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WILLS, TRUSTS, AND ESTATES

*J. William Gray, Jr. **
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INTRODUCTION

The Supreme Court of Virginia has handed down seven recent decisions addressing the authority of an agent to change the principal's estate plan, legal malpractice claims in estate planning, rights of incapacitated adults, limits of the constructive trust doctrine, effects of a reversionary clause in a deed, ownership of an engagement ring, and proof of undue influence. The 2017 Virginia General Assembly clarified rules on legal malpractice and tenancies by the entirety, adopted the Uniform Trust Decanting Act and the Uniform Fiduciary Access to Digital Assets Act, and expanded provisions governing estate administration, life insurance, and advance medical directives. Other legislation affecting wills, trusts, and estates included clarifications and technical corrections relating to augmented estate claims, non-exoneration of encumbered property, administration procedures, life insurance, adult financial exploitation, death certificate amendments, and spousal exemptions from real estate tax.¹

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1. Except where specifically noted, all 2017 legislation summarized in this article became effective July 1, 2017.

I. LEGISLATION

A. *Correction to Revised Augmented Estate Statute*

Virginia's new augmented estate statute became effective for all decedents dying on or after January 1, 2017.² Given the new law's broad scope, it was perhaps to be expected that a few technical corrections would be necessary once practitioners began to study the rules. One such error was discovered in the interplay between the augmented estate statute and the homestead allowance statute.

Under the pre-2017 version of Virginia's system, a surviving spouse who elected to claim an augmented estate share was expressly prohibited from also claiming a homestead allowance.³ The General Assembly failed to remove that prohibition from the family allowance statute in 2016 when it revised the augmented estate system to authorize the surviving spouse to claim exempt property and allowances in addition to an elective share.⁴

The 2017 General Assembly resolved the statutory conflict by amending Virginia Code section 64.2-311(D) to confirm that a surviving spouse may claim both an elective share of the augmented estate and a homestead allowance.⁵ An emergency clause made this amendment effective for the estates of decedents dying on or after January 1, 2017, the date the augmented estate revisions took effect.⁶

2. VA. CODE ANN. §§ 64.2-308.1 to -308.17 (Repl. Vol. 2017). For a full discussion of the changes to Virginia's augmented estate rules, see J. William Gray, Jr. & Katherine E. Ramsey, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 51 U. RICH. L. REV. 125, 125-30 (2016).

3. VA. CODE ANN. § 64.2-311(D) (Cum. Supp. 2016).

4. Compare VA. CODE ANN. § 64.2-311(D) (Cum. Supp. 2016) (prohibiting the homestead allowance claim), with Act of Mar. 7, 2016, ch. 269, 2016 Va. Acts __, __ (codified at VA. CODE ANN. § 64.2-308.3(B) (Repl. Vol. 2017)); Act of Mar. 1, 2016, ch. 187, 2016 Va. Acts __, __ (codified at VA. CODE ANN. § 64.2-308.3(B) (Repl. Vol. 2017)) (entitling the electing spouse to homestead and other allowances).

5. Act of Feb 20, 2017, ch. 82, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 64.2-311(D) (Repl. Vol. 2017)); Act of Feb. 17, 2017, ch. 32, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 64.2-311(D) (Repl. Vol. 2017)).

6. Ch. 82, 2017 Va. Acts __, __; ch. 32, 2017 Va. Acts __, __.

B. *Legal Malpractice in Estate Planning*

A 2016 decision by the Supreme Court of Virginia⁷ overturned what many Virginia estate planners believed to have been the law limiting a beneficiary's right to sue an estate planning attorney for malpractice after the client's death.⁸ The court held that the intended beneficiary under a will may sue as a third-party beneficiary of the oral contract between the client and the drafting attorney and, perhaps of greater concern, that the statute of limitations did not begin to run until the client's death.⁹

In response, the General Assembly replaced the statute governing legal malpractice involving irrevocable trusts with a broader statute that attempts to restore the law governing legal malpractice to its prior state in all estate planning matters.¹⁰

Under the new statute, an action for damages resulting from legal malpractice in estate planning accrues at completion of the representation during which the malpractice occurred.¹¹ The damages may arise from legal advice or document preparation and may include future tax liability.¹² Unless a written agreement between the client and the lawyer expressly grants standing to a third-party beneficiary by specific reference to the statute, only the client or the client's personal representative may maintain the action.¹³ As under prior law, the cause of action survives the client's death during the limitations period.¹⁴

Like other types of legal malpractice claims, the action must be brought within five years after it accrues if the contract for service as in writing, or within three years if the contract was unwritten.¹⁵

7. See *Thorsen v. Richmond Soc'y for the Prevention of Cruelty to Animals*, 292 Va. 257, 786 S.E.2d 453 (2016).

8. For a discussion of the *Thorsen* case, see *infra* Part II.B.

9. *Thorsen*, 292 Va. at 267, 276, 278, 786 S.E.2d at 459, 465.

10. Act of Feb. 20, 2017, ch. 93, 2017 Va. Acts __, __ (codified at VA. CODE ANN. § 64.2-520.1 (Repl. Vol. 2017)); Act of Feb. 17, 2017, ch. 43, 2017 Va. Acts __, __ (codified at VA. CODE ANN. § 64.2-520.1 (Repl. Vol. 2017)).

11. VA. CODE ANN. § 64.2-520.1(A) (Repl. Vol. 2017).

12. *Id.*

13. *Id.* § 64.2-520.1(B) (Repl. Vol. 2017).

14. *Id.* § 64.2-520.1(E) (Repl. Vol. 2017).

15. *Id.* § 64.2-520.1(C) (Repl. Vol. 2017).

The action may not be based on damages that may reasonably be avoided or that result from a subsequent change of law.¹⁶

To alleviate due process concerns, the new legislation does not affect any judicial proceeding brought before July 1, 2017; any cause of action that accrued before that date may be brought under prior law on or before July 1, 2018, or, if later, the expiration of the prior limitations period.¹⁷

C. Severance of Tenancy by the Entireties

In another legislative response to a court decision, the General Assembly addressed the requirements for terminating a tenancy by the entireties. In 2015, the Supreme Court of Virginia held in *Evans v. Evans* that a deed executed only by a husband and purporting to convey to his wife his interest in property, which they held as tenants by the entireties, created a fee simple estate in the wife.¹⁸ This decision raised questions about the creditor protection afforded to such property.¹⁹ On the recommendation of the Boyd-Graves Conference, the legislature enacted Virginia Code section 55-20.2 to provide that a written instrument will sever a tenancy by the entireties only if it is a deed that both spouses sign as grantors of the property.²⁰

D. Trust Decanting

“Decanting” describes the process by which the trustee of an otherwise irrevocable trust distributes the trust assets to a second trust that may have similar, but not identical, terms.²¹ Trust de-

16. *Id.* § 64.2-520.1(D) (Repl. Vol. 2017).

17. Act of Feb. 20, 2017, ch. 93, 2017 Va. Acts __, __, cl. 2, 3 (codified at VA. CODE ANN. § 64.2-520.1 (Repl. Vol. 2017)); Act of Feb. 17, 2017, ch. 43, 2017 Va. Acts __, __ (codified at VA. CODE ANN. § 64.2-520.1 (Repl. Vol. 2017)).

18. 290 Va. 176, 179, 772 S.E.2d 576, 577 (2015). For a discussion of the case, see Gray & Ramsey, *supra* note 2, at 139–41.

19. *Evans*, 290 Va. at 187–90, 772 S.E.2d at 582–84. A concurrence would have held the deed invalid, but would have vested title in the wife based on the parties' subsequent actions. *Id.* at 188, 772 S.E.2d at 583 (Powell, J., concurring).

20. Act of Feb. 17, 2017, ch. 38, 2017 Va. Acts __, __ (codified at VA. CODE ANN. § 55-20.2(B) (Cum. Supp. 2017)).

21. See *Legislative Fact Sheet - Trust Decanting*, UNIF. LAW COMM'N, <http://www.uni>

canting is a powerful tool available to trustees who believe the original trust terms are no longer appropriate due to a change in circumstances.²² However, there must be safeguards to prevent abuse and unintended adverse tax consequences.²³

In 2012, Virginia became one of the first states with its own decanting statute.²⁴ Virginia Code section 64.2-778.1 generally allowed the trustee of any irrevocable trust administered under Virginia law to exercise a discretionary power to make distributions to, or for the benefit of, a current trust beneficiary by appointing all or part of the principal or income of the original trust in favor of a trustee of a second trust.²⁵

Three years later, the Uniform Law Commission published the Uniform Trust Decanting Act (“UTDA”).²⁶ The UTDA expanded and clarified certain aspects of decanting that Virginia law had not addressed. Given these improvements, and in the interest of maintaining uniformity among the states, Virginia repealed Virginia Code section 64.2-778.1 in 2017 and adopted the UTDA in its place with only a few modifications.²⁷

Found in article 8.1 of Title 64.2 of the Virginia Code, the Virginia UTDA applies to any express non-charitable trust that is irrevocable or that is revocable only with the consent of the trustee or a person holding an adverse interest.²⁸ The Virginia UTDA applies regardless of when the trust was created, provided the trust is either governed by Virginia law or has its principal place of administration in Virginia.²⁹ The Act does not apply to a trust that (i)

formlaws.org/LegislativeFactSheet.aspx?title=Trust%20Decanting (last visited Sept. 27, 2017).

