NEWSLETTER
Trusts and Estates

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Message from the Chair

Jennifer E. Shirkey, Chair
Trusts and Estates Section

On behalf of the Board of Governors of the Virginia State Bar Trust and Estates Section, I'm pleased to introduce the Fall 2015 edition of our Trusts and Estates Newsletter.

This issue includes four timely articles. First, John Midgett suggests it's time to revisit Virginia's augmented estate law and adopt the approach used in the most recent version of the Revised Uniform Probate Code. The RUPC moves away from Virginia's current spousal support-based concept toward a view of marriage as an economic partnership, with the surviving spouse's share varying based on the length of marriage. The Virginia General Assembly may consider this proposal when it convenes in January.

In our second article, Sandy Sanders discusses the reasoning and impact of the Virginia Supreme Court's recent no contest clause decision in *Rafalko v. Georgiadis*. He describes useful practice hints in light of the opinion. Next, Thomas Repcyznski explores "de facto" wills—when a document failing to satisfy Virginia Code Section 64.2-403's formal execution requirements might still be accepted as a valid will. He helpfully summarizes cases decided on this topic to date. Finally, Kelly Pinckard offers valuable tips to put a smile on your Commissioner of Account's face when reviewing your next fiduciary accounting.

Many thanks to Lauren Jenkins, our Newsletter Editor, and Jennifer Schooley, our Assistant Newsletter Editor, for their work in producing this edition. We encourage anyone interested in contributing to upcoming newsletters to contact Lauren or Jennifer.

In addition to the newsletter, our Section once again assisted Virginia CLE in presenting the 34th Annual Trusts and Estates Seminar this Fall. Topics included a survey of federal and Virginia law developments, the evolving concept of marriage in Virginia, modifying trusts under the Uniform Trust Code, asset protection trusts, and ethics. Earlier, we co-sponsored a webinar on advance medical directives (AMD) with the VSB Special Committee on Access to Legal Services. Attendees agreed to either accept a pro bono referral to draft an AMD or financially contribute to a pro bono legal services organization in exchange for the free webinar.

Our Board of Governors welcomes your suggestions for future Section activities. Please feel free to contact me or any other Board member with your ideas. Our contact information is on the last page of this newsletter or on our Section website at http://www.vsb.org/site/sections/trustsandestates/te-board-of-governors. ⚜

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Reassessing and Revising Virginia's Elective Share Laws: Toward a more uniform and equitable result.

By John T. Midgett

On January 1, 1991, the concept of the "augmented estate" became effective as the basis for measuring the forced or elective share of a surviving spouse in the estate of a deceased spouse.[1] Prior to January 1, 1991, the forced share was limited to a fraction[2] of the decedent's net probate estate with respect to personal property plus whatever rights the surviving spouse's dower or curtesy interest gave the surviving spouse in the deceased spouse's real estate. Today, the same fractions apply, but to the statutorily defined augmented estate.

Non-vested rights of dower and curtesy, as well as existing separate equitable estates, were abolished effective January 1, 1991.[3]

Under prior law of dower and curtesy, many practitioners felt that the surviving spouse's forced share was not adequately defined, and there were numerous ways to defeat or minimize the election of a forced share and disinherit the surviving spouse:

1. Non-probate transactions such as insurance, joint property, and inter vivos trusts were not included in the spouse's forced share;

2. Separate equitable estates in both real estate and personal property were outside the scope of the spouse's forced share;

3. There was no way to make a forced share election in intestacy;

4. Gifts could be used to reduce the decedent's estate and frustrate the surviving spouse's claim; and

5. A spouse who had been adequately provided for during lifetime could "double dip" by adding forced share property to property acquired during lifetime or non-probate property acquired at death.

The concept of the augmented estate was taken from a version of the Uniform Probate Code (UPC) that originated in 1983.[4] It incorporated concepts from the federal estate and gift tax law in defining the size of the spouse's elective share. Virginia has not adopted the UPC in whole, and has instead adapted parts to existing laws, creating a fairly unique application of "uniform" concepts.

The elective share portions of the UPC were substantially revised by the National Conference of Commissioners on Uniform State Laws in 1990,[5] and re-organized and clarified in 1993[6] and again in 2008.[7] Virginia essentially adopted a version that had, by January, 1991, passed its prime. As we near the silver anniversary of the adoption by Virginia of the elective share, the deficiencies of our current statutes and the revisions to the UPC signal a need for change.

Virginia's elective share statutes contemplate a model that is designed to provide support to the surviving spouse. The Revised Uniform Probate Code (RUPC) instead brings the elective share laws in line with a contemporary view of marriage as an economic partnership.[8] This is the same view already employed in the divorce arena through equitable distribution, and at death in the eight (8) community property states. In many common law states, such as Virginia, the law has not quite caught up.

The concept of married persons being treated as one is not new in the law. The "unity of person" is an important element in the creation of tenants by the entirety property. A pooling of income between spouses is permitted for income tax filing under "married-filing jointly." A partnership theory of marriage has been described "as an expression of the presumed intent of husbands and wives to pool their fortunes in an equal basis, share and share alike."[9]

The RUPC version of the elective share differs from Virginia's current elective share statutes in three

(3) major ways:

1. The RUPC considers the assets of both spouses, not just the decedent's assets, in determining the pool of assets available for determining the elective share;[10]

2. The RUPC provides a set distribution of fifty percent (50%) of the marital assets,[11] but multiplies this portion by increasing percentages based upon the length of the marriage;[12] and

3. The RUPC provides a protective device for elective share claims made on behalf of an incapacitated spouse.[13]

Under the UPC and Virginia law, the surviving spouse in many cases can only claim a one-third (1/3) share in the decedent's assets, not fifty percent (50%) of the combined assets that an economic partnership would presume.[14]

Under Section 2-203 of the RUPC, the elective share percentage of fifty percent (50%) is applied to the value of the "marital property portion of the augmented estate."[15] Under the RUPC, the augmented estate equals the value of each spouse's combined assets, not merely the value of assets titled in the decedent's name.[16] The augmented estate consists of four (4) distinct elements:

1. The value of the decedent's net probate estate;[17]

2. The value of the decedent's non-probate transfers to others, consisting of will substitute type *inter vivos* transfers made by the decedent to persons other than the surviving spouse;[18]

3. The value of the decedent's non-probate transfers to the surviving spouse;[19] and

4. The value of the surviving spouse's net assets held at the decedent's death, plus any property that would have been included as the surviving spouse's non-probate transfers to others had the surviving spouse been the decedent.[20]

The second major change between the RUPC and Virginia's statutes is the "buy-in" period: a gradual vesting schedule that embodies the partnership theory of marriage.[21] Virginia's current elective share provides for a full one-third (1/3) (or one-half (1/2) in some instances) of the decedent's assets regardless of the length of the marriage. The RUPC provides for a "buy-in" period, the effect of which will decrease or even eliminate the entitlement of a survivor in a short term, late in life marriage, preventing the unintentional "disinheritance" of the decedent's family.[22]

The "buy-in" period provides for a minimal elective share claim for marriages of less than one (1) year, with increasing percentages until fifteen (15) years of marriage have elapsed, at which time both spouses are fully "vested" in the estate of the other.[23] This "buy-in" period removes the inequitable results when an elective share claim is made for a short-term marriage, affecting a partial disinheritance of the children of the decedent. Let's look at some examples of how this revised approach might work:

> Assume that Husband and Wife had been married for two (2) years at Husband's death. At Husband's death, he owned $3,000,000 in assets, while Wife owned just $10,000 in assets. Under the current elective share laws in Virginia, if Husband died first, Wife would be entitled to make an elective share claim for fifty percent (50%) or $1,500,000 unless Husband was survived by children from a prior relationship, in which case Wife would be entitled to an elective share claim of one-third (1/3) or $1,000,000.
>
> Under the RUPC, Husband and Wife's combined assets of $3,010,000 comprise the augmented estate. The marital property portion is fifty percent (50%) of $3,010,000 or $1,505,000. If Husband were to die first, Wife would be entitled to $180,600 as a two (2) year marriage would entitle the surviving spouse to twelve percent (12%) of the marital property share ($3,010,000 multiplied

by 50% multiplied by 12%). Because Wife already owns $10,000 of property, she would satisfy her elective share claim by obtaining $170,600 of Husband's assets.

