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Wills, Trusts, and Estates

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WILLS, TRUSTS, AND ESTATES

Hunter M. Glenn *
Allison A. Tait **

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INTRODUCTION

Between legislative and judicial activity, there have been a number of noteworthy developments and changes to the rules governing trusts and estates. Several of these developments turn on questions related to the role of fiduciaries, what responsibilities they have with respect to reporting as well as asset management, and when they can be removed. These questions concerning fiduciaries implicitly address the rights of beneficiaries and the protections available to them. New developments also will have multiple repercussions for estate planners and wealth managers. New planning strategies in response to changes in the law of undue influence may become important to consider and recent judicial opinions may influence a planner's drafting decisions, particularly with respect to no-contest and arbitration clauses. Overall, the developments clarify the balance of rights and responsibilities allocated between settlors, beneficiaries, and fiduciaries and, in many cases, bolster the rights of beneficiaries and those under legal guardianship.

I. LEGISLATION

The most significant pieces of legislation in the 2022 Session of the General Assembly pertained, in various ways, to fiduciary responsibility and protection of vulnerable parties. Legislators updated and adopted new rules with respect to the duties of trustees and other fiduciaries, guardians, and other persons providing care and support for such vulnerable parties. New legislation clarified the rules around treatment of income and principal for trustees just as new legislation added new notice requirements for guardianships. The most significant change, however, was likely the legislation concerning undue influence, which dramatically changed the traditional rule by placing the burden on the defendant to rebut an automatic presumption of undue influence.

A. Undue Influence and the Burden of Proof

Likely the most significant and controversial enactment from the 2022 Session is the General Assembly's adoption of Senate Bill 554, which changes the conventional rules with respect to the

burden of proof in undue influence cases.¹ The long-standing rule has been that a presumption of undue influence arises when an elderly or vulnerable party executes a will that favors someone (*usually* someone other than a spouse or child) with whom the decedent had a “confidential” or reliant relationship and who helped the decedent procure and execute the will.² In such cases, the will is suspicious because it expresses an intention contrary some previously expressed intention. Stating the traditional rule for Virginia in 2011, in *Parish v. Parish*, the Supreme Court of Virginia commented:

In *Martin v. Phillips*, we observed that in the will context “a presumption of undue influence arises when three elements are established: (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.”³

The court continued by remarking that “[o]nce the presumption of undue influence arises, the burden of producing evidence tending to rebut the presumption shifts to the opposing party.”⁴ Traditionally—in Virginia and every other state—the burden of proof has rested with the plaintiff seeking to challenge the validity of a will on the basis of undue influence.⁵ The plaintiff’s burden of proof has always been one of clear and convincing evidence and it has generally been relatively simple for the will proponent to overcome any presumption, once created, by demonstrating that the testator was capable, independent, and aware of the dispositions (and the significance of the dispositions) made in the will.⁶

The new law almost completely upends this entrenched rule. The text of the bill, incredibly short when compared with the text of the Uniform Fiduciary Income and Principal Act (“UFIPA”), states the following:

In any case contesting the validity of a decedent’s will where a presumption of undue influence arises, the finder of fact shall presume

1. S.B. 554, Va. Gen. Assembly (Reg. Sess. 2022) (enacted as 2022 Va. Acts ch. 265).

2. See *Parish v. Parish*, 281 Va. 191, 202, 704 S.E.2d 99, 105–06 (2011); see also *Martin v. Phillips*, 235 Va. 523, 528, 369 S.E.2d 397, 400 (1988).

3. 281 Va. at 202, 704 S.E.2d at 105–06 (citation omitted) (quoting *Martin*, 235 Va. At 527, 369 S.E.2d at 399).

4. *Id.* at 203, 704 S.E.2d at 106 (quoting *Martin*, 235 Va. at 529, 369 S.E.2d at 400).

5. See *Martin*, 235 Va. at 530, 369 S.E.2d at 401; see, e.g., *Hammond v. Union Planters Nat’l Bank* 222 S.W.2d 377, 383–84 (Tenn. 1949).

6. See, e.g., *Gill v. Gill*, 219 Va. 1101, 1106–07, 254 S.E.2d 122, 124–25 (1979).

that undue influence was exerted over the decedent unless, based on all the evidence introduced at trial, the finder of fact finds that the decedent did intend it to be his will.⁷

The new law completely reverses the burden of persuasion, for the most part, and places the burden on the defendant to rebut an automatic presumption of undue influence. So, beginning in July 2022, the defendant must make the case that undue influence did not occur from the outset. Otherwise, if the defendant cannot overcome the initial presumption, then the finder of fact must presume that undue influence was exerted over the decedent. The only exception occurs if, based on the totality of the evidence introduced at trial, the judge or jury finds that the decedent intended the document to be their will. It is unclear from the statutory text whether the clear and convincing standard still applies.

The new law has implications both for lawsuits and for estate planning. In the context of litigation, it is clear that it will be much easier, going forward, for plaintiffs to contest wills on the basis of undue influence. Whether this change will produce a slew of new claims remains to be seen, but with this reversal of who bears the burden of proof, will proponents will be put on the defensive from the outset and the dynamics of such litigation is sure to transform. Another litigation question centers on lost symmetry between wills and trusts. Before this change, the rules and standards for contesting were the same. When the new rule takes effect, the rules and standards for wills and trusts will differ and undue influence cases involving trusts (and any other form of wealth transfer other than a will) will continue to be governed by common law rules. It is unclear what will happen in cases involving both a will and a trust and whether the different standards can and will be correctly applied. Perhaps, alternatively, the General Assembly will look next to change the standard for these other forms of transfer.

For estate planners, this new rule may provide incentives to use trusts or other transfers as an alternative to wills, given the increased ease of challenging wills on undue influence grounds. If estate planners continue to use wills, they will certainly want to take additional steps to prove the general capacity, independence, and awareness of their older and more vulnerable clients. Estate planners might consider advising counsel against allowing parties other than paid professionals to provide assistance with the

7. VA. CODE ANN. § 64.2-454.1 (Cum. Supp. 2022).

financial management tasks or even routine chores and household tasks. Estate planners should take care to verify capacity and intention when drafting wills for these elderly or otherwise vulnerable clients, and planners might also warn of the dangers around giving family members and especially those in caretaking roles authority through a power of attorney or other such mechanism.

B. *Uniform Fiduciary Income and Principal Act*

One of the new developments in the 2022 Session was the enactment of House Bill 370, which proposed the replacement of the prior text with the new UFIPA from 2018.⁸ This version of the UFIPA has only been adopted in six states including Virginia.⁹ The bill was intended “to reflect modern trust investment practices in the allocation of principal and income.”¹⁰

The bill summary states that: “[t]he bill provides procedures for trustees administering estates and gives them additional flexibility to administer discretionary trusts to ensure that the intention of the creator of the trust is accomplished.”¹¹ The statute underscores that these are rules of administration that apply to any trust principally administered in Virginia, regardless of where created, except when the trust terms expressly provide otherwise.¹² Similarly, the rules apply to life estates “or other term interest in which the interest of one or more persons will be succeeded by the interest of one or more other persons.”¹³ Primarily, the bill includes

8. H.B. 370, Va. Gen. Assembly (Reg. Sess. 2022) (enacted as 2022 Va. Acts ch. 354). The last major change was in 1999, when the General Assembly adopted the 1997 version of the Uniform Principal and Income Act (“UPIA”). 1999 Va. Acts ch. 975 (codified at VA. CODE ANN. §§ 55-277.1 to -277.33 (Cum. Supp. 1999)); see generally J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 33 U. RICH. L. REV. 1075, 1076–77 (1999) (discussing the 1999 adoption). In 2009, however, the General Assembly adopted amendments made to the UPIA by the Uniform Law Commission. 2009 Va. Acts ch. 477 (codified as amended at VA. CODE ANN. § 55-277.4:1(D) (Cum. Supp. 2009)); see generally J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 44 U. RICH. L. REV. 631, 634–36 (discussing the 2009 amendments).