22. *See id.*

23. *See id.*

24. *See* J. William Gray, Jr. & Katherine E. Ramsey, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 47 U. RICH. L. REV. 343, 355 (2012).

25. *See id.*

26. For the full text of the Uniform Trust Decanting Act, see UNIF. TR. DECANTING ACT (UNIF. LAW COMM’N 2015) [hereinafter UNIF. TR. DECANTING ACT 2015], http://www.uniformlaws.org/shared/docs/trustdecanting/UTDA_Final%20Act_2016nov14.pdf (last visited Sept. 27, 2017).

27. Compare Act of Mar. 16, 2017, ch. 592, 2017 Va. Acts __, __ (codified at VA. CODE ANN. §§ 64.2-779.1 to -779.25 (Repl. Vol. 2017)), with UNIF. TR. DECANTING ACT 2015, *supra* note 26.

28. VA. CODE ANN. § 64.2-779.1(A)–(B) (Repl. Vol. 2017).

29. *Id.* §§ 64.2-779.1(A), -779.3 (Repl. Vol. 2017).

is held solely for charitable purposes,³⁰ or (ii) expressly prohibits the trustee from exercising any state law power to modify the trust or distribute assets to a second trust.³¹

Any fiduciary (other than a settlor) that has discretion to distribute trust income or principal to a beneficiary also has discretion to appoint (i.e., “decant”) the income or principal to a second trust without the consent of any person and without court approval.³² The trustee must act in accordance with its general fiduciary duties, but it has no duty to exercise the decanting power or to inform beneficiaries of its availability.³³

If the trustee may make distributions from the first trust only according to an ascertainable or reasonably definite standard, each beneficiary of the first trust must receive a substantially similar interest in the second trust.³⁴ The beneficial interests in the second trust need not be identical to those in the first, though. For example, a beneficiary’s right to receive a distribution may be postponed as long as no one else can benefit from the otherwise distributable property during the beneficiary’s lifetime and the deferred distribution is payable to the beneficiary’s estate (or subject to a general testamentary power of appointment in favor of the beneficiary’s estate) if the beneficiary dies before the second trust is terminated.³⁵ As another example, a power in the first trust to distribute income

30. *Id.* § 64.2-779.1(B) (Repl. Vol. 2017).

31. *Id.* §§ 64.2-779.1(C), -779.12 (Repl. Vol. 2017).

32. *Id.* §§ 64.2-701 (definition of “authorized fiduciary”), -779.5(B), -779.8(B), -779.9(B) (Repl. Vol. 2017). This is a significant change from the earlier Virginia statute, which prohibited decanting by an “interested trustee.” See VA. CODE ANN. § 64.2-778.1(D) (Cum. Supp. 2016), *repealed by* Act of Mar. 16, 2017, ch. 592, 2017 Va. Acts __, __. An interested trustee was (i) an individual who was “a current beneficiary of the original trust” or a permissible distributee of income or principal if the original trust were terminated, (ii) any trustee whom a current beneficiary could remove and replace with a trustee related or subordinate to the current beneficiary, or (iii) an individual “whose legal obligation to support a beneficiary [could] be satisfied by distributions” from the original trust. See *id.* § 64.2-778.1(A) (Cum. Supp. 2016), *repealed by* ch. 592, 2017 Va. Acts __ (defining “interested trustee” and “interested distributee”).

33. *Id.* § 64.2-779.2 (Repl. Vol. 2017).

34. See *id.* § 64.2-779.9(A), (C) (Repl. Vol. 2017). If the first trust is decanted into multiple second trusts, the beneficiaries’ interests are compared in the aggregate across all trusts. *Id.* § 64.2-779.9(C) (Repl. Vol. 2017).

35. *Id.* § 64.2-779.9(C) (Repl. Vol. 2017). This is a notable difference between the Virginia statute and the UTDA, which does not allow a trustee with such limited distributive discretion to postpone a beneficiary’s right to receive or withdraw trust assets. See UNIF. TR. DECANTING ACT 2015, *supra* note 26.

or principal directly to a beneficiary may be converted into a power in the second trust to make distributions for the benefit of the beneficiary.³⁶ However, a change that makes the distribution standard more or less expansive is not “substantially similar.”³⁷

If distributions under the first trust are not limited by an ascertainable or reasonably definite standard, the trustee has significantly more power to alter the beneficiaries’ interests through decanting.³⁸ The only applicable restrictions are that the second trust may not (i) reduce a vested interest,³⁹ (ii) include as a current beneficiary anyone who was not a current beneficiary of the first trust, or (iii) include as a beneficiary anyone who was not a qualified beneficiary or successor beneficiary of the first trust.⁴⁰ The trustee may eliminate or modify the interest of any non-vested beneficiary and any power of appointment that is not a presently exercisable general power.⁴¹ The trustee may also effectively add potential beneficiaries by creating or modifying a power of appointment to include permissible appointees who are not beneficiaries or permissible appointees of the first trust.⁴²

Special rules apply for decanting to a second trust for the benefit of someone with a disability.⁴³ Other restrictions protect charitable interests, as well as preserve certain tax benefits for which the first trust was intended to qualify.⁴⁴ Limits on decanting powers protect the beneficiaries from overreaching by the trustee.⁴⁵ For example,

36. VA. CODE ANN. § 64.2-779.9(D) (Repl. Vol. 2017).

37. See UNIF. TR. DECANTING ACT 2015, *supra* note 26, § 12 cmt.

38. See VA. CODE ANN. § 64.2-779.8 (Repl. Vol. 2017). See also UNIF. TR. DECANTING ACT 2015, *supra* note 26, § 12 cmt.

39. VA. CODE ANN. § 64.2-779.8(C)(3) (Repl. Vol. 2017). An interest is vested if it is not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur. Included are (i) a current right to a mandatory distribution; (ii) a current right at least annually to receive income, a specified sum (such as an annuity), or a percentage of trust property value (such as a unitrust payment) or to withdraw such amounts; (iii) a presently exercisable general power of appointment; and (iv) a right to receive an ascertainable part of the trust property on termination. See *id.* § 64.2-779.8(A) (Repl. Vol. 2017); UNIF. TR. DECANTING ACT 2015, *supra* note 26, § 11 cmt.

40. VA. CODE ANN. § 64.2-779.8(C) (Repl. Vol. 2017).

41. *Id.* § 64.2-779.8(B), (D) (Repl. Vol. 2017).

42. See *id.* § 64.2-779.8(D), (E) (Repl. Vol. 2017).

43. See *id.* § 64.2-779.10 (Repl. Vol. 2017).

44. See *id.* §§ 64.2-779.11, -779.16 (Repl. Vol. 2017).

45. See *id.* §§ 64.2-779.13, -779.14 (Repl. Vol. 2017).

a trustee may not decant to a second trust that increases the trustee's compensation unless the change is approved by all of the qualified beneficiaries or by the court.⁴⁶ Similarly, a trustee may not add language in the second trust that provides greater relief from liability for the trustee's breach of trust, although the second trust may divide and reallocate fiduciary powers among multiple fiduciaries and relieve any of them from liability for the acts and omissions of another.⁴⁷ Lastly, decanting may not be used to limit a power to remove or replace the trustee unless approved by the person who holds the power.⁴⁸ If the change involves a power held by someone who has not consented, it must be approved by the qualified beneficiaries or by the court and the power must be given to another person.⁴⁹

The trustee must give written or electronic notice of its intent to exercise the decanting power to each settlor of the trust, qualified beneficiary, holder of a presently exercisable power to appoint trust property, person authorized to remove or replace the trustee, co-trustee, trust advisor or protector, person with an adverse interest who has the power to consent to revocation of the trust, and fiduciary of the first or second trust.⁵⁰ If the trust includes a charitable interest, the trustee must also notify the Attorney General.⁵¹ The notice must include copies of the first trust instrument and each proposed second trust instrument, and it must specify how the trustee intends to exercise the power and the proposed effective date for the exercise.⁵² The notice must be provided sixty days before the intended effective date unless all persons entitled to receive notice sign a waiver of the waiting period.⁵³

The trustee must exercise the decanting power in a signed record or writing that identifies both the first and second trusts and specifies which property will be held subject to their respective terms.⁵⁴

46. *See id.* § 64.2-779.13(A), (B) (Repl. Vol. 2017).

47. *See id.* § 64.2-779.14(A), (D) (Repl. Vol. 2017).

48. *See id.* § 64.2-779.15 (Repl. Vol. 2017).

49. *See id.*

50. *Id.* §§ 64.2-701 (definition of "record"), -779.5(C) (Repl. Vol. 2017).

51. *Id.* § 64.2-779.5(C) (Repl. Vol. 2017).

52. *Id.* § 64.2-779.5(E) (Repl. Vol. 2017).

53. *Id.* § 64.2-779.5(A), (F) (Repl. Vol. 2017).

54. *Id.* § 64.2-779.7 (Repl. Vol. 2017).

