Virginia Update

2016

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 16, 2016, 12:00 to 1:45 PM
District of Columbia Conference Center

Virginia Legislative Session 2016
Selected Legislation Related to Estates, Trusts and Probate
See Virginia General Assembly Legislative Information System at http://leg1.state.va.us/
Legislation effective July 1, 2016, unless otherwise noted

TRUSTS

HB 230 Trusts Method of Creating Trusts

Amended VA Code §64.2-719 Method of Creating Trusts

Adds a section clarifying that a circuit court may create and establish a trust upon petition of an interested party.

GUARDIANSHIPS/CONSERVATORSHIPS

HB 1266 Guardianship appointments, modifications, and terminations; notice sent to DMAS.

Amended VA Code §§ 64.2-2011 and 64.2-2014

Requires that notices of guardianship appointments, modifications, and terminations be sent to the Department of Medical Assistance Services. Current law requires that such notices be sent only to the local department of social services.

HB 1267 Guardianship or conservatorship; orders prior to the respondent's 18th birthday

Amended VA Code §§ 64.2-2001 and 64.2-2009

Clarifies that a court may enter an order of appointment for a respondent's parent or guardian, or other person if there is no living parent or guardian, prior to the respondent's eighteenth birthday. The bill requires that any such order state whether the order takes effect immediately upon entry or on the child's eighteenth birthday.

HB 342/SB 632/SB 466 Guardianship; communication between incapacitated person and others.

Amended VA Code § 64.2-2019

Provides that a guardian shall not unreasonably restrict an incapacitated person's ability to communicate with, visit, or interact with other persons with whom the incapacitated person has an established relationship.

MEDICAL DIRECTIVES

HB 616 Discharge from involuntary admission; advance directive.

Amended VA Code § 37.2-838. Discharge of individuals from a licensed hospital.

Prior to the release from involuntary admission or discharge from involuntary admission to mandatory outpatient treatment of an individual who has not executed an advance directive, the individual be given a written explanation of the procedures for executing an advance directive and an advance directive form.

POWERS OF APPOINTMENT

SB 127 Uniform Powers of Appointment Act; codification of Act.

Amended VA Code §§ 64.2-407, 64.2-408, and 64.2-2700; Added VA Code §§ 64.2-2705 through 64.2-2741

Virginia adopted the Uniform Powers of Appointment Act, which the permits the owner of a property/asset to name a third party and give that third party the power to direct the distribution of that property among some class of eligible recipients. The Act is based on the Restatement (Third) of Property: Wills and Other Donative Transfers and was adopted by the Uniform Law Commission in 2013.

AUGMENTED ESTATE; ELECTIVE SHARE OF SURVIVING SPOUSE

HB 231/SB 181 Augmented estate; elective share of surviving spouse.

Amended VA Code §§ 55-41, 55-47.01, 64.2-300, 64.2-311, 64.2-317, 64.2-500, 64.2-502, 64.2-556, 64.2-632, 64.2-1805, and 64.2-2022; Added VA Code §§ 64.2-308.1 through 64.2-308.17

Revises the Code related to the elective share of the surviving spouse. The new sections revise the Code to track with recent changes made to the Uniform Probate Code by the Uniform Law Commission. Moving forward the elective share of the surviving spouse will calculated on a graduated percentage, taking into account both spouses' assets and the length of marriage. Under current law, the surviving spouse is awarded 50% of the estate if there were no children and 33.3% if there were children. The law also clarifies the process by which the elective share is to be claimed and provides instructions for the valuation of assets to encourage uniformity in the method of calculation of the elective share. Takes effect for decedent's dying on or after January 1, 2017

UNCLAIMED PROPERTY

HB 1020/SB 408 Unclaimed property; payment of property of deceased owner.

Provides a means for the State Treasurer to pay unclaimed property of a deceased owner to a claimant who provides certain evidence of his entitlement to payment of said unclaimed property. Evidence would include (i) a certificate of qualification as the executor or an order of appointment as the administrator or personal representative; (ii) an affidavit authorizing the claimant to be the designated successor under the Small Estate Act that names the claimant as the designated successor; or (iii) the order of distribution or the final accounting for a closed estate that reflects payment is due in whole or in part to the claimant. If no such evidence is available and the owner of the property died at least one year prior to the filing of the claim and the amount claimed is $15,000 or less, the claimant may submit an affidavit stating his claim to the property, and the State Treasurer may approve and pay such claim at his discretion.

DEATH CERTIFICATES

SB 592 Vital records; amending death certificates.

