University of Richmond Law Review

Volume 58
Issue 1 *Annual Survey of Virginia Law*

Article 7

12-1-2023

Wills, Trusts, and Estates

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WILLS, TRUSTS, AND ESTATES

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INTRODUCTION

This year's legislative and judicial activity surrounding wills, trusts, and estates did not bring any radical shifts in the law, but rather expansions and clarifications. In the legislative realm, the bulk of the activity centered on expanding protections for parties under guardianship, with a sensitivity to safeguarding vulnerable parties from neglect or even predation. The new rules aim to increase transparency in process, preserve confidential financial information, and ensure minimums of care and contact. The rules affect these goals by providing for more transparency through notice requirements as well as required written filings. Moreover, they protect parties under guardianship by mandating a certain number of visits from a guardian or other appropriate person and creating processes to protect those under guardianship from financial or other forms of abuse. Other legislation expands available methods for funeral service providers to recoup costs and addresses spousal liability for medical expenses.

In terms of judicial activity, while the Supreme Court of Virginia and the Court of Appeals of Virginia did not hand down many reported decisions relating to wills and trusts this year, the reported and unreported opinions provided by the courts offer helpful reminders regarding the importance of clear, unambiguous drafting. Moreover, these cases help highlight the potential downsides to using boilerplate and internet-purchased templates for an individual's estate planning. And, aside from those practical reminders, the court of appeals continued to build on Virginia's jurisprudence on no contest clauses and provisions, settling the question of whether good faith and probable cause exceptions are permitted under Virginia law.

I. LEGISLATIVE ACTIVITY

Overall, the legislative activity during the last year centered somewhat specifically on the regulation and oversight of guardians, with an eye to strengthening protections in various ways for those under guardianship. In addition, legislative activity has clarified sources of the payment of funeral services and severed some of the financial ties between spouses.

A. *Guardianships*

One example of the legislature's efforts this year to strengthen protections for those under guardianship was House Bill 2383, which sets in place the prohibition that any petition, pleading, motion, order, or report filed pursuant to a guardianship or conservatorship proceeding shall not contain any of the respondent's financial information, such as their anticipated annual gross income, other debts or obligations, or any identifying account numbers.[1] Any such information must now be included in a separate confidential addendum that is filed by the guardian ad litem, an attorney, or a party to the proceeding.[2] Whoever prepares the filing must ensure that all protected financial information is removed from the document and that the separate confidential memorandum is incorporated by reference into the filing.[3] Access to this confidential addendum will be given exclusively to the parties; "their attorneys; [a] guardian ad litem appointed . . . to represent the respondent; the commissioner of accounts or assistant commissioner of accounts for the circuit court that has jurisdiction over the guardianship or conservatorship; and [any] other persons as the court in its discretion" chooses to allow after making a showing of good cause.[4]

In furtherance of financial protection, House Bill 2063 created—and somewhat expanded—the duty to disclose relevant personal and financial information to a court-appointed guardian ad litem such that any individual or entity with information, records, or reports relevant to a guardianship or conservatorship proceeding must share the information with the guardian upon request if the guardian determines it necessary to perform his or her duties.[5] This statute now expressly applies, but is not limited to, healthcare providers, schools, social services, police, financial institutions,

1. H.B. 2383, Va. Gen. Assembly (Reg. Sess. 2023) (enacted as 2023 Va. Acts ch. 16). This bill amended the Code of Virginia by adding a section numbered 64.2-2000.1. 2023 Va. Acts ch. 16 (codified as amended at VA. CODE ANN. §§ 64.2-2002, -2005 & codified at VA. CODE ANN. § 64.2-2000.1 (2023)).

2. VA. CODE ANN. § 64.2-2000.1 (2023).

3. *Id.*

4. *Id.*

5. H.B. 2063, Va. Gen. Assembly (Reg. Sess. 2023) (enacted as 2023 Va. Acts chs. 260 & 261). This bill amended and reenacted §§ 6.2-103.1 and 64.2-2003 of the Code of Virginia. 2023 Va. Acts chs. 260 & 261 (codified as amended at VA. CODE ANN. §§ 6.2-103.1, 64.2-2003 (Cum. Supp. 2023 & 2023)).

investment advisors, and other financial services providers.[6] Furthermore, financial institutions are now also subject to the same duty in the case of any investigation of alleged adult abuse, neglect, or exploitation.[7] Previously, financial institutions were only required to disclose such information to the local department of social services.[8]

Another enacted bill relating to the provision of information was House Bill 1860, which states that a petition for guardianship or conservatorship must include the "name, location, and post office address of the respondent's primary health care provider, if any."[9] This requirement is meant to ensure that the relevant health care provider receives notice of the guardianship or conservatorship hearing and a copy of the petition, as that person may become a party to the proceeding.[10] The previous iteration of the law only required that a copy of the notice of a hearing, together with a copy of the accompanying appointment petition, be mailed by the petitioner to all individuals and entities whose names and post office addresses appeared in the petition.[11] The new rule also mandates that the guardian make a good faith effort to consult directly with such respondent's primary health care provider unless the provider prepared, either in whole or in part, the required report evaluating the respondent's condition before the hearing.[12] If the guardian is unable to consult the respondent's primary health care provider, they must disclose that information in a report to the court.[13]

Other enacted bills specifically targeted the care and treatment of those under guardianship. One such bill, House Bill 2028, contains a requirement that a guardian visit an incapacitated person at least three times per year and at least once every 120 days.[14] The bill further specifies that at least two of the visits must be con-

6. § 64.2-2003(D) (2023).
7. § 6.2-103.1 (Cum. Supp. 2023).
8. § 6.2-103.1 (Cum. Supp. 2022).
9. H.B. 1860, Va. Gen. Assembly (Reg. Sess. 2023) (enacted as 2023 Va. Acts ch. 176).
10. *See* § 64.2-2004 (C)–(D) (2023).
11. 2022 Va. Acts ch. 278 (codified as amended at VA. CODE ANN. § 64.2-2004 (Cum. Supp. 2022)).
12. §§ 64.2-2003(B), -2005(A) (2023).
13. § 64.2-2003(C) (2023).
14. H.B. 2028, Va. Gen. Assembly (Reg. Sess. 2023) (enacted as 2023 Va. Acts ch. 540). This bill amended and reenacted Code of Virginia sections 64.2-2019 and 64.2-2020. 2023 Va. Acts ch. 540 (codified as amended at VA. CODE ANN. §§ 64.2-2019, -2020 (2023)).

