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Wills, Trusts, and Estates

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WILLS, TRUSTS, AND ESTATES

J. William Gray, Jr. *
Katherine E. Ramsey **

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INTRODUCTION

The 2019 Virginia General Assembly did not enact any major new legislation, but it did pass several significant amendments.¹ Among the most useful was an amendment to the Virginia Uniform Transfers to Minors Act which extended the maximum age for custodianships from twenty-one to twenty-five. The legislature also decided to cease imposing income taxes on estates and trusts whose sole connection to the Commonwealth is that they are being administered here. It responded to two recent court cases involving the required execution formalities for leases and the right to award attorneys' fees in actions involving an agent's breach of fiduciary duty under a power of attorney. Among other legislative actions, the General Assembly modernized the recordation tax exemption for certain deeds of distribution; dealt with issues affecting Virginia's small estate, wrongful death, and property tax exemption statutes; made it easier for financial institutions to combat financial exploitation of the elderly; strengthened the enforcement of reporting requirements for guardians; and protected circuit court clerks who disclose probate tax return information to the commissioner of accounts or who destroy wills they have been holding for 100 years or more.

For its part, the Supreme Court of Virginia handed down six decisions addressing the presumption of undue influence, the attestation requirements and principles of construction applicable to wills, the legal effect of naming an estate or trust (rather than the fiduciary) as the sole party to a suit, the application of Virginia's long-arm statute in an elder abuse case, and the legal requirements for execution of a lease with a term of five years or more.

1. Except where specifically noted, all 2018 legislation summarized in this Article became effective July 1, 2019.

I. LEGISLATION

A. “Age 25” UTMA Custodianships

Donors who wish to make gifts to minors often use the Virginia Uniform Transfers to Minors Act (“UTMA”).² UTMA assets generally must be distributed to the minor beneficiary at age eighteen,³ but the donor may delay the required distribution until the beneficiary’s twenty-first birthday simply by adding “(21)” to the title when transferring the assets to the UTMA custodian.⁴ The holder of a power of appointment may exercise it in favor of a minor in the same manner,⁵ as may an executor or a trustee if the will or trust instrument expressly authorizes them to do so.⁶

Attorneys are often asked if there is any way to delay the required distribution until the beneficiary is even older. One answer is to have the custodian use the UTMA assets to create a “qualified minor’s trust” under section 2503(c) of the Internal Revenue Code.⁷ The terms of such a trust may extend the vesting age as the custodian thinks best, provided the beneficiary is given at least a one-time limited right of withdrawal at age twenty-one.⁸ However, an experienced trusts and estates attorney is needed to draft a qualified minor’s trust, and the trustee must file annual income tax returns.⁹ In many cases, these additional costs are prohibitive.

To fill the gap, the General Assembly has chosen to follow the lead of other states that have amended their UTMA statutes to allow transferors to specify a later UTMA age.¹⁰ For custodianships established under Virginia’s UTMA on or after July 1, 2019,

2. See VA. CODE ANN. §§ 64.2-1900 to -1922 (Repl. Vol. 2017 & Cum. Supp. 2019).

3. *Id.* § 64.2-1919(A)(1) (Cum. Supp. 2019).

4. *Id.* § 64.2-1908(D) (Cum. Supp. 2019).

5. *Id.* § 64.2-1903 (Repl. Vol. 2017).

6. *Id.* § 64.2-1904 (Repl. Vol. 2017). Other fiduciaries, including an executor or trustee under an instrument that does not include an express authorization, may also make transfers under UTMA, but their powers are more limited and are not affected by the 2019 legislation. See *id.* § 64.2-1905 (Repl. Vol. 2017).

7. See VA. CODE ANN. § 64.2-1900 (Repl. Vol. 2017) (definition of “qualified minor’s trust”); *id.* § 64.2-1913(B) (Repl. Vol. 2017).

8. This right of withdrawal is necessary to qualify the original transfer for the federal gift tax annual exclusion. See I.R.C. § 2503(c).

9. See generally I.R.C. §§ 6011, 6012(a)(4).

10. See, e.g., Act of Mar. 5, 1990, ch. 11, § 2, 1990 Alaska Sess. Laws (codified as amended at ALASKA STAT. § 13.46.195); Act of June 11, 2015, ch. 140, § 3, 2015 Fla. Laws 909, 910 (codified as amended at FLA. STAT. § 710.123); Act of Jan. 4, 2017, ch. 432, 2016 Ohio Laws (codified as amended at OHIO REV. CODE ANN. § 5814.09 (LexisNexis)); Act of

the donor may select the beneficiary's twenty-fifth birthday as the final distribution date rather than eighteen or twenty-one, provided the UTMA account is established before the individual reaches age twenty-one.¹¹ The restriction is imposed at the time of transfer by including the parenthetical "(25)" after the UTMA reference.¹² As with prior law, a personal representative or trustee may also use the "(25)" designation if authorized by the governing will or trust.¹³

To qualify "UTMA (25)" gifts for the federal gift tax annual exclusion, the minor beneficiary must have a right to withdraw the custodial property, beginning thirty days before his or her twenty-first birthday and ending thirty days after the later of (1) that birthday; or (2) the date on which the custodian gives the beneficiary written notice of the withdrawal right.¹⁴

B. *Definition of Resident Trust for Income Tax Purposes*

Virginia imposes an income tax on all resident estates and trusts.¹⁵ A "resident estate or trust" includes estates of Virginia domiciliaries, as well as testamentary and inter vivos trusts created by, or holding property of, Virginia domiciliaries.¹⁶ However, as of July 1, 2019, the definition no longer includes estates and trusts whose only connection to the Commonwealth is that they are being administered in Virginia.¹⁷ Fiduciaries of estates and trusts affected by this legislative change should consider filing a final part-year state return for 2019.

