GEORGE MASON AMERICAN INN OF COURT

PRACTICE AND PITFALLS IN ESTATE LAW

November 27, 2018

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Practice and Pitfalls in Estate Law CLE
George Mason Inn of Court
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1 credit pending

Outline

1. Drafting estate planning documents
   a. *Thorsen v. Richmond SPCA* and its fallout
   b. When may drafting attorneys name themselves as the executor/administrator/power of attorney?
   c. Other general drafting issues
   d. Business powers of attorney
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2. Representing fiduciaries and beneficiaries
   a. Qualification
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3. Attorney's fees
   a. Va. Code § 64.2-1208
   b. Va. Code § 64.2-795
   c. Hypotheticals

I. Drafting estate planning documents

A. *Thorsen v. Richmond SPCA*

1. The decedent hired Thorsen to draft a simple will leaving all of her property to her elderly mother, or, if her mother predeceased her, to the RSPCA. Thorsen was also named as the co-executor of the estate.

2. Five years after the will was executed, the decedent passed away, her mother having predeceased her. Thorsen informed the RSPCA that it was the sole beneficiary of the estate.

3. The title insurance company disagreed and said that the will only conveyed the personal property.

4. Thorsen brought suit to correct the will as a "scrivener's error" on the grounds that it was the decedent's intent to leave everything to her mother and then to the RSPCA. However, the circuit court found that the language of the will unambiguously left only tangible personal property to the RSPCA and the rest of the estate passed to the decedent's intestate heirs.

5. The RSPCA received only $72,015.60. It would have received $675,425.50 absent the error.

6. The RSPCA sued Thorsen for breach of contract professional negligence, as a third party beneficiary of the contract between Thorsen and the decedent.

7. Thorsen filed a demurrer on the grounds that the RSPCA had no standing due to lack of privity, and a plea in bar on the grounds that more than three years had passed since his representation had ended and therefore the statute of limitations barred the action.

8. The circuit court overruled the demurrer and denied the plea in bar. At trial, it found that Thorsen was liable for $603,409.90 in damages.

9. On appeal, the Supreme Court relied on cases from other jurisdictions to find that a beneficiary of a testamentary document has standing to sue the lawyer who drafted the document for legal malpractice. It noted that if this were not the case, there could be no meaningful recovery for the breach of the attorney's duty: the Client could recover only nominal damages, since she wasn't harmed.

10. It also held that a right of action for such legal malpractice accrues for third-party beneficiaries when the testator dies.

11. As Justice McClanahan noted in her dissent, this ruling leads to two major issues. First, this creates a huge exception in the strict privity requirement

under Virginia law. Under the ruling, lawyers creating estate documents are now potentially liable to an unforeseeable and unlimited number of people.

12. Second, the finding that the statute of limitations doesn't begin to run until the death of the testator means that this liability may not be triggered until decades after the representation ends. Attorneys with wealthy clients could be on the hook for potentially astronomical damages owed to unknowable potential beneficiaries, triggered by an event decades in the future.

13. Va. Code § 64.2-520.1, enacted in 2017, fixed both of these issues.

    a. An action for legal malpractice for estate planning accrues on completion of the representation.

    b. The action may only be maintained by the client or the client's personal representative unless the contract explicitly names another person and refers to the statute.

    c. Limitation of five years for a written contract and three years for an oral one.

14. Act of Assembly (H1617 and S1140) also includes a sunset provision requiring that any action for legal malpractice which accrued before July 1, 2017 and would otherwise be barred by the act must be brought by July 1, 2018.

B. Drafting attorney named as the executor/administrator/power of attorney (LEO 1515)

1. It is not necessary for an attorney to have a pre-existing relationship with a client in order to draft a document naming the attorney as the executor/trustee/power of attorney. However, the lack of a pre-existing relationship may enhance the possibility of a finding of undue influence.

2. The attorney/draftsman should consider the client's mental health and make a full disclosure of potential fees as executor, trustee, or legal counsel prior to execution, preferably in a written document signed by the client.

3. The attorney/draftsman has a duty to suggest that the client investigate potential fees of others who might otherwise provide such services and must disclose any separate fees for other services.

4. An attorney/fiduciary executor or trustee may retain his own law firm as attorney for the trust or estate; however, such employment creates a personal conflict which may be cured by the client's consent after full disclosure.

5. In the event that there are co-fiduciaries, consent must be obtained from all such co-fiduciaries prior to the firm's taking on representation of the estate.

6. An attorney's suggestion to a testator/grantor of the attorney's willingness to serve as fiduciary or legal counsel to the estate constitutes solicitation for future employment. The attorney must consider carefully the testator's state of mind and health before soliciting future employment as executor, trustee or legal counsel to the estate. The same considerations apply to the issue of waiving security on the executor's or trustee's bond.

7. Advice as to the suitability of specific persons or entities to serve as fiduciary should cover competence, personal service, and matters of financial stability.

C. General drafting issues

1. Basic drafting errors – check all language for accuracy

2. Improper execution under § 64.2-403 – must be signed by testator in presence of two witnesses who must also sign in presence of testator.

3. Imprecise terms – are items properly named?

4. Confirmation that client meets requirements for testamentary capacity

5. Confirmation that document is not the product of undue influence

6. Conflicts of interest when drafting documents for husband and wife with differing interests

7. Failing to ask all necessary questions (illegitimate children, children by prior marriage, real property in other states, unmarried partners, heir with special needs, etc.)

Powers of Attorney for Business Owners

1. Many people successfully complete their personal estate plans, which include a power of attorney. However, for business owners, this might not be enough to ensure business continuity during a period of incapacity.

2. There is no apparent law barring an agent under a power of attorney from acting in that capacity to manage the principal's business affairs, however many banks are pushing back on this authority.
    a. e.g. a dentist (sole practitioner with a PLLC) becomes incapacitated but payroll still needs to be paid, bills need to be paid, etc. The dentist's husband was appointed as her power of attorney when they did their estate planning, but the bank is refusing to honor that power of attorney as it applies to the PLLC's bank accounts.
    b. Banks have been demanding corporate documents showing that the business intended to allow the agent to make financial decisions on its behalf.

3. Additionally, many business owners might prefer someone other than a spouse, relative, or close friend to manage the business decisions.
    a. An office manager, business partner, or someone else with knowledge of the day to day business might make a better option for an agent for the business decisions.
    b. But, each situation is nuanced and many times the spouse/family member remains the best option.

4. Proactive suggestions for powers of attorney for business owners:
    a. Consider *who* the appropriate person is to take over the business affairs during a period of incapacity and draft a narrow power of attorney specifically for all business decisions in favor of the appropriate person. Refrain from using a form power of attorney, as it will not specifically reference the business and any decisions that need to be made.
    b. If appropriate, consider adding this person as an approved signatory on bank accounts. This might not always be desirable, but if it is appropriate it will make things easier if an incapacity occurs.
    c. Work with the business's financial institutions *prior* to any incapacity to ensure they will accept the power of attorney. This usually requires providing the power of attorney to a financial institution's legal department and having it "added" to the account. Sometimes they require both the principal and agent to sign forms.
    d. Put specific language in the power of attorney allowing the agent to make relevant business decisions.

5. In the situation where your client is already incapacitated but has a valid power of attorney and the bank is refusing to accept a duly executed power of attorney, there are two possible workarounds:
    a. Argue VA Code 64.2-1618, which states that a financial institution must accept a validly executed power of attorney, except in limited circumstances. This code section provides for attorneys' fees in a successful lawsuit to force them to accept

the power of attorney (but sadly does not provide any penalties to the financial institution for having to bring the suit in the first place).

b. Ask if the bank will accept a corporate governance document appointing the agent as an officer, member, director, or other corporate title with power to execute financial documents. These documents would be signed in the principal's name by the agent acting in her capacity as an agent.

6. Takeaways –
    a. Make sure your clients are thinking about business continuity during estate planning, or during business formation.
    b. Work with the financial institutions from the outset to make sure anything drafted will be accepted.
    c. Consider two powers of attorney – one for personal financial affairs and one for business decisions.

II. Representing fiduciaries and beneficiaries

A. The executor or administrator of an estate must qualify with the court before acting.

1. This has come up frequently in the course of wrongful death actions: *Johnston Memorial Hosp. v. Bazemore*, 277 Va. 308 (2009); *Harmon v. Sadjadi*, 273 Va. 184 (2007), *Brake v. Payne*, 268 Va. 92 (2004), and *Fowler v. Winchester Medical Center, Inc*., 266 Va. 131 (2003).

2. But it is also applicable in the context of actions on behalf of an estate. "A person named in a will as executor **shall not** exercise the powers of executor until he qualifies as such by taking an oath and giving bond in the court or before the clerk where the will or an authenticated copy thereof is admitted to record, except that he may provide for the burial of the testator, pay reasonable funeral expenses, and preserve the estate from waste." Va. Code § 64.2-511 (emphasis added).

3. "The personal representative, not a beneficiary of the estate, is the proper party to litigate on behalf of the estate." *Burns v. Equitable Assocs.*, 220 Va. 1020, 1028 (1980).

B. Who has the ability to challenge a will?

1. *Martone ex rel. Martone v. Martone*, 257 Va. 199 (1999).

2. Filed under former § 64.1-90 (now § 64.2-448) which allows "a person interested in the probate of a will" to file a complaint to impeach or establish the will.

3. The adult children of the decedent had previously filed suit to challenge their father's 1995 will. The minor grandchildren were not made parties and no guardian ad litem was appointed to protect their interests; however, an earlier document from 1991 was placed before the court.

4. The court found in the earlier action that the 1995 will was not a product of undue influence and that it revoked the 1991 document.

5. Granddaughter Stephanie (who was still a minor) filed a second suit attempting to uphold the 1991 document. The 1991 document placed the estate in a trust. The only provision in the will relating to the grandchildren was a provision allowing the executor, at his sole discretion, to pay the income from the estate during the period of administration to a class of persons which included the decedent's wife and his heirs.

6. The Supreme Court found that this did not constitute a sufficient interest for the purposes of seeking to impeach or establish a will. "[W]e believe that the term means that an individual must have a legally ascertainable, pecuniary interest, which will be impaired by probating a will or benefited

by setting aside the will, and not a mere expectancy." *Martone v. Martone*, 257 Va. 199 (1999).

7. The Court also found that *res judicata* applied as to the adult children due to the previous suit.

C. Who has the ability to challenge a trust?

1. "[T]he beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust." *Fletcher v. Fletcher*, 253 Va. 30 (1997).

2. Vested beneficiaries - *Shriners Hosps. for Crippled Children v. Smith*, 238 Va. 708 (1989).

3. During her lifetime, the trustor created an *inter vivos* trust mandating that the net income was to go to herself during her lifetime, then after her death to her sister, then to her niece. Upon her niece's death, marriage, or cohabitation, the principal and any income was to be turned over to the Shriner's Hospital. The terms of the trust required the trustee to provide an accounting only to the current beneficiary.

4. After the death of the trustor, the hospital filed suit against the trustee seeking an accounting after the trustee refused to provide one.

5. The Supreme Court found that the hospital was a vested remainderman entitled to an accounting under general equitable principles. "The trustee may be compelled to account not only by a beneficiary presently entitled to the payment of income or principal, but also by a beneficiary who will be or may be entitled to receive income or principal in the future." Restatement (2nd) of Trusts, § 172, comment c.

6. This principle applies even if there no accusations of mismanagement or fraud against the trustee.

7. *Garcia v. Suda*, 94 Va. Cir. 246 (2016).

8. The decedent's will poured his estate over into a trust, for which the trustee was his wife. Under the terms of the trust, twenty percent went to his wife and the other 80% was to be divided between two subtrusts, one on behalf of Mr. Garcia, to be administered by separate trustees.

9. The wife failed to fund the Garcia subtrust. Garcia filed suit alleging that she had financially mismanaged the primary trust, and the wife moved to dismiss on the ground that he did not have standing.

10. The trial court agreed with the wife. First, Garcia was not an actual beneficiary of the primary trust and therefore did not have standing to

challenge its administration. The trust instrument established multiple trusts and he was only a beneficiary of his own subtrust. His beneficial interest in the primary trust was "too indirect and remote to confer standing upon him in relation to" that trust.

11. Second, while Garcia had derivative standing to challenge the administration of the primary trust on behalf of his own subtrust, those claims were not yet ripe because the designated trustee had not yet accepted the trusteeship of that trust and Garcia had neither sought the appointment of a trustee to fill that vacancy or requested that the designated trustee pursue claims against the wife.

12. The case was dismissed without prejudice.

INSOLVENT ESTATES

Not an exhaustive discourse of the topic, but a focus on limiting Fiduciary Liability.

I. What is insolvency?

II. What is the procedure?

- a. Read the Will, if there is one.
- b. Qualify
    - i. separate or destroy clearly revoked LWT's
- c. Gather assets
- d. Inventory
- e. Due diligence on debts of the estate
- f. Read the Will
    - i. Residual before specific
    - ii. Personal Estate before Real Estate
- g. Understand your facts
    - i. Spouse?
    - ii. Children?
    - iii. Intestate heirs
    - iv. Special debtors or Assets
        1. Owned a business?
        2. Had personal Notes
- h. Order of Debtors when Insolvent. Va Code § 64.2-528
    - i. Administration costs and expenses
    - ii. Allowances (Family, Exempt Property, Homestead) spouse or minor children
    - iii. $4000 funeral expenses
    - iv. Federal Debts and taxes
    - v. Last illness hospital and doctor ($2,150 and 425, respectively)
    - vi. State debts and taxes
    - vii. Debts where the decedent owed a fiduciary
    - viii. Debts for child support
    - ix. Local debts and taxes
    - x. General Creditors
- i. Debts and Demands Hearing Va. Code §64.2-550
    - i. Are there Creditors you are disputing? Give them notice.
    - ii. Should you supply your thoughts to the commissioner classifying the creditors and the proper pro rata amount due each creditor within each class?

j. Commissioner of Accounts Report on the Debts and Demand Hearing §64.2-551
    i. Report details to the Fiduciary who to pay and how much.
    ii. What about new creditors discovered after the debts and demands hearing?
    iii. What about creditors fiduciary ignored?
        1. Did they file a claim under §64.2-552?
            a. If so, they were not ignored.
        2. If not, whose responsibility is it to tell them to file such a claim?
        3. Did fiduciary send notice disputing the claim?
k. Accounting & Proposed distribution
l. Order to show cause against distribution Va. Code §64.2-553
    i. Need Commissioner of Accounts Report on Accountings of Fiduciary
    ii. Need Proposed Order with list debtors and proper prorations
    iii. Need to have completed a Debts and Demands Hearing AND Report of the Commissioner of Accounts
    iv. Then the Court SHALL Order the estate in the possession of the personal representative as is proper be applied to the payment of such debts and demands.
m. Second and final accounting

III. Tips
a. Statue of Limitations (SOL)
    i. Va Code §64.2-529
        1. PR has no liability for unknown debts after 12 months, if PR paid too much to a class of creditors
            a. Wait 12 months before paying a class of creditors, if a creditor comes out from the woodworks the PR does not have liability. The Estate will if there is more money recovered
    ii. Va Code §64.2-556(B)
        1. Good Faith compliance with this section as approved by order signed by judge is not liable to demands of creditors and all other persons
    iii. Except - Va Code §8.01-245(B)
        1. Ten year SOL for a suit to surcharge or falsify such account of a fiduciary settled under 64.2-120, et seq.
b. Assume all estates are insolvent until otherwise.
c. Do the hard part first (or just don't neglect it)
    i. Collect and organized debts
    ii. Investigate taxes
    iii. State and local
d. Prioritize debts and don't pay out more than willing to lose.

        i. Funeral bills usually first issue of Personal Representative
    e. Some insolvent estates are better to left alone.
        i. Not enough to pay attorney for guidance or to assist in preparing.
        ii. What happens?
            1. A Creditor will take charge
            2. Asset will be Abandoned to state see Va Code §55-210.1, et seq.
            3. Secured Creditors
                a. Not affected by death, lien is still valid
                    i. Real Estate with DOT
                    ii. UCC financing Statements

About the Author -

Mr. Bushman was born in Arlington County, and raised in McLean, Virginia. He attended public school in Fairfax County. Mr. Bushman is a graduate of Hampden-Sydney College and the University of Richmond's T.C. Williams School of Law. While at law school, Mr. Bushman clerked for the Arlington Juvenile and Domestic Relations Court. After graduating from law school, Mr. Bushman was employed by the United States Supreme Court Clerk's office before starting his own firm. He is the sole member of Joshua E. Bushman, Esquire, PLLC. Mr. Bushman is a general practitioner with a focus on estate planning, guardianships and conservatorships, probate administration, residential real estate transactions and small business matters. Mr. Bushman is certified as a Guardian ad Litem for adults, and was formerly certified as a Guardian ad Litem for children.

Va. Code Ann. § 64.2-1208. Expenses and commissions allowed fiduciaries

A. In stating and settling the account, the commissioner of accounts shall allow the fiduciary any reasonable expenses incurred by him and, except in cases in which it is otherwise provided, a reasonable compensation in the form of a commission on receipts or otherwise. Unless otherwise provided by the court, any guardian appointed pursuant to Chapter 20 (§ 64.2-2000 et seq.) or Chapter 21 (§ 64.2-2100et seq.) shall also be allowed reasonable compensation for his services. If a committee or other fiduciary renders services with regard to real estate owned by the ward or beneficiary, compensation may also be allowed for the services rendered with regard to the real estate and the income from or the value of such real estate.

B. Notwithstanding subsection A or any provision under Chapter 7 (§ 64.2-700 et seq.), where the compensation of an institutional fiduciary is specified under the terms of the trust or will by reference to a standard published fee schedule, the commissioner of accounts shall not reduce the compensation below the amount specified unless there is sufficient proof that (i) the settlor or testator was not competent when the trust instrument or will was executed or (ii) such compensation is excessive in light of the compensation institutional fiduciaries generally receive in similar situations.

