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Estate Planning Council Newsletter
Virginia Law Developments 2014

CASES

Contract to Make Will

No Contract for Step-Daughters to Inherit

Dean v. Morris, 287 Va. 531, 756 S.E.2d 430 (April 17, 2014)

Shirley married Casey in 1978. Both had children from prior marriages. Shirley died in 1999. Her daughters decided not to probate their mother's Will (which benefited the daughters), based on their belief that their mother had an oral contract with Casey for him to provide for them in his Last Will and Testament. Casey died in 2010. The daughters unsuccessfully attempted to get Casey's estate documents from his son, Dean. The daughters received a check for $200,000 from the estate and a release, but they did not cash the check because they had not seen any estate paperwork. The daughters then sued Casey's estate for breach of oral contact between Casey and their mother.

At trial, Morris (one of the daughters) testified that Shirley told Morris that Shirley and Casey had agreed that the daughters would inherit more if they waited to receive property until after Casey's death. Morris admitted on cross-examination that her mother did not tell her how much they would inherit from Casey. An attorney who had worked with Casey testified regarding letters he wrote to Casey about Casey's trust having a two-thirds/one-third division of asset between Casey's family and Shirley's family and about Casey changing the trust so that it would be distributed only to Casey's family. In a later letter from the attorney to Casey, the attorney opined that no probate was needed for Shirley's estate because the assets were all jointly owned with Casey. The trial court found that the daughters carried the burden of proving, with clear and convincing evidence, that there was an agreement between Shirley and Casey that Shirley's children would be entitled to one-third of Casey's estate. Damages were awarded to the daughters.

On appeal, the Supreme Court of Virginia found that the record contained clear and convincing evidence to support the trial court's determination that an agreement existed between Shirley and Casey, regarding the disposition of their estates. However, the Supreme Court found that the evidence was not sufficient to prove the terms of the agreement, and that, without specificity of terms, there is no contract. Because the record lacked clear and convincing evidence as to the terms of the agreement between Casey and Shirley, the Supreme Court reversed the trial court's decision and vacated the damages awarded to the daughters.

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More on Elective Share

Claim for Elective Share Can be Made by Agent Acting under Power of Attorney

Grubb v. Yacoub, 86 Va. Cir. 503, 2013 Va. Cir. LEXIS 64 (July 3, 2013)

Bertha and Martin were married. Bertha died in 2010. Marvin was omitted from Bertha's Will. Marvin executed a Durable General Power of Attorney appointing Grubb as his attorney-in-fact. One month after Bertha's death, Marvin claimed his elective share of Bertha's augmented estate, pursuant to Va. Code § 64.1-13 ("When and How an Elective Share May be Claimed" now cited as § 64.2-302), by filing a written Notice to Take Elective Share (the "Notice") in the clerk's office of the Circuit Court for Fairfax County. The Notice was signed by Grubb, as attorney-in-fact for Marvin, who was incapacitated (although the Power of Attorney did not expressly provide that the agent would have the power to make an elective share claim on the principal's behalf). Grubb's signature on the Notice was acknowledged before a notary public. Marvin died in 2011, and Grubb qualified as the executor of Marvin's estate.

Grubb filed a Petition in 2012 seeking, among other things, a determination by the Court of the elective share of Bertha's augmented estate. Yacoub, on behalf of Bertha's estate, filed a Demurrer to Grubb's Petition. The question before the Court on the Demurrer was whether a claim for elective share signed and properly acknowledged by the attorney-in-fact for a surviving spouse, but not the surviving spouse himself, constitutes a valid claim under the elective share Code provision § 64.2-13 (now § 64.2-302).

The court noted that the statute requires that an elective share claim be made "either in person before the court having jurisdiction over the administration of the decedent's estate or by writing recorded in such court, or the clerk's office thereof, upon such acknowledgment or proof as would authorize a writing to be admitted to record under Chapter 6 . . . of Title 55." In Marvin's case, the claim was so made by filing a written claim, in the Clerk's office of the Fairfax County Circuit Court, within the necessary time frame. Grubb signed the Notice as attorney-in-fact, as authorized by Marvin's Power of Attorney, and Grubb's signature on the Notice was acknowledged by a notary.