ducted by the guardian and that at least one of the visits be in person.[15] The new rule allows for the second visit by the guardian to be conducted via virtual conference or video call.[16] The third—and final—required visit may be conducted in person by the guardian or a person other than the guardian, including a "family member . . . monitored by the guardian" or a professional "who is experienced in the care of individuals, including older adults or adults with disabilities," and is "retained by the guardian to perform guardianship duties" on the guardian's behalf.[17] This third meeting may also be conducted via virtual conference or video call between the individual under guardianship and either the guardian or, again, a family member monitored by the guardian or a skilled professional, "provided that the technological means by which such conference or call can take place are readily available."[18] A final requirement of the new rule is that an individual who visits the person under guardianship in lieu of the guardian must provide a written report to the guardian regarding any such visit.[19]

The legislature also enacted House Bill 2027,[20] likely in an effort to ward off any attempts at or charges of undue influence. The new rule provides that a guardian may not restrict an incapacitated person's ability to communicate, visit, or interact with anyone else that the person under guardianship has an established relationship with, unless the restriction is deemed reasonable to prevent physical, mental, or emotional harm to, or financial exploitation of, the person under guardianship.[21] In placing restrictions on communications, the guardian must consider the individual's wishes and adopt only the least restrictive measure.[22] If the guardian does place restrictions on any visits or communication, the guardian must notify the restricted person and the person under guardianship in writing.[23] In that notice, the guardian must specify the nature and terms of the restriction, the reasons why the guardian believes they are necessary, and how the restricted person or

15. *Id.*
16. § 64.2-2019(C) (2023).
17. *Id.*
18. *Id.*
19. *Id.*
20. H.B. 2027, Va. Gen. Assembly (Reg. Sess. 2023) (enacted as 2023 Va. Acts ch. 460).
21. § 64.2-2019.1 (2023).
22. § 64.2-2019.1(A).
23. § 64.2-2019.1(B).

incapacitated person may challenge the restriction in court.[24] The guardian must also provide a copy of the notice to the local department of social services and to the circuit court that appointed him or her as guardian.[25] If applicable, the guardian must also notify—informally or in writing—the hospital, convalescent home, assisted living facility, or similar institution in which the incapacitated person is staying.[26] The guardian is not obligated to provide notice to the incapacitated person if the guardian believes in good faith that it would be detrimental to the person's health or safety.[27] The court, in its discretion, may continue, modify, or terminate any restrictions put in place by the guardian, and a copy of any court order continuing, modifying, or terminating the restrictions must be sent to the local department of social services.[28] Finally, all orders appointing a guardian must include a statement of the guardian's duty not to restrict the incapacitated person's ability to interact with others beyond the limitations of the revised statute.[29]

Lastly, in the context of guardianships, the legislature enacted Senate Bill 987, requiring the court to establish a schedule for periodic review hearings in the order of appointment of a guardian or conservator unless the court makes a determination that such hearings are unnecessary or impracticable.[30] The amended rule also states that any waiver of the periodic review hearing must include the following assessments by the court: the likelihood of the respondent's condition improving or the respondent regaining capacity; whether concerns or questions were raised and addressed about the suitability of the person appointed as a guardian or conservator when the initial appointment was made; and whether the respondent or any other party contested the appointment of a guardian or conservator.[31]

B. *The Payment of Funeral Expenses*

Other new legislation pertains to the payment of funeral expenses, giving funeral service providers more power to reach assets

24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. § 64.2-2019.1(C)–(D), (G) (2023).
29. § 64.2-2009(E)(1) (2023).
30. S.B. 987, Va. Gen. Assembly (Reg. Sess. 2023) (enacted as 2023 Va. Acts ch. 595).
31. § 64.2-2009(A)(1) (2023).

from the decedent's estate. One example is House Bill 1817, which, as enacted, permits non-probate assets, in addition to assets included in the decedent's probate estate, to be seized in order to pay the costs of disposing of an unclaimed body.[32] This piece of legislation is notable not only for the clarification that it provides, but also the way it signals an understanding that the use of nonprobate transfer mechanisms is central to today's estate planning, and that in most cases, nonprobate mechanisms are in fact little more than will substitutes.

Another example of the increased powers of funeral service providers is the enacted House Bill 2128, which provides that upon presentation of an affidavit by the funeral service establishment handling the disposition of the decedent and any related funeral service, any person in possession of a small asset belonging to a decedent must pay or deliver the small asset to the funeral service provider to the extent the asset's value does not exceed the amount given priority and has not already been paid.[33] Under the new rule, the affidavit must state:

> [T]hat [the funeral services establishment] is the licensed funeral service establishment handling the funeral, if there is one, and the disposition of the decedent; the legal name and business address of the licensed funeral service establishment; the amount given priority by § 64.2-528, or the amount due to it for the funeral . . . and the disposition of the decedent reduced by any other payments it has received or expects to receive; [and] the reasons and supporting evidence that the person to whom the affidavit will be presented is in possession of a small asset belonging to the decedent.[34]

Prior to the enactment of this bill, such payment was discretionary and made strictly to the undertaker or mortuary.[35] The new rule also provides for the discharge and release of any person's obligation to pay or deliver a small asset as long as the person dealt with the decedent's personal representative.[36] If any person refuses to pay or deliver any small asset after the presentation of an affidavit, the small asset in question "may be recovered, or its payment or delivery compelled, and damages may be recovered, on proof of rightful claim" unless such refusal to pay was made in good faith.[37]

32. H.B. 1817, Va. Gen. Assembly (Reg. Sess. 2023) (enacted as 2023 Va. Acts ch. 486).
33. H.B. 2128, Va. Gen. Assembly (Reg. Sess. 2023) (enacted as 2023 Va. Acts ch. 494).
34. § 64.2-604(A)(1)–(4) (2023).
35. § 64.2-604(A) (Cum. Supp. 2022).
36. § 64.2-604(B) (2023).
37. § 64.2-604(B)(2).

