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TESTAMENTARY CAPACITY LITIGATION IN VIRGINIA

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ABSTRACT

In *Rust v. Reid*,[1] a 1918 case involving testamentary capacity, the Supreme Court of Virginia wrote the "cases upon this subject are almost without number, and they are not to be reconciled,"[2] but *Rust* referred to "all of the decisions of this court on the subject of competency of jurors,"[3] which also had been at issue in the case. However, in its decision in *Rust*, the Court easily could have leveled the same self-criticism about its cases deciding (1) which party bears the burden of proof in testamentary capacity litigation; (2) whether a presumption of testamentary capacity exists; and (3) whether the jury is instructed about that presumption. Today, after a series of three cases decided in the last four years,[4] those cases remain irreconcilable.

The burden of proof in testamentary capacity litigation has been "reversed" at least eleven times in the history of Commonwealth. However, those "reversals" occurred only in the colloquial, and not the legal, sense. The Supreme Court of Virginia has never expressly reversed any of its decisions, nor, with one exception in 1908,[5] has the court even admitted that a conflict exists. *Kiddell v. Labowitz*[6] (2012), the most recent case, discovered a jury instruction from *Huff v. Welch*[7] (1913), which had not been the subject of an appellate opinion for over sixty years, yet about which, according to *Kiddell*, "[f]or the next hundred years, the Court [had] addressed and approved the exact same instruction or a close variant."[8] Under the *Kiddell* instructions (which make an important and inadequately explained change to the *Huff* instruction), even though the proponent of a will ostensibly bears the burden to prove testamentary capacity, the will's opponent must present "[e]vidence that is sufficient to satisfy an unprejudiced mind seeking the truth"[9] "to overcome the presumption of testamentary capacity."[10]

Contrary to the express statement in *Kiddell* about a hundred-year consistency between *Huff* (1913) and *Kiddell* (2012), during that almost one hundred years fourteen cases flatly inconsistent with *Huff* were decided, including (1) three cases that placed the burden of proof upon the proponents without mention of the presumption at all,[11] (2) seven cases that placed

[1] Rust v. Reid, 97 S.E. 324 (Va. 1918).

[2] *Id.* at 328 (quoting McCue v. Commonwealth, 49 S.E. 623, 625 (Va. 1905)).

[3] *Id.*

[4] Kiddell v. Labowitz, 733 S.E.2d 622 (Va. 2012); Weedon v. Weedon, 720 S.E.2d 552 (Va. 2012); Parish v. Parish, 704 S.E.2d 99 (Va. 2011).

[5] Hopkins v. Wampler, 62 S.E. 926, 927 (Va. 1908).

[6] *Kiddell*, 733 S.E.2d at 629.

[7] Huff v. Welch, 78 S.E. 573, 575 (Va. 1913).

[8] *Kiddell*, 733 S.E.2d at 629 (citing *Huff*, 78 S.E. at 578).

[9] *Id.* at 627 (defining "evidence sufficient to overcome the presumption of testamentary capacity" as "satisfactory evidence" and defining "satisfactory evidence" as "[e]vidence that is sufficient to satisfy an unprejudiced mind seeking the truth").

[10] *Id.* at 627 (quoting Gibbs v. Gibbs, 387 S.E.2d 499, 501 (Va. 1990)).

[11] The cases are Fields v. Fields, 499 S.E.2d 826 (Va. 1998); Walton v. Walton, 191 S.E. 768 (Va.

the burden of proof upon the proponents, said that the presumption existed, but indicated that the presumption was of the common variety and not told to the jury, [12] and (3) four cases that placed the burden of proof upon the opponents, [13] thus obviating any need for an evidentiary presumption in favor of the proponents.[14]

Just before *Huff* was decided (1913), the *Wallen*[15] (1907) decision had provided another "hundred-year" canard. *Wallen v. Wallen* concluded that the presumption of testamentary capacity shifted the burden of proof to the opponent and cited *Temple v. Temple*[16] (1807) as "a case decided just one hundred years ago and never since questioned."[17] Although *Wallen* and *Temple* were consistent, during the one hundred years between them, five cases had placed the burden on the proponent without benefit of any presumption, and three of them had required proof by clear and convincing evidence,[18] yet *Wallen* mentioned none of them.[19]

Consequently, neither the hundred year consistency claimed by *Kiddell* (2012) about *Huff*'s 1913 rule on instructing juries about the presumption of testamentary capacity, nor the hundred year consistency claimed by *Wallen* (1907) about *Temple*'s (1807) rule that the opponent bears the burden of proof on testamentary capacity actually existed. Moreover, the irreconcilable cases did not vanish after those declarations of hundred-year rules. After *Wallen* (1907) and *Huff* (1913), the burden-of-proof and effect-of-presumption cases continued widely to vary the rules without recognition of any inconsistency.[20]

This article is both a piece of doctrinal scholarship, describing which party bears the burden in testamentary capacity litigation and whether and how a presumption of testamentary capacity operates, and a piece of historical analysis, demonstrating two disturbing practices of the Supreme Court of Virginia within those doctrines: a rather cavalier attitude in not following precedent, and a rather careless method of citing it.

1937); Lester's Ex'r v. Simpkins, 83 S.E. 1062 (Va. 1915). *See infra* section I.A.3.

[12] The cases are Weedon v. Weedon, 720 S.E.2d 552 (Va. 2012); Parish v. Parish, 704 S.E.2d 99 (Va. 2011); Gibbs v. Gibbs, 387 S.E.2d 499 (Va. 1990); Croft v. Snidow, 33 S.E.2d 208 (Va. 1945); Hall v. Hall, 23 S.E.2d 810 (Va. 1943); Redford v. Booker, 185 S.E. 879 (Va. 1936); Dickens v. Bonnewell, 108 S.E. 610 (Va. 1933). *See infra* section 0.

[13] The cases are Tate v. Chumbley, 57 S.E.2d 151 (Va. 1950); Tabb v. Willis, 156 S.E. 556 (Va. 1931); Smith v. Ottley, 132 S.E. 512 (Va. 1926); Woody v. Taylor, 77 S.E. 498 (1913). *See infra* section 0.

[14] *Tate*, 57 S.E.2d at 160 (placing the burden initially on the proponent but instructing the jury that the presumption governed "until the contrary is proved."). *Tate* was cited by *Kiddell* as consistent with *Huff*. *Kiddell*, 733 S.E.2d at 629–30.

[15] Wallen v. Wallen, 57 S.E. 596, 599 (Va. 1907).

[16] Temple v. Temple, 11 Va. (1 Hen. & M.) 476 (1807).

[17] *Wallen*, 57 S.E. at 599.

[18] The cases are Gray v. Rumrill, 44 S.E. 697 (Va. 1903); Chappell v. Trent, 19 S.E. 314 (Va. 1893); Tucker v. Sandidge, 8 S.E. 650 (Va. 1888); Riddell v. Johnson's Ex'r, 67 Va. (26 Gratt.) 152 (1875); Coalter's Ex'r v. Bryan, 42 Va. (1 Gratt.) 18 (1844). *See infra* notes 70 to 75 and accompanying text.

[19] *Wallen*, 57 S.E. at 598–99.

[20] *See infra* section I.A.1.

TABLE OF CONTENTS

I. INTRODUCTION

Section Two demonstrates that what *Kiddell v. Labowitz*[21] presented as a firm rule regarding the burden of proof in testamentary capacity litigation does not have a historical foundation nearly as firm as the Supreme Court of Virginia said it did. That historical analysis will show that eleven unannounced reversals in the burden-of-proof rule had been made prior to *Kiddell*. The problems arising from that serpentine path exist beyond the failure to satisfy the normal demand for consistency in common law. Rather, that discussion will show that when the Supreme Court of Virginia reverses the burden of proof, the Court does not acknowledge the conflict with prior decisions, much less discuss, analyze, or resolve the matter.

Section Three considers the *Kiddell* (2012) decision, and its recovery of the *Huff v. Welch* (1913) instruction, which had not been cited or applied in sixty years of appellate decisions. In *Huff*, the jury had been instructed that a presumption of testamentary capacity existed and that the presumption was "to be *taken into consideration* by the jury in determining the question of competency."[22] In *Kiddell*, the jury was instructed to *find for the proponent* unless the opponent introduced "evidence sufficient to overcome the presumption of testamentary capacity."[23] Notwithstanding the substantial variance between the *Huff* and *Kiddell* instructions, the Virginia Supreme Court in *Kiddell* described them as "functional equivalent[s]."[24] An analysis of the *Kiddell* instructions in Part Three demonstrates that those instructions effectively shift the burden of proof to the opponent, thereby rendering *Kiddell* the twelfth case silently reversing the burden-of-proof rule.

Section Four provides some other comments on testamentary capacity litigation including oscillations in the rule regarding the weight given to the testimony of attesting witnesses and some strategies for lawyers drafting wills when capacity challenges are anticipated.

II. HISTORY OF THE BURDEN OF PROOF IN TESTAMENTARY CAPACITY LITIGATION

In Virginia, the degree of mental capacity required at the time of execution of a will is referred to as testamentary capacity.[25] The form of civil ac-

[21] Kiddell v. Labowitz, 733 S.E.2d 622, 628 (Va. 2012).
[22] Huff v. Welch, 78 S.E. 573, 575 (Va. 1913) (quoting Instruction O) (emphasis added).
[23] *Kiddell*, 733 S.E.2d at 627 (quoting Instruction 9, second paragraph).
[24] *Id.* at 629 n.4.
[25] Gibbs v. Gibbs, 387 S.E.2d 499, 500 (Va. 1990).

tion in Virginia for litigating whether a writing complies with all of the requirements for a valid will is called inconsistently a will contest[26] and a *devisavit vel non*,[27] Latin for "she devises or not?"[28] Devise is a verb meaning to give under a will.[29] In Virginia, at least since 1785, the action is tried before a jury.[30] And, even before the merger of law and equity in Virginia,[31] the jury verdict in a will contest bound the chancellor in an unusual way.[32] Although verdicts by juries in equity proceedings typically did not bind the chancellor, but only informed his conscience, jury verdicts in will contests were treated identically with jury verdicts rendered in actions at law.[33] Because will contests in Virginia, unlike many other jurisdictions, are heard by juries,[34] proper descriptions of the burdens of proof and evidentiary presumptions are important. Will contests are currently governed by sections 64.2-443 to 64.2-449 of the Code of Virginia.[35] The present statutes do not address burdens of proof, evidentiary presumptions, or jury instructions, nor have any predecessor statutes done so.[36]

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[26] *Kiddell*, 733 S.E.2d at 624.

[27] *See, e.g.*, Matthews v. Matthews, 675 S.E.2d 157 (Va. 2009); Ford v. Gardner, 11 Va. (1 Hen. & M.) 72, 74 (1806).

[28] BLACK'S LAW DICTIONARY 547 (10th ed. 2009).

[29] *Id.*

[30] *See* VA. CODE ANN. § 64.2-446 (Repl. Vol. 2012); BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, THE STATUTES AT LARGE, 142 (William Waller Hening ed. 1823) [hereinafter HENING] ("If . . . any person interested shall . . . by his bill in chancery contest the validity of the will, an issue shall be made up, whether the writing produced be the will of the testator or not, which shall be tried by a jury, whose verdict shall be final between the parties; saving to the court a power of granting a new trial for good cause, as in other trials.").

[31] W. Hamilton Bryson, *The Merger of Common-Law and Equity Pleading in Virginia*, 41 U. RICH. L. REV. 77, 78 (2006).

[32] *See* Redford v. Booker, 185 S.E. 879, 884 (Va. 1936) ("The verdict in an issue out of chancery is not to be confused with one upon an issue of *devisavit vel non.* It is but an incident in litigation in which there may be many issues, and is intended to satisfy the conscience of the chancellor but does not control him. A verdict on an issue of *devisavit vel non* ends the litigation in that cause to the same extent that a jury's verdict settles it in a common-law action.").

[33] *Id.*

[34] John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 348 (2013) ("because experience has shown that juries may be more sympathetic to the disinherited than to the intentions of an eccentric decedent who is in any event beyond suffering, the direction of the law is away from the trial of will contests before a jury.") (internal citations omitted); *see* Ronald Chester, *Less Law, but More Justice? Jury Trials and Mediation as Means of Resolving Will Contests*, 37 DUQ. L. REV. 173, 178–81 (1999) (of will contests reported nationwide in a 12-month period, opponents won 5 out of 22 bench trials, but won 6 of 8 jury trials); Jeffrey A. Schoenblum, *Will Contests–An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 626 (1987) (in cases litigated in the county that includes Nashville, TN, in a nine-year period, opponents won 17% of bench trials, but 42% of jury trials).

[35] VA. CODE ANN. § 64.2-443 to -449 (Repl. Vol. 2012).

[36] *See generally id.* (showing the current Virginia statutes do not address burden of proof, evidentiary presumptions, or jury instructions).

Decisions of the Supreme Court of Virginia about which party bears the burden of proof in testamentary capacity litigation are replete with periodic unacknowledged reversals of the rule.[37] Although opinions in testamentary capacity cases expressly disclaim their value as precedents,[38] that disclaimer ought to extend only to the factual variance among them, and not to the precedential value of the rules of law they announce.

The naming convention used in will contest opinions has not been not consistent over time. Sometimes the person contending that a writing complies with all requirements for constituting a valid will is called the propounder or the proponent.[39] Her adversary is called the contestant or opponent.[40] The latter terms (proponent and opponent) tend to be used in the more recent cases[41], and I will use them, including altering quotations in older cases for consistency of presentation.

A. The Serpentine Path[42] in the Party Bearing the Burden of Proof in Testamentary Capacity Litigation

Kiddell v. Labowitz (2012) involved beneficiaries under an earlier will contesting a later, second writing that was offered as a will, for lack of testamentary capacity.[43] In *Kiddell*, in order to support the Supreme Court of Virginia's claim that in testamentary capacity litigation "the burden of proof is upon those offering a will for probate,"[44] the Supreme Court of Virginia quoted *Huff v. Welch*, a June 1913 case,[45] and then added, "[f]or the next hundred years, the Court addressed and approved the exact same instruction

[37] *See, e.g.*, Gibbs v. Gibbs, 387 S.E.2d 499, 500 (Va. 1990); Tabb v. Willis, 156 S.E. 556, 564 (Va. 1931).

[38] *Tabb*, 156 S.E. at 564–65 ("Culpepper v. Robie, 155 Va. [64], 154 S.E. 637, is cited to support [opponents]. That case, to a large extent, turns upon its facts and so is not controlling here.").

[39] *See* VA. CODE ANN. § 64.2-508 (Repl. Vol. 2012); *see also* Wallen v. Wallen, 57 S.E. 596, 597 (Va. 1907).

[40] *See* VA. CODE ANN. § 64.2-753 (Repl. Vol. 2012); *see also* Kiddell v. Labowitz, 733 S.E.2d 622, 627 (Va. 2012).

[41] *See, e.g.*, *Kiddell*, 733 S.E.2d at 626–27.

[42] In a recent article, Judge Kelsey of the Court of Appeals of Virginia wrote that "scientists instinctively use the argot of lawyers and judges." D. Arthur Kelsey, *The Laws of Physics and the Physics of Laws*, VA. LAWYER, Apr. 2014, at 89. Perhaps we could call the Supreme Court of Virginia's decisions on burdens of proof in testamentary capacity cases, which periodically alternate between polar extremes, "sinusoidal," yet the intervals between the oscillations are not equal, so we cannot; therefore, "serpentine" is used to denote oscillations between polar extremes at irregular intervals.

[43] *Kiddell*, 733 S.E.2d at 624.

[44] *Id.* at 630 (quoting Huff v. Welch, 78 S.E. 573, 575, 578 (Va. 1913)).

[45] *Huff*, 78 S.E. at 575.

or a close variant."[46] *Kiddell* failed to mention that (1) three cases from 1798 to 1825;[47] (2) a 1907 case;[48] (3) a March 1913 case (decided 3 months *prior* to *Huff*);[49] and (4) three cases in the "next hundred years" *after Huff* (and before *Kiddell*) had placed the burden of proof upon the opponent.[50] Thus, before *Kiddell*, eight opinions of the Supreme Court of Virginia had placed the burden of proof upon the opponent, yet *Kiddell* acknowledged none of them.

1. Cases before *Hopkins v. Wampler* (1798 to 1907)

The Harrison treatise,[51] a prominent treatise on Virginia wills law, discusses the history of the burden of proof in testamentary capacity litigation, and begins the discussion with *Burton v. Scott*,[52] an 1825 case. The Harrison treatise (1) notes that *Burton* placed the burden of proof upon the opponent; (2) notes that the burden-of-proof rule was changed by *Riddell v. Johnson's Executor* in 1875; and (3) states that the burden of proof thereafter consistently has remained on the proponent.[53] The Harrison treatise thereby presents the history of the burden-of-proof rule as having had one reversal; however, the case law has moved back and forth more than once between placing the burden on the proponent and the opponent. *Burton* in 1825 did place the burden of proof upon the opponent,[54] but so had two earlier cases, *Spencer v. Moore*[55] in 1798 and *Temple*[56] in 1807.

*Spence*r, the earliest reported Virginia case, was decided in 1798; the holding justified the placing of the burden of proof upon the opponent as a consequence of the pervasive presumption of human sanity: "Those who would impeach any act on the ground of incompetency in the grantor (his general competency being presumed) must clearly prove that incompetency

[46] *Kiddell*, 733 S.E.2d at 629 (citing Tate v. Chumbley, 57 S.E.2d 151, 160–61 (Va. 1950); Jenkins v. Trice, 147 S.E 251, 260 (Va. 1929); Rust v. Reid, 97 S.E.2d 324, 331(Va. 1918)).

[47] Burton v. Scott, 24 Va. (3 Rand.) 399 (1825); Temple v. Temple, 11 Va. (1 Hen. & M.) 476 (1807); Spencer v. Moore, 8 Va. (4 Call) 423 (1798).

[48] Wallen v. Wallen, 57 S.E. 596 (Va. 1907).

[49] Woody v. Taylor, 77 S.E. 498 (Va. 1913).

[50] *Tate*, 57 S.E.2d at 151; Tabb v. Willis, 156 S.E. 556 (Va. 1931); Smith v. Ottley, 132 S.E. 512 (Va. 1926).

[51] HARRISON ON WILLS AND ADMINISTRATION FOR VIRGINIA AND WEST VIRGINIA § 8.10 (James P. Cox, III ed., 4th ed. 2007 & Supp. 2013).

[52] Burton v. Scott, 24 Va. (3 Rand.) 399 (1825).

[53] HARRISON ON WILLS AND ADMINISTRATION FOR VIRGINIA AND WEST VIRGINIA, *supra* note 51, § 8.10.

[54] *Burton*, 24 Va. (3 Rand.) at 400.

[55] Spencer v. Moore, 8 Va. (4 Call) 423, 425 (1798).

[56] Temple v. Temple, 11 Va. (1 Hen. & M.) 476 (1807).

to exist, as at the time of executing the instrument in question."[57] Although *Spencer* cited no cases on that point, both its result and reasoning followed the common law.[58]

Swinburne's treatise provides this common law rule regarding the burden of proof in testamentary capacity cases: "Every person is presumed to be of perfect mind and memory, unless the contrary is *proved*. And therefore if any person go about to impugn or overthrow the testament by reason of insanity of mind, or want of memory, he must *prove* that impediment."[59]

The Commonwealth of Virginia adopted the common law by ordinance enacted in convention of May, 1776.[60] In 1792, "so much of the ordinance of 1776 as adopted the acts of Parliament of a general nature . . . was repealed by the Legislature; but that part of the ordinance of 1776, which established the common law until it should be altered by legislative power, has never been repealed."[61] Pursuant to that legislative direction, the Supreme Court of Virginia has applied the common law whenever "[t]he Legislature, which is the representative of the sovereign power of the people, and specially charged with the duty of making or amending laws to meet their needs, has not at any time enacted any law changing the rule of the common law with respect to the matter under consideration."[62]

Thus, in 1798 *Spencer* could have cited the common law in support of its decision, and that would have been fully consistent with the 1792 and 1776 legislative acts receiving the common law. It appears that no Supreme Court of Virginia decision has ever cited a Virginia statute addressing the burden of proof in testamentary capacity cases.[63] Consequently, the Court in *Spencer* reached the correct result for the correct reason; and it should not have been changed, even though it has on about a dozen occasions.[64]

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[57] *Spencer*, 8 Va. (4 Call) at 425. *Spencer* reversed the trial court's decision in favor of the will, because the opponent had "clearly proved . . . that [testator] was, at a time anterior to the execution of his will, incompetent to make a distribution of his property." *Id.* at 426.

[58] *Id.* at 423.

[59] 1 HENRY SWINBURNE, A TREATISE OF TESTAMENTS AND LAST WILLS 119 (7th ed. 1803) (emphasis added).

[60] HENING, *supra* note 30, at 127 ("The common law of England, all statutes or acts of Parliament made in aid of the common law prior to the fourth year of the reign of King James the First, and which are of a general nature . . . shall be considered as in full force, until the same shall be altered by the legislative power of this colony.").

[61] Foster v. Commonwealth, 31 S.E. 503, 504 (Va. 1898).