Yacoub argued that the right to renounce a Will and take an elective share is personal to the surviving spouse and cannot be exercised by another on his behalf. Yacoub noted that the Virginia Supreme Court has held that a claimant seeking to claim an elective share must strictly comply with the requirements set forth in § 64.1-13 (now § 64.2-302). Prior to this case, the Virginia Supreme Court had ruled that a guardian could not claim the elective share on behalf of an incompetent widow. It had also ruled that an attorney could not claim the elective share on behalf of his widow client where the attorney's signature was not acknowledged. However, in

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the latter case, the Virginia Supreme Court noted in a footnote that it was not addressing whether an attorney can make a claim for elective share for a client, if the attorney's signature is acknowledged. Referencing this footnote, the Court in Grubb found that the language of the statute does not require that the surviving spouse sign the written claim for elective share, and that it could be implied from the Supreme Court's earlier decisions that the words "in person" modify only "before the court", and do not modify "by writing". Further noting that Marvin had appointed his agent under the Power of Attorney, itself an entrustment of personal, financial and legal decision-making capacity, the Court ruled that, even though the Power of Attorney did not expressly allow Grubb to make an elective share claim on Marvin's behalf, the general authority granted in the Power was sufficient to empower Grubb to make the elective share claim. Since Grubb signed and filed the Notice in accordance with his power under the Power of Attorney and in accordance with Va. Code § 64.1-13 (now §64.2-302), the Notice to Take Elective Share filed by Grubb on Marvin's behalf was valid.

Intestate Estate

Half Blood Relative Receives Full Paternal Share of Intestate Estate

Sheppard v. Junes, 287 Va. 397, 756 S.E.2d 409 (April 17, 2014)

John Sheppard died intestate. His maternal second cousin, Linda Junes, was appointed administrator of his estate. Linda identified fourteen second cousins from John's maternal side as John's closest relatives. After certification by a genealogical research firm, Linda accepted Jason Sheppard, Jr. as John's half-uncle from John's paternal side.

As administrator, Linda filed a motion for aid and direction in the Circuit Court of Arlington County. She sought assistance to determine the proper distribution proportions of John's estate. In particular, Linda sought assistance to determine whether either (1) Jason could take the full amount of the paternal share because he was the only relative on the paternal side, or (2) Jason could only take one-half of the paternal share, with the remaining one-half to be divided among the beneficiaries on the maternal side, because half-bloods can only receive half of the inheritance of whole bloods under Virginia law. The Circuit Court ruled that Jason could only take a one-half share of the paternal portion of John's estate, because of his half-blood status.

Upon de novo review, the Virginia Supreme Court found as follows: Va. Code § 64.2-200 sets forth a sequential list of hierarchical classes of people to whom a decedent's estate passes; each subsection of that statute must be assessed in the order listed. Only if no person listed in a subsection qualifies as a member of the class included in that subsection may persons in the next subsection be considered as beneficiaries.

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Va. Code § 64.2-200(A)(5), the first subsection applicable to John's estate, provides that one-half of his estate passes to John's paternal relatives, and one-half passes to John's maternal relatives (each half being known as a "moiety"). For each moiety, the statutory provisions in Va. Code § 64.2-200(A)(5)(a) through (e) are applied separately and independently. Thus, under Va. Code § 64.2-200(A)(5), the maternal side moiety passes to the fourteen cousins on the maternal side, and the paternal side moiety passes to Jason.

Va. Code § 64.2-202(A) addresses when beneficiaries take *per capita* and *per stirpes*; the division of an estate under § 64.2-202(A) applies either to a decedent's entire estate, "or to each half portion of such estate when division is required by" § 64.2-202(A). That is, § 64.2-202(A) independently applies to each moiety of John's estate created pursuant to § 64.2-200(A)(5). Since Jason is the only member of the paternal class, he receives the entire paternal moiety.

The Court further found that Va. Code § 64.2-202(B), which provides that "collaterals of the half-blood shall inherit only half as much as those of the whole blood" modifies the application of § 64.2-202(A), but only of § 64.2-202(A); it does not change the division of the estate into the two moieties required by Va. Code § 64.2-200(A)(5). Since Jason was the only collateral heir on the paternal side, he receives the entire paternal moiety.

Presumption of Undue Influence

Fiduciary & Confidential Relationships Create Presumption of Undue Influence

Ayers v. Shaffer, 286 Va. 212, 748 S.E.2d 82 (2013)

Elsie Smith, elderly and in poor health, relied on a neighbor couple, the Shaffers, who were not related to her, to help her manage her financial affairs and to help her with the daily activities of living. Elsie executed a power of attorney naming Mrs. Shaffer as her agent and naming Mr. Shaffer as alternate agent. Elsie also named Mrs. Shaffer as the executor of her Will; in her Will, she directed that the Shaffers be compensated for the care they gave her. She left her residuary estate to relatives. Finally, Elsie retitled a bank account and several CD's in joint name with the Shaffers. Mrs. Shaffer used her survivorship rights and her power as agent to collect or transfer approximately $400,000 of Elsie's assets to herself or other persons not named in Elsie's Will. Elsie's family members (the residuary legatees) sued to recover those assets, arguing that the transfers were a result of undue influence and a breach of fiduciary duty.