May 30, 2001, ch. 244, § 2, 2001 Or. Laws 532, 532 (codified as amended at OR. REV. STAT. § 126.872); Act of June 12, 1995, ch. 513, 1995 Tenn. Pub. Acts 916 (codified as amended at TENN. CODE ANN. § 35-7-121); Act of Mar. 24, 2006, ch. 204, § 8, 2006 Wash. Sess. Laws 945, 951 (codified as amended at WASH. REV. CODE ANN. § 11.114.200).

11. Act of Mar. 18, 2019, ch. 527, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 64.2-1908(E), -1919 (Cum. Supp. 2019)).

12. VA. CODE ANN. § 64.2-1908(E) (Cum. Supp. 2019).

13. *Id.* § 64.2-1904 (Repl. Vol. 2017).

14. *Id.* § 64.2-1919(B) (Cum. Supp. 2019); *cf.* I.R.C. § 2503(c).

15. VA. CODE ANN. §§ 58.1-360, -361 (Repl. Vol. 2017).

16. *Id.* § 58.1-302 (Cum. Supp. 2019).

17. Act of Mar. 5, 2019, ch. 192, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-302 (Cum. Supp. 2019)); Act of Feb. 15, 2019, ch. 23, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-302 (Cum. Supp. 2019)).

C. *Effect of Leasehold Conveyance by Non-Deed*

In a direct response to the holding in *Game Place, L.L.C. v. Fredericksburg 35, LLC*,¹⁸ the General Assembly declared that a lease agreement or other writing conveying a nonfreehold interest in land is valid and enforceable even if the conveyance is not in the form of a deed.¹⁹ The rule applies to all such writings in effect as of, or entered into after, February 13, 2019, the day the Governor signed the legislation.²⁰

D. *Attorney Fees Under Power of Attorney Act*

Another legislative response to a recent court decision may be found in new subsection E to Virginia Code section 64.2-1614. The successful plaintiffs in *Mangrum v. Chavis*, a breach-of-duty suit against an agent under a durable general power of attorney, were denied recovery of their legal fees from the agent under the Virginia Uniform Power of Attorney Act (“UPOAA”).²¹ To avoid this outcome in the future, the new legislation provides that, for proceedings begun on or after July 1, 2019, a court may award costs and expenses, including reasonable attorney fees, “as justice and equity may require” to any party in a case involving the breach of an agent’s fiduciary duty under the UPOAA.²² It may require those amounts to be paid by a specified party or from the principal’s property.²³

E. *Recordation Tax on Deeds of Distribution*

A long-standing exemption from recordation taxes under Chapter 8 of Virginia Code Title 58.1 applies to “deeds of distribution,” i.e., deeds that transfer property from an estate or trust to the beneficiary or beneficiaries entitled to the property under the terms of

18. 295 Va. 396, 813 S.E.2d 312 (2018). For a discussion of the *Game Place, L.L.C.* case, see *infra* Part II.F.

19. Act of Feb. 19, 2019, ch. 49, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 55-2, -57, -76, -77, -79, 58.1-807(B) (Cum. Supp. 2019)); Act of Feb. 13, 2019, ch. 11, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 55-2, -57, -76, -77, -79, 58.1-807(B) (Cum. Supp. 2019)).

20. Ch. 49, 2019 Va. Acts at __; ch. 11, 2019 Va. Acts at __.

21. See *Mangrum v. Chavis*, No. 160782, 2018 Va. Unpub. LEXIS 4, at *11–12 (Mar. 1, 2018) (unpublished decision).

22. Act of Mar. 18, 2019, ch. 520, 2019 Va. Acts at __, __ (codified as amended at VA. CODE ANN. § 64.2-1614(E) (Cum. Supp. 2019)).

23. *Id.* ch. 520, 2019 Va. Acts at __.

the will or trust.²⁴ The 2019 General Assembly broadened and clarified this exemption for deeds made on or after July 1, 2019.²⁵

The amended exemption continues to cover deeds from a decedent's personal representative to fulfill a devise or bequest and deeds from the trustee of a decedent's trust to beneficiaries in accordance with trust terms at the decedent's death.²⁶ In addition, it also now applies to (1) deeds from trustees under a deed of trust to the original beneficiaries; (2) deeds pursuant to the exercise of a power of appointment; and (3) deeds pursuant to the exercise of a trustee's decanting power under the Uniform Trust Decanting Act.²⁷ To qualify for the exemption, the deed must state on its front page that it is a deed of distribution.²⁸

F. *Delivery of Small Asset*

In 2013, the Virginia Small Estate Act²⁹ was amended to permit the designated successor under a small estate affidavit to cash checks and sign over other negotiable instruments that qualify under the statute as small assets.³⁰ However, many banks and other financial institutions, concerned about their liability under other provisions of the Virginia Code, were reluctant to comply with the designated successor's request.³¹

To facilitate the use of small estate affidavits, Virginia Code section 64.2-601(E) has been amended to provide that when a designated successor with a proper small estate affidavit endorses or negotiates a check or other negotiable instrument payable to the decedent or his or her estate, the financial institution accepting

24. See VA. CODE ANN. § 58.1-811(A)(13) (Cum. Supp. 2018).

25. Act of Mar. 21, 2019, ch. 757, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-811(K) (Cum. Supp. 2019)).

26. See VA. CODE ANN. § 58.1-811(K) (Cum. Supp. 2019).

27. *Id.* (citing VA. CODE ANN. §§ 64.2-779.1 to -779.25 (Repl. Vol. 2017 & Cum. Supp. 2019)).

