held in Trust for Sean and, thus, Marjorie's interest was a life estate. This was further supported by the second part of the residual clause keeping Marjorie and the decedent's accounts separate. The Court rejected Marjorie's argument that the language used gave her absolute power to dispose of the residual property and, thus a life estate can only be created by express language. The SCV rejected Sean and James' argument allowing for attorney's fees to be paid from the estate under the doctrine of judicial instructions because of the ambiguous terms of the will. The SCV noted that Virginia hasn't accepted this doctrine at this point and that throughout the litigation Sean and James agreed that the language in the will was clear and unambiguous.

#### **COMMISSIONER OF ACCOUNT/SUBJECT MATTER JURISDICTION**

**Gray v. Binder et al**, Record Nos. 161419, 294 Va. 268, 805 S.E.2d 768 (November 2, 2017), Chief Justice Donald W. Lemons.

Background: Decedent Albert Bahnfleth died without living issue and assets of approximately half a million dollars. An administrator was appointed to administer the estate believing the decedent died intestate until a copy of a 1966 will was found. The 1966 will provided that if Bahnfleth survived his wife his estate would be divided between his parents, his only sibling, and his step-daughter. The devise to the step-daughter expressed Bahnfleth's "desire that she use it for the education of step-grandson Steven C. Gray." All the family members named in the will predeceased Bahnfleth. The administrator wrote a letter to the Commissioner of Accounts seeking a determination if the Commissioner could hear issues of heir determination and will interpretation. When the Commissioner confirmed that he could provide direction, the administrator requested a hearing on construction of the will, determination of the rightful beneficiaries, determination of the intestate heirs and their shares and that the administrator can proceed and conclude the administration of the estate under the direction and protection of the Commissioner of Accounts.

Proceedings: After an evidentiary hearing, the Commissioner filed a report in January 2015 with the circuit court regarding his findings. In the report, the Commissioner found that all

of the provisions in the will had lapsed. Further, the report stated that the provision with respect to providing for the step-daughter to use the money to fund Gray's education was precatory and the funds would go to the intestate heirs (the "Cousins"). Gray filed an exception to the report but the circuit court entered an order confirming the Commissioner's report in full. Gray motion for reconsideration and a hearing held on said topic was rejected by the circuit court stating Gray was not entitled to take under the will. The SCV rejected Gray's initial appeal of that circuit court decision. After the Commissioner filed a routine debts and demand report in May of 2016 with the circuit court authorizing the administrator to distribute the remainder of the estate, Gray filed additional exceptions to that report challenging the Commissioner's jurisdiction to issue its January 2015 report citing a recent SCV case, wherein the SCV considered whether a circuit court case had subject matter jurisdiction to decide an appeal of an unlawful detainer action that was originally filed in general district court. The circuit court allowed the Commissioner to file a response and after reviewing the response rejected Gray's exception stating that the circuit court doesn't delegate judicial authority to the commissioner of accounts but that the commissioner has the authority to hear any matter concerning the settlement of accounts. Gray appealed to the SCV on the basis that the Commissioner of Accounts lacks subject matter jurisdiction to hear petitions for aid and direction by administrator.

Supreme Court: The SCV rejected the Cousins position that Gray's subject matter argument failed to comply with raising the challenge while he had standing because Gray was no longer an interested person. The Court found this argument lacking stating that subject matter jurisdiction can be raised at any time and that Gray has standing because if the SCV ruled in his favor, the circuit court could determine that Gray is a beneficiary under the will. Gray argued that the Commissioner lacked subject matter jurisdiction to hear the petition for aid and direction because the petition invoked equitable jurisdiction of a circuit court and that the Commissioner only has limited probate jurisdiction of a commissioner. The SCV rejects that argument stating the Commissioner's authority to assist circuit court with the settlement of estates is an extension of the circuit court's subject matter jurisdiction.

Justice McCullough in a concurring opinion concerns the specific procedures that occurred in this case. McCullough states that there should have been a reference from the circuit court for the Commissioner to hear the matter.

## **UNDUE INFLUENCE**

**Gelber et al v. Glock**, Record Nos. 160500, 293 Va. 497, 800 S.E.2d 800 (June 22, 2017), Justice Elizabeth A. McClanahan

Background: Ms. Beverly Gelber has 5 children – Linda, Meryl, Larry, Darlene and Douglas. In 2010, Ms. Gelber executed several estate planning documents, including a will and trust agreement that revoked any other prior wills and gave her real and personal property to the trustee. She also executed a tangible personal property deed conveying all tangible personal property to herself as trustee. In July 2014, while undergoing cancer treatments, Ms. Gelber executed a gift deed conveying her real property to Meryl and executed a bill of sale transferring her tangible personal property to Meryl. In August 2014, Ms. Gelber individually and through her attorneys-in-fact, Larry and Darlene (the "Executors"), filed a complaint against Meryl alleging undue influence and fraud. After the death of Ms. Gelber in September 2014, a count



alleging a civil conspiracy between Meryl, Linda and Linda's husband Philip Landa. Meryl counterclaimed asserting breach of contract, statutory warranty and express warranty.

**Circuit Court Proceedings:** The Executors filed a motion for summary judgment as to title and possession of the personal property on the ground that the bill of sale signed by Ms. Gelber had no effect since it was conveyed in her individual capacity. The circuit court rejected this argument. At trial, the circuit court excluded evidence presented by the Executor on tax assessment records on Ms. Gelber's Virginia home. After presenting their case, the circuit court granted Meryl's motion to strike finding that Ms. Gelber's statements disavowing the property transfers were not admissible under the Dead Man's Statute and found in favor of Meryl on all claims. Executors appealed.

