

# NEWSLETTER

## *Trusts and Estates*

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### Message from the Chair

*Emily Martin*

On behalf of the Board of Governors of the Trusts and Estates Section of the Virginia State Bar, we are pleased to present the Fall 2025 issue of the Trusts and Estates Section Newsletter. In this edition we explore two topics which will enable us to serve our most vulnerable clients.

First, Greg Bean and Brett Herbert provide a few Virginia Legislative Updates for Trusts and Estates in 2025. These changes will affect estate planners, fiduciaries, beneficiaries, and related professionals. Specifically, there are new protections for funeral homes when next of kin dispute the disposition of remains, a significant narrowing of who has standing to sue estate-planning attorneys for malpractice, and a streamlined method for revoking transfer-on-death provisions in deeds. They also go over several changes to the Virginia Uniform Trust Code, including new definitions, expanded categories of qualified trustees, and broader trustee powers. Finally, the Greg and Brett detail numerous inflation-based increases to allowances, thresholds, and administrative limits, highlighting the General Assembly's continued effort to modernize and simplify estate administration.

Next, Alison R. Zizzo discusses undue influence in her article "Undue Influence: Proof and Presumption." She explains how courts distinguish between the concepts of undue influence and lack of capacity, the evolving presumptions that apply, and the differing burdens of proof involved in challenging wills, trusts, deeds, contracts, and beneficiary designations. She outlines how

Virginia case law has refined the elements required to raise a presumption of undue influence—particularly in will contests—and how the 2022 enactment of Virginia Code § 64.2-454.1 significantly shifted the burden to will proponents once such a presumption is established. Alison also reviews the varying capacity standards for wills, trusts, contracts, deeds, and gifts, emphasizing that capacity is judged at the moment of execution and supported by testimony from lawyers, witnesses, and physicians. Ultimately, this article underscores that while undue influence claims are common, proving them is legally intricate, fact-dependent, and often misunderstood by clients.

We want to thank Jennifer Lucey, the Newsletter Editor, for her efforts in preparing this edition. We also want to thank all of the authors for contributing their time, knowledge, and expertise to this edition. And finally, we want to thank our partners at the Virginia State Bar for their hard work. If you are interested in writing for future editions of the Trusts and Estates Section Newsletter, we encourage you to reach out to Jennifer Lucey ([jlucey@luceylawpllc.com](mailto:jlucey@luceylawpllc.com)) or any of the Board Members.

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# Virginia Legislative Updates for Trust and Estates: 2025

*By Greg Bean and Brett Herbert, Whiteford, Taylor & Preston LLP*

The Virginia General Assembly passed several laws that affect trust and estates in 2025. They include more protections for estate planners, simplification of deed revocation under certain circumstances, and changes in multiple financial figures in several statutes. A summary of each is below:

## **Funeral Homes Now Have Additional Protection in Disposing of Remains Where There is a Dispute Between the Next of Kin**

In Virginia, unless a person prepares written direction pursuant to Virginia Code § 54.1-2825 for the disposition of their body upon their death, the next of kin become the decision-makers. Virginia law has a framework for resolving disputes between next of kin. Virginia Code § 54.1-2807.01 states that any next of kin can petition the circuit court where the loved one resided at the time of death to determine which next of kin should make the decisions regarding funeral services and burial/cremation. The statute charges the Court to look at the wishes of the loved one, the relationship between the next of kin and the loved one, and any other factor the court considers relevant. The Court will then enter an order appointing one of the next of kin with the authority. Where there is such a dispute, at least one of the next of kin is required to notify the funeral home of the dispute within 48 hours of the funeral home receiving the remains, after which the funeral home must immediately stop making arrangements for the funeral or disposition.

In this year's legislative session, the Virginia General Assembly passed HB2246, which provided additional direction to funeral homes. The bill added to this statute, allowing funeral homes to continue with funeral and disposition arrangements if they have not received an agreement or court order regarding disposition within 30 days of being notified of the dispute. It also provided liability protection for the funeral home if it complied with the statute.

