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Wills, Trusts, and Estates

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WILLS, TRUSTS, AND ESTATES

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INTRODUCTION

The 2021 Virginia General Assembly did not pass any major laws governing estates or trusts this year. However, it did pass several legislative efforts related to the field and of which practitioners should be aware.[1] Perhaps the most relevant update given the COVID-19 pandemic was the Legislature's effort to modernize procedures for electronic notarizations and electronic recording of documents. Another new law was designed to improve retirement savings participation rates in the Commonwealth by requiring certain employers to enroll their employees by default in a new, state-facilitated individual retirement account program. The Legislature also passed several bills designed to make it easier for disabled individuals to receive third-party support when making their own healthcare, financial, and personal decisions. New laws also expanded the class of parents and custodians who can designate a standby legal guardian for a minor and slightly modified the order of priority for beneficiaries in a wrongful death suit. Finally, the Legislature updated the Virginia Stock Corporation Act as it pertains to filing procedures and requirements, shareholder notice requirements, and the ability of directors to take emergency action. Although these changes were not technically substantive developments in the area of wills, trusts, and estates, attorneys should be mindful of them when advising their clients in ancillary corporate matters.

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1. Except where specifically noted, all 2021 legislation summarized in this Article became effective July 1, 2021.

The Supreme Court of Virginia handed down six reported decisions in the past year, addressing the enforceability of a purchase option under a will, the standing of disinherited beneficiaries to challenge inter vivos gifts, the court's ability to award attorneys' fees in cases of fraud, and the impact of an out-of-state court's finding of capacity on a Virginia proceeding that challenged the same individual's revocation of a trust.

I. LEGISLATION

A. *Recordation of Electronic Documents; Electronic Notarization*

Although the 2021 General Assembly did not adopt a potentially groundbreaking bill that would have authorized the use of electronic wills in Virginia, it did address certain issues with electronic notarization and the recordation of electronic documents.[2] These changes became effective March 11, 2021.[3]

Clerks with an e-recording system in place must now accept otherwise valid electronic filings for recordation.[4] If the clerk is unable to record the electronic document, they must record a legible paper copy instead, provided it (1) otherwise meets the requirements for recordation and (2) is certified as a true and accurate copy of the electronic original by the person who is submitting it for recordation.[5] The statute includes a form of affidavit for this purpose.[6]

For electronic notarizations, the notarial certificate must include the county or city in the Commonwealth where the electronic notary public was physically located at the time of notarization and indicate whether the notarization was done in person or remotely.[7]

The legislation also expands the means by which an electronic notary may confirm the identity of the person whose signature is

2. *See* H.B. 1856, Va. Gen. Assembly (Reg. Sess. 2021); S.B. 1435, Va. Gen. Assembly (Reg. Sess. 2021); Act of Mar. 11, 2021, ch. 78, 2021 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 17.1-223, 47.1-2, 47.1-16, 55.1-606 (Cum. Supp. 2021)).

3. *See* ch. 78, 2021 Va. Acts at __.

4. *See* § 17.1-223(C) (Cum. Supp. 2021). Previously, the statute was silent regarding a clerk's duty to accept documents submitted electronically. *Cf. id.* § 17.1-223(C) (Repl. Vol. 2015).

5. *Id.* § 17.1-223(C) (Cum. Supp. 2021).

6. *See id.*

7. *Id.* § 47.1-16(A) (Cum. Supp. 2021); *see also id.* § 47.1-2 (Cum. Supp. 2021) (defining "electronic notarial certificate").

being notarized.[8] Previously, the electronic notary was required to confirm the person's identity through personal knowledge, a prior in-person identity-proofing process, or a valid digital certificate accessed by biometric data or similar means.[9] Now, the oath or affirmation of a credible witness is also an acceptable independent means for confirming the party's identity.[10] However, unless the electronic notary personally knows the person or a credible witness has sworn to their identity, the person's identity must be confirmed through at least two of the following methods: (1) credential analysis (that is, a process that independently affirms the veracity) of a government-issued photo identification with the person's signature, (2) "identity proofing" through a previous in-person process or other approved means, and (3) a valid digital certificate accessed by biometric data or similar means.[11]

