

2015 Virginia Update

Developments in Estates, Trusts and Probate Law

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Selected Virginia Legislative Changes in 2015 that relate to Estates, Trusts and Probate

The 2015 Virginia legislature enacted two major changes and several minor changes to the Virginia code related to estates, trusts and probate. Each major revision to the code addressed hot areas in the estate planning world. Unless noted all of the new laws took effect on July 1st.

The first major change arose from the enactment of SB 1404 amending a number of Virginia Code sections (including VA Code §§ 23-38.75, 23-38.76, 23-38.77, 23-38.80, 23-38.81, and 58.1-322) that will now allow for the creation of ABLE Savings Accounts. Under Achieving a Better Life Experience Act of 2014 (or “ABLE” Act), Congress authorized states to establish ABLE savings trust accounts to assist individuals and families in saving and paying for certain expense of individuals who are disabled or blind prior to the age of 26. Virginia became the first state to create the necessary state code sections to allow for individuals to create ABLE savings accounts.

Under the ABLE act, an individual would only be eligible to create an ABLE account, if that person becomes disabled before age 26 and

- receives Social Security Disability Insurance (SSDI) or SSI; or
- files a disability certification created by IRS will draft.

Expenses covered for the disabled individual would include education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, and other related expenses. Earnings on contributions to ABLE savings trust accounts would be exempt from federal income tax. Similar to how Virginia’s 529 accounts are administered, administration of ABLE savings accounts would be overseen by the Virginia College Savings Plan. Current indications from the administrators of the Virginia College Savings Plan are that individuals will be able to enroll to open ABLE savings accounts in the first quarter of 2016.

The second major piece of legislation passed deals with digital assets by amending VA Code §64.2-109 and §64.2-110 and enacting VA Code §64.2-111 through 115. Building off of a prior law enacted in 2014 that provided the ability for personal representatives of deceased minors to access the digital account (*e.g.* Facebook) of said deceased minors, Virginia enacted the Privacy Expectation Afterlife and Choices Act (the “Act”).

The Act grants similar powers as the 2014 law over digital assets to personal representatives of all decedents, not just minors, provided there is input on accessing the digital assets from the decedent prior to the decedent’s passing. The Act allows users to make choices before death and dictates how the digital information can be disclosed on death, including the following:

- The Act distinguishes the difference between digital “records” and digital “contents.” “Records” refers to the identification of the account holder and holder’s electronic addresses as well as times and dates of communication. “Contents” refers to the actual substance of the communication.
- A personal representative can ask the court to order a provider to supply the last 18 months of a decedent’s records as long as the request is not in conflict with the decedent’s last will and testament. Records farther back than 18 months can be requested if court concludes that the records are necessary to the administration of the decedent’s estate.
- A personal representative can request “contents” of the digital communications but a personal representative must show that the decedent consented to the disclosure. Disclosure can be shown through account settings or some form of affirmative direction to the provider by the decedent. General provisions in a Terms of Service (“TOS”) agreement with the provider won’t be enough.
- A provider can block access to both records and contents if the decedent acted to protect the privacy of the information which could include a simple click on a TOS agreement could be enough to denote a desire for restricting access. The provider can also block access to the request by demonstrating by clear and convincing evidence that compliance with the order would create an undue burden upon the provider.
- Further, disclosure would not be given if the disclosure violates state or Federal law.

When reviewing the legislative history of the Act, in combination with drafts issued by the Uniform Law Commission on fiduciary access to digital accounts, the Act appears to be more friendly toward the internet service provider (ISP) than providing the fiduciary the necessary access to the digital assets. With an appearance of the Act being unbalanced toward ISPs, the Virginia legislature will likely have to address the Act down the road to provide the necessary access to fiduciaries.

The Virginia legislature also addressed several minor points in the Virginia code as it relates to estates, trusts and probate. SB 762 clarified VA Code §55-20.2 stating that the proceeds of the sale of property held as tenants by the entirety in a trust retain the same immunity from a separate creditor of one spouse as is provided for the property itself. SB 762

also clarified that property held in trust where both spouses are beneficiaries of one trust or where each spouse is a beneficiary of a separate trust and the two separate trusts together hold the entire property is a tenancy by the entireties, provided that the other requirements for such a tenancy are met. Finally, the law stated the creditor protection provided under current law may be waived.