Amended VA Code § 32.1-269; Added § 32.1-269.1

Creates a process for amending certain information on a death certificate registered with the Virginia State Registrar. The law will require a court order to change the name of the deceased, the deceased's parent, or the informant; the marital status of the deceased; or the place of residence of the deceased, when the place of residence is changed to a jurisdiction outside of the Commonwealth. An affidavit testifying to corrected information will be required for other types of changes.

Selected Cases Related to Estates, Trusts and Probate

PERSONAL REPRESENTATIVE

Supreme Court of Virginia

In Re: Lakisha Woodley, Co-Administrator of the Estate of Jameer Khamarie Woodley, Deceased, Record No. 141706, Justice D. Arthur Kelsey, October 29, 2015

Background: Four year old Jameer Woodley ("Jameer") was struck and killed by a school bus in 2009. A school employee had directed the bus to drive forward while Woodley was crossing in front of the bus. Jameer was survived by his parents and three older brothers, all beneficiaries under Virginia's wrongful death law. Jameer's parents qualified as co-administrators of Jameer's estate to file suit against the school district. The school district conceded liability and a jury awarded damages in the amount of $4.357 million dollars. Within those damages, the jury awarded Jameer's 5 year old brother $200,000 and his twelve year old brother $750,000.

When wrongful death cases are decided by a jury, the jury is in charge of apportioning out the award. The law allows the jury to not only set the damages, but also set the amounts that each beneficiary will receive. Because two of Jameer's were minors, their parents arranged for two irrevocable trusts to hold the money. The trusts were to be managed by an independent, professional trust company as the trustee. The parent's would have no on-going rights in those funds and barred from controlling, altering, amending or terminating the trust agreement. The trust agreements that were going to be put in place "emphasized that the trust assets were to be used exclusively for the benefit of each minor son and not to be used without court permission as a substitute for the parent's legal duty of support." The trustee was given full discretion in administering the trust including when to distribute assets.

Trial Court's action: A Southampton County trial court rejected the proposed trusts and directed payment of the awards to the clerk of court. By letter, the clerk advised the parties that the funds would be deposited in a savings account with a "current rate-of-return" of "one tenth of one percent (.10%). The Woodley's appealed contend that the trial court erred when it ordered payment of the minors' wrongful death awards to the clerk of court.

Supreme Court of Virginia: The Supreme Court of Virginia agreed finding the trial court erred when it refused to direct payment of the minor beneficiaries' awards to the personal representatives and instead directed it to the court of the clerk. Even though no statute addressed the issued, the Supreme Court rejected the trial judges' implicit finding that the Virginia General Assembly intended trial courts to supervise all wrongful death awards to minor beneficiaries as a matter of court and that nothing in the Death by Wrongful Act Statute authorizes a trial court presiding over a wrongful death award to dictate proactively the specific choices that a personal representative should make on these issues. Virginia Code 8.01-54(C), directs that an award "shall be paid to the personal representative" and then specifies that the representative distributes the recovery to the beneficiaries in accord with the allocation in the verdict. This distribution will be made in full conformity with the fiduciary obligations imposed on the personal representative. Nothing in the code allows for a judge to disregard said statutory command.

TENANCY BY ENTIRETY

Supreme Court of Virginia

William D. Evans, Trustee of the Wanda S. Evans Trust v. Wayne L. Evans, Individual and Per. Rep. of Douglas E. Evans, Deceased, et al., Civil Action No. 14-1277, Judge Williams, June 4, 2015.

Background: In 1976, Douglas Evans ("Douglas") unilaterally transfers ownership interest as tenant by the entirety in a real property to his wife Wanda Evans ("Wanda") that created a fee simple estate. The deed isn't recorded until 1979. Douglas and Wanda have three children – William, Lloyd and Wayne. Wayne has 2 children of his own. In 1993, Wanda transfers said real property to her revocable trust. Under pertinent terms of the trust, the two grandchildren received monetary distribution, Douglas gets a life estate in the realty at issue then to William and the residue goes to William. Wanda dies in 1994. Wayne, as next of friend action for his two children files a declaratory judgment action against Douglas and William on the basis that the 1993 transfer to trust is ineffective because "neither spouse can sever an estate by the entireties...by his or sole act." Wayne also contended that the 1976 deed was ineffective because Douglas cannot by his sole act deed the property to Wanda. This action is dismissed without prejudice under a finding of no actual case or controversy and the parties draft a settlement agreement. The settlement agreement among the parties agree that that Douglass expressly waives any right he has the in the real property except for his life interest and receives a monetary award from Wanda's estate.