## **Standing for Legal Malpractice Claims Against Estate Planners Limited**

The Virginia General Assembly altered the law relating to who can bring legal malpractice claims against estate planners. In the 2025 legislative session, the General Assembly passed SB1115/HB2174, which specifically provided that "an attorney does not owe a legal duty to any person other than the client in any engagement for the purpose of the client's estate planning." Virginia Code § 64.2-520.1. This means that estate planning attorneys' legal duty is to the client only and not to any beneficiaries of the estate. Thus, only the client (while the client is alive) or the client's estate (after the client has passed) has standing to sue an estate planning attorney for legal malpractice.

The new law provides an exception whereby a client can enter into an agreement with the estate planning attorney to confer a benefit upon a third party. Such an agreement must be in writing, signed by the attorney and the client, and specifically reference the new code section. Unless these specific rules are followed, no third-party beneficiary will have standing to sue for legal malpractice.

## **Revoking Transfer on Death Provisions in Deeds Simplified**

A transfer on death provision in a deed results in an automatic transfer of the property to a certain named person or entity upon the owner's death. Prior to the current legislative session, a person wishing to revoke a transfer on death provision in a deed needed to expressly revoke the provision in a subsequent deed. This created confusion when an owner created a transfer on death provision in one deed, but then transferred the property to another person in a subsequent deed without revoking the provision. In that instance, what is the effect of the transfer on death provision because it was not expressly revoked in the new deed?

In 2025, the General Assembly passed HB1871 to avoid confusion. This bill altered the language of Virginia § 64.2-630(A)(1)(d), which now states that a subsequent deed conveying real property to another so that the transferor is no longer the owner at the time of the transferor’s death is effective to revoke the transfer on death deed without any specific language.

**Amendments to the Uniform Trust Code**

The General Assembly passed HB1770, which added the following definition of “Electronic” to the Uniform Trust Code: *relating to technology having electrical, digital, magnetic, wireless, optical, electro-magnetic, or similar capabilities.*

It also passed SB1116/HB1605, which expands the definitions of “independent qualified trustee” and “qualified trustee” to authorize additional entities to serve as an independent qualified trustee or a qualified trustee of a qualified self-settled spendthrift trust.

Finally, it passed HB2243, which expands certain specific powers conferred to a trustee, including the power to guarantee loans, the power to pledge trust property to guarantee loans, the exercise of certain powers with respect to an interest in real property, and the exercise of certain powers relating to stocks and other securities.

**Increases in Allowances for Surviving Heirs, Threshold for Notifications of Probate, Estate Expenses, and the Ceiling for Small Asset Estates and Uneconomic Trusts**

The General Assembly increased the amounts for certain allowances to surviving heirs to reflect the

change in the Consumer Price Index for urban consumers (HB1912). The changes are as follows:

- Family allowance for surviving spouse and minor children – Increased from \$24,000 to \$30,000 (or installments of \$2,000, increased to \$2,500)
- Exempt property allowance for surviving spouse (or minor children where there is no surviving spouse) – Increased from \$20,000 to \$25,000
- Homestead allowance for surviving spouse (or minor children where there is no surviving spouse) – Increased from \$20,000 to \$25,000

The bill also provided that beneficiaries of an estate receiving a bequest of less than \$10,000 are not entitled to notice of probate under Virginia Code § 64.2-508 (as opposed to the previous \$5,000).

The bill raised the amount under which an estate may be administered as a “small asset estate” to \$75,000 (as opposed to the previous \$50,000).

The bill also increased the threshold for determining that a trust is uneconomic and thus can be terminated without court approval from \$100,000 worth of trust property to \$250,000.

The bill also increased the amounts for funeral expenses and medical/hospital expenses that receive priority for payment from an estate and increased the threshold for the clerk of court to waive inventories and extend deadlines for accountings. Finally, it changed under what circumstances fiduciaries may qualify without security and made other various adjustments to fees and financial thresholds relating to estate planning and administration.

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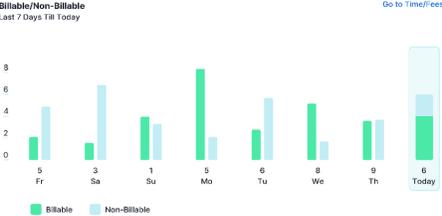
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# Undue Influence Proof and Presumption

By Alison R. Zizzo

“A son can bear with equanimity the loss of his father,  
but the loss of his inheritance may drive him to despair.”