HB 1657 amended VA Code §54.1-2984 adding language to the suggested written advance directives form that allows a female declarant to add specific instructions for life-prolonging procedures in case the declarant is pregnant when her attending physician determines that she has a terminal condition. HB 2229 amended VA Code §64.2-601 providing that if the successor to a decedent receives certain small assets in the form of checks, drafts, or other negotiable instruments that are payable to the decedent's estate, the successor may endorse or negotiate such checks, drafts, or other negotiable instruments. SB 951 (amending VA code §§32.1-309.1, 32.1-309.2, 54.1-2800, and 54.1-2818.1) and SB 1434 (amending VA Code §§ 32.1-309.1 and 32.1-309.2) addressed what persons can make arrangements for decedent's remains and clarified law-enforcement agencies role when identifying a body.

Selected Cases Related to Estates, Trusts and Probate

Virginia courts at the federal and state level addressed a number of topics that relate to estates, trusts and probate. While it appears there were no groundbreaking cases, there were a number of cases that can prove helpful to a practitioner's clients.

In *Cowser-Griffin v. Griffin*, Record No. 140350, February 26, 2015, (Va., 2015), the Supreme Court of Virginia affirmed a Court of Appeals of Virginia finding that a qualified domestic relations order ("QDRO") was fully incorporated into the final divorce decree that named decedent's children as beneficiaries to the decedent's 401(k). Further, the Court of Appeals found that the decedent breached the terms of his Property Settlement Agreement ("PSA") by altering the beneficiaries in his 401(k) from his children to decedent's new spouse.

David L. Griffin and Kimberley Griffin were married in 1987 and had two children. They divorced in 1998. The final divorce decree incorporated the terms of a PSA that stated "[t]he parties agree to name the children of the marriage as co-beneficiaries under all 401K Plans and other such plans which would be distributed upon the death of either party." At the time of his death, Mr. Griffin was employed and was provided a 401(k) plan covered by Employee Retirement Income Security Act ("ERISA") rules. The employer's 401(k) documents provided that "if you are divorced, benefit payments from the Pension Plan or Savings Plan may be made to your former spouse, your child, or other dependent only in response to a Qualified Domestic Relations Order (QDRO)." The employer testified at trial that the 401(k) plan is not a survivor annuity and it is strictly payable to the designated beneficiary. In 2002, Mr. Griffin had named his children as his beneficiaries. He remarried in 2007 to Kimberly Cowser-Griffin naming her as beneficiary to most of his accounts including the 401(k) at issue. Mr. Griffin died in 2012. In October 2012, Mrs. Griffin sent a draft QDRO to Mr. Griffin's employer requesting the funds pursuant to the final divorce decree. The employer responded stating that the proposed domestic relations order ("DRO") would not be treated as a QDRO.

At the trial court level, the a Virginia circuit court determined that it had jurisdiction over the matter circuit court citing to VA Code § 20–121.1, and that VA Code § 20–107.3(K) grants the circuit court continuing authority and jurisdiction “to make any additional orders necessary to effectuate and enforce any order entered pursuant to [equitable distribution].” However, the circuit court denied Mrs. Griffin's request to enter a proposed QDRO, finding that “under controlling federal law, without a preexisting QDRO, Mr. Griffin's retirement benefits in the Dominion Salaried Savings Plan vested entirely in the designated beneficiary and surviving spouse, [Cowser–Griffin], once the plan participant passed away.” The circuit court found that under federal case law, at the time of retirement or preretirement death the former spouse must have perfected a QDRO at the time the benefits became payable. Alternatively, the court found that Mrs. Griffin could have put the plan on notice of her children's interest in the benefits. The circuit court found that Mrs. Griffin failed in both accounts.