Douglas dies in 2012 and William files a declaratory judgment against Wayne (as individual and personal representative for Douglas's estate), Lloyd and the two grandchildren seeking quiet title to the real property at issue.

Circuit Court: After numerous motions and cross-motions related to the validity and effectiveness of the 1976 deed, a Tazewell Circuit Court issued an opinion in which it concluded that the 1976 deed failed to show the requisite intent to jointly transfer the property to Wanda and, thus, since the 1976 deed was ineffective, the 1993 deed was ineffective to transfer the interest to the trust.

Supreme Court: The Supreme Court holds there is sufficient evidence of the intent of the grantor-spouse to make the conveyance and that there was likewise acceptance of the conveyance by the grantee-spouse of the real property. The Court found that Wanda affirmatively accepted the conveyance from Douglas and, thus, did agree to the dissolution of the tenancy by entirety ownership of the property even if said actions were much later on. Wanda's execution of the 1993 deed into the trust, which addressed her ownership of the property as separate property is clear evidence of her affirmative intent to accept the 1976 deed and, thus, the realty is property of the trust. In dictia, the Supreme Court stated that best practice still would be for both spouses to join as grantors in a deed where the property is going to one of them separately.

Concurrence by Justice Powell, with whom Chief Justice Lemons and Justice Mims join: Justice Powell agrees with the outcome of the case but not the method to get there. Justice Powell's position is that terminating a tenancy by the entirety requires joint conveyance of the property and not the hodgepodge action at the matter at hand which could create uncertainty as to ownership. Justice Powell would reverse the trial court's judgement based on the terms of the 1995 settlement agreement executed by Douglas and all the other parties. At the time of the agreement Wanda was already dead and, thus Douglas was the sole owner of the house and free to alienate his right as he saw fit which means he could take a life estate for himself and then to William.

COPY OF WILL

Supreme Court of Virginia

James Christopher Edmonds v. Elizabeth Cashman Edmonds, Personal Representative for the Estate of James A. Edmonds, et al., Civil Action No. 14-1159, Chief Justice Lemons, June 4, 2015.

Background: 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.

Trial Court: 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. Christopher appealed.

Supreme Court: The Virginia Supreme Court rejected Christopher's argument that in 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.

DOMICILIARY

U.S. District for the Western District of Virginia

Karen Taylor Bagheri, Administrator of the Estate of Shawn Matthew McKee, Deceased v. Dwight L. Bailey, M.D., et al., Case No. 1:14CV00077, U.S. District for W.D. of VA, U.S. District Judge James P. Jones, November 6, 2015.

Finding a man who lived in Virginia when he saw defendant emergency department physician on June 7, 2013 and was diagnosed with acute bronchitis, but moved his family to Idaho on June 12 and, subsequently died on June 25, was a resident of Idaho when he died and the U.S. District Court has diversity jurisdiction in this medical malpractice case. The court will review the totality of the circumstances when weighing whether an individual has changed domiciles. The defendants argument that the deceased had not purchased or rented a home in Idaho, had not register to vote, held bank accounts in Virginia, had a Virginia driver's license and only paid Virginia taxes in the last 12 months was outweighed by the fact the deceased had packed up all of his family's belongs, drove across country, relinquished his Virginia apartment, resigned from his job and listed Idaho as their place of residence when completing employment/tax forms demonstrate the deceased had changed domiciliary.

NO-CONTEST PROVISIONS

Supreme Court of Virginia

Celia A. Rafalko, as Trustee of the Dimitri Georgiadis Trust v. Paul D. Georgiadis, et al., 777 S.E.2d 870, Judge Goodwyn, November 5, 2015.

Background: Dimitri Georgiadis established a revocable trust in 1989 naming his new wife Margaret and his two sons (Paul and Basil Georgiadis) from a previous marriage as beneficiaries and successor co-trustees. On August 27, 2012, Dimitri amended and restated his trust (the "August Trust") naming Margaret as the sole income beneficiary for her lifetime and distributed the remaining portion of the trust to his sons after she died. The August Trust restatement also removed the sons as successor co-trustees and appointed Celia A. Rafalko as successor trustee. Rafalko was a financial advisor. Dimitri further amended his trust on September 21, 2012 (the "September Trust") without the sons' knowledge. In the September Trust Amendment, Dimitri inserted a rather harsh no-contest provision and stated a provision that would allow the trustee to distribute the trust assets to a charity of the trustee's choosing if Margaret and Dimitri died and no beneficiaries remain.