[62] *Id.* at 505.

[63] I have been unable to locate any Supreme Court of Virginia decision citing a Virginia statute on point.

[64] *See generally* Spencer v. Moore, 8 Va. (4 Call) 423 (1798) (assessing the case on the principle that the burden of proof of incompetency rests with the opponent).

Next after *Spencer*, *Temple* (1807) placed the burden of proof upon the opponent, but indicated that it was a consequence of the proof of due execution of the writing as a will.

> It having been proved to this Court by the evidence of three credible and respectable witnesses, who were well acquainted with the [testator], that the paper-writing exhibited in this court, purporting to be the last will and testament of the [testator], was wholly written by himself, that circumstance, prima facie, amounts to presumptive proof of his deliberate intention and capacity to make a will at the time of writing the same. [65]

As the ensuing discussion will show, the consequences arising from the presumption of testamentary capacity, which is sometimes said to arise from proof of due execution and sometimes not, has varied significantly during the 205 years between *Temple* (1807) and *Kiddell* (2012), although, in a refrain to be mentioned throughout this presentation, the Supreme Court of Virginia never has acknowledged that variance. *Temple*, the first case to consider the presumption of testamentary capacity, (1) stated that it arose upon proof of due execution, and (2) held that the consequence of the presumption was to place the burden of proof upon the opponent.[66]

An initial point to consider, which has yet to be discussed in a Virginia case, is how the condition of due execution is meaningless; it simply restates an existing element that the proponent already must prove.[67] If a jury decides that due execution has not been shown, the case will end there; testamentary capacity is never decided for a writing that has not been executed in a manner sufficient to constitute a will.[68] Although some cases state that the presumption of testamentary capacity arises upon proof of due execution, the inclusion of this condition is a pointless addition.

The next case decided after *Temple* was *Burton* (1825); the Court ignored *Temple*'s use of a presumption of testamentary capacity, re-adopted *Spencer*'s result and reasoning, and quoted a 1792 English case for the burden-of-proof rules in testamentary capacity cases.

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[65] Temple v. Temple, 11 Va. (1 Hen. & M.) 476, 477 (1807).

[66] *Id.* at 477.

[67] VIRGINIA MODEL JURY INSTRUCTIONS – CIVIL R. 48.000 (Repl. ed. 2014) ("The only question in this case is whether this writing is [these writings are] the last will of (name of decedent). In deciding this question, you will have to consider these issues: (1) Was the writing properly executed? (2) Did (name of decedent) have testamentary intent when he signed it? (3) Did (name of decedent) have testamentary capacity when he signed it? On these issues, the proponents of the will have the burden of proof by the greater weight of the evidence."). *See infra* note 313.

[68] As well, following Virginia's 2007 adoption of the harmless error statute of the Uniform Probate Code, failures in execution will be exceedingly rare. *See infra* notes 314–320 and accompanying text.

> The natural presumption is, that every man is sane and competent to make a will, and this presumption must stand, until destroyed by *proof* on the other side. To say that insanity must be presumed, until sanity be proved, would seem to be saying that insanity is the natural state of the human mind. "The course of procedure, for the purpose of trying the state of the party's mind, allows of rules. If derangement be alledged, it is clearly incumbent on the party alledging it, to prove such derangement. If such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alledged to have prevailed at the period particularly referred to, then the burthen of proof attaches on the party alledging such lucid interval, who must shew sanity and competence at the period when the act was done, and to which the lucid interval refers."[69]

Thus, although all three of the earliest Virginia cases (*Spencer*, *Temple*, and *Burton*) placed the burden of proof upon the opponent, the justifications for the rule oscillated between a general presumption of sanity and a presumption of testamentary capacity arising upon proof of due execution. No explanation of the oscillation in rationale was provided. Next, the burden-of-proof rule itself would change.

As the Harrison treatise notes, in 1875, *Riddell* put the burden of proof upon proponents;[70] but so had *Coalter's Executor v. Bryan* in 1844.[71] Neither *Bryan* nor *Riddell* acknowledged that the matter ever had been decided by the Supreme Court of Virginia, and, failed to state any reasons for reversing the burden-of-proof rule of *Spencer*, *Temple*, and *Burton*. Shortly after *Riddell*, three cases, decided between 1888 and 1903 (*Tucker v. Sandidge*,[72] *Chappell v. Trent*,[73] and *Gray v. Rumrill*[74]), pressed even harder on

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[69] Burton v. Scott, 24 Va. (3 Rand.) 399, 400 (1825) (emphasis added) (quoting Attorney Gen. v. Parnther, (1792) 29 Eng. Rep. 632.

[70] Riddell v. Johnson's Ex'r, 67 Va. (26 Gratt.) 152, 177 (1875) ("the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator" (citing Barry v. Butlin, (1838) 163 Eng. Rep. 223 (P.C.)).

[71] Coalter's Ex'r v. Bryan, 42 Va. (1 Gratt.) 18, 83 (1844) ("[T]he [proponents] of the will [have] the burthen of maintaining not only the due execution thereof, but the capacity, freedom, and final action of the testator, and the continued validity of the instrument in all respects.").

[72] Tucker v. Sandidge, 8 S.E. 650, 654–55 (Va. 1888) ("The *onus probandi* is upon the party who seeks to set up the instrument in question; and this, from the fact that the [proponent] alleges that the paper offered for probate is the true will of a free and capable testator; and hence it devolves upon him to make good his allegation, that is, to prove by competent testimony that the instrument is what it purports to be; for in every such case the conscience of the court is to be satisfied, and nothing short of *clear and convincing evidence* will suffice. This doctrine has been *uniformly recognized* and acted on by this court." (citing *Riddell*, 67 Va. (26 Gratt.) at 152) (emphasis added)).

[73] Chappell v. Trent, 19 S.E. 314, 343 (Va. 1893) ("Upon this subject the jury should have been instructed in clear, strong, and unambiguous terms, that it must appear by *clear and convincing evidence* that the testator at the time of the execution of the paper retained sufficient active mind and memory to enable him to collect and arrange in his mind, without prompting by others, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least

the proponents, (1) by raising the evidentiary standard to require that proponents prove testamentary capacity by "clear and convincing evidence" and (2) by creating a separate requirement that the trial court be "judicially satisfied that the paper in question is in reality what it purports to be,"[75] even when a jury was the finder of fact. Those three cases constitute the high water mark of evidentiary pressure on the proponent: (1) burden of proof; (2) by clear and convincing evidence; (3) without operation of a presumption of sanity or a presumption of testamentary capacity; and (4) with an additional requirement that the trial court independently "be judicially satisfied," a standard of review apparently less deferential than the normal review that a trial court exercises over all civil jury verdicts.[76]

These high-water-mark cases (*Tucker*, *Chappell*, and *Gray*) did not discuss the general presumption of sanity, the presumption of testamentary capacity, or the earlier cases (*Spencer*, *Temple*, and *Burton*) that had placed the burden of proof on the opponent because of those presumptions. Four years after *Gray*, *Wallen v. Wallen*[77] (1907) reversed the the burden-of-proof rule of the high-water-mark cases, without discussing them . *Wallen* discussed both presumptions (citing *Temple* but not *Burton*); and merged them into the single presumption of testamentary capacity arising upon proof of due execution.[78] *Wallen* quoted *Temple* and held that the presumption shifted the burden of proof to the opponent.[79]

While *Wallen* correctly interpreted *Temple*'s holding about the presumption of testamentary capacity arising upon proof of due execution, the decision ignored *Burton*'s holding that the presumption of sanity created a rule of law placing the burden of proof upon the opponent. More egregiously, after stating and reiterating the *Temple* holding, *Wallen* claimed that *Temple*

their obvious relations to each other and to be able to form some rational judgment in relation to them; and that if he was unable to do this without prompting, he was incompetent to make a valid will." (emphasis added)).

[74] Gray v. Rumrill, 44 S.E. 697, 699 (Va. 1903) ("The *onus probandi* is upon the party who seeks to set up the instrument in question, and this from the fact that the [proponent] alleges that the paper offered for probate is the true will of a free and capable testator, and hence it devolves upon him to make good his allegation (that is, to prove by competent testimony that the instrument is what it purports to be), for in every such case the conscience of the court is to be satisfied, and nothing short of *clear and convincing evidence* will suffice. This doctrine has been *uniformly recognized* and acted on by this court." (emphasis added)).

[75] *Tucker*, 8 S.E. at 661.

[76] The requirement of judicial satisfaction beyond the normal review of civil jury verdicts does not appear to have surfaced in any other case.

[77] Wallen v. Wallen, 57 S.E. 596 (Va. 1907).

[78] *See id.* at 598.

[79] *Id.* at 599.

was "decided just one hundred years ago and never since questioned."[80] But of course, *Wallen*'s claim of a hundred-year consistency with *Temple* suffers from a glaring error. Between *Temple* (1807) and *Wallen* (1907), five cases (*Bryan*, *Riddell*, *Tucker*, *Chappell*, and *Gray*) did more than merely question *Temple*, they held, in silent reversal of *Temple* (and *Burton* and *Spencer*), that the burden of proof was on the proponent, and the *Bryan* through *Gray* cases made no mention of any presumption available to benefit the proponent. The following is *Wallen*'s description of the burden-of-proof scheme in testamentary capacity litigation.

> It is true that the [proponents] of a will have the burden placed upon them of proving the testamentary capacity of the decedent; but when a paper writing is offered to a probate court, and it is shown that the formalities required by the statute in such case made and provided have been complied with, and especially where it appears that the paper is wholly in the handwriting of and signed by the testator–is in form an holograph will–there is a presumption of testamentary capacity. There is, indeed, a presumption in favor of the sanity of every man until evidence that he is of unsound mind *is introduced*; and this presumption applies in all cases, criminal as well as civil.
> So it was held in *Temple*, a case decided just one hundred years ago and never since questioned, that "The circumstance that a writing, exhibited for probate as a last will and testament, was wholly written by the testator himself, is prima facie evidence that he was in his senses and able to make a will at the time of writing the same; so that the *onus probandi* to repel that presumption lies on those who wish to impugn it . . . ."[81]

Onus probandi is Latin for "burden of proof."[82] So, in the successive paragraphs quoted above, *Wallen* states that "the [proponents] of a will have the burden placed upon them of proving the testamentary capacity of the decedent," but if due execution is shown a presumption of testamentary capacity arises and "the *onus probandi* [burden of proof] to repel that presumption lies on those *who wish to impugn* it." The clear, combined consequence of those two statements in *Wallen*, like *Temple*'s holding, places the burden of proof upon the opponent when due execution is shown.

2. Hopkins v. Wampler (1908)

One year after *Wallen*, *Hopkins v. Wampler* (1908) reversed (again in silence) *Wallen*'s re-adoption of *Temple*'s burden-of-proof scheme.[83] In *Hop-*

[80] *Id.*

[81] *Id.* at 598–99 (emphasis added) (internal citations omitted).

[82] BLACK'S LAW DICTIONARY 1199 (9th ed. 2009).

[83] *See generally* Hopkins v. Wampler, 62 S.E. 926 (Va. 1908) (concluding the burden of proving the sanity of the testator at the time of the execution of the will rests with the proponents).

kins, the trial court (apparently applying the high-water-mark cases) placed the burden of proof upon the proponent, required the proponent to prove testamentary capacity by clear and convincing evidence, and did not mention any presumption available to benefit the proponent.[84] The Supreme Court of Virginia reversed (1) for requiring the higher degree of proof,[85] and (2) for failing to instruct the jury about the presumption of sanity arising upon proof of due execution.[86]

As noted above, *Wallen* rediscovered both the presumption of sanity and the presumption arising from due execution, merged them into a single presumption of testamentary capacity arising upon proof of due execution, and concluded that "the *onus probandi* [burden of proof] to repel that presumption lies on those *who wish to impugn* it."[87] Conversely, *Hopkins* concluded that the presumption of testamentary capacity arising upon proof of due execution did not shift the burden of proof to the opponent; instead, it merely required the opponent to introduce evidence of incapacity,[88] but *Hopkins* added that the jury would be told about the presumption. *Hopkins* stated, "Where, however, the sanity of the testator is put in issue by the *evidence* of the [opponent], the *onus probandi* lies upon the *proponent* to satisfy the court or jury that the writing propounded is the will of a capable testator,"[89] and "in determining that question [of testamentary capacity] the jury should also have taken into consideration the presumption in favor of testatrix's sanity."[90]

Hopkins does not discuss *Wallen*, but *Hopkins* significantly altered the *Wallen* rule, while citing that case,[91] and similarly quoted *Burton* and cited *Temple*; yet *Burton* and *Temple* had held the exact opposite–that the burden of proof was on the opponent–as the *Hopkins* court's quotation shows.[92]

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[84] *Hopkins*, 62 S.E. at 927 ("The unqualified language of this instruction, which wholly omits the presumption in favor of sanity and announces the proposition that the burden of proving testamentary capacity by clear and convincing testimony is upon the proponents, is not in harmony with the established rule on that subject . . .").

[85] *Id.* at 927–28.

[86] *Id.*

[87] Wallen v. Wallen, 57 S.E. 596, 599 (Va. 1907) (quoting Temple v. Temple, 11 Va. (1 Hen. & M.) 476 (1807)).

[88] *Hopkins*, 62 S.E. at 928.

[89] *Id.* at 927.

[90] *Id.* at 927-28.87.

[91] *Id.* at 927 (citing *Wallen*, 57 S.E. at 596).

[92] *Id.* ("In *Burton v. Scott*, in discussing the rules of evidence which govern questions of insanity in cases of probate, observes: 'I understood the counsel for the appellants (the [opponents]) to lay it down, as a general rule, that it was incumbent on the devisee claiming under a will to prove the sanity of the testator; that the onus was upon him in every question of this sort. Taken in this latitude, I do not consider the position correct. The natural presumption is that every man is sane and competent to make a will, and

Consequently, while (1) *Spencer* (1798) and *Burton* (1825) used the presumption of human sanity to create a rule of law placing the burden of proof upon opponents; (2) *Temple* (1825) used the presumption of testamentary capacity arising upon proof of due execution to place the burden of proof upon opponents; and (3) *Wallen* employed the rediscovered combined presumption of testamentary capacity and presumption of sanity to shift the burden of proof to the opponent upon proof of due execution, *Hopkins* said the only meaningful consequence of the presumption of testamentary capacity is that the jury will be told about it.[93]

Before we conclude that *Hopkins* inaugurated a hundred-year consistency in doctrine, as *Kiddell* asserted,[94] the ensuing analysis of burden-of-proof cases after *Hopkins* negates any claim of consistency. Between *Hopkins* and *Kiddell*, nineteen cases considered the burden of proof in testamentary capacity litigation: (1) five cases consistently applied the *Hopkins* rule;[95] (2) three cases placed the burden of proof upon the proponents without mention of any presumption of testamentary capacity in the opinion;[96] (3) seven cases placed the burden of proof upon the proponents, said that the presumption of testamentary capacity arising upon proof of due execution existed, but indicated that the presumption was of the common variety and not told to the jury; [97] and (4) four cases placed the burden of proof upon the opponents, [98] (including *Tate v. Chumbley*, which placed the burden on the proponent but instructed the jury that the presumption governed "until the contrary is proved").[99]

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this presumption must stand until destroyed by proof on the other side. To say that insanity must be presumed until sanity be proved would seem to be saying that insanity is the natural state of the human mind.'" (citing Temple v. Temple, 11 Va. (1 Hen. & M.) 476 (1807); Porter v. Porter, 15 S.E. 500 (Va. 1892); *Wallen*, 57 S.E. 596).

[93] *Hopkins*, 62 S.E. at 928 ("in determining that question the jury should also have taken into consideration the presumption in favor of testatrix's sanity.").

[94] Kiddell v. Labowitz, 733 S.E.2d 622, 629 (Va. 2012).

[95] *See* Culpepper v. Robie, 154 S.E. 687, 689 (Va. 1930); Jenkins v. Trice, 147 S.E. 251, 259–60 (Va. 1929); Green v. Green's Ex'rs, 143 S.E. 683, 687 (Va. 1928); Rust v. Reid, 97 S.E. 324, 331 (Va. 1918); Huff v. Welch, 78 S.E. 573, 575 (Va. 1913); *see infra* Section I.A.3.

[96] *See* Fields v. Fields, 499 S.E.2d 826, 828 (Va. 1998); Walton v. Walton, 191 S.E. 768, 769 (Va. 1937); Lester's Ex'r v. Simpkins, 83 S.E. 1062, 1063 (Va. 1915); *see infra* Section I.A.3.

[97] *See* Weedon v. Weedon, 720 S.E.2d 552, 558 (Va. 2012); Parish v. Parish, 704 S.E.2d 99, 104 (Va. 2011); Gibbs v. Gibbs, 387 S.E.2d 499, 500 (Va. 1990); Croft v. Snidow, 33 S.E.2d 208, 211 (Va. 1945); Hall v. Hall, 23 S.E.2d 810, 815 (Va. 1943); Redford v. Booker, 185 S.E. 879, 883 (Va. 1936); Dickens v. Bonnewell, 108 S.E. 610, 611, 614 (Va. 1933); *see infra* Section I.A.3.

[98] *See* Tate v. Chumbley, 57 S.E.2d 151, 160 (Va. 1950); Tabb v. Willis, 156 S.E. 556, 563 (Va. 1931); Smith v. Ottley, 132 S.E. 512, 513 (Va. 1926); Wooddy v. Taylor, 77 S.E. 498, 500 (Va. 1913); *see infra* Section I.A.3.

[99] *Tate*, 57 S.E.2d at 160.

To support its claim of the hundred-year consistency, the *Kiddell* majority opinion found and discussed three of the five cases that consistently applied the *Hopkins* rule, but missed the other two, although the concurring opinion did not.[100] The *Kiddell* majority opinion (1) did not discuss the fourteen cases clearly inconsistent with *Hopkins*; (2) said *Tate* was consistent with *Hopkins*, when it is not;[101] and (3) cited two cases not consistent with *Hopkins*, but only for points other than the burden of proof or the presumption of testamentary capacity.[102]

In *Hopkins*, in addition to placing the burden of proof upon the proponent and telling trial courts to instruct the jury about the presumption, *Hopkins* reversed the clear-and-convincing evidentiary standard applied by the trial court, and the manner in which the *Hopkins* court discussed its abandoning of the clear-and-convincing evidentiary standard is curious.

> It was suggested in the argument of the case in judgment, that a higher degree of proof of testamentary capacity was required in *Tucker v. Sandidge*; *Chappell v. Trent,* and *Gray v. Rumrill.*
> In those cases, it is true, the court does say that "nothing short of clear and convincing evidence will suffice," or that the proof must be "clear and convincing." But to sustain that proposition *Tucker v. Sandridge* cites *Riddell v. Johnson*; *Chappell v. Trent* refers to no authority; and *Gray v. Rumrill* cites the two former cases. So it will be observed that these cases rely upon *Riddell v. Johnson* and, while they change the phraseology of the rule, it is not believed that it was intended to modify the well-settled doctrine of the degree of proof required in that class of cases.[103]

Thus in *Hopkins*, the Supreme Court of Virginia (1) indicated that it was abandoning the clear-and-convincing evidentiary standard of *Tucker*, *Chappell*, and *Gray*; (2) grounded its abandonment of a second rule (the requirement of clear and convincing evidence) contrary to a first rule (the requirement of greater weight of the evidence) on the failure of the second-rule cases to cite the first-rule cases; (3) stated that changes in phraseology in an opinion do not "modify the well-settled doctrine;" (4) yet made no mention that *Hopkins* was reversing *Wallen* (without discussing it) on which party bears the burden of proof when the presumption of testamentary capacity operates; and (5) made no mention that in *Bryan* through

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[100] *Kiddell* quotes *Huff* and *Rust*, and cites *Trice*, but misses *Green* and *Culpepper*. *See Kiddell*, 733 S.E.2d at 628–29 (citing *Trice*, 147 S.E. at 260) (quoting *Rust*, 97 S.E. at 331; *Huff*, 78 S.E. at 575, 578). The concurring opinion cites *Green* and *Culpepper* in a footnote. *See id.* at 637 (McClanahan, J., concurring) (citing *Culpepper*, 154 S.E. at 260; *Green*, 143 S.E. at 686).

[101] *Id.* at 629–30.

[102] *Id.* at 628, 632–33, 635 (citing *Gibbs*, 387 S.E.2d at 500, 501) (citing *Weedon*, 720 S.E.2d at 558) (citing *Tabb*, 156 S.E. at 564) (citing *Hall*, 23 S.E.2d at 814) (citing *Parish*, 702 S.E.2d at 104).

[103] Hopkins v. Wampler, 62 S.E. 926, 927 (Va. 1908).

Gray, the Supreme Court of Virginia had reversed *Spencer* through *Burton*, and did so without citing those first-rule cases.

As noted above and described below, nineteen testamentary capacity cases decided between *Hopkins* and *Kiddell* continued to violate the Supreme Court of Virginia's own rules of legal method, discussed in *Hopkins*, by modifying the doctrine of *Hopkins*, without recognition of any conflict or explanation of any changes.