The trustee, a person entitled to notice, or another trust beneficiary may petition the court to (i) instruct the trustee as to the proposed decanting, (ii) appoint a special fiduciary to determine whether the decanting is appropriate, (iii) approve an exercise of the decanting power or determine that it was ineffective, (iv) provide instruction about other decantings, or (v) order other appropriate relief.⁵⁵ The trustee may also ask the court to approve a compensation increase or modify a provision for the trustee's removal.⁵⁶

E. *Fiduciary Access to Digital Assets*

The 2017 General Assembly replaced the little-used Privacy Expectation Afterlife and Choices Act, which was enacted with strong support from the digital industry in 2015, with the Uniform Fiduciary Access to Digital Assets Act ("UFADA").⁵⁷ UFADA is based on the 2015 revisions to a uniform act published by the Uniform Law Commission.⁵⁸ The statute expands the rules governing access to records of a digital account or the actual contents of the account by a fiduciary of the account user.⁵⁹ UFADA's approach represents a compromise between protecting the privacy of digital asset owners and enabling personal representatives to access the information they need in order to carry out their duties efficiently.⁶⁰

UFADA applies to the personal digital assets and accounts of any Virginia resident, and authorizes access by a fiduciary acting

55. *Id.* § 64.2-779.6(A) (Repl. Vol. 2017).

56. *Id.* § 64.2-779.6(B) (Repl. Vol. 2017).

57. Act of Feb. 20, 2017, ch. 80, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 64.2-116 to -132 (Repl. Vol. 2017)); Act of Feb. 17, 2017, ch. 33, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 64.2-116 to -132 (Repl. Vol. 2017)). For a discussion of the prior statute, see J. William Gray, Jr. & Katherine E. Ramsey, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 50 U. RICH. L. REV. 343, 201-06 (2015).

58. See REV. UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT (2015) (UNIF. LAW COMM'N 2015) [hereinafter REV. UNIF. FIDUCIARY ACCESS 2015], http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf (last visited Sept. 27, 2017).

59. *Cf. id.* at 1-2.

60. For the full text of the uniform law as revised in 2015, see REV. UNIF. FIDUCIARY ACCESS 2015, *supra* note 58.

under the resident's will or power of attorney; a personal representative of a deceased resident; or a conservator, guardian, or trustee for the resident.⁶¹

The account owner (or "user") may direct the person holding the digital assets in the account (or "custodian") whether and to whom to disclose some or all of the user's digital assets by any of the following means, listed in order of priority:⁶² (i) an online tool (separate from the account terms-of-service agreement) that allows the user to modify or delete a direction at any time;⁶³ (ii) the user's will, trust, power of attorney, or other written or electronic record;⁶⁴ or (iii) the terms-of-service agreement for the account.⁶⁵

To the extent the custodian is directed to disclose digital assets, it may choose to do so either by (i) granting to the person authorized by the user to administer the asset (the "designated recipient" selected by the user or, if none, the fiduciary) full access or partial access that is sufficient to perform the tasks with which the person is charged; or (ii) providing written or electronic copies of any digital asset that the user could have accessed.⁶⁶ The custodian does not need to disclose any digital asset that the user deleted and it may assess a reasonable administrative charge to cover the costs associated with the disclosure.⁶⁷ If the disclosure relates to some but not all of the digital assets and segregating the assets would impose an undue burden on the custodian, the custodian may seek relief from the court.⁶⁸

In the case of a deceased user's electronic communications for which disclosure has been authorized, the custodian may require a written request, a certified copy of the death certificate, a certified copy of the qualification letter, a small estate affidavit or court order confirming that the disclosure is proper, a copy of the document by which the user authorized disclosure (if not by way of an online

61. VA. CODE ANN. § 64.2-117 (Repl. Vol. 2017).

62. *Id.* §§ 64.2-116 (definitions of "user" and "custodian"), -118 (Repl. Vol. 2017).

63. *Id.* §§ 64.2-116 (definition of "online tool"), -118(A) (Repl. Vol. 2017).

64. *Id.* § 64.2-118(B) (Repl. Vol. 2017).

65. *Id.* § 64.2-118(C) (Repl. Vol. 2017).

66. *Id.* §§ 64.2-116, -120(A) (Repl. Vol. 2017).

67. *Id.* § 64.2-120(B), (C) (Repl. Vol. 2017).

68. *Id.* § 64.2-120(D) (Repl. Vol. 2017).

tool), and certain identifying information that links the account to the deceased user.⁶⁹

If the deceased user did not authorize disclosure of his or her electronic communications, the personal representative may still obtain a catalog of the electronic communications sent or received by the user and the user's other digital assets unless the user or a court has prohibited the disclosure.⁷⁰ The custodian may require information similar to that required for the disclosure of a deceased user's electronic communications, including a showing that the disclosure is reasonably necessary for the administration of the estate.⁷¹

Similar to the rules for a deceased user, in the case of a user who has expressly granted authority to an agent under a power of attorney over the content of the user's electronic communications (or, in the case of other digital assets, has not prohibited their disclosure), the custodian may require the agent to make a written request and provide specific evidence of the requester's authority before making the disclosure.⁷² The same rules generally apply to trustees holding a digital account created by another user and to conservators and guardians, except that the user's electronic communications may be disclosed unless expressly prohibited.⁷³

Not later than sixty days after receiving the required documentation, the custodian must disclose digital assets or terminate an account as requested unless the custodian is aware of any lawful access to the account after it received the fiduciary's request for disclosure or termination.⁷⁴ In all events, however, the custodian may obtain, or require a requester to obtain, a court order establishing the ownership of the account and/or the sufficiency of the

69. *Id.* § 64.2-121 (Repl. Vol. 2017).

70. *Id.* § 64.2-122 (Repl. Vol. 2017).

71. *See id.* §§ 64.2-121, -122 (Repl. Vol. 2017).

72. *See id.* §§ 64.2-123, -124 (Repl. Vol. 2017); *see also id.* § 64.2-1622(A)(8), (C) (Repl. Vol. 2017) (stating an agent's general authority under a power of attorney includes authority over the principal's digital assets other than the content of electronic communications, which must be expressly granted).

73. *See id.* §§ 64.2-125 to -128 (Repl. Vol. 2017).

74. *Id.* § 64.2-130 (Repl. Vol. 2017).

user's consent to the requested disclosure, along with other findings required by applicable law.⁷⁵ A custodian and its agents are immune from liability for good-faith acts or omissions in compliance with UFADA.⁷⁶

In addition to addressing when a third-party custodian must disclose a user's digital assets, UFADA details the extent of the fiduciary's legal duties and authority.⁷⁷ Specifically, a fiduciary has the same authority as the user except where the user has explicitly opted out.⁷⁸ The fiduciary must manage the user's digital assets in accordance with the same standards that apply to the management of another's tangible property, including the duties of care, loyalty, and confidentiality.⁷⁹ The fiduciary is also subject to the same terms of service and other laws applicable to the user, and may not use its authority to impersonate the user.⁸⁰ UFADA confirms that a fiduciary acting within the scope of its duties is considered an authorized user for purposes of any law prohibiting unauthorized computer access.⁸¹ This means that a fiduciary who has rightfully obtained the user's password may access the user's account without violating any laws against unauthorized access.⁸² If the fiduciary has authority over the user's property, it may freely access any digital asset that is not held by a custodian or subject to a terms-of-service agreement, such as digital art or recordings.⁸³ If that authority extends to the user's tangible property, the fiduciary may access any digital asset stored in the user's tangible personal property, such as files stored on a computer, smartphone, flash drive, or digital camera.⁸⁴

75. *Id.* § 64.2-130(E) (Repl. Vol. 2017).

76. *Id.* § 64.2-130(F) (Repl. Vol. 2017).

77. *See id.* § 64.2-129 (Repl. Vol. 2017).

78. *See* REV. UNIF. FIDUCIARY ACCESS 2015, *supra* note 58, § 15 cmt.

79. VA. CODE ANN. § 64.2-129(A) (Repl. Vol. 2017).

80. *Id.* § 64.2-129(B) (Repl. Vol. 2017).

81. *Id.* § 64.2-129(D) (Repl. Vol. 2017).

82. *See* REV. UNIF. FIDUCIARY ACCESS 2015, *supra* note 58, § 15 cmt.

83. VA. CODE ANN. § 64.2-129(C) (Repl. Vol. 2017).

84. *Id.* § 64.2-129(E) (Repl. Vol. 2017); *see also* REV. UNIF. FIDUCIARY ACCESS 2015, *supra* note 58, § 15 cmt.