9. Other states that have enacted the Uniform Fiduciary Income and Principal Act are Washington, Utah, Colorado, Kansas, and Arkansas. *Fiduciary Income and Principal Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=1105f9bb-eb93-4d4d-a1ab-a535ef73de0c> [<https://perma.cc/TLQ2-YWNV>].

10. COMMONWEALTH OF VA. DEPT OF PLAN. & BUDGET, 2022 FISCAL IMPACT STATEMENT: H.B. 370 (2022), <https://lis.virginia.gov/cgi-bin/legp604.exe?221+oth+HB370FER122+PDF> [<https://perma.cc/WC3A-7SL3>].

11. *Id.*

12. VA. CODE ANN. § 64.2-1035 (Cum. Supp. 2022).

13. *Id.* § 64.2-1034 (Cum. Supp. 2022).

provisions that clarify what a fiduciary's duties are under the new UFIPA and offers new guidance on converting a traditional trust into a "unitrust" to allow for total-return investing.

In terms of the duties of a fiduciary, the new provisions make no broad changes from the previous iteration when it comes to making an allocation or determination or exercising discretion.¹⁴ The new UFIPA, like all previous versions, requires good faith, impartial administration, and adherence to the terms of the trust.¹⁵ One revision, however, is that the UFIPA now expressly requires a fiduciary to consider what is fair and reasonable to all beneficiaries as a constituent part of good faith.¹⁶ Moreover, any allocation, determination, or exercise of discretion under UFIPA is presumed to be fair and reasonable, and the rules expressly exempt fiduciaries that act in good faith from liability.¹⁷

1. A Fiduciary's Power to Adjust

With respect to a fiduciary's power to adjust, the UFIPA states that a fiduciary "without court approval, may adjust between income and principal if the fiduciary determines the exercise of the power to adjust will assist the fiduciary to administer the trust or estate impartially."¹⁸ Accordingly, any equitable adjustment may be made if the fiduciary acts in good faith and the adjustment assists in the impartial administration of the estate. This power to adjust "may apply to the current period, the immediately preceding period, and one or more subsequent periods."¹⁹ These new rules are a shift from the previous rules insofar as they require more limiting preconditions in order to make an equitable adjustment, including that the fiduciary was unable to administer the trust impartially without making the adjustment.²⁰ In addition, the new UFIPA clarifies that a life tenant or term interest holder is subject

14. See *id.* § 64.2-1036(B) (Cum. Supp. 2022); *id.* § 64.2-1001(B) (2017), *repealed by* 2022 Va. Acts ch. 354.

15. See VA. CODE ANN. § 64.2-1036(A)(1)–(3) (Cum. Supp. 2022); *id.* § 64.2-1001(A) (2017), *repealed by* 2022 Va. Acts ch. 354.

16. VA. CODE ANN. § 64.2-1036(A)(1) (Cum. Supp. 2022).

17. *Id.* §§ 64.2-1036(B), -1040(F) (Cum. Supp. 2022).

18. *Id.* § 64.2-1038(A) (Cum. Supp. 2022).

19. *Id.* § 64.2-1038(J) (Cum. Supp. 2022).

20. See *id.* § 64.2-1002(A) (2017), *repealed by* 2022 Va. Acts ch. 354.

to the same fiduciary duties of good faith, care, and impartiality as a trustee or executor.²¹

Finally, along with this flexibility for the fiduciary comes one reporting requirement. The new rules create no duty to exercise or consider the power to adjust, nor do they create any duty to inform beneficiaries of the possibility of making an equitable adjustment.²² Nevertheless, the fiduciary must describe any actual exercise of the power in whatever report may be sent to the beneficiaries or, if no report is otherwise sent, in an annual report to all qualified beneficiaries other than the Attorney General.²³

2. Unitrust Conversions

The new rules in the UFIPA concerning unitrust conversions and provisions also provide increased flexibility for fiduciaries. Without court approval, a fiduciary may, under the new rules, convert an income trust to a unitrust if the fiduciary adopts in a record a unitrust policy for the trust.²⁴ The policy must provide “[t]hat in administering the trust the net income of the trust will be a unitrust amount rather than net income” and must specify “[t]he percentage and method used to calculate the unitrust amount.”²⁵ A fiduciary may also “[c]hange the percentage or method used to calculate a unitrust amount” upon adoption or the amending of a unitrust policy.²⁶ Finally, a fiduciary may “[c]onvert a unitrust to an income trust if the fiduciary adopts in a record a determination that . . . the net income of the trust will be net income . . . rather than a unitrust amount.”²⁷ A beneficiary may consent at any time to the unitrust conversion or modification, and in such a case no notice is required.²⁸ A beneficiary may, alternately, make a written request to the fiduciary for a conversion or modification and if, after ninety days, the fiduciary does not respond, the beneficiary may apply to the court directly.²⁹

21. VA. CODE ANN. § 64.2-1033 (Cum. Supp. 2022).

22. *Id.* § 64.2-1038(B) (Cum. Supp. 2022).

23. *Id.* § 64.2-1038(K) (Cum. Supp. 2022).

24. *Id.* § 64.2-1041(A)(1) (Cum. Supp. 2022).

25. *Id.*

26. *Id.* § 64.2-1041(A)(2) (Cum. Supp. 2022).

27. *Id.* § 64.2-1041(A)(3) (Cum. Supp. 2022).

28. *Id.* § 64.2-1042(C) (Cum. Supp. 2022).

29. *Id.* § 64.2-1041(E) (Cum. Supp. 2022).

With respect to percentages and rates, the fiduciary may define the unitrust amount using any percentage, including a variable percentage or one that is limited by a floor and/or ceiling.³⁰ With respect to value, “[a] unitrust policy must provide the method for determining the fair market value of an asset” in order to value the unitrust.³¹ The unitrust assets do not, however, need to be valued annually.³² In fact, a fiduciary may adopt any period, including a rolling period of time.³³ The unitrust policy may also exclude certain assets from valuation.³⁴

As with the previous UFIPA, a fiduciary under the new rules must consider the list of statutory factors when deciding whether to make an equitable adjustment or convert to a unitrust.³⁵ The factors in the new rules are similar but not identical to the previous factors and include:

1. The terms of the trust;
2. The nature, distribution standards, and expected duration of the trust;
3. The effect of the allocation rules, including specific adjustments between income and principal, . . . ;
4. The desirability of liquidity and regularity of income;
5. The desirability of the preservation and appreciation of principal;
6. The extent to which an asset is used or may be used by a beneficiary;
7. The increase or decrease in the value of principal assets, reasonably determined by the fiduciary;
8. Whether and to what extent the terms of the trust give the fiduciary power to accumulate income or invade principal or prohibit the fiduciary from accumulating income or invading principal;
9. The extent to which the fiduciary has accumulated income or invaded principal in preceding accounting periods;
10. The effect of current and reasonably expected economic conditions; and
11. The reasonably expected tax consequences of the exercise of the power.³⁶

As a fiduciary, the life tenant or term interest holder may exercise the power to adjust or to convert his or her income interest to a unitrust interest, but only after considering these same statutory

30. *Id.* § 64.2-1044 (Cum. Supp. 2022).