If a document appears on its face to have been properly notarized, whether electronically or not, the clerk must accept it for recordation if it otherwise meets the recording requirements.[12] Prior to the 2021 update, the clerk had discretion to reject any document submitted for recordation.[13] Any clerk who records a copy of a document that has been electronically notarized pursuant to the statute is protected from liability unless they were grossly negligent or engaged in willful misconduct in doing so.[14]

B. *Virginia IRA Savings Program*

Beginning July 1, 2023, Virginia will facilitate a new retirement savings program through the governing board of the Virginia College Savings Plan.[15] The program's goal is to spur self-employed individuals and employees of small and mid-sized enterprises who may not have access to an employer-sponsored plan to save more for their own retirement.[16]

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8. *See id.* § 47.1-2 (Cum. Supp. 2021) (defining "satisfactory evidence of identity").
9. *See id.* § 47.1-2 (Repl. Vol. 2020).
10. *Id.* § 47.1-2 (Cum. Supp. 2021).
11. *Id.*
12. *Id.* § 17.1-223(D) (Cum. Supp. 2021).
13. *Cf. id.* § 17.1-223(C) (Repl. Vol. 2020).
14. *Id.* § 55.1-606 (Cum. Supp. 2021).
15. Act of Apr. 15, 2021, ch. 556, 2021 Va. Acts __, __ (codified at §§ 2.2-2744 to -2757, and as amended at § 23.1-701(E) (Cum. Supp. 2021)).
16. *See* § 2.2-2745 (Cum. Supp. 2021).

The statute creates several new defined terms.[17] An "eligible employer" is any private-sector employer in Virginia that (1) has twenty-five or more eligible employees for all four quarters of the preceding calendar year, (2) has been operating for at least two years, and (3) does not otherwise offer a qualified retirement plan to its employees.[18] An "eligible employee" must be at least eighteen years old, currently working at least thirty hours per week, and receiving wages.[19]

Under the new rules, all eligible employers must enroll their eligible employees in the IRA savings program and arrange for their individual contributions to be deposited directly to their IRA account, unless the employee elects not to participate.[20] Non-eligible employers may also choose to help their eligible employees participate in the program, but are cautioned against accidentally creating an ERISA-covered employee benefit plan if they do.[21] Self-employed individuals with Virginia taxable income, or eligible employees of non-participating employers, will also be allowed to join the program on their own.[22]

A participating employee may terminate their participation in the program at any time.[23] Similarly, a participating employer may always set up a separate retirement plan for its employees, in which case it will no longer be eligible to participate in the program.[24]

The state-facilitated program will be administered by the Board of the Virginia College Savings Plan ("Board") with the assistance of one or more committees, including a Program Advisory Committee.[25] The members of the Program Advisory Committee must have extensive experience in retirement plan design, retirement plan investments, domestic or international equity or fixed-income

17. *See id.* § 2.2-2744 (Cum. Supp. 2021).

18. *Id.*

19. *Id.* To be eligible, the employee must have Virginia taxable income. *See id.* § 2.2-2751(A)(3) (Cum. Supp. 2021).

20. *See id.* § 2.2-2751(D)–(E) (Cum. Supp. 2021).

21. *Id.* § 2.2-2751(A)(1) (Cum. Supp. 2021).

22. *Id.* § 2.2-2751(A)(2)–(3) (Cum. Supp. 2021).

23. *Id.* § 2.2-2751(F) (Cum. Supp. 2021). Presumably a self-employed individual may also voluntarily withdraw from the program, but the statute only addresses termination by a "participating employee," which is defined as including only an "eligible employee." *See id.* §§ 2.2-2744, -2751(F) (Cum. Supp. 2021); *see also id.* § 2.2-2751(A)(2)–(3) (Cum. Supp. 2021).

24. *Id.* § 2.2-2751(K) (Cum. Supp. 2021).