Assume, however, that under the same circumstances Wife dies first. The calculation of Husband's elective share claim would be exactly the same, fifty percent (50%) of the combined assets multiplied by the twelve percent (12%) marriage factor yielding $180,600; however, Husband already owns property in excess of that amount, and would not be able to possess any of Wife's assets as a result.

Assume the same facts, but fast forward twenty-eight (28) years into the future where the parties have been married for thirty (30) years. Combined assets of $3,010,000 would yield the marital property share at a fifty percent (50%) rate or $1,505,000. Wife would be entitled to one hundred percent (100%) of this marital property share less the value of Wife's own assets, yielding a claim of $1,495,000 of Husband's assets ($3,010,000 multiplied by 50% multiplied by 100%, less Wife's $10,000).

Finally, under the same long term marriage, had Wife died first, Husband would be entitled to one hundred percent (100%) of the marital property of the combined assets or $1,505,000. Because Husband's individual assets exceeded that amount, Husband again would not be able to take any portion of Wife's property as a result of the elective share claim.

Clearly, the RUPC results in a more equitable treatment, not only for the parties to the marriage, but to their children.

The third major change contemplated by the RUPC is the treatment of elective share claims made by an incapacitated spouse.

Under Virginia's current statute, there is no explicit procedure for making an elective share claim by or on behalf of an incapacitated spouse. Under the Uniform Power of Attorney Act, if a power of attorney grants general authority to act on behalf of a principal with respect to estates, trusts, and other beneficial interests, the agent could "[d]emand or obtain money or another thing of value to which the principal is, may become, or claims to be entitled by reason of an estate, trust, or other beneficial interest, by litigation or otherwise."[24] The RUPC specifically permits an agent under a power of attorney, a conservator, or a guardian to make the elective share claim on behalf of an incapacitated spouse; however, unlike Virginia's current statute, any property used to satisfy the incapacitated spouse's elective share claim will not be paid outright to the claiming spouse, but will be held in a custodial trust for the benefit of the incapacitated surviving spouse.[25]

This custodial trust is treated as if it had been created by the decedent spouse and does not give the incapacitated spouse or anyone acting on the incapacitated spouse's behalf a power to terminate the trust.[26]

While the surviving spouse is incapacitated, the trustee expends as much or all of the trust property as advisable for the health, maintenance, and support of the surviving spouse.[27] Upon the death of the surviving spouse, the remaining trust property is distributed pursuant to the residuary clause of the will of the first spouse to die.[28]

This provision allows an incapacitated spouse to receive a benefit from the decedent spouse, but without unduly enriching the family of the incapacitated spouse at the expense of the decedent spouse's family.

The RUPC also has several minor differences with Virginia's current law, mostly as a result of the unique modifications made by the General Assembly when the elective share statute was first passed in 1991.[29]

Current Virginia law provides that property gifted by the decedent in the calendar year of death, or in any of the five (5) preceding calendar years is brought back into the augmented estate to the extent the gifts exceed the annual gift tax exclusion for the year in which the gift is made.[30]

The RUPC, as did the original UPC, only requires

a two (2) year "look back" for gifts made by the decedent (or in the case of the RUPC, the surviving spouse).[31]

Virginia's current augmented estate statute provides for an additional bonus to the surviving spouse of risk-free interest at the legal rate (six percent (6%)) from the date of the decedent's death to the date of satisfaction of the elective share.[32]

Under the RUPC, the surviving spouse's claim is treated as a general pecuniary bequest.[33] By treating the elective share claim as a pecuniary bequest, interest would not begin to run on the unsatisfied portion beginning at the date of the decedent's death, but would instead begin to run at the expiration of one (1) year after the date on which the beneficiary is entitled to receive the pecuniary amount.[34] Given the difficulty in setting any hearing, contested or otherwise, on the dockets of the courts within one (1) year of making an elective share claim, elimination of the interest penalty running from the date of death (not qualification of a personal representative) would result in a more equitable result for the decedent's personal representative and the decedent's family while still protecting the surviving spouse if satisfaction of the claim was not made in a timely manner following determination of the amounts due.

While the provisions of the RUPC are significantly different than current Virginia law, by considering assets of both spouses in determining the augmented estate value, by providing a variable benefit based on length of marriage, and by protecting the family of the decedent in the event of a claim for elective share by an incapacitated spouse, these differences are more in line with the evolving "partnership theory" of marriage versus Virginia's antiquated support based provisions. Legislation to adopt these provisions of the RUPC has been proposed and will be considered by the General Assembly beginning in the January, 2016 term. The adoption of an elective share process based on the RUPC will provide practitioners and the courts with interpretive guidance as provided by the comments made by the Uniform Law Commission and by common law through decisions made on similar statutes adopted by other states. Currently, Virginia with its unique take on the 1983 version of the UPC stands alone, and reliance on common law of other jurisdictions is not helpful in resolving disputes under our current statutes.

The time for change of our "support based" elective share system is now and the adoption of the RUPC version of the augmented estate will bring Virginia and its citizens more in line with present-day economic expectations arising out of marriage. ⚜

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Mr. Midgett is a graduate of the University of Virginia, where he attained a Bachelor of Arts degree, with Distinction. He is a graduate of the T. C. Williams School of Law at the University of Richmond, where he was a member of the Law Review.

Mr. Midgett is a nationally known speaker on topics relating to estate planning, taxation, probate, elder law, and family businesses. He has also written and lectured to other attorneys, accountants, and trust officers in the related areas of estate planning, taxation and administration for the continuing education required in the various professions.

In addition to his practice and speaking schedule, John is actively involved in the Virginia Bar Association Trusts & Estates Section (Vice Chairman 2015-2017), the Hampton Roads Estate Planning Council (President 2010-2011), and the Duke University Estate Planning Council. John has served as Chair of the Trusts & Estates Section of the Virginia State Bar in 2008-2009, and is a Past President of the Hampton Roads Gift Planning Council and the Norfolk-Tidewater Chapter of the Society for Financial Service Professionals. In May, 2006 he was elected by the Board of Directors of the National Association of Estate Planners & Councils as an Accredited Estate Planner®, and writes and edits the Technical Corner for the AEP® Alert. John has been rated as "AV" in the areas of estate planning and administration, the highest designation available to attorneys in the Martindale-Hubbell® Law Directory. John has been named to Virginia Business Magazine's Legal Elite, a Virginia "Super Lawyer" and has been included in the 2006-2015 editions of The Best Lawyers in America®, and was named in 2013 and in 2015 "Lawyer of the Year" for Trusts & Estates Litigation for the Hampton Roads area. He is a Fellow in the American College of Trust and Estate Planning Counsel. ⚜

(Endnotes)