Reasonable attorney's fees are allowed if they are incurred in good faith, and the attorney's work was for the benefit of the estate, and not for the personal interest of any party.

- An executor, may, in good faith, seek the aid of counsel in the execution of his duties. However, in addition to good faith there must be some reasonable ground that renders the employment of counsel reasonably necessary to aid the executor in the performance of his duties. If counsel is employed under these circumstances, then reasonable expenses incurred by such employment are assessable against the estate." *Clare v. Grasty*, 213 Va. 165, 191 S.E.2d 184 (1972).

- Allowance of attorney's fees for services rendered the estate apart from the duties as executor was within the sound discretion of the trial court. *Perrow v. Payne*, 203 Va. 17, 121 S.E.2d 900 (1961).

- The executor was not entitled to allowance of a fee to the attorney who represented him in the hearings on the exceptions to his accounting. *Perrow v. Payne*, 203 Va. 17, 121 S.E.2d 900 (1961).

- there was no statutory basis for an award of attorney fees to the surviving spouse under that circumstance and such litigation was undertaken to benefit him, and not his late wife's estate. *Dowling v. Rowan*, 270 Va. 510, 621 S.E.2d 397 (2005).

Although a beneficiary's attorney's fees are generally not recoverable in suits regarding the estate, a beneficiary who is also the trustee may collect reasonable attorney's fees from the losing

parties. The defendant trustee must be blameless and have a good faith basis to defend the suit. A good faith basis will be established, if the trustees and fiduciaries are acting in their duty to defend the trust. *See Cooper v. Brodie,* 253 Va. 38 (1997); *Steep v. Foster*, 45 Va. Cir. 522 (1998).

Determining Reasonableness:

The court has broad authority to determine reasonable compensation based on the specific case.

- "The Supreme Court of Virginia has made clear that while there is no set formula, the facts of each case provide the basis for any determination of reasonable compensation." *Higgerson v. Farthing*, 96 Va. Cir. 58 (City of Chesapeake 2017).
- "The allowance or refusal of compensation rests in the sound discretion of the court under the circumstances of each case." *Virginia Trust Co. v. Evans,* 193 Va. 425, 433, 69 S.E.2d 409 (1952).
- "reasonable compensation" is "to be measured by the conscience of the trial court." *Trotman v. Trotman*, 148 Va. 860, 139 S.E. 490 (1927).

In determining reasonableness, all legal services will be judged according to the *Chawla* standard, and all non-legal services will be judged according to the standard established by the caselaw interpreting Code § 64.2-1208. *In re Estate of Bone,* 91 Va. Cir. 547 (City of Chesapeake 2014)

- Non-legal: There is no "hard and fast rule" for determining reasonableness, there are several factors to be considered, including: (1) "the value of the Estate," (2) "the services rendered and responsibilities assumed," and (3) "the difficulties encountered and the results obtained." *Perrow v. Payne,* 203 Va. 17, 26, 121 S.E.2d 900 (1961)

- Non-legal: The Guidelines for Fiduciary Compensation set forth in 2004 by the Judicial Council of Virginia provide that for non-attorney services, a 5% fee will be allowed for all non-investment receipts realized during each accounting period, and a 1% fee on the first $500,000 based on the market value of assets brought forward from a prior account. *In re Estate of Bone*, 91 Va. Cir. 547 (City of Chesapeake 2014).

- Chawla Standard: This seven factor test was established in *Chawla v. Burgerbusters,* and remains the standard in Virginia. *Chawla,* 255 Va. 616, 499 S.E.2d 829 (1998).

    - (1) the time and effort expended by the attorney,
    - (2) the nature of the services rendered,
    - (3) the complexity of the services,
    - (4) the value of the services to the client,
    - (5) the results obtained,
    - (6) whether the fees incurred were consistent with those generally charged for similar services, and
    - (7) whether the services were necessary and appropriate.

Illustrative Cases:

In re Estate of Bone, 91 Va. Cir. 547 (City of Chesapeake 2014).

Kenneth Bone qualified as the conservator of the Estate of Kenneta Bone, but after he obtained a bond, filled of the first accounting, and increased the value of the surety bond, it became clear the Mr. Bone was unable to fulfill his duties. The court appointed an attorney (Mr. O'Keefe) to act as successor conservator. Mr. O'Keefe sent bills to the issuer of the bond. The bills totaled $12,079 at his billable rate of $275/hour. The Court held that Mr. O'Keefe was entitled to reasonable compensation, and that the bond was liable, but that payment of costs he incurred in taking over the estate from the principal may lead to an unfair depletion of the estate. Therefore, the Court requested more evidence be provided specifically on those fees and noted that the surety had already expressed its intent to go after the principal for indemnification of such fees.

Higgerson v. Farthing, 96 Va. Cir. 58 (City of Chesapeake 2017).

Farthing was an attorney acting as trustee for several trusts established by Mr. Higgerson. The Court determined that Farthing had breached his fiduciary duty by failing to act as a prudent investor. Farthing also had unexplained increases in his fees and lacked a clear fee schedule. This "undisclosed blended method of charging and undisclosed rate of pay" violated Code § 64.2-775(B)(4). He additionally violated § 64.2-764(A) because the trusts were not administered solely for the benefit of the beneficiaries. Ultimately, the court determined that a fair estimate of his reasonable fees would be 5% of the non-traded, stagnant stock, which was 1/3 of the value of the company as a whole. This entitled Farthing to $286,746.10, and he was ordered to return the $770,471.33 he had collected in excess of that. He was further ordered to pay $1,382,653 for breaching is fiduciary duty to act as a prudent investor.

Va. Code Ann. § 64.2-795

- Language of the statute
  - "In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or from the trust that is the subject of the controversy."
- Background of attorney's fees
  - Attorney's fees are generally only awarded to the prevailing party through contract or through statute. *Prospect Dev. Co. v. Bershader*, 258 Va. 75, 92 (1999).
  - Va. Code § 64.2-795 grants the court discretion in awarding reasonable attorney's fees in a case of a judicial proceeding involving the administration of a trust. *Higgerson v. Farthing*, 96 Va. Cir. 58, *71 (2017).
  - What Does it Mean to be Reasonable?
    - The Supreme Court of Virginia has compared this statute to Va. Code § 55-79.53(A) which awards reasonable attorney fees to the prevailing party in disputes concerning Condominium instruments. *Lambert v. Sea Oats Condo Ass'n*, 293 Va. 245, 254 (2017).
    - Both statutes give discretion to court and does not provide what is reasonable. *Id.*
    - Therefore, "we presume that when the General Assembly enacts legislation, it is aware of this Court's precedents. Consequently, we presume that the General Assembly intended courts to be guided by those precedents in 55-79.53(A) cases." *Id.*
      - These cases have listed seven factors to determine the reasonableness of the fees:
        - Time and effort expended by the attorney
        - The nature of the services rendered
        - The complexity of the services
        - The value of the services to the client
        - The results obtained
        - Whether the fees incurred where consistent with those generally charged for similar services
        - Whether the services were necessary and appropriate

      See Manchester Oaks Homeowners Ass'n v. Batt, 284 Va. 409, 430 (2012).
- Who pays the attorney fees?
  - *Landrith v. First Virginia Bank*, 40 Va.Cir. 59 (Fairfax Cty. Cir. Ct. 1995).
    - "The trustee is entitled to reimbursement from the trust for reasonable attorney's fees expended in protecting the trust. However, where the trustee was at fault in causing the litigation, the trustee should not receive reimbursement."
  - *Reineck v. Lemen*, 292 Va. 710 (2016)

        - Attorney's fees cannot be assessed against a litigant personally when they are in a representative capacity. *Id.* at 721.
            - Although the party may be both a beneficiary and a personal representative, the personal representative Is "the proper party to litigate on behalf of the estate." *Id.* at 722.
            - The court will not "blur the lines between a suit brought by a personal representative and a suit initiated by a beneficiary of the estate." *Id.*
            - In this case, the beneficiary brought a suit against trustees for breach of fiduciary duties. *Id.* at 716. After the case was dismissed, the same individual petitioned to become a curator of the estate and brought a second suit for the same issues. *Id.*
            - The court granted attorney's fees for both suits against Reineck in a personal capacity. *Id.* at 720-21. The Supreme Court of Virginia reversed the award of attorney's fees because the Va. Code § 64.2-795 only permits attorney's fees against a party and Reineck – in his personal capacity – was not party to the second suit. *Id.* at 723.
        - Fees can be paid by another party or from the trust. *Id.*
    - *Howell v. Hart*, 2014 Va. Cir. LEXIS 160 (Caroline Cty. Cir. Ct. 2014)
        - "The statute provides that even a non-trustee party may be ordered to pay or the trust itself may be ordered to pay attorney fees and costs provided the award serves the ends of justice and equity." *Id.* at *9.
        - The court rejected the argument that attorney's fees can only by awarded in the context of misconduct by the trustee. *Id.*
        - Even in this context – seeking advice and guidance from the court – attorney's fees can be awarded. *Id.*
    - *Rafalko v. Georgiadis*, 290 Va. 384 (2015)
        - The standard of review for awarding attorney's fees is abuse of discretion. *Id.* at 409.
        - The lower court granted attorney's fees based on "its conclusion that the trustee's decision to disqualify the sons based on the no-contest clause was improper." *Id.*
        - When the Supreme Court of Virginia reversed that conclusion, the court remanded the case to determine whether attorney's fees are appropriate. *Id.* at 409-10.
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- Examples
    - *In re Roszel*, 95 Va. Cir. 293 (Fauquier Cty. Cir. Ct. 2017).
        - Trustee had a longstanding course of self-dealing which supported the award of attorney's fees. *Id.* at 297.
        - Court granted fees under this Va. Code § 64.2-795 for $75,000. *Id.* at 298.
        - Trustee transferred a total of approximately $250,000 from the trust to his personal accounts. *Id.* at 295.

        - Using power of attorney, sold home and put the proceeds of the sale ($150,000) in his personal bank account. *Id.*
        - Money was spent on trustee's personal expenses. *Id.*
    - *Trimmer v. Savage*, 89 Va. Cir. 135 (Henrico Cir. Ct. 2014).
        - Lack of trustee for the trust was due to a lack of cooperation among three siblings. *Id.* at 137.
        - No one person could be held responsible for the disagreement/lack of cooperation. *Id.*
        - Since no person was at fault, could not award fees under Va. Code § 64.2-795. *Id.* The fees should be paid from the estate under Va. Code 64.2-2008. *Id.*
    - *In re Dorothy v. Tobin Trust*, 2014 Nev. Dist. LEXIS 1036 (Clark Cty. 2014).
        - Althought this case takes place in a trial court of Nevada, Virginia law governed the interpretation and enforcement of the Trust. *Id.* at 16-17.
        - A trust's attorney-in-fact was liable for attorney's fees but could not pay with the trust money. *Id.* at 21.
        - The attorney-in-fact paid herself approximately $10,000 without explanation and had expenses up to $25,000 that were un-explained – all within a single year. *Id.* at 14.
        - The court ordered that the attorney-in-fact must repay the individuals and the trust. *Id.* at 23.
        - If they cannot repay, the beneficiaries of the trust can request "the voiding of certain transactions where funds were improperly paid out of the trust." *Id.* at 24.

EXHIBITS

PRESENT: Lemons, C.J., Goodwyn, McClanahan, Powell, and Kelsey, JJ., and Russell and Millette, S.JJ.

JAMES B. THORSEN, ET AL.

v. Record No. 150528

RICHMOND SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS

OPINION BY
SENIOR JUSTICE LEROY F. MILLETTE, JR.
June 2, 2016

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND
Paul M. Peatross, Judge Designate

This appeal concerns whether an intended third-party beneficiary of a will contract, who failed to successfully take under the will instrument due to the drafting attorney's error, may sue the attorney for malpractice.

I. FACTS AND PROCEEDINGS

In 2003, Alice Louise Cralle Dumville, then a resident of Chesterfield County, met with James B. Thorsen, an attorney, at his office in Richmond, Virginia, in order to prepare her last will and testament. At the end of the initial meeting, Thorsen understood that Dumville wanted him to prepare a will that would, upon her death, convey all of her property to her mother if her mother survived her, and, in the event her mother predeceased her, to the Richmond Society for the Prevention of Cruelty to Animals ("RSPCA"). At the time, Dumville was forty-three and her mother was in her late seventies or early eighties. Dumville lived with three cats, which she desired to go to the RSPCA upon her death.

Thorsen prepared the will. At no time in the preparation of the will did Thorsen provide any tax advice, such as attempting to minimize tax burdens on the estate. On April 16, 2003, Thorsen wrote a letter to Dumville informing her of the completion of her will, and Dumville executed the will as drafted by Thorsen.

Dumville died on May 16, 2008, her mother having predeceased her. Thorsen, in his capacity as co-executor of the estate, notified the RSPCA that it was the sole beneficiary of Dumville's estate. Thorsen was subsequently informed that, in the opinion of the title insurance company, the will left only the tangible estate, not real estate, to the RSPCA.

Thorsen brought suit in a collateral proceeding to correct this "scrivener's error" based on Dumville's clear original intent. The Circuit Court of Chesterfield County, however, found the language unambiguously limited the bequest to the RSPCA to tangible personal property, while the intangible estate passed intestate to Dumville's heirs at law, Helen Boyle and Kathleen Davis. Thorsen v. Boyle, Rec. No. CL09-718 (April 9, 2010) (unpublished).

On April 14, 2011, the RSPCA brought suit against James B. Thorsen, Thorsen & Scher, LLP, and James B. Thorsen, P.C. (collectively, "Thorsen") for breach of contract-professional negligence, as a third-party beneficiary of the contract between Thorsen and Dumville. Thorsen demurred, arguing, among other things, that: (1) the RSPCA was not an intended third-party beneficiary of the contract and Thorsen undertook no obligation on its behalf, and so he could not be liable to the RSPCA; and (2) in the Commonwealth, an action by a third-party beneficiary arises under Code § 55-22 and requires a written agreement. Additionally, Thorsen filed a plea in bar premised on the statute of limitations. The circuit court overruled the demurrer and denied the plea in bar.

At trial, the parties stipulated that Thorsen, as Dumville's attorney, had a duty to incorporate her intent into her will accurately and that he did not accurately incorporate her intent as to the disposition of real property to the RSPCA. The RSPCA received $72,015.60 from the tangible estate, but the ultimate bequest, less expenses, would have totaled $675,425.50 absent the error.

The circuit court admitted Thorsen's testimony from the previous collateral proceedings regarding his understanding of Dumville's intent. After considering both this evidence and trial testimony, the court found for the RSPCA. The final order incorporated the proposed findings of fact and conclusions of law offered by the RSPCA and found damages for the RSPCA in the amount of $603,409.90. Thorsen now appeals.

II. DISCUSSION

A. Requirement of a Written Contract

Thorsen assigns error to the circuit court's "ruling that Virginia Code § 55-22 applied to the oral contract between Alice Louise Cralle Dumville and James B. Thorsen." We agree with Thorsen that Code § 55-22 does not apply to the oral contract between Dumville and Thorsen. However, we do not agree that this is fatal to the RSPCA's claim.

This issue of statutory interpretation presents a pure question of law which we review de novo. Conyers v. Martial Arts World of Richmond, Inc., 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007). "When the language of a statute is unambiguous, we are bound by the plain meaning of that language. Furthermore, we must give effect to the legislature's intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity." Id. (internal citations omitted).

Code § 55-22 states:

> An immediate estate or interest in or the benefit of a condition respecting any estate may be taken by a person under an instrument, although he be not a party thereto; and if a covenant or promise be made for the benefit, in whole or in part, of a person with whom it is not made, or with whom it is made jointly with others, such person, whether named in the instrument or not, may maintain in his own name any action thereon which he might maintain in case it had been made with him only and the consideration had moved from him to the party making such covenant or promise.

Thorsen argues that the language of Code § 55-22 refers to the third-party beneficiary of an "instrument." An instrument is a "written legal document that defines rights, duties, entitlements, or liabilities, such as a statute, contract, will, promissory note, or share certificate." Black's Law Dictionary 918 (10th ed. 2014) (emphasis added). Thorsen therefore contends that, under the plain language of the statute, the oral nature of the contract in question is fatal to the RSPCA's cause of action, and the RSPCA has no recourse.

The parties do not dispute, nor can they in good faith, that the plain meaning of the term "instrument" as employed in this statute refers to a written document. Because the benefit to the third-party referred to in the first phrase of the statute derives from an "instrument," Code § 55-22 must refer to a benefit from a written document. This interpretation is bolstered by the second half of the statute: although the term "covenant or promise" is not preceded by a modifier specifying "written," it is nonetheless closely followed by reference to "the instrument" (emphasis added). The definite article makes clear that the source of the benefit referred to in this statute must be a written agreement or other benefit that is memorialized in a written document.

While we agree with Thorsen's construction of the statute, we cannot agree that this statute abrogates the common law so as to prohibit the ability of third-party beneficiaries to sue upon oral contracts. We have previously noted:

> At common law,
>
> > the general rule was that, whether the contract was express or implied, by parol or under seal, or of record, the action must be brought in the name of the party in whom the legal interest was vested, and that this legal interest was vested in the person to whom the promise was made, and consequently that he or his privy was the only person who could sue in a court of law upon such contract.

> Thacker v. Hubard, 122 Va. 379, 387, 94 S.E. 929, 931 (1918); accord, Cemetery Cons[ultants] v. Tidewater Fun. Dir., 219 Va. 1001, 1003, 254 S.E.2d 61, 62 (1979). However, "in contracts not under seal, it has been held, for two centuries or more, that any one for whose benefit the contract was made may sue upon it." Thacker, 122 Va. at 387, 94 S.E. at 931 (emphasis in original).

Ward v. Ernst & Young, 246 Va. 317, 329, 435 S.E.2d 628, 634 (1993). Oral contracts are not under seal, and the Court has never held, in the centuries prior to Thacker or the century since, that the oral nature of a contract limits a third-party beneficiary's ability to sue upon it.