Consistent with the payment or delivery of a small asset to a designated successor by affidavit, the licensed funeral service establishment "is answerable and accountable therefor to any personal representative of the decedent's estate or to any successor having an equal or superior right" for any amount paid or delivered.[38]

C. *Treatment of Spousal Obligations Shared Obligations/Property*

New legislation regarding the treatment of shared obligations and property consisted of House Bill 2343, pertaining to spousal liability for health care expenses, and House Bill 1755, pertaining to the partition of real property.

The enactment of House Bill 2343 effectually repeals one spouse's liability for the health care expenses of the other spouse under the "doctrine of necessaries," a holdover of common law coverture rules which made one spouse (historically the husband) liable for the other spouse's (historically the wife's) expenses for food, clothing, lodging, and medical care.[39] Here, the enactment of House Bill 2343 repealed the Code of Virginia section 8.01-220.2 and amended section 55.1-202, to prevent a spouse from being held liable for the other spouse's health care expenses when the spouses were living together and the care was furnished either by a physician licensed to practice medicine in Virginia or by a hospital located in the state.[40] However, this rule only applies to "health care furnished to the patient spouse who predeceases the nonpatient spouse."[41] Prior to amendment, the statute protected spouses from liability only if the expense was incurred while they were living separate and apart—not if the spouses were cohabiting.[42] Spouses may still be liable for medical care expenses furnished outside of Virginia, subject to governing law in that jurisdiction. The spouses' principal residence continues to be protected from claims arising

38. § 64.2-604(C) (2023).

39. *Doctrine of Necessaries*, BLACK'S LAW DICTIONARY (11th ed. 2019).

40. H.B. 2343, Va. Gen. Assembly (Reg. Sess. 2023) (enacted as 2023 Va. Acts ch. 798); § 8.01-220.2 (Cum. Supp. 2022), *repealed by* 2023 Va. Acts ch. 798; 2023 Va. Acts ch. 798 (codified as amended at VA. CODE ANN. § 55.1-202 (Cum. Supp. 2023)).

41. § 55.1-202 (Cum. Supp. 2023).

42. § 55.1-202 (2022).

under the doctrine of necessaries if it is (or was at the first spouse's death) titled with the spouses as tenants by the entireties.[43]

With respect to Virginia's partition rules, enacted House Bill 1755 requires that courts ordering partition in kind expressly consider several factors.[44] The factors provided in the updated code include:

> 1. [E]vidence of the collective duration of ownership or possession of any portion of the property by a party and one or more predecessors in title or predecessors in possession of the property who are or were related to the party;
> 2. A party's sentimental attachment to any portion of the property, including any attachment arising because such portion of the property has ancestral or other unique or special value to the party;
> 3. The lawful use being made of any portion of the property by a party and the degree to which the party would be harmed if the party could not continue the same use of such portion of the property;
> 4. The degree to which a party has contributed to the physical improvement, maintenance, or upkeep of any portion of the property; and
> 5. Any other relevant factor.[45]

The rule also provides that one party will be responsible for advancing the cost of any court-appointed appraisal, but the ultimate cost will be divided proportionately among all the owners of the property.[46]

D. *Changes to Tax Rules*

One modification to the tax rules came from House Bill 1456;[47] this provides a slight change in a law enacted by the General Assembly in 2022, which permitted certain pass-through entities to elect to pay Virginia income tax at the entity level on behalf of all owners for tax years beginning in 2021 through 2025.[48] In this version of the rule, the election was only available to pass-through entities that were fully owned by natural persons or, in the case of an S corporation, other eligible S corporation shareholders.[49] The 2023

43. § 55.1-202 (Cum. Supp. 2023).
44. H.B. 1755, Va. Gen. Assembly (Reg. Sess. 2023) (enacted as 2023 Va. Acts ch. 333).
45. § 8.01-81 (Cum. Supp. 2023).
46. *Id.*
47. H.B. 1456, Va. Gen. Assembly (Reg. Sess. 2023) (enacted as 2023 Va. Acts chs. 686 & 687).
48. §§ 58.1-390.1 to -390.3 (2022).
49. §§ 58.1-390.1, -390.3 (2022).

amendment provides that the election is now available to all pass-through entities, regardless of ownership.[50] Accordingly, if a pass-through entity so elects, its tax liability will be based on only the amount of income, gain, loss, or deduction allocable to its "eligible owners."[51] Eligible owners are defined as natural persons, estates, or trusts that own a direct interest in the pass-through entity and are subject to Virginia income tax.[52] This amendment to the 2022 rule is applicable retroactively to all tax years beginning on and after January 1, 2021.[53]

One other new enactment pertains to timely tax filing and provides taxpayers with relief in certain cases. Virginia tax authorities have traditionally considered a tax return to be timely filed and a payment timely made if the postmark or shipping confirmation showed that either the return or payment was mailed or otherwise shipped on or before midnight on the due date.[54] House Bill 1927 provides that if, through no fault of the taxpayer, there is no postmark or the postmark is either illegible or incomplete, the return or payment will be deemed timely filed or made if it is received before the close of business on the fifth day after the due date.[55] Under the amended rule, even if the return or payment does not arrive by the fifth day, no penalty or interest will be imposed if the taxpayer can prove timely filing through the production of some kind of proof of mailing.[56]

II. JUDICIAL DECISIONS

Both the Supreme Court of Virginia and the Court of Appeals of Virginia provided examples and, in the court's own words, "cautionary tale[s],"[57] in their unpublished and published opinions this year, particularly with respect to boilerplate or internet templates, ambiguous or vague documents, and uncoordinated estate planning. Beyond those cautionary tales, however, the courts provided

50. H.B. 1456.

51. *See* § 58.1-390.3(B) (Cum. Supp. 2023).

52. § 58.1-390.1 (Cum. Supp. 2023).

53. H.B. 1456.

54. § 58.1-9(A) (Cum. Supp. 2023).