1. *See* Act of Apr. 9, 1990, ch. 831, 1990 Va. Acts 1354 (codi-

fied as amended at VA. CODE ANN. § 64.2-305).
2. *See* VA. CODE ANN. § 64.1-16 (1989). Under prior law, the forced share was limited to one-half (½) if the decedent was not survived by descendants and one-third (1/3) if the decedent was survived by descendants.
3. *See* 1990 Va. Acts 1354 (codified as amended at VA. CODE ANN. § 64.2-301).
4. *See* J. William Gray, Jr., *Virginia's Augmented Estate System: An Overview*, 24 U. RICH. L. REV. 513 (1989-1990).
5. UNIF. PROBATE CODE § 2 (UNIF. LAW COMM'N 1990).
6. UNIF. PROBATE CODE § 2 (UNIF. LAW COMM'N 1993).
7. UNIF. PROBATE CODE § 2 (UNIF. LAW COMM'N 2008).
8. *See* UNIF. PROBATE CODE pt. 2, cmt. at 71 (UNIF. LAW COMM'N 2010) [hereinafter RUPC] All references to the "Revised Uniform Probate Code" or "RUPC" refer to the Uniform Probate Code as revised in 2010.
9. *See* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW (1989).
10. RUPC, *supra* note 8, § 2-203.
11. *Id*. § 2-202(a).
12. *Id*. § 2-203(b).
13. *See id*. § 2-212(b).
14. *See* UNIF. PROBATE CODE § 2-201 (UNIF. LAW COMM'N 1983); VA. CODE ANN. §§ 64.2-304, -305.
15. RUPC, *supra* note 8, § 2-203.
16. *Id*. § 2-203(a).
17. *See id*. § 2-204.
18. *See id*. § 2-205.
19. *See id*. § 2-206.
20. *See id*. § 2-207.
21. VA. CODE ANN. § 64.2-304.
22. *See* RUPC, *supra* note 8, § 2-203(b).
23. *See id*.
24. VA. CODE ANN. § 64.2-1632(B)(2).
25. *See* RUPC, *supra* note 8, § 2-212.
26. *See id*. § 2-212(c).
27. *See id*. § 2-212(c)(2).
28. *See id*. § 2-212(c)(3).
29. *See* 1990 Va. Acts 1354.
30. VA. CODE ANN. § 64.2-305(A)(3)(d).
31. *See* RUPC, *supra* note 8, § 2-205(3)(C).
32. *See* VA. CODE ANN. § 64.2-304; VA. CODE ANN. § 6.2-301.
33. *See* RUPC, *supra* note 8, § 2-209(e).
34. *See* VA. CODE ANN. § 64.2-425(A). ⚜

No Contest Clauses in Virginia After *Rafalko v. Georgiadis*: Constitutional and Common Law Concerns

By Elwood Earl "Sandy" Sanders, Jr.

No contest or in terrorem clauses in wills and trusts have long vexed the courts in the United States, and Virginia is no exception. The standard form of a no contest clause is that if legal action is taken (or in some cases threatened) to contest the validity of a will or trust document, the beneficiary loses the bequest if the contest fails. Courts are troubled by these clauses because there is a conflict between: (i) the desire to uphold the testator's or settlor's right to testamentary freedom and the prevention of family litigation; and (ii) the abhorrence of a legal forfeiture and access to courts for redress of grievances. The Supreme Court of Virginia discussed these clauses in 1956[1] and 2009[2] decisions, but revisited the issue in the recent case of *Rafalko v. Georgiadis* decided on November 5, 2015.[3]

Rafalko involved a trust which originally allowed the settlor's two sons and the settlor's second wife (who was not the sons' mother) to receive the corpus of the trust share and share alike.[4] In 2012, the settlor amended the trust to provide that the sons would not take under the trust until after the death of the much younger second wife.[5] The upset sons tried to persuade their father to change his mind to no avail.[6] When the father died in late 2012, the sons engaged in several actions to indicate their intent to contest the trust:

- One of the sons sent a letter to the father's estate planning attorney asking the attorney to preserve all records for a possible contest.[7]
- The sons wrote a letter to their stepmother asking to terminate the trust by the agreed action of all beneficiaries. If the stepmother did not agree to the trust termination, the sons would seek to have the amendment invalidated due to undue influence and lack of testamentary capacity.[8]

The sons received an unpleasant surprise when they finally read the trust; the trust had been amended to include a particularly severe no contest clause:

> L. No Contest Clause and Release of Claims. I intend to eliminate the possibility that any beneficiary of mine will challenge the decisions that I have made concerning the disposition of my assets during my lifetime or at my death, and my Trustee shall take all appropriate steps to carry out this intent. Accordingly, I direct the following:
>
> 1. Absent proof of fraud, dishonesty, or bad faith on the part of my Trustee, if any beneficiary or potential beneficiary under this trust agreement shall directly or indirectly, by legal proceedings or otherwise, challenge or contest this trust agreement or any of its provisions, or shall attempt in any way to interfere with the administration of this trust according to its express terms, any provision I have made in this trust agreement for the benefit of such beneficiary shall be revoked and the property that is the subject of such provision shall be disposed of as if that contesting beneficiary and all of his or her descendants had predeceased me. Absent proof of fraud, dishonesty, or bad faith on the part of my Trustee, the decision of my Trustee that a beneficiary or potential beneficiary is not qualified to take a share of the trust assets under this provision shall be final.[9]

It seems that the clause would potentially come into effect for the letter to the stepmother and maybe even the letter to the lawyer who drafted the trust. The no contest clause did not require actual legal action to trigger it. The language also states that the decision of Rafalko (the trustee) is final subject to her

acting in bad faith or fraud or dishonesty as to whether this clause comes into play. The trustee did indeed decide after consultation with legal counsel that the sons' actions had violated the no contest clause.[10] As a result, the sons and their descendants would no longer take under the trust.[11] The sons then filed suit seeking a declaratory judgment that their actions did not invoke the no contest clause and that the sons and their descendants did not forfeit their interest under the trust.[12]

The circuit court held that the no contest clause had not been triggered. The clause only applied to the provisions of the amendment and did not apply to the provisions of the trust agreement that had not been amended.[13] Upon Rafalko's request for reconsideration, the trial court held that Rafalko had acted in bad faith when she determined that the sons had violated the no contest clause.[14]

The Supreme Court in a 4-3 decision, authored by Justice Goodwyn, did not reach the merits of the case. Rather, the Court held that the trustee did not assign error to the trial court's finding that the no contest clause only applied to the trust amendment and not the provisions of the trust itself.[15] Thus, because there is an independent, unappealed basis for the circuit court's decision, the court cannot do anything but affirm the trial court;[16] however, the Supreme Court did cite one of the leading cases on no contest clauses:

> No contest clauses in trusts that are part of a testamentary estate plan are given full effect, as they are in wills. *Keener v. Keener*, 278 Va. 435, 442, 682 S.E.2d 545, 548 (2009). Furthermore, our case law is clear that such clauses, while enforceable, are to be strictly construed. We construe a no contest clause strictly "according to its terms." *Id*.
>
> When determining whether a beneficiary's actions have triggered a no contest clause, we strictly construe the language of the clause because the drafter chose the language and forfeiture is disfavored in the law. *Id*. at 442-43, 682 S.E.2d at 548-49.[17]

There is no discussion by the Court on any public policy or constitutional exception to no contest clauses, and none have been cited in Virginia law; however, there is precedent in other states favoring a restrictive view of no contest clauses. Public policy and constitutional issues do exist, and where appropriate, need to be pled and argued.

I. Public Policy and Constitutional Issues

The majority rule in the United States allows and enforces no contest clauses; however, there is an important exception: the clause does not apply if the legal contest was made in good faith and with probable cause.[18] Furthermore, the Restatement (Third) of Property agrees: "A provision in a donative document purporting to rescind a donative transfer to, or a fiduciary appointment of, any person who institutes a proceeding challenging the validity of all or part of the donative document is enforceable unless probable cause existed for instituting the proceeding."[19] "Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful."[20]

The Mississippi Supreme Court cited a number of authorities in support of its holding in the case of *Parker v. Benoist* that no contest clauses are enforceable where good faith and probable cause were present.[21] The Mississippi court cited the reasons for upholding no contest clauses:

> The Restatement does acknowledge that forfeiture clauses may serve a valuable purpose in deterring "unwarranted challenges to the donor's intent by a disappointed person seeking to gain unjustified enrichment," or preventing "costly litigation that would deplete the estate or besmirch the reputation of the donor," or discouraging "a contest directed toward coercing a settlement—the so-called strike suit." However, enforcing such a provision without a probable-cause exception would defeat "the jurisdiction of the court to determine the validity of a donative transfer." Essentially, the Restatement reasons that unlimited

> enforceability of forfeiture clauses frustrates the fundamental purpose of the courts to ascertain the truth.[22]