31. *Id.* § 64.2-1045(A) (Cum. Supp. 2022).

32. *Id.* § 64.2-1045(A)(1) (Cum. Supp. 2022).

33. *See id.* § 64.2-1046 (Cum. Supp. 2022).

34. *Id.* § 64.2-1045(B)(2) (Cum. Supp. 2022).

35. *Id.* § 64.2-1036(D)–(E) (Cum. Supp. 2022); *id.* § 64.2-1002(B) (2017), *repealed by* 2022 Va. Acts ch. 354.

36. VA. CODE ANN. § 64.2-1036(E)(1)–(11) (Cum. Supp. 2022).

factors. And, although the bill also clarifies that the UFIPA applies to all trusts administered in Virginia, any total return unitrust created before July 1, 2022, and any previous determination of or equitable adjustment to principal and income remain valid.³⁷

C. Guardianships and the Protection of Vulnerable Parties

In the 2022 Session, the legislature passed several bills relating to guardianships. Senate Bill 302 was enacted to amend Code of Virginia sections 64.2-2002 and 64.2-2009 to clarify two points.³⁸ First, the new rule clarifies that a community services board and any other local or state governmental agency may file a petition for the appointment of a guardian or conservator of an incapacitated person.³⁹ Second, the new rule also specifies that a guardian need not be appointed for the purposes of making a health care decision when such decision is made pursuant to and within the scope of the Health Care Decisions Act (“HCDA”).⁴⁰ The HCDA provides procedures for the creation and use of advance medical directives as well as for decision-making in the absence of a directive.⁴¹ In such situations, where there is no advance directive in operation, health care decisions may be made by the patient’s guardian, spouse, adult child, parent, adult sibling, or other relative all in that order.⁴² The new rules also require the Department of Behavioral Health and Developmental Services to:

[C]onvene a work group to consider issues related to (i) the care of adults with permanent disabilities that render them incapable of making informed decisions about their own care and (ii) potential changes to guardianship requirements to make it easier for parents to care for their adult children with such disabilities.⁴³

In addition, House Bill 1212 requires that any notice of hearing for a guardianship or conservatorship petition include a notice that any adult individual or entity whose name and post office address appears in the initial petition for appointment may become a party to the action by filing a pleading with the circuit court in which the

37. 2022 Va. Acts ch. 354, cls. 3–4.

38. See S.B. 302, Va. Gen. Assembly (Reg. Sess. 2022) (enacted as 2022 Va. Acts ch. 630).

39. VA. CODE ANN. § 64.2-2002(A) (Cum. Supp. 2022).

40. *Id.* § 64.2-2009(D) (Cum. Supp. 2022).

41. *Id.* § 54.1-2983 (Cum. Supp. 2021); *id.* 54.1-2986 (2019).

42. VA. CODE ANN. § 54.1-2986(A)(1)–(6) (2019).

43. 2022 Va. Acts ch. 630, cl. 2.

guardianship or conservatorship proceeding is pending.⁴⁴ Furthermore, Senate Bill 514 makes several changes to the provisions on adult guardianships and conservatorships.⁴⁵ These changes include: (i) requiring a guardian ad litem to notify the court as soon as practicable if the respondent requests counsel, regardless of whether the guardian ad litem recommends counsel; (ii) requiring the notice of hearing on a guardianship or conservatorship petition to include notice that any adult individual or entity required to receive a copy of such notice may become a party to the proceeding by filing a pleading with the circuit court in which the case is pending; and (iii) requiring an appointed guardian to include in his or her annual report to the local department of social services certain additional information.⁴⁶

Another new law, originating with House Bill 496, changes statutory language and introduces the term “vulnerable adult.”⁴⁷ As stated in the amended statute, a “[v]ulnerable adult” indicates anyone eighteen years or older who is impaired by reason of mental illness, intellectual or developmental disability, physical illness or disability, or other causes, including age, to the extent the adult lacks sufficient understanding or capacity to make, communicate, or carry out reasonable decisions concerning his well-being or has one or more limitations that substantially impair the adult’s ability to independently provide for his daily needs or safeguard his person, property, or legal interests.⁴⁸

The term “vulnerable adult” replaces the term “incapacitated adult” in statutes concerning the financial exploitation, abuse, or neglect of such individuals.⁴⁹

Related to financial exploitation, Senate Bill 124 makes it a Class 1 misdemeanor for an agent under a power of attorney to knowingly or intentionally engage in financial exploitation of an incapacitated adult.⁵⁰ Upon conviction for such a crime, the bill provides that the agent’s authority terminates.⁵¹

44. H.B. 1212, Va. Gen. Assembly (Reg. Sess. 2022) (enacted as 2022 Va. Acts ch. 278).

45. S.B. 514, Va. Gen. Assembly (Reg. Sess. 2022) (enacted as 2022 Va. Acts ch. 381).

46. VA. CODE ANN. §§ 64.2-2003(B)(iv), -2004(D), -2020(B) (Cum. Supp. 2022).

47. H.B. 496, Va. Gen. Assembly (Reg. Sess. 2022) (enacted as 2022 Va. Acts ch. 259).

48. VA. CODE ANN. § 18.2-369(C) (Cum. Supp. 2022).

49. H.B. 496.

50. S.B. 124, Va. Gen. Assembly (Reg. Sess. 2022) (enacted as 2022 Va. Acts ch. 654); VA. CODE ANN. § 18.2-178.2(B) (Cum. Supp. 2022).

51. S.B. 124; VA. CODE ANN. § 64.2-1608(B)(4) (Cum. Supp. 2022).

D. Small Estates, Streamlined Transfers, and Public Documents

There were several bills that made small changes to rules pertinent to small estates. One of these bills, House Bill 1132, amended Code of Virginia section 8.01-606, increasing from \$25,000 to \$50,000 the amount under which a payment to certain persons may be made without the involvement of a fiduciary.⁵² The higher amount, then, is what a fiduciary or other person may pay into court, subsequently to be paid either to the person to whom it is due or to whoever may be administering it on behalf of the person. Similarly, it is now this higher amount that a court or trustee may pay to a non-fiduciary on behalf any person under legal disability, including a minor, who has no fiduciary; and the amount that a trustee may distribute to an incapacitated beneficiary, including a minor, without the intervention of a guardian, conservator, or committee, if so authorized by the trust terms.⁵³ In addition, a court may authorize the fiduciary to administer the funds for the benefit of the person entitled to the fund without the necessity of filing any further accounts when the amount under administration is not in excess of \$50,000.⁵⁴

The second bill relevant to small estates was House Bill 1066 which, as enacted, modifies requirements related to notice in the context of small estates.⁵⁵ The bill removes the exception to the notice of probate that allows such notice to not be given when assets passing under a will or in intestacy do not exceed \$5,000, although certain exceptions still remain including one for beneficiaries who receive a bequest of personal property valued at \$5,000.⁵⁶ The law now requires that an administrator qualifying solely for the purpose of participating in a personal injury or wrongful death action must provide notice of his or her qualification.⁵⁷ Moreover, the new rules mandate that the following language (in italics) be included in any notice: “If personal representatives qualified on this estate, *unless otherwise specifically exempted under Virginia law*, they are

52. H.B. 1132, Va. Gen. Assembly (Reg. Sess. 2022) (enacted as 2022 Va. Acts ch. 317); VA. CODE ANN. § 8.01-606(B) (Cum. Supp. 2022).

53. VA. CODE ANN. § 8.01-606(B), (E) (Cum. Supp. 2022).

54. *Id.* § 8.01-606(F) (Cum. Supp. 2022).