55. H.B. 1927, Va. Gen. Assembly (Reg. Sess. 2023) (enacted as 2023 Va. Acts ch. 163).

56. § 58.1-9 (Cum. Supp. 2023). Similar rules apply for local taxes. § 58.1-3916 (Cum. Supp. 2023).

57. Johnson v. Johnson, No. 0059-22-3, 2022 Va. App. LEXIS 503, at *6 (Oct. 11, 2022).

helpful guidance in understanding the presumptions surrounding lost wills and in the enforcement of no contest clauses.

A. *Voided Bequest Was Properly Disposed of as Part of the Residue of an Estate*

Through its unpublished opinion, *Anderson v. Bowen*, the Supreme Court of Virginia confirmed the disposition of a voided bequest, given the lack of a contrary intention in the document and the application of Virginia's statutes.[58]

Naji P. Maloof owned 893 guns at his death.[59] In a codicil to his will, Mr. Maloof directed that these guns be disposed of in the following manner:

> My gun collection is to be cared for, appraised, and sold in a reasonable manner with the exception of the following: I bequeath my father's rifle to RICK THORNLEY. Before the sale of any guns, RICK THORNLEY, GEORGE OWINGS, PERRY GRAY BOWEN, III, and DR. JOHN SCHINNER are to each receive their choice of five (5) guns. Mr. Thornley is to have first choice, then Mr. Owings, then Mr. Bowen, then Dr. Schinner. WILLIAM CREAGER is then to receive his choice of two (2) guns. Any guns that CLARENCE EUGENE ATKINS currently has in his possession are his to keep. It is then up to the discretion of, and I give full power to, my Personal Representative to gift such guns as he deems appropriate to my close friends and family. All of the rest are to be sold in an orderly manner.[60]

While the will and codicil did not name a specific beneficiary of the proceeds following the sale of the remaining firearms, the will provided a residuary clause, which paid "the entire rest and residue of [his] estate, whether real, personal, or mixed, of every kind, nature and description, whatsoever, and wherever situated" equally to his siblings, Mouna Anderson and Sami P. Maloof.[61]

Following Mr. Maloof's death, Perry G. Bowen, III—the executor of the estate—distributed five of the firearms to the specific individuals named in the will and codicil.[62] He then sold the remainder of the collection and retained the proceeds.[63]

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58. No. 210798, 2022 Va. Unpub. LEXIS 16, at *4 (Dec. 8, 2022).
59. *Id.* at *1.
60. *Id.* at *1–2 (emphasis omitted).
61. *Id.* at *2.
62. *Id.*
63. *Id.*

At trial, the King George County Circuit Court determined that the provision providing Mr. Bowen—as the personal representative of the estate—with the power to dispose of the guns in the manner he deemed appropriate was void for vagueness.[64] Therefore, the circuit court decided that the guns which were not specifically bequeathed in the document must be sold.[65] The proceeds from the sale were to be distributed to the five people identified in the codicil in proportion to the number of guns specifically devised to them.[66]

Mouna Anderson, one of the remainder beneficiaries, filed a motion for reconsideration, arguing that the proceeds should instead be added to the residuary estate because those proceeds were not specifically bequeathed.[67] The circuit court denied Ms. Anderson's motion, which she appealed to the Supreme Court of Virginia.[68]

On appeal, the supreme court reminded the parties of the Code of Virginia section 64.2-416(B), which provides, in part, that "[i]f a devise, bequest, or distribution other than a residuary devise, bequest, or distribution fails for any reason, it shall become a part of the residue."[69] This includes "'everything which turns out not to have been effectually disposed of,' such as property identified in void bequests."[70] Because the bequest of the remaining firearms to unnamed friends and relatives failed for its vagueness, and because both the will and codicil did not address the disposition of the sale proceeds, the proceeds should have been disposed of as part of the residue of the estate pursuant to section 64.2-416(B).[71]

That said, the intention of the testator is paramount in interpreting a will, so this general principal may be defeated by the testator's intentions if they are expressed in the document.[72] However, neither the will nor the codicil in this case provided a contrary intention for the disposition of those proceeds.[73] Accordingly, the

64. *Id.*
65. *Id.* at *2–3.
66. *Id.* at *3.
67. *Id.*
68. *Id.*
69. VA. CODE ANN. § 64.2-416(B) (2023).
70. *Anderson*, 2022 Va. Unpub. LEXIS 16, at *4.
71. *Id.* at *4–5.
72. *E.g.*, *id.* at *4.
73. *Id.* at *5.

supreme court reversed and remanded the circuit court's determination.[74]

B. *Interpretation of an Ambiguous Will*

In *Dagvadorj v. Aljabi*, the Supreme Court of Virginia again considered the testator's intent and the proper construction of an ambiguous will as a result of an executor's petition for aid and guidance.[75]

Here, the decedent, Mark Gabi, used an online template to create his will.[76] The will identified Sarangerel Dagvadorj, his surviving spouse, as well as two children from a prior marriage in the "Preliminary Declarations" portion of the instrument.[77] The will also named his brother, Mohamad Nidal Aljabi, as the executor of the estate.[78] From there, however, the will failed to clearly outline the intended disposition and recipients of his estate.[79] In fact, the portion of the will entitled "Distribution of the Estate" did not make any disposition of property nor expressly name his spouse, his children, or his brother as beneficiaries.[80]

In his suit for guidance, Mr. Aljabi maintained that he was the sole beneficiary of the estate under the terms of the will.[81] The decedent's surviving spouse, on the other hand, claimed that the decedent's two children were the beneficiaries.[82] Though neither Mr. Aljabi nor Ms. Dagvadorj presented any testimony regarding Mr. Gabi's intent in preparing the will or other extrinsic evidence (aside from Mr. Gabi and Ms. Dagvadorj's premarital agreement), the Loudoun County Circuit Court sided with Mr. Aljabi and named him as the sole beneficiary of the estate.[83]

74. *Id.* at *5–6.
75. No. 210785, 2022 Va. Unpub. LEXIS 14, at *1–2 (Oct. 20, 2022).
76. *Id.* at *1.
77. *Id.*
78. *Id.*
79. *Id.* at *3.
80. *Id.*
81. *Id.* at *1.
82. *Id.* at *1–2.
83. *Id.* at *2, n.1.