The Court of Appeals overturned the circuit court finding that the PSA was fully incorporated into the final divorce decree that named Griffin’s children as beneficiaries to his 401(k). Griffin breached the terms of his PSA by altering the beneficiaries in his 401(k) from his children to Cowser-Griffin. The Court of Appeals stated the only way for the circuit court to rectify the beneficiary issue is to issue a QDRO. The Court of Appeals found the delay on the part of Griffin was not fatal. Further, the Court of Appeals found that rights of the Griffin children in the 401(k) account vested when the final divorce decree was issued and that Cowser-Griffin’s rights under ERISA law did not vest. Thus, ERISA-governed death benefits can be subject to posthumously entered QDRO. The Virginia Supreme Court adopted the Court of Appeals reasoning in *toto*.

The dissent by Justice Millette, found that the Court of Appeals was wrong in its findings because Griffin did remarry and Cowser-Griffin was the default beneficiary under the plan and that Mrs. Griffin or her children never filed a QDRO to enforce their rights. The PSA and final divorce decree does provide rights under state law but not rights enforceable under ERISA. The dissent further stated that the plans documents, in combination with statutes find that benefits at issue became vested in Cowser-Griffin at the time of Griffin’s death and Cowser-Griffin was not subject to the QDRO.

The Virginia Supreme Court’s ruling might not be final because, as of August 31, 2015, Cowser-Griffin has filed a petition for a writ of certiorari having the U.S. Supreme Court provide their views on the case.

Given the large number of government workers that are clients, the importance of correcting executing government benefits documents is of prime importance. In *Van Den Broek v. Tang, Adm’r.*, CL-2013-0012884, Circuit Court of Fairfax County, (March 5, 2014), the Circuit Court found that although plaintiff and decedent divorced in 1994 and decedent designated defendant (widow) as beneficiary on decedent’s federal Thrift Savings Plan benefit, that designation was invalid. It was found invalid because defendant could not act as a witness and also be a beneficiary to the benefits from the plan. Further, federal law preempts defendant’s counterclaim asserting that plaintiff’s claim to the TSP benefits breached plaintiff’s property settlement agreement with decedent.

Not to be left out, the U.S. District for the Eastern District of Virginia also addressed retirement benefit issues. In *Johanna Van Vliet v. Arianne Van Vliet, et al.*, Civil Action No.

4:14cv151, (February 11, 2015) ruled on the jurisdictional aspects when plaintiff attempted to rescind the disclaiming of IRA benefits.

In *Van Vliet*, the plaintiff originally filed action in Virginia circuit court seeking rescission of Disclaimer of Interest as primary beneficiary of an IRA that belonged to plaintiff's deceased husband. After consultation with legal and financial advisors, plaintiff would disclaim her interest in the IRA benefits allowing it to pass to secondary beneficiary, a revocable trust. Needless to say, this was not a good outcome because mandatory distributions from IRA were significantly higher than projected resulting in higher income taxes.

The U.S. removed the suit to federal court on ground that any civil action commenced in a state court against U.S. may be removed. U.S. then moved to dismissed from the case.

The E.D.VA found that in cases where U.S. has not waived its sovereign immunity, the action must be dismissed for lack of subject-matter jurisdiction. Plaintiff failed in overcoming her burden of demonstrating U.S. waived sovereign immunity. The court also rejected plaintiffs position that subject matter jurisdiction flows from 28 U.S.C. §1331 (defines one part of subject matter jurisdiction, §1340 (grants subject matter jurisdiction) and §1346 (only authorizes money judgements) are not waivers of sovereign immunity. The court stated that plaintiff's actions are an attempt to prospectively bind the IRS by seeking an improper advisory tax opinion from the court and cannot serve as the basis of a waiver of sovereign immunity to sue the United States.

Virginia had two rather interesting cases with respect to missing wills and the ability to probate a copy of will. Each provided insight into what standard should be used when proffering the copy of a will and the factual circumstances to support admission of when a will is missing.

In *Palesis v. Hlouverakis et al.*, Case Nos. 13-275 and 13-500, (Cir. Ct. of Henrico Co May 29, 2014), the court was confronted not only with a copy of a will but two competing wills that were proffered to probate. The first will was a photocopy of a holographic will dated March 25, 2011 proffered by the decedent's niece. The second will was "formally" executed will dated September 9, 2012 proffered by Hlouverakis, the decedent's widow. The decedent died on November 30, 2012.