MACHIAVELLI, IL PRINCIPE 99 (Giuseppe Lisio ed., 1933) (1515)

## INTRODUCTION

One of the most common client suggestions for challenging a will is undue influence, followed quickly thereafter by lack of capacity. That is because clients believe that any disposition that surprises them negatively must be the result of someone influencing the testator. Clearly, clients do not fully understand the concept of undue influence. Conversely, attorneys need to understand it thoroughly to provide competent representation.

As the population continues to age and the instances of various cognitive impairment increase the number of undue influence contests is only increasing.<sup>1</sup> In light of this ever-increasing litigation, the proof and presumptions necessary to litigate a claim of undue influence and capacity become increasingly important. In this context, a review of relevant Virginia case law and its evolution is an important skill for any serious trust and estate litigator.

## UNDUE INFLUENCE

**Background.** Capacity (discussed in detail below) and undue influence are distinct but related. One can have the requisite capacity to make a will (trust, deed, or contract) but nevertheless be subject to undue influence in doing so.<sup>2</sup> Conversely, one who lacks testamentary capacity cannot be unduly influenced because the latter presupposes the ability to make a will.<sup>3</sup> Similarly, evidence relating to capacity and undue influence often overlaps. Evidence of the testator’s age, weakness of mind, a change in the disposition of the testator’s property, and evidence of an unnatural disposition of property all touch on capacity and undue influence.<sup>4</sup>

**Definition of Undue Influence.** Undue influence involves extreme pressure exerted by someone in a

dominant position against someone in a subordinate position. The pressure must be of such a nature that it leaves the testator with no choice but to act according to that influence. The testator’s free will is replaced with the direction of the dominant party, leaving the testator in a state of saying: “It is not my will but I must do it.”<sup>5</sup>

The Supreme Court of Virginia (“the Court”) frequently demonstrates an undue influence by rote, relying on several well-established formulations, each of which it has described memorably.

- “The undue influence which will vitiate a will must be of such a character as to control the mind and direct the action of the testator,” and it must be “sufficient to destroy free agency ...; it must amount to coercion – practically duress.”<sup>6</sup>
- “There must be manifest irresistible coercion which controls and directs the testator’s actions.”<sup>7</sup>
- Undue influence does not exist based on merely “resistible persuasion, solicitation, advice, suggestions, and importunity....”<sup>8</sup>
- “It has long been the general rule that suspicious circumstances place a burden upon the proponents of a will to make a satisfactory explanation.”<sup>9</sup>

In the context of a will, a presumption of undue influence arises when three elements are established: (i) the testator was old when the will was established; (ii) the testator named a beneficiary who stood in a relationship of confidence or dependence with the testator; and (iii) the testator previously had expressed an intention to make a contrary disposition of the testator’s property.<sup>10</sup> The Court has elaborated on the factors giving rise to the presumption, adding that:

- The evidence must show more than old age, such as that the testator suffered from “physical feebleness or mental weakness arising from age, infirmity, or some other cause.”
- The “age” requirement for the presumption of undue influence was “inappropriate” if the testator was rendered incapacitated at a young age.
- The factors “regarding persons of advanced age are equally applicable to other testators who have weakness of mind, whether from injury ... or from any other cause.”<sup>11</sup>

Undue influence requires that there be a “confidential or fiduciary relationship” between the testator and the defendant. This includes formal confidential or fiduciary relationships, such as attorney and client, agent and principal, or trustee and beneficiary. It also encompasses informal, confidential, or fiduciary relationships, such as parent and child, siblings,<sup>12</sup> or caretaker and invalid.<sup>13</sup>

The mere existence of a confidential relationship, however, is not sufficient. In Martin v. Phillips,<sup>14</sup> the Court stated that the “relationship must be accompanied by activity on the part of the dominant person in procuring or preparing the will in his favor before a presumption of undue influence will arise.”<sup>15</sup> The Court held that:

to raise a presumption of undue influence in the execution of a will, the evidence must show that (1) the testator was enfeebled in mind when the will was executed, (2) the requisite confidential or fiduciary relationship was accompanied by activity in procuring or preparing the favorable will, and (3) the testator previously had expressed a contrary intention to dispose of his property.<sup>16</sup>

This is not the precise formulation used by the Court in earlier cases, but it is a more accurate formulation than had previously been offered.<sup>17</sup>

In Friendly Ice Cream Corp. v. Beckner,<sup>18</sup> the Court held that in cases involving contracts, leases, etc., the presumption arises with a different formula than applies to a will. The factors it cited were: (a) weakness of mind **and** grossly inadequate consideration; (b) suspicious circumstances are shown; **or** (c) when a confidential relationship exists. This is a different rule with

respect to deeds than was enunciated in Martin, and the Friendly Ice Cream Court overruled Martin to that extent. Friendly Ice Cream, however, did not overrule Martin as it relates to the presumption *that applies to wills*.