25. *Id.* § 2.2-2746(A), (H) (Cum. Supp. 2021).

securities, cash management, alternative investments, institutional real estate investments, or managed futures.[26]

All employee contributions will be held in a segregated trust fund.[27] In addition to establishing enrollment and other procedures, the Board will control all investments and set default contribution rates.[28] Other state agencies are expressly authorized to share relevant information with the Board, unless otherwise prohibited.[29]

The legislation protects employers from liability in connection with the program.[30] The Commonwealth, the Virginia College Savings Plan, and its Board members are also generally protected against any claims relating to the payment of benefits under the program.[31]

C. *Informal Support for Disabled Individuals*

Many disabled individuals depend upon the assistance of family members, friends, or other trusted people to help them navigate through the healthcare system and deal with their finances. In such cases, the individual may not have (or even need) a legal guardian or conservator because they are capable of understanding the facts and making their own decisions when the information is presented clearly and they are given time to process it. However, third parties are not always comfortable with having another person in the room. Safety concerns related to the COVID-19 pandemic also exacerbated the issue. The 2021 General Assembly addressed the problem through two new statutes.[32]

1. Designated Support Persons

Inpatient hospitals (other than long-term acute care or specialty rehabilitation hospitals), outpatient surgical hospitals, hospice facilities, and certain state-owned or operated hospitals and nursing

26. *Id.* § 2.2-2746(C) (Cum. Supp. 2021).
27. *Id.* § 2.2-2752 (Cum. Supp. 2021).
28. *Id.* § 2.2-2747 (Cum. Supp. 2021).
29. *Id.* § 2.2-2748 (Cum. Supp. 2021).
30. *Id.* § 2.2-2751(G)–(I) (Cum. Supp. 2021).
31. *See id.* §§ 2.2-2749, -2755, -2756 (Cum. Supp. 2021).
32. *See* Act of Mar. 18, 2021, ch. 220, 2021 Va. Acts __, __ (codified at § 32.1-137.08 (Cum. Supp. 2021)); Act of Mar. 18, 2021, ch. 232, 2021 Va. Acts __, __ (codified at § 37.2-314.3, and codified as amended at §§ 64.2-2000, -2003, -2007 (Cum. Supp. 2021)).

homes must allow disabled individuals needing assistance as a result of their disability to be accompanied by a designated support person while admitted.[33] To qualify for the additional support, the disabled person must have (or have a record of having) a physical, sensory, mental or emotional impairment prior to admission that substantially limits one or more activities of daily living, such as bathing, dressing, toileting, transferring, or eating.[34]

The designated support person's role is to support and assist the disabled individual during their stay at the medical care facility.[35] This may include assistance with activities of daily living, communication, and decision-making, but only if the assistance is ongoing and (1) actually provided by the designated support person and (2) is necessary for the disabled individual's care or to ensure the individual has access to meaningful healthcare.[36]

The "designated support person" may be any adult who is knowledgeable about the disabled person's needs.[37] The designation may be made either orally or in writing by the disabled person or their guardian, authorized representative, or care provider.[38] If the disabled person is admitted for more than twenty-four hours, they may have more than one designated support person, but the medical care facility may limit the number present at any time.[39] Designated support persons are not subject to visitation restrictions, but must follow all other reasonable rules and restrictions.[40]

The presence of a designated support person does not relieve a medical care facility from its obligation to provide patients with effective communication support or other required services under state or federal law and regulations.[41] The law also does not require the facility to allow a designated support person to do anything that might pose a danger to the disabled individual, other patients, visitors, or staff.[42]

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33. *See* § 32.1-137.08(A)–(B) (Cum. Supp. 2021).
34. *Id.*
35. *See id.* § 32.1-137.08(B) (Cum. Supp. 2021).
36. *See id.* § 32.1-137.08(A) (Cum. Supp. 2021) (defining "support and assistance necessary due to the specifics of the person's disability").
37. *Id.*
38. *Id.*
39. *Id.* § 32.1-137.08(B) (Cum. Supp. 2021).
40. *See id.* § 32.1-137.08(C) (Cum. Supp. 2021).
41. *Id.* § 32.1-137.08(G) (Cum. Supp. 2021).
42. *Id.* § 32.1-137.08(H) (Cum. Supp. 2021).