The court discussed the need to truly determine the intent of the testator.[23] Further, will contests sound in equity and that equity requires all litigants to act in good faith.[24] The court also cited a provision of its state constitution that ensures access to courts.[25] Virginia has no such provision in its constitution.[26]

II. Did Virginia Adopt the Good Faith and Probable Cause Exception?

The Supreme Court of Virginia in 1956 discussed the good faith and probable cause exception in *Womble v. Gunter*,[27] and elected not to apply it because it was not pled either at trial or on appeal:

> It is unnecessary, however, for the court at this time and in this case to pass upon the question whether good faith, probable cause and reasonable justification afford a defense to a "no contest" provision in a will. This is a question that must be affirmatively established by the parties making the allegation. It was not made an issue in the pleadings other than as heretofore stated. No testimony bearing on the question was introduced except the opinion of one witness, who did not state the facts upon which he based his conclusion, nor was the question raised in the lower court. It is well settled that this court will not determine questions not raised in the court below. "We do not consider matters which are not presented in the pleadings or involved in the issues of the case in the trial court. New contentions first appearing in the petition for appeal are beyond our review of the case."[28]

In effect, the question was barred by the contemporaneous objection rule; however, the Court also held that those minor children who contested the will through their next friend were also barred from taking under it.[29] The Court called for a strict interpretation of the no contest clause based upon upholding the testator's intent to distribute the testator's property as the testator sees fit, but the clause is disfavored because it works a forfeiture.[30] The *Keener* court seemed to say *Womble* rejected the good faith and probable cause rule on its merits.[31]

My research did disclose some potential English common law precedent that adopts the good faith and probable cause exception to a no contest provision.[32] Because English common law is the rule of decision in this Commonwealth,[33] an argument can be made (and it must be cited at trial and on appeal with care) that require Virginia courts to adopt the good faith and probable cause exception to no contest clauses.[34]

III. Is Knowledge of the No Contest Clause Necessary?

There are no Virginia cases on point, but other states' precedent is not encouraging with respect to whether a beneficiary's knowledge of a no contest clause impacts its enforcement.[35] In *Alper v. Alper,* the New Jersey Supreme Court held that the contest of one beneficiary barred all of the other beneficiaries (even a minor child) from taking under the will.[36] The court did not draw a distinction between the knowing and unknowing potential takers.

IV.Practice Tips

There are several practice tips that can be learned from the *Rafalko* opinion:

1. Although no contest clauses are disfavored, they will be strictly enforced. The trial court in *Rafalko* adopted what could be argued was a strained interpretation of the no contest clause to avoid the issue of its effect[37] and the Supreme Court decided the case on the unrelated issues of the existence and sufficiency of the assignment of error probably to avoid the effect of the clause. If you have to draft such a clause, use very clear language as to what constitutes a contest, and that the clause if in an amendment to a trust (or a codicil to a will) applies to the entire trust or will. Do not assume the courts will uphold the no contest clause just because it is in the document.
2. If you are considering challenging a will or trust, make sure you have the most recent version of the will or trust.[38]
3. If you must litigate in spite of the no contest clause, argue every ethically conceivable

point at both trial and on appeal.

4. Finally, the no contest clause may need legislative reform. At least one state has adopted the good faith and probable clause exception as a statute.[39] I do not think this article is a proper place to advocate such a reform, but the General Assembly could consider it. ⚜

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(Endnotes)

1. *See* Womble v. Gunter, 198 Va. 522 (1956).

2. *See* Keener v. Keener, 278 Va. 435 (2009).

3. *See* Rafalko v. Georgiadis, No. 141533 (Va. Nov. 5, 2015).

4. *See Rafalko*, slip op. at 1.

5. *See id*.

6. *See id*. at 2.

7. *See id*.

8. *Id*. It is amazing that the sons, one of whom is an attorney, did not first ask for a copy of the trust before they acted.

9. *Id*. at 2-3.

10. *Id*. at 4.

11. *Id*.

12. *Id*.

13. *Id*. at 5-6.

14. *Id*. at 6.

15. *Id*. at 14.

16. *Id*. The Supreme Court also held there was sufficient evidence to find bad faith by the trustee in the timing of the decision to invoke the no contest clause (three months) in spite of the sons' attempt to disavow their earlier letters and threatening actions. The sons also signed releases promising not to challenge the trust legally. *Id*. at 11-13.

17. *Id*. at 7.

18. *See* South Norwalk Trust Co. v. St. John, 101 A. 961 (Conn. 1917).

19. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.5 (AM. LAW INST. 2003). The Uniform Probate Code has codified the enforcement of a no contest clause when there is probable cause. UNIF. PROBATE CODE § 2-517 (UNIF. LAW COMM'N 2010) ("A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.").

20. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.5 cmt. c.

21. 160 So. 3d 198 (Miss. 2015).

22. *Id*. at 205 (citations omitted).

23. *Id*. at 206.

24. *Id*. at 205, 212.

25. *Id*. at 205 ("All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay." (quoting MISS. CONST. art. 3, § 24)). At least one other court applied similar clauses in the state's constitution. See In re Keenan's Will, 205 N.W. 1001, 1006 (1925) ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." (quoting WIS. CONST. art. I, § 9)).

26. I suppose a clever litigant could argue due process and access to courts (and should do so), but it is not likely to be successful.

27. 198 Va. 522, 528 (1956).

28. *Id*. (citations omitted).

29. *Id*. at 532.

30. *See id*. at 532. The Court in *Rafalko* said something very similar in an introductory manner. *See* Rafalko v. Georgiadis, No. 141533, slip op. at 7 (Va. Nov. 5, 2015).Fairfax County Circuit Court Judge Stanley P. Klein held that *Keener* was controlling and upheld the no contest clause. *See In re* Estate of Rohrbaugh, 80 Va. Cir. 253 (2010).

31. *See* Keener v. Keener, 278 Va. 435, 443 (2009).

32. *See* Powell v. Morgan, 2 Vern. 90, 23 Eng. Rpt. 668 (Chancery 1688); Morris v. Borroughs, 1 Atkyns. 404 (1739); Loyd v. Spillant, 3 Pere William's Rpts. 344 (1734).

33. VA. CODE ANN. § 1-200 (English common law is the rule of decision in the Virginia courts unless a decision is repugnant to the Virginia Constitution or Bill of Rights). This statute has teeth in the prior cases. *See Weishaupt v. Commonwealth*, 227 Va. 389 (1984) (extensive discussion of English cases on martial rape) and Campbell v. Commonwealth, 246 Va. 174 (1993)

(After discussion of English common law and the Virginia statutes, the Court held forgery of a public record does not require prejudice to another).

34. It is important to note that this was not argued in *Rafalko*.

35. In *Rafalko*, the sons did not know about the no contest clause prior to the activities that were considered triggering events. *See* Rafalko v. Georgiadis, No. 141533, slip op. at 3 (Va. Nov. 5, 2015) ("Neither Basil nor Paul were aware of the September amendments to the trust until after Paul had sent the letters.").

36. 65 A.2d 737, 741 (N.J. 1949) (finding that the forfeiture of the minor's bequest did not violate public policy); *see also* Tunstall v. Wells, 144 Cal. App. 4th 554 (2nd Dist. 2006) (*Alper* followed but California has some public policy exceptions to no contest clauses such as forgery; constitutional claims rejected and other cases cited); Commerce Trust Co. v. Weed, 318 S.W.2d 289, 302 (Mo. 1958) (rejecting probable cause exception and barring those taking under the rights of a contesting party from taking under will). I have grave questions on barring innocent beneficiaries for the contest of one particular beneficiary. The U.S. Constitution, art. 3, § 3 forbids "corruption of blood" as a punishment for treason and also forbids a bill of attainder, but those arguments have not yet prevailed over innocents who would have taken from a slayer in administration of the anti-slayer statutes. If applicable, that issue should be researched and argued.