**Burdens of Proof and Production.** Undue influence is a species of fraud and must be proven by clear and convincing evidence.<sup>19</sup> As the Supreme Court held in Pace v. Richmond,<sup>20</sup> “[t]he burden of showing undue influence rests upon those who allege it, and it cannot be based upon bare suggestion, innuendo, or suspicion.”

A finding of undue influence is, by definition, fact-specific and, as with cases involving testamentary capacity, evidence of undue influence varies depending on the particular circumstances of each case.<sup>21</sup> Proving (a) weakness of mind and grossly inadequate consideration; (b) suspicious circumstances; or (c) when a confidential relationship exists, each by clear and convincing evidence, raises the presumption of undue influence.<sup>22</sup>

Virginia Code § 64.2-454.1, enacted by the General Assembly in 2022, upended the established rules regarding the presumption in undue influence cases. Virginia Code § 64.2-454.1 states as follows:

In any case contesting the validity of a decedent’s will where a presumption of undue influence arises, the finder of fact shall presume that undue influence was exerted over the decedent unless, based on all the evidence introduced at trial, the finder of fact finds that the decedent did intend it to be his will. VA. Code § 64.2-454.1.

Prior to the enactment of this statute, the accepted standard regarding how the presumption operates once established in a will contest case was well established—the plaintiff seeking to challenge the will on the basis of undue influence had the ultimate burden of proof.<sup>23</sup> In Parson v. Miller,<sup>24</sup> the Court provided a detailed analysis of the two theories of presumptions. The Thayer theory holds that the only effect of a presumption is to shift the burden of proof regarding the presumed fact. Once the party against whom the presumption operates introduces countervailing evidence, the presumption disappears and has no further impact on the trial.<sup>25</sup> The Thayer theory in Parson was compared against the Morgan theory, under which the presumption has both

the effect of shifting the burden of production and the burden of persuasion on the factual issue in question against whom the presumption operates.<sup>26</sup>

However, with the enactment of Virginia Code § 64.2-454.1, the legislature shifted from the Thayer theory to the Morgan presumption. This marks a significant change in the burden of proof when a presumption of undue influence is established in a will contest. Under the Morgan theory, once a presumption of undue influence arises, both the burden of production and the burden of persuasion shift to the party defending the validity of the challenged will. Therefore, if a will contestant proves the three elements necessary at trial to establish a presumption of undue influence, the burden shifts to the defendant (the proponent of the will) to rebut that presumption. If the defendant is unable to overcome it, the fact finder must presume that undue influence was exerted over the decedent. Only if the defendant can prove “based on all the evidence introduced at trial” that the decedent intended it to be his will, will the fact finder disregard this presumption.

Importantly, what is left unclear by the statutory language is whether the clear and convincing standard still applies to the defendant’s evidence that the decedent intended it to be his will. At least one court has held that the burden of persuasion lies with the proponent of the will to prove, by clear and convincing evidence, that the will was not the product of undue influence.<sup>27</sup>

## CAPACITY TO MAKE A WILL

Virginia Code § 64.2-401 states that a valid will may be made by any person who is not “(i) of unsound mind or (ii) under the age of eighteen years, unless emancipated pursuant to Article 15 of Chapter 11 of Title 16.1.”<sup>28</sup> The most common formulation of the standard for testamentary capacity enumerates four elements. The testator must:

- The testator must be capable of recollecting her property;
- The testator must know the natural objects of her bounty and their claims upon her;
- The testator must know the business about which she was engaged; and<sup>29</sup>
- The testator must know how she wished to dispose of her property.