Dimitri died on December 3, 2012. On January 3, 2013, Paul wrote a letter to the attorney that drafted the August Trust, asking him to preserve documents relating to Dimitri's estate plan and stating that the documents "will be subject of a contest." On January 4, 2013, Paul wrote a letter

to Margaret asking her to agree to terminate the August trust and distribute its assets out with 1/3rd going to her and 1/3rd each to Paul and Basil. The letter also warned about a possible contest over the will and the trust that would raise questions about undue influence and testamentary capacity. Pursuant to VA Code § 64.2–775, Rafalko sent a copy of Dimitri's trust and will to Paul and Basil. On January 7, 2013, Basil wrote a letter to Rafalko disavowing the January 4th letter written by his brother Paul. In a letter dated January 31, 2013, Rafalko sent a letter to the sons stating she was considering whether the January 4th letter violated the no-contest provision and requesting they send any information they might believe would impact her decisions. This letter included releases to be signed by the sons pursuant to the trust document. On February 19, 2013, Rafalko received the releases by which all claims concerning any challenge to the will or trust. However, in a letter dated May 28, 2013, Rafalko informed the sons that she had decided that the letters sent by Paul violated the no-contest provision. The sons filed a declaratory judgement action asserting their rights and that son's conduct did not trigger the no-contest clause and that her decisions were arbitrary and capricious, contrary to law and public policy, and contrary to Dimitri's intent.

Trial Court: The circuit court for Henrico County issued an opinion construing the no-contest provision stating that the no-contest provision was limited to the September Trust because of the use of the words "under this trust agreement." Thus, the court found that the sons did not violate the no-contest provisions because Paul's letter referred to the August Trust. Rafalko filed a motion for reconsideration on the grounds that the sons presented no evidence that she had acted fraudulently, dishonestly or in bad faith that would provide for overturning her decisions. The Court denied her motion and Rafalko appealed.

Supreme Court: In a 4-3 decision, the Virginia Supreme Court allowed Dimitri's sons to continue as remainder beneficiaries of Dimitri's estate, despite Rafalko's decision that the son's had violated the no-contest provisions. The 4-3 decision demonstrates the "yes, but" approach Virginia takes toward no-contest provisions finding that said clauses are enforceable, but they are not favored and must be strictly construed. The majority opinion found that the Court must evaluate the trustee's actions to determine if they were consistent with the terms and purposes of the trust and acting arbitrarily violates the duty to act in conformance with the purposes of the trust. One overwhelming issue was Rafalko's spending 3 months collecting information and consulting attorneys about whether the sons' actions violated the no-contest clause. The Court has the authority to overrule discretionary actions if the trustee has clearly abused the discretion granted the trustee under the trust instrument or acted arbitrarily. The Court agreed with the circuit court that the Paul's letters only referred to the August Trust and didn't trigger the no-contest provisions in the September Trust. The Court also noticed the importance that the letters didn't go to the Trustee but third parties.

Mims dissent: Agreed with the majority that the Court has authority to review breach of fiduciary duty, but just for language in the no-contest clause. The Mims dissent found there was not enough evidence to support a finding of bad faith or breach of any other fiduciary duty. Also found that the "this trust agreement" language did not just apply to the September trust but the entire trust agreement because the September Trust contains none of the elements to create a trust and couldn't stand on its own.

Kelsey dissent with McClanahan joining: The basis for the dissent is not whether the no-contest provision was violated but who gets to make the call. The Kelsey dissent believes absent "egregious circumstances, the settlor of this trust intended his trustee – no the litigation

machinery of the court system" to make that call. The dissent also went through a detailed analysis in how poorly the sons treated Dimitri. The dissent also found that where there is no ambiguity in the no-contest provision, no need to construe and disagreed that evidence in the record demonstrated that the trustee acted arbitrary and capriciously.

REMOVAL OF PERSONAL REPRESENTATIVE

Circuit Court

Norris et al. v. Hicks, Adm'r for the estate of Jonathan Hick, Record No. 016-8-011, Judge Brown, December 18, 2015

Decedent died in motorcycle accident and was survived by his mother, a 13 year old from his first marriage and a 3 year old with another woman. Decedent's mother files to become administrator of decedent's estate as it relates to the civil action over his death and later is qualified as administrator for all other purposes. Decedent's mother files a lawsuit demanding $32 million. Women of the two minor children file a petition to remove decedent's mother as administrator. Court denies petition finding that the law requires "cause" such as fraud, breach of trust or some other default, to remove a properly qualified administrator.

Trial Court Findings: 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. Plaintiff appealed.

Supreme Court Findings: Supreme Court reversed 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. Plaintiff is entitled to ½ half of decedent's estate and not limited to ½ of the paternal-side share.