55. H.B. 1066, Va. Gen. Assembly (Reg. Sess. 2022) (enacted as 2022 Va. Acts ch. 777); VA. CODE ANN. § 64.2-508 (Cum. Supp. 2022).

56. H.B. 1066; VA. CODE ANN. § 64.2-508(B)(8) (Cum. Supp. 2022).

57. VA. CODE ANN. § 64.2-508(A) (Cum. Supp. 2022).

required by law to file an inventory with the commissioner of accounts within four months after they qualify.”⁵⁸

With an eye to streamlining and standardizing the rules around Virginia’s transfer on death deeds, a new rule amending Code of Virginia sections 64.2-621 and 64.2-628 provides that a conveyance of a cooperative interest is included in the meaning of a transfer on death deed.⁵⁹ In such cases, the conveyance document “shall contain the essential elements and formalities of a properly recordable inter vivos deed or document to convey a cooperative interest created pursuant to the Virginia Real Estate Cooperative Act.”⁶⁰

In the realm of wills and death certificates, new rules allow for certain changes. Senate Bill 221 facilitates the creation of a pilot program in Rockingham County for an index of wills complemented by a searchable database available to the public.⁶¹ And, with respect to death certificates, a bill amending section 32.1-269.1 allows for a forty-five-day window in which the State Registrar may correct any information reported on a death certificate.⁶² Within the forty-five-day period, the State Registrar may amend a death certificate to reflect any new information upon presentation of the proper evidence.⁶³ After forty-five days, the State Registrar may continue to make certain corrections:

[I]ncluding the correct spelling of the name of the deceased, the deceased’s parent or spouse, or the informant; the sex, age, race, date of birth, place of birth, citizenship, social security number, education, occupation or kind or type of business, military status, or date of death of the deceased; the place of residence of the deceased, if located within the Commonwealth; the name of the institution; the county, city, or town where the death occurred; or the street or place where the death occurred . . .⁶⁴

Any other changes must, after forty-five days, be made by petitioning the circuit court.⁶⁵

58. *Id.* § 64.2-508(C)(5) (Cum. Supp. 2022) (emphasis added).

59. 2022 Va. Acts ch. 309 (codified as amended at VA. CODE ANN. §§ 64.2-621, -628 (Cum. Supp. 2022)).

60. VA. CODE ANN. § 64.2-628(1) (Cum. Supp. 2022); *see also* VA. CODE ANN. §§ 55.1-2100 to -2184 (2022).

61. S.B. 221, Va. Gen. Assembly (Reg. Sess. 2022) (enacted as 2022 Va. Acts ch. 109).

62. S.B. 55, Va. Gen. Assembly (Reg. Sess. 2022) (enacted as 2022 Va. Acts ch. 117); VA. CODE ANN. § 32.1-269.1(C) (Cum. Supp. 2022).

63. § 32.1-269.1(C).

64. *Id.* § 32.1-269.1(D) (Cum. Supp. 2022).

65. *Id.* § 32.1-269.1(E) (Cum. Supp. 2022).

II. JUDICIAL DECISIONS

In addition to these legislative enactments, the Supreme Court of Virginia also provided guidance to practitioners through several key decisions. Notably, the court's opinions offered clarity as to the application of certain provisions, like no contest clauses, arbitration provisions, and a principal's direction in their power of attorney instruments. These opinions also helped confirm an individual's standing to sue in certain instances and the court's broad powers in supervising fiduciaries.

A. No Contest Clauses Apply to a Trust Settlor

In its unpublished opinion, *McMurtrie v. McMurtrie*, the Supreme Court of Virginia held that a trust's no contest clause was enforceable against all trust beneficiaries, including the trust's settlor.⁶⁶

Alexander B. McMurtrie Jr. created a revocable trust for his benefit during his lifetime.⁶⁷ Mr. McMurtrie named three individuals as co-trustees of the trust.⁶⁸ Under the terms of the trust, the trustees were given absolute discretion in making distributions.⁶⁹ The trust's terms also contained a no contest clause which caused "any devisee, legatee, or beneficiary" to "forfeit their interest in the [t]rust, and that of any of their descendants, if they seek to impair or invalidate any provisions of the [t]rust."⁷⁰

In 2019, Mr. McMurtrie requested a distribution of the trust's principal.⁷¹ However, one of the co-trustees declined this request, relying on the absolute discretion provided to the trustees under the terms of the governing instrument.⁷² In response, Mr. McMurtrie filed a complaint with the Chesterfield County Circuit Court, requesting a declaratory judgment that the trust's no contest clause did not apply to him as the settlor of the trust.⁷³ The trustees answered, prompting Mr. McMurtrie to seek summary

66. No. 200404, 2021 Va. Unpub. LEXIS 12, at *4–5 (Apr. 22, 2021).

67. *Id.* at *1–2.

68. *Id.* at *1.

69. *Id.* at *2.

70. *Id.* at *1.

71. *Id.*

72. *Id.* at *2.

73. *Id.*

judgment that he was not subject to the trust's no contest clause, or, in the event he was subject to the clause, that the clause's provisions were inapplicable to any claims (a) asserted under section 64.2-729 of the Virginia Uniform Trust Code, and (b) against the trustees for breaches of fiduciary duty.⁷⁴

The circuit court sided with Mr. McMurtrie, holding that the no contest clause did not apply to him, as trustor, and affirming that Mr. McMurtrie's action for summary judgment, and any subsequent action challenging the trustees for a breach of fiduciary duties or under section 64.2-729 of the Virginia Uniform Trust Code, would also not run afoul of the provision.⁷⁵ Specifically, the court agreed with Mr. McMurtrie that, because the agreement ambiguously referred to him as both a "trustor" and "beneficiary," the court should interpret the will to effect his intent as to the provision.⁷⁶ The trustees appealed the circuit court's ruling, disagreeing that the provision was ambiguous and arguing that by not strictly enforcing the clause, the circuit court "effectively rewrote" the provision to exclude the settlor.⁷⁷

The Supreme Court of Virginia agreed with the trustees, holding that the no contest clause did in fact apply to Mr. McMurtrie as a beneficiary of the trust.⁷⁸ The court reasoned that, despite Mr. McMurtrie's argument that the provision was ambiguous, the clause clearly applied to any beneficiary of the trust.⁷⁹ Mr. McMurtrie was an undisputed beneficiary of the trust during his lifetime.⁸⁰ Furthermore, the court pointed to another recent case, *Hunter v. Hunter*, which determined that a no contest clause should be strictly enforced and construed, "without any wincing on [the court's] part concerning its alleged harshness or unfairness."⁸¹ Therefore, because Mr. McMurtrie was a clear beneficiary of the trust during his lifetime, and because these provisions must be strictly enforced, the court held that the Mr. McMurtrie was subject to the no contest clause.⁸²

74. *Id.*

75. *Id.* at *2-3.

76. *Id.*

77. *Id.* at *3-4.

78. *Id.* at *4-5.

79. *Id.*

80. *Id.* at *5.

81. *Id.* at *4 (quoting 298 Va. 414, 424, 838 S.E.2d 721, 725 (2020)).

82. *Id.* at *5.

However, the trustees were only partially victorious. Despite not being challenged on appeal, the court affirmed that the provision would not limit Mr. McMurtrie from seeking a remedy under section 64.2-729 of the Virginia Uniform Trust Code or from bringing an action against the trustees for a breach of fiduciary duty.⁸³ Therefore, while Mr. McMurtrie was found to be subject to the terms of the no contest clause, the court left open a clear path for Mr. McMurtrie to seek relief, without fear of triggering the provision in question.