It is not necessary that the testator have perfect memory or a certain degree of intelligence, or even that the testator know the legal meaning of each and every

term of the will. As the Court long ago stated in Huff v. Welch,

The testator need not have the same perfect and complete understanding and appreciation of these matters, in all their bearings, as a person in sound and vigorous health of mind and body would have; nor is he required to know the precise legal effect of every provision made in his will.<sup>30</sup>

Old age, sickness, eccentricity, odd behavior, habitual intoxication, and similar traits do not, by themselves, demonstrate a lack of testamentary capacity.<sup>31</sup> An unnatural disposition of property is not enough to demonstrate a lack of capacity. When, however, the testator’s capacity has been called into question by competent evidence, the court may consider how the testator disposed of his or her property as circumstantial evidence either to support or defeat capacity. As the Court stated in 1876, “[i]f such dispositions be in themselves consistent with the situation of the testator ... this is itself said to be persuasive evidence of testamentary capacity. The rationality of the act goes to show the reason of the person....”<sup>32</sup>

An adjudication of incompetency does not render a person incapable of making a will or create a presumption of incapacity.<sup>33</sup> The “mere fact that one is under a guardianship does not deprive him of the power to make a will.”<sup>34</sup>

An adjudication of insanity, in contrast with an adjudication of incompetency, creates a presumption that the testator lacked capacity to make a will.<sup>35</sup> That presumption can be overcome with evidence that “at the time of composing and executing it, [the testator is] factually so far free of his affliction that the ordinary legal consequences of his insanity do not apply to what he is then doing.”<sup>36</sup> Such evidence must be clear and convincing.<sup>37</sup>

Capacity is judged solely at the time of execution of the will or other instrument.<sup>38</sup> Capacity can be shown to exist in a lucid interval at the time of execution, but such intervals usually need to be more than fleeting.<sup>39</sup>

The proponent of the will bears the burden of proving by a preponderance of the evidence that at the time the testator executed the will he or she possessed testamentary capacity.<sup>40</sup>

The proponent of the will is entitled to a presumption that testamentary capacity existed by proving com-

pliance with the statutory requirements for the valid execution of a will.<sup>41</sup>

Proving the validity or invalidity of a will always depends upon the testimony of witnesses, though the testimony of no witness is conclusive.<sup>42</sup> The drafter of a will is often the best witness in a suit to establish or reject a will.<sup>43</sup> As the Court has stated that “[t]he testimony ... of a reputable attorney who receives the instructions for drafting the will, drafts it, reads it over and explains it to the testator, and is present at its execution, is entitled to very great consideration as to the mental capacity of the testator.”<sup>44</sup>

The testimony of the lawyer, however, is not always entitled to great weight on all issues. “When an attorney engaged in a case becomes a witness to other than formal matters, his testimony should not as a matter of law be entitled to any greater weight than that of a lay witness.”<sup>45</sup>

The testimony of a legal assistant who interviews the testator for the purpose of determining if the testator “was mentally competent to execute a will” is also entitled to “great weight.”<sup>46</sup> Whether the legal assistant thereafter drafts the will is not material in determining the weight afforded his or her testimony.

Rather obviously, the witnesses to the will are important witnesses and their testimony is afforded special weight.<sup>47</sup> In *Fields v. Fields*, the Court afforded the testimony of the notary the same weight as that of the ascribing witnesses.

The testimony of the testator’s attending physicians is entitled to “great weight” even when such testimony is not precisely contemporaneous with the signing of the will.<sup>48</sup> In *Eason v. Eason*,<sup>49</sup> the Court approved a jury instruction which stated “the evidence of physicians, especially those who attended the testatrix ... and were with her considerably during her last illness, is entitled to great weight and is especially so in the case of the physician attending the testatrix through her last illness when the will was executed.” The “weight to which the evidence of attending physicians is entitled, however, necessarily depends upon a number of factors, including the opportunity they had to observe the patient, the interval of time during which they attended the patient, and the amount of time spent with the patient.”<sup>50</sup>

### **CAPACITY TO MAKE A TRUST**

The Virginia Uniform Trust Code (the “VUTC”) states that the capacity to create, amend, or revoke a revocable trust “is the same as that required to make a

will.”<sup>51</sup> The Comments to the comparable section of the Uniform Trust Code provide that: “a revocable trust is used primarily as a will substitute.... Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills rather than that for lifetime gifts should apply.”<sup>52</sup>

The testamentary capacity standard of § 64.2-750 only applies to revocable trusts.

