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## Corporate and Business Law

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# CORPORATE AND BUSINESS LAW

*Laurence V. Parker, Jr. \**

## INTRODUCTION

Over the past three years, there have been a number of legislative changes to Virginia's business entity statutes. In Part I, this article highlights the changes to the Virginia Stock Corporation Act ("VSCA") and the Virginia Nonstock Corporation Act ("VNSCA"). Part II highlights changes to the Limited Liability Company Act ("LLC Act"). Part III summarizes Virginia's new intrastate crowdfunding law. The Supreme Court of Virginia has also addressed several significant issues over the last three years, including the applicability of appraisal rights in a stepped transaction. Part IV reviews several of the significant cases during this period.

### I. CERTAIN STATUTORY CHANGES RELATED TO CORPORATIONS AND NONSTOCK CORPORATIONS

#### A. *Action by Less Than Unanimous Written Consent in a Nonstock Board*

Thanks to a 2016 amendment to VNSCA, a nonstock corporation's board of directors can approve an action that does not require member approval by less than unanimous written consent if it is authorized in the nonstock corporation's articles of incorporation and, if no director objects to the proposed action, within ten days.<sup>1</sup> To permit directors an opportunity to object, the corpora-

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\* Shareholder, Williams Mullen, Richmond, Virginia. J.D., 2003, University of Richmond School of Law; M.B.A., 2003, The Robins School of Business, University of Richmond; B.A., 1995, University of Virginia.

1. Act of Mar. 11, 2016, ch. 382, 2016 Va. Acts \_\_, \_\_ (codified at VA. CODE ANN. § 13.1-865(A) (Cum. Supp. 2016)).

tion must give written notice to all directors at least ten days prior to the action.<sup>2</sup>

### B. *Technical Amendments in 2015*

In HB 2176,<sup>3</sup> the General Assembly made a number of technical amendments to VSCA and VNCSA in 2015. These changes included: (i) clarifying that annual reports may be signed by court-appointed fiduciaries;<sup>4</sup> (ii) permitting the State Corporation Commission to correct clerical errors on its own motion;<sup>5</sup> (iii) clarifying that annual fees are not payable if prior to their due date, a domestic corporation terminates its existence or merges into another form of entity, or a foreign corporation withdraws or converts into another form of entity;<sup>6</sup> (iv) crediting a domestic limited liability company converting into a domestic corporation that was previously a domestic corporation with any filing fees paid by the entity for any previous filings as a domestic corporation;<sup>7</sup> (v) permitting the surviving holding company created in a transaction under section 13.1-719.1 of VSCA to change its name to the name of the subsidiary entity for which the holding company was formed;<sup>8</sup> (vi) adding that service on the Clerk of the Commission is service on a former domestic corporation that has re-domesticated into another state;<sup>9</sup> (vii) revising the requirements for articles of entity conversion to conform to the 2012 amendments, allowing a conversion to be effected by incorporators before there are directors or directors before there are shareholders;<sup>10</sup> (viii) conforming the effect of entity conversion provisions to LLC Act;<sup>11</sup> (ix) clarifying that an amended certificate of authority is required for a foreign corporation if it desires to abandon or change a designated name used in Virginia;<sup>12</sup> (x) improving the

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2. *Id.*

3. *See* Act of Mar. 26, 2015, ch. 623, 2015 Va. Acts 1396–1414 (codified throughout VSCA and VSCNA).

4. VA. CODE ANN. §§ 13.1-604(G), -804(G) (Cum. Supp. 2016).

5. *Id.* §§ 13.1-614(C), -813(C) (Cum. Supp. 2016).

6. *Id.* §§ 13.1-615(C), -815(C) (Cum. Supp. 2016).

7. *Id.* § 13.1-617(E) (repealed 2002).

8. *Id.* § 13.1-706(6) (Cum. Supp. 2016).

9. *Id.* § 13.1-722.5(E) (Cum. Supp. 2016).

10. *Id.* § 13.1-722.12(A)(3) (Cum. Supp. 2016).

11. *Id.* § 13.1-722.13(B) (Cum. Supp. 2016); *see also id.* § 13.1-1010.1(C) (Repl. Vol. 2011).