Code § 55-22 is silent as to oral contracts. By its plain terms, it applies only to written contracts. Its enactment therefore does not affect the ability of a third-party beneficiary to bring a common law action based on an oral contract made for his or her benefit, which remains intact.

Additionally, "statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogeneous system, or a single and complete statutory arrangement." Prillaman v. Commonwealth, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957) (quoting 50 Am. Jur. Statutes § 349). Code § 11-2, entitled "When written evidence required to maintain action," more commonly known as the Statute of Frauds, sets forth limitations on oral contracts under some circumstances. A third-party beneficiary cannot sue upon an oral promise to answer for his or her debt, for example. Code § 11-2(4). However, there is no prohibition in Code § 11-2 on the ability of third-party beneficiaries to sue upon oral contracts generally. To so hold would be to judicially amend the Statute of Frauds, an action we decline to take.

Neither the complaint in this case nor the final order invoke or rely on Code § 55-22. This issue is raised only on demurrer by Thorsen, who sought to apply Code § 55-22 due to his belief that it prohibited oral contracts and no common law cause of action existed.

Because the RSPCA had the authority to proceed under common law as a third-party beneficiary of an oral contract, and the circuit court had the authority to enter judgment

accordingly, and nothing in the pleadings frustrates this authority, we therefore conclude that the demurrer was properly overruled and proceed to the next assignment of error.

B. Standing

Thorsen next assigns error to the circuit court's holding that the RSPCA has standing to sue for breach of contract while not party to the attorney-client relationship. Standing is a question of law which we review de novo. Kelley v. Stamos, 285 Va. 68, 73, 737 S.E.2d 218, 220 (2013).

This assignment of error requires us to consider two legal components: first, whether Virginia recognizes a cause of action for breach of contract against attorneys by third-party testamentary beneficiaries, and, if so, whether the RSPCA's pleadings were sufficient to accord it standing as a third-party beneficiary of the attorney-client contract.

1. The Cause of Action

While, as a general rule, strangers to a contract acquire no rights under such contract, third-party beneficiary contracts represent a well-recognized exception in our law under which a nonparty can nevertheless enforce the contract under certain circumstances. 13 Williston on Contracts § 37:1, at 14-15 (Richard A. Lord ed., 4th ed. 1990 & 2013 rev.); see supra Part II.A. A primary rationale for supporting third-party beneficiary claims was that donee contracts, of which testamentary instruments are one example, otherwise could rarely be enforced, as the promisee could recover only nominal damages upon nonperformance: "The party to the contract would have no action for its breach except nominal damages since he was not the one who suffered by the promisor's default. If the beneficiary could not sue there could be no adequate recovery even though the breach was established." Isbrandtsen Co. v. Local 1291 of Int'l Longshoremen's Ass'n, 204 F.2d 495, 497 (3d Cir. 1953). Thus, "through this travail . . . the

common law has given birth to a distinct, new principle of law which takes its own place in the family of legal principles, and gives not only to a donee beneficiary, but also to a creditor beneficiary, the right to enforce directly the promise from which he derives his interest." Id. (quoting 2 Williston on Contracts § 357 (rev. ed. 1936) (alteration omitted). "[A]s stated in one leading decision: 'The tendency of American authority is to sustain the gift in all such cases and to permit the donee-beneficiary to recover on the contract.'" 13 Williston on Contracts § 37:13, at 134 (Richard A. Lord, ed., 4th ed. 2013) (quoting Seaver v. Ransom, 120 N.E. 639 (N.Y. 1918)).

The Supreme Court of the United States held in National Savings Bank v. Ward, 100 U.S. 195, 205-07 (1880), that a bank could not recover as against an attorney for negligence in examining title to the property when the attorney's clients and not the bank had retained the attorney to conduct the title search, due to lack of privity between the attorney and the bank:

> Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party, and unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained.
>
> . . . .
>
> Analogous cases . . . demonstrat[e] that it is not every one who suffers a loss from the negligence of another that can maintain a suit on such grounds. On the contrary, the limit of the doctrine relating to actionable negligence, says Beasley, C. J., is, that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss.

Id. at 200, 202 (citation omitted). While this rule remains throughout many aspects of the attorney-client relationship, courts in the majority of our sister states have recognized some form of cause of action against negligent drafters of estate instruments by frustrated beneficiaries, through contract or tort principles, or both.[1] In Virginia, "an action for the negligence of an

[1] See, e.g., Fickett v. Super. Ct., 558 P.2d 988, 990 (Ariz. Ct. App. 1976); Lucas v. Hamm, 364 P.2d 685, 689 & n.2 (Cal. 1961); Stowe v. Smith, 441 A.2d 81, 84 (Conn. 1981);

attorney in the performance of professional duties, while sounding in tort, is an action for breach of contract." Oleyar v. Kerr, 217 Va. 88, 90, 225 S.E.2d 398, 400 (1976). In the Commonwealth, the cause of action alleged today therefore lies in contract, and the exception to the privity rule lies there as well.

Indeed, this Court is among those which have previously addressed the privity requirement in terms of the attorney-client relationship in Copenhaver v. Rogers, 238 Va. 361, 384 S.E.2d 593 (1989), in which grandchildren who were remaindermen under their grandparents' testamentary trust were precluded from bringing a legal malpractice action. The fatal aspect of the claim, however, was that they had asserted they were intended beneficiaries of the estate rather than intended beneficiaries of the contract. Id. at 369, 371, 384 S.E.2d at 597-98.

"In order to proceed on the third-party beneficiary contract theory, the party claiming the benefit must show that the parties to a contract 'clearly and definitely intended' to confer a benefit upon him." Id. at 367, 384 S.E.2d at 596 (citing Allen v. Lindstrom, 237 Va. 489, 500, 379 S.E.2d 450, 457 (1989)). While a party may reap a benefit from an estate, such party may

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Needham v. Hamilton, 459 A.2d 1060, 1062 (D.C. 1983); Passell v. Watts, 794 So.2d 651, 652-53 (Fla. Dist. Ct. App. 2001); Blair v. Ing, 21 P.3d 452, 462 (Haw. 2001); Ogle v. Fuiten, 466 N.E.2d 224, 226 (Ill. 1984); Walker v. Lawson, 526 N.E.2d 968, 968 (Ind. 1988); Schreiner v. Scoville, 410 N.W.2d 679, 682 (Iowa 1987); Woodfork v. Sanders, 248 So.2d 419, 425 (La. Ct. App. 1971); Pizel v. Zuspann, 795 P.2d 42, 51 (Kan. 1990); Mieras v. DeBona, 550 N.W.2d 202, 211 (Mich. 1996); Francis v. Piper, 597 N.W.2d 922, 924 (Minn. Ct. App. 1999); Donahue v. Shughart, Thomson & Kilroy, P.C., 900 S.W.2d 624, 629 (Mo. 1995); Simpson v. Calivas, 650 A.2d 318, 322 (N.H. 1994); Leak-Gilbert v. Fahle, 55 P.3d 1054, 1062 (Okla. 2002); Hale v. Groce, 744 P.2d 1289, 1292 (Or. 1987); Guy v. Liederbach, 459 A.2d 744, 746 (Pa. 1983); Fabian v. Lindsay, 765 S.E.2d 132, 141 (S.C. 2014); Persche v. Jones, 387 N.W.2d 32, 35-36 (S.D. 1986); Powers v. Hayes, 776 A.2d 374, 375 (Vt. 2001); Auric v. Continental Casualty Co., 331 N.W.2d 325, 328 (Wis. 1983); Stangland v. Brock, 747 P.2d 464, 467-68 (Wash. 1987). See also Riser v. Livsey, 227 S.E.2d 88, 89 (Ga. Ct. App. 1976); Hargett v. Holland, 447 S.E.2d 784, 786 (N.C. 1994); Jaramillo v. Hood, 601 P.2d 66, 67 (N.M. 1979) (recognizing a cause of action but finding that the statute of limitations had run).

not proceed in Virginia against one who negligently drafted testamentary documents without showing that the party was a "clearly and definitely intended" beneficiary of the contract to draft the testamentary documents. Id. at 368-69, 384 S.E.2d at 596-97. By way of illustration, the Court in Copenhaver offered these polar hypotheticals:

> There is a critical difference between being the intended beneficiary of an estate and being the intended beneficiary of a contract between a lawyer and his client. A set of examples will illustrate the point: A client might direct his lawyer to put his estate in order and advise his lawyer that he really does not care what happens to his money except that he wants the government to get as little of it as possible. Given those instructions, a lawyer might devise an estate plan with various features, including inter vivos trusts to certain relatives, specific bequests. . . [and] many people and institutions might be beneficiaries of the estate, but none could fairly be described as beneficiaries of the contract between the client and his attorney because the intent of that arrangement was to avoid taxes as much as possible. By contrast, a client might direct his lawyer to put his estate in order and advise his lawyer that his one overriding intent is to ensure that each of his grandchildren receive one million dollars at his death and that unless the lawyer agrees to take all steps necessary to ensure that each grandchild receives the specified amount, the client will take his legal business elsewhere. In this second example, if the lawyer agrees to comply with these specific directives, one might fairly argue each grandchild is an intended beneficiary of the contract between the client and the lawyer.

Id. Because the Copenhavers "never alleged that their grandparents and Rogers entered a contract of which they were intended beneficiaries," they had no claim. Id.

The above authority reflects this Court's understanding, nearly three decades ago, that the specific agreement between a testator client and an attorney concerning the drafting of a will could establish an intended third-party beneficiary, while specifically acknowledging the difficulty in proving third-party beneficiary status under such circumstances. Id. at 371, 384 S.E.2d at 598.

"The essence of a third-party beneficiary's claim is that others have agreed between themselves to bestow a benefit upon the third party but one of the parties to the agreement fails to uphold his part of the bargain." Id. at 367, 384 S.E.2d at 596. In short, there is an agreement

out of which arises an obligation to benefit a third party, the breach of which causes damages to that third party. Accordingly, "where the intent to benefit the plaintiff is clear and the promisee (testator) is unable to enforce the contract," our precedent recognizes a cause of action among the narrow class of third-party beneficiaries to enforce claims which would otherwise have no recourse for failed legacies resulting from attorney malpractice. Fabian v. Lindsay, 765 S.E.2d 132, 140 (S.C. 2014) (quoting Guy v. Liederbach, 459 A.2d 744, 747 (Pa. 1983)).

Four years later, our holding in Ward v. Ernst & Young reinforced this understanding. In Ward, in the context of accountants, this Court permitted the privity requirement to be satisfied by a showing that a nonparty is a third-party beneficiary of the contract: the Court held that the circuit court had improperly granted a motion to strike plaintiff's evidence at the close of plaintiff's proof on the amended pleading, because the evidence, taken in the light most favorable to the plaintiff, "was fully sufficient to raise a jury question" on the claim that the contracting parties intended to benefit the plaintiff. 246 Va. at 332, 435 S.E.2d at 636. See Bank of Am. v. Musselman, Bowling, Franklin & Co., 240 F.Supp. 2d 547, 553-54 (E.D. Va. 2003) ("[P]rivity of contract is required where, as here, a non-party to a contract for . . . accounting services seeks damages for an economic loss resulting from the accountant's allegedly negligent performance. . . . [H]owever, the privity requirement may be satisfied through a showing by the non-party that he is a third-party beneficiary of the contract." (citing Ward and other Virginia authority)).[2] In Ward, the Court also declined to distinguish between attorneys and accountants as to privity requirements, because both are "licensed to invite the

[2] While it has become commonplace for American courts to adopt the language that the third-party beneficiary relationship establishes privity, in that it implies the necessary obligation, it is more precise to state that the relationship dispenses with the need for strict privity. 13 Williston on Contracts § 37:1, at 24 (Richard A. Lord ed., 4th ed. 1990 & 2013 rev.) (citing Anderson v. Rexroad, 266 P.2d 320 (Kan. 1954)).

public to rely on their professional competence, and they are regulated and disciplined in the performance of services to those who accept their invitation." 246 Va. at 326, 435 S.E.2d at 632.

Thorsen argues that Johnson v. Hart, 279 Va. 617, 692 S.E.2d 239 (2010), overrules Copenhaver. Yet Johnson applies specifically to an attempt to bring suit under Code § 8.01-13, pertaining to assigns and beneficial owners. The appeal concerned whether a sole testamentary beneficiary could bring a legal malpractice action in her own name against the attorney for the estate for negligent services rendered. Id. at 622, 692 S.E.2d at 240. Because the attorney-client relationship existed between the attorney and the estate, id. at 621, 692 S.E.2d at 241, Johnson never argued that she was an intended third-party beneficiary. Johnson sought to bring suit as a beneficial owner under Code § 8.01-13, but the Court found that such action was barred by the rule prohibiting assignment of legal malpractice actions in the Commonwealth. Id. at 626, 692 S.E.2d at 244. We thus find the holding in Johnson inapplicable to the question before this Court today.

"[I]mposing an avenue for recourse in the beneficiary, where the client is deceased, is effectively enforcing the client's intent, and the third party is in privity with the attorney." Fabian, 765 S.E.2d at 140 (recognizing legal malpractice cause of action in estate planning derived on a third-party beneficiary theory, among other theories). Indeed, many of our sister states recognize that contracts made for the benefit of a third-party testamentary beneficiary provide that party with a cause of action against an attorney for damages incurred due to breach of contract in the nature of professional negligence. See, e.g., Lucas v. Hamm, 364 P.2d 685, 689 & n.2 (Cal. 1961); Stowe v. Smith, 441 A.2d 81, 84 (Conn. 1981); Blair v. Ing, 21 P.3d 452, 462 (Haw. 2001); McLane v. Russell, 546 N.E.2d 499, 501-02 (Ill. 1989); Walker v. Lawson,

526 N.E.2d 968, 968 (Ind. 1988); Woodfork v. Sanders, 248 So.2d 419, 425 (La. Ct. App. 1971); Simpson v. Calivas, 650 A.2d 318, 322 (N.H. 1994); Leak-Gilbert v. Fahle, 55 P.3d 1054, 1062 (Okla. 2002); Hale v. Groce, 744 P.2d 1289, 1292 (Or. 1987); Guy v. Liederbach, 459 A.2d 744, 746 (Pa. 1983); Fabian v. Lindsay, 765 S.E.2d 132, 140 (S.C. 2014); Stangland v. Brock, 747 P.2d 464, 467-68 (Wash. 1987). Because this cause of action requires that one of the primary purposes for the establishment of the attorney-client relationship is to benefit the nonclient,[3] the scope of such claims is necessarily limited; as this Court has previously stated, "it will no doubt be difficult for a litigant, in a case of this kind, to meet the requirements of third-party beneficiary claims." Copenhaver, 238 Va. at 371, 384 S.E.2d at 598. Indeed, it has proved so difficult that this Court has not seen another such case in the nearly three decades from Copenhaver until this day.

2. Allegations of Third-Party Beneficiary Status

The only element in dispute regarding standing is the RSPCA's status as a third-party beneficiary. A nonparty must allege facts sufficient to conclude it was a "clearly and definitely intended beneficiary" of the contract; "[a]n incidental beneficiary has no standing to sue." Kelly Health Care, Inc., v. Prudential Ins. Co., 226 Va. 376, 380, 309 S.E.2d 305, 307 (1983) (citing Valley Landscape Co. v. Rolland, 218 Va. 257, 260, 237 S.E.2d 120, 122 (1977)). We will accordingly limit the scope of our discussion to this element of the claim. An incidental beneficiary is so far removed from the obligations assumed by the contracting parties that a court will not allow him to sue on that contract, whereas an intended beneficiary is such an integral part of the obligations assumed by the contracting parties that a court will permit him to sue on

[3] Cf. Restatement (Third) of the Law Governing Lawyers, § 51 (2000) (describing the circumstances giving rise to a duty of care when professional negligence lies in tort, yet analogous to the reasoning underlying a duty to third-party nonclient beneficiaries when professional negligence sounds in tort but arises from a contractual agreement).

that contract. Radosevic v. Virginia Intermont College, 651 F.Supp. 1037, 1038 (W.D. Va. 1987).

In the complaint, the RSPCA alleges that, "In engaging Mr. Thorsen's legal services . . . Ms. Dumville informed Mr. Thorsen . . . in the event that her mother predeceased her . . . to designate the RSPCA as the sole beneficiary of all of her property." The RSPCA alleges that "Mr. Thorsen was informed that Ms. Dumville sought to bestow a benefit on the RSPCA by leaving all of her property to this one recipient in the event her mother predeceased her"; that, "[w]hen agreeing to prepare [the will,]" and "as part of his Contract," Thorsen specifically agreed to draft the will as instructed by Dumville for the sole benefit of the RSCPA in the event that her mother predeceased her; that it was clear to both Dumville and Thorsen that the RSPCA was "an intended beneficiary of the Contract;" and that Dumville was "assured by Mr. Thorsen that he had written the Will to meet her testamentary intent to leave all of her property to the RSPCA in the event that her mother predeceased her" before she executed the will.

Here, the facts sufficiently allege that the contract was entered into for the benefit of Dumville's mother and the RSPCA. The RSPCA sufficiently alleges that Dumville "sought to confer a benefit" to the RSPCA upon her death; that she sought Thorsen's professional expertise to accomplish this task; that Dumville and Thorsen contracted so that Dumville would confer a benefit, and that Thorsen accepted that obligation, thus creating the clear and definite intent to create a benefit to the RSPCA. When, according to the allegations, Thorsen accepted the contract to prepare Dumville's will as she specified, the RSPCA became not only the intended beneficiary of Dumville's will but also the intended beneficiary of her contract of employment with Thorsen. Copenhaver, 238 Va. at 368-69, 384 S.E.2d at 596-97. In sum, despite the

practical difficulties in being able to prove such a case, the RSPCA alleges many of the elements set forth in the successful Copenhaver hypothetical.

Accordingly, while we have suggested in the past that such a cause of action could exist under properly pled facts, today we affirmatively acknowledge the RSPCA's pleading as sufficient to allege a cause of action for breach of contract-professional negligence on behalf of a third-party beneficiary of the contract between the testator and her attorney. The RSPCA has standing to proceed.