The comments to the UTC state that to create an irrevocable trust, “the settlor must have the capacity that would be needed to transfer the property free of trust.”<sup>53</sup>

### **CAPACITY TO MAKE CONTRACT OR DEED**

The capacity required to make a contract and for the “transaction of ordinary business” is greater than that required to make a will.<sup>54</sup> The test is “whether, at the time the instrument was executed, the grantor possessed sufficient mental capacity to understand the nature of the transaction and to agree to its provisions.”<sup>55</sup> Stated in the negative, the test is whether the party is “incapable of understanding the nature and consequences of his acts, or, more exactly, whether his mental powers have become so far affected as to make him unable to understand the character of the transaction in question.”<sup>56</sup>

Many of the same evidentiary principles apply when determining capacity to make a deed or contract. The law creates a rebuttable presumption that every person has the capacity to make a contract.<sup>57</sup>

There is no specific “degree of mental acuteness” that is required to “measure one’s capacity to execute a deed.”<sup>58</sup> In proving the validity of a deed, “[t]he testimony of witnesses who were present when the instrument was executed is entitled to greater weight than the testimony of those witnesses not present.”<sup>59</sup>

### **CAPACITY TO MAKE BENEFICIARY DESIGNATIONS**

A significant amount of wealth is transferred via means other than wills and trusts, over which estate planners may exercise little influence, including joint tenancies with right of survivorship, beneficiary designations (typically for life insurance and retirement benefits), and pay-on-death (“POD”) designations. Reported cases on challenges to such property transfers are rare, and there are no customary means of protecting a client’s wishes with respect to these transfers, such as the use of a no-contest clause. Nevertheless, estate planning lawyers should not ignore these prop-

erty transfers when considering means to protect their client's wishes from post-death challenges.

Transfers pursuant to a POD designation are contractual and not testamentary.<sup>60</sup> In Kaplan v. Copeland,<sup>61</sup> the Court held that a change of beneficiary on a life insurance policy "constituted a gift ... of valuable benefits...." When asked to determine whether the policy owner had the requisite capacity to change the beneficiary of the policy, the Court stated that the standard was whether he had "sufficient mental capacity to understand the nature of the transaction he was entering into."<sup>62</sup>

It appears that the methods to challenge a beneficiary designation as described in this section are generally the same as those discussed above with respect to wills and trusts, including lack of capacity and undue influence. Further, as noted above, the standard of capacity to make a gift and to make a contract is virtually the same.

### CAPACITY TO MAKE A GIFT

The standard used by the Court for capacity to make a gift is "sufficient mental capacity to understand the nature of the transaction [the donor] was entering into."<sup>63</sup> The burden of proof rests upon the donee to establish every fact and circumstance.<sup>64</sup> No presumption of a gift arises where the donee claims title to the property, and the burden is on the donee to prove by clear and convincing evidence that the property was a gift.<sup>65</sup>

### CONCLUSION

The Court uses different tests to determine if a presumption of undue influence arises in cases involving wills and cases involving certain other commercial transactions such as contracts, leases, and deeds. In Weedon, it stated that a contest to the validity of a will (and presumably a trust) requires proof that: "(1) the testator was old when his will was established; (2) he named a beneficiary who stood in a relationship of confidence or dependence; and (3) he previously had expressed an intention to make a contrary disposition of his property."<sup>66</sup> In Friendly's and Parfitt, the Court stated that the standard was: "when [1] weakness of mind *and* grossly inadequate consideration or suspicious circumstances are shown *or* [2] when a confidential relationship is established."<sup>67</sup>

In a case where the plaintiff challenges both the validity of a will (or trust) and also the validity of a beneficiary designation or other non-probate transfer

on the basis of undue influence, two standards apply to determine if the presumption arises. Often it is a mix of transfers that are challenged. When a testator creates a new will, or a grantor creates a new trust often deeds and beneficiary designations are created or changed. For example, in Weedon and Parish, the Court applied the standard applicable to wills, whereas in Parfitt, the Court applied the standard applicable to contracts with respect to a POD designation on the decedent's bank account.<sup>68</sup>

As an interesting note, both deeds, contracts, and gifts have a somewhat heightened capacity requirement than do wills and trusts. Nevertheless, the presumption in an undue influence case for a contract or deed is a slightly easier hurdle to get over than in a will case. As noted throughout this article, a deed or contract undue influence case has a couple of routes to get to the presumption (the OR standards) wherein a will or trust undue influence case requires the showing of all three elements.