12. *Id.* §§ 13.1-760(A)(2), -922(A)(2) (Cum. Supp. 2016).

withdrawal provisions for foreign corporations that were parties to mergers governed by foreign laws;<sup>13</sup> (xi) improving the provisions related to reinstating a foreign corporation whose certificate of authority has been revoked and the reinstatement of a corporation that has ceased to exist;<sup>14</sup> and (xii) conforming the effect of conversion provisions of VSCA and VNSCA.<sup>15</sup>

## II. CERTAIN STATUTORY CHANGES RELATED TO LIMITED LIABILITY COMPANIES

### A. *Records May be Stored Electronically or at the Principal Office*

Traditionally, the LLC Act technically required that a Virginia limited liability company maintain physical copies of its required records at its principal office and, partially for this reason, the State Corporation Commission has in the past rejected Articles of Organization that did not include a physical address for the principal office (versus just a post-office box or similar mail box service).<sup>16</sup> The 2016 change to the LLC Act would permit a Virginia limited liability company to maintain its required records electronically on a network or system if it grants members access to those required records.<sup>17</sup> Based on this change, it is possible the State Corporation Commission might now accept principal office addresses that are not physical addresses.

### B. *Officers of LLCs May Serve as Registered Agents*

For several years, the LLC Act has included language mentioning “officers” of a limited liability company in a way that implicitly made this a permissible role.<sup>18</sup> This year, the General Assembly made that role explicitly permissible by adding language that permits an “officer” of a Virginia limited liability company to serve as its registered agent.<sup>19</sup>

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13. *Id.* §§ 13.1-766.1(B), -767(B)(2), -928.1(B), -929(B)(2) (Cum. Supp. 2016).

14. *Id.* §§ 13.1-754, -769.1, -916, -931.1 (Cum. Supp. 2016).

15. *Id.* § 13.1-944 (Cum. Supp. 2016); *see also id.* § 13.1-722.13 (Cum. Supp. 2016).

16. *See id.* § 13.1-1011(A)(3) (Repl. Vol. 2011).

17. Act of Mar. 7, 2016, ch. 287, 2016 Va. Acts \_\_, \_\_ (codified at VA. CODE ANN. § 13.1-1028 (Cum. Supp. 2016)).

18. *See* VA. CODE ANN. § 13.1-1024(H) (Cum. Supp. 2015).

19. Act of Mar. 7, 2016, ch. 275, 2016 Va. Acts \_\_, \_\_ (codified at VA. CODE ANN. § 13.1-1015 (Cum. Supp. 2016)).

### C. *Liability in Single Member LLCs*

In *Olmstead v. Federal Trade Commission*, the Florida Supreme Court created a kerfuffle in the legal community when it permitted “reverse veil piercing” for a single member limited liability company.<sup>20</sup> In that case, the court held the Florida Limited Liability Company Act’s charging order provisions—which, like those of many other states with similar language, have since been amended by Florida’s legislature—did not include language stating that a charging order was an exclusive remedy to a creditor of the LLC; thus, the Florida court reasoned the creditor could also exercise all rights of an owner with respect to the LLC.<sup>21</sup> While Virginia’s LLC Act has stated a charging order is an exclusive remedy since it was added to the Act in 2004,<sup>22</sup> and the concept of a member’s liability being limited has been included in the Virginia LLC Act since it was first passed in 1991,<sup>23</sup> perhaps out of an abundance of caution and in reaction to the ongoing kerfuffle over the *Olmstead* case, in 2015, the General Assembly added language to clarify that a member’s liability is limited by the entity regardless of whether there are one or more members.<sup>24</sup>

## III. CROWDFUNDING

In 2015, the General Assembly authorized intrastate crowdfunding in Virginia in HB 1360.<sup>25</sup> Pursuant to new section 13.1-514(B)(21) of the Virginia Securities Act, there is a “crowdfunding” exemption that applies if the offering: (i) is to Virginia residents only and otherwise complies with section 3(a)(11) of the Securities Act of 1933 and Securities Exchange Commission Rule 147; (ii) does not exceed \$2 million in the aggregate or such other amount as the State Corporation Commission establishes by rule; (iii) has a limit which no investor other than an accredited investor is permitted to invest more than \$10,000; (iv) is connected to a solicitation fee paid to only a registered broker dealer or an agent of a broker dealer, unless otherwise permitted by a rule promul-

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20. 44 So.3d 76, 78 (Fla. 2010).