C. Contingent, Residuary Beneficiaries as Third Party Beneficiaries

Thorsen next argues that a contingent, residuary beneficiary to a will cannot be a "clearly and definitely intended" third-party beneficiary as a matter of law. We disagree.

Thorsen seeks to remove factual matters properly within the province of the trial court, thus creating a per se rule against certain classes of testamentary beneficiaries. The class of beneficiary in a will is one of many factors to be considered in weighing whether the nonparty was a "clearly and definitely intended beneficiary" to the contract.

1. Residuary Beneficiaries

First, we consider the residuary beneficiary, the beneficiary who takes after specific bequests. It is patently obvious that this beneficiary can be a "clearly and definitely intended beneficiary" under the law.

Consider the following example: a widowed and remarried woman living in a nursing home with her husband retains an attorney to create a will for the benefit of her own biological son. She leaves a specific bequest to her husband of her wedding ring and bequeaths the entire residue of her estate to her son. Although the residuary taker, the son receives nearly the entirety

of the estate, and, although there may have been multiple purposes to the will, the son was a "clearly and definitely intended beneficiary" of the contract and not an incidental beneficiary.

Depending on circumstances, a residuary beneficiary may take all of the estate, none of the estate, or anything in between. Evidence may support a finding that the residuary beneficiary was clearly and definitely intended by the testator, or may support the conclusion that the residuary was an incidental beneficiary, such as if the testator instructed the attorney to select a charity for the residuary estate. Whether the residuary beneficiary is a third-party beneficiary is a fact-intensive inquiry; the residuary beneficiary is not precluded from third-party beneficiary status as a matter of law. See Teasdale v. Allen, 520 A.2d 295, 296 (D.C. 1987) (declining "to adopt any per se rule that standing may be granted only to those whose precise status as intended beneficiaries can be discerned from the four corners of the will itself"); Needham v. Hamilton, 459 A.2d 1060, 1061 (D.C. 1983) (upholding standing in a testamentary malpractice action in which the legatee was the residuary beneficiary); Guy v. Liederbach, 459 A.2d 744, 746-47 (Pa. 1983) (finding that a named residuary beneficiary was an intended beneficiary). See also Lucas v. Hamm, 364 P.2d 685, 687 (Cal. 1961) (plaintiffs were would be takers of residual trust); Passell v. Watts, 794 So.2d 651, 652 (Fl. Dist. Ct. App. 2001) (plaintiffs were contingent, residual beneficiaries); Leak-Gilbert v. Fahle, 55 P.3d 1054, 1055-56 (Okla. 2002) (plaintiffs who were unintentionally omitted residual beneficiaries could bring a claim).

2. Contingent Beneficiaries

At the time a will is drafted, the testator cannot know or at least could not be certain whether any particular contingency will be removed such that a contingent beneficiary will in fact take. Thorsen argues, therefore, that a contingent beneficiary by definition cannot be a "definitely intended beneficiary."

Yet one of the most common scenarios in which parents enter into their first set of testamentary instruments shows this to be contrary to reason. Consider the couple who retains an attorney to draft reciprocal wills at the birth of their child. They will likely name each other as the primary beneficiaries, desiring that if something were to happen to only one of them, the other would benefit from the will. The child is a contingent beneficiary, sometimes through a trust if a minor and in his or her own name as an adult. An overriding purpose in entering into the contract with the attorney to draft such a will at this time is generally to account for the possibility that both parents might perish, perhaps in a common accident, and to provide for the child's long-term care. Although the surviving spouse remains the primary beneficiary of the will, and the child takes only as a contingent beneficiary, this does not alter the fact that the child is a "clearly and definitely intended beneficiary" of the contract to draft the will.

Contrary to Thorsen's claims, the viability of a third-party contract claim in this context does not depend on identifying, or being able to identify, the specific party being benefitted when the contract is made. Palmetto Fire Ins. Co. v. Conn, 272 U.S. 295, 304-05 (1926); see also 13 Williston on Contracts § 37:29, at 215 (Richard A. Lord ed., 4th ed. 1990 & 2013 rev.) (citing many sources). Contingent beneficiaries exist to accommodate changing circumstance, particularly age, and to direct the progression of beneficiaries without the constant need to revisit the instrument as time and eventuality go by. Thus, the fact that beneficiaries do not take first does not mean that they are not "clearly and definitely intended beneficiar[ies]" under the contract, but rather that they were not intended as the first takers given the circumstances at the time the will was drafted; yet, the will might still have been drafted, perhaps even primarily as in the example above, for their benefit. See, e.g., Ogle v. Fuiten, 466 N.E.2d 224, 226 (Ill. 1984) (allowing a claim from niece and nephew contingent beneficiaries to go forward on a breach of

contract/third-party beneficiary theory); Passell v. Watts, 794 So.2d 651, 652 (Fl. Dist. Ct. App. 2001) (plaintiffs were contingent, residuary beneficiaries). Whether a contingent beneficiary in a will is a third-party beneficiary of the contract to draft the will is a fact-intensive inquiry.

3. Contingent, Residuary Beneficiaries

As there is no justification for barring contingent or residuary beneficiaries as a matter of law from being considered third-party beneficiaries to the attorney-client contract, neither can there be justification for barring contingent, residuary beneficiaries as a matter of law. See Passell, 794 So.2d 651 at 652. Determining whether such parties satisfy the requirements for an actionable claim is an inquiry properly left to the finder of fact.

D. Plea in Bar

The denial of a plea in bar as to the statute of limitations is a question of law that this Court reviews do novo. Van Dam v. Gay, 280 Va. 457, 460, 699 S.E.2d 480, 281 (2010).

In Virginia, actions for legal malpractice are actions for breach of contract and are thus governed by the limitations periods prescribed for contract claims. Oleyar, 217 Va. at 90, 225 S.E.2d at 399. Code § 8.01-246 states that "actions founded upon a contract . . . shall be brought within the following number of years next after the cause of action shall have accrued: . . . 4. In actions upon any unwritten contract, express or implied, within three years." (Emphasis added.)

Code § 8.01-230 states that:

> In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property, when the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under Code § 8.01-233, subsection C of § 8.01-245, §§ 8.01-249, 8.01-250 or other statute.

(Emphases added.)

Thorsen maintains that, if he breached the contract, it was when he drafted the will, thus completing his legal services, on April 16, 2003 (citing MacLellan v. Throckmorton, 235 Va. 341, 345, 367 S.E.2d 720, 722 (1988) ("[T]he breach of contract or duty occurs and the statute of limitations begins to run when the attorney's services rendered in connection with that particular undertaking or transaction have terminated.")). In his view, the statute of limitations then expired three years later, on April 16, 2006. We disagree.

Statutes of limitation do not affect a cause of action; they bar a right of action. The two may accrue at the same time, but will not of necessity do so. First Va. Bank-Colonial v. Baker, 225 Va. 72, 81-82, 301 S.E.2d 8, 13-14 (1983). A cause of action is the operative set of facts giving rise to a right of action. Id.; Locke v. Johns-Manville Corp., 221 Va. 951, 959, 275 S.E.2d 900, 905 (1981). "A right of action cannot arise until a cause of action exists because a right of action is a remedial right to presently enforce an existing cause of action." Van Dam, 280 Va. at 460, 699 S.E.2d at 481 (citing Shipman v. Kruck, 267 Va. 495, 502, 593 S.E.2d 319, 322 (2004)). "Some injury or damage, however slight, is essential to a cause of action." Id. at 463, 699 S.E.2d at 482.

In the case of a testamentary beneficiary, no injury, however slight, can be sustained prior to the testator's death, because "[a] testator may, during his lifetime, alter his will or other testamentary papers as he pleases and whenever he chooses." Van Dam, 280 Va. at 462, 699 S.E.2d at 482. "While [the testator] lives, no beneficiary has anything more than a bare expectancy and no person has suffered any injury or damage as a result of his tentative dispositions." Id. (citing Schilling v. Schilling, 280 Va. 146, 149, 695 S.E.2d 181, 183 (2010)). Because of this mutability and bare expectancy, no testamentary beneficiary has a cause of action prior to the death of the testator.

In accordance with Code § 8.01-246, the three-year statute of limitations cannot begin to run as to the testamentary beneficiary until a cause of action accrues, after the death of the testator. Thus Code § 8.01-246 can, under the proper circumstances in which no injury is sustained, provide one of the referenced statutory exceptions to the rule set forth in Code § 8.01-230 that contractual rights of action accrue at breach.[4]

Most courts have allowed both the promisee and the third-party beneficiary to sue to enforce the contract. 13 Williston on Contracts § 37:55, at 354 (Richard A. Lord ed., 4th ed. 1990 & 2013 rev.). While both parties have an action against the promisor, there can only be one satisfaction, preventing double recovery. Id. at 355. This is particularly true of testamentary actions.

We do not today overrule our previous holding in MacLellan, 235 Va. at 345, 367 S.E.2d at 722 (holding that the statute of limitations began to run on a divorce attorney's services when that particular undertaking or transaction had terminated). There, MacLellan received erroneous advice on his Property Settlement Agreement, which was entered by the court as part of his divorce decree, but suffered monetarily from that harm only years later when his income changed. However, while some injury or damage, however slight, is required for a cause of action to accrue, "it is immaterial that all the damages resulting from the injury do not occur at the time of the injury." Van Dam, 280 Va. at 463, 699 S.E.2d at 482 (emphasis added). Although the plaintiff in Van Dam similarly suffered primary monetary damage at the time of her ex-husband's death due to lost survivor benefits, the Court found some initial injury took place at the time the divorce decree was entered. In each instance, the statute of limitations on

[4] We note that the primary purpose of Code § 8.01-230 as to contracts is to avoid creating a so-called "discovery rule," and this reading of the two statutes together in no way frustrates that purpose. The requirement of the cause of action is merely that one sustains injury, not that it be known.

plaintiff's right of action ran from the entry of the divorce decree, when the parties' rights were fixed.

The RSPCA's position in this case can be distinguished. It was unable to bring suit in the years following the execution of the will: lacking a vested interest and possessing only a bare expectancy, it had no standing to sue. Not even slight harm or damage accrued to the RSPCA until the testator's death.

American jurisdictions vary considerably in their approaches to statutes of limitations, some permitting the discovery rule to apply to contracts which Virginia's Code § 8.01-230 would prohibit. Nonetheless:

> Courts which have addressed this issue seem to agree that the cause of action accrues as [sic] the testator's death, not at the time of the drafting of, or signing of, the will. This is the time when the attorney's negligence becomes irremediable and the impact of the injury occurs, courts recognize; before a testator's death, the potential beneficiaries possess no recognized legal interest in the estate.

Joan Teshima, Annotation, Attorney's Liability, To One Other Than Immediate Client, For Negligence in Connection with Legal Duties, 61 A.L.R. 4th 615, § 5 (1988 & 2015 rev.) (citing Heyer v. Flaig, 449 P.2d 161 (Cal. 1969), Shideler v. Dwyer, 417 N.E.2d 281 (Ind. 1981); Auric v. Continental Casualty Co., 331 N.W.2d 325 (Wis. 1983)).

Because the RSPCA's cause of action could not have accrued until the testator's death, we must affirm the trial court's denial of the plea in bar premised on the statute of limitations.

E. Sufficiency of the Evidence

Thorsen additionally challenges the sufficiency of the evidence to render a verdict in favor of the RSPCA at trial. Thorsen stipulated at trial that, as Dumville's attorney and pursuant to their agreement, he "had a duty to incorporate Ms. Dumville's intent into her Will in an accurate manner," that the will he drafted "did not incorporate [her] intentions regarding the

disposition of her property," that he is "ultimately responsible for the error in [the will]," and "as a result of this error, the RSPCA did not receive all of [her] property." Accordingly, the only element that Thorsen challenges the sufficiency of is whether the RSPCA was an intended third-party beneficiary of the contract, such that Thorsen's duty ran not only to Dumville but also to the RSPCA.

On appeal, we view the evidence and all reasonable inferences arising therefrom in the light most favorable to the prevailing party at trial. Nationwide Mut. Ins. Co. v. St. John, 259 Va. 71, 76, 524 S.E.2d 649, 651 (2000); Ravenwood Towers, Inc. v. Woodyard, 244 Va. 51, 57, 419 S.E.2d 627, 630 (1992). "A judgment should be reversed for insufficient evidence only if it is plainly wrong or without evidence to support it." Edmonds v. Edmonds, 290 Va. 10, 18, 772 S.E.2d 898, 903 (2015) (internal quotation marks omitted). To review the circuit court's finding that the RSPCA was a third-party beneficiary of the contract, we review both the evidence as to Dumville's intent and Thorsen's intent at the time of the contract to consider whether the RSPCA was a "clearly and definitely intended" beneficiary.

1. Dumville's Intent

First, we consider the question of whether the facts were sufficient for a factfinder to conclude that, for Dumville, an overriding purpose of the contract was to benefit the RSPCA. Thorsen's answer to an interrogatory from the prior collateral proceeding stated: "The decedent was clear in her instructions to Thorsen . . . that she wanted her entire estate to go to her mother and if her mother predeceased her, then her entire estate be to the Richmond SPCA. These were her instructions and intentions at the time of the initial interview and the creation of her last will and testament and throughout the drafting period." The RSPCA introduced a letter from Thorsen to the title insurance company stating:

> [I]t was the clear intent of Alice and the intent in my drafting, to make a full and complete conveyance of Alice's estate to her mother if she survived Alice, and if not, a full and complete bequeath/conveyance of all of Alice's entire estate to the RSPCA. Moreover, I had no idea Alice had any relative other than her mother, and did not become aware of Ms. Boyles [sic] until sometime after [Dumville's mother] died.

The parties stipulated that Dumville was forty-three and her mother was in her late seventies or early eighties when the will was drafted. Thorsen testified that he was aware that Dumville had a relationship with the RSPCA, had an affinity for the organization, and wanted her cats to go to the RSPCA after her death. Thorsen testified in the previous matter that these three cats "were her babies" and she "probably cared for her cats more than she did herself." Finally, although there is error in the drafting, the RSPCA is named specifically in the will instrument.

Thorsen testified in the current proceeding that Dumville's motivation for creating a will was in part to disinherit her husband while divorce proceedings were underway. However, in the prior 2009 proceeding, he stated that "it would not have been a consideration," and he "did not discuss with [Dumville] any issue of her husband's rights of intestacy."

The circuit court found Thorsen's answers in the 2009 proceeding credible. The factfinder is entitled to consider the nature and content of the instrument as evidence and draw reasonable inferences arising therefrom. Here, a single woman with an uncomplicated estate created a simple will devising her entire estate to the only relative with whom evidence suggests she had a close relationship, her elderly mother, or, if her mother predeceased her, a charity with which she had a preexisting relationship, upon her death. It is a fair inference that the client entered into a contract to draft a will <u>for the purpose of</u> benefiting one of those parties upon her death. Given the deference afforded to the factfinder, we find no error in the circuit court's conclusion that the primary or overriding purpose of the contract was for the benefit of the will beneficiaries.

The evidence was also sufficient to support Dumville's intent for the RSPCA specifically to benefit. There was testimony as to her relationship with the RSPCA, supporting the RSPCA as a purposeful choice. The ages of Dumville and her mother at the time the will was drafted make it not unlikely and, in fact, foreseeable that Dumville's mother would predecease her and the RSPCA would take the entirety of Dumville's estate. Finally, in the case of a residuary charitable beneficiary, affirmatively being named in the instrument lends additional support to the testator's clear and definite intention to benefit the charity in her contract with her attorney and his understanding of that obligation. [5] Taking these facts together, we find no error in the trial court's finding of sufficient evidence to conclude that Dumville clearly and definitely intended the RSPCA to be a third-party beneficiary of the contract.

2. Thorsen's Intent

Thorsen alleges that there was no evidence that Thorsen agreed to benefit the RSPCA in entering into the retention agreement to draft the will, and so the RSPCA cannot be a third-party beneficiary of the contract. A third-party beneficiary rule "has no application unless the party sought to be held liable has assumed an obligation for the benefit of the third party." Valley Landscape Co., 218 Va. at 259-60, 237 S.E.2d at 122. Thorsen argues that, in the Copenhaver hypothetical, this Court explicitly included a requirement that a lawyer comply with the testator's specific directives at the outset of their retention. 238 Va. at 369, 384 S.E.2d at 597. Thorsen desires the Court to distinguish between the obligation undertaken to make a will in a retention agreement and the obligation to benefit the parties in the will.

[5] Here, it is equally important to note what we do not decide today: while naming may in some cases support intention, failure to name does not necessarily indicate lack of intention, such as in the case of an intentional bequest to the substantially defined but open class of "my children," a term invoked in many wills to include after-born children.

We disagree that Copenhaver requires some specific language in the contract between a testator and her attorney that the lawyer must comply with her directives or there will be no contract, and we do not find this cause of action necessarily so limited. The Copenhaver hypothetical indeed emphasizes that mutual understanding of the benefit to the third party is essential to the contract. Id. at 369, 384 S.E.2d at 597 (e.g., "unless the lawyer agrees . . . the client will take his legal business elsewhere"; "if the lawyer agrees to comply with these specific directives"). Yet, the agreement to comply with specific directives is implied when the client contracts with the attorney to perform a specific service which the attorney then undertakes to perform. We cannot separate the obligations of the client's intent from the agreement because, without the intent and the assent to take on those specific directives, there would be no retention agreement.

For this reason, when a client can terminate a contract at any time, a client's request six months into an attorney-client relationship to make a third party his or her beneficiary has the same weight as a request on the first day of the relationship: refusal of the attorney to draft the will according to his or her wishes would likewise result in the termination of the attorney-client relationship. Thus, we do not find it necessary to prove that this mutual assent was expressed prior to retention, but rather that, prior to the completion of the attorney's services, the attorney became aware of the directives of the client and agreed to undertake the obligation.