The will proffered by the decedent's widow was determined by forensic evidence to be a fake created after his death. Electronic evidence demonstrated that the will was created after the date of the death of the decedent. The testimony in support of the widow's will was found to be contradictory and evasive including admonishing the attesting witnesses as lying in support of the widow's will given the blatant evidence demonstrating the will was a fake. The questionable evidence include misspelling of the decedent's name in the widow's will, mislabeling familial relationships in the will, and contradictory witness testimony by a housekeeper contradicting the attesting witnesses. The court rightly stated the proponent of a will has the burden to demonstrate the will is valid. Evidence of widow's conviction in 2000 of the felony of grand larceny was allowed in because it was probative of widow's creditability limiting her testimony.

The will proffered by decedent's niece, even though it was a photocopy was admitted. The niece's will was admitted based on testimony from several witnesses that the decedent originally handwrote the will and it was then typed up by a relative. The decedent signed that will and it was witnessed by disinterested witnesses. There is no impediment to the probate of a handwritten will once it is established by two disinterested witnesses who show that it is "wholly in the testator's writing." In this case, three disinterested witness identified decedent's

handwriting and signature. When an original testamentary document is missing, as here, and its last known location was not in the possession of the testator, the law presumes that it was lost. Here, the decedent had left his original will on the kitchen table of a friend supports that position. The court found that the niece's will met its burden of showing the testator's signature plus clear and convincing evidence that "the decedent intended the document or writing to constitute the decedent's will."

In *Edmonds v. Edmonds*, Case No. 14-1159, (Va. June 4, 2015), the Virginia Supreme Court continued with the same view in *Palesis* that a copy of a will proffered for probate may be accepted based on the factual circumstances of the case and that that the proponent of the non-original will is not required to prove why the original will was lost.

James A. Edmonds, Jr. ("Edmonds") died on April 30, 2013 and was survived by his wife, Elizabeth Cashman Edmonds ("Elizabeth"), his daughter from that marriage, Kelly Elizabeth Edmonds ("Kelly"), and a son from a previous marriage, James Christopher Edmonds ("Christopher"). It was undisputed that the Edmonds executed a valid will on November, 8 2002. The 2002 will intentionally disinherited Christopher and gave the entire estate to Elizabeth or if she predeceased him to Kelly. However, the original 2002 will was not found; only photocopies of it were located in his office.

Elizabeth filed a petition to probate a copy of the will. Christopher contested the petition because if the copy of the will was not admitted to probate, the decedent would be deemed to have died intestate, and therefore, Christopher would receive a portion of the decedent's estate under intestacy. At trial, Elizabeth presented numerous witnesses supporting her position that the Edmonds had told them that he did not want to leave any portion of his estate to Christopher, and that he intended to leave his entire estate to Elizabeth. The trial court ruled in favor of Elizabeth, holding that she had proved by clear and convincing evidence that the 2002 will was not revoked, and that accordingly the copy of the will would be admitted to probate.

On appeal, the Virginia Supreme Court, rejected Christopher's argument that it order for the proponent of a will to meet the burden of proof of clear and convincing evidence, the proponent must prove some other cause for the disappearance of the will. Affirming its decision in *Brown v. Hardin*, 225 Va. 624 (1983), the Court stated that a proponent of a missing will is not required to specifically prove what became of the missing will only that by clear and convincing evidence, that the testator did not destroy the will with the intention of revoking it.

In *Perez v. Tatyana Draskinis et al.*, Case No. CL13-1286, (Cir. Ct. of Roanoke Co. April 25, 2014), the Court addressed pre-nuptial agreement on statutory rights. While not breaking any new ground it is instructive in the applicability of prenuptial agreements and the need to seek counsel for both parties.