37. *See Rafalko*, slip op. at 24-25 (Mims, J., dissenting) ("The circuit court ruled that the words 'this trust agreement' as used in the September amendment applied only to that amendment itself rather than to the entire trust agreement as amended and restated on August 27, 2012. However, the September amendment is not a trust agreement. . . . Consequently, the words 'this trust agreement' as used in the September amendment must refer not to that amendment alone but to that amendment together and collectively with the August 27, 2012 trust agreement it amends.").

38. Section 64.2-775 of the Code of Virginia requires the trustee to provide the beneficiary with a copy of the trust instrument. I recommend using that statute first before any legal action is taken or threatened.

39. *See* ARIZ. REV. STAT. ANN. § 14-2517 (adopting section 2-517 of the Uniform Probate Code). ⚜

"De Facto Wills": Estate Planning's Dirty Little Secret?

By Thomas W. Repczynski

"De facto wills?" you say. "Surely not in Virginia! Did I miss a memo? Is the General Assembly even in session?"

Without so much as a tweet or a blog post, let alone fanfare or a spread on the front page of Lawyers Weekly, Virginia now recognizes "de facto wills." No one, it seems, has dared to so label them until now. Nevertheless, like Christmas in Seuss's Whoville, de facto wills came just the same: "It came without ribbons! It came without tags! It came without packages, boxes or bags!"[1] Chapter Two of the Virginia Practice Probate Handbook (updated in 2015) warns practitioners to "BE CAREFUL" of this "MAJOR CHANGE IN THE LAW."[2] So, how is it that such a development carried no newsflash at all?

The 2007 adoption (yes, I said 2007!) of what is now section 64.2-404[3] opened wide the doors to proving and probating attempts to document and effect testamentary dispositions that would have failed before its enactment.[4] An estates and trusts litigator's dream, "404" blurred a long-accepted and easily-recognized "bright line" standard, replacing it instead with a fact-intensive, situation-specific approach. This relatively recent statutory shift–still only minimally battle-tested here in the Commonwealth–has long-time practitioners and judges alike re-evaluating what it takes for a document to be accepted as a will when the requirements of section 64.2-403 have not been met.[5]

When is a will that is not a will capable of being deemed a will?

There are now defined circumstances in which an otherwise legally-deficient document intended as a testamentary disposition will be upheld as a valid will in Virginia. Section 64.2-404, is Virginia's enactment of section 2-503 of the Uniform Probate Code (UPC), the so-called "Harmless Error Rule."[6] The rule states that certain defects may be forgiven if sufficient proof can be adduced that the testator intended the faulty document to be the testator's will.[7] The proponent of the will must present clear and convincing evidence to establish that the testator intended the document (or alteration) to effect a final testamentary disposition.[8] If the evidence succeeds, the statute now affords recognition and legal acceptance of the testator's insufficient effort. The statute expressly permits admitting to probate writings "not executed in compliance with § 64.2-403" but otherwise supported in court by convincing evidence of intentionality and finality.[9] Specifically, section 62.4-404 provides as follows:

> A. Although a document, or a writing added upon a document, was not executed in compliance with § 64.2-403, the document or writing shall be treated as if it had been executed in compliance with § 64.2-403 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.
>
> B. The remedy granted by this section (i) may not be used to excuse compliance with any requirement for a testator's signature, except in circumstances where two persons mistakenly sign each other's will, or a person signs the self-proving certificate to a will instead of signing the will itself and (ii) is available only in proceedings brought in a circuit court under the appropriate provisions of this title, filed within one year from the decedent's date of death and in which all interested persons are made parties.[10]

The purpose of the Harmless Error Rule is to allow a reviewing "court to excuse a harmless error in

complying with the formal requirements for executing or revoking a will" in much the same manner as "has long been applied to defective compliance with the formal requirements for nonprobate transfers," as with life insurance beneficiary designations, for example.[11] Case studies and evidence considered by the Uniform Law Commission (ULC), i.e., the drafters of the UPC[12], suggested that the remedial impact of the new statute would primarily apply in two cases: (i) failure to obtain signatures from one or both attesting witnesses, so long as the will proponent could show that "the defective execution did not result from irresolution or from circumstances suggesting duress or trickery–in other words, that the defect was harmless to the purpose of the formality"; and (ii) situations involving "alterations to a previously executed will" such as when "the testator adds a clause" or "crosses out former text and inserts replacement terms."[13] As noted by the ULC, "[l]ay persons do not always understand that the execution and revocation requirements of Section 2-502 call for fresh execution in order to modify a will; rather, lay persons often think that the original execution has continuing effect."[14]

The only Virginia Supreme Court case addressing section 64.2-404 was in 2010 overturning a will contestant's successful demurrer that had blocked the probate of a holographic will containing several notations that were alleged to have been written by the will's proponent at the specific request of the decedent.[15] The Court has not yet had occasion or taken the opportunity to address the substance of section 64.2-404;[16] however, while we continue to await substantive decisional authority in Virginia interpreting section 64.2-404, we must look to other jurisdictions that have adopted this UPC provision. In New Jersey, for example, the UPC's Harmless Error Rule has engendered a fair amount of activity. One particularly relevant example is *In re Estate of Hoch*.[17] In *Hoch*, there was a dispute over a will that was validly executed but later altered with cross-outs and additions that were initialed by the testator. Noting New Jersey's adoption of the Harmless Error Rule, the court applied the rule to give testamentary effect to the testator's alterations and to uphold the trial court's admission of the revised will to probate.[18]

Here in Virginia, although reported cases even mentioning section 64.2-404 are practically non-existent, there have been a few occasions at the Circuit Court level to apply the new statute. In the *Estate of Brown* case in December, 2013, Fairfax County Circuit Court Judge Robert J. Smith analyzed section 64.2-404, but ultimately rationalized around applying it, instead accepting a "conformed (unsigned) copy" of a will under the lost will doctrine.[19] Judge Smith reasoned under the specific factual circumstances that the conformed copy could be admitted without applying the "saving statute" as he dubbed section 64.2-404, reasoning that the lost original of the same will had complied in full with the signature requirements of section 64.2-403 prior to its loss and therefore "did not need saving."[20]

In *Palesis v. Hlouverakis*, which may be the most direct application in Virginia to date, Henrico County Circuit Court Judge Catherine C. Hammond, admitted to probate together (presumably as a single will) both a photocopy of a 2011 holographic will and a signed, typed version of the 2011 will.[21] Multiple trial witnesses testified to have seen the decedent sign the typed copy, but none of the witnesses signed the typed copy of the will. Having already considered and excluded a later 2012 will as "an elaborate fake," undermined by "many preposterous circumstances" and "false testimony" of the two attesting witnesses, Judge Hammond appeared to have little difficulty ascribing the requisite signatures to the earlier will as if the witnesses had actually signed.[22] Despite the "unusual circumstances" of the case, Judge Hammond concluded that the requisite clear and convincing evidence standard had been met.[23] The testimony apparently supported findings that the original, handwritten will would not have remained important to the testator and that the signed and typed, but "unwitnessed," version of the document should be elevated to the same dignity "as if" properly witnessed under section 64.2-403.

Similarly, in one of several litigated matters relating to the *Estate of Marvin Sacks*, the Arlington Circuit Court recently had occasion to address multiple facets of the statute under circumstances resembling *Hoch*.[24] The *Sacks* case involved section 64.2-404 statutory challenges not only to alterations

to an existing will, but also to the statutory signature requirement itself. At the threshold, the respondent in Sacks sought to dismiss the petitioner's effort to probate a "de facto will" by challenging the requirement for a testator's *"signature"* found in section 64.2-404; however, the court explained that the respondent had improperly conflated the section 64.2-404 signature requirement with the provisions under section 64.2-403 regarding *"execution"* of a will. Although section 64.2-404 specifically references a requirement for a "testator's *signature*," it is important to note that it does not require *"execution"* of the writing in question by the testator as would otherwise be mandated by section 64.2-403. The words "signature" and "execution" are most certainly not interchangeable in this regard.