On appeal, the Supreme Court of Virginia took a more skeptical approach, flagging the various inconsistent and ambiguous provisions contained in the document.[84]

For example, while the will identified Ms. Dagvadorj and the testator's children specifically, the instrument did not direct any assets to any of those family members.[85] Moreover, the will contained a provision which stated, "[i]f I have omitted to leave property in this Will to one or more of my heirs as named above or have provided them with zero shares of a bequest, the failure to do so is intentional."[86] Given this language, and because Mr. Gabi clearly identified his children and spouse in the instrument, the court reasoned that one potential interpretation was that Mr. Gabi intentionally excluded those family members from taking under the will.[87]

At the same time, the court pointed to additional provisions that implied that Mr. Gabi did intend for these family members to take.[88] In particular, section 10 of the will, titled "Distribution of Residue," stated: "The entire estate residue is to be divided between my designated beneficiaries with the beneficiaries receiving a share of the entire estate residue."[89] Section 11 of the will addressed circumstances where his spouse and children failed to survive the decedent and directed that the assets be distributed to Mhd Youssef Aljabi, his nephew and the son of Mr. Aljabi.[90] The court found that this language could support the idea that the decedent sought to include his spouse and his children as beneficiaries through his "preliminary declarations" at the outset of the instrument, because these provisions refer to "beneficiaries" (as opposed to a singular beneficiary) and provide for a disposition of his assets in the event his children and spouse predeceased him.[91]

However, the court also flagged section 22, "Additional Provisions," which directed "[a]ll [his] properties, assets, bank accounts, 401k, and everything [he owned to] be given to [his] brother Mohamad Nidal Aljabi where he can administer [Mr. Gabi's] wishes

84. *Id.* at *3–5.
85. *Id.* at *4–5.
86. *Id.* at *3.
87. *Id.* at *4.
88. *Id.* at *4–5.
89. *Id.* at *4.
90. *Id.* at *4–5, n.2.
91. *Id.* at *4–5.

after [his] death."[92] Though this seemed more determinative than some of the other provisions highlighted in the will, the court determined that the disposition may have instead been intended to be left to Mr. Aljabi in trust to be distributed to other beneficiaries, such as Ms. Dagvadorj and/or Mr. Gabi's children.[93]

Because of the multiple interpretations of the will, the court determined that the circuit court erred in deciding that Mr. Gabi's will named Mr. Aljabi as the sole beneficiary of his estate.[94] The court then remanded the matter back to the circuit court for further proceedings.[95]

C. *Impact of Foreign Certificate of Heirship*

In *Taylor v. Aids-Hilfe Koln, e.V.*, the Supreme Court of Virginia addressed a foreign charity's ability to initiate proceedings in a Virginia court and challenge a beneficiary designation on a U.S.-based brokerage account.[96]

This case involved the estate of a German and United States dual citizen, James A. Towsey.[97] Mr. Towsey executed a will in 2000, which left his entire estate to Aids-Hilfe Koln, e.V. ("Aids-Hilfe"), a German charitable organization.[98] Separate from the will, in 2018—almost two years before his death—Mr. Towsey added his nephew, James Brian Taylor, and his nephew's wife as the transfer on death beneficiaries of a Morgan Stanley account located in the bank's Richmond, Virginia location.[99]

Upon Mr. Towsey's death, Aids-Hilfe petitioned the Richmond City Circuit Court to do the following: admit Mr. Towsey's will to probate; appoint an administrator c.t.a.; invalidate the transfer on death designation on the Morgan Stanley account; and, under the Uniform Foreign-Country Money Judgments Recognition Act, recognize the certificate of heirship the German court provided naming the charity as Mr. Towsey's sole heir.[100] According to the

92. *Id.* at *5–6.
93. *Id.* at *6.
94. *Id.* at *7.
95. *Id.*
96. 301 Va. 352, 355, 878 S.E.2d 385, 387 (2022).
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 356, 878 S.E.2d at 387.

charity, Mr. Towsey was incapacitated at the time of the transfer on death designation.[101] In support of this argument, the charity provided evidence that a German court had previously appointed the equivalent of a conservator for Mr. Towsey after an expert testified that Mr. Towsey was incapable of managing his own affairs.[102]

Mr. Towsey's nephew, Mr. Taylor, filed a demurrer to the charity's petition, challenging that the estate was property situated in Richmond, Virginia, that the charity was the sole legatee, and the charity's dispute of the account designation.[103] The circuit court overruled the demurrer and granted the charity's motion for summary judgment.[104] As a result, the circuit court directed that the will be admitted to probate, appointed an administrator c.t.a., recognized the certificate of heirship, and awarded the proceeds of the Morgan Stanley account to the charity.[105]

On appeal, the Supreme Court of Virginia considered Mr. Taylor's argument that the estate was improperly situated in Richmond and that the charity was not a substantial legatee.[106]

According to the supreme court, Mr. Towsey's estate was properly before the Richmond City Circuit Court because the brokerage account was based in Richmond.[107] Though the transfer on death designation typically causes the account to pass outside of a decedent's probate estate, the court reasoned that the charity's allegations regarding the designation were sufficient to establish that the decedent "ha[d] estate" in Richmond for purposes of Code of Virginia section 64.2-443(a).[108] The court also agreed that the charity was a substantial legatee of the estate because it was the sole beneficiary under Mr. Towsey's will.[109] Because the charity was a substantial legatee, it could petition the court for an administrator c.t.a. under section 64.2-500(A).[110]

101. *Id.*
102. *Id.* at 358, 878 S.E.2d at 388.
103. *Id.* at 356, 878 S.E.2d at 387.
104. *Id.* at 356–57, 878 S.E.2d at 387–88.
105. *Id.* at 356, 878 S.E.2d at 387–88.
106. *Id.* at 358, 878 S.E.2d at 388–89.
107. *Id.* at 358, 878 S.E.2d at 388.
108. *Id.*
109. *Id.* at 358, 878 S.E.2d at 388–89.
110. *Id.*