21. *Id.* at 82–83.

22. VA. CODE ANN. § 13.1-1041.1 (Cum. Supp. 2004).

23. *Id.* § 13.1-1019 (Cum. Supp. 1991).

24. *Id.* (Cum. Supp. 2015).

25. See Act of Mar. 23, 2015, ch. 400, 2015 Va. Acts 759–62 (codified at VA. CODE ANN. § 13.1-514(B)(21) (Cum. Supp. 2016)).

gated by the State Corporation Commission; (v) is not subject to certain disqualifications established by the State Corporation Commission related to the issuer or its principals; and (vi) otherwise complies with the rules established by the State Corporation Commission.<sup>26</sup>

The State Corporation Commission took to heart the authority to issue rules and issued detailed rules governing the use of the intrastate crowdfunding exemption. Among other things, the State Corporation Commission rules require: (i) the issuer to be formed in Virginia, have its principal place of business in Virginia, and be authorized to do business in Virginia; (ii) the issuer to only issue equity securities, not debt; (iii) the total amount raised to be under \$2 million, less any amounts raised in the preceding twelve month period; (iv) to exclude certain persons subject to “bad boy” rules under the federal securities laws, pooled investment vehicles, companies without existing operations or business plans, or companies engaging in petroleum or mining industries; (v) each investor to receive a uniform notice that the issuer is relying on the intrastate crowdfunding exemption; (vi) to place certain restrictions on crowdfunding efforts conducted via the internet; (vii) the funds be maintained pursuant to a written escrow agreement at a bank located in Virginia until the targeted amount of capital has been raised and closing occurs; (viii) the offering not extend for more than twelve months; and (ix) the exemption not be used in conjunction with any other exemptions.<sup>27</sup>

One of the more burdensome requirements is the filing of an offering memorandum with the State Corporation Commission along with a \$250 filing fee at least twenty days prior to the offering.<sup>28</sup> That offering memorandum must include:

- (1) A description of the issuer, including type of entity, the address and telephone number of its principal office, its formation history, and its business plan;
- (2) A description of the intended use of the offering proceeds, including any amounts to be paid, as compensation or otherwise, to any owner, executive officer, director, managing member, or other person occupying a similar status or performing similar functions on behalf of the issuer;

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26. VA. CODE ANN. § 13.1-514(B)(21) (Cum. Supp. 2016).

27. 21 VA. ADMIN. CODE § 5-40-190 (2015).

28. *See id.* § 5-40-190(A)(6) (2015).

- (3) The identity of each person that owns more than 10% of the ownership interests of any class of securities of the issuer and the amount of said securities held by such person;
- (4) The identity of the executive officers, directors, or managing members of the issuer and any other individuals who occupy similar status or perform similar functions in the name of and on behalf of the issuer, including their titles and their prior business experience;
- (5) The terms and conditions of the securities being offered including:
  - (a) The type and amounts of any outstanding securities of the issuer;
  - (b) The minimum and maximum amount of securities being offered, if any;
  - (c) Either the percentage ownership of the issuer represented by the offered securities or the valuation of the issuer implied by the price of the offered securities;
  - (d) The price per share, unit, or interest of the securities being offered;
  - (e) Any restrictions on transfer of the securities being offered; and
  - (f) A disclosure of any anticipated future issuance of securities that might dilute the value of the securities being offered;
- (6) The identity of any person that the issuer has or intends to retain to assist the issuer in conducting the offer and sale of the securities, including the owner of any websites, if known, but excluding any person acting solely as an accountant or attorney and any employees whose primary job responsibilities involve the operating business of the issuer rather than assisting the issuer in raising capital;
- (7) For each person identified as required in subdivision 6 b(6) of this subsection, a description of the consideration being paid to the person for such assistance;
- (8) A description of any litigation or legal proceedings involving the issuer or any executive officer, director, or managing member or other person occupying a similar status or performing similar functions on behalf of the issuer;
- (9) The issuer's financial statements for the three most recent fiscal years or for as much time as the issuer has been in existence, if less than three years;
- (10) The name and address, including the uniform resource locator, of each Internet website that will be used by the issuer to offer or sell securities under an exemption under this section; and
- (11) Any additional information material to the offering, including, if appropriate, a discussion of significant risk factors that make the offering speculative or risky. This discussion shall be concise and organized logically and may not be limited to risks that could apply to any issuer or any offering.<sup>29</sup>

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29. *Id.* § 5-40-190(A)(6) (2015).