28. *Id.*

29. VA. CODE ANN. §§ 64.2-600 to -605 (Repl. Vol. 2017 & Cum. Supp. 2019).

30. Act of Mar. 5, 2013, ch. 68, 2013 Va. Acts 125, 125 (codified as amended at VA. CODE ANN. § 64.2-601(E) (Cum. Supp. 2013)).

31. See, e.g., VA. CODE ANN. §§ 8.3A-403, -417, -420 (Repl. Vol. 2015) (unauthorized signature on financial instrument, presentment warranties, and conversion of instrument).

the instrument will not be subject to liability for the amount accepted, notwithstanding other provisions in the Virginia Code to the contrary.³²

G. *Entitlement to Damages for Wrongful Death*

For causes of action arising on or after July 1, 2019, the preferred class of relatives who may share in damages arising from a decedent's wrongful death includes the decedent's parents if the decedent regularly provided them with support or services for living expenses, food, shelter, health care expenses, in-home assistance or care, or other necessities in the twelve months before his or her death.³³ In all other events, parents remain entitled to a share of an award only if the decedent left no spouse or descendants.³⁴

H. *Financial Exploitation of the Elderly*

To help combat the financial exploitation of vulnerable adults, the General Assembly has authorized financial institutions to refuse or delay any suspect transactions or disbursement requests.³⁵ The transaction or disbursement may be refused or delayed for up to thirty business days if the institution's employee, agent, or other representative believes in good faith that it involves the financial exploitation of an adult or knows that someone has filed a report with the local adult protective services hotline alleging that the transaction involves financial exploitation.³⁶ The institution and its staff are immune from civil and criminal liability for their actions taken in good faith with respect to the transaction, including making a report to the local department of social services.³⁷

The statute defines financial exploitation as "the illegal, unauthorized, improper, or fraudulent use" of an adult's assets to

32. Act of Mar. 12, 2019, ch. 360, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 64.2-601(E) (Cum. Supp. 2019)).

33. Act of Mar. 8, 2019, ch. 328, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-53(A)(i) (Cum. Supp. 2019)); Act of Feb. 19, 2019, ch. 47, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 8.01-53(A)(i) (Cum. Supp. 2019)).

34. VA. CODE ANN. § 8.01-53(A)(ii) (Cum. Supp. 2019).

35. Act of Mar. 18, 2019, ch. 421, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 63.2-1606(C), (L) (Cum. Supp. 2019)); Act of Mar. 18, 2019, ch. 420, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 63.2-1606(C), (L) (Cum. Supp. 2019)).

36. VA. CODE ANN. § 63.2-1606(L) (Cum. Supp. 2019).

37. *Id.*

(1) profit, benefit, or advantage someone else; or (2) deprive the adult of rightful use of or access to the assets.³⁸ Examples include not only intentional breaches of fiduciary duty, but also intentionally failing to use financial assets for the adult's benefit; controlling the adult's property through undue influence, coercion, or duress; and forcing the adult to pay for goods or services for someone else's benefit.³⁹

I. *Abuse or Neglect of Incapacitated Adults*

It is a crime for a person who has been given, or who has voluntarily taken, responsibility for the care, custody, or control of an incapacitated individual to abuse or neglect him or her.⁴⁰ Exemptions exist for those who act with the individual's informed consent, pursuant to a financial or healthcare power of attorney, or in accordance with his or her religious beliefs.⁴¹ The Virginia legislature confirmed in 2019 that these exemptions apply only if the informed consent was given, the power of attorney was made, or the religious beliefs were made known while the individual was not incapacitated.⁴²

J. *Annual Report of Guardian*

A guardian of an incapacitated individual must file an annual report with the local department of social services regarding the individual's situation, including his or her mental, physical, and social condition; living arrangements; and services received.⁴³ A 2019 amendment authorizes the circuit court, upon notice from the local social services department that the guardian has failed to file the required report, to issue a summons or rule to show cause to the guardian.⁴⁴

38. *Id.* § 63.2-1606(C) (Cum. Supp. 2019).

39. *Id.*

40. *Id.* § 18.2-369(A)–(C) (Cum. Supp. 2019).

41. *Id.* § 18.2-369(D) (Cum. Supp. 2019).