F. *Non-Exoneration*

Ten years ago, the General Assembly enacted Virginia Code section 64.1-157.1, which changed the default rule for the treatment of debts secured by property that is subject to a specific bequest or devise.⁸⁵ Prior to the change, a beneficiary received a specific bequest or devise free of any debt, but many felt this was contrary to what most testators intended.⁸⁶ The revised statute reversed the presumption so that such property passes subject to the debt, without exoneration, unless a contrary intent is clearly set out in the will.⁸⁷ This approach created a problem for the personal representative, who is responsible for paying the decedent's debts. If the estate is closed and the specific beneficiary later fails to refinance or pay the debt in full, the personal representative could be held personally liable to the creditor.⁸⁸

To address this issue, section 64.2-531 (formerly section 64.1-157.1) was amended to authorize the personal representative either to secure the release of estate property from a lien or to proceed to sell the property in satisfaction of the debt.⁸⁹ To take advantage of this process, the personal representative must send a copy of the statute by certified mail to the creditor along with notice that there is no statutory right of exoneration for the debt.⁹⁰

The creditor may file a claim with the commissioner of accounts within one year after the representative qualified or six months after the representative gives the written notice.⁹¹ If no timely creditor claim is filed, the liability of the personal representative or surety will not exceed the estate assets that remain in the representative's possession and are available to apply to the debt

85. See J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 42 U. RICH. L. REV. 435, 447 (2008).

86. *Id.*

87. VA. CODE ANN. § 64.2-531(A) (Repl. Vol. 2017).

88. *Cf. id.* § 64.2-555 (Repl. Vol. 2017) (declaring that a personal representative is not personally liable for the decedent's debts if he or she "pays any legacy made in the will or distributes any of the estate of the decedent and a proper refunding bond . . . is filed and recorded").

89. Act of Feb. 21, 2017, ch. 139, 2017 Va. Acts __, __ (codified at VA. CODE ANN. § 64.2-531(B), (E) (Repl. Vol. 2017)); Act of Feb. 17, 2017, ch. 34, 2017 Va. Acts __, __ (codified at VA. CODE ANN. § 64.2-531(B), (E) (Repl. Vol. 2017)).

90. VA. CODE ANN. § 64.2-531(B) (Repl. Vol. 2017).

91. *Id.*

when the creditor demands payment from the personal representative.⁹² If the creditor files a timely claim, the personal representative has ninety days in which to give the beneficiary receiving the property written notice that the beneficiary must obtain a release of the claim from the creditor.⁹³ If the estate has not been released by the later of 180 days from the date of the notice to the beneficiary or one year from qualification, the personal representative may sell the property, apply the sale proceeds toward the claim, and distribute any excess proceeds to the beneficiary.⁹⁴ Any deficiency remains a debt of the estate.⁹⁵

G. *Debt Payment Priority*

Virginia Code section 64.2-528, which sets forth the order in which an insolvent decedent's debts are to be paid, has been amended by adding unpaid child support obligations in eighth place, after amounts held by the decedent as a fiduciary for others and before debts and taxes due to localities and municipal corporations.⁹⁶

H. *Life Insurance in Divorce*

New Virginia Code section 20-107.1:1 authorizes the court to address life insurance in a divorce decree.⁹⁷ Specifically, in connection with a spousal support or separate maintenance order, the court may order a party to (i) maintain a policy on the party's life that was purchased during the marriage, issued through the insured's employment, or within the insured's effective control; (ii) designate the other party as beneficiary of some or all of the policy death benefit while the insured is obligated to pay spousal support to the other party; (iii) allocate the premium cost between the parties;

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Act of Mar. 16, 2017, ch. 591, 2017 Va. Acts __, __ (codified at VA. CODE ANN. § 64.2-528(8) (Repl. Vol. 2017)).

97. Act of Apr. 5, 2017, ch. 797, 2017 Va. Acts __, __ (codified at VA. CODE ANN. § 20-107.1:1 (Supp. 2017)).

and/or (iv) assure the other party that that party is the named beneficiary and that the policy is in good standing.⁹⁸ The statute directs the court to consider all factors necessary to arrive at a fair order, including, but not limited to, the parties' age and health, their ability to pay premiums, the cost of the policy, prevailing insurance rates, and the term and amount of the spousal obligation.⁹⁹

I. *Life Insurance Information*

Two new Virginia Code sections authorize a funeral service provider to request, and an insurance company to provide, information about a decedent's life insurance policy.¹⁰⁰ The provider must submit the following to the insurer believed to have issued the policy: (i) a copy of the decedent's death certificate; (ii) evidence of the decedent's affiliation with a covered group if the inquiry relates to a group life policy; and (iii) written authorization for the request signed by the person designated to arrange for disposition of the decedent's remains, the agent named in the decedent's advance directive, the decedent's court-appointed guardian, or the next of kin.¹⁰¹

Upon receiving the request, the insurance company is authorized, but not required, to provide information about the existence of any life insurance policy that it or its affiliate issued on the decedent's life, as well as the names and contact information, if available, of any beneficiaries on record.¹⁰² The insurer does not have to provide information that is confidential or protected from disclosure by law.¹⁰³

If the policy is payable to someone other than the decedent's estate, the funeral service provider must make all reasonable efforts

98. VA. CODE ANN. § 20-107.1:1(A) (Supp. 2017).

99. *Id.* § 20-107.1:1(B) (Supp. 2017).

100. Act of Mar. 13, 2017, ch. 482, 2017 Va. Acts __, __ (codified at VA. CODE ANN. § 38.2-3117.01 (Cum. Supp. 2017); *id.* § 54.1-2818.5 (Cum. Supp. 2017)).

101. VA. CODE ANN. § 54.1-2818.5(A) (Cum. Supp. 2017).

102. *Id.* § 38.2-3117.01 (Cum. Supp. 2017).

103. *Id.*

to pass the information along to all beneficiaries within four calendar days of receiving it.¹⁰⁴ Before providing the information, the provider must inform the beneficiaries that they have no legal duty or obligation to pay the decedent's debts or obligations or the cost of funeral services.¹⁰⁵

J. *Commissioner's Fee for Statement in Lieu*

An amendment to Virginia Code section 64.2-1314 eliminates the commissioners' of accounts authorization to charge a seventy-five-dollar fee for reviewing and approving a personal representative's statement in lieu of settlement of accounts, or its notice of intent to file such a statement.¹⁰⁶

K. *Clerk's Fee for Paper Filing*

A clerk of a circuit court that maintains an electronic filing system may now charge five dollars to record every land record filed by paper.¹⁰⁷ Previously, the fee applied to each instrument recorded electronically, but that fee has now been eliminated.¹⁰⁸

104. *Id.* § 54.1-2818.5(B) (Cum. Supp. 2017).

105. *Id.* Despite this statutory prohibition, the authors have learned that at least a few funeral service providers are insisting that families assign the benefits to the provider before the funeral.

106. Act of Mar. 20, 2017, ch. 638, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 64.2-1314 (Repl. Vol. 2017)). While the amendment might be read to prohibit commissioners from charging any fee for reviewing those documents, the authors understand that its purpose was to remove the seventy-five-dollar statutory fee cap so that the fee for that service could be increased as part of a general fee increase approved earlier this year. Compare JUDICIAL COUNCIL OF VA., UNIFORM FEE SCHEDULE GUIDELINES FOR COMMISSIONERS OF ACCOUNTS 2 (2017), http://www.courts.state.va.us/courts/circuit/resources/coa_fee_schedule.pdf (last visited Sept. 27, 2017), with JUDICIAL COUNCIL OF VA., UNIFORM FEE SCHEDULE GUIDELINES FOR COMMISSIONERS OF ACCOUNTS 2 (2016), <http://www.fredericksburgva.gov/DocumentCenter/View/7181> (last visited Sept. 27, 2017).

107. Act of Mar. 3, 2017, ch. 289, 2017 Va. Acts __, __ (codified at VA. CODE ANN. § 17.1-258.3:1(B) (Cum. Supp. 2017)); Act of Feb. 20, 2017, ch. 90, 2017 Va. Acts __, __ (codified at VA. CODE ANN. § 17.1-258.3:1(B) (Cum. Supp. 2017)).

108. Compare VA. CODE ANN. § 17.1-258.3:1(A) (Cum. Supp. 2017), with *id.* § 17.1-258.3:1(A) (Supp. 2016).

L. *Electronic Filing of Fiduciary Returns*

Effective January 1, 2018, all estates and trusts must file estimated tax payments, annual income tax returns, and final payments using an electronic medium in a format to be prescribed by the Tax Commissioner.¹⁰⁹

M. *Adult Exploitation*

Two new 2017 laws provide greater protection for individuals who may be susceptible to financial exploitation. The first expands the definition of “adult exploitation” that must, or may, be reported to the local department of social services or the adult protective services hotline under Virginia Code section 63.2-1606.¹¹⁰ Before the change, only suspected “illegal use of an [older or incapacitated] adult or his resources” was required to be reported.¹¹¹ The revised definition now also includes any activities that are “unauthorized, improper or fraudulent” or that deprive the adult of rightful use or access, and applies to any “funds, property, benefits, resources or other assets,” not just the adult’s “resources.”¹¹²

The expanded definition now expressly applies to acts by anyone involved with adults or their assets, including a caregiver or fiduciary.¹¹³ An action is to be reported if it results in another’s “profit, benefit, or advantage,” or deprives the adult of rightful use of or access to the assets.¹¹⁴ Examples include: (i) intentionally breaching a fiduciary obligation to the adult’s detriment; (ii) neglect of the adult resulting from failure to use available financial resources; (iii) using undue influence, coercion, or duress to acquire, possess or control the adult’s financial resources or property; and (iv) forcing or coercing an adult to pay for goods or services or perform services for another’s profit, benefit, or advantage if the adult

109. Act of Apr. 28, 2017, ch. 836, item 275(K)(1)(e), 2017 Va. Acts __, __.

110. Act of Feb. 23, 2017, ch. 195, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 63.2-100 (Repl. Vol. 2017)).

111. VA. CODE ANN. § 63.2-100 (Cum. Supp. 2016) (definition of “adult exploitation”); see *id.* § 63.2-1603 (Cum. Supp. 2016) (definitions of “adult” and “incapacitated person”).