In addition to the offering memorandum, if the issuer relies on the intrastate crowdfunding exemption, the issuer must have its financial statements certified by a principal officer if raising \$500,000 or less, reviewed by a certified public accounting firm if raising more than \$500,000 and less than \$1,000,000, and audited if raising \$1,000,000 or more.<sup>30</sup> Given the expense of preparing an offering memorandum that complies with the State Corporation Commission's rules, the expense of preparing reviewed or audited financials, the low limits placed on the amount that may be raised, and the difficulty of conducting a purely intrastate crowdfunding offering, in each case when compared to a general solicitation or traditional private offering to accredited investors,<sup>31</sup> it will be interesting to see how frequently this intrastate crowdfunding exemption is actually used.

#### IV. SELECTED CASES AFFECTING CORPORATE AND BUSINESS LAW

##### A. *Jimenez v. Corr*

In *Jimenez v. Corr*,<sup>32</sup> the Supreme Court of Virginia was asked to permit a will to displace the buyout provisions of a shareholder agreement. Without deciding which document had a superior claim to disposing of the underlying stock, Justice Millette, writing for the majority, held that in this case, the provisions of the shareholders agreement governed as a matter of contractual interpretation.<sup>33</sup>

Capitol Foundry of Virginia was a Virginia corporation owned by the Corr family.<sup>34</sup> Lewis Corr Sr. was the patriarch and owned all of the stock initially, but later sold five shares to his son Lewis Corr Jr.<sup>35</sup> Upon Lewis Corr Sr.'s death in 1999, his shares passed to his wife Norma.<sup>36</sup> Norma had a Last Will and Testament and a Revocable Trust, both dated July 17, 1992 ("Estate Planning Documents").<sup>37</sup> Norma and the other shareholders—her daughter,

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30. *Id.* § 5-40-190(A)(4) (2015).

31. *See* 17 C.F.R. §§ 230.501–506 (2015); VA. CODE ANN. § 13.1-514(B)(19)(21) (Cum. Supp. 2016); VA. ADMIN. CODE § 42-5-40 (2015).

32. 288 Va. 395, 764 S.E.2d 115 (2014).

33. *Id.* at 409, 764 S.E.2d at 121.

34. *Id.* at 402, 764 S.E.2d at 117.

35. *Id.*

36. *Id.*

37. *Id.* at 404–05, 764 S.E.2d at 118.



Nancy, had become a shareholder along with her son, Lewis Corr Jr.—signed a shareholders agreement in 2002 (“Shareholders Agreement”).<sup>38</sup>

The Estate Planning Documents had a residue provision that placed any residual assets, not disposed of specifically via Norma’s will, into the Revocable Trust.<sup>39</sup> The Revocable Trust had a “pour over” provision allowing any assets that would pass immediately to Norma’s beneficiaries pursuant to the Revocable Trust to bypass the Trust and go to her beneficiaries directly.<sup>40</sup> The Revocable Trust provided that the residuary estate should pass directly to Norma’s living children per stirpes.<sup>41</sup> However, the Revocable Trust provided that Lewis Corr Jr. would have a right to purchase any Capitol Foundry stock that became subject to the Trust.<sup>42</sup>

Nancy brought a claim in the Circuit Court of the City of Virginia Beach arguing that the Shareholders Agreement should govern the disposition of the stock held by her mother.<sup>43</sup> Lewis Corr Jr. countered that the Estate Planning Documents should govern.<sup>44</sup> The trial court found that the Shareholders Agreement did not govern and Lewis Corr Jr. had properly exercised an option to purchase the shares; Nancy appealed.<sup>45</sup>

Reading the Estate Planning Documents together, the court held that the purchase right meant the stock could not pass directly to the trust beneficiaries; thus, the right was in fact held by the Revocable Trust for the period necessary to be exercised by Lewis Corr Jr.<sup>46</sup> However, the Revocable Trust was not a permitted transferee under the Shareholders Agreement; if this was the case, the Shareholders Agreement indicated that the shares would be subject to a mandatory buyout by the shareholders or the Corporation.<sup>47</sup>

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38. *Id.* at 408–09, 764 S.E.2d at 120–21.