3. Cases after *Hopkins v. Wampler* (1913 to 2012)

Five years after *Hopkins*, *Wooddy v. Taylor* (1913) reversed the burden back to the opponent, citing *Temple* and no other Virginia testamentary capacity cases.[104] Notably, *Wooddy* did not read *Temple* as using the presumption of testamentary capacity arising upon proof of due execution to shift the burden of proof to the opponent. Instead, like *Spencer* and *Burton* (but not citing them), *Wooddy* declared a rule that the burden always was upon the opponent, "'[t]hose who would impeach the will on the ground that the decedent has become incompetent, must clearly prove that incompetency to exist.'"[105]

Three months later, in June of 1913, *Huff*[106] returned to the *Hopkins* rules, without citation or discussion of *Hopkins* or of any other testamentary capacity cases, yet oddly quoting *Wooddy* about the weight given to the testimony of attesting witnesses.[107] *Huff* ignored *Wooddy*'s rule that the burden of proof in testamentary capacity litigation is always on the opponent. *Huff* returned to the *Hopkins* rule, without citing that case, by placing the burden on the proponent, and *Huff* enhanced the *Hopkins* rule by expressly approving a jury instruction about the presumption of testamentary capacity.[108]

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[104] *See* Wooddy v. Taylor, 77 S.E. 498, 500 (Va. 1913).

[105] *Id.* at 500. The court quoted Robertson's Old Practice, vol. 3, p. 337 as follows: "Those who would impeach the will on the ground that the decedent has become incompetent must clearly prove that incompetency to exist." *Id.* Robertson's Old Practice cited *Temple* v. *Temple* to support its statement, and *Wooddy* included that in its quotation. *Id.* The Supreme Court of Virginia in *Wooddy* then said, the "principles announced by this high authority have been repeatedly upheld by this court, the latest cases being Howard v. Howard, [112 Va. 566 (1911)], and Wampler v. Harrell, 112 Va. 635, 72 S.E. 135 [1911]." *Id. Howard* and *Wampler* were not wills cases, but cases about deeds. 112 Va. at 566; 112 Va. at 635.

[106] Huff v. Welch, 78 S.E. 573 (Va. 1913).

[107] *See id.* at 579.

[108] *See id.* at 575 (quoting Instruction O). In *Huff*, the court extensively quoted jury instructions in the Statement section of the opinion, one of which stated, "the burden of proof is upon those offering a will for probate." *Id.* In *Huff*, the jury instructions were not at issue in the case, because the court reversed on the facts, finding the jury verdict was a "plain and palpable deviation from the proof." *Id* at 579. How-

Two years later, *Lester's Executor v. Simpkins* (1915) kept the burden on the proponent, but, contrary to *Wallen*'s and *Hopkins*' supposed reversal of heightened proof, required proof of testamentary capacity by clear and convincing evidence, and contrary to *Wallen*, *Hopkins*, and *Huff*, made no mention of any presumption in favor of the proponent.[109]

Next, *Rust*[110] (1918) (1) reiterated the *Hopkins* rule placing the burden on the proponent,[111] and (2) again approved the *Huff* instruction, which told the jury about the presumption of testamentary capacity.[112] *Rust* did not mention requiring clear and convincing evidence of testamentary capacity, and the requirement of clear and convincing evidence has not since been made, except when the putative testator is adjudicated insane prior to the execution of the writing.[113]

The party bearing the burden of proof next reversed in 1926, when it was placed back on the opponent by *Smith v. Ottley*,[114] which quoted *Wooddy* and *Wooddy*'s citing of *Temple*. Like *Wooddy*, *Ottley* did not interpret *Temple* as employing the presumption of testamentary capacity to shift the burden of proof to the opponent. Instead, *Ottley* declared a rule that the burden

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ever in the opinion, the *Huff* court did write, "[t]he instructions given by the court, all of which will appear with the official report of this opinion, were ample to submit to the jury fully and fairly the case." *Id.* at 578.

[109] *See generally* Lester's Ex'r v. Simpkins, 83 S.E. 1062 (Va. 1915). In *Lester's Executor*, the Supreme Court of Virginia gave blanket approval to jury instructions quoted in the Statement section of that opinion. "It would serve no good purpose to undertake to review the instructions as given by the court, and which will be set out with the official report of this opinion. Suffice it to say that they, in our judgment, fully and fairly submitted the issues of the case to the jury upon the facts which the evidence in the case tended to prove." *Id.* at 1068. One instruction placed the burden of proof upon the proponents. *Id.* at at 1063 (quoting Instruction 1). Another required proof by "clear and convincing evidence." *Id.* (quoting Instruction 3).

[110] Rust v. Reid, 97 S.E. 324 (Va. 1918).

[111] *Id.* at 331.

[112] *Id.* ("The burden of proving testamentary capacity is on the [proponent] of the will and continues upon him throughout any contest on that question; but, when he has shown a compliance with all the statutory requirements for the due execution of a will, the legal presumption of sanity comes to his relief, and dispenses with any evidence to the contrary. The proof of due execution, therefore, entitles the [proponent] prima facie to have the will admitted to probate.").

[113] Tate v. Chumbley, 57 S.E.2d 151, 161 (Va. 1950) ("[T]he condition of insanity established by the committal proceedings . . . is presumed to continue, and the burden is on . . . the proponent of the purported will . . . to establish by clear and convincing evidence that on that date [the putative testator] was possessed of testamentary capacity") (quoting trial court's instruction with approval)). In *Gilmer v. Brown*, the court contrasted an adjudication of insanity, for which a presumption arises, and an appointment of a guardian, for which a presumption does not. 44 S.E.2d 16, 20 (Va. 1947) ("The provisions of the pertinent [mental health] statutes . . . reveal the legislative intent to recognize a distinction between, and to make different provisions for, the insane and the mentally or physically incapacitated.").

[114] *See* Smith v. Ottley, 132 S.E. 512, 513–14 (Va. 1926) ("Those who would impeach the will on the ground that the decedent has become incompetent, must clearly prove that incompetency to exist.") (quoting Wooddy v. Taylor, 77 S.E. 498 (Va. 1913)).

always is upon the opponent,[115] which, although not citing those cases, was a return to the rule of *Spencer*, *Burton*, and *Wooddy*.

Next, *Green v. Green's Executors*[116] (1928), *Jenkins v. Trice*[117] (1929), and *Culpepper v. Robie*[118] (1930) silently reversed *Ottley* by returning the burden of proof back to the proponent. All three cases reiterated the *Hopkins* rule, by placing the burden on the proponent and approving the *Huff* instruction telling the jury about the presumption of testamentary capacity.[119]

Next, *Tabb v. Willis*[120] (1931) reversed the burden back to the opponent, citing *Temple* and *Ottley*. Like *Ottley* (and *Wooddy*), *Tabb* did not interpret *Temple* as employing the presumption of testamentary capacity to shift the burden of proof to the opponent.[121] Instead, *Tabb* declared a rule that the burden is always upon the opponent.[122] Although not citing those cases, *Tabb* was a return to the rule of *Spencer*, *Burton*, and *Wooddy*, and *Ottley*.

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[115] *Id.*

[116] *See generally* Green v. Green's Ex'rs, 143 S.E. 683 (Va. 1928). In *Green*, the Supreme Court of Virginia quoted many instructions, including this one: "And while the burden of proof is upon those offering a will for probate to show testamentary capacity on the part of the testator at the time the will was executed, yet the court tells the jury that there is in all cases an existing presumption in favor of the testator's sanity and capacity, which is to be taken into consideration by the jury in determining the question of competency." *Id.* at 686. The Supreme Court of Virginia included that instruction in its blanket approval of the instructions given. "A careful consideration of all the instructions granted satisfies us that they are free from error, and that when read together, as they should be, they fairly and sufficiently instructed the jury upon the law applicable to the case. It follows, therefore, that the appellant was not prejudiced by the court's refusal to give other instructions." *Id.* at 687.

[117] *See generally* Jenkins v. Trice, 147 S.E. 251 (Va. 1929). The Supreme Court of Virginia quoted an instruction that included the following, "the burden of proof is upon those offering a will for probate, to show testamentary capacity on the part of the testator at the time the will was executed to the satisfaction of the jury." *Id.* at 260. The Supreme Court of Virginia said that "it was approved in [*Huff*] and [*Rust*]." *Id* (citations omitted).

[118] *See generally* Culpepper v. Robie, 154 S.E. 687 (Va. 1930). The Supreme Court of Virginia quoted the following jury instruction: "The court instructs the jury that while the burden of proof is upon those offering a will for probate, to show testamentary capacity on the part of the testator at the time the will was executed to the satisfaction of the jury, yet the court tells the jury that there is in all cases an existing presumption in favor of the testator's sanity and capacity, which is to be taken into consideration by the jury in determining the question of competency." *Id.* at 689. The Supreme Court of Virginia did not discuss the instruction, but included it in a blanket approval. "[I]nasmuch as the instructions given substantially cover the issues and the evidence, the refusal of the trial court to give any of these latter instructions is not reversible error." *Id.* at 695.

[119] *See Culpepper*, 154 S.E. at 689–90; *Trice*, 147 S.E. at 260; *Green*, 143 S.E. at 686.

[120] Tabb v. Willis, 156 S.E. 556 (Va. 1931).

[121] *Id.* at 564. ("[T]hose who would impeach a will on the ground that the decedent had become incompetent must clearly prove that incompetency to exist").

[122] *Id.*

In addition, *Tabb* cited *Huff* and two wills cases that did not discuss burdens of proof in testamentary capacity litigation.[123]

Next, five cases from 1933 to 1945, *Dickens v. Bonnewell*,[124] *Redford v. Booker*,[125] *Walton v. Walton*,[126] *Hall v. Hall*,[127] and *Croft v. Snidow*,[128] silently reversed *Tabb* by returning the burden of proof back to the proponent.[129] However, in each of those five the jury was not instructed about the presumption of testamentary capacity.[130] *Dickens*, *Redford*, *Hall*, and *Croft* stated that the presumption existed, but limited its consequence to requiring the opponent to introduce evidence contesting capacity; those cases did not indicate that the jury was, or should have been, instructed about the presumption.[131] *Walton* did not discuss the presumption at all.[132]

A reversal in the party bearing the burden of proof next occurs in 1950. *Tate*[133] concluded that the presumption of testamentary capacity shifted the burden of proof to the opponent, but *Tate* neither cited nor discussed any

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[123] *Id.* at 564 (citing Smith v. Ottley, 132 S.E. 512 [(Va. 1926)]; Portner v. Portner, 112 S.E. 762 [(Va. 1922)]; Huff v. Welch, 78 S.E. 573 [(Va. 1913)]; Parramore v. Taylor, 52 Va. (11 Gratt.) 220 [(1854)]; Temple v. Temple, 11 Va. (1 Hen. & M.) 476 [(1807)]). *Parramore* did not involve the burden of proof for testamentary capacity, but for proving undue influence. 52 Va. (11 Gratt.) at 220. *Portner* did not discuss burdens of proof at all. 112 S.E. 762.

[124] Dickens v. Bonnewell, 168 S.E. 610, 612 (Va. 1933) ("when 'the sanity of the testator is put in issue by the evidence of the [opponent], the *onus probandi* lies upon the proponent to satisfy the court or jury that the writing propounded is the will of a capable testator'" (quoting Hopkins v. Wampler, 62 S.E. 926, 927 (Va. 1908))).

[125] Redford v. Booker, 185 S.E. 879, 883 (Va. 1936). "The burden of proving testamentary capacity is on the [proponent] of the will and continues upon him throughout any contest on that question." (citing Dickens v. Bonnewell, 168 S.E. 610 [(Va. 1933)]; Good v. Dyer, 119 S.E. 277 [(Va. 1923)]). *Good v. Dyer* is not a wills case. It considers whether a promissory note is enforceable against an estate. 119 S.E. at 277.

[126] Walton v. Walton, 191 S.E. 768, 770 (Va. 1937) (citing Dickens v. Bonnewell, 168 S.E. 610, 612 (Va. 1933)). When reversing the trial court's granting of a motion to strike all the evidence, the Supreme Court of Virginia stated, "[a]s the affirmative of the issue was on the [proponents], their motion was not to strike all of the evidence, but only that offered by appellants. There is some difference between the issue here raised, and the issue in usual common law actions. In the latter, plaintiff has to bear the burden of proof, hence [proponents] were not in a position to move for the elimination of all evidence, if they desired the will to be probated." *Id.*

[127] Hall v. Hall, 23 S.E.2d 810, 815 (Va. 1943) ("The burden of proving testamentary capacity is on the [proponent] of the will and continues upon him throughout any contest on that question." (quoting Redford v. Booker, 185 S.E. 879, 883 (Va. 1936))).

[128] Croft v. Snidow, 33 S.E.2d 208, 212 (Va. 1945) ("Thus upon a case like this, if all the statutory requirements for due execution be shown the legal presumption of sanity comes to the proponents' relief. A prima facie case is made out, and the burden then rests upon the [opponents] to produce evidence if this presumption is to be overcome." (quoting Redford v. Booker, 185 S.E. 879, 883 (Va. 1936))).

[129] *See supra* notes 124–28.

[130] *See infra* text accompanying notes 131–32.

[131] *See supra* notes 124–29.

[132] *See supra* note 126.

[133] Tate v. Chumbley, 57 S.E.2d 151, 160 (Va. 1950)).

cases on the point. Although not citing those cases, *Tate* approved an instruction similar to (1) the holding in *Temple* and (2) the instruction approved in *Wallen*. *Temple*, *Wallen*, and *Tate* employed the presumption of testamentary capacity to shift the burden of proof to the opponent. However, while *Temple* and *Wallen* conditioned the burden shift upon the finding of due execution,[134] *Tate* conditioned the burden shift only on the testator not having been adjudicated insane.[135] Here is the *Tate* instruction:

> And while the burden of proof is upon those offering a will for probate, to show testamentary capacity on the part of the testatrix at the time the will was executed to the satisfaction of the jury, yet the court tells the jury that all persons who have not been adjudged insane are presumed to be sane and capable of making a will *until the contrary is proved*, and that this presumption is to be taken into consideration by the jury in determining the question of competency.[136]

While *Tate* did not cite or discuss any testamentary capacity cases when approving that jury instruction, the decision did cite testamentary capacity cases for points other than the burden of proof, including *Chappell*,[137] *Redford*,[138] *Lester's Executor*,[139] and *Trice*.[140]

Forty years passed without a Supreme Court of Virginia case analyzing burdens of proof or presumptions in testamentary capacity cases.[141] Next, *Gibbs* in 1990 reversed a trial court decision for improperly placing the

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[134] *See supra* text accompanying notes 65–66, 79.

[135] *Tate*, 57 S.E.2d at 160; *see infra* note 136 and accompanying text.

[136] *Tate*, 57 S.E.2d at 160 (emphasis added) (quoting Instruction B). In Tate, the appellant argued that "the burden imposed upon the proponents of the respective wills was not sufficiently observed during the trial or clearly pointed out to the jury." The court quoted the instructions, including Instruction B, and wrote, "the character of proof incumbent upon the respective proponents was made evident to the jury." Note that the instruction says "until the contrary"–lack of testamentary capacity–is *proved*, not "contested," "rebutted," "contradicted," or "introduced." *Id.*

[137] *Id.* at 161 (citing Chappell v. Trent, 19 S.E. 314, 326 (Va. 1983)) (the duty of attesting witnesses).

[138] *Id.* at 161, 162 (citing Redford v. Booker, 185 S.E. 879, 884, 886 (Va. 1936)) (the standard of appellate review and the duty of attesting witnesses).

[139] *Id.* at 158–59 (quoting Lester's Ex'r v. Simpkins, 83 S.E. 1062, 1066 (Va. 1915)) (the admissibility of expert opinion).

[140] *Id.* at 158, 162 (citing Jenkins v. Trice, 147 S.E. 251, 260–62 (Va. 1929)) (the rule that mental status at the time of executing the will is controlling, the rule of lucid intervals, and the rule that no error results when the trial judge refuses to give additional relevant instructions to the jury).

[141] After *Tate*, *W. State Hosp. v. Wininger* affirmed a trial court's setting aside of a jury verdict in favor of an instrument executed after the putative testator had been adjudicated insane. The Supreme Court of Virginia stated, "[c]lear and convincing proof that capacity existed at the time the will was executed is required to overcome the existing *prima facie* presumption of lack of capacity. That character of proof may not be supplied by indulgence in conjecture, surmise or speculation. Nothing short of clear proof of capacity when the instrument was drawn and executed will suffice." 183 S.E.2d 446, 453 (Va. 1954).

burden of proof upon the opponent and requiring proof by clear and convincing evidence.[142] That decision silently reversed *Tate*.

Thereafter, *Fields v. Fields*[143] (1998), *Parish v. Parish*[144] (2011), and *Weedon v. Weedon*[145] (2012) also placed the burden of proof upon proponents. However, in each of those four cases the jury was not instructed about the presumption of testamentary capacity.[146] *Gibbs*, *Parish*, and *Weedon* stated that the presumption existed, but limited the consequence of the presumption to requiring the opponent to introduce evidence contesting capacity. *Fields* did not discuss the presumption at all.

Thus, prior to *Kiddell*, twenty-nine Supreme Court of Virginia cases discussed the burden of proof in testamentary capacity litigation; eight placed the burden of proof upon the opponent, and 21 placed the burden on the proponent. Of the eight opponent-burden cases, five stated that rule as a matter of law,[147] and three stated it as a consequence of the presumption of testamentary capacity.[148] Of the twenty-one cases that placed the burden of proof upon the proponent, eight did not mention any presumption,[149] seven indicated that a presumption of testamentary capacity existed, but it is a

[142]Gibbs v. Gibbs, 387 S.E.2d 499, 501 (Va. 1990) ("Instruction 6 placed a burden of persuasion on the [opponents] to prove testamentary incapacity. The instruction also required the [opponents] to establish testamentary incapacity by clear and convincing evidence . . . . To show incapacity, the [opponents] need only go forward with evidence sufficient to rebut the presumption of testamentary capacity.").

[143] Fields v. Fields, 499 S.E.2d 826, 828 (Va. 1998) ("The proponents of the . . . will had the burden of proving the existence of that degree of mental competence required for the valid execution of a will by a preponderance of the evidence and retained that burden throughout the proceeding." (citing *Gibbs*, 387 S.E.2d at 500)).

[144] Parish v. Parish, 704 S.E.2d 99, 104 (Va. 2011) ("[I]n the absence of a presumption of incapacity, 'the proponent of the will bears the burden of proving the existence of testamentary capacity by a preponderance of evidence and retains that burden throughout the proceeding.'" (citing *Gibbs*, 387 S.E.2d at 500)). The court also held that "[t]he mere fact that one is under a conservatorship is not an adjudication of insanity and does not create a presumption of incapacity." However, if there is an adjudication of insanity, "clear and convincing proof of capacity [is required] to overcome a presumption of insanity when the testator previously was adjudicated insane."). *Id* at 103 (citing *Wininger*, 83 S.E.2d at 453).

[145] Weedon v. Weedon, 720 S.E.2d 552, 558 (Va. 2012) ("The proponent of a will bears the burden of proving by a preponderance of the evidence that at the time the testatrix executed her will she possessed testamentary capacity . . . .").

[146] *See supra* notes 142–45.

[147] Tabb v. Willis, 156 S.E. 556 (Va. 1931); Smith v. Ottley, 132 S.E. 512 (Va. 1926); Wooddy v. Taylor, 77 S.E. 498 (Va. 1913); Burton v. Scott, 24 Va. (3 Rand.) 399 (1825); Spencer v. Moore, 8 Va. (4 Call) 423 (1798); *see infra* Sections II.A.1, II.A.

[148] Tate v. Chumbley, 57 S.E.2d 151 (Va. 1950); Wallen v. Wallen, 57 S.E. 596 (Va. 1907); Temple v. Temple, 11 Va. (1 Hen. & M.) 476 (1807); *see infra* Sections II.A.1, II.A.3.

[149] Fields v. Fields, 499 S.E.2d 826 (Va. 1998); Walton v. Walton, 191 S.E. 768 (Va. 1937); Lester v. Simpkins, 83 S.E. 1062 (Va. 1915); Gray v. Rumrill, 44 S.E. 697 (Va. 1903); Chappell v. Trent, 19 S.E. 314 (Va. 1893); Tucker v. Sandidge, 8 S.E. 650 (1888); Riddell v. Johnson's Ex'r, 67 Va. (26 Gratt.) 152 (1875); Coalter's Ex'r v. Bryan, 42 Va. (1 Gratt.) 18 (1844); *see infra* Sections II.A.1–3.

mere evidentiary presumption not told to the jury, [150] and six indicated that the presumption existed and formed part of the jury instructions. [151]

When *Kiddell* considered the burden of proof in testamentary capacity, it found five of the twenty-nine cases,[152] all of which, according to the court, supported its decision, but one of which did not.[153] The court did not discuss the other twenty-four cases, twenty-two of which did not support its decision.