112. *Id.* § 63.2-100 (Repl. Vol. 2017).

113. *Id.*

114. *Id.* §§ 63.2-100, -1606(A) (Repl. Vol. 2017).

did not agree, or was tricked, misled, or defrauded into agreeing to do so.¹¹⁵

The second legislative change amends Virginia Code section 63.2-1605 to expand the reporting requirements for suspected instances of financial exploitation of an older or incapacitated adult.¹¹⁶ The amendment requires financial exploitation involving any amount to be reported to local law enforcement agencies.¹¹⁷ Previously, reporting was required only if the amount exceeded \$50,000.¹¹⁸

N. *Assistance with Advance Medical Directives*

Advance medical directives are legal documents, but Virginia lawmakers have tried to encourage their use by making a sample form available to the public.¹¹⁹ A 2017 amendment confirms that non-lawyers who distribute qualifying forms and certain others who assist the public with their completion no longer need to worry about being charged with the unauthorized practice of law.¹²⁰

Agents and employees of health care providers and “qualified advance directive facilitators” do not engage in the unauthorized practice of law when they distribute advance medical directive forms or provide technical advice, consultation, and assistance in completing and executing them.¹²¹ A person may become a qualified advance directive facilitator by completing a training program

115. *Id.* § 63.2-100 (Repl. Vol. 2017).

116. Act of Mar. 13, 2017, ch. 473, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 63.2-1605(C) (Repl. Vol. 2017)); Act of Mar. 13, 2017, ch. 459, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 63.2-1605(C) (Repl. Vol. 2017)).

117. VA. CODE ANN. § 63.2-1605(C) (Repl. Vol. 2017).

118. *Compare id.* § 63.2-1605(C), (H), (I) (Repl. Vol. 2017), *with id.* § 63.2-1605(C), (H), (I) (Cum. Supp. 2016).

119. *See id.* § 54.1-2984 (Repl. Vol. 2013 & Cum. Supp. 2017).

120. Act of Mar. 24, 2017, ch. 752, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 54.1-2982 (Repl. Vol. 2013 & Cum. Supp. 2017); *id.* §§ 54.1-2988.1, -2993.1 (Cum. Supp. 2017)); Act of Mar. 24, 2017, ch. 747, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 54.1-2982 (Repl. Vol. 2013 & Cum. Supp. 2017); *id.* §§ 54.1-2988.1, -2993.1 (Cum. Supp. 2017)).

121. VA. CODE ANN. § 54.1-2988.1(A) (Cum. Supp. 2017).

approved by the Department of Health and passing a written examination.¹²² In order to qualify, the training program must include instruction on the meaning of provisions of a directive and requirements for demonstrating competence in helping persons complete and execute the form.¹²³

Non-lawyers who do not satisfy the requirements to give technical advice and consultation may still provide ministerial assistance in completing or executing the form, such as reading it to a person, discussing the person's preferences, recording the person's answers on the form, and helping obtain necessary signatures.¹²⁴ The more limited protection does not apply to expressing an opinion on the legal effects of any item contained in the form or offering legal advice to the person.¹²⁵

In a related measure, the General Assembly also amended Virginia Code sections 32.1-325 and 63.2-501 to require state entities that receive Medicaid applications to provide those applicants with information about the purpose and benefits of advance medical directives and the procedure for making them.¹²⁶

O. *Reciprocity of Do Not Resuscitate Orders*

Virginia Code section 54.1-2987.1 was amended to confirm that a "Durable Do Not Resuscitate" order or similar document executed in another state according to its laws will be given the same legal effect as one executed in accordance with Virginia law.¹²⁷

P. *Capacity Determinations Under Advance Medical Directives*

The incapacity of an individual subject to an advance medical directive generally is determined by the attending physician, who

122. *Id.* § 54.1-2982 (Repl. Vol. 2013 & Cum. Supp. 2017); *id.* § 2993.1 (Cum. Supp. 2017).

123. *Id.* § 54.1-2993.1 (Cum. Supp. 2017).

124. *Id.* § 54.1-2988.1(B) (Cum. Supp. 2017).

125. *Id.*

126. *See* Act of Feb. 21, 2017, ch. 106, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 32.1-325(A)(9) (Repl. Vol. 2015 & Cum. Supp. 2017); *id.* § 63.2-501(C) (Repl. Vol. 2017)).

127. Act of Feb. 23, 2017, ch. 179, 2017 Va. Acts __, __ (codified at VA. CODE ANN. § 54.1-2987.1(C) (Repl. Vol. 2013 & Cum. Supp. 2017)).

must certify in writing upon personal examination of the patient that the patient is incapable of making an informed decision regarding health care; that determination is then reviewed and confirmed in writing by another physician or clinical psychologist.¹²⁸ The process must be followed prior to (or as soon as reasonably practicable after) providing, continuing, withholding, or withdrawing health care, and must be repeated no less frequently than every 180 days while the need for health care continues.¹²⁹

However, as of July 1, 2017, in the case of the patient's admission to a facility for mental health treatment, the incapacity determination may be made not only by the attending physician, but also by (i) a psychiatrist or licensed clinical psychologist, (ii) a licensed psychiatric nurse practitioner, (iii) a licensed clinical social worker, or (iv) a designee of the local community services board who has personally examined the patient.¹³⁰

Similarly, if the agent is to have the authority to make healthcare decisions over the declarant's protest, the directive must explicitly authorize the action; moreover, the declarant's capacity at the time the advance medical directive is made must be established contemporaneously in writing by the declarant's attending physician or a licensed clinical psychologist.¹³¹ The 2017 amendment expands the class of professionals who may make that attestation to include (i) other licensed physicians, (ii) licensed physician assistants, (iii) licensed nurse practitioners, (iv) licensed professional counselors, and (v) licensed clinical social workers who are familiar with the declarant.¹³²

128. VA. CODE ANN. § 54.1-2983.2(B) (Repl. Vol. 2013 & Cum. Supp. 2017).

129. *Id.*

130. Act of Mar. 13, 2017, ch. 474, 2017 Va. Acts __, __ (codified at VA. CODE ANN. § 54.1-2983.2(C) (Cum. Supp. 2017)); Act of Mar. 13, 2017, ch. 456, 2017 Va. Acts __, __ (codified at VA. CODE ANN. § 54.1-2983.2(C) (Repl. Vol. 2013 & Cum. Supp. 2017)).

131. VA. CODE ANN. § 54.1-2986.2(B)(1) (Cum. Supp. 2017).

132. Act of Mar. 13, 2017, ch. 474, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 54.1-2986.2(B)(1) (Cum. Supp. 2017)); Act of Mar. 13, 2017, ch. 456, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 54.1-2986.2(B)(1) (Cum. Supp. 2017)).

Q. *Amendment of Death Certificates*

Revisions to Virginia Code section 32.1-269.1 clarify the procedures for amending death certificates.¹³³ The State Registrar may change a death certificate based on an affidavit if the change relates to the spelling of the name of the decedent, the decedent's parent or spouse, or the informant; or to the decedent's sex, age, race, date or place of birth, citizenship, social security number, education, occupation, military status, date or place of death, or place of residence (if within the Commonwealth).¹³⁴ This is not a change from prior law.¹³⁵

However, other corrections, such as changing the decedent's name, marital status, or place of residence outside Virginia, or the name of the decedent's parent or spouse or the informant, may be made only by court order.¹³⁶ The decedent's surviving spouse or immediate family member, the attending funeral service licensee, or another reporting source may petition the circuit court where the decedent resided or the Circuit Court of the City of Richmond for an order to amend the death certificate.¹³⁷ If an applicant believes that a death certificate should be amended in some other particular, or if the State Registrar refuses to amend the certificate in response to an affidavit, the applicant may similarly petition the court in Richmond or in the jurisdiction where the applicant resides.¹³⁸ The petition must be served on the State Registrar and any person who provided information for the death certificate unless that person has provided an affidavit in support of the petition.¹³⁹ Unless the court finds that a hearing is necessary, it may enter an order without a hearing.¹⁴⁰

133. Act of Mar. 3, 2017, ch. 285, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 32.1-269.1 (Cum. Supp. 2017)); Act of Mar. 3, 2017, ch. 284, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 32.1-269.1 (Cum. Supp. 2017)).

134. VA. CODE ANN. § 32.1-269.1(C) (Cum. Supp. 2017).

135. Compare *id.* § 32.1-269.1(D) (Cum. Supp. 2017), with *id.* § 32.1-269.1(D) (Supp. 2016).

136. *Id.* § 32.1-269.1(D) (Cum. Supp. 2017).