Due to the state of emergency in effect as a result of the COVID-19 virus, the new statute became effective on March 18, 2021.[43]

2. Supported Decision-Making

New Virginia Code section 37.2-314.3 directs the Virginia Department of Behavioral Health and Developmental Services to educate individuals with intellectual and developmental disabilities, their families, and others about the use of supported decision-making agreements to ensure the disabled individual's wishes and decisions are carried out.[44]

A "supported decision-making agreement" is an agreement between any adult with an intellectual or developmental disability and a third party (the "supporter").[45] The agreement must set out the specific terms of support to be provided by the supporter.[46] Examples of support that might be addressed include: (1) helping the disabled person monitor and manage their medical, financial, and other affairs; (2) assisting the disabled person in accessing, obtaining, and understanding information relevant to decisions regarding their affairs; (3) assisting the disabled person in understanding information, options, responsibilities, and consequences of decisions; or (4) communicating the disabled person's wishes and decisions regarding their affairs to others and then working to ensure they are carried out.[47]

As part of its charge, the Department of Behavioral Health and Developmental Service will (1) provide educational and training programs for interested parties on the use of supported decision-making agreements; (2) develop model agreements; and (3) establish protocols for preventing, identifying, and addressing abuse and exploitation of any disabled person who enters into a supported decision-making agreement.[48]

The statute also directs courts and guardians ad litem in guardianship or conservatorship proceedings to consider whether a

43. Act of Mar. 18, 2021, ch. 220, 2021 Va. Acts __, __, para. 2 (codified as amended at § 32.1-137.08 (Cum. Supp. 2021)).

44. *See* § 37.2-314.3(A)–(B) (Cum. Supp. 2021).

45. *Id.* § 37.2-314.3(A) (Cum. Supp. 2021).

46. *Id.*

47. *Id.*

48. *Id.* § 37.2-314.3(B) (Cum. Supp. 2021).

supported decision-making arrangement would be a viable alternative.[49]

D. *Standby Guardianships*

Since 1998, parents and others with legal physical custody of a minor child who had been diagnosed with a progressive or chronic condition could designate a guardian who would take over responsibility for the child in the event the parent became incompetent or died.[50] The 2021 General Assembly expanded the reach of the statute to allow a parent or other person with physical custody of a minor child to name a standby guardian if the parent or custodian is facing possible detention, incarceration, or deportation connected to an immigration action.[51]

E. *Wrongful Death Beneficiaries*

In 2019, the wrongful death statute was amended to add parents who regularly received certain support or services from the decedent to the first class of statutory beneficiaries who, along with the decedent's surviving spouse and children (or the children of a deceased child), could receive a share of any damages awarded in a wrongful death suit.[52] The Virginia Legislature modified the statute slightly in 2021 to give priority to a supported parent only if there is also a surviving spouse or child (or grandchild).[53] Otherwise, the supported parent remains part of the second class of beneficiaries, which includes the decedent's other parents, siblings, and other related household members who were dependent on the decedent for support or services.[54]

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49. *Id.* §§ 64.2-2003(B), -2007(C) (Cum. Supp. 2021).

50. *See* Act of Apr. 22, 1998, ch. 829, 1998 Va. Acts, 2020, 2028 (codified at §§ 16.1-349, -355, and codified as amended at § 16.1-241 (Cum. Supp. 1998)).

51. Act of Mar. 18, 2021, ch. 241, 2021 Va. Acts, __, __ (codified as amended at §§ 16.1-349 to -353 (Cum. Supp. 2021)).

52. Act of Feb. 19, 2019, ch. 47, 2019 Va. Acts, 52, 52–53 (codified as amended § 8.01-53(A)(i) (Cum. Supp. 2019)). For a discussion of the 2019 legislation, see J. William Gray, Jr. & Katherine E. Ramsey, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 54 U. RICH. L. REV. 183, 190–91 (2019).