The trial court sustained the Shaffers' demurrer, finding that the existence of the power of attorney did not raise a presumption of undue influence. On appeal, the Virginia Supreme Court noted that a presumption of undue influence can arise: (1) "[W]here great weakness of mind concurs with gross inadequacy of consideration, or circumstances of suspicion", or (2) "[W]here one person stands in a relationship of special confidence towards another, so as to acquire an

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habitual influence over him". With a fiduciary relationship, a presumption of undue influence arises when there is any transaction that benefits the dominant party and that is a detriment to the other party.

In Elsie's case, the Supreme Court found that that the funding of the joint account in the names of Elsie and the Shaffers created a confidential relationship under Va. Code § 6.2-619(A), which provides that "[p]arties to a joint account . . . occupy the relation of principal and agent as to each other." Thus, the existence of the accounts funded entirely by Elsie and titled by Elsie in joint name with the Shaffers imposed a fiduciary duty on the Shaffers, shifting the burden of proving bona fides to the Shaffers. In addition, the Court found that a confidential relationship existed between Elsie and the Shaffers by virtue of the power of attorney, and, separately, by virtue of Elsie's dependence on the Shaffers for assistance with financial matters and daily living. The Court reversed the lower court's judgment on those counts and remanded the case for further proceedings.

LEGISLATION

Filing of Evaluation Reports for Incapacitated Persons

The Virginia General Assembly (the "Assembly") amended Va. Code § 64.2-2005 to require that the medical evaluation report filed with the Circuit Court in guardian or conservator proceedings must be filed under seal. In addition, a copy of the report must be provided not only to the guardian ad litem, but also to the respondent and to all adult individuals and entities to whom notice is required to be given under Va. Code § 64.2-2004, within a reasonable time prior to the hearing on the petition.

Qualification of Administrator in Action for Wrongful Death or Personal Injury

Va. Code § 64.2-454 provides that an administrator can be appointed in any case in which a civil action for personal injury or death by wrongful act arising within Virginia is contemplated against or on behalf of an estate or the beneficiaries of the estate of a Virginia resident or nonresident who has died within or outside of Virginia solely for the purpose of prosecution of such matter, if an executor has not been appointed in the estate. The Assembly amended § 64.2-454 to clarify that a fiduciary appointed in a foreign jurisdiction can qualify as an administrator for purposes of maintaining a wrongful death action or personal injury action in Virginia. The amendment further provides that a Virginia resident and nonresident can be appointed as co-administrators.

Trust Directors; Defenses to Liability

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Va. Code § 64.2-770 allows a trust settlor to appoint a trust director who can direct certain actions of the trustee. The Assembly amended § 64.2-770 to provide that the provisions set forth in subsection E of the statute can be incorporated into a trust by the settlor or by a nonjudicial settlement agreement. If subsection E is incorporated by reference, then (i) the trust director is liable for a breach of the trust director's fiduciary duty to the same extent that a trustee would be liable for a breach of his fiduciary duty, and (ii) a trust director can assert defenses to liability on the same basis as a trustee. Notwithstanding the foregoing, a term of a trust relieving a trust director of liability for breach of trust is unenforceable to the extent that it (i) relieves the trust director of liability for a breach of trust that was committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the settlor, or (ii) was inserted as the result of an abuse by the trust director. An exculpatory term drafted or caused to be drafted by the trust director is invalid as an abuse of a fiduciary or confidential relationship unless the trust director proves that the existence and contents of the exculpatory term were adequately communicated to the settlor.

Increase in Various Allowances and Other Amounts Related to Wills, Trusts & Fiduciaries

The Assembly increased the amounts of various allowances, threshold amounts and other dollar-based provisions in Title 64.2 of the Virginia Code (Wills, Trusts and Fiduciaries), to account for inflation. Of particular note are the following increases:

(i) § 64.2-305 (Augmented Estate) – The value of property transferred by the decedent to anyone other than a bona fide purchaser, at any time during the marriage to the surviving spouse, is included in the augmented estate. The amendment aligns the value of a gift or transfer without full consideration with the amount specified under IRC Code § 2503(b), *i.e.*, the annual exclusion amount. Amounts that exceed the federal annual exclusion amount are includable in the augmented estate. Prior to the amendment, amounts that exceeded $10,000 were includable in the augmented estate.

(ii) § 64.2-309 (Family Allowance) – The family allowance is increased from $18,000 to $24,000, with periodic installments not to exceed $2,000 (increased from $1,500) per month for one year.

(iii) § 64.2-310 (Exempt Property) – The exempt property value is increased from $15,000 to $20,000.

(iv) § 64.2-311 (Homestead Allowance) – The homestead allowance is increased from $15,000 to $20,000.

(v) § 64.2-416 (Devises & Bequests that Fail) – Unless a contrary intention appears in the Will, if a testator makes a bequest to a legatee, not exceeding the value of $100

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(increased from $25), and the legatee refuses to take possession of the bequest, then the bequest fails and becomes part of the residue.