B. *Standing to Challenge a Decedent's Will*

In *Machen v. Williams*, the Supreme Court of Virginia considered a beneficiary's standing to impeach a will for fraud and undue influence when one of the beneficiaries was only a legatee under the challenged will and the other, an heir at law as well as a legatee, had signed a release prior to filing suit.⁸⁴

This case involved the estate of Wilma R. Williams, a widow who died childless in Fairfax County. Prior to her death, Ms. Williams was living in a retirement home.⁸⁵ During that time, she was often visited by an attorney, Robert B. Machen, who she had previously worked with and who held her power of attorney.⁸⁶ On one visit in particular, Mr. Machen, with Ms. Williams' permission, opened a letter from an investment firm.⁸⁷ The letter showed that Ms. Williams owned an investment account valued at approximately \$1.3 million.⁸⁸ After reviewing the statement, Mr. Machen told Ms. Williams she needed to create a will.⁸⁹ Ms. Williams agreed.⁹⁰

Mr. Machen then took it upon himself to draft a will for Ms. Williams.⁹¹ The document included a handful of \$10,000 bequests to Ms. Williams' nieces and nephews, some of whom were related to Ms. Williams by blood and some of whom were related to Ms. Williams by marriage.⁹² Mr. Machen then named himself as the

83. *Id.*

84. 299 Va. 701, 702, 858 S.E.2d 203, 204–05 (2021).

85. *Id.* at 701, 858 S.E.2d at 204.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 701–02, 858 S.E.2d at 204.

beneficiary of the residuary estate, with his son, a stranger to Ms. Williams, as the contingent beneficiary.⁹³ He also named himself as the executor of Ms. Williams estate.⁹⁴ Finally, Mr. Machen included a no contest clause, prohibiting any person from challenging the will and its terms.⁹⁵

Shortly before her death, Mr. Machen presented three copies of his draft will for Ms. Williams' signature.⁹⁶ Ms. Williams signed each copy.⁹⁷ After her death, Mr. Machen presented one of the wills to the clerk's office for probate and qualified as executor.⁹⁸ Mr. Machen then retained counsel, who was also a friend of Mr. Machen.⁹⁹ The attorney circulated letters to the relevant family members, alerting them to the bequests in the will and cautioning them of the provisions of the document's no contest clause.¹⁰⁰ The letter also included a release and promised to expedite any family member's payment if they promptly returned the release.¹⁰¹ Each family member, except one of the appellees, David Williams, signed the enclosed release.¹⁰²

David Williams and Nell Williams later sued to impeach the will, alleging fraud, undue influence, lack of capacity, and failure to meet statutory requirements.¹⁰³ Mr. Machen filed a plea in bar, arguing that David Williams lacked standing to sue because he was Ms. Williams' nephew only by marriage—the son of a brother of Ms. Williams' late husband—and therefore not an heir at law.¹⁰⁴ Mr. Machen challenged Nell Williams' claims, because, despite being an heir at law as well as a beneficiary under the will, she had executed the release.¹⁰⁵ The case was presented to a jury, who determined that none of the wills offered by Mr. Machen were the last will and testament of Ms. Williams.¹⁰⁶ The court then entered

93. *Id.*

94. *See id.* at 702, 858 S.E.2d at 204.

95. *See id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 702, 858 S.E.2d at 205.

104. *Id.* at 702–03, 858 S.E.2d at 205.

105. *Id.* at 702, 858 S.E. 2d at 204–05.

106. *Id.* at 703, 858 S.E.2d at 205.

final orders consistent with that finding and invalidating Nell Williams' release.¹⁰⁷ Mr. Machen appealed.¹⁰⁸

On appeal, Mr. Machen reiterated his argument that David Williams lacked standing because, as a relative by marriage and not by blood, he had no pecuniary interest in the controversy.¹⁰⁹ However, the court held any question of David Williams' standing was rendered moot due to Nell Williams' standing.¹¹⁰ The release was held invalid by the lower court as a "mere instrument of [Mr.] Machen's fraudulent scheme" and therefore, Nell Williams, an heir at law and a beneficiary under the will, retained her standing to impeach the will.¹¹¹ Accordingly, the parties' suit was unaffected by any question of David Williams' standing and would remain pending.¹¹²

C. Circuit Court is Provided Wide Latitude in Removing Executors

Under Virginia law, a circuit court is granted "considerable latitude" in determining whether to remove an executor of an estate.¹¹³ This deference to the circuit court was affirmed in a recent Supreme Court of Virginia case, *Galiotos v. Galiotos*, where two brothers, who served as co-executors of their mother's estate, were "hopelessly deadlocked" in the estate's administration.¹¹⁴

Steve and Tasos Galiotos qualified as co-executors of their mother's estate.¹¹⁵ After qualifying, the brothers began to disagree as to the administration of the estate and the execution of their duties.¹¹⁶ During the administration, the attorney representing the estate told both brothers that, because she represented the estate, she could not represent either of them, and further, that they could

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 703–04, 858 S.E.2d at 205.

111. *Id.* at 704, 858 S.E.2d at 205.

112. *Id.*

113. *Galiotos v. Galiotos*, 300 Va. 1, 10, 858 S.E.2d 653, 658 (2021) (citing *Clark v. Grasty*, 210 Va. 33, 37, 168 S.E.2d 268 (1969)).

114. *Id.* at 12, 858 S.E.2d at 658–59.

115. *Id.* at 5, 858 S.E.2d at 655.

116. *Id.*

retain their own counsel at the expense of the estate.¹¹⁷ Both brothers did so.¹¹⁸

The conflict continued, eventually causing one brother, Tasos, to petition the Virginia Beach City Circuit Court to remove Steve as co-executor.¹¹⁹ In petitioning the court, Tasos alleged that Steve failed to fulfill his duties as executor and that he had refused to work cooperatively with Tasos in the estate's administration.¹²⁰ In response, Steve counterclaimed, echoing his brother's original petition and requesting that Tasos be removed.¹²¹ Both brothers alleged the other mishandled estate property and distributed estate assets improperly.¹²²

The circuit court held a bench trial on each brother's claim and heard testimony supporting the bitterness between the two siblings, the disagreements as to the distribution of the estate, and the numerous agents who had been hired and subsequently resigned because of the discord between the brothers.¹²³ Given the testimony and the evidence presented, the circuit court, noting that the brothers "beat up on each other for reasons unclear to the court," ruled that it was in the best interest of the estate to remove both brothers as co-executors and appoint a disinterested third party, a local Commissioner of Accounts, to serve in their stead.¹²⁴ The court further denied each brother's request for attorneys' fees and for compensation.¹²⁵ Unsurprisingly, each brother filed separate but mirroring appeals, stating that the court erred in removing him as co-executor but affirming the removal of his brother.¹²⁶ Each brother also appealed the circuit court's denial of their respective fees and compensation.¹²⁷

In upholding the circuit court's decision to remove both brothers, the court reminded the parties of the circuit court's broad powers

117. *Id.*

118. *Id.*

119. *Id.* at 5–6, 858 S.E.2d at 655.

120. *Id.* at 6, 858 S.E.2d at 655.

121. *Id.* at 7, 858 S.E.2d at 656.

122. *Id.* at 6–7, 858 S.E.2d at 655–56.

123. *Id.* at 8, 858 S.E.2d at 656–57.

124. *Id.* at 8–9, 858 S.E.2d at 657.

125. *Id.* at 9, 858 S.E.2d at 657.