42. Act of Mar. 5, 2019, ch. 234, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 18.2-369(D) (Cum. Supp. 2019)).

43. VA. CODE ANN. § 64.2-2020 (Cum. Supp. 2019).

44. Act of Mar. 18, 2019, ch. 443, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 64.2-2020(C) (Cum. Supp. 2019)).

K. *Disclosure of Probate Tax Return Information*

Virginia Code section 58.1-3 has been amended to confirm that the circuit court clerk may provide the commissioner of accounts with information from an estate's probate tax return without violating Virginia's laws governing confidentiality of personal tax information.⁴⁵

L. *Wills Lodged for Safekeeping*

Although few circuit court clerks still accept wills for safekeeping, those that do, and those that have accepted them in the past, are now free to destroy any will that has been lodged with them for 100 years or more.⁴⁶

M. *Property Tax Exemptions*

The General Assembly passed two separate bills in 2019 that addressed real property tax exemption issues:

1. An improvement made to the otherwise exempt dwelling of an elderly or disabled owner will also be exempt if it is not used principally for business purposes and if it houses or covers a motor vehicle or household goods;⁴⁷ and

2. The property tax exemptions for surviving spouses of disabled veterans, spouses of armed forces members killed in action, and spouses of law enforcement agents killed in the line of duty have been expanded.⁴⁸ For tax years beginning on or after January 1, 2019, a spouse who was previously eligible for this exemption will not lose it by moving to a new principal residence.⁴⁹ If a surviving spouse of a disabled veteran lost eligibility for the exemption before 2019 as the result of a move, it may be reclaimed now,

45. Act of Mar. 22, 2019, ch. 786, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3(A)(5) (Cum. Supp. 2019)).

46. Act of Mar. 18, 2019, ch. 529, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 64.2-409(G) (Cum. Supp. 2019)).

47. Act of Mar. 21, 2019, ch. 737, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3210(C) (Cum. Supp. 2019)); Act of Mar. 21, 2019, ch. 736, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3210(C) (Cum. Supp. 2019)).

48. Act of Mar. 25, 2019, ch. 801, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 58.1-3219.5, -3219.9, -3219.14 (Cum. Supp. 2019)); Act of Feb. 15, 2019, ch. 15, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 58.1-3219.5, -3219.9, -3219.14 (Cum. Supp. 2019)).

49. VA. CODE ANN. §§ 58.1-3219.5(B), -3219.9(C), -3219.14(C) (Cum. Supp. 2019).

but there appears to be no comparable provision for the spouse of an armed forces member or law enforcement agent killed in the line of duty.⁵⁰

II. CASES

A. *Effect of Presumption of Undue Influence in Procuring a Will*

Parson v. Miller reexamined the evidence needed to raise a presumption of undue influence in a will contest and the effects of that presumption, once raised.⁵¹ The case involved an elderly testator who had previously declared on several occasions that he intended to leave his property to his daughter, Miller.⁵² However, one week before his death, he executed a will that instead left his entire estate to his caregiver, niece, and neighbor, Parson.⁵³ After the document was admitted to probate, Miller sought to impeach it, alleging that her father was unduly influenced by Parson.⁵⁴

In addition to her father's previous declarations, Miller presented evidence that he was in declining health and that Parson cared for him in his home and in the hospital and procured the will kit he used to name her as his sole beneficiary.⁵⁵ Miller was not able to cite any specific action Parson might have taken to influence her father.⁵⁶ Nevertheless, Miller argued that she should prevail in her claim due to the presumption of undue influence if Parson could not prove she did not unduly influence the testator.⁵⁷

Several witnesses for Parson testified to the testator's strong cognitive abilities and independence in the final weeks before his death and his concern about what Miller would likely do with his property.⁵⁸ They denied ever seeing Parson try to control him or

50. Ch. 801, 2019 Va. Acts at __; ch. 15, 2019 Va. Acts at __.

51. 296 Va. 509, 822 S.E.2d 169 (2018). For discussion of a similar case cited by the Parson court, *Weedon v. Weedon*, 283 Va. 241, 720 S.E.2d 552 (2012), see J. William Gray, Jr. & Katherine E. Ramsey, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 47 U. RICH. L. REV. 343, 369–72 (2012).

52. *See* 296 Va. at 514–16, 822 S.E.2d at 172–73.

53. *See id.* at 513–14, 822 S.E.2d at 172.

54. *See id.* at 514, 822 S.E.2d at 172.

55. *See id.* at 514–15, 822 S.E.2d at 172–73.

56. *See id.* at 515, 822 S.E.2d at 173.

57. *See id.* at 521, 822 S.E.2d at 176.

58. *See id.* at 517–19, 822 S.E.2d at 173–75.

limit others' access to him.⁵⁹ Parson and others also testified that the testator initiated and arranged for his new will himself and that Parson was not present when it was prepared and signed.⁶⁰

At trial, the court instructed the jury that Miller was entitled to a presumption of undue influence because she showed that her father was old, that he named a beneficiary on whom he was dependent, and that he had previously expressed an intention to make a contrary disposition.⁶¹ The court denied Parson's motion to strike the evidence.⁶² After the jury found in Miller's favor, the judge refused to set the verdict aside.⁶³

On appeal, the Supreme Court of Virginia reiterated the rule that a party successfully raises a presumption of undue influence in the procurement of a will by showing that "(1) the testator was old when his will was established; (2) he named a beneficiary who stood in a relationship of confidence or dependence; and (3) he previously had expressed an intention to make a contrary disposition of his property."⁶⁴ The court also reiterated that the presumption shifts only the burden of producing contrary evidence to the opposing party, and that once sufficient evidence had been produced to rebut the presumption, it disappears entirely.⁶⁵ The burden of proving undue influence by clear and convincing evidence always remains with the plaintiff.⁶⁶

Since Parson produced evidence of the testator's independence to rebut the presumption, the supreme court ruled that the trial court erred by instructing the jury as to the presumption.⁶⁷ It also found that the lower court erred when it did not grant Parson's motions to strike or set aside the verdict.⁶⁸ Because Miller had produced no evidence that her father's free will was actually overborne, the court reversed the trial court's judgment.⁶⁹

59. *See id.*

60. *See id.*

61. *See id.* at 520, 822 S.E.2d at 175.