There may be many reasons for drafting a testamentary instrument which would not result in the creation of third-party beneficiaries to the attorney-client contract. But the evidence in this case supports the trial court's finding that Dumville went to Thorsen to draft a will for the purpose of benefiting her mother and the RSPCA. The parties stipulated that, at the end of their initial meeting regarding preparation of the will, "Thorsen understood that Ms. Dumville wanted

him to prepare a Will which would accurately incorporate and effectuate Ms. Dumville's decisions as to the distribution of her estate upon her death, i.e. that upon her death all of her property would be left to her mother if her mother survived her, and in the event her mother predeceased her, all of her property would be left to the RSPCA." Thorsen stated under oath that "There was no doubt in my mind what she wanted in terms of the will, no doubt what she expressed." In that meeting, which Thorsen testified was their only meeting regarding the will prior to his drafting, Thorsen agreed to draft a will according to those specifications. We find no error below.

Thus, taking these findings together as a whole, we find no error in the trial court's holding that the RSPCA was a clearly and definitely identified third-party beneficiary of the contract.

III. CONCLUSION

For the aforementioned reasons, we will affirm the judgment of the circuit court.

Affirmed.

JUSTICE McCLANAHAN, dissenting.

Because the rule of strict privity in legal malpractice actions has not been abolished in Virginia, I would hold that the Richmond Society for the Prevention of Cruelty to Animals ("RSPCA") does not have standing to sue for breach of the legal services agreement between Alice Louise Cralle Dumville and James B. Thorsen. The determination of whether to abolish the common law privity requirement is a policy decision that should be made by the General Assembly, not this Court. Therefore, I dissent.

"Virginia has adopted the strict privity doctrine in legal malpractice cases." Johnson v. Hart, 279 Va. 617, 624, 692 S.E.2d 239, 243 (2010). In fact, "the common law has long

provided that [a legal malpractice action] requires the existence of an attorney-client relationship as a threshold requirement." Id. at 626, 692 S.E.2d at 244. The requirement of privity is grounded in the "'highly confidential and fiduciary relationship between an attorney and client'" and "'safeguards the attorney-client relationship which is an indispensable component of our adversarial system of justice.'" Id. at 625, 692 S.E.2d at 243 (quoting MNC Credit Corp. v. Sickels, 255 Va. 314, 318-19, 497 S.E.2d 331, 333-34 (1998)). We have held that this policy underlying the requirement of privity "precludes a testamentary beneficiary from maintaining, in her own name, a legal malpractice action against an attorney with whom an attorney-client relationship never existed." Id. at 625, 692 S.E.2d at 244.[1]

"By statute in Virginia, it is provided that: 'Every attorney at law shall be liable to his client for any damage sustained by him by the neglect of his duty as such attorney.'" Glenn v. Haynes, 192 Va. 574, 580, 66 S.E.2d 509, 512 (1951) (emphasis added) (quoting former Code § 54-46, predecessor to Code § 54.1-3906); see Code § 54.1-3906 ("Every attorney shall be liable to his client for any damage sustained by the client through the neglect of his duty as such attorney." (emphasis added); Ripper v. Bain, 253 Va. 197, 202, 482 S.E.2d 832, 835 (1997) ("An attorney is liable to the client for damages caused by the attorney's negligence.") (citing Code § 54.1-3906). The General Assembly has dispensed with the requirement of privity to allow actions resulting from legal malpractice concerning an irrevocable trust where a legal services contract existed between the grantor of the trust and the attorney prior to the grantor's death. See

[1] The majority concludes that the "holding" in Johnson is "inapplicable" because the testamentary beneficiary pursued her claim as a beneficial owner under Code § 8.01-13 and "never argued that she was an intended third-party beneficiary." Yet, the majority's conclusion ignores the ratio decidendi for the Court's holding in Johnson – the common law requirement of the existence of an attorney-client relationship to maintain a legal malpractice action and the underlying policy of such requirement, which also precludes assignment of legal malpractice claims.

Code § 64.2-520(B) (permitting action for damages to the grantor, the estate, or the trust, by the grantor's personal representative or the trustee if such damages are incurred after the grantor's death).[2] The General Assembly has not abolished the common law requirement of privity for any other legal malpractice actions.

Contrary to the majority's suggestion, this Court did not abandon the requirement of privity in legal malpractice actions in Copenhaver v. Rogers, 238 Va. 361, 384 S.E.2d 593 (1989). Although, in that case, the Court discussed cases from other jurisdictions that have permitted third-party beneficiary claims against attorneys and ultimately ruled that the claim of the beneficiaries in Copenhaver did not meet traditional rules governing third-party beneficiary claims, the Court did not address the issue of whether the common law requirement of privity in legal malpractice actions has been, or should be, abandoned in Virginia to accommodate third-party beneficiary claims against attorneys. This issue is squarely before the Court in this case and demands a careful and thorough discussion of the policies underlying the requirement of strict privity and the role this Court should play in determining whether this common law requirement should be abolished.[3]

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[2] The statute provides that "[a]n action for damages, including future tax liability, to the grantor, his estate or his trust, resulting from legal malpractice concerning an irrevocable trust shall accrue upon completion of the representation in which the malpractice occurred." Code § 64.2-520(B) (emphasis added). "An action for damages pursuant to this section in which a written contract for legal services existed between the grantor and the defendant shall be brought within five years after the cause of action accrues" and "[a]n action for damages pursuant to this section in which an unwritten contract for legal services existed between the grantor and the defendant shall be brought within three years after the cause of action accrues." Id.

[3] Despite the majority's implication otherwise, the Court in Ward v. Ernst & Young, 246 Va. 317, 435 S.E.2d 628 (1993), made no comparison between accountants and attorneys in its analysis of the third-party beneficiary claim in that case. In fact, the Court did not discuss the privity requirement in legal malpractice actions or even cite to Copenhaver in the context of its discussion of that claim.

The abolishment of the common law requirement of privity in legal malpractice actions presents competing public policy concerns. While acknowledging the need to have attorney accountability in the area of estate planning, many state courts have refused to abandon the privity requirement in actions for legal malpractice in this context. See, e.g., Robinson v. Benton, 842 So.2d 631, 637 (Ala. 2002) ("[W]e decline to change the rule of law in this state that bars an action for legal malpractice against a lawyer by a plaintiff for whom the lawyer has not undertaken a duty."); Baker v. Wood, Ris & Hames, PC, 364 P.3d 872, 882 (Colo. 2016) (extending third-party beneficiary theory of contract liability to legal malpractice claims by intended beneficiaries of a will "is contrary to each of the settled policies underlying the strict privity rule to which Colorado courts have long adhered, and we perceive no justifiable policy reason for so extending attorney liability"); Noble v. Bruce, 709 A.2d 1264, 1275 (Md. Ct. App. 1998) ("We decline the beneficiaries' invitation to create a new rule in Maryland governing attorney liability to nonclients arising out of will drafting or estate planning."); Schneider v. Finmann, 933 N.E.2d 718, 721 (N.Y. 2010) ("[S]trict privity remains a bar against beneficiaries' and other third-party individuals' estate planning malpractice claims absent fraud or other circumstances."); Shoemaker v. Gindlesberger, 887 N.E.2d 1167, 1172 (Ohio 2008) ("While recognizing that public-policy reasons exist on both sides of the issue, we conclude that the bright-line rule of privity remains beneficial. The rule provides for certainty in estate planning and preserves an attorney's loyalty to the client."); Barcelo v. Elliott, 923 S.W.2d 575, 579 (Tex. 1996) ("We therefore hold that an attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to persons named as beneficiaries under the will or trust.").

Chief among the policy reasons underlying the rule of privity is the preservation of the sanctity of the attorney-client relationship. "Primarily, the [privity] rule is used to protect the

attorney's duty of loyalty and the attorney's effective advocacy for the client." Shoemaker, 887 N.E.2d at 1171. "The strict privity rule ensures that attorneys may represent their clients without the threat of suit from third parties who may compromise that representation. Otherwise, an attorney's preoccupation or concern with potential negligence claims by third parties might diminish the quality of legal services provided to the client if the attorney were to weigh the client's interests against the possibility of third-party lawsuits." Id.; see also Baker, 364 P.3d at 877 ("[L]imiting an attorney's liability to his or her clients protects the attorney's duty of loyalty to and effective advocacy for the client."); Barcelo, 923 S.W.2d at 578-79 (preserving a bright-line privity rule "will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation").[4]

The privity rule also serves to protect against the potential for conflicting duties owed to clients and third parties by the attorney. "[E]xpanding attorney liability to non-clients could result in adversarial relationships between an attorney and third parties and thus give rise to conflicting duties on the part of the attorney." Baker, 364 P.3d at 877. "Such conflicting duties and loyalties, in turn, could constrain the attorney's ability to represent his or her client

[4] Discussing the scenario in which an attorney may have delayed in ensuring a will was properly executed, the Supreme Court of Texas observed:

> In most cases where a defect renders a will or trust invalid, however, there are concomitant questions as to the true intentions of the testator. Suppose, for example, that a properly drafted will is simply not executed at the time of the testator's death. The document may express the testator's true intentions, lacking signatures solely because of the attorney's negligent delay. On the other hand, the testator may have postponed execution because of second thoughts regarding the distribution scheme. In the latter situation, the attorney's representation of the testator will likely be affected if he or she knows that the existence of an unexecuted will may create malpractice liability if the testator unexpectedly dies.

The Court stated, "we are unable to craft a bright-line rule that allows a lawsuit to proceed where alleged malpractice causes a will or trust to fail in a manner that casts no real doubt on the testator's intentions, while prohibiting actions in other situations." Barcelo, 923 S.W.2d at 578.

properly." Id. Thus, "without the strict privity rule, the attorney could have conflicting duties and divided loyalties during the estate planning process." Shoemaker, 887 N.E.2d at 1171.

The abandonment of privity in legal malpractice actions also raises justifiable concerns over uncertain and unlimited liability as well as the effect on the availability of legal services. As the Supreme Court of Colorado noted, "if an attorney's duty of care were extended to third parties, then the attorney could be liable to an unforeseeable and unlimited number of people." Baker, 364 P.3d at 878. "The impact of an expansion of attorney liability to third parties would not be limited to the attorneys. As other courts have recognized, an expansion of attorney liability to allow claims by non-clients could deter attorneys from undertaking certain legal matters, thus compromising the interests of potential clients by making it more difficult for them to obtain legal services." Id.; see also Schneider, 933 N.E.2d at 721 ("Relaxing privity to permit third parties to commence professional negligence actions against estate planning attorneys would produce undesirable results--uncertainty and limitless liability."); Shoemaker, 887 N.E.2d at 1171 (observing that without the privity requirement "there would be unlimited potential liability for the lawyer").

In the context of estate planning services, the abandonment of the privity doctrine is particularly troublesome since, under the majority's holding that the cause of action for legal malpractice accrues on the date of the client's death, an attorney may be held liable for malpractice decades after the testamentary documents were drafted for the client.[5] In general, when the alleged legal malpractice consists of a single, isolated act, the statute of limitations

[5] In contrast, in the one instance in which the General Assembly has dispensed with the requirement of privity to permit a legal malpractice action by a nonclient, the General Assembly has provided that the action "shall accrue upon completion of the representation in which the malpractice occurred." Code § 64.2-520(B) (emphasis added) (permitting action for damages to the grantor, the estate, or the trust, by the grantor's personal representative or the trustee if such damages are incurred after the grantor's death).

begins to run when the act is performed. Keller v. Denny, 232 Va. 512, 518, 352 S.E.2d 327, 330 (1987); see Code § 8.01-230. When a course of professional services takes place over a period of time, the statute of limitations begins to run when the attorney's services related to that particular undertaking ended. Id. Yet, as this Court has observed, "[a] testator may, during his lifetime, alter his will or other testamentary papers as he pleases and whenever he chooses." Van Dam v. Gay, 280 Va. 457, 462, 699 S.E.2d 480, 482 (2010). Thus, while the testator lives, "no beneficiary has anything more than a bare expectancy and no person has suffered any injury or damage as a result of his tentative dispositions." Id. Following this logic, the majority concludes that since third-party beneficiaries of a legal services agreement to draft a will suffer no damage until the testator's death, the statute of limitations does not begin to run until testator's death. Thus, attorneys in Virginia will now be subject to liability to nonclients for malpractice in connection with the preparation of testamentary documents for an indefinite, and potentially lengthy, period of time after the preparation of such documents.

In my view, the decision of whether to abolish the privity requirement in legal malpractice actions and create a new cause of action against attorneys in favor of third-party beneficiaries should be left to the legislature. Although the public's interest in holding attorneys accountable in providing estate planning services is an important consideration, there are competing policy concerns raised by the extension of legal malpractice standing to nonclients. "The public policy of the Commonwealth is determined by the General Assembly [because] it is the responsibility of the legislature, and not the judiciary, . . . to strike the appropriate balance between competing interests." Uniwest Constr., Inc. v. Amtech Elevator Servs., 280 Va. 428, 440, 699 S.E.2d 223, 229 (2010) (internal quotation marks and citation omitted). When the

question of whether to recognize a new cause of action involves a multitude of competing interests,

> which courts are ill-equipped to balance, ... [o]n the other hand, the legislative machinery is specially geared to the task. A legislative change in the law is initiated by introduction of a bill which serves as public notice to all concerned. The legislature serves as a forum for witnesses representing interests directly affected by the decision. The issue is tried and tested in the crucible of public debate. The decision reached by the chosen representatives of the people reflects the will of the body politic. And when the decision is likely to disrupt the historic balance of competing values, its effective date can be postponed to give the public time to make necessary adjustments.

Bruce Farms, Inc. v. Coupe, 219 Va. 287, 293, 247 S.E.2d 400, 404 (1978).

The majority's decision to recognize this new cause of action represents a radical departure from the existing law of legal malpractice in Virginia. Under the majority opinion, the common law requirement of privity in legal malpractice actions is now abolished in Virginia. From this date forward, attorneys will owe a legal duty to nonclients by virtue of legal services agreements with their clients whenever a "lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient."[6] In the specific context of estate planning in which the cause of action will accrue upon the client's death, attorneys will be subject to liability for malpractice for a period of time that could extend well beyond the date that the testamentary documents were drafted. Such uncertain and unlimited liability will undoubtedly deter attorneys from offering estate planning services. Additionally, this expansion of liability will likely lead to higher malpractice insurance premiums and ultimately affect the ability of potential clients to obtain affordable estate planning

[6] Although today's opinion is rendered in the context of an action resulting from services provided in connection with a will, the majority's discussion, as well as its citation to the Restatement (Third) of the Law Governing Lawyers, § 51 (2000), signals the Court's intention to abolish the requirement of privity in all legal malpractice actions.

services from attorneys who choose to continue to offer such services. The common law requirement of privity in legal malpractice actions may "produce inequities," but "it is the role of the General Assembly, not the courts, to change a rule of law that has been relied upon by the bench and bar for many years." Van Dam, 280 Va. at 462, 699 S.E.2d at 483.

For the foregoing reasons, I would hold that the RSPCA lacked standing to sue Thorsen for legal malpractice and would, therefore, reverse the judgment of the circuit court overruling the demurrer.

§ 64.2-520.1. Action for damages from legal malpractice concerning estate planning.

A. An action for damages to an individual or an individual's estate, including future tax liability, resulting from legal malpractice concerning the individual's estate planning, including the provision of legal advice or the preparation of legal documents, regardless of when executed, shall accrue upon completion of the representation during which the malpractice occurred.

B. Notwithstanding § 55-22, but subject to any written agreement between the individual and the defendant that expressly grants standing to a person who is not a party to the representation by specific reference to this subsection, the action may be maintained only by the individual or by the individual's personal representative.

C. An action for damages pursuant to this section in which a written contract for legal services existed between the individual and the defendant shall be brought within five years after the cause of action accrues as provided in this section. An action for damages pursuant to this section in which an unwritten contract for legal services existed between the individual and the defendant shall be brought within three years after the cause of action accrues as provided in this section.

D. Notwithstanding the provisions of this section, no such action shall be based upon damages that may reasonably be avoided or that result from a change of law subsequent to the representation upon which the action is based.

E. Any action pursuant to this section shall survive pursuant to § 8.01-25.

2017, cc. 43, 93.

Approved by Supreme Court
Effective February 1, 1994

LEGAL ETHICS OPINION 1515

ATTORNEY DRAFTING INSTRUMENT WHICH NAMES SELF EITHER AS PERSONAL REPRESENTATIVE OR TRUSTEE OR WHICH DIRECTS SUCH OTHER DESIGNEE TO EMPLOY ATTORNEY AS FIDUCIARY ADMINISTRATOR.

Inquiry: An attorney requests the Committee to opine as to the circumstances under which an attorney may draft an instrument in which the client names the attorney either as executor or trustee or which specifically directs that other persons whom the testator/grantor/client designates as executor or trustee consult the attorney/draftsman for legal services. Specifically, the attorney inquires:

(1) whether there must be a pre-existing attorney-client relationship in addition to the attorney-client relationship arising out of the preparation of the instrument in order for the attorney to be named as executor or trustee or for the document to designate that the executor or trustee engage the services of the attorney to provide legal services;

(2) what disclosure, if any, must be made to the client by the attorney with respect to fees that may be charged for the attorney's service as contemplated by the instrument and if disclosure is required, when must the disclosure be made;

(3) (a) whether an attorney/executor or trustee may retain his law firm as attorney for a trust or estate for which he is serving as fiduciary;

(b) if it is proper to retain the executor or trustee's own law firm, what limitations exist as to compensation for each;

(c) whether the matter must be disclosed to the testator/grantor/client in the course of the preparation of the instrument;

(4) whether the Code of Professional Responsibility imposes a minimum standard of competence upon attorneys serving as fiduciaries; and

(5) whether Virginia attorneys initiate the conversation with their clients as to who might be an appropriate fiduciary for the client's trust or estate or who might provide appropriate legal counsel to the estate, and whether the attorney may suggest his willingness to serve as such.

Opinion: 1. Draftsman as Fiduciary. Must there be a pre-existing attorney-client relationship in addition to the attorney-client relationship arising out of the preparation of the instrument in order for the attorney to be named as executor or trustee or for the document to designate that the executor or trustee engage the services of the attorney to

provide legal services and, if so, what must be the nature and quality of that attorney/client relationship?