Although the Supreme Court of Virginia agreed with the charity as to the probate of the will and the appointment of an administrator, the court agreed with Mr. Taylor on the remaining issues.[111] Specifically, the supreme court determined that the circuit court was improper in determining that Mr. Towsey lacked capacity in making the transfer on death designation.[112] According to the supreme court, the challenge to the validity of the transfer on death designation should have been brought by the administrator of the will, not a beneficiary.[113] Thus, the charity did not have standing to make the claim.[114]

In addition, the Supreme Court of Virginia did not find the charity's argument relating to the Uniform Foreign-Country Money Judgements Recognition Act compelling.[115] The Act, the court reasoned, primarily relates to the recovery of a sum of money.[116] Here, the German court only determined that the charity was the sole heir of the estate.[117] According to the supreme court, "[d]eclaring a person or entity to be an heir is not the same as granting or denying 'recovery of a sum of money.'"[118] Though the charity claimed that the German court ruled that the brokerage account was properly owned by the charity, the court disagreed, pointing out that "[t]he German court specifically declined to rule on the issue."[119] Accordingly, the supreme court reversed and vacated the circuit court's decision as to the disposition of the brokerage account.[120]

D. *Proponents of a Lost Will May Present Multiple Theories to Overcome Presumption of Destruction*

In its reported opinion, *Glynn v. Kenney*, the Court of Appeals of Virginia considered the state law's presumptions surrounding lost wills and their application to the will of a Virginia Beach resident, Patricia Lynch-Carbaugh.[121]

111. *Id.* at 359–61, 878 S.E.2d at 389–90.
112. *Id.* at 359, 878 S.E.2d at 389.
113. *Id.*
114. *Id.*
115. *Id.* at 360, 878 S.E.2d at 389–90.
116. *Id.* at 360, 878 S.E.2d at 389.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 360–61, 878 S.E.2d at 390.
121. 77 Va. App. 73, 884 S.E.2d 260 (2023).

This case originated from Vita Kenney's bill in equity to probate a copy of Ms. Lynch-Carbaugh's last will and testament.[122] According to Ms. Kenney, the executor, the messy state of Ms. Lynch-Carbaugh's home prevented her from locating the original instrument.[123] John and Kevin Glynn—the testator's children who were both disinherited under the will—opposed Ms. Kenney's action, arguing that Ms. Kenney failed to overcome the presumption of an intentional revocation.[124]

Under Virginia law:

> Where an executed will in the testator's custody cannot be found after his death there is a presumption that it was destroyed by the testator . . . . This presumption, however, is only *prima facie* and may be rebutted, but the burden is upon those who seek to establish such an instrument to assign and prove some other cause for its disappearance, by clear and convincing evidence, leading to the conclusion that the will was not revoked.[125]

Because the will could be traced to Ms. Lynch-Carbaugh's custody at her death, Ms. Kenney carried the burden of demonstrating that Ms. Lynch-Carbaugh had not destroyed the will with the intention of revoking it.[126]

At a hearing on the matter, Ms. Kenney pointed to various pieces of evidence to support that the will had been lost as opposed to destroyed with the intention of revocation.[127] To begin, Ms. Kenney offered evidence as to the condition of the decedent's house, including photographs and videos of the home, which showed evidence of a rodent infestation.[128] Ms. Kenney stated that she had difficulty finding other important items, such as the decedent's purse and car keys, and, because of the status of the home, had sought the services of a professional remediation company to clean out the home.[129]

Beyond the physical state of the decedent's home, Ms. Kenney also offered evidence pertaining to Ms. Lynch-Carbaugh's relationship with her estate planning attorney and the steps Ms. Lynch-

122. *Id.* at 73, 884 S.E.2d at 260.
123. *Id.* at 73, 884 S.E.2d at 260–61.
124. *Id.*
125. *Id.* at 76, 884 S.E.2d at 262.
126. *Id.* at 75, 884 S.E.2d at 261.
127. *Id.* at 74, 884 S.E.2d at 261.
128. *Id.*
129. *Id.*

Carbaugh had taken in recent years to create and execute her estate plan.[130] The decedent had been working with an attorney for her estate planning needs and had even enrolled in the attorney's maintenance program, which allowed her to update her estate planning documents from time to time at no additional cost.[131] Ms. Lynch-Carbaugh had re-enrolled in the program shortly before her death, which—the attorney testified—supported the idea that it was unlikely that Ms. Lynch-Carbaugh would have gone to another attorney for assistance in any revocation of, or later amendment to, the will.[132]

According to the attorney, the decedent met with her several times to update her documents and would make certain changes to the charities she chose to benefit under her documents, but the decedent was otherwise "fairly consistent" with the friends she wanted to benefit.[133] The attorney stated that the decedent did not contact her for further changes to the documents following the execution of her most recent will, and the decedent did not otherwise "share any reason" that she wanted to revoke the instrument.[134] Finally, Ms. Kenney also pointed to the express and specific provision in the will which disinherited her two sons "for reasons personal to [Ms.] Lynch-Carbaugh and known to [her sons]."[135]

Both sons argued that Ms. Kenney's evidence was insufficient to overcome the presumption and had only demonstrated that the will "could have been chewed up by rodents, could be lost, or that it could still be in the house."[136] The two brothers "contended that merely not knowing what happened to the will, which was all that Kenney had proved, was not enough to overcome the presumption of revocation."[137] However, the Virginia Beach City Circuit Court disagreed and determined that Ms. Kenney had presented clear and convincing evidence that the will was lost and that it had not been destroyed with the intention of revocation.[138]

130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 75, 884 S.E.2d at 261.
137. *Id.*
138. *Id.* at 76, 884 S.E.2d at 262.