53. Act of Mar. 31, 2021, ch. 488, 2021 Va. Acts __, __ (codified as amended at § 8.01-53(A)(i) (Cum. Supp. 2021)).

54. *See* § 8.01-53(A)(ii) (Cum. Supp. 2021).

F. *Virginia Stock Corporations*

The General Assembly substantially modernized the Virginia Stock Corporation Act in 2019.[55] In 2021, the Act was further changed, inter alia, to bring many of its provisions governing State Corporation Commission ("SCC") filing procedures and requirements into alignment with those applicable to other types of entities.[56] Notably, the 2021 update also modifies shareholder notice requirements and the ability of directors to act in an emergency, such as the COVID-19 pandemic.[57] Although a full discussion of these changes is best left to the corporate attorneys, trusts and estates practitioners are cautioned to check the statute for any relevant changes before filing documents with the SCC or otherwise handling ancillary corporate legal matters for their clients.

II. CASES

A. *Enforceability of Purchase Option in Will*

In *Wilburn v. Mangano*, the Supreme Court of Virginia considered, as a matter of first impression, whether the terms of an option granted under a will and codicil were certain enough to create an enforceable contract.[58]

The decedent's will and codicil left her residence to her three daughters, but gave her son (Anthony) the option, exercisable for one year from the date the will was probated, to purchase the property from his sisters for a price "equal to the fair market value at the time of my death."[59] After Anthony timely exercised his option, his sisters obtained two appraisals: one for $311,000 and one for $270,000.[60] At this point, it appears Anthony had cold feet, and the sisters filed suit to compel him to purchase the home for the average of the two appraised values, or $290,500.[61] They later amended their complaint to ask the court to compel their brother to purchase

55. For a discussion of the 2019 legislation, see Laurence V. Parker, Jr., *Annual Survey of Virginia Law: Corporate and Business Law*, 54 U. RICH. L. REV. 73, 75–85 (2019).

56. Act of Mar. 31, 2021, ch. 487, 2021 Va. Acts __, __ (codified as amended in scattered sections of VA. CODE ANN. tits. 13.1, 15.2, 50 (Cum. Supp. 2021)).

57. *See* §§ 13.1-610(E), -625(D), -628(C) (Cum. Supp. 2021).

58. 299 Va. 348, 350, 354, 851 S.E.2d 474, 475, 477 (2020).

59. *See id.* at 350–51, 851 S.E.2d at 475.

60. *See id.* at 351, 851 S.E.2d at 475.

61. *See id.* at 351, 851 S.E.2d at 475.

the property for the higher price of $311,000.[62] Anthony responded by arguing there was no enforceable purchase contract because "fair market value at the date of [his mother's] death" was not a sufficiently specific term to establish mutual assent to the purchase price.[63]

At trial, the Northumberland County Circuit Court agreed with Anthony, holding that the testamentary language was too vague to establish a meeting of the minds regarding the purchase price because it lacked any method for determining the property's fair market value.[64] The circuit court suggested that the decedent might have believed her children would agree on the method for determining the actual price once the option was exercised.[65]

On appeal, the supreme court upheld the circuit court's decision, restating the well-established rule that a contract relating to the sale of land will not be specifically enforced if it is incomplete, uncertain, or indefinite in its material terms.[66] Because price is a material term, the Court said it must be fixed by the agreement itself or else the agreement must provide a method for determining it with certainty.[67]

Although the decedent's will appeared to establish a price for the property equal to its "fair market value at the time of [her] death," the Court explained that "fair market value" meant only the price on which a willing buyer and willing seller would agree in an arm's-length transaction on the open market.[68] Therefore, without more specific language, the decedent's will did no more than grant Anthony the option to purchase the property at a price he was willing to pay and his sisters were willing to accept.[69]

62. *See id.* at 351, 851 S.E.2d at 475.

63. *Id.* at 351–52, 851 S.E.2d at 475.

64. *See id.* at 352, 851 S.E.2d at 475–76.

65. *See id.* at 352, 851 S.E.2d at 476.