Virginia Code § 64.2-454.1 has certainly made it easier for contestants to challenge wills on the basis of undue influence. However, this code section does not eliminate the requirement that to survive demurrer, the initial pleading must establish the necessary elements to give rise to the presumption as recognized by the Parson Court. This is an important tool to use in both offensive and defensive contexts.

The common nature of a will challenge on the grounds of undue influence belies the complexity of proving such undue influence. Attorneys must impress upon clients that what appears to the client to be undue influence may not satisfy Virginia law, both to prepare the client for the length and cost of the contest and to dissuade the client from pursuing a case with little likelihood of success.

### (Endnotes)

- 1.. Kenneth I. Shulman et al., Assessment of Testamentary Capacity and Vulnerability to Undue Influence, 164 AM. J. PSYCHIATRY 722, 722 (2007).
2. See Culpepper v. Robie, 155 Va. 64 (1930).
3. See Chappell v. Trent, 90 Va. 849 (1893).
4. See Gill v. Gill, 219 Va. (1979); Weedon v. Weedon, 283 Va. 241 (2012). Often in an undue influence case lack of capacity is also raised as a reason to invalidate the instrument in question.
5. Gill v. Gill, 219 Va. 1101 (1979).
6. Weedon v. Weedon, 283 Va. 241 (2012).
7. Wilroy v. Halbleib, 214 Va. 442 (1974).
8. Pace v. Richmond, 231 Va. 216 (1986); see also Gill v. Gill, 219 Va. 1101 (1979).