Although the committee is of the opinion that a pre-existing attorney/client relationship is not required, it believes that a significant factor concerning the appropriateness of an attorney being named as executor or trustee in a document drafted by the attorney is whether the attorney draftsman took advantage of his role as draftsman to secure such a nomination for the attorney or another member of the attorney's firm. The naming of the executor or trustee must be an informed and fully volitional act of the client.

Although the issue of whether or not undue influence was exerted upon the testator/grantor by the attorney requires a factual determination, on a case-by-case basis, which is beyond the purview of the committee, the committee is of the opinion that the total lack of any pre-existing attorney/client relationship greatly enhances the potential for a finding of undue influence. The existence, duration, and nature of any earlier relationship would obviously mitigate such a finding because, clearly, an attorney with knowledge of the testator's/grantor's affairs, values, and estate would be in a position to best serve the client's needs. See DR:5-101(A); H. Drinker, Legal Ethics 94 (1979) (cited in ABA Comm. on Ethics and Professional Responsibility, Informal Dec. 602 (1963). See also Estate of Weinstock, 386 N.Y.S.2d 1 (1976) (when evidence also indicates overreaching, attorneys who named themselves as executors and who also were strangers to testator were removed as executors); Haynes v. First Nat'l State Bank of New Jersey, 432 A.2d 890 (N.J. 1981); Disciplinary Board v. Amundson, 297 N.W.2d 433 (N.D. 1980); and Discipline of Theodosen, 303 N.W.2d 104 (S.D. 1981).

Furthermore, while the Virginia Code of Professional Responsibility does not generally preclude in-person solicitation, DR:2-103(A) prohibits it under certain circumstances and requires that the attorney take into consideration the "physical, emotional or mental state of the person to whom the [solicitation] communication is directed and the circumstances in which the communication is made." Therefore, whether or not a pre-existing attorney/client relationship is involved, in order to minimize the appearance of undue influence, the attorney must consider carefully the testator's/grantor's state of mind and health before recommending himself or a member of his firm, for future employment as executor or trustee.

2. Disclosure of Fees. What disclosure, if any, must be made to the client by the attorney with respect to fees that may be charged for the attorney's service as contemplated by the instrument and, if disclosure is required, when must the disclosure be made?

The committee believes that the disciplinary rules applicable to your second question are DR:2-105(A), requiring, in pertinent part, that the attorney's fees be adequately explained to the client; DR:5-101(A) requiring a client's consent, after full and adequate disclosure, to the attorney's financial interest when that interest may affect the exercise

of the attorney's professional judgment on behalf of his client; and DR:6-101(C) which requires an attorney to keep a client reasonably informed about matters in which that attorney's services are being rendered.

It is the committee's opinion that full disclosure of the attorney/draftsman's potential fees as executor or trustee or legal counsel to the estate must be made to the client, as required by each of the pertinent disciplinary rules, prior to the execution of the instrument. See Estate of Weinstock, 386 N.Y.S.2d 1. The committee believes that the guidance articulated in EC:2-21 is particularly pertinent in these circumstances:

> As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made .... It is usually beneficial to reduce to writing the understanding of the parties regarding the fee ....

The committee is of the further opinion that it is advisable that the disclosure be made in written form, signed by the testator/grantor, either in the will or trust agreement itself or in a separate document.

Furthermore, when the attorney/draftsman or a member of his firm is being named executor or trustee, the committee also believes that the attorney has a duty to suggest that the client investigate potential fees of others who might otherwise provide such services. Finally, the committee is of the opinion that an attorney/draftsman who contemplates charging separate fees for investment, tax or other services, over and above the fees for executor/trustee, must also fully disclose those separate fees.

3. Attorney/Fiduciary Retaining Own Law Firm as Attorney For Trust/Estate. May an attorney/executor or trustee retain his law firm as attorney for a trust or estate for which he is serving as fiduciary? If it is proper to retain the executor or trustee's own law firm, what limitations exist as to compensation for each? Should this matter be disclosed to the testator/grantor/client in the course of the preparation of the instrument?

The committee is of the opinion that the attorney named as executor or trustee must disclose and obtain the consent of the testator/grantor prior to the execution of the trust/will when the attorney intends to or is considering retaining his law firm as attorney for the trust or estate. The committee is of the further opinion that the disclosure must include the general compensation to be paid to the law firm. The role of the attorney who serves as fiduciary to a trust or estate and additionally engages his law firm as attorney for the same entity presents a personal conflict as described by DR:5-101(A). In such a situation, the attorney's own financial, business, or personal interest may potentially affect the exercise of his professional judgment on behalf of the trust or estate.

The committee has earlier opined that it is not per se improper for an executor or trustee to engage his own law firm to provide representation in legal matters relating to estate administration. LE Op. 1387.

The committee believes that LE Op. 1353 is also relevant to the question you raise.

That opinion found that it would not be improper for a lawyer who is employed both as Assistant General Counsel to a corporation and as "of counsel" to a law firm to retain the outside law firm to provide legal services to the same corporate client. The committee did opine, however, that full disclosure of the conflict must be made, consent from the corporate client must be received, the lawyer must not provide direct representation to the corporate client through the law firm, the lawyer must not share in any of the fees received by the firm from the corporate client, and communication between the outside law firm and the corporation must be maintained with other directors or employees of the corporation.

LE Op. 1353 dealt with a situation where the consent of the client could be readily obtained. Clearly, if at the time of the preparation of the document, the attorney/draftsman/executor/trustee makes a full and adequate disclosure of the possibility that the trustee/executor may retain his firm as legal counsel and of the general compensation that would be paid, and the testator/grantor/client consents, then the personal conflict is cured. However, if the trustee/executor did not obtain the consent of the now deceased testator/grantor/client, either because it was not disclosed at the time the document was drafted, or because the executor/trustee did not draft the document, then the committee is of the opinion that, after full and adequate disclosure, the conflict can be cured by the consent of all the residual beneficiaries of the estate or all of the income beneficiaries and vested remainder beneficiaries of the trust.

4. Fiduciary Competence. As a matter of ethical consideration, does the Code of Professional Responsibility impose a minimum standard of competence upon attorneys serving as fiduciaries?

Although the committee believes that standards for competence of Virginia attorneys serving as fiduciaries are governed by Virginia law and thus present a legal question beyond the purview of the committee, the committee does direct your attention to LE Op. 1325 which adopted the conclusions reached in ABA Formal Opinion 336 and found that when an attorney assumes the responsibility of acting as a fiduciary and violates his or her duty in a manner that would justify disciplinary action had the relationship been that of attorney/client, the attorney may be properly disciplined pursuant to the [Virginia] Code of Professional Responsibility.

Further, the committee directs your attention to DR:6-101(A) which in pertinent part mandates that a lawyer should undertake representation only in matters in which the lawyer can act with competence an demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters.

Finally, the committee cautions that DR:6-102(A) precludes a lawyer from limiting his liability to his client for his personal malpractice. See also LE Op. 1452 (an

attorney/client relationship arises between the attorney and the personal representative of an estate, albeit for the ultimate benefit of the estate).

5. Suggestions for Fiduciaries. May Virginia attorneys initiate the conversation with their clients as to who might be an appropriate fiduciary for the client's trust or estate or who might provide appropriate legal counsel to the estate, and, further, may the attorney suggest his willingness to serve as such? Are there limitations on an attorney's ability to solicit his designation as a fiduciary or future legal counsel to the estate?

The committee is of the belief that DR:2-103(A), regarding a lawyer's solicitation of professional employment, is applicable to the question you raise. In addition, Ethical Consideration 5-6 [EC:5-6] provides further guidance in that it instructs that

> [A] lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

The committee is of the opinion that, although conversation with the testator/grantor as to the suitability of specific persons or entities to serve as fiduciaries or legal counsel to the estate, and recommendations that a. professional fiduciary (e.g., a bank, attorney, or accountant) would be preferable to or in addition to a lay person in certain instances, is clearly in the nature of appropriate legal advice to a client, the attorney's suggestion of his own willingness to serve in those capacities would constitute solicitation for future employment. Although the Virginia Code of Professional Responsibility does not generally preclude in-person solicitation, DR:2-103(A) does, however, prohibit it if the communication has a substantial potential for or involves the use of overpersuasion or overreaching and requires that the attorney take into consideration the "sophistication regarding legal matters, [and] the physical, emotional or mental state of the person to whom the [solicitation] communication is directed and the circumstances in which the communication is made." Therefore, the attorney must consider carefully the testator's state of mind and health before soliciting future employment as executor, trustee or legal counsel to the estate, in order to minimize the appearance of undue influence.

The committee is of the view that the same considerations apply whether the document names the attorney as executor or trustee, on the one hand, or directs that the executor/trustee whom the client has designated engage the services of the attorney. In addition, the same considerations would also apply to the issue of waiving security on the executor's or trustee's bond where the attorney or a member of the attorney's firm is designated as executor or trustee. Advice about the suitability of specific persons or entities to serve as fiduciary should cover, in addition to competence and personal service, matters of financial stability both for the attorney and any agents with whom the attorney is expected to deal.

In addition, it is especially important to review with the client who wishes to avoid probate the availability of alternate fiduciary review procedures. Whether or not the client

elects to remain within the probate system, the attorney in all cases should carefully review with the client the potential consequences of an elective waiver of security on the bond of the fiduciary.

Summary: No previous attorney/client relationship is required before an attorney may be named as executor or trustee in an instrument drafted by the attorney or for the instrument to designate that the executor or trustee consult the attorney/draftsman or his firm to provide legal services in the administration of the estate. However, the total lack of a pre-existing attorney/client relationship may enhance the possibility of a finding of undue influence. The attorney/draftsman must consider the testator's/grantor's mental and physical health before soliciting or accepting future employment as executor or trustee.

Full disclosure of the attorney/draftsman's potential fees as executor or trustee or legal counsel to the estate must be made to the client prior to the execution of the instrument. It is advisable that the disclosure be made in written form, signed by the testator/grantor, either in the will or trust agreement itself or in a separate document. The attorney/draftsman has a duty to suggest that the client investigate potential fees of others who might otherwise provide such services. An attorney/draftsman who contemplates charging separate fees for investment, tax or other services, over and above the fees for executor/trustee, must also fully disclose those separate fees.

An attorney/fiduciary executor or trustee may retain his own law firm as attorney for the trust or estate; however, such employment creates a personal conflict under DR:5-101(A) which may be cured by the client's consent after full disclosure. If consent was not received at the time the document was drafted, the conflict can be cured by the consent of all the residual beneficiaries of the estate or all the income beneficiaries and vested remainder beneficiaries of the trust.

In the event that there are co-fiduciaries, consent must be obtained from all such co-fiduciaries prior to the firm's taking on representation of the estate.

Standards for competence of Virginia attorneys serving as fiduciaries are governed by Virginia law. However, when an attorney acts as a fiduciary and violates his or her duty in a manner that would justify disciplinary action had the relationship been that of attorney/client, the attorney may be disciplined under the Code of Professional Responsibility. LE Op. 1325. A lawyer should undertake representation only in matters in which the lawyer can act with competence and demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters. DR:6-101(A). A lawyer may not limit his liability to his client for his personal malpractice. DR:6-102(A).

An attorney's suggestion to a testator/grantor of the attorney's willingness to serve as fiduciary or legal counsel to the estate constitutes solicitation for future employment. The attorney must consider carefully the testator's state of mind and health before soliciting future employment as executor, trustee or legal counsel to the estate.

The same considerations apply to the issue of waiving security on the executor's or trustee's bond where the attorney or a member of the attorney's firm is designated as executor or trustee.

Advice as to the suitability of specific persons or entities to serve as fiduciary should cover competence, personal service, and matters of financial stability. The attorney should also review probate and the availability of alternate fiduciary review procedures, and the potential consequences of an elective waiver of security on the bond of the fiduciary.

Approved by Supreme Court
Effective February 1, 1994

Code of Virginia
Title 64.2. Wills, Trusts, and Fiduciaries
Chapter 5. Personal Representatives and Administration of Estates

§ 64.2-528. Order in which debts and demands of decedents to be paid.

When the assets of the decedent in his personal representative's possession are not sufficient to satisfy all debts and demands against him, they shall be applied to the payment of such debts and demands in the following order:

1. Costs and expenses of administration;

2. The allowances provided in Article 2 (§ 64.2-309 et seq.) of Chapter 3;

3. Funeral expenses not to exceed $4,000;

4. Debts and taxes with preference under federal law;

5. Medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him not to exceed $2,150 for each hospital and nursing home and $425 for each person furnishing services or goods;

6. Debts and taxes due the Commonwealth;

7. Debts due as trustee for persons under disabilities; as receiver or commissioner under decree of court of the Commonwealth; as personal representative, guardian, conservator, or committee when the qualification was in the Commonwealth; and for moneys collected by anyone to the credit of another and not paid over, regardless of whether or not a bond has been executed for the faithful performance of the duties of the party so collecting such funds;

8. Debts for child support arrearages;

9. Debts and taxes due localities and municipal corporations of the Commonwealth; and

10. All other claims.

No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over a claim not due.

Code 1950, § 64-147; 1956, c. 231; 1966, c. 274; 1968, c. 656, § 64.1-157; 1972, c. 96; 1981, c. 580; 1986, c. 109; 1993, c. 259; 1996, c. 84; 1997, c. 801; 2007, c. 735; 2008, cc. 666, 817; 2012, c. 614; 2014, c. 532; 2017, c. 591.

Code of Virginia
Title 64.2. Wills, Trusts, and Fiduciaries
Chapter 5. Personal Representatives and Administration of Estates

§ 64.2-550. Proceedings for receiving proof of debts by commissioners of accounts.

A. A commissioner of accounts who has for settlement the accounts of a personal representative of a decedent shall, when requested to so do by a personal representative or any creditor, legatee, or distributee of a decedent, or may at any other time determined by the commissioner of accounts, even though no accounting is pending, conduct a hearing for receiving proof of debts and demands against the decedent or the decedent's estate. The commissioner of accounts shall publish notice of the hearing at least 10 days before the date set for the hearing in a newspaper published or having general circulation in the jurisdiction where the personal representative qualified. and shall also post a notice of the time and place of the hearing at the front door of the courthouse of the court of the jurisdiction where the personal representative qualified. The commissioner of accounts may adjourn the hearing from time to time as necessary.

B. The personal representative shall give written notice by personal service or by regular, certified, or registered mail at least 10 days before the date set for the hearing to any claimant of a disputed claim that is known to the personal representative at the last address of the claimant known to the personal representative. The notice shall inform the claimant of his right to attend the hearing and present his case, his right to obtain another hearing date if the commissioner of accounts finds the initial date inappropriate, and the fact that the claimant will be bound by any adverse ruling. The personal representative shall also inform the claimant of his right to file exceptions with the circuit court in the event of an adverse ruling. The personal representative shall file proof of any mailing or service of notice with the commissioner of accounts.

C. The commissioner of accounts may direct the personal representative, the claimant, or both of them to institute a proceeding in the circuit court to establish the validity or invalidity of any claim or demand that the commissioner of accounts deems not otherwise sufficiently proved.

Code 1950, §§ 64-161, 64-162; 1966, c. 335; 1968, cc. 385, 656, §§ 64.1-171, 64.1-172; 1981, c. 484; 1989, c. 492; 2012, c. 614.

Code of Virginia
Title 64.2. Wills, Trusts, and Fiduciaries
Chapter 5. Personal Representatives and Administration of Estates

§ 64.2-553. When court to order payment of debts.

A. Upon confirmation of a report of the accounts of any personal representative and of the debts and demands against the decedent's estate pursuant to Chapter 12 (§ 64.2-1200 et seq.), the court shall order that so much of the estate in the possession of the personal representative as is proper be applied to the payment of such debts and demands. The court, in its discretion, may order that a portion of the estate be reserved to pay all or a proportion of a claim of a surety for the decedent or any other contingent claim against the estate, or to pay all or a proportion of any other claim not finally passed upon, provided that creditors of the same class shall be paid in the same proportion.

B. For any claim allowed subsequent to any dividend where the court ordered that a portion of the estate be reserved to pay such a claim, the court shall order that the claim be paid from the estate in the possession of the personal representative, regardless of the existence of any debt or demand of superior dignity for which no reservation has been ordered. The claim shall be paid in the same proportion as creditors of the same class, provided, however, that whether there be enough reserved to pay the claim pursuant to this subsection shall not affect any dividend already paid.

C. If there are assets remaining in the possession of the personal representative after claims are paid pursuant to subsections A and B, or if further assets come into the possession of the personal representative, such surplus shall be divided among all the decedent's creditors who have proved debts and demands against the decedent's estate in the order and proportion in which they may be entitled.

Code 1950, §§ 64-164, 64-165, 64-166; 1968, c. 656, §§ 64.1-174, 64.1-175, 64.1-176; 2012, c. 614.

Code of Virginia
Title 64.2. Wills, Trusts, and Fiduciaries
Chapter 5. Personal Representatives and Administration of Estates

§ 64.2-554. When distribution may be required; refunding bond.

A personal representative shall not be compelled to pay any legacy made in the will or to distribute the estate of the decedent for six months from the date of the order conferring authority on the first executor or administrator of such decedent and, except when it is otherwise specifically provided for in the will, the personal representative shall not be compelled to make such payment or distribution until the legatee or distributee gives a bond, executed by himself or some other person, with sufficient surety, to refund a due proportion of any debts or demands subsequently proved against the decedent or the decedent's estate and of the costs of the recovery of such debts or demands. Such bond shall be filed and recorded in the clerk's office of the court that may have decreed such payment or distribution or in which the accounts of such representative may be recorded.

Code 1950, § 64-167; 1968, c. 656, § 64.1-177; 2012, c. 614.

Code of Virginia
Title 64.2. Wills, Trusts, and Fiduciaries
Chapter 5. Personal Representatives and Administration of Estates

§ 64.2-555. When fiduciaries are protected by refunding bonds.