In summary, regarding the burden of proof in testamentary capacity litigation, before *Kiddell*, eleven reversals in the party bearing the burden of proof occurred: *Spencer* through *Burton* [opponent burden], *Bryan* through *Gray* [proponent]; *Wallen* [opponent]; *Hopkins* [proponent]; *Wooddy* [opponent]; *Huff* through *Rust* [proponent]; *Ottley* [opponent]; *Green* through *Culpepper* [proponent]; *Tabb* [opponent]; *Dickens* through *Croft* [proponent]; *Tate* [opponent]; *Gibbs* through *Weedon* [proponent].

Here is a Table summarizing the discussion in this section. It demonstrates three points: (1) the eleven reversals before *Kiddell* in the party bearing the burden of proof; (2) the convolutions in whether a presumption of testamentary capacity exists and its consequence (which is considered in greater detail in the next section); and (3) the failure to find and discuss, and then apply, reject, revise, or reverse precedent.

[150] *Weedon*, 720 S.E.2d 552; Parish v. Parish, 704 S.E.2d 99 (Va. 2011); Gibbs v. Gibbs, 387 S.E.2d 499 (Va. 1990); Croft v. Snidow, 33 S.E.2d 208 (Va. 1945); Hall v. Hall, 23 S.E.2d 810 (Va. 1943); Redford v. Booker, 185 S.E. 879 (Va. 1936); Dickens v. Bonnewell, 168 S.E. 610 (Va. 1933); *see infra* Sections II.A.2–3.

[151] Culpepper v. Robie, 154 S.E. 687 (Va. 1930); Jenkins v. Trice, 147 S.E. 251 (Va. 1929); Green v. Green's Ex'rs, 143 S.E. 683 (Va. 1928); Rust v. Reid, 97 S.E. 324 (Va. 1918); Huff v. Welch, 78 S.E. 573 (Va. 1913); Hopkins v. Wampler, 62 S.E. 926 (Va. 1908); *see infra* Sections II.A.2–3.

[152] *Tate*, 57 S.E.2d 151; *Trice*, 147 S.E. 251; *Rust*, 97 S.E. 324; *Huff*, 78 S.E. 573; *Hopkins*, 62 S.E. 926; *see infra* Sections II.A.2–3.

[153] *Tate*, 57 S.E.2d 151; *see infra* Sections II.A.2–3.

4. Table Summarizing the Burden-of-Proof Cases

TABLE OF VIRGINIA CASES ADDRESSING BURDENS OF PROOF AND PRESUMPTIONS IN TESTAMENTARY CAPACITY CASES

Opponent Burden Cases	Proponent Burden Cases	Virginia Cases Discussed for Burden-of-Proof	Presumption Type
Spencer[154] (1798)			RL
Temple[155] (1807)			SB
Burton[156] (1825)			RL
	Bryan[157] (1844)		NM
	Riddell[158] (1875)		NM
	Tucker[159] (1888)	*Riddell*	NM
	Chappell[160] (1893)		NM
	Gray[161] (1903)	*Tucker*, *Chappell*	NM

[154] *See infra* Section II.A.1; *supra* note 55 and accompanying text, and text accompanying notes 54, 57, 69.
[155] *See infra* Section II.A.1; *supra* note 56 and accompanying text, and text accompanying notes 54, 69.
[156] *See infra* Section II.A.1; *supra* note 52 and accompanying text, and text accompanying notes 54, 69.
[157] *See infra* Section II.A.1; *supra* note 71 and accompanying text, text accompanying note 70, and text following note 80.
[158] *See infra* Section II.A.1; *supra* note 70 and accompanying text, and text following note 80.
[159] *See infra* Section II.A.1; *supra* note 72 and accompanying text, and text accompanying notes 73–76.
[160] *See infra* Section II.A.1; *supra* note 73 and accompanying text, and text accompanying notes 72, 74–76.
[161] *See infra* Section II.A.1; *supra* note 74 and accompanying text, and text accompanying notes 72–73, 75–76.

Opponent Burden Cases	Proponent Burden Cases	Virginia Cases Discussed for Burden-of-Proof	Presumption Type
Wallen[162] (1907)		*Temple*	SB
	Hopkins[163] (1908)	***Burton***, ***Temple***, ***Wallen***	JI
Wooddy[164] (1913)		*Temple*	RL
	Huff[165] (1913)		JI
	Lester's Ex'r[166] (1915)		NM
	Rust[167] (1918)	***Burton***, ***Wallen***, *Hopkins*	JI
Ottley[168] (1926)		*Temple*, *Wooddy*	RL
	Green[169] (1928)		JI
	Trice[170] (1929)	*Huff*, *Rust*	JI

[162] *See infra* Section II.A.1; *supra* note 77 and accompanying text, and text accompanying notes 78–80.
[163] *See infra* Section II.A.2; *supra* note 83 and accompanying text, and text accompanying notes 88–92.
[164] *See infra* Section II.A.3; *supra* note 105 and accompanying text, and text accompanying note 104.
[165] *See infra* Section II.A.3; *supra* note 106 and accompanying text, and text accompanying notes 107–08.
[166] *See infra* Section II.A.3; *supra* note 109 and accompanying text.
[167] *See infra* Section II.A.3; *supra* note 110 and accompanying text, and text accompanying notes 111–12.
[168] *See supra* note 114.
[169] *See supra* note 116.

Opponent Burden Cases	Proponent Burden Cases	Virginia Cases Discussed for Burden-of-Proof	Presumption Type
	Culpepper[171] (1930)		JI
Tabb (1931)[172]		*Ottley*, *Temple*, ***Huff***	RL
	Dickens[173] (1933)	*Bryan*, ***Wallen***, *Hopkins*	EP
	Redford[174] (1936)	*Dickens*, ***Tabb***	EP
	Walton[175] (1937)	*Dickens*	EP
	Hall[176] (1943)	*Redford*, *Rust*	NM
	Croft[177] (1945)	*Redford*	EP
Tate (1950)[178]			SB
	Gibbs[179] (1990)	***Ottley***, *Rust*, ***Spencer***	EP

[170] *See supra* note 117.
[171] *See supra* note 118.
[172] *See supra* note 120.
[173] *See supra* note 124.
[174] *See supra* note 125.
[175] *See supra* note 126.
[176] *See supra* note 127.
[177] *See supra* note 128.
[178] *See supra* note 133.
[179] *See supra* note 142.

Opponent Burden Cases	Proponent Burden Cases	Virginia Cases Discussed for Burden-of-Proof	Presumption Type
	Fields[180] (1998)	*Gibbs*, ***Wooddy***	NM
	Parish[181] (2011)	*Gibbs*	EP
	Weedon[182] (2012)	*Gibbs*	EP
Kiddell[183] (2012)		*Hopkins, Huff*, *Rust, Trice*, *Tate*	JI

Key to Presumption Types:

RL = the presumption is used as rationale to create a rule of law always placing the burden of proof upon the opponent.

SB = when operative by proof of the basic fact, the presumption expressly shifts the burden to the opponent.

NM = a presumption of consequence to the burden of proof is not mentioned in the opinion.

JI = the presumption is included in the jury instructions.

EP = when operative by proof of the basic fact, the presumption is an evidentiary presumption that only gives rise to a burden of production upon the opponent, and is not part of the jury instructions.

Bold = when the rule of the citing case directly opposes the rule of the cited case.

[180] *See supra* note 143.
[181] *See supra* note 144.
[182] *See supra* note 145.
[183] The burden-of-proof rule of *Kiddell* is considered at some length in section III.C. *See infra* Section III.C. That analysis concludes that *Kiddell* should be regarded as having shifted the burden of proof to the opponent. *See also* Kiddell v. Labowitz, 733 S.E. 2d. 622, 628–31 (Va. 2012).

B. Citing Inapposite Cases

In the 1950s, when a later, third, Supreme Court of Virginia opinion concluded that an earlier, second opinion had improperly interpreted an even earlier, first opinion because the first opinion did not support the proposition for which the second opinion cited the first opinion, the court has said the following in the third opinion: "but the quotation from [the first opinion in the second opinion] appears rather to confuse than clarify."[184] That statement by the court was a quote from Judge Brockenbrough Lamb's *Virginia Probate Practice* treatise discussing cases deciding whether testamentary character must appear from the face of a writing offered as a will.[185] It could equally apply to cases stating the burden of proof in testamentary capacity litigation.

The table above identifies erroneous citations in **bold** text, when the rule of the citing case directly opposes the rule of the cited case.

Perhaps even more strangely, the Supreme Court of Virginia has cited the same case in support of opposite rules. *Kiddell* (2012) quoted *Huff*[186] to support *Kiddell*'s claim that "burden of proof is upon those offering a will for probate to show testamentary capacity on the part of the testator," [187] yet *Tabb* (1931) cited *Huff* for the opposite rule: "those who would impeach a will on the ground that the decedent had become incompetent must clearly prove that incompetency to exist."[188] *Tabb* is missing from *Kiddell*'s discussion and from its citation of cases, although *Tabb* was decided in the middle of those cases string-cited in *Kiddell*.[189]

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[184] Poindexter v. Jones, 106 S.E.2d 144, 147 (Va. 1958) (quoting BROCKENBROUGH LAMB, VIRGINIA PROBATE PRACTICE § 33, at 68 (1957)).

[185] LAMB, *supra* note 184, at 68.

[186] Huff v. Welch, 78 S.E. 573 (Va. 1913).

[187] *Kiddell*, 733 S.E.2d at 629 (quoting *Huff*, 78 S.E. at 575, 578).

[188] Tabb v. Willis, 155 S.E. 556, 564 (Va. 1931) (citing *Huff*, 78 S. E. at 573).

[189] *Kiddell*, 733 S.E.2d at 629–30. To support placing the burden of proof upon those alleging testamentary incapacity, i.e., the opponents of the will, *Tabb* cites six cases, dating from 1807 to 1926. *Tabb*, 155 S.E. at 564 (citing Smith v. Ottley, 132 S.E. 512 (Va. 1926); Portner v. Portner, 112 S.E. 762 (Va. 1922); *Huff*, 78 S.E. 573; Parramore v. Taylor, 52 Va. (11 Gratt.) 220 (1854); Kachline v. Clark, 4 Whart. (Pa.) 320 (1839); Temple v. Temple, 11 Va. (1 Hen. & M.) 476 (1807)).

III. THE EVIDENTIARY PRESUMPTION ARISING UPON PROOF OF DUE EXECUTION

A. Evidentiary Presumptions in General

A detailed analysis of *Kiddell* first requires a précis on evidentiary presumptions. The term "presumption" refers to three separate processes: (1) inferences; (2) rebuttable presumptions; and (3) conclusive presumptions.[190] "The similarity between three importantly distinct processes has led to some confusion, as is usually the case when a single term is used in the law in more than one sense."[191] All three processes concern the relation between one fact, sometimes called the "first fact" or the "basic fact," and another fact, sometimes called the "second fact" or the "presumed fact."[192]

With an inference, when the first fact is proven, "the jury is permitted or authorized to find the existence of the second fact, but is not compelled to do so, even if no evidence on the point is offered by the opposition."[193] With a conclusive presumption, "when the first fact is proven, the second fact must be found to exist, and no evidence of its nonexistence is admissible."[194]

The rebuttable presumption exists as a category between the inference, which is permissive, and the conclusive presumption, which is mandatory. Under a rebuttable presumption, when the first fact is proven, the jury must accept the second fact "only if no sufficient evidence is offered by the opponent to rebut the existence of the second fact."[195] "[R]ebuttable presumptions are the *only true presumptions*, and it should be borne in mind that proof of the first fact *compels* the trier of fact to find that the second fact exists if no adequate evidence is offered to disprove or rebut the existence of the second fact."[196]

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[190] CHARLES E. FRIEND & KENT SINCLAIR, THE LAW OF EVIDENCE IN VIRGINIA § 4-1, at 211 (7th ed. 2012) [hereinafter FRIEND & SINCLAIR 2012].

[191] *Id.* § 4-1[a], at 211–12.

[192] City of Hopewell v. Tirpak, 502 S.E.2d 161, 168 (Va. Ct. App. 1998) ("A presumption is a procedural rule of law 'directing that if a party proves certain facts (the "basic facts") at a trial or hearing, the factfinder must also accept an additional fact (the "presumed fact") as proven unless sufficient evidence is introduced tending to rebut the presumed fact." (citing 1 CLIFFORD S. FISHMAN, JONES ON EVIDENCE: CIVIL AND CRIMINAL § 4:2 (7th ed. 1992)).

[193] FRIEND & SINCLAIR 2012, supra note 190, § 4-1[a], at 212 (emphasis omitted).

[194] FRIEND & SINCLAIR 2012, supra note 190, § 4-1[b], at 212 (emphasis omitted).

[195] FRIEND & SINCLAIR 2012, supra note 190, § 4-1[c], at 213.

[196] FRIEND & SINCLAIR 2012, supra note 190, § 4-1[c], at 213 (citing Martin v. Phillips, 369 S.E.2d 397 (Va. 1988)).

Rebuttable presumptions affect only the burden of producing evidence, and not the burden of proof. The "burden of producing evidence . . . frequently passes from party to party during the progress of a trial, but the necessity of proving his case [the burden of proof] always rests upon the plaintiff and never shifts."[197]

Kiddell reminded the bench and bar that rebuttable presumptions bifurcate into persistent and bursting presumptions. *Kiddell* held "that the presumption of testamentary capacity does not disappear, unless . . ." the trial court rules that the presumption was rebutted as a matter of law because "no rational fact finder could find that the presumption had not been rebutted."[198]

B. Problems with the General Virginia Law of Presumptions

Professors Friend and Sinclair, in the latest update to their *Evidence in Virginia* treatise, tell us that *Kiddell* is a significant event in the law of evidence. "The Supreme Court of Virginia's sharply divided opinion in *Kiddell v. Labowitz*, a case about the presumption of testamentary capacity . . ., leaves important issues to be worked out in Virginia practice with respect to *all* of the other presumptions recognized in the Commonwealth."[199]

When searching Supreme Court of Virginia opinions to divide rebuttable presumptions into bursting and persistent types, other problems will surface; Professors Friend and Sinclair describe them. Terminology is imprecise, regarding the word "presumption"[200] and the phrase "*prima facie* evidence."[201] Holdings are inconsistent on questions about whether an inference or presumption can be based upon another inference or presump-

[197] Redford v. Booker, 185 S.E. 879, 883 (Va. 1936).

[198] Kiddell v. Labowitz, 733 S.E.2d 622, 630–31 (Va. 2012).

[199] CHARLES E. FRIEND & KENT SINCLAIR, THE LAW OF EVIDENCE IN VIRGINIA § 4-5, at 7 (7th ed. Supp. 2013) [hereinafter FRIEND & SINCLAIR 2013] (emphasis added).

[200] FRIEND & SINCLAIR 2012, *supra* note 190, § 4-1, at 211–12 ("The term presumption is used to describe at least three different processes incident to a trial. . . . The similarity between three importantly distinct processes has led to some confusion, as is usually the case when a single term is used in the law in more than one sense.").

[201] FRIEND & SINCLAIR 2012, *supra* note 190, § 4-4, at 218 ("The term 'prima facie evidence' is also frequently used in the appellate cases. Where it is defined in the cases, the definitions sometimes suggest that 'prima facie evidence' creates an inference rather than a true presumption, but other formulations indicate that it establishes a rebuttable presumption. Because of this duality of definition, it is usually necessary to look at the effect given to the evidence in a particular case to determine how the term is being used.").

tion.[202] When describing how so to divide rebuttable presumptions, Professors Friend and Sinclair make these observations.

> From the foregoing, only two conclusions can safely be reached:
> 1. Virginia courts often do instruct juries on true [rebuttable] presumptions, even when rebutted, and
> 2. The assistance of the Supreme Court is needed in clarifying the propriety of this practice.
> Whether such instructions are correct or not-and there are good arguments both pro and con-the situation is, as the old saying goes, "not a model of clarity."[203]

At present, *Kiddell* provides the latest rules for clarifying the practice of instructing juries on a particular rebuttable presumption: the presumption of testamentary capacity.

C. The Persisting Rebuttable Presumption of Testamentary Capacity; Kiddell v. Labowitz Analyzed

In *Kiddell*,[204] beneficiaries under an earlier will contested a later, second writing, offered as a will, for lack of testamentary capacity.[205] After the close of all of the evidence, the opponents moved to strike the evidence of the proponent of the second writing, contending that the proponent's evidence was insufficient to prove that the decedent possessed testamentary capacity when she executed the second writing.[206] The trial court denied the opponents' motion, allowed the case to go to the jury, and instructed the jury, over the opponents' objection about the presumption of testamentary capacity and the consequences of its operation.[207] Opponents appealed, contending error (1) in instructing the jury about the presumption and (2) in denying opponents' motion to strike the evidence.[208]

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[202] FRIEND & SINCLAIR 2012, *supra* note 190, § 4-3, at 217.

[203] FRIEND & SINCLAIR 2012, *supra* note 190, § 4-6, at 225.

[204] Kiddell v. Labowitz, 733 S.E.2d 622 (Va. 2012). Among the other problems in the *Kiddell* opinion, the Supreme Court of Virginia misstated the rules for due execution of a will. The court stated, "[The drafting lawyer] and one of the paralegals from his office witnessed the testator's execution of her will, and the other paralegal served as the notary public in accordance with the provisions of Code § 64.1-49." *Id.* at 625. Section 64.1-49, now 64.2-403, states the elements requisite for constituting a writing as a will. VA. CODE ANN. § 64.2-403 (Repl. Vol. 2012). A notary is not required. By contrast, sections 64.2-452 and 64.2-453 address another subject, how to make a will self-proving, and that requires a notary. §§ 64.2-452 to -453.

[205] *Kiddell*, 733 S.E.2d at 624–25.

[206] *Id.* at 626.

[207] *Id.*

[208] *Id.* at 627 ("We awarded [opponent] this appeal on two issues: (1) whether the [trial] court erred by granting Instructions 8 and 9 [Instruction 8 was the presumption instruction and Instruction 9 was the finding instruction]; and (2) whether the [trial] court erred by denying [opponent's] motion to strike the

The Supreme Court of Virginia's decision consisted of three opinions. All seven Justices agreed that the trial court did not err in denying the opponents' motion to strike the proponent's evidence.[209] Justice Powell wrote the majority opinion, joined by Justices Goodwyn and Millette, which also found that the trial court did not err in instructing the jury about the presumption of testamentary capacity.[210] Justice McClanahan agreed that the jury should be instructed about the presumption of testamentary capacity, but would not reach one point that the majority had addressed.[211] Chief Justice Kinser wrote an opinion, joined by Justices Lemons and Mims, which concluded that the jury should not have been instructed about the presumption of testamentary capacity.[212]

The rationale for the majority's decision to instruct the jury about the presumption of testamentary capacity is difficult to discern, but two possibilities exist: (1) the point stability of equipoise (under which rationale all rebuttable presumptions become persistent), and (2) precedent, existing and not overruled, but not readily remembered, that made the testamentary capacity presumption persistent, rather than bursting (under which rationale only certain, previously identified rebuttable presumptions are persistent).

1. The Point Stability of Equipoise

In the concluding paragraph of the presumption analysis section of the *Kiddell* majority opinion, the court wrote as follows.

> When the proponent of a will enjoys the presumption of testamentary capacity, the jury must be instructed as to this presumption. Where the evidence is in equipoise, the presumption comes to the proponent's rescue, allowing him to prevail. Indeed, if the jury is not advised of the presumption, the proponent is de-

evidence.").

[209] Justice Powell's majority opinion concluded that a conflict existed in the testimony about testamentary capacity, thereby making testamentary capacity a jury issue, and forming the basis for the trial court's properly denying the motion to strike. *Id.* at 632. Justice Kinser, joined by Justices Lemons and Mims, summarily agreed. *Id.* at 633 n.2 ("I concur with part II, section B. of the majority opinion and agree that the [trial] court did not err by denying the opponents' motion to strike the evidence.") (Kinser, J., concurring in part and dissenting in part). So did Justice McClanahan. *Id.* at 637 ("I agree with the majority's holding that the [trial] court did not err in . . . refusing to grant [opponents'] motion to strike [proponent's] evidence.") (McClanahan, J., concurring).

[210] *Kiddell*, 733 S.E.2d at 624.

[211] *Id.*at 637 ("I agree with the majority's holding that the [trial] court did not err in granting Instructions 8 and 9 . . . I write separately because I believe it is unnecessary for us to determine whether the evidence in this case was sufficient to rebut the presumption of testamentary capacity as a matter of law because [opponent] did not move the [trial] court for such a determination.") (McClanahan, J., concurring).

[212] *Id.* at 637 ("I conclude that the [trial] court erred by giving Instructions 8 and 9.") (Kinser, J., concurring in part and dissenting in part).

> prived of this benefit and, in the face of equal evidence, would be found to have not carried his burden even though the law is otherwise. *For this reason*, we *hold* that the presumption of testamentary capacity does not disappear, unless the [trial] court rules that the presumption was rebutted as a matter of law because no rational fact finder could find that the presumption had not been rebutted. In this case, the [trial] court did not err in instructing the jury as to the existence of the presumption.[213]

As noted above, the Supreme Court of Virginia used "equipoise" to refer to a condition of equal evidence. In that circumstance, according to the Supreme Court of Virginia, the jury should apply the presumption and find the presumed fact to have been proven.[214] And, if the jury has not been instructed about the presumption, then, when equipoise exists, the jury obviously cannot apply the presumption, so the jury then would be forced to find against the party bearing the burden of proof, and the party bearing the burden of proof can be different from the party against whom the presumption operates.