**Superior Court of Virginia:** The SCV agreed with the circuit court that Ms. Gelber retained the power to revoke prior conveyances to her trust and therefore could withdraw property from the trust by complying with provisions of the trust agreement that only required written notice to herself, which the execution of the bill of sale met. The Court agreed with the Executor's position that Ms. Gelber's declarations disavowing the real property transfers were admissible under hearsay exception. The SCV stated that the circuit court erred in the admissibility of Ms. Gelber's declarations under the Dead's Man's statute. The SCV agreed that the circuit court's exclusion of the tax assessment records was appropriate because the records contained hearsay expert opinions without any corresponding expert to introduce said records. The SCV found that the circuit court erred in granting Meryl's motion to strike the evidence as to the Executor's claims of undue influence, fraud and civil conspiracy. The SCV, in clear directions to the circuit court went through an exhaustive review of the standard for when a party may show undue influence by stating the standard is when (1) upon proof of great weakness of mind and grossly inadequate consideration or suspicious circumstances; or (2) upon proof that a confidential relationship existed between the grantor and the proponent of the instrument. The SCV also noted that the Executors present sufficient evidence to support a claim of promissory fraud against Meryl based on numerous comments Meryl made with respect to Ms. Gelber moving in with Meryl, even though, medically Ms. Gelber was never going to leave the hospital. The SCV did agree with Meryl that the Executors did not present enough evidence of a conspiracy because the Executors had failed to prove damages to reach a civil conspiracy and that they only sought rescission of the deed of gift of the real property and bill of sale of the tangible personal property. Further, the Executors only name Meryl in the matter and did not add Philip and Linda.

**D'Ambrosio v. Wolf et al.**, Civil Action No. 170521, (Virginia 2018) Judge Mims, February 22, 2018.

**Background:** In September 2013, Nancy D'Ambrosio ("Nancy") signed a durable power of attorney naming her son James D'Ambrosio ("James") as her attorney-in-fact. In February of 2014, she executed a will dividing her estate between James and her two daughters (Jane Wolf and Electra D'Ambrosio). James, Jane and Electra had a contentious relationship and eventually in mid-2014, Jane and Electra petitioned the circuit court to appoint a GAL, declare Nancy incapacitated, declared Nancy's POA void, appoint Jane and Electra co-guardians for Nancy and appointed a third-party conservator. James counterclaimed seeking a declaratory judgment that the POA was valid and the appointment of a guardian and conservator for Nancy. James

eventually added an affirmative defense that the Jane and Electra should deny their petition on the basis of unclean hands that the 2014 will was procured without the knowledge of James.

Circuit Court: After extensive discovery, the circuit court entered a consent order finding Nancy incapacitated and appointed a third-party as guardian and conservator and voided Nancy's POA, but not the will. When Nancy died in 2015, the 2014 will was probated and James filed a complaint seeking to impeach the will on the grounds of undue influence and lack of testamentary capacity. The court agreed with Jane and Electra's position that James' claims were barred by the doctrine of claim preclusion because the claims arose from the same conduct, transaction, or occurrence as the early claim. James appealed.

Superior Court of Virginia: The SCV noted that James challenged the circuit court on three grounds: claim preclusion, issue preclusion and judicial estoppel. On claim preclusion, the SCV agreed with James, that he could not contest Nancy's will in the 2014 litigation because she was still alive because his interest in Nancy's estate was tentative to the disposition in her will and had nothing more than a bare expectancy. The SCV further rejected the circuit court's position that James could have filed a declaratory judgment to invalidate the will stating that declaratory judgments are designed not to give parties greater rights than those previously possessed but to permit the declaration of those rights before they mature. The SCV agreed with James that he was not barred under issue preclusion in the 2014 litigation because there is no evidence that the court considered, litigated, or decided the issue of undue influence. The SCV further agreed that the James was not barred under judicial estoppel even though James claimed that Nancy was competent to execute a POA but, only a few months later was not competent to execute a will.

### **Circuit Court**

#### **FAMILY BUSINESS DISTRIBUTIONS**

O'Brien v. Midgett, Civil Action No. 15-5459, Circuit Court of City of Norfolk; Judge Lannetti, July 26, 2017.

Estate was seventy percent owner of family business that operated a miniature golf course in Virginia Beach after the majority owner died. Executor for the decedent's will attempted to recoup "excessive compensation" and called an interest free loan on the minority owner. The minority owner (and decedent's son) who operated the business owned the remaining thirty percent of the business. The decedent and son were the only directors of the business. The Executor Nancy O'Brien for the estate alleged that the son abused his authority as a director of Jungle Golf to award himself improper benefits including excessive compensation, disproportionate distributions and an interest-free loan that had not been called and said actions were a detriment to the corporation. After dueling experts on compensation, the circuit court found that the son was entitled to his salary as CEO of Jungle Golf and that interest-free loan were not protected by the business judgment doctrine because said transactions between son and Jungle Golf were a conflict of interest. However, the court found the excessive compensation and disproportionate distribution transactions were saved by VA Code §13.1-691 which states that such transactions can be approved be either being (1) authorized by a majority of disinterested directors, (2) approved by a majority of disinterested shareholders, or (3) fair to the corporation. The court found that decedent, and only other director, when alive did not protest the son's salary and found that the son's salary were consistent with his role as CEO of Jungle Golf. Further, the court found that executor's claim for disproportionate distributions were not properly demanded

or plead, even though the distributions were made outside of the normal time period, the executor failed to prove said distributions failed to harm the corporation. However, the court did find once the demand for the loan was made that it was improper of the son's duties and the son is require to pay back the loan an interest on the remaining portion.