On appeal, the court of appeals reaffirmed the circuit court's holding.[139] The court clarified that, despite the son's argument that a proponent cannot overcome the presumption with multiple theories as to a will's location, Virginia law expressly permits this.[140] According to the court, Virginia law is consistent and clear that the proponent must not prove specifically what became of a will, but instead that the will was not destroyed by the testator with the intention to revoke the instrument.[141] Here, the court of appeals agreed that the evidence presented before the circuit court was sufficient to establish by clear and convincing evidence that the testator had not revoked her will.[142]

E. *No Good Faith or Probable Cause Exception to No Contest Clauses*

In its next published opinion, the Court of Appeals of Virignia addressed Virginia's position on a good faith exception to the enforcement of no contest clauses in testamentary instruments.[143]

This case arose following the passing of William Helton, Jr.[144] Prior to his death, Mr. Helton had amended his will three times.[145] The first will in 2012 left $40,000 to each of his deceased wife's grandchildren, Keefe Butler ("Butler") and Kalle Butler ("Kalle").[146] Following several other bequests, the residue of his estate was also to be distributed to Butler and Kalle.[147] Mr. Helton then amended his instrument in 2016 to reduce the bequests to Butler and Kalle to $20,000.[148] This 2016 will also included $5,000 to his neighbors, Martha and William Stegmaier, who, following Mr. Helton's wife's death, had begun assisting him with various tasks.[149] The 2016 will named Ms. Stegmaier as the beneficiary of his residuary estate.[150]

139. *Id.* at 80, 884 S.E.2d at 264.
140. *Id.* at 78, 884 S.E.2d. at 262.
141. *Id.*
142. *Id.* at 80, S.E.2d at 264.
143. Butler v. Stegmaier, 77 Va. App. 115, 138, 884 S.E.2d 806, 817 (2023).
144. *Id.* at 122, 884 S.E.2d at 809.
145. *Id.* at 121, 884 S.E.2d at 809.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*

Mr. Helton amended his will for the final time in 2017.[151] In that iteration of his will, Mr. Helton left only $10,000 to Butler, though he retained the $20,000 to Kalle.[152] He also retained the bequests to each of the Stegmaiers and retained Martha as the remainder beneficiary of his estate.[153] In addition, Mr. Helton named Martha's sister as the beneficiary of the estate in the event both the Stegmaiers predeceased Mr. Helton.[154] The 2017 will also named Ms. Stegmaier as the primary executor, followed by Mr. Stegmaier in the event she could not serve.[155] If neither Stegmaier could act as executor, Mr. Helton named Ms. Stegmaier's sister.[156] Finally, the 2017 will included a no contest clause, which revoked the interests of any beneficiary who challenged the will or its provisions.[157]

Following Mr. Helton's death, Ms. Stegmaier qualified as executor of Mr. Helton's estate and probated his will.[158] Butler then filed a complaint to impeach the 2017 will and establish the 2012 will as Mr. Helton's last will and testament.[159] In response, Ms. Stegmaier filed a counterclaim seeking to enforce the provisions of the 2017 will's no contest clause.[160]

The jury determined that the 2017 will was Mr. Helton's last will and testament, and despite Butler's argument that he acted in good faith and with probable cause, the Kent County Circuit Court ultimately agreed with Ms. Stegmaier that Butler had violated the no contest clause.[161]

On appeal, the court of appeals considered several evidentiary and procedural issues.[162] With regard to Butler's appeal for a good faith exception to the application of the no contest clause, the appellate court reminded Butler of Virginia's "strict enforcement" of

151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 122, 884 S.E.2d at 809.
159. *Id.*
160. *Id.*
161. *Id.* at 123–24, 884 S.E.2d at 810.
162. *Id.* at 127–28, 884 S.E.2d at 812.

these types of provisions, "without any wincing on [the court's] part concerning its alleged harshness or unfairness."[163]

While the court acknowledged that there are public policy arguments as to the acceptance of a good faith exception to the enforcement of these clauses—particularly in circumstances of undue influence, fraud, or forgery—the court noted that there are public policy arguments which favor the strict enforcement of these provisions, such as avoiding family disputes and contests.[164] Ultimately, the court noted that these public policy considerations had already been weighed in prior Virginia decisions.[165]

In addition, the court declined to accept Butler's argument that other states have adopted this good faith and probable cause exception.[166] The court distinguished the approach of these sister states from the present circumstances by highlighting the fact that these exceptions were authorized by state statute.[167] Thus, according to the court, "it is the role of the General Assembly to evaluate and adopt or discard particular public policy changes," and not the role of the courts.[168]

Finally, the court did not find Butler's argument—that Virginia was required to follow the English common law's good faith exception—compelling.[169] To begin, the court questioned whether the cases which Butler relied upon actually established the good faith and probable cause exception that Butler advocated for.[170] In addition, the court reminded Butler that these cases had previously been evaluated in a similar context before the United States Supreme Court.[171] In that case, the appellate court noted, the Supreme Court determined that a probable cause exception may apply under English common law where there is no "gift over" provision (or clause that changes a bequest to a different individual if certain circumstances occur).[172] In other words, this probable cause

163. *Id.* at 138, 884 S.E.2d at 817.
164. *Id.* at 131–33, 884 S.E.2d at 814–15.
165. *Id.*
166. *Id.* at 133, 135, 884 S.E.2d at 815–16.
167. *Id.* at 134, 884 S.E.2d at 815.
168. *Id.*
169. *Id.* at 135–36, 884 S.E.2d at 816.
170. *Id.* at 136, 884 S.E.2d at 816.
171. *Id.* at 136–38, 884 S.E.2d at 817.
172. *Id.* at 137, 884 S.E.2d at 817 (citing Smithsonian Inst. v. Meech, 169 U.S. 398, 413–14 (1898)).

exception would only apply in circumstances—unlike the one before the court in this case—where the clause was "a mostly empty threat."[173] Even if this exception were applicable here, the court noted that the Supreme Court of Virginia and neighboring states do not recognize a distinction between these "gifted over" and non-"gifted over" bequests.[174]

For those reasons, the court of appeals agreed with the circuit court in declining to adopt a good faith and probable cause exception to the 2017 will's no contest clause.[175] According to the court, this strict enforcement is required absent other actions by the Virginia legislature.[176]

F. *Revival of a Prior Testamentary Instrument*

In its unpublished opinion—*Johnson v. Johnson*—the Court of Appeals of Virginia provided a "cautionary tale" in addressing whether or not subsequent instruments could revive a prior will.[177]