But under the equipoise rationale, the jury needs to know about all presumptions, because the possibility of equipoise exists whenever the party bearing the burden of proof differs from the party against whom the presumption operates.[215] But, as Justice Kinser noted, although the sole rationale given by the majority, when stating its holding, was the equipoise rationale, the jury instructions in *Kiddell* "did not tell the jury that if the evidence is in equipoise, the presumption tips the scales in favor of [proponent] and permits a finding that he proved testamentary capacity by a preponderance of the evidence."[216] That failure in reasoning between the rationale and holding of the *Kiddell* majority opinion is manifest, and thus apt to mislead. As Justice Kinser stated, "[t]hus, using the majority's rationale, the [trial] court erred by giving Instructions [about the presumption of testamentary capacity]. But, the majority does not so hold. Consequently, trial courts in the future will not know whether to instruct a jury in a will

[213] *Id.* at 631 (emphasis added).

[214] *Id.* at 633.

[215] Professors Friend and Sinclair, discuss the plain conflict of *Kiddell* and *Kavanaugh v. Wheeling*, 7 S.E.2d 125 (1940). "[T]he Court had said in *Kavanaugh* that in Virginia a presumption 'cannot stand in the face of positive facts to the contrary.' Because a presumption simply creates a hypothesis, 'if the presumption thus created is rebutted or overcome by substantial evidence showing the true facts to be to the contrary, the presumption disappears. Presumptions give way to ascertained or established facts.' This language leaves a very important question: does a presumption disappear where the opponent can produce at least 'some' positive evidence of what happened on the occasion in question, or does it only disappear if the opponent proves conclusively that the presumed fact is not correct. . . . [I]t is not clear how the Court today, under *Kiddell*, will read the [*Kavanaugh*] requirement of offering 'ascertained or established facts' to rebut a presumption and cause it to disappear." FRIEND & SINCLAIR 2013, *supra* note 199, § 4-5 at 8.

[216] *Kiddell*, 733 S.E.2d at 635 (Kinser, J., concurring in part and dissenting in part).

contest using instructions like those in our prior cases or instructions similar to [those in *Kiddell*]."[217]

The *Kiddell* majority stated that there is one circumstance in which the jury will not be told about the presumption of testamentary capacity: when the trial court finds that the presumption was rebutted "as a matter of law because no rational fact finder could find that the presumption had not been rebutted."[218] But of course, as Justice Kinser noted, in such a situation, no jury instructions ever will be made, because the trial court should direct a verdict in favor of the opponent–the party against whom the presumption operated.[219]

Here is an example. Proponents of a will prove due execution, giving rise to a presumption of testamentary capacity operating against opponents, but opponents introduce evidence of sufficient quantity and quality that the trial judge decides "as a matter of law [that] no rational fact finder could find that the presumption [of testamentary capacity] had not been rebutted."[220] Well, if no rational jury could decide that a presumption [in favor of testamentary capacity] had not been rebutted, how could that jury rationally decide that testamentary capacity had been shown? Or, dropping all the negatives in that sentence: If the evidence shows to the trial court that the *only rational decision* a jury could make is that the opponent has rebutted testamentary capacity, then how could the same jury rationally find that the proponents had proven testamentary capacity? If the negation of testamentary capacity is established so thoroughly that it exists as a matter of law to destroy a presumption, how then can the presence of testamentary capacity rationally be found to predominate when applying the burden of proof?

The only way out of that conundrum is if the standard for rebutting the presumption ("sufficient evidence") is different from the standard of proof ("greater weight of the evidence"), and, under *Kiddell*'s definitions, there appears no meaningful difference between them.[221]

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[217] *Id.*

[218] *Id.* at 631.

[219] *Id.* at 633 ("Moreover, a finding that the opponent of a will has proven testamentary incapacity as a matter of law means that no rational fact finder could find the existence of testamentary capacity when the will was executed and judgment must therefore be entered in favor of the opponent.").

[220] *See id.* at 631.

[221] *See infra* Section III.D.2.

2. The Larger Evidentiary Quandary

The larger evidentiary quandary after *Kiddell* is the extent of the persistence (or bursting) of other presumptions, and this is the matter upon which Professors Friend and Sinclair have written.

> [T]he Court had said in *Kavanaugh* that in Virginia a presumption "cannot stand in the face of positive facts to the contrary." Because a presumption simply creates a hypothesis, "if the presumption thus created is rebutted or overcome by substantial evidence showing the true facts to be to the contrary, the presumption disappears. Presumptions give way to ascertained or established facts." This language leaves a very important question: does a presumption disappear where the opponent can produce at least "some" positive evidence of what happened on the occasion in question, or does it only disappear if the opponent proves conclusively that the presumed fact is not correct. . . . [I]t is not clear how the Court today, under *Kiddell*, will read the [*Kavanaugh*] requirement of offering "ascertained or established facts" to rebut a presumption and cause it to disappear.[222]

As noted, two possibilities exist for the holding in *Kiddell*: (1) the point stability of equipoise (under which rationale all rebuttable presumptions become persistent), and (2) precedent, existing and not overruled, but not readily remembered, that made the testamentary capacity presumption persistent, rather than bursting (under which rationale only certain, previously identified rebuttable presumptions are persistent). If the point-stability-of-equipoise holding controls, all presumptions in Virginia become the subject of jury instruction. If the controlling precedent holding controls, then all of the Supreme Court of Virginia's precedent about any given presumption must be surveyed to determine whether that presumption persists for instruction to the jury, or bursts upon introduction of evidence sufficient in the trial judge's mind to create a jury question. [223]

When the *Kiddell* court stated its holding, it recited only the equipoise rationale.[224] However, earlier in the opinion the Supreme Court of Virginia stated that, as a general rule, presumptions in Virginia burst. "As *Kiddell* correctly argues, in most contexts in Virginia, a presumption disappears when the presumption is rebutted as a matter of law. However, *Kiddell's* contention that the presumption of testamentary capacity disappears in the

[222] FRIEND & SINCLAIR 2013, *supra* note 199, § 4-5, at 8.

[223] FRIEND & SINCLAIR 2012, *supra* note 190, §4-8, at 227 ("Where the presumption merely shifts the burden of going forward, however, it would appear that the presumption is rebutted (i.e., disappears) when the opponent has introduced enough evidence to justify the jury in finding the nonexistence of the presumed fact–i.e., enough evidence to create a jury question as to whether Fact Two exists. Thereafter, the case proceeds 'exactly as if no presumption had ever been applicable in the action'").

[224] *See supra* note 213 and accompanying text.

face of any evidence presented to the contrary is incorrect."[225] Thus, although *Kiddell*'s most limited statement of its holding exclusively relies upon the equipoise rationale, *Kiddell*'s discussion of *Kavanaugh* challenges that exclusivity. All rebuttable presumptions operating against the party not bearing the burden of proof (or, removing the negatives, all rebuttable presumptions operating in favor of the party bearing the burden of proof) present the equipoise problem, and if *Kiddell* makes all of them persistent, then *Kiddell* would have reversed the general rule of *Kavanaugh* that it ostensibly affirmed.

To retain *Kavanaugh*'s general rule, we must read *Kiddell* as adopting the second rationale. Under that second rationale, Virginia presumptions burst generally, but exceptions exist for certain presumptions previously identified by common law, and the presumption of testamentary capacity is such an exception, because "as early as 1908, th[e] [Virginia Supreme] Court addressed the propriety of advising the jury of the presumption in will contests and allowing them to consider it."[226]

The next issue to consider is whether the Supreme Court of Virginia's decision in *Kiddell* was correct in asserting that Virginia common law previously had identified the presumption of testamentary capacity as an exceptional presumption that persists for instruction to the jury.

3. Precedent Unique to Testamentary Capacity Litigation

To support its holding that the presumption of testamentary capacity is a persistent rebuttable presumption, i.e., the type of presumption that is told to the jury, the *Kiddell* majority cited *Hopkins* (1908); *Huff* (1913); *Rust* (1918); *Trice* (1929); and *Tate* (1950).[227]

As noted earlier, *Hopkins* in 1908 (and *Wallen* in 1907) turned back the high water mark of evidentiary pressure on the proponent.[228] In particular,

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[225] Kiddell v. Labowitz, 733 S.E.2d 622, 630 (Va. 2012) (citing Kavanaugh v. Wheeling, 7 S.E.2d 125, 128 (Va. 1940)).

[226] *Id.* at 628. Accepting that second rationale of *Kiddell* would make the scheme for deciding whether a particular Virginia rebuttable presumption persists similar with the scheme for deciding whether a particular Virginia rebuttable presumption shifts the burden of proof. Under Rule 2:302, "[u]nless otherwise provided by Virginia common law or statute, in a civil action a rebuttable presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof." VA. SUP. CT. R. 2:301 (Repl. Vol. 2013).

[227] *Kiddell*, 733 S.E.2d at 628, 629 (citing Tate v. Chumbley, 57 S.E.2d 151, 160–61 (Va. 1950); Jenkins v. Trice, 147 S.E. 251, 260 (Va. 1929); Rust v. Reid, 97 S.E. 324, 331 (Va. 1918); Huff v. Welch, 78 S.E. 573, 575, 578 (Va. 1913); Hopkins v. Wampler, 62 S.E. 926, 927–28 (Va. 1908)).

[228] *See infra* Section II.A.2.

Hopkins reversed a verdict against a will for two errors in jury instructions: (1) improperly requiring that a proponent prove testamentary capacity by clear and convincing evidence,[229] and (2) omitting the "presumption of sanity." Regarding the "presumption of sanity," the Supreme Court of Virginia wrote, "[w]e conclude on that branch of the case (testatrix's sanity having been drawn in question), that the burden of proving her sanity at the time of the execution of the alleged will to the satisfaction of the jury rested upon the [proponents]; and in determining that question the jury should also *have taken into consideration* the presumption in favor of testatrix's sanity."[230] The *Hopkins* court did not describe how the presumption was to be taken into consideration, nor did the decision condition operation of the presumption upon proof of due execution.

In *Huff* (1913), the Supreme Court of Virginia reversed a judgment entered on a jury verdict against a will because there had been a "plain and palpable deviation from the proof, [so] interference on the part of the appellate court is warranted."[231] In a portion of the opinion headed "Statement," the Supreme Court of Virginia reprinted five pages of jury instructions.[232] In the opinion, the Court did not discuss the jury instructions other than to write, "[t]he instructions given by the court, *all of which appear in the statement preceding this opinion*, were ample to submit to the jury fully and fairly the case which the evidence adduced tended to prove, and we are, therefore, of opinion that the court committed no reversible error in its rulings with respect to the instructions refused or to those given."[233]

The only instruction in *Huff* addressing burdens of proof or presumptions in proving testamentary capacity was Instruction O, which provided as follows.

> While the burden of proof is upon those offering a will for probate, to show testamentary capacity on the part of the testator at the time the will was executed to the satisfaction of the jury, yet the court tells the jury that there is *in all cases* an existing presumption in favor of the testator's sanity and capacity, which is to be *taken into consideration* by the jury in determining the question of competency.[234]

The only point in *Huff* relevant to *Kiddell* is Instruction O; therefore, the *Kiddell* majority's citation of *Huff* necessarily interprets *Huff* as approving

[229] *Hopkins*, 62 S.E. at 927–28.
[230] *Id.* (emphasis added).
[231] *Huff*, 78 S.E. at 579.
[232] *Id.* at 574–76.
[233] *Id.* at 578 (emphasis added).
[234] *Id.* at 575 (quoting Instruction O) (emphasis added).

Instruction O, yet other decisions of the Supreme Court of Virginia discount the precedential value of such blanket approvals of jury instructions.[235] Note that Instruction O simply recites the language of *Hopkins*; therefore, neither *Huff* nor *Hopkins* describe how the presumption is to be taken into consideration by the jury, and *Huff* and *Hopkins* do not condition operation of the presumption upon proof of due execution.

In *Rust*,[236] (1918) the Supreme Court of Virginia reversed a trial court judgment entered on a jury verdict in favor of a will because two jurors, who had had business dealings with the testator, should not have been empanelled on the jury.[237] In addition, the Supreme Court of Virginia in *Rust* analyzed and specifically approved a jury instruction identical to *Huff*'s Instruction O,[238] about which *Huff* had given only blanket approval.[239]

About ten years later, in *Trice*[240] (1929), the Supreme Court of Virginia affirmed a trial court judgment entered on a jury verdict in favor of a will against a challenge for lack of testamentary capacity.[241] The Supreme Court of Virginia reviewed forty-three jury instructions and the objections to them, which "covered more than seventy-five pages of [opponents'] briefs.[242] One of the instructions approved in *Trice* was identical to the jury instruction in *Huff* and *Rust*, except for the addition of the word "and" to

[235] Decisions of the Supreme Court of Virginia after *Tate* are inconsistent about the precedential value of *Tate*'s approval of the instructions. In *Gibbs* (1990), the Supreme Court of Virginia said that the propriety of instructions was not at issue in *Tate*, so that it wasn't error for the trial court in *Gibbs* not to give an instruction, based on *Tate*, that the jury "should consider" the pendency of committal proceedings when the putative will was executed. Gibbs v. Gibbs, 387 S.E.2d 499, 501 (Va. 1990). However, in *Kiddell*, when discussing the jury instructions, *Tate* is quoted. Kiddell v. Labowitz, 733 S.E.2d 622, 629–30 (Va. 2012).

[236] Rust v. Reid, 97 S.E. 324 (Va. 1918).

[237] In *Rust*, the case "should not have been submitted to the determination of jurors who had made up and expressed opinions on the subject from their intimate acquaintance and business relations with the testator." *Id.* at 330. Two jurors had "had business transactions with [the testator], one of them renting his property and the other 'had transactions with him in the store, selling him goods,' thereby in the most positive way affirming his capacity to contract. They would have placed themselves in a very awkward position to affirm by their verdict that he did not have the capacity to make a will." *Id.* at 329–30.

[238] *Id.* at 331 (quoting Instruction 3). Strangely, that jury instruction did not mimic the law as discussed earlier in the opinion. The Supreme Court of Virginia discussed the law as follows. "The burden of proving testamentary capacity is on the [proponent] of the will, and continues upon him throughout any contest on that question; but when he has shown a compliance with all the statutory requirements for the due execution of a will, the legal presumption of sanity comes to his relief, and dispenses with any evidence to the contrary. The proof of due execution, therefore, entitles the [proponent] prima facie to have the will admitted to probate." *Id.*

[239] *See* Huff v. Welch, 78 S.E. 573, 578 (Va. 1913).

[240] Jenkins v. Trice, 147 S.E. 251 (Va. 1929).

[241] *Id.*

[242] *Id.* at 262.

begin the *Trice* instruction.[243] The Supreme Court of Virginia's analysis in *Trice* consisted merely of stating, "[the instruction] was approved in *Huff* and in *Rust*."[244] Thus the *Huff*, *Rust*, and *Trice* decisions all approved an identical instruction; it places the burden of proof upon the proponent and tells the jury to take the presumption of testamentary capacity into consideration when deciding if the proponent has met that burden.

In *Tate*[245] (1950) the Supreme Court of Virginia affirmed a trial court judgment entered on a jury verdict in favor of a will executed by an individual who had been adjudged insane prior to executing it.[246] Two writings were offered as wills; one made in 1915 and another in 1916.[247] Between the execution of the two writings, *Tate* had been "adjudged to be insane" by a "lunacy commission" in a "committal proceeding."[248] The jury was required to consider whether neither, either, or both of the 1915 and 1916 writings constituted a will, and the jury returned a verdict that the 1916 writing was the testator's valid last will.[249]

Because the testator had been adjudicated insane during the time between the execution of the 1915 and 1916 writings, two presumptions of capacity existed in the case, one in favor of capacity for the 1915 writing and one against capacity for the 1916 writing. The jury was instructed (1) that a presumption of capacity existed for the 1915 writing; (2) that for the 1915 writing, the jury "should consider" the "committal proceedings" commenced seven months later; and (3) that for the 1916 writing, a presumption of incapacity existed because testator had been adjudged insane.[250]

The Supreme Court of Virginia in *Tate* expressly approved the following instruction regarding the presumption in favor of capacity for the 1915 writing executed by the testator prior to her adjudication as insane.

> And while the burden of proof is upon those offering a will for probate, to show testamentary capacity on the part of the testatrix at the time the will was executed to the satisfaction of the jury, yet the court tells the jury that all persons

[243] *Id.* at 260 (quoting Instruction No. 4).
[244] *Id.* (citations omitted).
[245] Tate v. Chumbley, 57 S.E.2d 151 (Va. 1950).
[246] *Id.*
[247] *Id.* at 153.
[248] *Id.* at 155.
[249] *Id.* at 153–54.
[250] The court distinguished *Gilmer v. Brown* (1947), because the capacity proceeding there proceeded under a statute different from the capacity proceeding in *Tate*. In *Tate*, the capacity proceeding was under Acts of 1910, ch. 102, which in 1950 was section 1017 of the Code of 1942 (but the court also cites 1050 of the Code of 1942 as the procedural section). In *Gilmer*, the action was under section 1080a of the Code of 1942. *Tate*, 57 S.E.2d at 157–58.

> who have not been adjudged insane are presumed to be sane and capable of making a will *until the contrary is proved*, and that this presumption is to be taken into consideration by the jury in determining the question of competency.[251]

Let us contrast the operative parts of (1) the instruction approved in *Tate* and (2) the instruction approved in *Huff*, *Rust*, and *Trice* (the "*H-R-T* instruction"). Under the *H-R-T* instruction, the presumption of testamentary capacity is to be "taken into consideration," without more direction.[252] Under the *Tate* instruction, the presumption of testamentary capacity governs "until the contrary is proved."[253] In *Tate*, the presumption of testamentary capacity was conditioned only on the testator's having not been adjudicated insane. In the *H-R-T* instruction, the presumption of testamentary capacity was subject to no condition for its operation; it exists in all cases.[254] That difference arises because the testator in *Tate* had been adjudicated insane prior to the execution of one of the writings at issue. Consequently, neither the *Tate* nor *H-R-T* instructions condition the presumption of testamentary capacity upon due execution. Under these approaches, the presumption exists in all cases, except the rare situation in which an adjudication of insanity occurred. And the *Tate* instruction tells the jury to shift the burden of proof to the opponent if the testator has not been adjudicated insane.

For forty years after the *Tate* decision, which unambiguously had placed the burden of proof on the opponent absent adjudication of insanity,[255] the Supreme Court of Virginia did not decide any cases that addressed (1)

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[251] *Id.* at 160 (emphasis added) (quoting Instruction B). In *Tate*, the appellant argued that "the burden imposed upon the proponents of the respective wills was not sufficiently observed during the trial or clearly pointed out to the jury." *Id.* The court quoted the instructions, including Instruction B, and wrote, "the character of proof incumbent upon the respective proponents was made evident to the jury." *Id.*

[252] Jenkins v. Trice, 147 S.E. 251, 260 (Va. 1929) (quoting Instruction No. 4); Rust v. Reid, 97 S.E. 324, 331 (Va. 1918) (quoting Instruction 3); Huff v. Welch, 78 S.E. 573, 575 (Va. 1913) (quoting Instruction O). ("[T]he court tells the jury that there is in all cases an existing presumption in favor of the testator's sanity and capacity, which is to be taken into consideration by the jury in determining the question of competency.").

[253] Tate v. Chumbley, 57 S.E.2d 151, 160 (Va. 1950) (quoting Instruction B) ("[T]he court tells the jury that all persons who have not been adjudged insane are presumed to be sane and capable of making a will *until the contrary is proved*, and that this presumption is to be taken into consideration by the jury in determining the question of competency." (emphasis added). Note that the instruction says "until the contrary"–lack of testamentary capacity–is *proved*, not "contested," "rebutted," "contradicted," or "introduced." *Id.*

[254] *Jenkins*, 147 S.E. at 260 (quoting Instruction No. 4); *Rust*, 97 S.E. at 331 (quoting Instruction 3); *Huff*, 78 S.E. at 575 (quoting Instruction O). "[T]he court tells the jury that there is in all cases an existing presumption in favor of the testator's sanity and capacity, which is to be taken into consideration by the jury in determining the question of competency." *Rust*, 97 S.E. at 331; *Huff*, 78 S.E. at 575; *see Jenkins*, 147 S.E. at 260.