137. *Id.*

138. *Id.* § 32.1-269.1(E) (Cum. Supp. 2017).

139. *Id.* § 32.1-269.1(D), (E) (Cum. Supp. 2017).

140. *Id.*

R. *Real Estate Taxes of Certain Surviving Spouses*

The 2017 General Assembly enacted legislation that authorizes localities to provide a real estate tax exemption for the primary residence of the surviving spouse of a law-enforcement officer, firefighter, search-and-rescue personnel, or emergency medical services provider who is killed in the line of duty.¹⁴¹ The individual must have died on or after April 8, 1972, in the line of duty as a direct or proximate result of performing his duty.¹⁴² The surviving spouse remains eligible for the exemption until death or remarriage.¹⁴³

The property must be the spouse's principal residence, and the exemption is transferable if the spouse moves from one principal residence to another.¹⁴⁴ Extended periods of residence in a hospital, nursing home, convalescent home or other facility for physical or mental care will not affect the spouse's eligibility for the exemption so long as the property is not used by or leased to others for consideration.¹⁴⁵

The exemption applies to a dwelling and up to one acre of land on which it is situated, but only to the extent that the assessed value of the dwelling does not exceed the average assessed value of homes in that locality on land zoned as single-family residential.¹⁴⁶ It is available whether the spouse owns the property outright, as a tenant for life, in a revocable trust over which the spouse holds a power of revocation, or in an irrevocable trust under which the spouse holds an estate for life or enjoys a continuing right of use or

141. Act of Feb. 24, 2017, ch. 248, 2017 Va. Acts __, __ (codified at VA. CODE ANN. §§ 58.1-3219.13 to -3219.16 (Repl. Vol. 2017)). The exemption is available to the surviving spouse of a law-enforcement officer; a jail officer; a regional jail or jail farm superintendent; a police chaplain; a firefighter or emergency medical services provider; a member of the Virginia National Guard or the Virginia Defense Force; an Alcoholic Beverage Control agent; a conservation officer or forest warden; a member or employee of certain state agencies; a municipal employee providing services in an emergency; a member of a hazmat response team, or a Motor Vehicles enforcement employee. See VA. CODE ANN. § 9.1-400 (Cum. Supp. 2017); *id.* § 58.1-3219.13 (Repl. Vol. 2017).

142. VA. CODE ANN. § 9.1-400 (Cum. Supp. 2017).

143. *Id.* § 58.1-3219.14(C) (Repl. Vol. 2017).

144. *Id.*

145. *Id.* § 58.1-3219.16 (Repl. Vol. 2017).

146. *Id.* § 58.1-3219.14(B), (D) (Repl. Vol. 2017).

support.¹⁴⁷ If other owners have interests in the property, the exemption is prorated.¹⁴⁸

II. CASES

A. *Authority of Agent to Change Principal's Estate Plan*

In *Reineck v. Lemen*, the Supreme Court of Virginia considered whether the language of a durable general power of attorney authorized the named agents to take steps that effectively bypassed the other beneficiaries of the principal's estate plan and caused the principal's entire estate to pass to the agents.¹⁴⁹

Originally, a married couple, Frank and Jane, executed reciprocal estate plans that left a portion of each spouse's estate to his or her own relatives and a portion to the other spouse's relatives.¹⁵⁰ Frank also executed a durable power of attorney that named Jane as his agent and his daughter, LaVerne Lemen, as Jane's successor.¹⁵¹ The power of attorney authorized the agent to "perform in a fiduciary capacity . . . anything of any character which I might do."¹⁵²

After Frank developed dementia, Jane amended her own estate documents to eliminate the share for his family, so that at her death her entire estate would pass to her relatives only.¹⁵³ Shortly after Jane's death (and shortly before Frank's), Lemen used her power of attorney to name herself and her brother as the sole beneficiaries of Frank's individual retirement account.¹⁵⁴ She also transferred Frank's other assets to two new trusts she created that

147. *Id.* § 58.1-3219.14(E) (Repl. Vol. 2017). The exemption is not available to a spouse who holds only a leasehold or term-of-years interest. *Id.*

148. *Id.* § 58.1-3219.14(F) (Repl. Vol. 2017).

149. 292 Va. 710, 713, 792 S.E.2d 269, 270 (2016).

150. *Id.* at 713–14, 792 S.E.2d at 271.

151. *Id.* at 714, 792 S.E.2d at 271.

152. *Id.* at 714, 792 S.E.2d at 271.

153. *Id.* at 715, 792 S.E.2d at 272.

154. The facts surrounding the change of account beneficiaries were not discussed in the court's opinion, but it may be inferred from the court's holding that Lemen made the change. *See id.* at 719–20, 792 S.E.2d at 274.

named herself and her brother as the sole remainder beneficiaries.¹⁵⁵

After Frank's death, one of Jane's relatives (and a beneficiary under her estate plan), William Reineck, sued Lemen, alleging that she had breached her fiduciary duties.¹⁵⁶ The trial court dismissed the suit, holding that Jane's relatives were contingent beneficiaries of Frank's estate plan and therefore lacked standing to bring the suit.¹⁵⁷ Reineck then secured appointment as curator of Frank's estate and filed a second suit in his fiduciary capacity, alleging breach of fiduciary duty and asking for imposition of a constructive trust.¹⁵⁸ The trial court granted summary judgment to Lemen and charged Reineck personally with Lemen's attorney's fees from both suits.¹⁵⁹

On appeal, Reineck argued that Lemen had exceeded her authority under the power of attorney by creating the new trusts and changing the beneficiary designation to eliminate the provisions for Jane's relatives.¹⁶⁰ Declaring that the power of attorney was unambiguous and should be strictly construed, the supreme court noted that the power of attorney gave Lemen broad powers to benefit Frank and his wife and descendants.¹⁶¹ The court first rejected Reineck's argument that Lemen's actions had to benefit everyone with a potential interest in Frank's original trust, finding instead that a benefit to any one or more of them was sufficient.¹⁶² It held that Lemen acted in Frank's best interests because her actions did not harm him during his lifetime, did not affect his concern for the welfare of his wife, who had predeceased him, and benefitted his children, as he had intended.¹⁶³ The court mentioned, but appeared to give no weight to, the inconsistency with Frank's pre-existing estate plan and instead concluded that the broad powers set forth

155. *Id.* at 715, 792 S.E.2d at 272.

156. *Id.* at 716, 792 S.E.2d at 272.

157. *Id.* at 716, 792 S.E.2d at 272.

158. *Id.* at 716, 792 S.E.2d at 272.

159. *Id.* at 716, 721-22, 792 S.E.2d at 272, 274.

160. *Id.* at 716, 720, 792 S.E.2d at 272, 274.

161. *Id.* at 716-17, 792 S.E.2d at 272-73.

162. *Id.* at 717-18, 792 S.E.2d at 273.

163. *Id.* at 718, 792 S.E.2d at 273.

in the document authorized Lemen to create and fund the new trusts.¹⁶⁴

The court employed a similar analysis to conclude that Lemen had the power to change the beneficiaries of Frank's individual retirement account, noting that the power of attorney authorized Lemen to exercise "all of the rights, privileges, elections, and options" that Frank possessed and that he obviously had the power to change beneficiaries.¹⁶⁵

In reversing the trial court's award of attorney's fees against Reineck personally, the supreme court found no statutory or contractual basis for departing from the normal rule that each party bears its own costs of litigation.¹⁶⁶ Charging fees of the second suit against Reineck personally was improper because he was not before the court in his personal capacity but instead only as curator; additionally, charging fees of the first suit was improper because that suit had already been concluded.¹⁶⁷

B. Will Drafter's Liability to Intended Beneficiary

Historically, Virginia has required strict privity of contract between the plaintiff and defendant for legal malpractice cases.¹⁶⁸ However, despite this long-established rule, the Supreme Court of Virginia found in *Thorsen v. Richmond Society for the Prevention of Cruelty to Animals* that a beneficiary may sue the drafting at-

164. *Id.* at 718–19, 792 S.E.2d at 273. The court seemed to find the change to have been warranted by Jane's departure from the couple's original "parallel" plan when she revised her own estate plan to exclude Frank's descendants. *Id.* at 718, 792 S.E.2d at 273.

165. *Id.* at 718, 720, 792 S.E.2d at 273–74. In reaching its conclusion, the court appears to have considered the broad grant of the general power to "do [all acts] of any character which I might do" as sufficient to satisfy the statutory requirement in Virginia Code section 64.2-1622(A) that the power to change beneficiaries be expressly granted. *See* VA. CODE ANN. § 64.2-1622(A) (Repl. Vol. 2017); *Reineck*, 292 Va. at 720, 792 S.E.2d at 274. The court's construction of the statutory requirement is contrary to the drafters' comments to the Uniform Power of Attorney Act (on which the Virginia statute is based), which provide that "the purpose of [Virginia Code section 64.2-1622(A)] is to make clear that authority for these acts may not be inferred from a grant of general authority." *See* UNIF. POWER OF ATT'Y ACT (2006) art. 2 cmt. (UNIF. LAW COMM'N 2006), http://www.uniformlaws.org/shared/docs/power%20of%20attorney/UPOAA_2011_Final%20Act_2017jan30.pdf (last visited Sept. 27, 2017).