62. *See id.* at 520–21, 822 S.E.2d at 175–76.

63. *See id.* at 521, 822 S.E.2d at 176.

64. *Id.* at 524, 822 S.E.2d at 177 (citing *Weedon v. Weedon*, 283 Va. 251, 255, 720 S.E.2d 552, 559 (2012)).

65. *See id.* at 527–28, 822 S.E.2d at 179.

66. *See id.* at 528, 822 S.E.2d at 179 (citing *Weedon*, 283 Va. at 256, 720 S.E.2d at 560).

67. *See id.* at 529, 822 S.E.2d at 180.

68. *See id.* at 530–31, 822 S.E.2d at 181.

69. *See id.*

B. *Probate of Attested Will*

The defendant in *Canody v. Hamblin* presented for probate as her father's will three computer-generated pages of the same font and font size, without page numbers, and with no paragraphs split between pages, but with staple holes that lined up.⁷⁰ The document was signed by the testator and two witnesses and was notarized.⁷¹ If established as a valid will, it would have effectively disinherited the testator's other children, including his son, the plaintiff.⁷²

Testimony from one witness and the notary established that the testator had properly executed the document as his will, but neither could testify as to the actual contents of the first two pages.⁷³ The son contended those pages might have been substituted after execution, and therefore argued the circuit court should have required the defendant to prove their authenticity as well.⁷⁴ He also argued that the testimony of one of the testator's close friends, who said the testator had described to him an estate plan that mirrored the provisions in the document, should not have been considered for purposes of establishing the testamentary nature of the document.⁷⁵ Nevertheless, the circuit court directed the document to be admitted to probate as the decedent's last will.⁷⁶

In considering the son's appeal, the supreme court confirmed that a document submitted for probate must show indicators of testamentary intent on its face, as the document at issue did.⁷⁷ Where its genuineness is questioned, however, extrinsic evidence is admissible to establish the testator's state of mind and to show whether his plan and intent were consistent with its terms.⁷⁸ Therefore, the trial court properly considered the friend's testimony to find that the first two pages were part of the original will.⁷⁹

70. 295 Va. 597, 600, 816 S.E.2d 286, 287 (2018).

71. *See id.* at 600, 816 S.E.2d at 287.

72. *See id.*

73. *See id.* at 600–01, 816 S.E.2d at 287–88.

74. *See id.* at 603, 816 S.E.2d at 289.

75. *See id.* at 601, 816 S.E.2d at 288.

76. *Id.*

77. *See id.* at 601–02, 816 S.E.2d at 288 (quoting *Payne v. Rice*, 210 Va. 514, 517, 171 S.E.2d 826, 828 (1970)).

78. *See id.* at 602, 816 S.E.2d at 288–89 (citing *Samuel v. Hunter's Executrix*, 122 Va. 636, 638–41, 95 S.E. 399, 399–400 (1918)).

79. *See id.* at 602–03, 816 S.E.2d at 289.

The supreme court also rejected the son's contention that his sister should be required to authenticate all three pages of the will because modern computers make forgery easy.⁸⁰ It noted that compliance with the statutory requirements for will execution has always been sufficient to create a presumption of a valid will and thereby to shift the burden of proving fraud onto the challenger.⁸¹ The court found the possibility of fraud insufficient to justify the adoption of a "novel and more rigorous standard," which would make it harder for property owners to devise their estates by means of wills.⁸² Because the son did not provide any evidence of actual fraud, the court affirmed the decision to admit the document to probate as the testator's will.⁸³

C. *Interpretation of Will Residuary Clause*

Feeney v. Feeney considered whether language in the residuary clause of a will was precatory or whether it limited the surviving spouse's interest to a life estate.⁸⁴ The will left the testator's residuary estate to his wife,⁸⁵ but it went on to describe the testator's intentions regarding his wife's use and ultimate disposition of the assets.⁸⁶ Specifically, the testator expressed his intention that she use the assets to support herself and his son from a prior marriage, that any assets remaining at her death continue in trust for the son, and that no assets pass to certain named individuals.⁸⁷ The will explained that the couple had agreed to provide for each other but to keep their assets separate so that, when both had died, their remaining assets could benefit their respective children.⁸⁸

The testator's sons asked the circuit court to construe the residuary clause as granting the widow only a life estate.⁸⁹ The parties agreed the language was unambiguous, so no extrinsic evidence

80. *See id.* at 604–05, 816 S.E.2d at 290.

81. *See id.* at 605, 816 S.E.2d at 290.

82. *See id.* at 600, 604–05, 816 S.E.2d at 287, 290 (quoting *Savage v. Bowen*, 103 Va. 540, 546, 49 S.E. 668, 669–70 (1905)).