[255] *Tate*, 57 S.E.2d 151. *See generally* Gibbs v. Gibbs, 387 S.E.2d 499 (Va. 1990) (addressing burden in testamentary capacity challenge in 1990).

which party bears the burden of proof in testamentary capacity litigation; (2) whether, and how, a presumption of capacity exists; or (3) whether, and how, the jury is instructed about that presumption. In 1990, the *Gibbs* decision reversed a trial court for improperly placing the burden of proof upon the opponent,[256] and stated that the burden of proof was upon the proponent.[257] *Gibbs* discussed *Tate*, without addressing the clear conflict in the decisions about which party bears the burden of proof.[258]

Three subsequent cases, *Fields*[259] (1998), *Parish*[260] (2011), and *Weedon*[261] (2012), like *Gibbs*, placed the burden of proof upon proponents. However, in *Gibbs*, *Fields*, *Parish*, and *Weedon*, the jury was not instructed about the presumption of testamentary capacity.[262] *Fields* did not discuss the presumption at all.[263] *Gibbs*, *Parish*, and *Weedon* stated that the presumption existed, but limited its consequence to requiring introduction by the opponent of ev-

[256] *Gibbs*, 387 S.E.2d at 501 ("Instruction 6 placed a burden of persuasion on the [opponents] to prove testamentary incapacity. The instruction also required the [opponents] to establish testamentary incapacity by clear and convincing evidence. . . . To show incapacity, the [opponents] need only go forward with evidence sufficient to rebut the presumption of testamentary capacity."). The trial court also was reversed for requiring the opponent to prove testamentary incapacity by clear and convincing evidence. *Id.*

[257] *Id.* (citing Redford v. Booker, 185 S.E. 879, 883 (Va. 1936)).

[258] *Id.* at 501. The discussion of *Tate* in *Gibbs* was limited to whether the jury should be instructed to consider an adjudication of incapacity made subsequent to the execution of a purported will. The opponents in *Gibbs* sought such an instruction, basing it on *Tate*. In *Gibbs*, the court stated, "Our consideration of the instruction in *Tate* was simply to demonstrate the distinction between the two wills at issue in that case. The instruction was not at issue on appeal, and we did not pass on the propriety of the language used in that instruction. Therefore, the fact that similar instruction was given in *Tate* is not instructive in the instant case." *Id.*

[259] Fields v. Fields, 499 S.E.2d 826, 828 (Va. 1998) ("The proponents of the . . . will had the burden of proving the existence of that degree of mental competence required for the valid execution of a will by a preponderance of the evidence and retained that burden throughout the proceeding." (quoting *Gibbs*, 387 S.E.2d at 500).

[260] Parish v. Parish, 704 S.E.2d 99, 104 (Va. 2011) ("[I]n the absence of a presumption of incapacity, '[t]he proponent of the will bears the burden of proving the existence of testamentary capacity by a preponderance of evidence and retains that burden throughout the proceeding.'" (citing *Gibbs*, 239 Va. at 199, 387 S.E.2d at 500)). The court also held that the "mere fact that one is under a conservatorship is not an adjudication of insanity and does not create a presumption of incapacity." *Id.* at 103. However, if there is an adjudication of insanity, "clear and convincing proof of capacity [is required] to overcome a presumption of insanity when the testator previously was adjudicated insane." *Id.* at 103 (citing W. State Hosp. v. Wininger, 83 S.E.2d 446, 452–53 (Va. 1954)).

[261] Weedon v. Weedon, 720 S.E.2d 552, 558 (Va. 2012) ("The proponent of a will bears the burden of proving by a preponderance of the evidence that at the time the testatrix executed her will she possessed testamentary capacity . . . .").

[262] *Cf. Weedon*, 720 S.E.2d at 558; *Parish*, 704 S.E.2d at 104; *Fields*, 499 S.E.2d at 826; *Gibbs*, 387 S.E.2d at 500–01 (citing the instructions given by the court and lack of discussion on the presumption of testamentary capacity).

[263] *Cf. Fields*, 499 S.E.2d 826 (court does not discuss testamentary capacity).

idence contesting capacity.[264] The *Gibbs* decision stated the following; both the *Parish* and *Weedon* decisions quoted it.

> [T]he proponent of the will is entitled to a presumption that testamentary capacity existed by proving compliance with all statutory requirements for the valid execution of the will. Once the presumption exists, the [opponent] then bears the burden of going forward with evidence to overcome this presumption, although the burden of persuasion remains with the proponent.[265]

Therefore, in *Gibbs*, *Parish*, and *Weedon*, the presumption of testamentary capacity (1) was conditioned upon proof of due execution and (2) was a bursting rebuttable presumption because it merely required the opponent to "go forward" or "produce" evidence contradicting capacity. Those three cases did not mention that the jury was instructed about the presumption, and indeed any such instruction would be inconsistent with "going forward" as the only consequence of the operation of the presumption of testamentary capacity.

The Supreme Court of Virginia decided *Kiddell*, 11 months after *Weedon*; the decision ignored how *Gibbs*, *Parish*, and *Weedon* had treated the presumption of testamentary capacity. Instead, *Kiddell* claimed to remember the "exact" or "close variant" jury instruction of *Huff*, *Rust*, *Trice*, and *Tate*, but of course *Tate*'s instruction was markedly different.[266] The *Tate* instruction expressly shifted the burden of proof to the opponent, while the *Huff-Rust-Tate* instruction (the "*H-R-T* instruction") merely told the jury to take the presumption into consideration. *Kiddell* also ignored the *Tate* difference, thereby treating the "exact" or "close variant" instruction as the *H-R-T* instruction.

However, even if we treat the *H-R-T* instruction as the "exact same instruction or close variant" approved for a hundred years,[267] the *Kiddell* instructions did not reproduce the *H-R-T* instruction. The *H-R-T* instruction told the jury to take the presumption of testamentary capacity "into consideration," without more direction.[268] The *Kiddell* instructions told the jury to

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[264] *Weedon*, 720 S.E.2d at 558 (citing *Gibbs*, 387 S.E.2d at 501); *Parish*, 704 S.E.2d at 104 (citing *Gibbs*, 387 S.E.2d at 501); *Gibbs*, 387 S.E.2d at 501(citing Redford v. Booker, 185 S.E. 879, 883 (Va. 1936)).

[265] *Weedon*, 720 S.E.2d at 558 (citing *Gibbs*, 387 S.E.2d at 501); *Parish*, 704 S.E.2d at 104 (citing *Gibbs*, 387 S.E.2d at 501); *Gibbs*, 387 S.E.2d at 501(citing *Redford*, 185 S.E. at 883).

[266] *Compare* Kiddell v. Labowitz, 733 S.E.2d 622, 629 (Va. 2012) *with* Tate v. Chumbley, 57 S.E.2d 151, 160 (Va. 1950) ("[T]he court tells the jury that all persons who have not been adjudged insane are presumed to be sane and capable of making a will *until the contrary is proved*, and that this presumption is to be taken into consideration by the jury in determining the question of competency." (emphasis added) (quoting Instruction B)).

[267] *Kiddell*, 733 S.E.2d at 629.

[268] Jenkins v. Trice, 147 S.E. 251, 260 (Va. 1929) (quoting Instruction No. 4); Rust v. Reid, 97 S.E. 324,

find for the proponent unless the opponent introduced "evidence sufficient to overcome the presumption of testamentary capacity."[269]

The *Kiddell* opinion addressed the difference between the *H-R-T* and *Kiddell* instructions, in footnote 4, yet found them functionally equivalent.

> The jury in the instant case was specifically told to determine whether the opponents had presented sufficient evidence to rebut the presumption of testamentary capacity. In prior cases, the jury was told that they were to take "into consideration" the presumption of testamentary capacity when "determining the question of competency." Telling the jury to take the presumption into consideration is the functional equivalent of instructing the jury to determine whether the evidence was sufficiently rebutted. Indeed, this practice is not without precedent in will contest cases. With regard to lost wills, the Virginia Model Jury Instructions inform the jury that there is a presumption that a will that was in the possession of the decedent prior to his death but cannot be found after his death was destroyed and "[t]o overcome this presumption the burden is on [the proponent] to prove by clear and convincing evidence that [decedent] did not revoke the will."[270]

An analysis of the logical premises employed in footnote 4 will demonstrate that footnote 4's reasoning demands that all persistent rebuttable presumptions be treated as shifting the burden of proof upon the presumed fact. Under the presumption of revocation, in the Model Jury Instruction, discussed in footnote 4, (1) the basic facts are (i) a will, (ii) last in the testator's possession, (iii) and not found after her death; (2) the presumed fact is revocation; and (3) the burden to prove revocation, absent operation of the presumption, rests upon the opponent. The Model Jury Instruction, discussed in footnote 4, states that when the basic facts of (i) a will, (ii) last in testator's possession, and (iii) not found at her death are proven, the presumed fact of revocation exists, and "[t]o overcome this presumption the burden is on [the proponent] to prove by clear and convincing evidence that [decedent] did not revoke the will."[271] Therefore, when its presumption operates, the Model Jury Instruction on lost wills expressly shifts the burden of proof on the fact of revocation from the opponent, who bears it absent the presumption, to the proponent, who then must prove the lack of revocation.

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331 (Va. 1918) (quoting Instruction 3); Huff v. Welch, 78 S.E. 573, 575 (Va. 1913) (quoting Instruction O). "[T]he court tells the jury that there is in all cases an existing presumption in favor of the testator's sanity and capacity, which is to be taken into consideration by the jury in determining the question of competency." *Rust*, 97 S.E. at 331 (quoting Instruction 3); *Huff*, 78 S.E. at 575 (quoting Instruction O).

[269] *Kiddell*, 733 S.E.2d at 627 (quoting Instruction 9, second paragraph).

[270] *Id.* at 629 n.4 (quoting *Rust*, 97 S.E. at 331(citations omitted); VIRGINIA MODEL JURY INSTRUCTIONS–CIVIL R. 48.055 (Repl. ed.2011) (bracket alterations in the original)).

[271] VIRGINIA MODEL JURY INSTRUCTIONS–CIVIL R. 48.055.

For the presumption of testamentary capacity, (1) the basic fact is due execution; (2) the presumed fact is testamentary capacity; and (3) the burden to prove testamentary capacity, absent operation of the presumption, rests upon the proponent. By analogy to the Model Jury Instruction on lost wills, the jury should be instructed that when the basic fact of execution is proven, the presumed fact of testamentary capacity exists, and to overcome this presumption the burden is on the opponent to prove that testator did not possess testamentary capacity.

The direct analogy made by footnote 4 among (1) the Model Jury Instruction on lost wills, (2) the *Kiddell* instructions, and (3) the *H-R-T* instruction demands these conclusions: (1) the *Kiddell* instructions shift the burden of proving testamentary capacity to the opponent because the Model Jury Instruction on lost wills shifts the burden of proof on proving revocation, and (2) the *H-R-T* instruction must have shifted the burden of proof because the *H-R-T* and the *Kiddell* instructions are "functional equivalent[s]."[272]

Accepting those analogies would make *Kiddell* the 12th unannounced reversal in the party bearing the burden of proof in testamentary capacity litigation, and would do so in a manner reminiscent of *Temple*, *Wallen* and *Tate*, all of which expressly shifted the burden of proof when the presumption of testamentary capacity operated.[273]

However, that interpretation of footnote 4 means that all persisting rebuttable presumptions shift the burden of proof. Whenever a jury is told to take a presumption "into consideration," which is what persisting rebuttable presumptions require, that jury also could be given this functional equivalent instruction: the presumed fact exists until the party against whom the presumption operates proves that the presumed fact did not exist. Having all persisting rebuttable presumptions shift the burden of proof is not consistent with Virginia Rule of Evidence 2:301, which states: "Unless otherwise provided by Virginia common law or statute, in a civil action a rebuttable presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof, which remains throughout the trial upon the party on whom it originally rested."[274] Because footnote 4 likely does not intend to change the law of evidence to that extent in a footnote, the meaning of footnote 4 is not apparent.

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[272] *Kiddell*, 733 S.E.2d at 635 (Kinser, C.J., concurring in part and dissenting in part).

[273] *See supra* section I.A.

[274] VA. SUP. CT. R. 2:301 (Repl. Vol. 2014).

After *Kiddell*, the Virginia Model Jury Instructions were updated to account for that case.[275] Included in the discussion, but not in the text of any instructions was the following:

> [T]he Court [in *Kiddell*] held that the [trial] court did not err in granting two jury instructions as to the existence of the presumption, the requirement that the opponents introduce evidence sufficient to rebut the presumption, and as to the burdens and standards of proof. This Instruction [No. 48.040] and Instruction No. 48.090 should be adapted to include the issues and findings as may be applicable to a particular case.[276]

Notably, the Virginia Model Jury Instructions propose no such adaptations.

Silence is open to many interpretations, yet the failure of the Model Jury Instructions to create instructions based on *Kiddell* is some indication that the task is not straightforward. Consequently, additional litigation is required to resolve issues surrounding the *Kiddell* instructions. The issues likely to be considered in future litigation, in addition to the meaning of footnote 4, are addressed in the next section.

D. Conduct of Testamentary Capacity Litigation after Kiddell

The following are the instructions approved in *Kiddell*:

> 8.1.The proponent of the will . . . is entitled to a presumption that [testator] had testamentary capacity . . . at the time she executed the writing.[277]
> 8.2.The opponents of the will . . . must introduce evidence sufficient to rebut the presumption of testamentary capacity.[278]
> 8.3.If you find that the opponents of the will have introduced evidence sufficient to rebut the presumption, the burden rests upon the proponent of the will to prove by the greater weight of the evidence that [testator] had testamentary capacity at the time of the execution of the . . . writing.[279]
> 9.1.You shall find your verdict in favor of [opponents] if you find that they have introduced evidence sufficient to rebut the presumption of testamentary capacity and [proponent] has failed to prove by the greater weight of the evidence that [testator] had testamentary capacity at the time of the execution of the writing.[280]
> 9.2.You shall find your verdict in favor of the [proponent] if the [opponents]

[275] VIRGINIA MODEL JURY INSTRUCTIONS – CIVIL R. 48.040 (2013).

[276] *Id.*

[277] Kiddell v. Labowitz, 733 S.E.2d 622, 627 (Va. 2012). That instruction will be further referred to as Instruction 8.1.

[278] *Id.* That instruction will be further referred to as Instruction 8.2.

[279] *Id.* That instruction will be further referred to as Instruction 8.3.

[280] *Id.* That instruction will be further referred to as Instruction 9.1.

> have failed to present evidence sufficient to overcome the presumption of testamentary capacity or [proponent] has proved testamentary capacity at the time of execution by the greater weight of the evidence.[281]

1. Summary of the *Kiddell* Instructions

a. Instruction 8 and its Three Parts

Instruction 8.1 states the existence of the presumption of testamentary capacity, without any condition to its operation.[282] Instruction 8.2 flatly requires the opponent to introduce evidence sufficient to rebut the presumption of testamentary capacity.[283] Instruction 8.3 states a consequence: if the opponent satisfies the requirement of introducing evidence sufficient to rebut the presumption of testamentary capacity, then the burden rests upon the proponent to prove testamentary capacity by the greater weight of the evidence.[284]

The sequence of presentation in Instruction 8 places the burden of proof upon the opponent. The jury is told, first, a presumption exists; second, opponents must do something–rebut the presumption by sufficient evidence; and third, only if the opponents accomplish that thing–rebut the presumption by sufficient evidence–does a burden arise on the proponent.[285]

b. Instruction 9 and its Two Parts

Instruction 9 is a so-called finding instruction: telling the jury to "find" for one party or the other when certain conditions are met.[286]

Instruction 9.1 tells the jury to find for the opponent IF (1) opponent introduced evidence sufficient to rebut the presumption AND (2) proponent failed to prove testamentary capacity by the greater weight of the evidence.[287]

Instruction 9.2 tells the jury to find for the proponent IF (1) opponent failed to *present* evidence sufficient to *overcome* the presumption OR pro-

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[281] *Id.* That instruction will be further referred to as Instruction 9.2.

[282] *Kiddell*, 733 S.E.2d at 627. Note that the instruction does not condition operation of the presumption on the basic fact of due execution. The jury was told that the presumption exists.

[283] *Id.*

[284] *Id.*

[285] *Id.*

[286] *Id.*

[287] *Kiddell*, 733 S.E.2d at 627 (emphasis added).

ponent proved testamentary capacity by the greater weight of the evidence.[288]

Note that 9.2 twice breaks syntactic consistency with the other four instructions: "introduce evidence" becomes "present evidence" and "rebut the presumption" become "overcome the presumption."[289]

2. "Sufficient Evidence" Compared to "Greater Weight of the Evidence"

Instructions 8.2, 8.3, 9.1, and 9.2 state a condition of the opponent introducing or presenting "evidence sufficient" to rebut or overcome the presumption of testamentary capacity.[290] Instructions 8.3, 9.1, and 9.2 state a condition of the proponent proving testamentary capacity by the "greater weight of the evidence."[291] The jury instructions did not define "sufficient evidence," but the Supreme Court of Virginia did.

> When a word [sic] is commonly used and has an accepted meaning, a trial court need not instruct the jury as to the meaning of the word. Black's Law Dictionary treats "sufficient evidence" and "satisfactory evidence" as synonymous. It defines "satisfactory evidence" as "[e]vidence that is sufficient to satisfy an unprejudiced mind seeking the truth. — Also termed sufficient evidence; satisfactory proof." "Sufficient" means "[a]dequate; of such quality, number, force or value as is necessary for a given purpose <sufficient consideration> <sufficient evidence>.[292]

"Sufficient evidence" is the amount of evidence "sufficient to satisfy an unprejudiced mind seeking the truth."[293] Yet, what amount of evidence is sufficient to create *truth*? At a minimum, truth requires at least the "greater weight of the evidence."[294] How can a thing be regarded as true if it has not been proven at least by the greater weight of the evidence? Consequently, under the definition in *Kiddell*, "sufficient evidence" is equivalent to, or greater than, "the greater weight of the evidence."[295]

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[288] *Id.*

[289] *Id.*

[290] *Id.*

[291] *Id.*

[292] *Kiddell*, 733 S.E.2d at 628 (citations omitted). The Supreme Court of Virginia did not explain why it used Black's Law Dictionary to define the commonly used and accepted meaning for words used in a jury instruction. Dictionaries of more general circulation likely are better sources for meanings generally accepted by the public from which jurors are drawn. *See id.*

[293] *Id.*

[294] *See id.* at 627.

[295] *Id.*

Therefore, the *Kiddell* instructions and *Kiddell*'s definition of "sufficient evidence" require the opponent to prove true the rebutting or overcoming of the presumption, which raises the question of the meanings of "rebut" and "overcome."

3. The Meaning of "Rebut" in the *Kiddell* Instructions

Instructions 8.2, 8.3, and 9.1 state a condition on the opponent to "introduce evidence sufficient to rebut the presumption of testamentary capacity."[296] Instruction 9.2 states a condition on the opponent to "present evidence sufficient to overcome the presumption of testamentary capacity."[297]

In *Kiddell*, "rebut" was not defined in the jury instructions or by the Supreme Court of Virginia. The commonly understood meaning of rebut is "to prove something is false by using arguments or evidence."[298] The commonly understood meaning of overcome is "to defeat."[299] Therefore Instructions 8.2, 8.3, and 9.1 require the jury to decide if the opponent introduced evidence sufficient to prove false the presumption of testamentary capacity. Instruction 9.2 uses the verb "overcome," rather than "rebut," so Instruction 9.2 requires the jury to decide if the opponent defeated the presumption of testamentary capacity.[300] Those common meanings of "rebut" and "overcome" clearly place the burden of proof upon the opponent to defeat capacity.

Under the law of evidence, the meaning of "rebut" markedly differs from the commonly understood meaning. When a trial judge decides whether the party against whom a bursting rebuttable presumption operates has "rebutted" the presumption, the judge decides whether that party has introduced enough evidence "to create a jury question." [301] In that process, the trial judge does not decide if that party has proven the presumed fact false.[302] Rather a question for the jury is created when "reasonable people could find in

[296] *Id.*

[297] *Kiddell*, 733 S.E.2d at 627.

[298] MERRIAM-WEBSTER, REBUT (2014), *available at* http://www.merriam-webster.com/dictionary/rebut.

[299] MERRIAM-WEBSTER, OVERCOME (2014), *available at* http://www.merriam-webster.com/dictionary/overcome.

[300] *Kiddell*, 733 S.E.2d at 627.

[301] FRIEND & SINCLAIR 2012, *supra* note 190, § 4-8, at 227 ("Where the presumption merely shifts the burden of going forward, however, it would appear that the presumption is rebutted (i.e., disappears) when the opponent has introduced enough evidence to justify the jury in finding the nonexistence of the presumed fact-i.e., enough evidence to create a jury question as to whether Fact Two exists. Thereafter, the case proceeds 'exactly as if no presumption had ever been applicable in the action.'").

[302] FRIEND & SINCLAIR 2012, *supra* note 190, § 5-6, at 316–17.

favor of the party offering the evidence."[303] Let us consider the sequence that results if "rebut," in Instructions 8.2, 8.3, and 9.1, means what it means in the general law of evidence.

Under that meaning of rebut, Instructions 8.2, 8.3, and 9.1 would require the jury to decide if the opponent introduced evidence sufficient to create a jury question about the presumption of testamentary capacity. Thus, the jury would be told the following: (1) decide if the opponent has introduced enough evidence for reasonable people to find against testamentary capacity; (2) if not, find for the proponent; but (3) if so, forget the presumption and make the proponent prove testamentary capacity.[304] That process tells the jury to presume that something–testamentary capacity–exists long enough to decide whether to forget that it exists, and then to restart the fact-finding process without the presumption. The difficulty of that process, where the jury decides if a jury question exists, suggests that "rebut" in the *Kiddell* Instructions should not interpreted to mean what it means in the general law of evidence.