Decedent, Stanley Draskinis, died during the process of divorcing his fourth wife, Tatyana Draskinis ("Draskinis"). The divorce was never finalized but decedent disinherited Draskinis under his will. Draskinis sought to exercise her statutory rights to take against the decedent's will. Perez is the decedent's daughter from decedent's second marriage and denies Draskinis's rights based on a premarital agreement that decedent and Draskinis entered into prior to their marriage. Court found that, even though, Draskinis was a relative new immigrant from Russia and spoke limited English her executing of the pre-nuptial agreement limited her rights. Draskinis's son testified that he reviewed the pre-nuptial agreement with Draskinis and that the decedent, a Lithuanian who spoke Russian, also went over the pre-nuptial, explaining the terms

to Draskinis in Russian. Additional testimony and evidence supported Perez's position that the pre-nuptial was valid ignoring Draskinis's argument that the pre-nuptial is ambiguous, she did not voluntarily enter into the pre-nuptial and that the pre-nuptial is unconscionable.

In *Sheppard, Jr. v. Junes*, Case No. 13-0871, (Va. April 17, 2014), the Virginia Supreme Court addressed intestacy and the share a half-blood relationship to the decedent is entitled to from an intestate decedent.

The facts of the case are fairly simple. Decedent died intestate. Decedent never married and had no children. At the time of the decedent's death, decedent was survived by fourteen second cousins on decedent's maternal side and one half-uncle on decedent's paternal side. Defendant, as administrator of the decedent's estate, sought judicial assistance to determine if the proper distribution to half-uncle was either (1) half-uncle would take the entirety of decedent's paternal distribution, or (2) would only take one-half of take the entirety of decedent's paternal distribution because half-bloods can only take half of the inheritance of whole-bloods.

At the trial court level, the circuit court held that half-uncle could only take a one-half share of decedent's estate that was to pass to decedent's paternal side, and the remainder of decedent's entire estate was to go to the fourteen maternal second cousins. The Virginia Supreme Court reversed the circuit court holding the circuit court erred when it held that the sole collateral heir on the paternal side of an intestate estate is limited to only one-half of the paternal share because he is a half-blood relative of the decedent, and that the other half of the paternal share shall be distributed to all other heirs on the maternal side. Instead, the plaintiff is entitled to ½ half of decedent's estate and not limited to ½ of the paternal-side share given the plaintiff was the only heir on the decedent's paternal side.

In *Bartee v. Vitacruz*, No. 13-1283, (Va. June 5, 2014), the Virginia Supreme Court addressed the situation of when one of the co-administrator the surviving co-administrator has standing alone to sue the defendant when the other co-administrator has died. Decedent died from alleged medical error. Robert Bartee and Wiley Begley qualified as co-administrators of decedent's estate. Begley subsequently died prior to Bartee filing a wrongful death lawsuit against an emergency department physician. Defendant moved to dismiss the action on the grounds that there was no unity of action because one of the co-administrators had died.

The trial court dismissed the action, concluding that Bartee lacked standing to sue alone on the grounds that there must be a unity of action whether there is one personal representative or more than one pursuant to VA Code § 8.01-50(C)

The Virginia Supreme Court reversed the trial court ruling holding that Bartee had standing to file the action under the doctrine of survivorship because the power of appointment given to Bartee and Wiley Begley as co-administrators of the estate to prosecute a wrongful death action could be exercised by Bartee as the sole remaining survivor.

The Virginia Supreme Court addressed will interpretation in *Jimenez v. Corr, Jr., et al.*, No. 14-0112, (Va. October 31, 2014) as it relates to estate plans with multiple estate planning documents and how language within each document impacts the reading of the other.

Decedent's husband established Capitol Foundry of Virginia ("Company") in 1970. The Company was incorporated in 1976 with decedent's husband initially as the sole shareholder. Defendant joined the business and was allowed to purchase five newly issued shares of Company stock. That same year, plaintiff joined the business. Decedent's husband died in 1999, with all of

his outstanding shares in Company going to decedent. In 2002, decedent conveyed five of decedent's shares to plaintiff. At the time of decedent's death in 2012, plaintiff owned ninety-five shares of Company stock, defendant owned five shares and plaintiff owned the remaining five shares.