If any personal representative pays any legacy made in the will or distributes any of the estate of the decedent and a proper refunding bond for what is so paid or distributed, with sufficient surety at the time it was made, is filed and recorded pursuant to § 64.2-554, such personal representative shall not be personally liable for any debt or demand against the decedent, whether it be of record or not, unless, within six months from his qualification or before such payment or distribution, he had notice of such debt or demand. However, if any creditor of the decedent establishes a debt or demand against the decedent's estate by judgment therefor or by confirmation of a report of the commissioner of accounts that allows the debt or demand, a suit may be maintained on such refunding bond, in the name of the obligee or his personal representative, for the benefit of such creditor, and a recovery shall be had thereon to the same extent that would have been had if such obligee or his personal representative had satisfied such debt or demand.

Code 1950, § 64-168; 1968, c. 656, § 64.1-178; 2012, c. 614.

Code of Virginia
Title 64.2. Wills, Trusts, and Fiduciaries
Chapter 5. Personal Representatives and Administration of Estates

§ 64.2-556. Order to creditors to show cause against distribution of estate to legatees or distributees; liability of legatees or distributees to refund.

A. When a report of the accounts of any personal representative and of the debts and demands against the decedent's estate has been filed in the office of a clerk of a court, whether under §§ 64.2-550 and 64.2-551 or in a civil action, the court, after six months from the qualification of the personal representative, may, on motion of the personal representative, or a successor or substitute personal representative, or on motion of a legatee or distributee of the decedent, enter an order for the creditors and all other persons interested in the estate of the decedent to show cause on the day named in the order against the payment and delivery of the estate of the decedent to his legatees or distributees. A copy of the order shall be published once a week for two successive weeks, in one or more newspapers, as the court directs; the costs of such publication shall be paid by the petitioner or applicant. On or after the day named in the order, the court may order the payment and delivery to the legatees or distributees of the whole or a part of the money and other estate not before distributed, with or without a refunding bond, as it prescribes. However, every legatee or distributee to whom any such payment or delivery is made, and his representatives, may, in a suit brought against him within five years after such payment or delivery is made, be adjudged to refund a due proportion of any claims enforceable against the decedent or his estate that have been finally allowed by the commissioner of accounts or the court, or that were not presented to the commissioner of accounts, and the costs of the recovery of such claim. In the event any claim becomes known to the fiduciary after the notice for debts and demands but prior to the entry of an order of distribution, the claimant, if the claim is disputed, shall be given notice in the form provided in § 64.2-550 and the order of distribution shall not be entered until after expiration of 10 days from the giving of such notice. If the claimant, within such 10-day period, indicates his desire to pursue the claim, the commissioner of accounts shall schedule a date for hearing the claim and for reporting thereon if action thereon is contemplated under § 64.2-550.

B. Any personal representative who has in good faith complied with the provisions of this section and has, in compliance with or, as subsequently approved by, the order of the court, paid and delivered the money or other estate in his possession to any party that the court has adjudged entitled thereto shall not be liable for any demands of creditors and all other persons.

C. Any personal representative who has in good faith complied with the provisions of this section and has, in compliance with, or as subsequently approved by, the order of the court, paid and delivered the money or other estate in his possession to any party that the court has adjudged entitled thereto, even if such distribution shall be prior to the expiration of the period of one year provided in § 64.2-302, Article 1.1 (§ 64.2-308.1 et seq.) of Chapter 3, or § 64.2-313, 64.2-448, or 64.2-457, shall not be liable for any demands of spouses, persons seeking to impeach the will or establish another will, or purchasers of real estate from the personal representative, provided that

the personal representative has contacted any surviving spouse known to it having rights of renunciation and ascertained that the surviving spouse had no plan to renounce the will, such intent to be stated in writing in the case of renunciation under § 64.2-302 or Article 1.1 (§ 64.2-308.1 et seq.) of Chapter 3, as applicable, and that the personal representative has not been notified in writing of any person's intent to impeach the will or establish a later will in the case of persons claiming under § 64.2-448 or 64.2-457 or under a later will.

D. In the case of such distribution prior to the expiration of such one-year period, the personal representative shall take refunding bonds, without surety, to the next of kin or legatees to whom distribution is made, to protect against the contingencies specified in this section.

Code 1950, § 64-169; 1966, c. 335; 1968, c. 656, § 64.1-179; 1980, c. 439; 1982, c. 588; 1989, c. 492; 1991, c. 527; 1996, c. 352; 2005, c. 681; 2012, c. 614; 2016, cc. 187, 269.

Code of Virginia
Title 8.01. Civil Remedies and Procedure
Chapter 4. Limitations of Actions

§ 8.01-254. Limitation on enforcement of bequests and legacies.

Wherever by any will, the testator devises any real estate to some person and requires such person to pay some other person a specified sum of money, or provides a legacy for some person which constitutes a charge against the real estate of the testator, or any part thereof, no suit or action shall be brought to subject such real estate to the payment of such specified sum of money or such legacy, as the case may be, after twenty years from the time when the same shall have been payable, and if the will specifies no time for the payment thereof, it shall be deemed to have been payable immediately upon death of the testator.

Code 1950, § 8-21; 1977, c. 617.

Code of Virginia
Title 8.01. Civil Remedies and Procedure
Chapter 4. Limitations of Actions

§ 8.01-245. Limitation on actions upon the bond of any fiduciaries or as to suits against fiduciaries themselves; accrual of cause of action where execution sustained.

A. No action shall be brought upon the bond of any fiduciary except within ten years next after the right to bring such action shall have first accrued.

B. When any fiduciary has settled an account under the provisions of Part A (§ 64.2-1200 et seq.) of Subtitle IV of Title 64.2, and whether or not he has given bond, a suit to surcharge or falsify such account, or to hold such fiduciary or his sureties liable for any balance stated in such account, to be in his hands, shall be brought within ten years after the account has been confirmed.

C. In actions upon the bond of any personal representative of a decedent or fiduciary of a person under a disability against whom an execution has been obtained or where a court acting upon the account of such representative or committee shall order payment or delivery of estate in the hands of such committee and representative, the cause of action shall be deemed to accrue from the return day of such execution or from the time of the right to require payment or delivery upon such order, whichever shall happen first.

Code 1950, §§ 8-13, 8-15, 8-16; 1964, c. 219; 1966, c. 118; 1972, c. 825; 1977, c. 617.

Code of Virginia
Title 55. Property and Conveyances
Chapter 11.1. Disposition of Unclaimed Property

§ 55-210.2:1. Property presumed abandoned; general rule.

All tangible and intangible property, including any income or increment thereon, less any lawful charges, that is held, issued or owing in the ordinary course of the holder's business and has remained unclaimed by the owner for more than five years after it became payable is presumed abandoned, except as otherwise provided by this chapter. Property is payable for the purpose of this chapter notwithstanding the owner's failure to make demand or to present any instrument or document required to receive payment.

1984, c. 121; 1985, c. 294; 2000, cc. 733, 745.

Code of Virginia
Title 55. Property and Conveyances
Chapter 11.1. Disposition of Unclaimed Property

§ 55-210.10:2. Holder of tangible or intangible personal property may voluntarily report same.

Any holder of tangible or intangible personal property, the owner of which is unlocatable, may voluntarily report the property to the State Treasurer, prior to the statutory due dates, whereupon the property shall be presumed abandoned under this chapter.

1981, c. 47; 1983, c. 190.

Code of Virginia
Title 55. Property and Conveyances
Chapter 11.1. Disposition of Unclaimed Property

§ 55-210.3:3. Contents of safe deposit box or other safekeeping repository.

All tangible and intangible property held in a safe deposit box or any other safekeeping repository in this Commonwealth in the ordinary course of the holder's business and all proceeds resulting from the lawful sale of this property shall be presumed abandoned if unclaimed by the owner for more than five years after the lease or rental period on the box or other repository has expired.

1985, c. 294.

Code of Virginia
Title 55. Property and Conveyances
Chapter 11.1. Disposition of Unclaimed Property

§ 55-210.5. Deposits held by utilities.

Any deposit, including any interest thereon, made by a subscriber with a utility to secure payment or any sum paid in advance for utility services to be furnished, less any lawful deductions, which remains unclaimed by the owner for more than one year after termination of the services for which the deposit or advance payment was made is presumed abandoned.

1960, c. 330; 1981, c. 47; 1983, c. 190.

Code of Virginia
Title 55. Property and Conveyances
Chapter 11.1. Disposition of Unclaimed Property

§ 55-210.6:2. Refunds held by business associations.

Except to the extent otherwise ordered by a court or administrative agency of competent jurisdiction any sum that a business association has been ordered to refund by a court or administrative agency which has remained unclaimed by the owner for more than one year after it became payable in accordance with the final determination or order providing for the refund, regardless of whether the final determination or order requires any person entitled to a refund to make a claim for it, is presumed abandoned.

1984, c. 121.

Code of Virginia
Title 55. Property and Conveyances
Chapter 11.1. Disposition of Unclaimed Property

§ 55-210.8:2. Wages.

Unpaid wages, including wages represented by unpresented payroll checks owing in the ordinary course of the holder's business, that have remained unclaimed by the owner for more than one year after becoming payable are presumed abandoned.

1983, c. 190.

Code of Virginia
Title 55. Property and Conveyances
Chapter 11.1. Disposition of Unclaimed Property

§ 55-210.9:1. Property held by courts.

All intangible property held for the owner by any state or federal court that has remained unclaimed by the owner for more than one year after it became payable is presumed abandoned.

1983, c. 190; 1985, c. 294; 2000, cc. 733, 745.

Code of Virginia
Title 55. Property and Conveyances
Chapter 11.1. Disposition of Unclaimed Property

§ 55-210.9:2. Responsibilities of general receiver and clerk.

The general receiver, if one has been appointed, and the clerk of each circuit court shall be responsible for identifying moneys held by them in their respective accounts which have remained unclaimed by the owner for more than one year after such moneys became payable and for petitioning the court to remit such money to the State Treasurer. There shall be no obligation to report or remit funds deposited as compensation and damages in condemnation proceedings pursuant to § 25.1-237 prior to a final court order or pursuant to § 33.2-1019.

1988, c. 841; 2000, cc. 733, 745.

Code of Virginia
Title 55. Property and Conveyances
Chapter 11.1. Disposition of Unclaimed Property

§ 55-210.12. Report and remittance to be made by holder of funds or property presumed abandoned; holder to exercise due diligence to locate owner.

A. Every person holding funds or other property, tangible or intangible, presumed abandoned under this chapter shall report and remit to the administrator with respect to the property as hereinafter provided. Reports containing 25 or more items shall be remitted in an electronic format as prescribed by the administrator. The administrator may waive this requirement when he determines, in his discretion, that it creates an undue hardship.

B. The report shall be verified and shall include:

1. The name and social security or federal identification number, if known, and last known address, including ZIP code, if any, of each person appearing from the records of the holder to be the owner of any property of the value of $100 or more presumed abandoned under this chapter;

2. In case of unclaimed funds of insurance corporations, the full name of the insured or annuitant and any beneficiary, if known, and the last known address according to the insurance corporation's records;

3. In the case of the contents of a safe deposit box or other safekeeping repository or in the case of other tangible property, a description of the property and the place where it is held and may be inspected by the administrator, and any amounts owing to the holder;

4. The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, except that items of value under $100 each may be reported in aggregate;

5. The date when the property became payable, demandable, or returnable, and the date of the last transaction with the owner with respect to the property; and

6. Other information which the administrator prescribes by rule as reasonably necessary for the administration of this chapter.

C. If the person holding property presumed abandoned is a successor to other persons who previously held the property for the owner, or if the holder has changed his name while holding the property, he shall file with his report all prior known names and addresses of each holder of the property.

D. The report and remittance, including the remittance of unclaimed demutualization proceeds made pursuant to § 55-210.4:2, shall be filed before November 1 of each year as of June 30 next preceding, but the report and remittance of insurance corporations shall be filed before May 1 of each year as of December 31 next preceding. When property is evidenced by certificate of

ownership as set forth in § 55-210.6:1, the holder shall deliver to the State Treasurer a duplicate of any such certificate registered in the name "Treasurer of Virginia" or the Treasurer's designated nominee at the time of report and remittance. The administrator may postpone the reporting and remittance date upon written request by any person required to file a report.

E. If the holder of property presumed abandoned under this chapter knows the whereabouts of the owner, the holder shall, before filing the annual report, communicate with the owner and take necessary steps to prevent abandonment from being presumed. All holders shall exercise due diligence, as defined in § 55-210.2, at least 60 days prior to the submission of the report to ascertain the whereabouts of the owner if (i) the holder has in its records an address for the apparent owner which the holder's records do not disclose to be inaccurate and (ii) the property has a value of $100 or more.

F. Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or private corporation, by an officer; and if made by a public corporation, by its chief fiscal officer.

1960, c. 330; 1981, c. 47; 1982, c. 331; 1983, c. 190; 1984, c. 121; 1985, c. 294; 1987, c. 236; 1988, c. 378; 1992, c. 583; 2000, cc. 733, 745; 2003, cc. 750, 765; 2004, c. 524.

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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September 6, 2016

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Re: *Ricardo Garcia v. Burke E. Suda, Trustee of the Donald J. Suda Revocable Trust, et al.*, Case No. CL-2015-11379

Dear Counsel:

This case is before the Court on Defendant Burke Suda's Motion to Dismiss for Lack of Standing. Plaintiff Ricardo Garcia ("Mr. Garcia") has twice sued Burke Suda ("Ms. Suda"), trustee of the Donald J. Suda Revocable Trust (the "Suda Trust"), for alleged mismanagement of the Suda Trust. Mr. Garcia is the beneficiary of a separate, unfunded subtrust, the Ricardo Garcia Trust (the "Garcia Trust"), which is to be created under the terms of the Suda Trust instrument. Mr. Garcia nonetheless claims an interest in the Suda Trust and seeks to offer input into its administration. Therefore, the Court must decide two issues:

A. Whether the beneficiary of a separate, unfunded subtrust has standing to bring a direct action against the trustee of a primary trust?

B. Whether the beneficiary of a separate, unfunded subtrust has the right to bring a derivative action against the trustee of a primary trust?

OPINION LETTER

After considering the pleadings and exhibits, authorities, and oral arguments presented by counsel, the Court answers those questions in the negative and grants the Motion to Dismiss for Lack of Standing.

I. BACKGROUND

A. Factual Background

Donald J. Suda ("Mr. Suda") died testate on May 21, 2014. Mr. Suda's pour-over will provided for the distribution of his estate in accordance with the terms of the Suda Trust instrument. Upon his death, but after an administrative period intended for the payment of estate expenses and taxes, twenty percent of the Suda Trust property was to be distributed to Ms. Suda, free of trust, with the remaining eighty percent divided equally between two separate subtrusts: the Garcia Trust and the Scott Suda Trust. Mr. Garcia is the beneficiary of the Garcia Trust, and Mr. Suda's grandson, Scott Suda, is the beneficiary of the Scott Suda Trust. Christopher Suda, Mr. Suda's nephew, is designated as the trustee of the Garcia Trust, although he is not a party to this action either personally or in his representative capacity as trustee of the Garcia Trust. To date, the Garcia Trust has remained unfunded.

B. Procedural Background

On August 27, 2015, Mr. Garcia filed this action seeking, among other relief, the removal of Ms. Suda from her role as trustee of the Suda Trust. Mr. Garcia alleges that Ms. Suda breached various fiduciary duties in administering the Suda Trust. He contends that her mismanagement dissipated the assets of the Suda Trust, which in turn diminished the value of his beneficial interest in the Garcia Trust.

In response, Ms. Suda moved to dismiss the Complaint for lack of standing. The Court took this case under advisement after hearing oral argument from counsel, and the issue of Mr. Garcia's standing is now ripe for decision. For the following reasons, the Court concludes that Mr. Garcia does not have standing to sue Ms. Suda individually and in her representative capacity as trustee of the Suda Trust.

II. STANDARD OF REVIEW

In ruling upon an evidentiary motion to dismiss for lack of standing, the trial court must determine whether the defendant demonstrated by a

preponderance of the evidence that the factual allegations cited by the plaintiff in support of standing were incorrect. *Va. Marine Res. Comm'n v. Clark*, 281 Va. 679, 686–87 (2011); *see also Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697, 701 (E.D. Va. 2010).

III. ARGUMENTS

A. Ms. Suda's Motion to Dismiss

Ms. Suda challenges Mr. Garcia's standing to bring this action and seeks its dismissal. She asserts that Mr. Garcia lacks standing because he is not a beneficiary of the Suda Trust and, consequently, Mr. Garcia has no immediate, pecuniary, and substantial interest at stake. Instead, according to Ms. Suda, Mr. Garcia has nothing more than a remote or indirect interest arising from his status as a beneficiary of a separate, unfunded subtrust, i.e., the Garcia Trust. She argues that his remote or indirect interest is insufficient to confer standing upon Mr. Garcia to bring a direct action in relation to the Suda Trust.

In addition, Ms. Suda notes that she is not designated as the trustee of the Garcia Trust. Rather, Christopher Suda will undertake its administration and related fiduciary duties if the Garcia Trust is funded and if Christopher Suda accepts the trusteeship. She contends that Mr. Garcia not only lacks standing to bring a direct action, but also an action on behalf of the Garcia Trust. Ms. Suda posits that only a trustee may sue on behalf of a trust and, as a result, Mr. Garcia lacks standing to initiate a derivative action.

B. Mr. Garcia's Opposition

Mr. Garcia counters that any beneficiary may petition a trustee to account, regardless of whether the beneficiary is a current beneficiary. Relying on *Shriners Hospital for Crippled Children v. Smith*, 238 Va. 708, he contends that his equitable interest in the unfunded Garcia Trust is really a vested remainder interest in the Suda Trust because forty percent of its residue might ultimately fund the Garcia Trust.