Consequently, under the commonly understood meaning of rebut, augmented by the substitution of "overcome" for "rebut" in Instruction 9.2, the condition in the *Kiddell* instructions about the opponent introducing evidence sufficient to rebut the presumption of testamentary capacity clearly requires the opponents to prove testamentary capacity false. The demand that opponents introduce evidence sufficient to rebut the presumption of testamentary capacity exists as an independent requirement in Instruction 8.2, and as a conditional in sentences containing logical operators in Instructions 8.3, 9.1 and 9.2.

4. The Logical Conditions in *Kiddell* Instruction 9

Instructions 9.1 and 9.2 purport to state conditions under which the proponent must prove testamentary capacity by the greater weight of the evi-

[303] FRIEND & SINCLAIR 2012, *supra* note 190, § 5-6 ("What is sufficient to create a jury question in Virginia? This is a matter controlled by case law and the substantive liability doctrines of the causes of action or criminal offenses being tried. . . . When the evidence is such that reasonable persons can differ on the issue, a jury question has been created. A 'mere scintilla' of evidence is not enough, of course. There must be sufficient evidence that reasonable people could find in favor of the party offering the evidence, and this means, among other things, that the evidence offered is not contrary to natural laws or common knowledge, or otherwise incredible.").

[304] That sequence can make sense when a judge acts as gatekeeper in deciding whether a question of fact should be submitted to a jury, but makes no sense when applied by jury in actually finding facts.

dence in order to win. Yet, that condition on the proponent does not arise unless and until the opponent proves testamentary capacity false.[305]

Instruction 9.1 tells the jury to find for the opponent IF (1) opponent introduced evidence sufficient to rebut the presumption AND (2) proponent failed to prove testamentary capacity by the greater weight of the evidence.[306] Under Instruction 9.1, if the opponent does not meet the IF condition–prove testamentary capacity false–then the jury does not proceed across the AND statement.[307] Thus, the burden of proof is on the opponent under the only instruction that can result in the opponent winning the verdict.

Instruction 9.2 tells the jury to find for the proponent IF (1) opponent failed to present evidence sufficient to overcome the presumption OR proponent proved testamentary capacity by the greater weight of the evidence.[308] Under Instruction 9.2, if the IF condition is satisfied–the opponent failed to prove testamentary capacity false–then the jury proceeds across the OR statement and ostensibly, but not actually, the jury decides if the proponent proved testamentary capacity by the greater weight of the evidence.

Prior to crossing to the OR in Instruction 9.2, the jury will have already decided that the opponent failed to prove testamentary capacity false. That would mean that the jury decided that the truth–which is the requirement of the "sufficient evidence" test–is that the lack of testamentary capacity is false; therefore, testamentary capacity must be true. Consequently, the proponent never bears the burden of proof; rather, the proponent wins in the absence of the opponent proving testamentary capacity false. In other words, if the jury decides that the presumption of testamentary capacity was *not* rebutted by evidence sufficient to satisfy an unprejudiced mind seeking the truth, has not that jury necessarily decided that testamentary capacity was proven by evidence sufficient to satisfy an unprejudiced mind seeking the truth?

5. Instruction 9 Interpretations Creating Equipoise

A second possible interpretation of Instruction 9.1 creates an instance of the equipoise problem. Instruction 9.1 tells the jury to find for the opponent

[305] *Kiddell*, 733 S.E.2d at 627 ("[I]f you find that they have introduced evidence sufficient to rebut the presumption of testamentary capacity and defendant, Mr. Labowitz, has failed to prove by the greater weight of the evidence that Ms. Judsen had testamentary capacity at the time of the execution of the writing.").

[306] *Id.* (emphasis added).

[307] *Id.* (emphasis added).

[308] *Id.* (emphasis added).

IF (1) opponent introduced evidence sufficient to rebut the presumption AND (2) proponent failed to prove testamentary capacity by the greater weight of the evidence.[309] Suppose the jury first applies the condition stated second. That is, the jury first decides whether the proponent failed to prove testamentary capacity by the greater weight of the evidence. That would place the initial burden on the proponent, yet because the logical connection is an AND, the opponent does not win unless the opponent also proves testamentary capacity false. Thus, the burden of proof would be on both parties. However, that interpretation creates an instance of equipoise rather than solving it, and the reason for instructing the jury about the presumption, according to *Kiddell*, is to solve the equipoise problem. Consequently, an interpretation of Instruction 9.1 that does not solve the equipoise problem should not be favored.

A third possible interpretation of Instruction 9.2 is that the OR connection between the logical statements means that both statements independently are evaluated and then compared. If so, 9.2 fights with itself about who has the burden of proof. Under that interpretation the jury reads Instruction 9.2 to say, "the opponent must prove incapacity; proponent must prove capacity; you decide which happened." However, that interpretation creates an instance of equipoise, and an interpretation of Instruction 9.2 that does not solve the equipoise problem should not be favored.

6. Summary of *Kiddell* Instruction Interpretation

The *Kiddell* instructions either (1) shift the burden of proof to the opponent, under the logical conclusion of *Kiddell*'s footnote 4, under which all persistent presumptions shift the burden of proof; (2) shift the burden of proof to the opponent, under *Kiddell*'s definition of "sufficient evidence," which requires evidence sufficient to create truth, and the evaluation of the logical statements in Instruction 9; or (3) establish no burden of proof, under an alternate evaluation of the logical statements in Instruction 9, which interpretation should be disfavored because it creates an equipoise problem rather than solving it.

Only subsequent cases can resolve which of those interpretations, or some other, are given to the *Kiddell* instructions. Yet, the most probable among those interpretations will result in a shift of the burden of proof to the opponent, which would constitute the 12th unannounced reversal in the party bearing the burden of proof in testamentary capacity litigation.

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[309] *Id.* (emphasis added).

7. The Pointless Condition of Due Execution

Although *Kiddell* states that the presumption of testamentary capacity does not arise until the proponent proves "'compliance with all statutory requirements for the valid execution of the will,'"[310] (1) the *Kiddell* instructions did not condition the presumption of testamentary capacity upon proof of due execution; (2) no other Supreme Court of Virginia case speaks to the manner by which the due execution condition of the testamentary capacity presumption should be stated in the jury instructions; and (3) the Virginia Model Jury Instructions do not include instructions about the presumption of testamentary capacity, conditions to its operation, or the consequence of its operation.

Indeed, not only do the opinions of the Supreme Court of Virginia fail to address particular language in jury instructions about the due execution condition of the testamentary capacity presumption, the opinions are unclear about who would make the decision regarding whether due execution condition was met. One would think that deciding whether the condition had been met would be a question of fact for the jury. However, in *Redford*, which was a will contest tried before a jury, the Supreme Court of Virginia stated, "[t]he able chancellor was of opinion that the actual execution was satisfactorily shown. We accept his judgment."[311]

However, if we conclude that the decision of whether due execution occurred is a question of fact for the jury and should become part of the jury instructions as a condition to operation of the presumption of testamentary capacity as the Practice Commmentary (but not the text) of the Virginia Model Jury Instructions suggest,[312] and the opinions seemingly require, conditioning the presumption of testamentary capacity upon proof of due execution is a meaningless and repetitive addition to the jury instructions. The jury already will be told that proof of due execution is an independently required element in a will contest.

Whenever a jury considers testamentary capacity, the jury necessarily will have concluded that due execution occurred, and that jury will apply the presumption of testamentary capacity.[313] Telling a jury twice that due

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[310] *Kiddell*, 733 S.E.2d at 627–28 (quoting Gibbs v. Gibbs, 387 S.E.2d 499, 501 (Va. 1990)). "[T]he proponent of the will is entitled to a presumption that testamentary capacity existed by proving compliance with all statutory requirements for the valid execution of the will." *Id.*

[311] Redford v. Booker, 185 S.E. 879, 884 (Va. 1936).

[312] VIRGINIA MODEL JURY INSTRUCTIONS – CIVIL R. 48.040 (2013).

[313] One could posit a situation in which a jury decides to consider the element of testamentary capacity before considering the element of due execution. However, if the jury decides that capacity was met,

execution is required, first as an independent element of a will and another time as a condition of the presumption of testamentary capacity is unnecessary. Instead, the jury should be told that due execution is required as well as testamentary capacity and there is a presumption of testamentary capacity. In other words, the *Kiddell* instructions do not need to be amended to add a condition of due execution, even when due execution is contested, because the element of due execution is an independent element in the test for whether a writing is a will.

In addition, if the due execution condition actually is intended to create a distinct, separate condition prior to the application of the presumption of testamentary capacity, the cases have not considered two "recent" changes to the rules regarding the execution of wills in Virginia: (1) self-proving affidavits, and (2) the harmless error rule. Self-proving affidavits were added to the Code of Virginia in 1972;[314] the harmless error rule was added in 2007.[315]

Under the "self-proving affidavit" procedure, "[a] will, at the time of its execution or at any subsequent date, may be made self-proved by the acknowledgment thereof by the testator and the affidavits of the attesting witnesses, each made before an officer authorized to administer oaths . . . ."[316] In addition, "[t]he officer's certificate shall be substantially . . . in form and content" prescribed by the statute, which form and certificate recite all of the requirements for proper execution of a will in Virginia.[317]

Regarding the consequences of such affidavits, the Virginia statute provides, "the affidavits of any such witnesses taken as provided by this section, whenever made, shall be accepted by the court as if it had been taken ore tenus before such court."[318] However, while the statute equates the affidavits with testimony before a trial court, it does not address their consequence on the presumption arising from due execution.

In Virginia, we do not know which of the following state the consequence of a self-proving affidavit. Is the self-proving affidavit only testi-

perhaps even by operation of the presumption of testamentary capacity, the jury then will decide whether due execution occurred, and if it did not, the jury will find against the writing as a will. In any event, it is not necessary to tell the jury to decide due execution twice.

[314] 1972 Va. Acts 117 (codified at VA. CODE ANN. §§ 64.2-452, -453 (Repl. Vol. 2012)).

[315] 2007 Va. Acts 735 (codified at VA. CODE ANN. § 64.2-404 (Repl. Vol. 2012)).

[316] VA. CODE ANN. § 64.2-452 (Repl. Vol. 2012).

[317] Compare § 64.2-452 and § 64.2-453, the self-proving affidavit statutes, with VA. CODE ANN. § 64.2-403 (2012 & Supp. 2014), the statute listing the requirements for a will.

[318] VA. CODE ANN. § 64.2-452 (Repl. Vol. 2012).

mony?[319] Does it create a presumption of due execution? Does it establish due execution unless the opponent proves one of a limited set of challenges?

Although the Virginia statutes are silent on the point, the Uniform Probate Code, from which the self-proving affidavit statute was derived, chose the third option. When a self-proving affidavit is tendered into evidence, questions of due execution may not be contested "unless there is evidence of fraud or forgery affecting the acknowledgment or affidavit."[320] Would Virginia apply that rule? And, would not such a presumption of due execution automatically carry with it the additional presumption of testamentary capacity arising from proof of due execution?

The self-proving affidavit procedure creates optional, heightened formalities, with the consequent benefit of immunizing against some challenges to due execution. Although the extent of such immunity in Virginia is not known, making due execution harder to contest should nearly guarantee that the presumption of testamentary capacity arising upon due execution will occur, and thus under *Kiddell* the jury virtually is guaranteed to hear the instruction about the due execution presumption whenever the probate of a self-proved will is contested. Therefore, if due execution and testamentary capacity are contested in a self-proved will case and *Kiddell*'s language, stating that due execution is a condition of the presumption of testamentary capacity, controls, litigants and judges will face the question of whether the presumption of testamentary capacity arising from due execution can be based upon the presumption of due execution arising from a self-proving affidavit.

The second recent development, not incorporated into the *Kiddell* rule, emerges from the other end of the formalities spectrum: the harmless error rule for formally defective executions. Adopted in 2007, Section 64.2-404 provides that a document or writing not executed in compliance with the wills statute shall be treated as if it had been executed in compliance with that statute "if the proponent of the document or writing establishes by clear

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[319] If the affidavit is mere testimony, then the self-proving affidavit is pointless. Even when an attesting witness is dead, the act of attestation certifies the witness's belief about capacity.

> The Court instructs the jury that although . . . one of the attesting witnesses to the Chumbley will is dead, yet you are instructed that the placing of his name to the will is, in effect, certificate to his belief of the mental capacity of [testator] at the time, and that the will was executed by her freely and understandingly, with full knowledge of its contents; and you are further instructed that the attestation by the said [witness] is, in effect, a representation that such witness believed the testatrix understood what she was doing and was competent to do so at the time.

Tate v. Chumbley, 57 S.E.2d 151, 161 (1950).

[320] UNIF. PROBATE CODE § 3-406(1) (amended 2010).

and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will . . . ."[321]

After the *Kiddell* decision, members of the bench and bar must decide whether, when due execution is contested, the *Kiddell* instructions about testamentary capacity need to be amended to include a condition of due execution on the operation of the presumption of testamentary capacity. However, as discussed above, that condition does not need to be added because the element of due execution is an independent element in the test for whether a writing is a will. If due execution is contested, an instruction requiring due execution already will be included, and there is no need to require due execution twice. Even if trial courts are inclined to add that condition, due execution rarely will be contested because self-proving affidavits and the harmless error rule greatly will reduce the number of cases in which due execution will be contested.

IV. OTHER COMMENTS ON TESTAMENTARY CAPACITY LITIGATION

In the *Tabb* decision, the Supreme Court of Virginia rejected the *Culpepper* rule cited by opponents because "[t]hat case, to a large extent, turns upon its facts and so is not controlling here."[322] Notwithstanding that disclaimer about the value of precedent in fact sensitive cases, some themes emerge.

A. Oscillations in the Rule Regarding the Weight of Attesting Witness Testimony

Trial testimony in virtually all testamentary capacity cases includes the testimony of two individuals who witnessed the testator's signing or acknowledgment of the will in the presence of the testator and of each other.[323] Indeed, an animating purpose of the statute of wills is to ensure that such witnesses routinely will be available.[324] In the testamentary capacity opinions, such witnesses interchangeably are called "subscribing" or "attesting"

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[321] VA. CODE ANN. § 64.2-404 (Repl. Vol. 2012). That section was adopted in 2007 as § 64.1-87.1. 2007 Va. Acts 735. The section was re-codified in 2012. 2012 Va. Act 1167, 1185.

[322] Tabb v. Willis, 156 S.E. 556, 565 (Va. 1931). Earlier in the *Tabb* opinion the Supreme Court of Virginia wrote: "This case, like most will cases, turns upon the evidence, which here is voluminous. Its examination must be tedious but, of necessity, is unavoidable." *Id.* at 557.

[323] In Virginia, a will "wholly in the testator's handwriting and signed by the testator" need not be witnessed, yet nearly all of the reported testamentary capacity cases involve formal, witnessed wills, rather than holographic ones. VA. CODE ANN. § 64.2-403 (Repl. Vol. 2012 & Supp. 2014).

[324] Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 8 (1941).

witnesses, with the former term used in older cases[325] and the latter in more recent.[326]

1. Attesting Witness Cases Where Deference is Given

The purpose of attesting witnesses and their near universal presence in testamentary capacity cases gave rise to rules regarding the weight of their testimony. As early as 1825, the Supreme Court of Virginia indicated that the evidence of attesting witnesses is entitled to added weight.

> What is the employment of the witness? It is to inspect and judge of the testator's sanity, before they attest; and if he is not capable, they ought not to attest. In other cases, the witnesses are passive; here they are active, and the principal parties to the transaction. The testator is entrusted to their care.[327]

In *Weedon* (2012), the Supreme Court of Virginia's most recent decision on the matter, the court said "[i]n determining the mental capacity of a testator, great weight is to be attached to the testimony of the draftsman of the will, of the attesting witnesses, and of attending physicians."[328]

But the decisions between *Burton* in 1825 and *Weedon* in 2012 that have addressed the weight of attesting witness testimony do not fit neatly in an unbroken line of authority. Like the burden-of-proof cases, the attesting-witness-weight cases oscillate between greater and lesser deference. Presently, the case law seems to be at a point of high deference, with attesting witness testimony nearly unassailable.

In *Weedon*, the Supreme Court of Virginia reversed a trial court's finding of fact that the proponent of a will had not carried her evidentiary burden to show that the testator had testamentary capacity at the time she executed her will.[329] The Supreme Court concluded that the trial court's decision was "based on an incorrect view of the law and an improper weighing of the evidence."[330] The trial court's "incorrect view of the law" occurred when the trial court gave "diminished weight to [a legal assistant's] testimony because she was not the literal 'drafter' of the will."[331] The trial court's "improper weighing of the evidence" consisted of two errors: (1) the trial

[325] Burton v. Scott, 24 Va. (1 Rand) 399, 401 (1825) ("subscribing witnesses").
[326] Kiddell v. Labowitz, 733 S.E.2d 622, 632 (Va. 2012) ("attesting witnesses").
[327] *Burton*, 24 Va. (1 Rand) at 401 (citing 4 RICHARD BURN, THE ECCLESIASTICAL LAW 88 (Robert Phillimore ed., 9th ed. 1842)).
[328] Weedon v. Weedon, 720 S.E.2d 552, 558 (Va. 2012).
[329] *Id.* at 561.
[330] *Id.* at 559.
[331] *Id.* at 558–59.

court's "placing undue weight" on the fact that someone other than the testator initiated the telephone call to the drafting lawyer's office when the testator spoke with the lawyer's assistant and during that call, in the judgment of the appellate court, the testator "clearly expressed her desires as to how she wanted her will changed,"[332] and (2) the trial court's "placing more weight" upon the testimony of witnesses not present at the will's execution than on those present at the execution.[333]

Similarly, in 1998 the Supreme Court of Virginia reversed a trial court's finding of fact for over-crediting general testimony about the testator at the expense of attesting witness testimony.

> The [opponent's] evidence related to the testator's mental capacity did not directly contradict the testimony of those present *at the time the testator executed the 1988 will* or at any time on the day it was executed. While the [opponent's] evidence established that at other times the testator might very well have lacked the requisite mental capacity to execute a will, the respondents offered only lay witness testimony. As such, the observations of these witnesses are valuable only to provide "facts which indicate such incapacity" generally, and not as evidence of incapacity on the date the will was executed. *Thornton v. Thornton's Ex'rs*, 141 Va. 232, 237, 126 S.E. 69, 70 (1925). In such cases, the testimony of lay witnesses will not overthrow the testimony of the witnesses to the execution of the will where the latter evidence is clear as to the testator's capacity at the time the will was executed. *See id.* at 239, 126 S.E. at 71.[334]

By citing to *Thornton*, *Fields* referred to one of a group of cases in the 1910s and 1920s that similarly made attesting witness testimony virtually unassailable.

Consider *Huff* from 1913.

> Expressions of opinions by witnesses that the testator was not competent to make a will based upon facts which do not sustain the opinions are not to be considered as conflicting with the evidence of the witnesses of the factum who speak of the testator's condition immediately at the time of the execution of the paper in question and unite in the unqualified statement to the effect that when the paper was executed by the testator his mind was clear and good, and that he knew all about what he was doing."[335]

While the *Huff* decision could be read to require that the attesting witnesses' testimony be "united" as to capacity in order to become unassailable, the *Young v. Barner* decision tells us that the testimony of any attesting

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[332] *Id.* at 559.

[333] *Weedon*, 720 S.E.2d at 559.

[334] Fields v. Fields, 499 S.E.2d 826, 828–29 (Va. 1998).

[335] Huff v. Welch, 78 S.E. 573, 579 (Va. 1913) (citing Wooddy v. Taylor, 77 S.E. 498 (Va. 1913)).

witnesses against capacity "is to be received with the most scrupulous jealousy."[336]

Other cases that similarly concluded that attesting witness testimony is entitled to "peculiar weight" and approved a jury instruction to that effect include *Trice*[337] (1929), *Thornton*[338] (1925), and *Rust*[339] (1918). Others cases that draw the same conclusion but use different terminology include *Young*[340] (1876), *Riddell*[341] (1875), and *Parramore v. Taylor*[342] (1854).

However, there have been cases in which less, or no deference was paid to attesting witness testimony.

2. Attesting Witness Cases Where Deference is Not Given

In *Lewis v. Roberts* (1967), the Supreme Court of Virginia affirmed a judgment entered on a jury verdict against a will.[343] The court noted that while "there was testimony of attesting witnesses that at the time of the execution of the wills in question [testator] appeared to be sober and normal in all respects,"[344] and there "were numerous witnesses, both lay and profes-

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[336] Young v. Barner, 68 Va. (27 Gratt.) 96, 103 (1876) (citing 1 JARMAN ON WILLS 77 (6th ed.)).

[337] Jenkins v. Trice, 147 S.E. 251, 256 (Va. 1929) ("[I]t is well settled that the testimony of the subscribing witness at the time of the act is entitled to peculiar weight.").