Section 64.2-404(A) actually references the execution requirements of section 64.2-403 twice.[25] Had the Virginia General Assembly intended the words "testator's signature" found in section 64.2-404(B) instead to mean a document "executed in compliance with § 64.2-403," then presumably they would have used the same language.[26] Moreover, reading the word "signature" to mean "execution" or "attestation" as required by section 64.2-403 would lead to an absurd result rendering section 64.2-404(A) entirely meaningless.[27] Under such an interpretation, all writings intended as wills described in section 64.2-404 would have to be executed in compliance with section 64.2-403 except in the two (2) circumstances described in section 64.-2404(B), thereby defeating the purpose of section 64.2-404 in the first instance. Section 64.2-404(A) expressly permits writings "not executed in compliance with § 64.2-403" to be admitted to probate under the relevant circumstances. It was and is the primary purpose of the Harmless Error Rule's adoption.

Section 64.2-404(B) requires a signature and differs materially in this respect from the standard language proposed by the ULC. The comments to UPC Section 2-503 note that "[w]hereas the South Australian and Israeli courts[28] lightly excuse breaches of the attestation requirements, they have never excused noncompliance with the requirement that a will be in writing, and they have been extremely reluctant to excuse noncompliance with the signature requirement."[29] Nevertheless, the ULC was ultimately prepared to overlook as "harmless" in appropriate circumstances not only the attestation requirements, but also the signature requirement itself. Known for refusing wholesale adoption of uniform codes and acting consistent with this general approach in this instance, the General Assembly saw fit to adopt the UPC's saving provision without accepting the entirety of the UPC;[30] however, Virginia legislators were collectively unwilling to be nearly as forgiving as the ULC would have intended.[31] With the addition of section 64.2-404(B), the Virginia General Assembly clearly determined to limit the reach of UPC Section 2-503 (with the signature requirement alone serving to circumscribe the list of potentially "harmless errors" covered by the UPC's form provision). By stopping short of mandating either attestation or execution, section 64.2-404 leaves open plenty of room for fact-specific litigation. Those contending that a broader read of section 64.2-404(B) encompasses a signature requirement and arguing that to rule otherwise threatens a flood of litigation should recognize the near absence of litigation on the issue since the adoption of section 64.2-404 in 2007.

One must be careful not to read the statutory language requiring "compliance *with* any requirement for a testator's signature" to relate to all requirements "about" or "relating to" the circumstances of the signature itself. Such a reading would be inconsistent with the statutory language and the intent of the Virginia drafters in adding this limitation to the harmless error provision. Generally speaking, reference to a "signature requirement" in provisions of both the UPC and other uniform code enactments in Virginia are to the more general concept merely that there must be a signature of the testator on the document itself.[32]

Clear and convincing evidence?

Before 2007, all wills and changes to wills had to be signed in accordance with section 64.2-403, With the adoption of section 64.2-404, the law in Virginia has certainly changed. So what evidence is needed to meet the clear and convincing standard?

Below is a non-exhaustive list of factors to take into account when evaluating a potential section

64.2-404 case. When assessing whether the potentially supporting evidence is sufficiently more than a mere preponderance for or against, one should consider evidence of the following factors along with any other evidence tending to support or refute whether the document in question truly reflects the decedent's testamentary intentions (and not merely draft considerations) at the time the document was made:

- De facto will signature but no signing.[33]
- Witnesses to the de facto will (formally "witnessed" (i.e., signed) or mere observers).
- Age of the testator at the time of the making of the de facto will.
- Temporal proximity of the de facto will to the onset of testator's terminal condition or date of death.
- Questions or concerns (including possible undue influence) regarding capacity of the testator.
- (In)consistency of the de facto will provision(s) with previously articulated intentions (documented and undocumented) of the testator.
- (In)consistency of the manner of document creation with prior testamentary dispositions and current changed circumstances (e.g., typed verse holographic, physical or mental impairments impacting writing).
- Motivation(s) and incentive(s) for the de facto will proponent to lie.
- Level of independence of source of information.
- Status of the testator's most recent prior known testamentary disposition documentation.
- Access to the de facto will and other will(s) at issue.
- Credibility or impeachability of the de facto will proponent's witnesses.

For as long as people have attempted testamentary dispositions of property in Virginia, they have been expected and required to adhere to particular formalities to create a presumption of validity. Exceptions have been introduced along the way allowing for such circumstances as when one deems it appropriate to dispose of one's property exclusively in one's own hand. Attempt an unwitnessed holographic change to a testamentary document not otherwise solely in one's own hand, however, and for at least the past 70 years or more, such a change was ineffective *per se*[34]. Not so anymore since 2007 with what is now codified as section 64.2-404.

It would seem malpractice carriers should all justifiably be charging less (and litigators perhaps more?!) now that will formality mistakes can be fixed and wrongs righted with sufficient evidence of intent. In any event, unlike Dr. Seuss's Grinch (and in homage to Theodor Geisel himself) suffer not your "puzzler" to be sore; not long nor hard should you need puzzle at all knowing now as you do, if you didn't before, for safe harbor you need look no farther than "404." ⚜

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(Endnotes)

1. DR. SEUSS, HOW THE GRINCH STOLE CHRISTMAS! (1957).

2. Frank O. Brown, Jr., *Va. Prac. Probate Handbook* § 2:3 (Westlaw 2015).

3. All section references are to the Virginia Code unless otherwise noted.

4. VA. CODE ANN. § 64.2-404 (formerly VA. CODE ANN. § 64.1-49.1).

5. VA. CODE ANN. § 64.2-403 sets forth the requirements for a valid will.

6. *See* UNIF. PROBATE CODE § 2-503 (UNIF. LAW COMM'N 2010).

7. UNIF. PROBATE CODE, Art. II, pt. 5, cmt. at 138 (UNIF. LAW COMM'N 2010) ("[T]he purpose of validating wills whenever possible has been strengthened by the addition of a new section, Section 2-503, which allows a will to be upheld despite a harmless error in its execution.").

8. *See* VA. CODE ANN. § 64.2-404.

9. *See id*.

10. *Id*.

11. UNIF. PROBATE CODE § 2-503 cmt. at 142 (UNIF. LAW COMM'N 2010).

12. The ULC, also called the National Conference of Commissioners on Uniform State Laws, considered at length similar legislation enacted in South Australia (1975) and in Israel (1965), and studies on the impact and effectiveness of the legislation in these jurisdictions. See UNIF. PROBATE CODE § 2-503 cmt. at 142-143 (citing numerous reports and also noting "[t]he measure accords with legislation in force in the Canadian province of Manitoba and in several Australian jurisdictions. The Uniform Laws Conference of Canada approved a comparable measure for the Canadian Uniform Wills Act in 1987").

13. UNIF. PROBATE CODE § 2-503 cmt. at 142-43 (UNIF. LAW COMM'N 2010).

14. *Id*. at 143.

15. *See* Schilling v. Schilling, 280 Va. 146 (2010) (remanding for further proceedings to allow will's proponent opportunity to adduce sufficient evidence under "harmless error" statute).

16. *See* Hampton Roads Seventh-Day Adventist Church v. Stevens, 275 Va. 205, 212 (2008) (acknowledging but declining to consider new statute having determined the signature requirements sufficiently followed prior version of section 64.2-403).

17. No. A-0758-10T2, 2012 WL 1379846 (N.J. Super. Ct. App. Div. Apr. 23, 2012).

18. *See id*. at *5.

19. *In re* Estate of Brown, 87 Va. Cir. 353, 355-58 (2013).

20. *See id*. at 358.

21. *See* 88 Va. Cir. 293, 296-97 (2014).

22. *See id*. at 295.

23. *See id*. at 297.

24. *See* Fain v. DaSilva (*In re* Estate of Marvin Sacks), CL13-334-03, Order dated Feb. 14, 2014 (denying plea without opinion). The author represented Petitioner Sharon Fain in the trial court proceedings.

25. VA. CODE ANN. § 64.2-404(A) ("Although a document, or a writing added upon a document, was not *executed in compliance with* § 64.2-403, the document or writing shall be treated as if it had been *executed in compliance with* § 64.2-403….") (emphases added).