83. *See id.* at 605–06, 816 S.E.2d at 290.

84. 295 Va. 312, 811 S.E.2d 830 (2018).

85. *See id.* at 315, 811 S.E.2d at 831. The relevant language provided as follows: "I devise and bequeath all of such rest and residue of my Estate to [my wife], should she survive me." *Id.*

86. *Id.* at 315, 811 S.E.2d at 831–32.

87. *Id.*

88. *Id.* at 315, 811 S.E.2d at 832.

89. *See id.* at 316, 811 S.E.2d at 832.

was necessary.⁹⁰ On cross motions for summary judgment, the circuit court sided with the wife and found that the testator intended to leave her the entire residue.⁹¹ It concluded that the additional language in the will regarding the wife's use and ultimate disposition of the assets was precatory. It denied the sons' request to charge their attorney fees against the estate, because it found they litigated the case for their own interests.⁹²

In considering the sons' appeal, the supreme court noted that no specific words are required to create a life estate and that a will should be construed to pass the greatest estate that the language can convey unless the language shows a contrary intention.⁹³ To ascertain a testator's intention, the whole will must be examined and effect should be given to all its parts, as far as possible.⁹⁴

The court went on to find that when the will was read as a whole, its provisions for the testator's descendants after the widow's death did, in fact, show that he intended to restrict her interest.⁹⁵ For example, the will referred to her right to "use" the residue, which the court found to imply only temporary rights inconsistent with an absolute power of disposition, especially since the will also included express limits as to how she was to use the property.⁹⁶ The court therefore found that the will created a life estate by implication, even though it did not expressly grant the residue to the widow "for life."⁹⁷

Despite its interpretation of the residuary clause, the supreme court rejected the sons' claim for attorney fees.⁹⁸ It noted that parties in Virginia normally pay their own fees and costs and that the court has not explicitly recognized an exception for instances where parties seek judicial instructions with respect to a will or

90. *Id.*

91. *See id.*

92. *See id.* at 317, 811 S.E.2d at 832–33.

93. *Id.* at 318, 811 S.E.2d at 833 (quoting *Goodson v. Capehart*, 232 Va. 232, 237, 349 S.E.2d 130, 134 (1986); then quoting *Gaymon v. Gaymon*, 258 Va. 224, 229, 315 S.E.2d 196, 199 (1984)).

94. *Id.* at 317, 811 S.E.2d at 833 (quoting *Haag v. Stickley*, 239 Va. 298, 302, 389 S.E.2d 691, 694 (1990)).

95. *Id.* at 318, 811 S.E.2d at 833.

96. *See id.* at 318–19, 811 S.E.2d at 833–34.

97. *Id.* at 319, 811 S.E.2d at 833–34.

98. *See id.* at 321–22, 811 S.E.2d at 835.

trust.⁹⁹ In any event, it observed that such a doctrine would apply only if judicial instructions were needed to interpret an ambiguous document, but in the instant case the sons had consistently maintained that the residuary clause in the testator's will was clear and unambiguous.¹⁰⁰

D. *Effect of Suit Against an Estate*

Attorneys practicing in the area of trusts and estates often see documents prepared by others that refer to the trust or estate as if it were an entity. *Ray v. Ready*, in which the supreme court considered whether a plaintiff could amend a suit filed against an estate to name the personal representative as defendant after the limitations period had run, highlights the potentially severe consequences of such an error.¹⁰¹

In *Ray*, the decedent's surviving spouse filed an action to claim her elective share of his augmented estate.¹⁰² In doing so, she named her late husband's estate as defendant, but made no mention of the estate's administratrix.¹⁰³ The spouse served process on the estate by delivery to the administratrix, who filed an answer on behalf of the estate.¹⁰⁴ The estate's attorney even pointed out the error to the spouse's attorney, but the mistake was never corrected.¹⁰⁵

After the six-month statute of limitations for augmented estate claims had run, the administratrix moved to dismiss the action as improperly filed.¹⁰⁶ The spouse sought leave to amend her claim, arguing that the proper party was before the court because the estate administratrix had answered the complaint in her representative capacity.¹⁰⁷ The circuit court ruled, however, that the spouse's action was a nullity because the proper party was not

99. *See id.* at 321, 811 S.E.2d at 835 (citing *Lannon v. Lee Conner Realty Corp.*, 238 Va. 590, 594, 385 S.E.2d 380, 382–83 (1989); then citing *Dupont v. Shackelford*, 235 Va. 588, 595, 369 S.E.2d 673, 677 (1988)).

100. *Id.* at 321, 811 S.E.2d at 835.

101. 296 Va. 553, 822 S.E.2d 181 (2018).

102. *Id.* at 556, 822 S.E.2d at 182–83.

103. *See id.*

104. *Id.* at 556, 822 S.E.2d at 183.