9. Parish v. Parish, 281 Va. 191 (2011); see also, Jarvis v. Tonkin, 238 Va. 115 (1989); Barnes v. Bess, 171 Va. 1 (1938).
10. Martin v. Phillips, 235 Va. 523 (1988); Parish v. Parish, 281 Va. 191 (2011); Weedon v. Weedon, 283 Va. 241 (2012).
11. Parish v. Parish, 281 Va. 191 (2011).
12. Jackson v. Seymour, 193 Va. 735 (1952). Aa parent-child relationship, standing alone, is not sufficient to create a confidential or fiduciary relationship. Such a relationship can exist in the familial context if it is accompanied by an attorney-client relationship, or by a principal-agent relationship, or if one family member provides financial advice to, or handles the finances of, another family member.
13. Bibby v. Thomas, 165 Va. 248 (1935).
14. Martin v. Phillips, 235 Va. 523 (1988).
15. Martin v. Phillips, 235 Va. 523 (1988).
16. Martin v. Phillips, 235 Va. 523 at 528 (1988).
17. Compare Parish v. Parish, 281 Va. 191 (2011); Weedon v. Weedon, 283 Va. 241 (2012).
18. Friendly Ice Cream Corp. v. Beckner, 268 Va. 23 (2004).
19. See Culpepper v. Robie, 155 Va. 64 (1930); Gibbs v. Gibbs, 239 Va. 197 (1990); Weedon v. Weedon, 283 Va. 241 (2012).
20. Pace v. Richmond, 231 Va. 216 (1986).
21. Culpepper v. Robie, 155 Va. 64 (1930) (“Undue influence is shown chiefly by results, and hence the evidence to establish undue influence is usually circumstantial.”)
22. Martin v. Phillips, 235 Va. 523 (1988); Bailey v. Turnbow, 273 Va. 262 (2007).
23. Martin, 235 Va. at 530.
24. Parson v. Miller, 822 S.E. 2d 169, 2018 VA. LEXIS 198 (2018), *superseded by statute*, Va. Code § 64.2-454.1.
25. Id at 178.
26. Id.
27. Miller, 114 Va. Cir. at 77.
28. Virginia law applies to determine the capacity of a testator whose will is probated in Virginia even if the will was executed in another state. See Poole v. Perkins, 126 Va. 331 (1919) (recognizing an exception to Virginia’s rule of *lex loci* for issues of capacity).
29. Weedon v. Weedon, 283 Va. 241 (2012); see also Gibbs v. Gibbs, 239 Va. 197 (1990).
30. Huff v. Welch, 115 Va. 74 at \_\_\_ (1913); see also Wooddy v. Taylor, 114 Va. 737 (1913) (noting that a testator need not “retain all the force of intellect which he may have had at a former period.”).
31. See Thomason v. Carlton, 221 Va. 845 (1981) (sickness); Paramore v. Taylor, 52 Va. 220 (1854) (habitual intoxication).
32. Young v. Barner, 68 Va. 96 (1876).
33. Parish v. Parish, 281 Va. 191 (2011).
34. Gilmer v. Brown, 186 Va. 630 (1947).
35. Tate v. Chumbley, 190 Va. 480 (1950); Western State Hospital v. Wininger, 196 Va. 300 (1954).
36. Tate v. Chumbley, 190 Va. 480 (1950).
37. Western State Hospital v. Wininger, 196 Va. 300 (1954).
38. “The time of execution of the will ... is the critical time for determining testamentary capacity.” Fields v. Fields, 255 Va. 546 (1998); Parish v. Parish, 281 Va. 191 (2011).
39. Weedon v. Weedon, 283 Va. 241 (2012).
40. Weedon v. Weedon, 283 Va. 241 (2012).
41. Gibbs v. Gibbs, 239 Va. 197 (1990).
42. Culpepper v. Robie, 155 Va. 64 (1930).
43. Hall v. Hall, 181 Va. 67 (1943) (“In determining the mental capacity of a testator, great weight is to be attached to the testimony of the draftsman of the will....”).
44. Forehand v. Sawyer, 147 Va. 105 (1927).
45. Culpepper v. Robie, 155 Va. 64 (1930).
46. Weedon v. Weedon, 283 Va. 241 (2012).
47. Thornton v. Thornton’s Executors, 141 Va. 232 (1925) (“[I]t is well settled that the testimony of the subscribing witness at the time of the act is entitled to peculiar weight.”); Thomason v. Carlton, 221 Va. 845 (1981) (“The testimony of those present at the factum - when the will is executed - is entitled to the greatest consideration.”); see also Fields v. Fields, 255 Va. 546 (1998).
48. See Parish v. Parish, 281 Va. 191 (2011); see also Forehand v. Sawyer, 147 Va. 105 (1927); Weedon v. Weedon, 283 Va. 241 (2012); Shacklett v. Roller, 97 Va. 639 (1899).
49. Eason v. Eason, 203 Va. 246 at \_\_\_ (1962).
50. Dunn v. Strong, 216 Va. 205 (1975).
51. Va. Code § 64.2-750. Va. Code § 64.2-720 requires that the settlor must have capacity to create a valid trust.
52. See Uniform Trust Code, § 601, Comment, Uniform Law Commission, at <http://www.nccusl.org>.
53. Uniform Trust Code, § 601, Comment.
54. Gilmer v. Brown, 186 Va. 630 (1947).
55. Brown v. Resort Developments, 238 Va. 527 (1989).
56. Lohman v. Sherwood, 181 Va. 594 (1943).
57. Lohman v. Sherwood, 181 Va. 594 (1943); Drewry v. Drewry, 8 Va. App. 460 (1989).
58. McGrue v. Brownfield, 202 Va. 418 (1961).
59. Brown v. Resort Developments, 238 Va. 527 (1989).
60. See Va. Code § 6.2-610; see also Virginia National Bank v. Harris, 220 Va. 336 (1979); Jones v. Brandt, 274 Va. 131 (2007).
61. Kaplan v. Copeland, 183 Va. 589 (1945).
62. Kaplan v. Copeland, 183 Va. 589 at \_\_\_ (1945).
63. Kaplan v. Copeland, 183 Va. 589 (1945), quoting Lohman v. Sherwood, 181 Va. 594 (1943); see also, 9A MICHIES JURISPRUDENCE Gifts § 8.
64. Brown v. Metz, 240 Va. 127 (1990).
65. Parish v. Parish, 281 Va. 191 at \_\_\_ (2011)
66. Weedon v. Weedon, 283 Va. 241 (2012).
67. Parfitt v. Parfitt, 277 Va. 333 (2009); Friendly’s Ice Cream Corp. v. Beckner, 268 Va. 23 (2004).
68. See also Jones v. Brandt, 274 Va. 131 (2007) (holding that “[a] certificate of deposit including the designation of the beneficiary POD thereon is a contract between the depositor and the bank relating to personal property.”); Willard v. Dobson, 6 Va. Cir. 299 (Accomack County 1986).

# NEWSLETTER

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