39. *Id.* at 406, 764 S.E.2d at 119.

40. *Id.*

41. *Id.*

42. *Id.* at 407, 764 S.E.2d at 120.

43. *Id.* at 403, 764 S.E.2d at 117.

44. *Id.*

45. *Id.* at 403, 764 S.E.2d at 118.

46. *Id.*

47. *Id.* at 413, 764 S.E.2d at 123.

Further, the court reasoned that because the Shareholders Agreement and the Estate Planning Documents dealt with the same subject matter, the stock of Capitol Foundry, they both embodied the testator's intent on the subject.<sup>48</sup> But because the Shareholders Agreement identified the stock specifically and the Estate Planning Documents only addressed the residuary estate generally, the court determined the more specific provisions of the Shareholders Agreement would govern the disposition of the stock as a matter of contract interpretation.<sup>49</sup> Lewis Corr Jr. argued that because the shareholders could not agree on who would purchase the stock—the two stockholders or the Corporation—the Shareholders Agreement was impermissibly vague; however, the court held the shareholders had an unambiguous obligation to cause the Corporation to purchase if they could not agree on their shareholders' purchasing rights.<sup>50</sup>

In dissent, Justice McClanahan argued the court had elevated form over substance, given that the transfer to Lewis Corr Jr. was consistent with the purpose of the Shareholders Agreement's limits; namely, prohibiting transfers to persons other than family members.<sup>51</sup>

#### B. Birchwood-Manassas Associates, LLC v. Birchwood at Oak Knoll Farm, LLC

In *Birchwood-Manassas Associates, LLC v. Birchwood at Oak Knoll Farm, LLC*,<sup>52</sup> the Supreme Court of Virginia in a letter opinion held that allegations of breaches of fiduciary duties and conflicts of interest are not grounds for equitably tolling the applicable three-year statute of limitations where the party seeking equitable tolling does not show either (i) the breaches or conflicts of interest were concealed by the bad actors, or (ii) the breaches or conflicts were otherwise unknown to the members who could have asserted a claim during the limitations period.<sup>53</sup>

Ronald J. Horowitz and Burton Haims were managers of Birchwood-Manassas Associates, LLC ("BM"), but Horowitz exer-

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48. *Id.* at 412, 764 S.E.2d at 123.

49. *Id.* at 409, 764 S.E.2d at 121.

50. *Id.* at 415–16, 764 S.E.2d at 125.

51. *Id.* at 417, 764 S.E.2d at 126.

52. 290 Va. 5, 773 S.E.2d 162 (2015).

53. *Id.* at 7, 773 S.E.2d at 163–64.

cised day-to-day control.<sup>54</sup> BM was intended to own, develop, and sell real estate.<sup>55</sup> Horowitz and Haims also managed two other entities, Birchwood at Oak Knoll Farm, LLC (“Oak Knoll”) and Birchwood at Wading River, LLC (“Wading River”); Horowitz exercised day-to-day control of these, as well.<sup>56</sup> Like BM, Oak Knoll and Wading River were intended to develop and sell real estate.<sup>57</sup> BM, Oak Knoll, and Wading River may not have had a common set of owners.