[338] Thornton v. Thornton's Ex'rs, 126 S.E. 69, 71 (Va. 1925) In *Thornton*, one of the subscribing witnesses "was called in from the street, had never seen the testator before, paid little attention to the transaction, and his testimony, while it fails to support the testator's capacity, is negative". *Id.* Nonetheless, the Supreme Court of Virginia reversed a verdict in favor of the opponents, based on the testimony of the other subscribing witness. "This testimony [of the subscribing witness in favor of capacity], *unless overthrown,* fully meets every requirement of the law for it is well settled that the testimony of the subscribing witness at the time of the act is entitled to peculiar weight." *Id.* (emphasis added).

[339] Rust v. Reid, 97 S.E. 324, 331 (Va. 1918) "The court instructs the jury that the testimony of credible witnesses present at the execution of the will is entitled to peculiar weight on the question of testamentary capacity and that this is especially true of attesting witnesses whose duty it is to ascertain and judge of the testator's mental capacity at the time." *Id.* (quoting Instruction 4).

[340] *Barner*, 68 Va. (1 Gratt.) at 103 ("[I]t is also held upon good authority, that a person who signs his name as a witness to a will, by his act of attestation solemnly testifies to the sanity of the testator." (citing 1 JARMAN ON WILLS 77 (6th ed.)).

[341] Riddell v. Johnson's Ex'r, 67 Va. (26 Gratt.) 152, 178 (1875) ("The three subscribing witnesses, who are regarded in law as placed around the testator that no fraud may be practiced on him in the execution of the will, and to ascertain and judge of his capacity, all of whom are represented to be men of intelligence and respectability, were not only of that opinion, (and the law makes their opinion evidence,) but facts are proved by them and others, which, in connection with the intrinsic evidence furnished by the instrument itself, excludes all doubt that the testator was of sound disposing mind.").

[342] Parramore v. Taylor, 52 Va. (11 Gratt.) 220, 222 (1854) ("He is by far the most important witness in this cause; and if his testimony is to be believed, it conclusively settles at least two of the three questions arising in the case. He was the scrivener who wrote both the will and the codicil, as well as a prior will; was present at the execution and acknowledgment of all of them, and was a subscribing witness to all.").

[343] Lewis v. Roberts, 152 S.E.2d 44, 50 (Va. 1967).

[344] *Id.* at 45.

sional, who testified on behalf of the [opponents] as to [testator's] insanity," including "[f]ive general practitioners who had treated her," . . . [t]wo psychiatrists and a psychologist," . . . and "members of [testator's] family, friends and other persons [who] testified as to her unfounded hatred towards her children as well as to delusions and other irrational behavior."[345]

In *Redford v Booker*, affirming a judgment entered on a jury verdict against a will, the Supreme Court of Virginia, after noting that in "contests of this kind we turn first to the testimony of attesting witnesses,"[346] summarily dismissed that testimony.[347]

> In contests of this kind we turn first to the testimony of attesting witnesses. Usually they know what they are doing. The presumption is that they would not aid in the execution of a will had they cause to doubt its validity. If there be any question, Jenkins v. Trice, 152 Va. 411, 147 S.E. 251, 256, gives us an excellent example of what should then be done. There "the attesting witnesses, after conference, deliberately reached the conclusion that the testator was competent to make a will." On the other hand: "* * * if they had no previous acquaintance with the testator, were not selected by him, and nothing was said or done by him at the time to indicate his then mental condition, it is said that their testimony is not accorded the weight which would otherwise attach to it."[348]

The attesting witnesses were bank employees, asked to witness the will during the course of their normal business duties.[349] "The evidence of [the attesting witnesses] has been stated. They were strangers to [testator], took no interest in the transaction and witnessed this will merely because they were asked to do it. They did not even take the trouble to read the attestation clause. They do not help us."[350]

Thus the *Redford* decision makes much of the attesting witnesses not knowing either the testator or the contents of the will. However, before we conclude that deference is granted to attesting witnesses only when they know the testator, the contents of the will, or both, we must consider the *Tabb* and *Dearing v. Dearing* decisions. In *Tabb*, when reversing a judg-

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[345] *Id.* at 49.

[346] Redford v. Booker, 185 S.E. 879, 886, 88 (Va. 1936) "It is pertinent to remember that Mr. Dyson did not think that Mrs. Redford could make a will, but wrote to humor her." *Id.* at 888. So *Redford* tells us that "the presumption is that they [attesting witnesses] would not aid in the execution of a will had they cause to doubt its validity," but drafters do write wills to humor the putative testators!

[347] *Id.* at 890–91.

[348] *Id.* at 886 (quoting Forehand v. Sawyer, 136 S.E. 683, 688 (Va. 1927); Thornton v. Thornton's Ex'rs, 126 S.E. 69 (Va. 1925)).

[349] *Id.* at 883.

[350] *Id.* at 883, 866.

ment entered on a jury verdict against a will, the Supreme Court of Virginia said "few subscribing witnesses do."[351]

> As against this we have the testimony of subscribing witnesses. They are the subjects of a vigorous attack, and are charged with knowingly participating in a fraud. It should be conceded that they might have examined with more care into the condition of the testatrix, but they were inexperienced in such matters and saw no reason to do so. They had been sent for to witness the will. They went and found the testatrix ill and propped up in bed. They announced the purpose for which they had come. The will was produced; the testatrix in signing it asked [one of the attesting witnesses] to steady her arm, and this she did. When it was over [testatrix] said that she was "glad it was all fixed." They did not read the will and few subscribing witnesses do. They merely appeared at the request of the testatrix, and withdrew when they had done all that they had been asked to do.[352]

In *Dearing*, the Supreme Court of Virginia affirmed the trial court's overturning of a jury verdict against a will.[353] To support its conclusion that "[a] careful examination of the evidence reveals *nothing* which would warrant a jury in finding that the paper writing . . . is not the true last will and testament of [testator],"[354] the Supreme Court of Virginia addressed the testimony of the attesting witnesses.

> Neither is it required that the witnesses to a will should read it or examine it with such care as to be able, upon application to admit to probate, to say that all the pages or clauses of the proposed will were the pages and clauses signed by the testator and attested by them." . . . "[T]he forgetfulness of the accessible subscribing witness, as to certain necessary facts of execution, does not avoid a prima facie case made out by proof of the genuineness of the signature of the testator and the subscribing witnesses. So, where the subscribing witnesses identify their signatures, but have no recollection of having attested the instrument, or the circumstances of execution, the presumption that it was properly executed will uphold it in the absence of clear and satisfactory proof to the contrary."[355]

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[351] Tabb v. Willis, 156 S.E. 556, 564 (Va. 1931).

[352] *Id.* at 564. In *Tabb*, the proponents demurred to the evidence and the jury found against the will, subject to the decision of the court on the demurrer to the evidence. The court sustained the demurrer to the evidence and entered judgment in favor of the proponents, and the Supreme Court of Virginia affirmed. 156 S.E. 556.

[353] Dearing v. Dearing, 111 S.E. 286, 291 (Va. 1922).

[354] *Id.* (emphasis added).

[355] *Id.* at 288–89 (quoting 4 WILLIAM BOWE & DOUGLAS PARKER, PAGE ON WILLS § 372 (2004)).

3. Summary of the Attesting Witness Cases

The testimony of the attesting witnesses about the execution ceremony governs and establishes testamentary capacity unless their testimony is unclear on the point or expert testimony from physicians who examined the testator call capacity into question. Without examining experts, testimony about the execution ceremony apparently governs.

In addition, if one of the attesting witnesses testifies in favor of capacity and the other against, the testimony against capacity "is to be received with suspicion,"[356] to the point that "no fact stated by such a witness can be relied on when he is not corroborated by other witnesses."[357]

B. Strategies

The possibility of a capacity challenge exists in every attempt to prove a will. The cases identify a particular situation in which the probability of a capacity challenge increases. Whenever a new will makes a significant change from an earlier will, the capacity challenge is invited by the change itself. "The right to change a will is not questioned, but where this change overturns a purpose long manifest it is of evidential value as in some measures gauging the mentalities of the testatrix and the influences which brought it about."[358]

A careful reading of the cases identifies some strategies to use when capacity challenges are anticipated.

1. Lifetime Gifts to Anticipated Challengers

In *Wooddy*, the testator made a lifetime gift, about the same time as he executed his will, to an individual who later challenged the testator's will.[359] The Supreme Court of Virginia noted that the acceptance of the check was inconsistent with a belief that the testator lacked capacity at that time, and accordingly discredited that witness's testimony against capacity.[360] The testator "gave [an individual] a check for $50, and yet this [individual] ex-

[356] Cheatham v. Hatcher, 71 Va. (1 Gratt.) 56, 64 (1878) (citing Kinleside v. Harrison, (1818) 161 Eng. Rep. 1196; 2 Phill. Ecc. 449).
[357] *Id.*
[358] Redford v. Booker, 185 S.E. 879, 888 (Va. 1936) (quoting Hartman v. Strickler, 82 Va. 225, 238 (1886)).
[359] Wooddy v. Taylor, 77 S.E. 498, 499 (Va. 1913).
[360] *Id.* at 500–01.

pressed the opinion that at the time of the visit mentioned [where the check was accepted] the testator was not competent to make a will."[361] The Supreme Court of Virginia described the testimony of that gift recipient as "valueless and without weight as a basis for the opinion that testator was incompetent to make the will involved in this controversy."[362]

2. Attesting Witness Strategies

As noted above, the decisions generally state that the testimony of the attesting witnesses governs and establishes testamentary capacity unless their testimony is unclear on the point or expert testimony from physicians who examined the testator calls capacity into question. Some cases buttress the deference given to attesting witness by noting special characteristics of the witnesses in those cases.

a. Independent Lawyer as Attesting Witness

When a capacity challenge is anticipated, the drafting lawyer should consider using an independent lawyer expressly hired to judge capacity. In *Montague v. Allan's Executor*,[363] the Supreme Court of Virginia endorsed that strategy. "Mr. Ellyson, an educated lawyer, who was called in to attest the execution of the will, with the view of testing her testamentary capacity, conversed with her on the occasion when she executed the will, and was perfectly satisfied as to the condition of her mind; that he 'was perfectly certain of her capacity to make a will, and was so struck with her mental vigor, for one of her age, that he remarked on it when he got home.'"[364]

b. County Clerk as Drafter

Although the strategy of having a county clerk of court draft and supervise the execution of a will may not generally be available, it was extraordinarily helpful in *Trice*.[365] In that case, six physicians, all of whom examined and treated testator, and one of whom had known testator from boyhood,

[361] *Id.* at 500.
[362] *Id.* at 501.
[363] Montague v. Allan's Ex'r, 78 Va. 592, 596 (1884).
[364] *Id.* at 596.
[365] Jenkins v. Trice, 147 S.E. 251, 255 (Va. 1929).

testified that he lacked capacity.[366] However, the Supreme Court of Virginia affirmed a judgment entered on a jury verdict in favor of the will, and noted that there was high quality evidence regarding the execution of the will, including the drafter of the will who was "county clerk of Goochland County and has been in that office from forty-five to fifty years. His father, grandfather and great-grandfather have held it uninterruptedly since 1790. He was no ordinary lay witness."[367]

c. Conference

When a capacity challenge is anticipated, the drafting lawyer should consider having the attesting witnesses confer about capacity and memorialize their conclusion that capacity existed. "If there be any question [about capacity], *Jenkins v. Trice* gives us an excellent example of what should then be done. There 'the attesting witnesses, after conference, deliberately reached the conclusion that the testator was competent to make a will.'"[368]

3. Attending Physician Testimony

While this article has demonstrated that many rules regarding testamentary capacity claimed by the Supreme Court of Virginia to have been applied uniformly for centuries actually have been subject to significant variation, the deference to attending physician testimony is not among them. From *Burton* to *Weedon*, great weight is attached to the testimony of attending physicians.

In *Burton* (1825), the Supreme Court of Virginia said, "Physicians are considered as occupying a high grade on such questions [of capacity], both because they are generally men of cultivated minds and observation, and because, from the course of their education and pursuits, they are supposed to have turned their attention more particularly to such subjects, and therefore, to be able to discriminate more accurately; especially a physician who has attended the patient through the disease, which is supposed to have disabled his mind."[369] Indeed, in *Burton*, testimony of physicians ranked higher than the testimony of lawyers about application of the legal standard of testamentary capacity.

[366] *Id.* at 254–55.
[367] *Id.* at 255.
[368] Redford v. Booker, 185 S.E. 879, 886 (Va. 1936) (citing *Trice*, 147 S.E. at 256).
[369] Burton v. Scott, 24 Va. (1 Rand.) 399, 403–04 (1825).

> On the other hand, there are some most respectable witnesses, who did not think him capable of making a will. In the first rank of these, are Smith and Anthony, two attorneys, one called in, in 1817, the other, in 1821, to draw wills for Major Scott. They both state that they thought him incapable, and give their reasons. But these gentlemen, however respectable, (and none can be more so) are, I think, overweighed by the two physicians, whose opportunities were better, and who, for the reasons before given, would be considered abler judges in such a case.[370]

Other cases drawing the same conclusion about the testimony of examining physician testimony include the following. In *Parramore*, the Supreme Court of Virginia wrote, "I have stated thus fully the evidence of the attending physicians, because it is entitled to great and peculiar weight in determining the question now under consideration."[371] In *Montague*, the Supreme Court of Virginia wrote, "[p]hysicians are considered as occupying a high grade on such questions, … especially a physician who has attended the patient through the disease which is supposed to have disabled her mind."[372]

By contrast, physician testimony by experts who did not examine testator but were hired for litigation largely is ignored.

> This witness had practically no acquaintance with the testator, had not seen him for many years, and says that, having no personal knowledge of the facts, he would have no right to question at all the opinion of a doctor who knew him intimately and had attended him as his family physician for more than 40 years.[373]

4. Dispositions as Substantive Evidence of Capacity

In addition to testimony about the testator, the dispositions themselves can be used to demonstrate testamentary capacity.

> In all questions of testamentary capacity, particularly where the evidence is conflicting, the courts are inclined much to consider the dispositions contained in the will. If such dispositions be in themselves consistent with the situation of the testator, in conformity with his affections and previous declarations–if they be such as might justly have been expected–this is itself said to be persuasive evidence of testamentary capacity. The rationality of the act goes to shew the reason of the person. This rule has been repeatedly applied in the English courts in cases of doubtful capacity from age or sickness.[374]

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[370] *Id.* at 405.

[371] Parramore v. Taylor, 52 Va. (1 Gratt.) 220, 228 (1854) (citing *Burton*, 24 Va. (1 Rand.) at 403).

[372] Montague v. Allan's Ex'r, 78 Va. 592, 597 (1884). (citing Cheatham v. Hatcher, 71 Va. (1 Gratt.) 56 (1878)).

[373] Wooddy v. Taylor, 77 S.E. 498, 501 (Va. 1913).

[374] Young v. Barner, 68 Va. (1 Gratt.) 96, 103 (1876) (citing 1 JARMAN ON WILLS 82 (6th ed.)).

V. CONCLUSION

This article is a piece of doctrinal scholarship, describing which party bears the burden of proof in testamentary capacity litigation and describing whether and how a presumption of testamentary capacity operates, as well as a piece of historical analysis, demonstrating two disturbing practices of the Supreme Court of Virginia within those doctrines: a rather cavalier attitude in not following precedent, and a rather careless method of citing it.

Those practices have created a glaring inefficiency in Virginia common law. On three basic points of law, (1) who bears the burden of proof in testamentary capacity cases; (2) whether and how a presumption of capacity exists; and (3) whether and how the jury is instructed about that presumption, the Supreme Court of Virginia blithely asserts that it has applied law uniformly for a hundred or more years; it has not.

Prior to *Kiddell*, 29 cases decided by the Supreme Court of Virginia discussed the burden of proof in testamentary capacity litigation; eight placed the burden of proof upon the opponent, and 21 placed the burden on the proponent. Of the eight opponent-burden cases, five stated that rule as a matter of law (Group One cases),[375] and three stated it as a consequence of the presumption of testamentary capacity (Group Two cases).[376] Of the 21 cases that placed the burden of proof upon the proponent, eight did not mention any presumption (Group Three cases);[377] seven indicated that a presumption of testamentary capacity existed, but it is a mere evidentiary presumption not told to the jury (Group Four cases); [378] and six indicated that the presumption is told to the jury as something to "take into consideration" (Group Five cases).[379]

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[375] Tabb v. Willis, 156 S.E. 556, 564 (Va. 1931); Smith v. Ottley, 132 S.E. 512, 514 (Va. 1926); *Woodd*y, 77 S.E. at 500; Burton v. Scott, 24 Va. (1 Rand.) 399, 400–03 (1825); Spencer v. Moore, 8 Va. (1 Call) 423, 425 (1798).

[376] Tate v. Chumbley, 57 S.E.2d 151, 160 (Va. 1950); Wallen v. Wallen, 57 S.E. 596, 597–99 (Va. 1907); Temple v. Temple, 11 Va. (1 Hen. & M.) 476, 477 (1807).

[377] Fields v. Fields, 499 S.E.2d 826, 828 (Va. 1998); Lester's Extr. v. Simpkins, 83 S.E. 1062, 1068 (Va. 1952); Walton v. Walton, 191 S.E. 768, 769 (Va. 1937); Gray v. Rumrill, 44 S.E. 697, 699 (Va. 1903); Chappell v. Trent, 19 S.E. 314, 315, 326 (Va. 1893); Tucker v. Sandidge, 8 S.E. 650, 661 (Va. 1888); Riddell v. Johnson's Ex'r, 67 Va. (1 Gratt.) 152, 177 (1875); Coalter's Ex'r v. Bryan, 42 Va. (1 Rob.) 18, 83 (1844).

[378] Weedon v. Weedon, 720 S.E.2d 552, 558 (Va. 2012); Parish v. Parish, 704 S.E.2d 99, 104 (Va. 2011);

Gibbs v. Gibbs, 387 S.E.2d 499, 500 (Va. 1990); Croft v. Snidow, 33 S.E.2d 208, 211 (Va. 1945); Hall v. Hall, 23 S.E.2d 810, 815 (Va. 1943); Redford v. Booker, 185 S.E. 879, 883 (1936); Dickens v. Bonnewell, 168 S.E. 610, 611–12 (Va. 1933).

[379] Culpepper v. Robie, 154 S.E. 687, 689 (Va. 1930), Jenkins v. Trice, 147 S.E. 251, 260 (Va. 1929), Green v. Green's Ex'rs, 143 S.E. 683, 686 (Va. 1928), Rust v. Reid, 97 S.E. 324, 331 (Va. 1918), Huff

The Court's decision in *Kiddell* continued the theme of inadequately researched decisions. According to *Kiddell*, only Group Five cases exist. *Kiddell*, like all 29 of the earlier decisions of the Supreme Court of Virginia, except one in 1908, failed to discern any conflicts in its cases addressing the burden of proof in testamentary capacity litigation.

Kiddell also is an inadequately-reasoned decision. It claims to be a Group Five case, but that can be true only if "sufficient evidence," as used in the jury instruction in *Kiddell*, means an amount of evidence less than the "greater weight of the evidence." *Kiddell* defines "sufficient evidence" as "[e]vidence that is sufficient to satisfy an unprejudiced mind seeking the truth," which appears at least equal to the "greater weight of the evidence."

The jury instructions in *Kiddell* therefore either (1) shift the burden of proof to the opponent, under the logical conclusion of *Kiddell*'s footnote 4, under which all persistent presumptions shift the burden of proof; (2) shift the burden of proof to the opponent, under *Kiddell*'s definition of "sufficient evidence," which requires evidence sufficient to create truth, and the evaluation of the logical statements in Instruction 9; or (3) establish no burden of proof, under an alternate evaluation of the logical statements in Instruction 9, which interpretation should be disfavored because it creates an equipoise problem rather than solving it.

Consequently, the most probable interpretation of the *Kiddell* instructions is that while they state that the burden of proof is upon the proponent, they shift the burden of proof to the opponent when the presumption of testamentary capacity operates. Virginia law on testamentary capacity would benefit from express recognition that the presumption of testamentary is not conditioned upon proof of due execution of a writing as a will. That condition does not need to be included because the element of due execution already is an independent element in the test for whether a writing is a will. Therefore, when due execution is contested, an instruction requiring due execution already will be included, and there is no need to require due execution twice.

Perhaps in a larger irony, the net effect of *Kiddell* likely is a return to *Temple* (1807), *Wallen* (1907), and *Tate* (1950), three points in the long serpentine path traced by testamentary capacity cases during the history of the Commonwealth. *Temple*, *Wallen*, and *Tate* concluded that the presumption of testamentary capacity shifts the burden of proving incapacity to the opponent, as *Kiddell* apparently has done. And if so, that result can be

v. Welch, 78 S.E. 573, 575 (Va. 1913), Hopkins v. Wampler, 62 S.E. 926, 927–28 (Va. 1908).

achieved much more directly than the circuitous route of the *Kiddell* instructions and their multiple logical statements for the jury to evaluate. Instead, why not directly place the burden of proving a lack of testamentary capacity upon the opponent by rule of law? A simple direct statement placing the burden of proving incapacity upon those who allege it would return Virginia law to *Spencer* (1798), where it began, as a rule of common law, and from which it never should have deviated.