66. *See id.* at 353, 356, 851 S.E.2d at 476, 478 (citing Parker v. Murphy, 152 Va. 173, 183, 146 S.E. 254, 257 (1929); and then citing Duke v. Tobin, 198 Va. 758, 759, 96 S.E.2d 758, 760 (1957)).

67. *See id.* at 353, 851 S.E.2d at 476–77 (citing *Parker*, 152 Va. at 184, 146 S.E. at 257–58).

68. *See id.* at 351, 354–55, 851 S.E.2d at 475, 477.

69. *See id.* at 355, 851 S.E.2d at 477.

B. *Standing to Challenge Decedent's Lifetime Gifts*

Platt v. Griffith confirmed that a personal representative is the only person who has standing to sue on behalf of the estate and its beneficiaries to set aside lifetime gifts made by the decedent.[70]

The decedent (Dr. Griffith) made a will in 2010 by which he left his estate to his second wife and his son, except for two twenty-acre parcels of farmland for his two daughters (the plaintiffs).[71] In the years that followed, the testator executed two deeds of gift, one of which transferred all of his personal property to his wife and the other of which gave his wife a life estate in the farm with the remainder to his son.[72] As a result of these transfers, the two daughters were effectively disinherited.[73]

After their father's death, the disappointed daughters unsuccessfully challenged the validity of his 2010 will.[74] They then brought suit against their brother and stepmother for, inter alia, breach of fiduciary duty, conversion, and undue influence.[75] They asked the court to place their father's assets in a constructive trust and to declare the inter vivos transfers void.[76]

The Henrico County Circuit Court granted the defendants' motion to dismiss on the grounds that the daughters lacked standing, holding that only Dr. Griffith's son, as personal representative, could bring such claims.[77] The circuit court held that the daughters had no right, title, or interest in their father's estate because the 2010 will extinguished any expectation they may have had as to his personal property, while the decedent had transferred the farm to his wife and son before his death.[78]

On appeal, the supreme court upheld the circuit court's ruling, finding that the daughters could not show an "immediate, pecuniary, and substantial interest in the litigation."[79] The Court

70. 299 Va. 388, 391, 853 S.E.2d 63, 65 (2021).
71. *See id.* at 388, 853 S.E.2d at 63.
72. *See id.* at 388–89, 853 S.E.2d at 63–64.
73. *See id.* at 389, 853 S.E.2d at 64.
74. *See id.* at 388–89, 853 S.E.2d at 63–64.
75. *See id.* at 388–89, 853 S.E.2d at 63–64.
76. *See id.* at 389, 853 S.E.2d at 64.
77. *See id.* at 389–90, 853 S.E.2d at 64.
78. *See id.* at 390, 853 S.E.2d at 64.
79. *See id.* at 390, 853 S.E.2d at 64–65 (quoting Westlake Props., Inc. v. Westlake Pointe Prop. Owners Ass'n, 273 Va. 107, 120, 639 S.E.2d 257, 265 (2007)).

confirmed that only the personal representative may litigate claims belonging to the decedent on behalf of the estate, even when the personal representative is also a possible beneficiary of the estate.[80] Although the plaintiffs tried to argue for standing based on their own "vested" interest in the land under the 2010 will, the Court disagreed, finding that the plaintiffs did not have a vested property interest and their claims for rescission of the lifetime gifts were inherently on behalf of the estate.[81] The Court suggested that even when the claims relate to the personal representative's own alleged misconduct, the beneficiaries' only course of action is to seek to have the personal representative removed and replaced.[82]

C. *Award of Attorney Fees in Fraud Case*

Even attorneys who do not handle litigation are familiar with the so-called "American Rule," which generally requires parties to pay their own attorneys' fees absent a contractual or statutory provision to the contrary.[83] However, as *St. John v. Thompson* showed, the rule is not without its exceptions.[84] In *St. John*, the Supreme Court of Virginia considered whether the "American Rule" should apply to deny an award of attorneys' fees against a defendant who was found to have defrauded a neighbor into transferring assets to a trust for his benefit.[85]