126. *Id.*

127. *Id.* at 9–10, 858 S.E.2d at 657.

in evaluating the removal of an executor.¹²⁸ Because the circuit court is best positioned to make determinations as to the facts of the case and the executor's ability to serve the estate, the appellate court's review is limited to an abuse of discretion.¹²⁹ That abuse of discretion can fall into three categories: (1) when a relevant factor is not given sufficient weight; (2) when an irrelevant or improper factor is given disproportionate weight; and (3) when the court considered proper factors, but commits clear error of judgment.¹³⁰

The court noted that, in addition to removing a fiduciary for fraud, breach of trust, or gross negligence, a circuit court may also remove an executor for any cause, so long as it is proper.¹³¹ This could include "friction" between individuals.¹³² In the present case, the brothers' clear acrimony impacted the administration of the estate and created that significant friction.¹³³ That discord and its hindrance on the estate's administration was sufficient to justify the removal of both brothers and the appointment of a third party.¹³⁴ Because of this, the court held, the circuit court did not abuse its discretion in removing both siblings.¹³⁵

The court then considered the brothers' appeal of the circuit court's decisions as to their fiduciary compensation and reimbursement for attorney's fees and expenses.¹³⁶ As with the review of the decision to remove the brothers, the court's review of the circuit court's decisions regarding compensation and legal fees was also limited to abuse of discretion.¹³⁷

Under Virginia law, fiduciary compensation is only permitted when an executor has faithfully discharged their duties.¹³⁸ In addition, reimbursement for attorney's fees and costs is permitted when those services "aid the executor in the performance of [their]

128. *Id.* at 10, 858 S.E.2d at 658 (citing *Clark v. Grasty*, 210 Va. 33, 37, 168 S.E.2d 268, 271 (1969)).

129. *Id.*

130. *Id.* at 10–11, 858 S.E.2d at 658.

131. *Id.* at 11, 858 S.E.2d at 658 (citing VA. CODE ANN § 64.2-1410(A) (2017)).

132. *Id.* (quoting *Clark*, 210 Va. at 37–38, 168 S.E.2d at 271).

133. *Id.* at 11–12, 858 S.E.2d at 658.

134. *Id.* at 11–12, 858 S.E.2d at 658–59.

135. *Id.*

136. *Id.* at 12, 858 S.E.2d at 659.

137. *Id.*

138. *Id.* at 12–13, 858 S.E.2d at 659 (citing *Clare v. Grasty*, 213 Va. 165, 170, 191 S.E.2d 184, 188 (1972)).

duties and are beneficial to the estate.”¹³⁹ Given the “ample evidence” that numerous agents and attorneys were hired primarily to benefit the siblings and not the estate, thereby frustrating its administration, the court found that the circuit court did not abuse its discretion in rejecting the two brothers’ claims for attorneys’ fees and fiduciary compensation.¹⁴⁰

D. *Rights to Statutory and Equitable Accountings*

In the case *Phillips v. Rohrbaugh*, the Supreme Court of Virginia clarified who may seek equitable and statutory accountings, as well as the impact of a principal’s expressed intent to limit accounting actions in their power of attorney.¹⁴¹

John Mark Rohrbaugh Sr. executed a durable power of attorney, naming his son, John Mark Rohrbaugh Jr., as agent.¹⁴² In addition to vesting his son with certain powers, including the power to make certain gifts, it also expressly stated:

[I]t is my intention that, except as specifically provided for herein, my agent shall never be required to make disclosure or inspection of my affairs, or their actions as my agent, either under this instrument or otherwise, to any third party. I authorize my agent to refuse any request for disclosure or inspection, and they have the sole discretion to determine the scope, if any, of disclosure or inspection they may wish to permit. I authorize my agent as an expense of the agency to resist any proceeding to compel such disclosure or inspection. . . . Without limitation of the foregoing sentences in this paragraph, I specifically intend that my agent shall never be required to make disclosure of their actions or permit inspection of my affairs under this instrument, pursuant to section 11-9.1, section 11-9.6, section 37.1-134.22 of the Code of Virginia of 1950, as amended, or any other statute.¹⁴³

Years later, Rohrbaugh Jr. began assisting with the management of his father’s finances pursuant to the powers granted to him in the power of attorney.¹⁴⁴

Rohrbaugh Sr. later died, survived by Rohrbaugh Jr., as well as his other child, Susan E. Phillips.¹⁴⁵ Rohrbaugh Jr., as well as

139. *Id.* at 13, 858 S.E.2d at 659 (citing *Clare*, 213 Va. At 170, 191 S.E.2d at 188).

140. *Id.*

141. *See* 300 Va. 289, 863 S.E.2d 847 (2021).

142. *Id.* at 297, 863 S.E.2d at 849.

143. *Id.* at 297–98, 863 S.E.2d at 849.

144. *Id.* at 297–98, 863 S.E.2d at 849–50.

145. *Id.* at 298, 863 S.E.2d at 850.

another individual, John J. Davies III, qualified as co-executors of the estate.¹⁴⁶ Both of Rohrbaugh Sr.'s children were beneficiaries of the estate under Rohrbaugh Sr.'s will.¹⁴⁷

During the estate's administration, Ms. Phillips sent a letter to the co-executors' counsel, requesting information about the transactions Rohrbaugh Jr. entered into under the power of attorney, and alleging that Rohrbaugh Jr. had engaged in suspicious or self-dealing activity.¹⁴⁸ Rohrbaugh Jr. responded with some of the requested information, but this was unsatisfactory to Ms. Phillips, causing her to bring an action against Rohrbaugh Jr., individually, and as the co-executor of the estate, as well as Mr. Davies, as executor, to request both a statutory accounting under Code of Virginia section 64.2-1614(a) for Rohrbaugh Jr.'s actions as agent under his father's power of attorney and an equitable accounting under section 8.01-31.¹⁴⁹ Both Rohrbaugh Jr. and Mr. Davies filed demurrers, pointing to the language in the power of attorney that prohibited the agent from "making disclosures to anyone under specific disclosure statutes 'or any other statutes.'"¹⁵⁰ The circuit court agreed and granted the demurrers.¹⁵¹ Ms. Phillips then appealed.¹⁵²

1. Right to Equitable Accounting

The court first addressed Ms. Phillips's claim for an equitable accounting.¹⁵³ After outlining the evolution of this action over time, the court clarified that an equitable accounting is not "merely a judicially managed discovery proceeding in anticipation of a possible lawsuit" but, rather, "[i]t is . . . a means to enforce an implied duty of disclosure and reckoning arising out of an equitable relationship."¹⁵⁴ In those relationships, the agent has a duty to render to his principal an account of the money and assets that were paid

146. *Id.*

147. *Id.*

148. *Id.* at 299, 863 S.E.2d at 850.

149. *Id.*

150. *Id.* at 300, 863 S.E.2d at 851.

151. *Id.*

152. *Id.* at 301, 863 S.E.2d at 851.