166. *Reineck*, 292 Va. at 721, 792 S.E.2d at 275.

167. *Id.* at 723–24, 792 S.E.2d at 276.

168. *See, e.g., Johnson v. Hart*, 279 Va. 617, 624–25, 692 S.E.2d 239, 243 (2010).

torney for malpractice if he or she shows that the attorney and client “clearly and definitely intended” to confer a benefit upon the beneficiary.¹⁶⁹

In 2003, the testatrix, Alice Dumville, engaged an attorney, James Thorsen, to draft a will that would leave her entire estate to the Richmond Society for the Prevention of Cruelty to Animals (“RSPCA”) if her mother did not survive her.¹⁷⁰ The parties had no written contract, but Thorsen admitted he understood that her goal was to benefit the RSPCA.¹⁷¹ The will he drafted, however, left only Dumville’s tangible property to the charity; her residuary estate passed to her heirs by intestacy.¹⁷²

The RSPCA sued Thorsen for “breach of contract-professional negligence,” arguing that it was a third-party beneficiary of the testatrix’s contract with him.¹⁷³ On appeal from the trial court’s ruling in favor of the RSPCA, Thorsen argued that a third-party beneficiary may recover for breach of contract only under Virginia Code section 55-22, which refers to beneficiaries under an “instrument” and therefore does not apply to beneficiaries of oral contracts.¹⁷⁴ The supreme court held, however, that the statute, being silent as to oral contracts, does not abrogate the common law rule that anyone for whose benefit a contract is made may sue upon it.¹⁷⁵ The court also declared that while the Statute of Frauds, codified at Virginia Code section 11-2, requires certain types of contracts to be in writing, it does not generally prohibit third-party beneficiaries from suing on oral contracts.¹⁷⁶

The court noted that an action for legal malpractice, “while sounding in tort, is an action for breach of contract.”¹⁷⁷ It distinguished previous decisions in which third parties had not been permitted to maintain a malpractice claim against a will drafter by

169. 292 Va. 257, 269, 284, 786 S.E.2d 453, 460, 468 (2016).

170. *Id.* at 262–63, 786 S.E.2d at 457.

171. *Id.* at 284, 786 S.E.2d at 468.

172. *Id.* at 263, 786 S.E.2d at 457.

173. *Id.* at 263, 786 S.E.2d at 457.

174. *Id.* at 264–65, 786 S.E.2d at 458.

175. *Id.* at 265–66, 786 S.E.2d at 458–59.

176. *Id.* at 266, 786 S.E.2d at 459.

177. *Id.* at 269, 786 S.E.2d at 460 (quoting *Oleyar v. Kerr*, 217 Va. 88, 90, 225 S.E.2d 398, 400 (1976)).

claiming to be beneficiaries of the testator's estate rather than the contract for legal services or claiming to be assignees of the testator's contractual claim.¹⁷⁸ The court saw no reason to treat the intended beneficiaries of a contract for legal services differently from the beneficiaries of a contract for other professional services, whom it previously had allowed to bring a third-party claim.¹⁷⁹

The court found that the viability of a third-party claim in this context did not depend on being able to identify the specific party to be benefitted when the contract was made.¹⁸⁰ Accordingly, a residuary or contingent beneficiary, such as the RSPCA, could bring a claim as long as it could show that it was a "clearly and definitely intended" beneficiary of the will.¹⁸¹

In addressing Thorsen's statute of limitations plea in bar, the court observed that some injury must occur to give rise to a cause of action and that a testamentary beneficiary cannot sustain any injury during a testator's lifetime because the testator may change his will at any time.¹⁸² The three-year statute of limitations on contract claims therefore cannot begin to run as to the third-party beneficiaries of a will until the cause of action accrues, at the testator's death.¹⁸³

The court found no error in the trial court's finding that Dumville intended to benefit the RSPCA and that, by accepting the engagement, Thorsen agreed to undertake that obligation.¹⁸⁴ It therefore affirmed the judgment of the trial court that the RSPCA, as a clearly and definitely identified third-party beneficiary of the contract between Dumville and Thorsen, could maintain a malpractice action against Thorsen.¹⁸⁵

178. See *id.* at 269–72, 786 S.E.2d at 460–62 (discussing *Copenhaver v. Rogers*, 238 Va. 361, 384 S.E.2d 593 (1989); *Ward v. Ernst & Young*, 246 Va. 317, 435 S.E.2d 628 (1993); *Johnson v. Hart*, 279 Va. 617, 692 S.E.2d 239 (2010)).

179. *Id.* at 271, 786 S.E.2d at 461–62 (discussing *Ward*, 246 Va. 317, 435 S.E.2d 628).

180. *Id.* at 276, 786 S.E.2d at 464.

181. *Id.* at 275–76, 786 S.E.2d at 463–64.

182. *Id.* at 278, 786 S.E.2d at 465.

183. *Id.* at 278, 786 S.E.2d at 465.

184. *Id.* at 282, 284, 786 S.E.2d at 467–68.

185. *Id.* at 284, 786 S.E.2d at 468–69.

A vigorous dissent argued the majority's reasoning had effectively abolished the long-standing requirement of privity of contract in all legal malpractice actions.¹⁸⁶ While acknowledging the need for attorneys to be held accountable, the dissent observed that the privity rule protects attorneys against the potential for conflicting duties owed to clients and third parties and against potential liability that is both uncertain in scope and amount and indefinite in duration.¹⁸⁷ The dissent also speculated that those prospects might deter attorneys from accepting estate planning work, making it more difficult for the public to obtain needed legal services.¹⁸⁸ Calling the majority decision a "radical departure from the existing law," the dissent concluded that such a change should be a policy decision for the General Assembly, not the court.¹⁸⁹

For a discussion of the Virginia General Assembly's response to the *Thorsen* decision, see Part I.B above.¹⁹⁰

C. *Suit by Individual Subject to Adult Guardianship*

In *Lopez-Rosario v. Habib*, the court considered whether an adult with a court-appointed guardian could file a medical malpractice suit in her own name.¹⁹¹ The plaintiff's parents had previously been appointed as her co-guardians.¹⁹² However, a medical malpractice suit was later filed on behalf of the plaintiff in her own name.¹⁹³ The trial court sustained the defendant's plea in bar arguing that, because the plaintiff had court-appointed guardians, she could not file suit under her own name.¹⁹⁴

On appeal, the Supreme Court of Virginia noted that a guardian may be appointed to attend to all the personal affairs of an incapacitated person or for more limited purposes.¹⁹⁵ Declaring that the

186. *Id.* at 284–86, 786 S.E.2d at 469 (McClanahan, J., dissenting).

187. *Id.* at 286–89, 786 S.E.2d at 470–71.

188. *Id.* at 288, 786 S.E.2d at 471.

189. *Id.* at 290–91, 786 S.E.2d at 472.

190. *See supra* Part I.B.

191. 291 Va. 293, 295, 785 S.E.2d 214, 214 (2016).

192. *Id.* at 295, 785 S.E.2d at 214.

193. *Id.* at 296, 785 S.E.2d at 215.

194. *Id.* at 296, 785 S.E.2d at 215.

195. *Id.* at 298, 785 S.E.2d at 216.

language in the circuit court order appointing the guardian is controlling, the supreme court noted that the order in this instance did not specify any limitations, effectively granting all of the authority that a court may vest in a guardian, including the authority and obligation to prosecute lawsuits on the ward's behalf.¹⁹⁶ Having held under a previous version of the guardianship statute that a ward may not sue in his or her own name, the court affirmed the lower court judgment granting the plea in bar on the basis that the plaintiff lacked standing to file the suit.¹⁹⁷

D. *Imposition of Constructive Trust*

The court in *Bank of Hampton Roads v. Powell* considered whether a court could impose a constructive trust on one subdivision lot after a developer breached its contract to convey a different lot to the plaintiff.¹⁹⁸ The plaintiff, Ethel Powell, had sold her property to the developer in exchange for cash and a specifically identified lot within the anticipated subdivision.¹⁹⁹ When the developer conveyed that lot to a third party instead, Powell sued the developer, the lot purchaser, and others for breach of contract and fraudulent conveyance and asked the court to impose a constructive trust on the promised lot.²⁰⁰ After Powell settled with the lot purchaser and released her claim to the original lot, the trial court imposed a constructive trust in her favor on the only unsold lot remaining in the subdivision.²⁰¹

On appeal, the supreme court observed that a constructive trust is an equitable remedy designed to prevent fraud or injustice.²⁰² To benefit from such a trust, however, a claimant's interest must be "distinctly traced" into the property that is made the subject of the trust.²⁰³ Powell's contract was for a particular lot, and since land is

196. *Id.* at 299, 785 S.E.2d at 216–17.

197. *Id.* at 297, 299–300, 785 S.E.2d at 215, 217 (citing *Cook v. Radford Comm. Hosp.*, 260 Va. 443, 451, 536 S.E.2d 906, 910 (2000)).

198. 292 Va. 10, 11, 785 S.E.2d 788, 789 (2016).

199. *Id.* at 12, 785 S.E.2d at 789.