Between 2004 and 2009, Horowitz and Haims caused funds to be transferred from BM to Oak Knoll and Wading River, and the transfers were reflected in each applicable entity’s books and records.<sup>58</sup> The operating agreement of BM had a requirement that it be dissolved not later than January 1, 2008.<sup>59</sup> In 2011, a member of BM filed suit in Prince William County seeking dissolution of BM and appointment of a liquidating trustee. The court determined it did not need to find any actual misconduct to appoint a liquidating trustee because Horowitz and Haims had conflicts of interest related to the repayment of funds from Oak Knoll and Wading River to BM.<sup>60</sup> The liquidating trustee accepted his appointment in January of 2013, demanded repayment, and subsequently, in January of 2014 (recall, the transfers occurred and were booked between 2004 to 2009), asserted breach of contract, unjust enrichment, and constructive trust claims against Oak Knoll and Wading River, as well as breach of fiduciary duty claims against Horowitz and Haims.<sup>61</sup>

Oak Knoll, Wading River, Horowitz, and Haims argued BM’s claims asserted by the liquidating trustee were time barred; BM countered that the breaches made asserting the claims impossible within the three-year statute of limitations—2014 being five years after the most recent transfers.<sup>62</sup> When determining whether to equitably toll the statute of limitations, the court requires a showing of “extraordinary circumstances,” such as “(1) where

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54. *Id.* at 5, 773 S.E.2d at 162–63.

55. *Id.* at 5, 773 S.E.2d at 162.

56. *Id.* at 5, 773 S.E.2d at 163.

57. *Id.*

58. *Id.*

59. *Id.* at 5–6, 773 S.E.2d at 163.

60. *Id.* at 6, 773 S.E.2d at 163.

61. *Id.*

62. *Id.* at 6–7, 773 S.E.2d at 163.

fraud prevents a plaintiff from asserting its claims, or (2) where the defendant ‘has by affirmative act deprived the plaintiff of his power to assert his cause of action in due season.’”<sup>63</sup>

However, the court reasoned the other members of BM could have asserted a derivative action within the limitations period; in fact, at least one member did seek judicial dissolution, which meant, as a matter of law, it was not impossible for the claim to have been asserted during the limitations period.<sup>64</sup> For these reasons, and because the transfers were not hidden—rather, they were reflected on the books and records of the interrelated entities—the court declined to extend equitable tolling in this case.<sup>65</sup>

### C. *Fisher v. Tails, Inc.*

In *Fisher v. Tails, Inc.*,<sup>66</sup> Justice Goodwin, writing for the court, declined to apply the step transaction or form over substance doctrine to Virginia’s appraisal rights statutes.<sup>67</sup>

Tails, Inc. was a Virginia corporation that owned a RE/MAX real estate franchise.<sup>68</sup> On August 9, 2013, Tails, Inc. and Buena Suerte Holdings, Inc. (“Buena”) signed a Plan of Reorganization and Purchase Agreement (“Purchase Agreement”).<sup>69</sup> Under the Purchase Agreement, (i) Tails, Inc. would re-domesticate to Delaware pursuant to VSCA section 13.1-722.2 and title 8, section 265 of the Delaware Code; (ii) Tails, Inc. would merge into Tails, LLC (a subsidiary of Tails Holdco, Inc. (“Holdco”)) with Tails, LLC to be the survivor; (iii) Holdco would cause Tails, LLC to amend and restate its limited liability company agreement; and (iv) Holdco would sell Buena all of its membership interests in Tails, LLC.<sup>70</sup> On September 4, 2013, a special meeting of the shareholders of Tails, Inc. was held and the transactions contemplated in the Purchase Agreement were approved, but the plain-

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63. *Id.* at 7, 773 S.E.2d at 164 (quoting *Schmidt v. Household Fin. Corp.*, II, 276 Va. 108, 117, 661 S.E.2d 834, 838–39 (2008)).

64. *Id.* at 8, 773 S.E.2d at 164.

65. *Id.*

66. 289 Va. 69, 767 S.E.2d 710 (2015).

67. *Id.* at 70, 78, 767 S.E.2d at 711, 715.

68. *Id.* at 72, 767 S.E.2d at 711.