Plaintiff filed suit in the Circuit Court of the City of Virginia Beach against defendant, the executors of decedent's estate, and the Company. Plaintiff alleged that decedent, plaintiff and defendant entered into an agreement (the "Shareholders' Agreement") which required decedent's executors to make decedent's ninety-five shares of Company stock available for purchase by the Company, and required Company to purchase those shares. Defendants countered that decedent's estate planning documents, and not the Shareholders' Agreement, controlled disposition of decedent's shares of Company stock. Therefore, in accordance with the decedent's estate planning documents, those shares were to go into an *inter vivos* trust rather than being subject to purchase under the Shareholders' Agreement.

The circuit court held that the relevant portions of the Shareholders' Agreement were not applicable to decedent's shares of Company stock, and therefore those shares were to pass to the *inter vivos* trust established by decedent's estate planning documents. Moreover, because those estate planning documents permitted defendant to exercise an exclusive option to purchase all Company stock which passed into the *inter vivos* trust, defendant properly exercised said option.

The Virginia Supreme Court found that the decedent's will created a general provision governing the residue of decedent's estate which included the Company stock because it was not specifically bequeathed in the decedent's will. But for the defendant having an option on the stock prior to it being transferred to the revocable trust, a residuary clause would normally provide that the residuary of the decedent's estate would "pour-over" into decedent's revocable trust.

Further, the Court found that the Shareholder's Agreement governed the disposition of decedent's shares in the Company and that the Shareholder's Agreement mandatory purchase clause limited to whom the decedent's will could bequeath the stock. In this case, the Shareholder's Agreement required that decedent could only bequeath Company stock to "immediate family." Parties agreed that a provision in Shareholder's Agreement would allow decedent to bypass mandatory stock purchase provisions by bequeathing stock to specific individuals. But, the parties disagreed over whether that provision permitted the decedent to avoid the mandatory stock purchase provisions by the use of the "pour-over" provisions of the decedent's will. Thus, the question at issue was whether decedent's revocable trust would qualify as "immediate family."

The Court held that while all the beneficiaries of decedent's trust qualified under the "immediate family" requirement, the successor co-trustees of the decedent's revocable trust were not. Thus, because decedent's method of bequeathing her shares by way of the revocable trust did not satisfy the terms of the mandatory purchase clause in the Shareholders Agreement, those shares poured-over into the trust were exempt from the mandatory purchase scheme and contradictory.

The dissent took a rather harsh look at the majority's opinion with respect to a trustee's ownership of the stock in a trust. The dissent found that because the trustees would hold no more than "bare" legal title to the stock doesn't equate to invalidating the mandatory purchase

provisions in the Shareholder Agreement under the grounds that a co-Trustee was not immediate family.

In short, the big takeaway from this case is to ensure that your estate planning and business succession document work in harmony and terms in those documents are strictly defined.

Last, the 4th Circuit for the U.S. Court of Appeals addressed Virginia's ban on same sex marriage in *Bostic v. Schaefer*, 760 F.3d 352, (4th Cir. 2014). On July 18, 2013, two gay men filed a lawsuit in the U.S. District Court for the Eastern District of Virginia challenging the state's ban on same-sex marriage. In January 2014, Virginia Attorney General Mark Herring and Governor Terry McAuliffe announced their support for the suit. Judge Arenda L. Wright Allen heard oral arguments on February 4, 2014, with attorneys for the Clerk of the Circuit Court for the City of Norfolk defending the state's ban on same-sex marriage.

On February 13, 2014, Judge Wright Allen ruled that Virginia's statutory and constitutional ban on same-sex marriage is unconstitutional on the grounds that Virginia's Marriage Laws denied the plaintiffs their rights to due process and equal protection guaranteed under the Fourteenth Amendment of the United States Constitution.

In 2–1 ruling, the 4th Circuit found in favor of striking down Virginia's ban on same-sex marriage on grounds of infringement on plaintiffs' due process and equal protection rights. The U.S. Supreme Court stayed the enforcement of the ruling from August 20 through October 6. On October 6th, the U.S. Supreme Court rejected Virginia's appeal without hearings. This allowed the Fourth Circuit to lift the stay on its ruling.