(vi) § 64.2-528 (Decedent's Debts) – The funeral expense limitation is increased from $3,500 to $4,000; and the medical and hospital expense limitation is increased from $400 to $2,150 for each hospital and nursing home and from $150 to $425 for each person furnishing services or goods.

(vii) § 64.2-602 (Small Assets) – If a person has possession of an asset valued at $25,000 or less (increased from $15,000), he can deliver the asset to any successor provided that at least 60 days have elapsed since the decedent's death and no application for the appointment of a personal representative is pending or has been granted in any jurisdiction.

Amounts were also increased in the following statutes: § 64.2-424 (When Direction to Purchase Annuity Binding on Legatee), § 64.2-537 (Action to Enforce Claim of Less than $100; Notice); § 64.2-609 (Money and Personal Property Belonging to Nonresident Decedents), § 64.2-904 (Transfer to Custodial Trustee by Fiduciary or Obligor; Facility of Payment), § 64.2-1302 (Waiver of Inventory and Settlement for Certain Estates), § 64.2-1311 (Vouchers and Statement of Assets on Hand; Direct Payments to Account; Vouchers for IRS Payments), § 64.2-1313 (Exhibition of Accounts when Sum does Not Exceed Certain Amount), § 64.2-1411 (When Fiduciary May Qualify Without Security), § 64.2-1802 (Parental Duty of Support; Limited Authority of Commissioner of Accounts), § 64.2-1905 (Other Transfer by Fiduciary), § 64.2-1906 (Transfer by Obligor), § 64.2-2017 (Payments from U.S. Department of Veterans Affairs), and § 64.2-2026 (Surrender of Incapacitated Person's Estate).

The Assembly also amended § 64.2-2023 (Estate Planning) to provide that a commissioner of accounts has the same authority as the circuit court has to determine the amounts, recipients and proportions of any gifts made from the estate of an incapacitated person for whom a conservator has been appointed, provided that (i) the total gifts authorized by the commissioner shall not exceed $25,000 in a calendar year and that (ii) the commissioner must report to the circuit court his determination as to such gifts.

Decanting Statute; Conditions for Second Trust

§ 64.2-778.1 allows a trustee to decant to a second trust under certain conditions. Section C of § 64.2-778.1 provides that the terms of the second trust are subject to a number of conditions. The condition in subsection 6 of Section C provided as follows: "[i]f contributions to the original trust have been excluded from the gift tax by the application of 26 U.S.C. § 2503(b) or (c), the second trust shall provide that the beneficiary's remainder interest in the contributions shall vest and become distributable no later than the date upon which the interest

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would have vested and become distributable under the terms of the original trust." The Assembly changed the word "or" in subsection 6 to "and".

Cemetery; Special Interments

The Assembly adopted Va. Code § 54.1-2312.01 which provides that, under certain conditions, a cemetery company may have a section in the cemetery devoted to the interment of human remains and the pets of such deceased humans and/or a section devoted to the interment of pets only.

Correcting Errors in Deeds, Deeds of Trust and Mortgages

The Assembly adopted Va. Code § 55-109.2, which allows an attorney to record a corrective affidavit to correct an obvious description error contained in a recorded deed, deed of trust or mortgage. "Obvious description errors" include (i) errors transcribing courses and distances, (ii) errors incorporating a recorded plat or deed reference, (iii) errors in listing a lot number or designation, or (iv) omitted exhibits supplying the legal description of the real property conveyed. Before a corrective affidavit can be recorded, the attorney who prepared the deed, deed of trust or mortgage must deliver a copy of the affidavit to all parties to the deed, deed of trust or mortgage, if known and if possible, and to the title insurance company, if known, and give notice of the intent to record the affidavit and of each party's right to object to the affidavit. For errors in transcribing courses and distances, a copy of the affidavit must also be provided to any owner of property adjoining the line to be corrected. The parties have 30 days to object in writing to the recordation of the affidavit. Model Corrective Language is included in the statute.

Mental Health, Firearms and Guardianship

The Assembly amended §§ 37.2-819 and 64.2-2014 to provide as follows:

(i) the order from a commitment hearing for involuntary admission or involuntary outpatient treatment or any certification of voluntary admission subsequent to a temporary detention order must be filed with the district court clerk for the county or city where the hearing took place as soon as practicable but no later than the close of business on the next business day following the completion of the hearing; and

(ii) a copy of the court's findings that a person is incapacitated or has been restored to capacity or a copy of any order appointing a conservator or guardian must be filed by the judge with the clerk of the circuit court for the county or city where the hearing took place as soon as practicable, but no later than the close of business on the next business day following the completion of the hearing.