26. *See* Hubbard v. Henrico Ltd. P'ship, 255 Va. 335, 339 (1998) ("[W]hen the legislature has used words of a clear and definite meaning, the courts cannot place on them a construction that amounts to holding that the legislature did not intend what it actually has expressed.").

27. *See* Lynchburg Div. of Soc. Servs. v. Cook, 276 Va. 465, 483 (2008) ("[R]ules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd." (quoting Jones v. Conwell, 227 Va. 176, 181 (1984)).

28. In support of moving in this "trending" direction away from the often very harsh results and generally unintended consequences of decedents having failed to adhere strictly to statutory signing formalities, the ULC cited extensively to studies conducted of both South Australian and Israeli experience with similar "saving provisions." *See* UNIF. PROBATE CODE § 2-503 cmt. at 142-143 (UNIF. LAW COMM'N 2010).

29. *See id*. at 143.

30. Virginia is not counted among the only 16 states to have adopted the UPC in its entirety. Virginia's version of the UPC's Harmless Error Rule includes Subsection B, none of which appears as part of UPC Section 2-503.

31. *Contra* UNIF. PROBATE CODE § 2-503 (UNIF. LAW COMM'N 2010) *with* VA. CODE ANN. § 64.2-404(B).

32. *See, e.g*., UNIF. PROBATE CODE § 2-513 cmt. at 157 ("The signature requirement is designed to prevent mere drafts from becoming effective against the testator's wishes. An unsigned document could still be given effect under Section 2-503, however, if the proponent could carry the burden of proving by clear and convincing evidence that the testator intended the document to be effective."); *see also* UNIF. PROBATE CODE § 6-201(10)("special requirements concerning necessary signatures"); VA. CODE ANN. § 8.9A-502, cmt. 3 ("signature requirement" referencing need for a signature) (UCC context); VA. CODE ANN. § 55-79.71:1(C) (Condominium Act); VA. CODE ANN. § 55-515.3(C) ("An electronic signature meeting the requirements of applicable law shall satisfy any requirement for a signature under any declaration or bylaw provision or any provision of this chapter.") (Property Owners Association Act).

33. Recognize that being signed by the decedent and having the signature of the decedent on the document are not necessarily the same.

34. *See* Triplett v. Triplett, 161 Va. 906 (1934). ⚜

Tips from a Fiduciary Accounting Professional (a.k.a. How to Delight Your Commissioner of Accounts)

By Kelly J. Pinckard, CPA

If almost 10 years of specializing in fiduciary accounting for estates, trusts, conservatorships, and guardianships has taught me one thing, it is this: "If your Commissioner of Accounts ain't happy…ain't nobody happy."

It is sometimes necessary to look at something from 10,000 feet in order to understand why a Commissioner of Accounts ("COA") can be so particular about seemingly inconsequential or immaterial transactions or assets. A COA can care as much about a specific bequest of $50,000 as the COA does about a specific bequest of a nominally valued, but sentimental, piece of jewelry. COAs are appointed by judges of the various circuit courts across Virginia, and are responsible for protecting the interests of the beneficiaries and creditors of an estate.[1] Making the job of COAs and their audit staff easier by preparing accountings that have anticipated and addressed all of the possible questions they could ask and documentation they could request, will put you well on your way to delighting your COA.

Having a background in auditing with a Big Six accounting firm, as well as experience in internal audit and forensic accounting, I have approached the preparation of my fiduciary accountings first and foremost as an auditor. In a sense, I work backwards from what I envision the accounting should look like in order to pass an audit and be approved by the COA. Having an accounting approved by the COA without any exceptions results in a happy COA. Going above and beyond what the COA might expect in terms of preparing an accurate accounting history with all supporting documentation and including the filing fee with the submission equals a delighted COA.

I have compiled some accounting tips from my many years of preparing fiduciary accountings that I hope will be of use to both attorneys who dabble in probate as well as seasoned probate attorneys.

Inventory and Accounting Filings

Know What is Due, When it is Due, and Why it is Due. Ensure your clients are in compliance with all of these filing deadlines:

- Affidavit of Notice. Within thirty (30) days after the fiduciary qualifies on an estate, the fiduciary is required to send notice to certain individuals.[2] The fiduciary must then file the Affidavit of Notice with the clerk's office by which the fiduciary confirms the requisite notices were sent.[3] The Affidavit of Notice is due within four (4) months of qualification.[4]
- Inventory for Estate. The inventory is due within four (4) months of the fiduciary's date of qualification.[5] The inventory is like a photograph taken at a moment in time: it is a picture of the decedent's assets as of the decedent's date of death.[6]
- Account for Estate. The first accounting is due within sixteen (16) months of qualifying as fiduciary of an estate, and "technically" covers the period from the date of qualification through twelve (12) months after the date of qualification.[7] Do not let this time period fool you; the COA actually wants you to report the transactions from the decedent's date of death through twelve (12) months after the date of qualification. Although the COA typically does not want to receive accounting reports for longer than a twelve (12) month period, this is not the case for a first accounting. Unless the qualification date is within two or three weeks following the date of death, the first accounting will typically cover a period of thirteen (13) through fourteen (14) months. If the inventory is a photograph, the accountings are the story told from the date of the photograph (i.e., the date

of death) through the closing of the estate.

- Tax Certificate. Many COAs require the filing of a one page Tax Certificate which simply attests to the fact that all necessary and required tax filings, both individual and fiduciary, have been completed and related taxes paid.[8] The Tax Certificate should be filed with the final accounting.[9]
- Inventory for Trust. The inventory for a testamentary trust is due within four (4) months of the later of: (i) the date of qualification; or (ii) the first funding of the testamentary trust.[10] Similar to an inventory for a probate estate, it is a snapshot of the value of the assets when they are received by the fiduciary.[11]
- Account for Trust. The first accounting for a testamentary trust covers the period beginning with the date of qualification through December 31st of that calendar year.[12] The first accounting is due by May 1st of the following year.[13] Subsequent accountings cover January 1st through December 31st, and are due by May 1st of the following year.[14] Similar to the accounting for a probate estate, the accounting for a testamentary trust is a report of the trust's transactions throughout the period. If you know the difference between income and principal receipts and income and principal disbursements, your COA will be extra delighted.[15]

Do Not Forget to Report Gains and Losses on Investments. One of the main reasons clients seek professional assistance with the preparation of fiduciary accountings is because they cannot get their accounting to balance. One of the common reasons for this frustration is because the gains and losses on asset sales and dispositions are incorrectly reported on the accounting. Investments should be reported at carrying value, increased by additions, reinvested dividends, and reinvested capital gains, and decreased by withdrawals and investment fees. Capital gains and losses on the sales of these investments should be reported only when the asset is sold or otherwise disposed. It is important to note that market fluctuation is not reported because these gains and losses are unrealized.

Automatic Withdrawals and Debits. Some COAs encourage fiduciaries to immediately stop automated payments because there is an insufficient paper trail to accurately identify the purpose for the debit. For example, if there is more than one real property, it may be difficult to know which payment to the electric company is attributable to which real property. Other COAs may not mind the automatic debits, but even in these cases it is wise to show at the outset that the monthly automatic debit is related to a particular monthly administration expense. Know what your COA prefers, and provide that—preferably with a smile.

Remember there is an Order of Priority for Disbursements. If there are sufficient assets in the probate estate to pay all debts and expenses, the order of payment does not matter; however, if the estate is insolvent, or has the potential to become insolvent, the order in which debts and expenses are paid does matter.[16] The fiduciary can become personally liable if a creditor is paid out of order, is paid too much, or is paid at all.[17] Insolvent estates are required to pay debts and claims against the estate in the following order:

1. Administrative expenses of the estate (luckily, that includes us!);
2. Certain family and homestead allowances;
3. Funeral expenses not to exceed $4,000;[18]
4. Debts and taxes given priority under Federal law;
5. Medical and hospital expenses of the last illness of the decedent, including compensation of persons attending to the decedent, not to exceed $2,150 for each hospital and nursing home and $425 for each person furnishing goods and services;
6. Debts and taxes due to the Commonwealth;
7. Debts due by the decedent acting in a fiduciary capacity for another;
8. Debts and taxes due to localities and municipal corporations of the Commonwealth; and
9. All other claims.[19] If there are estate funds remaining available to pay all other claims

(after paying the priority claims above), then the fiduciary will need to prorate payments to these creditors based on each creditor's percentage of such creditor's claim in relation to the total of all other claims.