69. *Id.*

70. *Id.*

tiffs, who held 21 percent of the stock of Tails, Inc., did not vote in favor of the transaction.<sup>71</sup>

The plaintiffs filed a claim in the Circuit Court of Henrico County demanding appraisal rights and seeking a declaratory judgment that the transaction, by which Tails, Inc. sold all of its assets after re-domesticating to Delaware, triggered appraisal rights in favor of the plaintiffs.<sup>72</sup> Tails, Inc. filed a demurrer, the trial court sustained that demurrer, and the plaintiffs appealed.<sup>73</sup>

The court first reviewed the instances in which section 13.1-730.A of VSCA provides for appraisal rights—certain mergers, share exchanges, sales of substantially all assets, amendments to articles of incorporation that can cash out stockholders or other instances provided for in the articles of incorporation—and noted re-domestication is not included.<sup>74</sup> In fact, regarding re-domestication and appraisal rights, the court noted the General Assembly intentionally chose not to follow the Model Business Corporation Act, which is the basis for much of the remaining VSCA statute.<sup>75</sup> Thus, the court held the trial court did not err in holding that appraisal rights did not apply.<sup>76</sup>

However, the court did address the plaintiff's step transaction theory for the sake of argument. As the opinion noted, the plaintiffs and appellants argued the court should apply the step transaction doctrine and pointed out that, while Virginia has not applied this theory to appraisal rights, Delaware has.<sup>77</sup> The plaintiffs' argument was that the transactions should be viewed as one transaction that resulted in the sale of assets to Buena and as such, appraisal rights should apply.<sup>78</sup> In disagreeing, the court noted the doctrine of "independent legal significance" holds that equitable principles, like the step transaction doctrine, should not apply under Delaware law.<sup>79</sup> Rather, under the doctrine, a statutory transaction is subject to that provision alone.<sup>80</sup> Thus, the

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71. *Id.* at 72, 767 S.E.2d at 711–12.

72. *Id.* at 71, 767 S.E.2d at 711.

73. *Id.*

74. *Id.* at 73–74, 767 S.E.2d at 712–13.

75. *Id.* at 75, 767 S.E.2d at 713.

76. *Id.*

77. *Id.* at 75–76, 767 S.E.2d at 713.

78. *Id.* at 77, 767 S.E.2d at 714.

79. *Id.* at 78, 767 S.E.2d at 714.

80. *Id.* at 78, 767 S.E.2d at 715.

court reasoned, even if Virginia did recognize the step transaction or form over substance doctrines, it would not have changed the outcome because the re-domestication had independent legal significance and under Delaware law, the subsequent sale of assets did not give rise to appraisal rights.<sup>81</sup>

#### D. *A.G. Dillard, Inc. v. Stonehaus Construction, LLC*

In an unpublished opinion, the court in *A.G. Dillard, Inc. v. Stonehaus Construction, LLC*, addressed the prima facie pleadings necessary to survive a demurrer in a veil piercing and reverse veil piercing case.<sup>82</sup>

Stonehaus Construction, LLC (“Stonehaus”), along with Stonehaus, LLC, Bondstone Ventures, LLC, Stonehaus Realty, LLC, and Bondstone Operations Group, LLC (collectively, “Related Entities”) were all owned by Robert and Kedra Hauser.<sup>83</sup> *A.G. Dillard, Inc.* (“Dillard”), seeking to collect on a judgment it had against Stonehaus, brought an action in the Circuit Court of Albemarle County alleging veil piercing, reverse veil piercing, and fraudulent transfer claims against Stonehaus and the Related Entities, respectively.<sup>84</sup> The purpose of the suit was to allow Dillard to collect its judgment from Robert and Kedra personally and/or the Related Entities.<sup>85</sup> Stonehaus, the Related Entities, and the Hausers demurred, arguing the fraud allegations were not pled with sufficient particularity.<sup>86</sup> The circuit court sustained the demurrer, and Dillard appealed.<sup>87</sup>

The court reviewed its veil piercing precedent and noted:

[W]hile there is no single rule or standard and the determination is fact specific, “when the unity of interest and ownership is such that the separate personalities of the corporation and individual no longer exist and to adhere to separateness would work an injustice” it is appropriate to pierce the corporate veil.<sup>88</sup>

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81. *Id.*

82. No. 151182, 2016 Va. LEXIS 16, at \*1 (June 2, 2016) (unpublished decision).

83. *Id.* at \*2.

84. *Id.*

85. *Id.*

86. *Id.* at \*4.