200. *Id.* at 12–13, 785 S.E.2d at 789.

201. *Id.* at 13, 785 S.E.2d at 789.

202. *Id.* at 15, 785 S.E.2d at 790.

203. *Id.* at 15, 785 S.E.2d at 791 (citing *Crestar Bank v. Williams*, 250 Va. 198, 204, 462 S.E.2d 333, 335 (1995)).

not fungible, the supreme court ruled that the trial court erred in imposing a constructive trust on a different lot.²⁰⁴

E. *Possibility of Reverter*

In *Hamm v. Hazelwood*, the court examined the enforceability of a provision in a deed of gift creating a possibility of reverter.²⁰⁵ Dorothy Hamm conveyed a one-half interest in property to her sister via a deed of gift that declared the property would automatically revert to Hamm if her sister's son ever acquired any interest in it.²⁰⁶ When the donee, Hamm's sister, later died intestate, her son received a share in the property as an heir in violation of the deed provision, and the estate's administrator sought the court's guidance as to the validity of the possibility-of-reverter provision.²⁰⁷ The circuit court responded by declaring that the possibility-of-reverter provision in the deed was void as an impermissible restraint on alienation.²⁰⁸

On appeal by Hamm's successors, the supreme court cited two common law property rules. The first is that the power to convey property cannot be plenary unless the owner can limit the conveyance powers of future owners.²⁰⁹ The second is that certain restraints on conveyance are so broad as to be unreasonable.²¹⁰ The court noted that these rules generally have been applied to find that a restraint on alienation is void if it applies generally as to time and person, but not if it is limited in duration and limited as to the number of persons to whom conveyance is prohibited.²¹¹ The court found that the restraint in Hamm's deed was of the latter type, applying only to a single individual (her sister's son) and for a limited period (his lifetime).²¹² It therefore overruled the circuit

204. *Id.* at 16–17, 785 S.E.2d at 791.

205. 292 Va. 153, 156, 787 S.E.2d 144, 146 (2016).

206. *Id.* at 156, 787 S.E.2d at 146.

207. *See id.* at 157, 787 S.E.2d at 146.

208. *See id.* at 157, 787 S.E.2d at 146.

209. *Id.* at 157–58, 787 S.E.2d at 147.

210. *Id.* at 158, 787 S.E.2d at 147.

211. *Id.* at 159–60, 787 S.E.2d at 147–48.

212. *Id.* at 162, 787 S.E.2d at 149.

court and held the possibility-of-reverter provision in Hamm's deed to be enforceable.²¹³

F. *Ownership of Engagement Ring After Breakup*

In *McGrath v. Dockendorf*, the court considered whether Virginia's "heart balm" statute, Virginia Code section 8.01-220, authorizes an action in detinue to recover an engagement ring after the engagement is ended.²¹⁴

After a broken engagement, the disappointed suitor, Dockendorf, brought an action in detinue to recover the \$26,000 diamond ring he had given his fiancée, McGrath.²¹⁵ She demurred, arguing that his action was precluded by the "heart balm" statute, which prohibits civil actions for alienation of affection, breach of promise to marry, or criminal conversation.²¹⁶ The trial court, however, viewed the ring as a conditional gift and held that the statute prohibited only the three specified types of actions and not a common law suit to recover the gift.²¹⁷

On appeal, McGrath continued to maintain that the statute controlled, arguing that an action to recover an engagement ring is equivalent to an action for breach of promise to marry and therefore prohibited by the "heart balm" statute.²¹⁸ The court disagreed, observing that a detinue action is limited in scope and offers limited relief—the return of the ring or its value—while the actions prohibited by the statute involve any number of financial and social considerations and imprecise measures of damages.²¹⁹ In support of its conclusion, the court noted that it had authorized a common law cause of action to recover a ring or equivalent value almost three decades before the "heart balm" statute was enacted.²²⁰ The court observed that the General Assembly was

213. *Id.* at 164, 787 S.E.2d at 150–51.

214. 292 Va. 834, 836, 793 S.E.2d 336, 337 (2016).

215. *Id.* at 836, 793 S.E.2d at 337.

216. *Id.* at 836, 838–39, 793 S.E.2d at 337–38.

217. *Id.* at 837, 839, 793 S.E.2d at 337–38.

218. *Id.* at 838–39, 793 S.E.2d at 338.

219. *Id.* at 840, 793 S.E.2d at 339.

220. *Id.* at 838, 793 S.E.2d at 338 (citing *Pretlow v. Pretlow*, 177 Va. 524, 555, 14 S.E.2d 381, 388 (1941)).

deemed to know of that judicial precedent and could have worded that statute to unequivocally bar the underlying cause of action if it had wished.²²¹

G. *Undue Influence in Procuring Lifetime Gift*

In *Gelber v. Glock*, the executors of the estate of an elderly cancer patient, Beverly Gelber, continued her challenge to the validity of transfers made shortly before her death, alleging undue influence and fraud by one of her children.²²² Gelber's estate plan had divided her estate equally among her five children.²²³ While hospitalized with terminal cancer, however, she signed a deed of gift and bill of sale that conveyed her home and its contents to one daughter, Meryl Glock.²²⁴ Within a month, Gelber disavowed the transfers both orally and in writing and filed a complaint against Glock seeking rescission of the transfers.²²⁵ Gelber's executors pursued the claim after her death.²²⁶

The trial court ruled that the bill of sale, which Gelber signed in her individual capacity, was effective even though it related to property she had previously transferred to herself, as trustee of a revocable trust.²²⁷ It also struck the executors' evidence as to all claims, ruling that Gelber's disavowals could not be considered.²²⁸

On appeal, the supreme court confirmed that the bill of sale was effective.²²⁹ Gelber had retained the power to revoke prior conveyances to her trust by notifying the trustee in writing, and the court found she had substantially complied with the notice requirement by executing an instrument conveying the property to Glock.²³⁰

However, the supreme court overturned the lower court's decision to exclude evidence of Gelber's disavowals of the transfers,

221. *Id.* at 840–41, 793 S.E.2d at 339.

222. 293 Va. 497, 503, 800 S.E.2d 800, 804 (2017).

223. *Id.* at 504, 800 S.E.2d at 804.

224. *Id.* at 504, 800 S.E.2d at 804.

225. *Id.* at 504, 800 S.E.2d at 804.

226. *Id.* at 504–05, 800 S.E.2d at 804–05.

227. *Id.* at 505, 800 S.E.2d at 805.

228. *Id.* at 505, 800 S.E.2d at 805.

229. *Id.* at 508–09, 800 S.E.2d at 806–07.

230. *Id.* at 508, 800 S.E.2d at 806.

agreeing with the executors that the “Dead Man’s statute,” Virginia Code section 8.01-397, provided an exception to the hearsay rule because Gelber was unavailable and the declarations, though not contemporaneous with the transfers, were “relevant to the matter in issue.”²³¹

The court found that the executors’ evidence of Gelber’s “great weakness of mind” and the “grossly inadequate consideration” or suspicious circumstances surrounding the transfers was sufficient to establish a presumption of undue influence.²³² It found that evidence of Glock’s interactions with her mother could show a confidential relationship that would also raise the presumption of undue influence.²³³ In addition, a prima facie case of fraud could arise from evidence that Glock made misrepresentations of material fact or false promises to Gelber in order to induce her to convey the home and contents to Glock.²³⁴ For these reasons, the court reversed the trial court’s exclusion of the executors’ evidence and remanded the case for a new trial.²³⁵

CONCLUSION

The 2017 Session of the Virginia General Assembly reaffirmed principles of legal malpractice and real estate conveyancing that had been called into question by recent opinions of the Supreme Court of Virginia. The General Assembly also enacted new rules that empower trustees of certain irrevocable trusts to revise trust terms without approval from a court or trust beneficiaries. It expanded and updated fiduciaries’ statutory rights to deal with digital assets. Practitioners should study these new systems so as to take advantage of the planning opportunities they may present.

Legislation also gave personal representatives a way to deal with encumbrances on a decedent’s assets, and refined several other rules relating to estate administration, medical directives, and financial exploitation of vulnerable adults. It also expanded available real estate tax exemptions for surviving spouses of law

231. *Id.* at 512, 800 S.E.2d at 809.

232. *Id.* at 530, 800 S.E.2d at 818.

233. *Id.* at 529–30, 800 S.E.2d at 818.

234. *Id.* at 530–32, 800 S.E.2d at 818–20.

235. *Id.* at 535–36, 800 S.E.2d at 821–22.

enforcement officers and first responders. The amendments and clarifications should prove useful in their specific areas.

In terms of case law, the *Reineck* decision confirmed that an agent need not be bound by the principal's existing estate plan when making changes to asset titles. The *Lopez-Rosario* decision highlighted the effects of adult guardianships, and the *Powell* decision reminded practitioners of the limits of the constructive trust doctrine. *Hamm* explored the proper use of reverter clauses in deeds; *Gelber* emphasized the facts-and-circumstances nature of undue influence claims, while suggesting a substantial compliance test for settlor/trustees of revocable trusts; and *McGrath* shed new light on the age-old question "whose ring is it, anyway?"