105. *See id.*

106. *See id.*

107. *See id.* at 557, 822 S.E.2d at 183.

named anywhere in the complaint, and it could not be amended because the claim was then time-barred.¹⁰⁸

On appeal the supreme court noted that a plaintiff must always adequately identify the party being sued and that an estate and its fiduciary are not the same legal entity.¹⁰⁹ It rejected the spouse's claim that her proposed substitution would merely correct a "misnomer," saying that a misnomer occurs when the correct party is named incorrectly, not when an incorrect party is named.¹¹⁰ In the latter event, the only resolution is to file a new action naming the correct party, subject to any applicable statute of limitations.¹¹¹

The court acknowledged that Virginia Code section 8.01-6.3 provides a safe harbor for a defective pleading to be retroactively amended to name the representative, but only if the pleading "otherwise identifies the proper parties."¹¹² In this case, the spouse's pleading did not qualify for relief because it not only did not name the administratrix as defendant, it did not even refer to her anywhere in the document.¹¹³

With no statutory relief available, the supreme court found that the spouse's claim was governed by the common law rule, which required it to have been re-filed rather than amended.¹¹⁴ Unfortunately, re-filing was not possible because the limitations period had run.¹¹⁵

E. *Jurisdiction over Foreign Defendant in Elder Abuse Case*

In *Mercer v. MacKinnon*, the supreme court examined the jurisdiction of Virginia courts over a Canadian citizen who was accused of financially abusing an elderly Virginia resident.¹¹⁶

108. *See id.*

109. *See id.* at 558–59, 822 S.E.2d at 184 (quoting *Swann v. Marks*, 252 Va. 181, 184, 476 S.E.2d 170, 171 (1996)).

110. *See id.* at 558–59, 822 S.E.2d at 184 (quoting *Swann*, 211 Va. at 184, 476 S.E.2d at 172)).

111. *Id.* at 559, 822 S.E.2d at 184 (quoting *Estate of James v. Peyton*, 277 Va. 443, 456, 674 S.E.2d 864, 870 (2009)).

112. *See id.* at 559–60, 822 S.E.2d at 184–85 (quoting VA. CODE ANN. § 8.01-6.3(B) (Repl. Vol. 2015)).

113. *See id.* at 560, 822 S.E.2d at 185.

114. *See id.* at 559–60, 822 S.E.2d at 184–85.

115. *See id.* at 560, 822 S.E.2d at 185.

116. 297 Va. 157, 823 S.E.2d 252 (2019).

The plaintiff in the case, Mercer, was the primary caretaker for her elderly father and her step-mother, Eleanor.¹¹⁷ While Mercer was occupied with her father's care, MacKinnon, a Canadian citizen and Eleanor's niece, came to Virginia and arranged for her aunt to sign a new power of attorney naming her as agent.¹¹⁸ MacKinnon then moved her aunt to Canada and used the power of attorney to remove Mercer's father from the couple's joint accounts and otherwise take control of Eleanor's retirement funds and bank accounts.¹¹⁹

Mercer and MacKinnon each subsequently petitioned the Virginia circuit court to be named Eleanor's guardian and conservator.¹²⁰ The court gave each of them control over particular assets until a final determination could be made.¹²¹ Each filed periodic accountings with the court-appointed guardian ad litem and regularly appeared in court by counsel and in person.¹²²

Ultimately, the Virginia court appointed Mercer as Eleanor's guardian and, following Eleanor's death, administrator of her estate.¹²³ In the latter capacity, Mercer brought a suit against MacKinnon alleging that she had illegally used assets from accounts belonging to Eleanor.¹²⁴

MacKinnon moved to dismiss Mercer's complaint for lack of personal jurisdiction under Virginia's "long-arm" statute, Virginia Code section 8.01-328.1.¹²⁵ The circuit court found that the only viable grounds for personal jurisdiction would be under Virginia Code section 8.01-328.1(A)(4), which establishes personal jurisdiction over an out-of-state defendant who causes tortious injury in Virginia by an act outside Virginia if the defendant engaged in a

117. *Id.* at 159, 823 S.E.2d at 253.

118. *Id.*

119. *Id.* at 159–60, 823 S.E.2d at 253.

120. *Id.* at 160, 823 S.E.2d at 253.

121. *See id.*

122. *Id.* at 160, 823 S.E.2d at 253–54.

123. *See id.* at 160, 823 S.E.2d at 254.

124. *Id.*

125. *Id.* at 160–61, 823 S.E.2d at 254. Mercer opposed the motion on several grounds, citing the defendant's actions as a basis for jurisdiction under section 8.01-328.1(A)(1) (Cum. Supp. 2018) (transacting business within Virginia), section 8.01-328.1(A)(3) (Cum. Supp. 2018) (causing tortious injury by an act or omission in Virginia), or section 8.01-328.1(A)(4) (Cum. Supp. 2018) (engaging in a consistent course of conduct in Virginia). *See* 297 Va. at 160–61, 823 S.E.2d at 254. She also argued personal jurisdiction existed because the case involved a probate matter within Virginia. *Id.* at 160–61, 823 S.E.2d at 254.