Mr. Garcia also analogizes this case to *Estate of Necastro*, 1991 Del. Ch. LEXIS 30 (Del. Ch. Feb. 27, 1991), where the Delaware Court of Chancery concluded that the beneficiaries of a residuary testamentary trust had standing to file exceptions to the accounts of the executrix under the Delaware probate statute. He contends that "while normally trustees are tasked with protecting the interests of the various cestuis to take under the subject trust, where it is the misfeasant or malfeasant acts or omission of the trustee that are cause for concern, equity dictates that this conflict of interest be cured."

IV. ANALYSIS

The Court concludes that Ms. Suda demonstrated by a preponderance of the evidence that the factual allegations cited by Mr. Garcia in support of standing were incorrect. Consequently, Mr. Garcia lacks standing to bring this action against Ms. Suda personally and in her representative capacity as trustee of the Suda Trust.

A threshold standing determination "concerns itself with the characteristics of the person or entity who files suit. The point of standing is to ensure that the person who asserts a position has a substantial legal right to do so and that his rights will be affected by the disposition of the case." *Cupp v. Board of Supervisors*, 227 Va. 580, 589 (1984). A plaintiff must plead sufficient factual allegations to "show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest." *Va. Marine Res. Comm'n v. Clark*, 281 Va. 679, 687 (2011).

However, a defendant may rebut those factual allegations through an evidentiary motion to dismiss for lack of standing. *Va. Marine Res. Comm'n v. Clark*, 281 Va. 679, 686–87 (2011); *see also Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697, 701 (E.D. Va. 2010). To determine whether Ms. Suda rebutted Mr. Garcia's allegations in support of his immediate, pecuniary, and substantial interest in this litigation, the Court must examine the interests of the parties and Mr. Suda's intent as ascertained from the plain language of the Suda Trust instrument. *See Ladysmith Rescue Squad, Inc. v. Newlin*, 280 Va. 195, 201–02 (2010) ("[I]n construing, enforcing and administrating wills and trusts . . . intent is to be ascertained by the language the testator or settlor used in creating the will or trust."); *NationsBank of Virginia, N.A. v. Estate of Grandy*, 248 Va. 557, 561 (1994) ("In reaching the correct interpretation, the intent of the testator in establishing the trust as ascertained from the plain language of the instrument controls a court's inquiry.").

A. Mr. Garcia does not have standing to bring a direct action against Ms. Suda personally and in her representative capacity as trustee of the Suda Trust because Mr. Garcia is not a beneficiary of the Suda Trust.

The plain language of the Suda Trust instrument indicates that Mr. Garcia is not a beneficiary of the Suda Trust. A trust is "a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create [a trust]." *Jimenez v. Corr*, 288 Va. 395, 410–11 (2014).

The parties to the trust relationship include the "'settlor,' or the person who creates a trust, the 'trustee,' or the person holding property in trust, and the 'beneficiary,' or the person for whose benefit property is held in trust."[1] *Id.* at 411 (quotations omitted). Certainly, the Virginia Uniform Trust Code (the "UTC") codifies the well-settled principle that "a beneficiary's equitable title permits the beneficiary to enforce the terms of the trust and to seek judicial remedy in the event of a breach." *Jimenez v. Corr*, 288 Va. 395, 412 (2014) (citing Va. Code Ann. § 64.2-792(B)). However, the Court is persuaded that a beneficial interest in a subtrust does not by definition confer standing upon a subtrust beneficiary to sue the trustee of a primary trust. Indeed, the Restatement (Second) of Trusts § 126 makes clear:

> The beneficiaries of a trust include only the persons upon whom the settlor manifested an intention to confer a beneficial interest under the trust, or their successors in interest. Other persons, although they may benefit from the performance of the trust, are not beneficiaries of the trust and cannot enforce it.

Restatement (Second) of Trusts, § 126 cmt. a (discussing incidental beneficiaries).

In essence, Mr. Garcia asks the Court to treat the Suda Trust and the Garcia Trust as one and the same without examining Mr. Suda's intent as ascertained from the plain language of the Suda Trust instrument. Yet, as other jurisdictions have noted:

> In considering whether the settlor intended to create a single trust or multiple trusts, a number of factors are to be considered: (1) The meaning of the trust instrument language in its use of the singular word "trust" or the plural "trusts" (2) whether the trust fund is divided or maintained as a single res; (3) whether a provision in the trust instrument authorizes a flat amount to be distributed out of the corpus to beneficiaries without regard to any separation of the corpus; (4) the practical construction of the trust instrument by the settlor[;] and (5) whether the provisions of the trust disposition plan relating to the various beneficiaries are so interwoven as to preclude the intention of multiple trusts.

19 Michie's Jurisprudence of Virginia & West Virginia, *Trusts and Trustees* § 18 (discussing *Hemphill v. Aukamp*, 164 W. Va. 368 (1980) (collecting cases)).

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[1] *See also* Va. Code Ann. § 64.2-701 (defining the term "beneficiary" as "a person that (i) has a present or future beneficial interest in a trust, vested or contingent; or (ii) in a capacity other than that of trustee, holds a power of appointment over trust property.").

Turning to those factors for guidance in the absence of Virginia authority directly on point,[2] the Court concludes that Mr. Suda intended to create multiple trusts under the Suda Trust instrument and, further, Mr. Garcia is not a beneficiary of the Suda Trust.[3]

First, the Suda Trust instrument refers to the plural "trusts." Section 13.07(b) expressly defines "this agreement" to include "*all trusts* created under the terms of this agreement." (emphasis added). Similarly, Section 13.7(o) defines "this trust" and "this trust agreement" to "refer to this agreement and *all trusts* created under the terms of this agreement." (emphasis added). Tellingly, Section 7.02 specifies, "My Trustee shall administer the share set aside for Ricardo Garcia in trust (referred to as the 'Ricardo Garcia Trust') as provided in this Section." In a parallel provision, Section 7.04 states, "My Trustee shall administer the share set aside for Scott Suda in trust (referred to as the 'Scott Suda Trust') as provided in this Section." Moreover, Section 13.7(p) indicates that the term "Trustee" will refer to the "singular or *plural as the context may require*." (emphasis added).

Second, in accordance with Sections 7.02 and 7.04, any residue of the Suda Trust will be divided into separate subtrusts with distinct trustees, and therefore the Suda Trust, the Scott Suda Trust, and the Garcia Trust are not to be maintained as a single res.

Third, the Suda Trust instrument does not authorize a flat amount to be distributed out of the corpus to beneficiaries without regard to any separation of the corpus. Indeed, the terms of the Suda Trust achieve the opposite outcome. Section 7.01 provides, "My trustee *shall divide my remaining trust property into shares* as follows . . . ." The separation of the Suda Trust corpus into shares is not merely a direction to the trustees as to the manner of keeping the accounts of the trust. After any residue of the Suda Trust corpus is divided, Mr. Garcia's share will be legally titled to a separate trustee in accordance with Section 7.02.

Fourth, the provisions of the trust disposition plan relating to the various beneficiaries of the Suda Trust, the Garcia Trust, and the Scott Suda Trust are not so interwoven as to preclude the intention of multiple trusts. For example, Section 7.02(c) grants Mr. Garcia the right to withdraw

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[2] *Cf. Fletcher v. Fletcher*, 253 Va. 30 (1997).

[3] The Court forgoes a discussion of factor four of the *Hemphill* factors for two reasons: First, the Suda Trust instrument is unambiguous. Second, the subtrusts are testamentary in nature and therefore Mr. Suda's conduct cannot be used to construe the meaning of terms that took effect after his death.

principal annually from the Garcia Trust in an amount not exceeding that referred to in Section 2514(e) of the Internal Revenue Code. In contrast, Section 7.04 sets forth different incentive provisions permitting Scott Suda to withdraw principal from the Scott Suda Trust after particular educational and employment benchmarks are attained. Accordingly, as ascertained from the plain language of the Suda Trust instrument, Mr. Suda intended the Suda Trust, the Scott Suda Trust, and the Garcia Trust to be separate and distinct.

There can be no dispute that Mr. Garcia is a beneficiary of the Garcia Trust because Section 7.02 references "the share set aside for Ricardo Garcia in trust (referred to as the 'Ricardo Garcia Trust')" and "the trust established for Ricardo Garcia." However, it is Christopher Suda, as the designated trustee of the Garcia Trust, who holds a beneficial interest in the Suda Trust, not Mr. Garcia. Section 3.03(b) provides, "I appoint Christopher Suda to serve as Trustee of the trust created under Section 7.02 hereof for Ricardo Garcia ('Ricardo Garcia Trust') upon creation of the Ricardo Garcia Trust." During the administrative period of the Suda Trust, Ms. Suda has held its corpus in trust for the benefit of Christopher Suda until he acquires legal title to forty percent of any residue and administers it for the benefit of Mr. Garcia in accordance with the provisions of the Garcia Trust. *See Jimenez*, 288 Va. at 411 (2014) ("[T]he trustee acquires legal title to the trust property, while the beneficiary is the equitable owner of trust property, in whole or in part.") (quotations and brackets omitted); *see also* Sections 3.03, 5.02, 7.02. Thus, although Mr. Garcia will benefit from the performance of the Suda Trust, he is merely an incidental beneficiary of its terms. Restatement (Second) of Trusts, § 126 cmt. a ("Other persons, although they may benefit from the performance of the trust, are not beneficiaries of the trust and cannot enforce it.").

The legal and beneficial title to the Suda Trust is split between Ms. Suda as trustee of the Suda Trust and Christopher Suda as its immediate distributee, albeit in his representative capacity as the designated trustee of the Garcia Trust. Therefore, the Court concludes that Mr. Garcia does not have an immediate, pecuniary, and substantial interest in the Suda Trust. His beneficial interest in the Garcia Trust is too indirect and remote to confer standing upon him in relation to the Suda Trust. Consequently, Mr. Garcia lacks standing to bring a direct action against Ms. Suda personally and in her representative capacity as trustee of the Suda Trust.[4] *See id.* at § 200 ("No one except a beneficiary or one suing on his

[4] For those same reasons, the Court considers *Shriners Hospitals for Crippled Children v. Smith*, 238 Va. 708 (1989), inapposite. Although relied upon by Mr. Garcia, *Shriners Hospitals* dealt with the right of a vested remainderman to seek an accounting from the trustee of a unitary trust, not standing within the context of a trust-subtrust relationship.

behalf can maintain a suit against the trustee to enforce the trust or to enjoin or obtain redress for a breach of trust.").

B. Mr. Garcia may have standing to bring a derivative action against Ms. Suda personally and in her representative capacity as trustee of the Suda Trust; however, any claims brought on behalf of the Garcia Trust are unripe.

The Court must consider whether Mr. Garcia has standing to assert a derivative action against Ms. Suda on behalf of the Garcia Trust. Citing *Broyhill v. Bank of America, N.A.* 2010 U.S. Dist. LEXIS 106766 (E.D. Va. Oct. 6, 2010), Ms. Suda contends that only a trustee may sue on behalf of a trust. The Court disagrees, but nonetheless holds that Mr. Garcia's claims are not yet ripe for a derivate action against Ms. Suda personally and in her representative capacity as trustee of the Suda Trust.

Generally, the right to bring a claim on behalf of a trust belongs to the trustee: A "trustee can maintain such actions at law or suits in equity or other proceedings against a third person as he could maintain if he held the trust property free of trust." Restatement (Second) of Trusts, § 280. Consistent with the Restatement (Second) of Trusts, the UTC directs the trustee to take "reasonable steps to enforce claims of the trust . . . ." Va. Code Ann. § 64.2-773. Similarly, the trustee must "take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee . . . ." Va. Code Ann. § 64.2-774. There is, however, "an exception to the general rule that trustees alone are competent to bring suit against third parties: If the trustee improperly refuses or neglects to bring an action against the third person, the beneficiary can maintain a suit in equity against the trustee and the third person." *Burton v. Dolph*, 89 Va. Cir. 101, 113 (Norfolk 2014) (quoting the Restatement (Second) of Trusts § 282 and noting that, although the Supreme Court of Virginia has not officially adopted the Restatement, it has consistently relied upon it for guidance).

Ms. Suda cites the United States District Court for the Eastern District of Virginia's decision in *Broyhill* as persuasive authority for the proposition that "only trustees—and not mere beneficiaries—can sue on behalf of trusts." To be sure, *Broyhill* involved derivative claims brought by a trust beneficiary against a third-party bank that the district court ultimately dismissed for lack of standing. *See id.* at *5. Its persuasiveness is nonetheless diminished for a reason noted by the circuit court in *Burton*: The beneficiary "neither addressed that particular issue in briefing, nor did he refute opposing counsel's contentions during oral argument." *Burton*, 89 Va. Cir. at 113.

Moreover, the *Busman* and *Poage* cases cited by the District Court in *Broyhill* do not support such a categorical bar against derivative actions by trust beneficiaries as Ms. Suda suggests.[5] For instance, as the Circuit Court in *Burton* explained, "The issue in *Busman* was not whether a trust's beneficiary could bring suit against a third party for unlawful action concerning the trust, but rather whether the *trustee* could maintain such an action." *Id.* Similarly, in *Poage v. Bell*, 35 Va. 604 (1837), although the Supreme Court of Virginia held that a trust beneficiary could not maintain an action at law against a third party alleged to have converted trust property, it went on to indicate that the beneficiary could maintain the action in a court of equity. *Id.* at 607 ("This shows the propriety of confining the cestui que trust to a court of equity . . . ."); *cf.* Restatement (Second) of Trusts § 282. For those reasons, the Court finds that "the Restatement more accurately reflects the current state of the law, especially after the enactment of the Virginia Uniform Trust Code." *Burton*, 89 Va. Cir. at 114–15 (observing that UTC § 1004 is codified verbatim at Virginia Code § 64.2-795 and quoting the official comment to UTC §1004: "On other occasions, the suit by the beneficiary is brought because of the trustee's failure to take action against a third party, such as to recover property properly belonging to the trust."). Thus, where a trustee fails to perform his duty to protect the trust, the beneficiaries may sue in equity to protect their interests. Restatement (Second) of Trusts § 282 ("If the trustee improperly refuses or neglects to bring an action against the third person, the beneficiary can maintain a suit in equity against the trustee and the third person."). Even so, Mr. Garcia's claims are not yet ripe for a derivative action on behalf of the Garcia Trust.

Mr. Garcia's derivative claims are unripe for several reasons. There is no indication that either Christopher Suda or Michael Cosgrove, as successor trustee, has acted to accept the trusteeship of the Garcia Trust. *See* Va. Code Ann. § 64.2-754. Accordingly, neither has undertaken a fiduciary duty to enforce claims of the trust or to compel another person to deliver trust property to the trustee. *Id.* at §§ 64.2-773, 64.2-774. Moreover, Mr. Garcia has not petitioned the Court to appoint a trustee in place of the designated trustee of the Garcia Trust. *See* Va. Code Ann. § 64.2-757(A)–(B) ("A vacancy in a trusteeship occurs if . . . [a] person designated as trustee rejects the trusteeship . . . . A vacancy in a trusteeship shall be filled if the trust has no remaining trustee."); Va. Code Ann. § 64.2-712 ("Proceedings to appoint or remove trustees may be brought by motion pursuant to [Virginia Code] §§ 64.2-1405 and 64.2-1406."). Furthermore, Mr. Garcia has never made a demand upon Christopher Suda, as the designated trustee of the Garcia Trust, to bring an action

[5] The *Broyhill* decision relied upon *Poage v. Bell*, 35 Va. 604 (1837), and this Circuit's decision in *Busman v. Beeren & Barry Invs., LLC*, 69 Va. Cir. 375 (Fairfax 2005).

against Burke Suda personally and in her representative capacity as trustee of the Suda Trust. *See, e.g., Hill v. Vanderbilt Capital Advisors, LLC*, 834 F. Supp. 2d 1228, 1245 (D.N.M. 2011) (citing G.G. Bogert & G.T. Bogert, *The Law of Trusts and Trustees* § 869, at 199 n.35 and accompanying text (rev. 2d ed., repl. vol. 1995)) ("The common law of trusts has a comparable demand requirement which predates its corporate counterpart: If a trust suffers harm at the hands of a third party, e.g., the trustee's investment agent, the trust beneficiaries first must make a demand on the trustees to correct the problem."). Mr. Garcia has not alleged that Christopher Suda, as the designated trustee of the Garcia Trust, has improperly refused or neglected to bring an action against a third person. Therefore, any derivative claims Mr. Garcia may have are unripe for adjudication by the Court.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS the Motion to Dismiss for Lack of Standing. This ruling is without prejudice to Mr. Garcia's right as a beneficiary of the Garcia Trust to make a demand against the trustee of the Garcia Trust or any action he might undertake to remove the trustee of the Garcia Trust. It is also without prejudice to any claim the Trustee of the Garcia Trust might bring against the trustee of the Suda Trust. The enclosed Order is consistent with the ruling of the Court and incorporates this Opinion Letter.

Sincerely,

[redacted]

Daniel E. Ortiz
Circuit Court Judge

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

RICARDO GARCIA,	)	
Plaintiff,	)	
v.	)	**CL-2015-11379**
DONALD J. SUDA REVOCABLE TRUST, et al.,	)	
Defendants.	)	

FINAL ORDER

THIS CASE came before the Court on the Motion to Dismiss for Lack of Standing of Defendant-Counterclaim Plaintiff Donald J. Suda Revocable Trust; and

IT APPEARING to the Court, after considering the pleadings, memoranda, exhibits, relevant authorities, and arguments of counsel, that the Motion is well-taken; it is therefore

ORDERED, that the Motion to Dismiss for Lack of Standing is GRANTED without prejudice to any cause of action and right of action that Plaintiff Ricardo Garcia may have against the Ricardo Garcia Trust or the Trustee(s) of the Ricardo Garcia Trust; and

IT IS FURTHER ORDERED that this Final Order is without prejudice to

any cause of action and right of action that the Ricardo Garcia Trust may have against the Donald J. Suda Revocable Trust or the Trustee(s) of the Donald J. Suda Revocable Trust.

This Order is Final.

ENTERED on this 6 day of September, 2016.

[redacted]

Daniel E. Ortiz
Circuit Court Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.