The facts involved a gentleman (Mr. Elsea) who had a limited education, below average intellectual abilities, poor sight and hearing, and poor health, which together left him with cognitive deficits and a fear that his family would take his property and place him in a nursing home.[86] Elsea was the beneficiary of several trusts and owned a gun collection worth almost $100,000.[87]

In 2015, Elsea was befriended by a new neighbor, Mr. St. John.[88] The neighbor convinced Elsea to (1) transfer his firearms and other assets into a gun trust controlled by St. John, (2) sign a durable

80. *See id.* at 390, 853 S.E.2d at 65 (citing Reineck v. Lemen, 292 Va. 710, 722, 792 S.E.2d 269, 275 (2016)).

81. *See id.* at 390–91, 853 S.E.2d at 64–65.

82. *See id.* at 391, 853 S.E.2d at 65.

83. *See, e.g.*, Prospect Dev. Co. v. Bershader, 258 Va. 75, 92, 515 S.E.2d 291, 300 (1999).

84. *See generally* 299 Va. 431, 854 S.E.2d 648 (2021).

85. *Id.* at 432, 854 S.E.2d at 649.

86. *See id.* at 433, 854 S.E.2d at 650.

87. *See id.* at 433, 854 S.E.2d at 650.

88. *See id.* at 433, 854 S.E.2d at 650.

power of attorney naming St. John as his agent, (3) fire his estate planning attorney, and (4) execute new estate planning documents that benefited St. John and his partner.[89] After St. John moved away, Elsea revoked the power of attorney and demanded he return the guns, which St. John refused to do.[90]

At trial, the Clarke County Circuit Court found that St. John had committed fraud and ordered him to return the weapons to Elsea or else pay him their value.[91] In addition, the circuit court ordered St. John to pay over $100,000 of Elsea's attorney fees.[92]

The supreme court upheld the circuit court's decision, explaining that the "American Rule" regarding attorney fees was subject to an equitable exception in abusive or egregious cases.[93] Specifically, in cases of fraud, a court may award attorneys' fees to the defrauded party after considering the circumstances surrounding the fraudulent acts.[94] The Court rejected St. John's argument that the exception applied only in particularly egregious cases of fraud, finding that the equitable relief may be given at the court's discretion.[95]

D. *Collateral Estoppel as Applied to Settlor's Capacity*

The Supreme Court of Virginia considered in *Plofchan v. Plofchan* whether the plaintiff fiduciaries were collaterally estopped from arguing in a Virginia court that the defendant was incapacitated with respect to financial matters and therefore could not revoke her Virginia trust, after another state's court had found that she was not incapacitated in the context of a legal guardianship proceeding.[96]

Thomas Plofchan began serving as his mother's attorney-in-fact in 2001.[97] In 2006, Ms. Plofchan created a revocable trust governed by Virginia law.[98] She named herself as the sole trustee and reserved the right as grantor to amend or revoke the trust without

89. *See id.* at 433, 854 S.E.2d at 650.
90. *See id.* at 433–34, 854 S.E.2d at 650.
91. *See id.* at 434, 854 S.E.2d at 650.
92. *See id.* at 434, 854 S.E.2d at 650.
93. *See id.* at 434–35, 854 S.E.2d at 650–51.
94. *See id.* at 435, 854 S.E.2d at 651.
95. *See id.* at 432, 435, 854 S.E.2d at 650–51.
96. *See generally* 299 Va. 534, 855 S.E.2d 857 (2021).
97. *Id.* at 538, 855 S.E.2d at 859.
98. *See id.* at 538, 855 S.E.2d at 860.

the consent of the trustee or any other person.[99] Ms. Plofchan moved to New York in 2013 to live with her daughter, and shortly thereafter she was diagnosed with Alzheimer's disease.[100] In 2016, Ms. Plofchan resigned as trustee of her trust, and named Thomas and another child as successor cotrustees.[101] Shortly thereafter, two doctors signed certificates of incapacity stating that Ms. Plofchan was deemed incapacitated pursuant to the terms of the trust agreement.[102]