Reimbursement of Expenses Paid by Fiduciary. Whenever the fiduciary is reimbursed by the estate, the supporting documentation required is the same as if the expense had been originally paid by the estate itself, but there is the added requirement to prove that this expense was in fact paid by the fiduciary.[20] It is best to provide proof of payment from the fiduciary's own funds (e.g., check copy or copy of credit card statement) as well as a copy of the invoice being paid.

Insolvent Estates and Protection Offered by Debts and Demands Hearing. An estate may appear to be solvent, but after further investigation is determined to be insolvent. In situations like this, having a Debts and Demands Hearing and subsequently obtaining an Order of Distribution is a process that offers the most protection to the fiduciary.[21] This process will direct a fiduciary with respect to the payment of debts and expenses of the estate, and guide a fiduciary through proper distributions to beneficiaries. While it is a longer process that involves additional fees, insolvent estates are one situation where it is better to ask permission now than to ask for forgiveness later.

Cash Distributions to Beneficiaries. Many COAs do not recommend distributing cash to beneficiaries via cashier's checks. Typically, this situation arises only at the time of final distributions for the final accounting. If the checks are lost, it is like losing cash. In family situations with strained relationships, a beneficiary may receive a cashier's check, but a fiduciary would have a hard time proving the beneficiary received the cashier's check if the beneficiary refused to sign a receipt. Issuing a check from the estate account is preferred by many COAs. In some circumstances, I prefer to use cashier's checks during a final accounting due to the immediate deduction of funds from the estate account. I only do so, however, in situations where I am comfortable and confident that the beneficiary will sign the distribution receipt, and never do so when there are strained family relationships.

Refunding Bond. Protect your clients by having all beneficiaries sign a Refunding Bond. In some cases it can be argued that the Refunding Bond is only as good as the paper on which it is written, but better to have a signed Refunding Bond which documents the intention of a beneficiary to refund money to the estate if unexpected debts of the estate come to light after the estate is closed. Beneficiaries should be made aware that had these debts come to light prior to final distributions, their final distribution amount would have been reduced by their prorated share of the debt anyway.

Fiduciary Compensation. COAs generally accept, and may even encourage, the use of an outside professional, but be sure to know when it is appropriate to deduct these professional fees from your client's fiduciary compensation. Increases in fiduciary compensation may be allowed if the fiduciary provides a written explanation to the COA detailing the manner in which the fiduciary went above and beyond the responsibilities that are normally expected. Even in these instances, however, the fiduciary must reduce the fiduciary's compensation by the fees paid to any professionals who performed duties that could reasonably have been performed by the fiduciary. Typically, this does not include legal fees or tax preparation fees, but may include fees related to the preparation of the inventory and accountings.

Filing Fees. Calculate the filing fees correctly, and include a check payable to the COA along with your submission. By doing this every time, the COA does not have to waste time requesting the filing fee.

Statement in Lieu – Know When Your Client Has Hit the Jackpot. When the stars have aligned for a fiduciary, the fiduciary qualifies for the Statement in Lieu of Settlement of Accounts. Know when your clients qualify for this short form. Even though they have qualified as fiduciary, they may not be aware that their reporting responsibilities are significantly reduced by qualifying for a Statement in Lieu. This

happens when the fiduciary is the sole residual beneficiary of an estate.[22] It can also happen when co-fiduciaries are co-residual beneficiaries of an estate.[23] The requirements for filing a Statement in Lieu are that all debts and expenses of the estate must be paid, all specific bequests must have been distributed, and six (6) months must have passed from the date the fiduciary qualified before the Statement in Lieu can be filed.[24]

Proper Record Keeping. Encourage your clients, if they have not done so already, to keep a meticulous set of bank and investment account statements, copies of canceled checks (front and back), and receipts or copies of invoices paid. It is better to go overboard on your supporting documentation than to be lacking. Fiduciary accountings are similar to telling a story, and it is best to not have pages missing from the story.

Delinquency. The word itself gives rise to bad feelings, but we are in a position to turn things around for these "special" clients. When clients come to us in a delinquent status, right out of the gate they are behind the eight ball. I have had clients delinquent by months; I have had clients delinquent by years; I have had clients call me and say, "This is our most desperate hour. Help me Obi-Wan Kenobi, you're my only hope." No matter the reason for the desperate call, these clients need a special kind of hand-holding, and it is during these times that we as CPAs and attorneys can really gain the trust and respect of our clients. It is also during these times that we as professionals can truly be of assistance to the COAs. Oftentimes, delinquent clients can become a burden to the COA and the COA's staff, as they are often inundated with phone calls, emails, and erroneous or incomplete filings. We can alleviate this burden by preparing these reports in a way the COA could have only hoped the delinquent fiduciaries could accomplish on their own. "Happy wife, happy life?" No, it's more like: "Not delinquent for one more day, delighted COA."

Other Tasks

Don't Forget Taxes. Remember that a fiduciary is not only responsible for the proper administration of the estate or trust and the reports that are due to the COAs. The fiduciary is also responsible for filing the final individual income taxes of the decedent (Federal and state), as well as any fiduciary tax returns that are required to be filed on the estate's or trust's behalf. Estates and trusts are their own taxable entities, complete with their own taxpayer identification numbers. For any taxable year in which an estate has $600 or more of gross income or a trust has any taxable income or gross income of $600 or more, Federal and state fiduciary tax returns must be filed.[25]

Don't Print Your Reports with Gray Shading. Inventory and accounting forms found online have gray shading so that you may type directly in the online forms themselves. You must eliminate the shading in the online form before submitting the finalized form for filing.

Know When to Say When. In estate planning and matters of probate and trust law, CPAs need the expertise of attorneys. Likewise, in matters of fiduciary accounting and taxation, attorneys should feel comfortable seeking the expertise of a fiduciary accounting professional or CPA. We can and should work together to deliver a service to our clients and to the COA that is so far superior that word of mouth alone will keep our firms running. ⚜

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Kelly worked as an auditor for Big Six firm Arthur Andersen in Baltimore, and subsequently as an internal auditor at Johns Hopkins Hospital. Looking for a more varied experience in the accounting industry, she independently contracted corporate accounting services in the fields of healthcare and manufacturing.

Currently, Kelly sits on the Board of Directors for her children's charter school and is active in her church. She enjoys

long distance running and ironman distance triathlons.

(Endnotes)

1. *See* VA. CODE ANN. § 64.2-1200.
2. *Id*. § 64.2-508.
3. *See id*.
4. *Id*.
5. *Id*. § 64.2-1300(A).
6. *See id*. § 64.2-1300(D).
7. *See id*. § 64.2-1304.
8. *See id*. § 58.1-22.
9. *See id*. § 58.1-911.
10. *See id*. § 64.2-1300(C).
11. *See id*. § 64.2-1300(D).
12. *See id*. § 64.2-1306.
13. *Id*. § 64.2-1306(A).
14. *See id*.
15. *See id*. §§ 64.2-1000 to -1032.
16. *See id*. § 64.2-529.
17. *See id*.
18. If a fiduciary comes to you after having already paid in excess of $4,000 from an insolvent estate for funeral expenses, the fiduciary will be required to reimburse the estate for the amount paid in excess of $4,000.
19. *See* VA. CODE ANN. § 64.2-528.
20. *See id*. § 64.2-1311.
21. *See id*. §§ 64.2-550, -553.
22. *See id*. § 64.2-1314.
23. *See id*.
24. *See id*.
25. I.R.C. § 6012; *see, e.g.*, VA. CODE ANN. § 58.1-381(A)(1).

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