153. *Id.*

154. *Id.* at 301-02, 863 S.E.2d at 851-52.

out on the principal's behalf.¹⁵⁵ With that understanding, the court highlighted that these equitable accounting claims flow from “a discrete *cause of action* – the agent's breach of his fiduciary duty to provide the required disclosures to his principal.”¹⁵⁶

Here, Ms. Phillips was never a principal to whom Rohrbaugh Jr. owed a fiduciary duty to account, and therefore, Ms. Phillips was not entitled to an equitable accounting in her personal capacity.¹⁵⁷ The court further noted that, because Ms. Phillips was not Rohrbaugh Sr.'s personal representative, she also did not have the authority to make this claim on behalf of the estate.¹⁵⁸ Finally, the court did not find Ms. Phillips' claim that she fell within the special circumstances that might otherwise allow her to serve as an ad hoc representative of the estate, such as fraud, collusion, or the refusal to sue persuasive.¹⁵⁹

However, the court did agree that Ms. Phillips could have the right to an equitable accounting as a beneficiary of the estate against the co-executors of the estate.¹⁶⁰ But, the court noted, this relief is purely discretionary and only available when no other form of relief is available or adequate.¹⁶¹ In this case, both executors remained subject to the supervisory power of the probate court and the Commissioner of Accounts.¹⁶² Because of this, the proper forum to pursue an equitable accounting would be through the Commissioner and not the courts.¹⁶³ For these reasons, the court affirmed the lower court's dismissal of the equitable accounting claims.¹⁶⁴

2. Right to Statutory Accounting

The court next addressed Ms. Phillips's request for a statutory accounting claim under the Virginia Power of Attorney Act (“VPAA”).¹⁶⁵ While the VPAA grants certain claimants—including

155. *Id.* at 302, 863 S.E.2d at 852 (quoting *Bain v. Pulley*, 201 Va. 398, 402, 111 S.E.2d 287, 291 (1959)).

156. *Id.* at 302–03, 863 S.E.2d at 852.

157. *Id.* at 303, 863 S.E.2d at 852.

158. *Id.*

159. *Id.* at 303–05, 863 S.E.2d at 852–53.

160. *Id.* at 305, 858 S.E.2d at 853.

161. *Id.*

162. *Id.* at 308, 863 S.E.2d at 855.

163. *Id.*

164. *Id.*

165. *Id.*

a principal's relatives—the right to petition a court to review an agent's conduct in certain instances, those rights are still subject to the remaining provisions of the VPAA, which may be abrogated by the principal.¹⁶⁶

The court first examined Code of Virginia section 64.2-1612(H), which provides:

Except as otherwise provided in the power of attorney, an agent shall disclose receipts, disbursements, or transactions conducted on behalf of the principal if requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate.¹⁶⁷

The court emphasized that this provision only provides a short list of individuals who may request an accounting under section 64.2-1612(H).¹⁶⁸ Even when an individual falls within the prescribed categories in Code of Virginia section 64.2-1614(A), such individual's right to pursue the accounting may be limited by the terms of the relevant instrument.¹⁶⁹ Similarly, while Code of Virginia section 64.2-1612(I) allows certain individuals, including a principal's relatives, to seek an accounting from an agent when the individual has a good faith belief that the principal is or was incapacitated, that right to request an accounting is still subject to the terms of the power of attorney itself.¹⁷⁰

Lastly, the court looked to section 64.2-1614(B)(1), which allows any person to whom an agent owes a duty to petition a court for discovery where an agent has violated section 64.2-1612.¹⁷¹ Because the provision is limited to those owed a duty by the agent, “anyone barred by the power of attorney from receiving such disclosures” would also be limited from initiating this kind of proceeding.¹⁷²

Ultimately, the court found, these statutes present an “underlying theme” that “courts should respect the personal financial

166. *See id.*; VA. CODE ANN. §§ 64.2-1612(H)–(I), -1614(A)(4), (B)(1), (D) (2017 & Cum. Supp. 2019).

167. *Phillips*, 300 Va. at 309, 863 S.E.2d at 855 (quoting VA. CODE ANN. § 64.2-1612(H) (2017)).

168. *Id.* at 309, 863 S.E.2d at 855–56.

169. *Id.* at 309, 858 S.E.2d at 856.

170. *Id.* at 310–11 (quoting VA. CODE ANN. § 64.2-1612(I) (2017)).

171. *Id.* at 311, 863 S.E.2d at 856 (quoting VA. CODE ANN. § 64.2-1614(B)(1) (2017)).

172. *Id.* at 311, 863 S.E.2d at 856–57.

privacy of competent principals” while balancing the need to “provid[e] opportunities for others to initiate account-rendering litigation on behalf of incompetent or deceased principals.”¹⁷³ Rohrbaugh Sr.’s capacity was never in question in the case. Therefore, due to Rohrbaugh Sr.’s clear instruction that the agent “shall never be required to make disclosure or inspection of [his] affairs, or their actions as [his] agent,” the court determined it would be inconsistent with the remainder of the VPAA to allow Ms. Phillips to employ a statutory accounting procedure that the principal expressly forbade.¹⁷⁴ Given this, the court agreed that Ms. Phillips’ statutory accounting claim was barred by the declared intent found in his power of attorney.¹⁷⁵

E. *Personal Representatives Have Sole Standing to Sue on Behalf of an Estate*

In *Kittrell v. Fowler*, the Supreme Court of Virginia provided additional guidance as to standing, though this time, the court addressed who may sue on behalf of an estate.¹⁷⁶

Walter Hurley Sr. and Margaret Hurley had three children: Susan, Lisa, and Walter Jr.¹⁷⁷ Prior to Walter Sr.’s death, each of Walter Sr., Margaret, and Walter Jr. owned a one-third interest in Hurley, LLC.¹⁷⁸ Upon Walter Sr.’s death, his one-third interest passed to Walter Jr.¹⁷⁹ Shortly after Walter Sr.’s death, Margaret transferred her interest in Hurley, LLC to Walter Jr. in exchange for a promissory note in the amount of \$950,000 (“Hurley Transaction”).¹⁸⁰

A year later, Margaret created her own revocable trust, which was subsequently amended and ultimately directed distribution of the residual trust property in equal shares to Susan and Lisa.¹⁸¹

Following Margaret’s death, Lisa and Susan filed complaints challenging an amendment of Margaret’s revocable trust and

173. *Id.* at 311, 836 S.E.2d at 857.

174. *Id.* at 312, 836 S.E.2d at 857.

175. *Id.* at 313, 836 S.E.2d at 858.

176. ___ Va. ___, ___, 870 S.E.2d 210, 212–13 (2022).

177. *Id.* at ___, 870 S.E.2d 211.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

Margaret's creation of a separate trust.¹⁸² Through an amended complaint, Lisa and Susan also requested that the court declare the Hurley Transaction void due to Walter Jr.'s alleged undue influence and breach of fiduciary duty and sought damages equaling the value of Margaret's interest in Hurley, LLC as of the date of Margaret's death.¹⁸³ The defendants filed a demurrer and plea in bar, arguing that Lisa and Susan lacked standing to challenge the Hurley Transaction because neither Lisa nor Susan were personal representatives of Margaret's estate.¹⁸⁴ The circuit court overruled the demurrer and allowed the claim to go forward.¹⁸⁵ In response, the defendants sought an interlocutory appeal, claiming that the circuit court improperly conferred standing on Lisa and Susan to challenge the Hurley Transaction.¹⁸⁶

Lisa and Susan alleged that the revocable trust would have been the ultimate recipient of the interest in Hurley, LLC if the Hurley Transaction had not occurred.¹⁸⁷ However, the Hurley Transaction occurred one year prior to the creation of the trust.¹⁸⁸ Given that, the court reasoned, the interest would have belonged to Margaret, individually, and therefore, at her death, to her estate.¹⁸⁹

Under Virginia law, a party must have an "immediate, pecuniary, and substantial interest in the litigation."¹⁹⁰ In the context of an estate, a personal representative—not a beneficiary—is the proper party with that interest.¹⁹¹ According to the court, as remainder beneficiaries of the revocable trust, Lisa and Susan "are legal strangers" to the Hurley Transaction.¹⁹² The court concluded that, assuming there was a proper claim to challenge the Hurley Transaction, the proper party to make any claim rests solely with the personal representative of the estate.¹⁹³ Because neither Lisa

182. *Id.* at __, 870 S.E.2d 212.