Hazel C. Johnson executed a will drafted by an attorney in 2015.[178] This instrument made certain bequests to her children and grandchildren and directed that the residue of her estate be divided equally among her children and grandchildren.[179] The 2015 instrument also named her daughter, Kellie, as her executor, with Kellie's daughter, Alexis, as successor.[180] Three years later, Ms. Johnson was hospitalized for heart and kidney failure, which ultimately led to her passing roughly two weeks later.[181]

Prior to her death, her children began to disagree as to the administration of her estate plan.[182] On July 23, 2018, two of her children—Vickie and Kevin—provided Ms. Johnson with a new "Last Will and Testament of Hazel Carter Johnson" for her signature.[183] This document was created using a form from RocketLawyer.com,

173. *Id.*
174. *Id.* at 138, 884 S.E.2d at 817.
175. *Id.*
176. *Id.*
177. No. 0059-22-3, 2022 Va. App. LEXIS 503, at *6 (Oct. 11, 2022).
178. *Id.* at *2.
179. *Id.*
180. *Id.* at n.2.
181. *Id.* at *2.
182. *Id.*
183. *Id.* at *2–3.

and it expressly revoked any of Ms. Johnson's prior wills and codicils.[184] Notably, the July 23 instrument did not provide for any bequests or distributions of property.[185] Those lines and spaces were left blank.[186] Instead, the July 23 will only named Vickie and Kevin as Ms. Johnson's primary executors, with Kellie as their successor in the event they could not act.[187]

Six days later, on July 29, 2018, Kellie presented three more documents to Ms. Johnson for her signature.[188] The first document stated: "I Hazel Johnson would like to change exceutor [sic] of will back to Kellie Renee Johnson & Alexis Renee Kelley."[189] The second document, titled the "Final Last Will Codicil to Last Will Codicil of Hazel Carter Johnson," sought to modify Ms. Johnson's "last will Codicil" to change the primary executors from Vickie and Kevin back to Kellie.[190] The third document stated that the prior documents naming Vickie and Kevin as executors were "null and void," but that the documents signed on July 29 were valid.[191] The third document reiterated that Kellie and Alexis were to be the primary and successor executors, respectively, and that "[t]his final codicil should make Article Four of the original will valid with no additional executors of estate and trustees other than Kellie Renee Johnson and successor Alexis Renee Kelley."[192]

Ms. Johnson died a few days after signing the July 29 documents.[193] Following her death, Vickie and Kevin sought to probate the July 23 will and qualified as co-executors.[194] Kellie then challenged the validity of the July 29 will and her siblings' appointment.[195] At a hearing on Kellie's challenge, the Bedford County Circuit Court concluded that each of the instruments were valid.[196] The court determined that Ms. Johnson had capacity to execute the instruments, and that the instruments were not the result of

184. *Id.* at *3.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at *3–4.
191. *Id.* at *4.
192. *Id.* at *4–5 (footnote omitted).
193. *Id.* at *2–3.
194. *Id.* at *5.
195. *Id.*
196. *Id.*

coercion or undue influence.[197] Importantly, the court also determined that the July 23 will revoked the 2015 will, and that the later codicils—executed on July 29—revoked the July 23 will without reviving the 2015 will.[198] Because each of those documents were revoked, the court determined that Ms. Johnson died intestate.[199]

On appeal, the court of appeals agreed that, given the language of the document, the July 23 will revoked the 2015 will despite not containing any bequests or instructions for the disposition of the estate.[200] Similarly, the July 29 codicils expressed Ms. Johnson's intent to revoke the July 23 will.[201] The court also agreed that the July 29 codicils were not sufficient to revive or re-execute the 2015 will.[202] Under the Code of Virginia section 64.2-411, a revival of a will or codicil is only possible "to the extent that the testator's intent to revive the will or codicil is shown."[203] Here, the court found that the July 29 instruments did not clearly indicate this intent, both because of inconsistent references to prior documents and because of the language of the documents themselves.[204]

For this reason, the court of appeals, while recognizing that "no one—including the parties—intended or wished for [Ms. Johnson] to die intestate," determined that Ms. Johnson had not revived her 2015 will through the July 29 codicils and died intestate.[205]

CONCLUSION

Taking the legislative and judicial activity of the year collectively, several themes recur. Clarity is one such theme—we see the importance of clear process and communication, clear drafting, clear lines of obligation, and clear guardianship obligations. Another through-line is protection—whether it be the protection of vulnerable parties under guardianship or the protection of decedent intent in the judicial construction of wills. In the legislative

197. *Id.*
198. *Id.* at *5–6.
199. *Id.*
200. *Id.* at *8.
201. *Id.*
202. *Id.*
203. VA. CODE ANN. § 64.2-411 (2023).
204. *Johnson*, 2022 Va. App. LEXIS 503 at *10.
205. *Id.* at *6.

arena, with what we might interpret as a new sensitivity to the possibility of elder abuse, newly amended rules codify guardianship obligations and provide for an increase in accountability as well as care for persons under guardianship. The amended rules also clarify liability and lines around property, from the enabling of funeral service providers to reach nonprobate assets to the ending of spousal liability stemming from outdated coverture rules.

Cases from the Supreme Court of Virginia and the Court of Appeals of Virginia this year highlighted how vague drafting and internet templates can cause issues in the administration of an estate. These cases provide compelling reminders to both practitioners and laypersons regarding the importance of careful and coordinated estate planning to avoid unintended consequences following a testator's passing. The court of appeals also provided guidance regarding the presumptions relating to lost wills and the enforcement of no contest clauses. Through its opinions, the court helped clarify the burden of proof a proponent has in probating a lost will, particularly when the proponent presents multiple theories to explain the loss. And, importantly, the court of appeals confirmed the strict application of no contest clauses and the lack of exceptions for a good faith challenge or contest based on probable cause. Of course, the court of appeals left open the potential for the Virginia legislature to enact a statutory exception of this kind, so it remains to be seen how these types of provisions will be enforced should the General Assembly take steps of that kind.