“persistent course of conduct” in Virginia.¹²⁶ It then ruled that the facts presented were insufficient to establish the requisite “persistent course of conduct” by MacKinnon.¹²⁷

On appeal, Mercer contended that MacKinnon had used Eleanor’s Virginia assets to fund litigation in Canada for MacKinnon’s own benefit, and that she had engaged in the required persistent course of conduct by coming to Virginia, having a power of attorney prepared here, using it to change account beneficiary designations, seeking a fiduciary appointment from a Virginia court, and filing accountings and appeals.¹²⁸

The supreme court characterized MacKinnon’s actions differently, noting that she came to Virginia once, had the power of attorney prepared, and then returned to Canada with her aunt, and that her only other contact with the state was “for the limited purpose of litigating a single case.”¹²⁹ Drawing on rulings from other states to address this issue of first impression in Virginia, the court concluded that MacKinnon’s contacts with the state “did not ‘exist for a long or longer than usual time or continuously,’ and they were not ‘enduring’ or ‘lingering.’”¹³⁰ Therefore, it affirmed the circuit court’s decision that MacKinnon’s actions did not constitute the sort of ongoing interaction with Virginia that the long-arm statute requires to support jurisdiction.¹³¹

F. *Necessity for Seal or Statutory Substitute*

It has been the long-standing rule in Virginia that any lease for five or more years must be evidenced in writing and executed with the same formalities as a deed.¹³² The plaintiff in *Game Place, L.L.C. v. Fredericksburg 35, LLC* received an unwelcome reminder of the importance of this formality.¹³³

126. *See id.* at 161, 823 S.E.2d at 254.

127. *Id.* at 161, 823 S.E.2d at 254.

128. *See id.* at 164–65, 823 S.E.2d at 256.

129. *Id.* at 164, 823 S.E.2d at 256.

130. *See id.* at 164, 823 S.E.2d at 255–56 (quoting the definition of “persistent” in WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1686 (2002)).

131. *Id.* at 165, 823 S.E.2d at 256.

132. VA. CODE ANN. § 55-2 (Cum. Supp. 2019) (“No estate . . . for a term of more than five years in lands shall be conveyed unless by deed or will[.]”).

133. 295 Va. 396, 813 S.E.2d 312 (2018).

The plaintiff lessor sued to collect unpaid rent on a fifteen-year lease after the lessee vacated the property before the end of the lease term.¹³⁴ The lessee argued that the lease was unenforceable under Virginia's Statute of Conveyances (Virginia Code section 55-2) because it had neither a formal seal nor any statutory seal substitute, as required for a valid deed.¹³⁵ The trial court rejected the lessee's argument as elevating form over substance, and awarded the lessor the amount of rent unpaid under the lease as well as attorney fees.¹³⁶

On appeal, the supreme court began with an extensive review of the historic reasons for sealed instruments.¹³⁷ It observed that the General Assembly has never done away with the common-law requirement for deeds to bear a seal.¹³⁸ Rather, it has authorized certain seal substitutes: a scroll, an imprint or stamp, the use of such words as "this deed" or "this indenture" in the document, or a notarial acknowledgment.¹³⁹ The lease at issue, however, had neither a seal nor any of the authorized seal substitutes; therefore it failed to satisfy the definition of "deed" for purposes of the Statute of Conveyances.¹⁴⁰

The lessor argued that the lease should be governed by Virginia Code section 55-51, which makes certain defective deeds binding on the parties.¹⁴¹ However, in ruling for the lessee, the court declared that that provision did not operate to change the definition of "deed" as used in the Statute of Conveyances, and therefore it did not excuse failure to satisfy the historic requirement of a seal or statutory equivalent.¹⁴²

134. *See id.* at 399, 813 S.E.2d at 313.

135. *See id.* at 400, 813 S.E.2d at 313.

136. *See id.* at 401, 813 S.E.2d at 314.

137. *See id.* at 401-07, 813 S.E.2d at 314-17.

138. *See id.* at 407, 813 S.E.2d at 317.

139. *See id.* (quoting VA. CODE ANN. § 11-3 (Repl. Vol. 2016)).

140. *See id.* at 407, 813 S.E.2d at 317.

141. *See id.* at 412, 813 S.E.2d at 320. Virginia Code section 55-51 provides:

Any deed, or a part of a deed, which shall fail to take effect by virtue of this chapter shall, nevertheless, be as valid and effectual and as binding upon the parties thereto, so far as the rules of law and equity will permit, as if this chapter had not been enacted.

VA. CODE ANN. § 55-51 (Cum. Supp. 2019).

142. *See* 295 Va. at 412-13, 813 S.E.2d at 320-21.

CONCLUSION

In a year without a Uniform Act or other major change in Virginia trust and estate law, the 2019 General Assembly nevertheless provided useful planning options in the form of an extended UTMA custodianship and a state income tax exemption for estates and trusts that are administered in Virginia but have no other connection with the Commonwealth. It made several other useful revisions, including augmenting state statutory protection against financial exploitation of adults;¹⁴³ protecting parents of wrongful death victims; clarifying conveyancing issues relating to leases and distribution deeds; facilitating settlement of small estates; and confirming the tax-exempt status of improvements to, or replacements of, exempt real estate. It also provided statutory protection for circuit court clerks concerned about potential liability for sharing probate tax return data with their commissioners of accounts or for destroying century-old wills lodged with them for safekeeping.

The Supreme Court of Virginia prompted a legislative response to its opinion in *Game Place*, its *Parson* opinion provided a refresher course in the elements and effects of the presumption of undue influence in will contests, its *Canody* opinion refused to adopt a stricter test for proper will execution, and *Ray* was a reminder of the importance of proper and timely pleading. *Feeney* showed the importance of considering all terms of a document, while *Mercer* was a surprisingly narrow application of Virginia's long-arm statute.

143. For a discussion of 2017 legislation also designed to prevent financial exploitation of vulnerable adults, see J. William Gray, Jr. & Katherine E. Ramsey, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 52 U. RICH. L. REV. 115, 131–32 (2017).