183. *Id.*

184. *Id.* at __, 870 S.E.2d 212–13.

185. *Id.*

186. *Id.* at __, 870 S.E.2d 213.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* (quoting *Platt v. Griffith*, 299 Va. 690, 692, 858 S.E.2d 413, 415 (2021)).

191. *Id.* at __, 870 S.E.2d 213–14.

192. *Id.* at __, 870 S.E.2d 213.

193. *Id.* at __, 870 S.E.2d 213–14.

nor Susan were the personal representative, both lacked standing to bring their claim.¹⁹⁴

F. *Arbitration Clauses Held Unenforceable Against Beneficiaries*

In *Boyle v. Anderson*, the Supreme Court of Virginia considered whether arbitration clauses are enforceable against the beneficiaries of a trust.¹⁹⁵

The facts involved a settlor, Strother R. Anderson, and his revocable trust.¹⁹⁶ Under the terms of the trust, the residue was to be divided into equal shares for each of his children upon Mr. Anderson's death.¹⁹⁷ Mr. Anderson also incorporated "an unambiguous" arbitration clause in the agreement that required "[a]ny dispute . . . not amicably resolved, by mediation or otherwise," to be resolved by arbitration.¹⁹⁸

Mr. Anderson later died. During the administration of his estate, Linda Anderson, widow of one of Mr. Anderson's children, John, and the administrator of John's estate, filed a complaint against Sarah Boyle, Mr. Anderson's daughter and trustee of his revocable trust.¹⁹⁹ In her complaint, Ms. Anderson alleged that Ms. Boyle breached her fiduciary duties as trustee and sought her removal.²⁰⁰ In response, Ms. Boyle moved to compel arbitration pursuant to the terms of the agreement.²⁰¹ Ms. Anderson opposed Ms. Boyle's motion, arguing that the trust was not a contract and that she had not agreed to the arbitration.²⁰² The circuit court agreed, denying Ms. Boyle's motion.²⁰³ Ms. Boyle then filed an interlocutory appeal under Code of Virginia section 8.01-581.016.²⁰⁴

194. *Id.*

195. ___ Va. ___, ___, 871 S.E.2d 226, 227 (2022). The authors would like to thank Stephen W. Murphy, Michael H. Barker, and Jodie Herrman Lawson for their input and discussions in the preparation of the summary of this particular case.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at ___, 871 S.E.2d at 228.

204. *Id.* Section 8.01-581.016 authorizes appeals from orders "denying an application to compel arbitration." VA. CODE ANN. § 8.01-501.016(1) (Cum. Supp. 2016).

On appeal, the court noted that access to a court is a constitutional right.²⁰⁵ However, this right may be waived by a party in favor of resolving disputes through an alternative means, like arbitration or mediation, so long as the party agrees to submit to such alternative means.²⁰⁶ Specifically, a party's waiver must align with the provisions of the Virginia Uniform Arbitration Act ("VUAA"), which permits arbitration clauses in "written agreement[s] to submit any existing controversy to arbitration" or through "a provision in a written contract to submit to arbitration any controversy thereafter arising"²⁰⁷

The court held that a trust is neither a contract nor an agreement that would otherwise be subject to the provisions of the VUAA.²⁰⁸

In differentiating between a trust and a contract, the court pointed to three defining characteristics.²⁰⁹ First, the court noted that trusts are usually formed by the conveyance of a beneficial interest, as donative instruments, and without consideration.²¹⁰ Contracts, on the other hand, are formed by mutual assent, with an offer, acceptance, and consideration.²¹¹ Next, the court contrasted the duties of a contracting party against those of a fiduciary and highlighted the higher standard to which a fiduciary is held.²¹² In challenging a trustee's actions, the court noted, a beneficiary does not assert a breach of contract claim but rather asserts their claim as a breach of fiduciary duty.²¹³ Finally, the court pointed to the difference in property ownership under both structures.²¹⁴ Specifically, the court noted that "[o]ne of the major distinguishing characteristics of a trust is divided ownership of property" with the trustee "having legal title and the beneficiary having equitable title."²¹⁵ Conversely, parties to a contract do not have the same

205. *Id.* (citing VA. CONST. art. I, § 12).

206. *Id.*

207. *Id.* (quoting VA. CODE ANN. § 8.01-581.01 (2015)).

208. *Id.*

209. *Id.* at __, 871 S.E.2d at 228–29.

210. *Id.* at __, 871 S.E.2d at 229.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* (quoting GEORGE TAYLOR BOGERT, GEORGE GLEASON BOGERT & AMY MORRIS HESS, THE LAWS OF TRUSTS AND TRUSTEES § 17 (3d ed. 2017)).

division of property interest and their rights and duties may be freely transferred.²¹⁶

Next, the court reasoned that a trust is also not an agreement.²¹⁷ In making this distinction, the court noted that an agreement typically constitutes a mutual understanding between two or more persons about their rights and duties.²¹⁸ Beneficiaries of a trust are not parties to a written agreement compelling arbitration and, therefore, have not agreed to submit to arbitration.²¹⁹

Finally, the court noted that, in the absence of the Supreme Court of the United States' binding precedent, the same analysis would apply in evaluating whether the Federal Arbitration Act ("FAA") could compel arbitration in this case.²²⁰ Because a trust does not constitute a contract, the FAA also did not apply to the clause here.²²¹

Therefore, because the trust was neither an agreement or a contract for purposes of the VUAA or the FAA, the beneficiary could not be compelled to arbitrate.²²² Notably, the court's opinion left open the potential for arbitration clauses to be enforceable through other avenues, however the court did not go so far as to explain what those alternatives might be.²²³

CONCLUSION

Legislative enactments from the 2022 Session have provided practitioners with new guideposts and considerations. In particular, based on new language in the undue influence statute, practitioners will likely need to give additional consideration to documenting the capacity and self-sufficiency of clients, in order to defend against the new presumption of undue influence. In the same vein, practitioners will want to scrutinize more carefully what help clients receive and from whom. Outside of that change, the new statutory modifications clarify fiduciary responsibilities with respect to adjustments of income and principal, and the

216. *Id.*

217. *Id.* at __, 871 S.E.2d at 229–30.

218. *Id.*

219. *Id.* at __, 871 S.E.2d at 230.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

creation of unitrusts, guardianship rights and how a guardian may be appointed, and the rules governing small estates.

Addressing a range of circumstances, the Supreme Court of Virginia's recent cases provide practitioners with additional guidance as to what provisions may be included in an individual's documents, as well as the overall impact those provisions might have. In the *McMurtrie* case, we learned that no contest clauses could be applicable to settlors, given Virginia law's clear instruction that such provisions be strictly enforced. Similarly, the *Phillips* case demonstrated how a principal's expressed intent in their power of attorney can prevent others from pursuing equitable and statutory accountings, even after death. And finally, the *Boyle* case provided clarity, at least for now, that certain arbitration provisions cannot be enforced against a beneficiary who has not otherwise agreed to the provision.

These cases also shed light on who has standing to pursue actions on behalf of an estate. In both the *Rohrbaugh* and *Kittrell* cases, the court reminded parties that a personal representative is the proper party to bring a claim on behalf of an estate. Similarly, the *Machen* case addressed an heir's standing to sue to impeach a will, given their pecuniary interest in the estate's disposition. Finally, the *Galiotos* case provided a helpful reminder that the circuit court has broad discretion in removing fiduciaries of an estate and in denying fiduciary compensation and attorney's fees, particularly in instances where its administrators and fiduciaries are not acting with the estate's best interests in mind.