Two years later, Ms. Plofchan signed a document revoking Thomas's power of attorney and asked a New York court to appoint her daughter as her guardian and terminate all authority she had previously granted to the cotrustees of her revocable trust.[103] As part of that proceeding, the two doctors who had previously signed certificates of incapacity revoked them, stating that Ms. Plofchan had "a broad understanding of her finances."[104] Shortly thereafter, Ms. Plofchan notified her children that she had also revoked her trust.[105]

Meanwhile, in the New York guardianship proceeding, the court found that Ms. Plofchan was not an incapacitated person within the meaning of the applicable New York statute and, apparently without being aware of Ms. Plofchan's revocation of the power of attorney and trust, that those two documents obviated the need for a guardian.[106] Shortly thereafter, the trustees filed a complaint in Virginia alleging that their mother was incapacitated as it related to financial matters, that the revocation of her power of attorney and trust were ineffective, and that she had taken certain actions to frustrate the administration of the trust and cut off their access to her trust accounts and personal accounts.[107] The trustees asked the Virginia court to prevent Ms. Plofchan from wasting the trust assets and interfering with their administration of the trust.[108]

99. *See id.* at 538, 855 S.E.2d at 860.
100. *See id.* at 538, 855 S.E.2d at 860.
101. *Id.* at 538, 855 S.E.2d at 860.
102. *Id.* at 539, 855 S.E.2d at 860.
103. *See id.* at 539, 855 S.E.2d at 860.
104. *See id.* at 539, 855 S.E.2d at 860.
105. *See id.* at 540, 855 S.E.2d at 860–61.
106. *See id.* at 540–41, 855 S.E.2d at 861.
107. *See id.* at 541, 855 S.E.2d at 861.
108. *See id.* at 541, 855 S.E.2d at 861.

Ms. Plofchan argued that the plaintiffs lacked standing because she had previously revoked the power of attorney and trust, and that the New York court's decision collaterally estopped them from bringing a suit in Virginia to deem her incapacitated.[109] The Fairfax County Circuit Court agreed and dismissed the case with prejudice, but did not elaborate on its ruling.[110]

The Supreme Court of Virginia reversed and remanded the case.[111] The Court ruled that the New York court's determination that Ms. Plofchan was not an incapacitated person and could manage her own affairs addressed a different question than the one in the Virginia proceeding, which was whether Ms. Plofchan had mental capacity on the dates she signed the revocation of the power of attorney and trust.[112] In addition to the different standards under different state laws and different situations, the Court explained that the key inquiry in the Virginia case was whether Ms. Plofchan had mental capacity at the time she signed the revocation instruments, not at the time of the New York guardianship proceeding.[113]

CONCLUSION

This year the General Assembly refrained from making significant changes in Virginia law governing estates and trusts. It did, however, provide helpful new rules as to the notarization and recording of electronic documents. The Legislature also created a state-facilitated retirement savings program, modified the priority among the beneficiaries of a wrongful death award, expanded the availability of standby guardianship designations, provided additional support to disabled individuals in healthcare and other settings, and made several additional updates to the recently modified Virginia Stock Corporation Act.

Similarly, the Supreme Court of Virginia did not blaze many new trails. However, its *Wilburn* decision served as a reminder to drafters of estate planning documents of the need to specify how a purchase price is to be determined, and its *Platt* decision confirmed that only a decedent's personal representative may pursue claims

109. *See id.* at 542, 855 S.E.2d at 862.
110. *See id.* at 542, 855 S.E.2d at 862.
111. *See id.* at 549, 855 S.E.2d at 866.
112. *See id.* at 544–46, 855 S.E.2d at 863–64.
113. *See id.* at 546, 855 S.E.2d at 864.

on behalf of the estate. Similarly, the *St. John* case highlighted the "fraud" exception to the well-known American Rule regarding attorneys' fees in Virginia. Lastly, *Plofchan* illustrated the distinction to be made between the mental capacity standard for a guardianship proceeding versus the determination of testamentary or contract capacity.