87. *Id.*

88. *Id.* at \*6 (citing *Dana v. 313 Freemason Condo. Ass’n*, 266 Va. 491, 500, 587 S.E.2d 548, 553–54 (2003)).

The standard the court quoted requires proof that the corporation was “the alter ego, alias, stooge, or dummy of the individual sought to be held personally accountable” and “a device or sham used to disguise wrongs, obscure fraud, or conceal crime.”<sup>89</sup> While these are corporate standards, the court made clear they also apply to limited liability companies and limited partnerships.<sup>90</sup>

The court also indicated it has recognized reverse veil piercing where a claim against a member of a limited liability company can be satisfied by the assets of the limited liability company under essentially the same standard.<sup>91</sup> However, in a reverse veil piercing case, the court must also consider the impact of reverse veil piercing on innocent investors and innocent creditors, which was not an issue in the instant case.<sup>92</sup>

Because Dillard’s complaint alleged that the Hausers, Stonehaus, and the Related Entities did not operate as separate personalities, they advertised to the public as single entities, and the funds and employees of each entity were used as if they were funds and employees of one entity, the court held the circuit court erred in sustaining the demurrer on the veil piercing and reverse veil piercing claims.<sup>93</sup>

With respect to fraudulent transfer, the court reasoned only one of the traditional badges of fraud needs to be pled to make out a prima facie claim for fraudulent conveyance.<sup>94</sup> The badges of fraud include:

- (1) retention of an interest in the transferred property by the transferor;
- (2) transfer between family members for allegedly antecedent debt;
- (3) pursuit of the transferor or threat of litigation by his creditors at the time of the transfer;
- (4) lack of or gross inadequacy of consideration for the conveyance;
- (5) retention or possession of the property by transferor; and
- (6) fraudulent incurrence of indebtedness after the conveyance.<sup>95</sup>

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89. *Id.* at \*6–7 (quoting *RF & P Corp. v. Little*, 247 Va. 309, 316, 440 S.E.2d 908, 913 (1994)).

90. *Id.*

91. *Id.* at \*7.

92. *Id.* at \*7 n.2.

93. *Id.* at \*11.

94. *Id.* at \*11–12.

95. *Id.* at \*13–14 (quoting *Fox Rest Assocs., L.P. v. Little*, 282 Va. 277, 285, 717 S.E.2d 126, 131–32 (2011)).

Here, the court found that the pleadings included at least one badge of fraud because the Hausers owed Stonehaus over \$160,000, but there had been no attempt to collect, and Stonehaus had transferred funds it received since the date of the Dillard judgment to the Related Entities for no consideration.<sup>96</sup> Finally, the court determined the fraudulent transfer statute permits claims where there is an intent to delay or hinder a creditor in addition to fraud, so it is not necessary to plead with the same specificity as a common law fraud claim.<sup>97</sup> In other words, there was no need to plead the exact dollar figure and date of the allegedly fraudulent transfer; the general reference to transfers was sufficient.<sup>98</sup> Thus, the court reversed the circuit court and held the circuit court erred when it sustained the demur of the fraudulent transfer claims for failure to plead with the particularity required for a common law fraud claim.<sup>99</sup>

### CONCLUSION

Over the past three years, the General Assembly and Virginia regulators have continued to update and refine VSCA, VNCSA, and the LLC Act. The state has also adopted intrastate crowdfunding rules that allow a company to raise funds in an offering that is exempt from registration under securities laws but includes a general solicitation from non-accredited investors, subject to some very detailed limitations and restrictions. Finally, during this period the Supreme Court of Virginia (i) declined to apply the stepped transaction doctrine in a case where a Virginia corporation converted into a Delaware corporation and then engaged in a transaction that would have triggered appraisal rights if entered into by a Virginia corporation; (ii) did not toll the three-year statute of limitations in a breach of fiduciary duty case; (iii) provided useful insight on how the court would approach apparent conflicts between estate planning documents of a controlling shareholder and a shareholder agreement; and (iv) gave a glimpse of the court's approach to piercing the veil, reverse veil piercing, and fraudulent transfer claims.

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96. *Id.* at \*14.

97. *Id.* at \*15.

98. *Id.*

99. *Id.* at \*15-16.



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