PRO BONO AND ELDER LAW: END OF LIFE PLANNING

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THE VIRGINIA STATE BAR, THE VIRGINIA DEPARTMENT FOR AGING AND REHABILITATIVE SERVICES, AND THE VIRGINIA POVERTY LAW CENTER
Webinar Presenters

• David Hominik, Legal Services Developer, Virginia Department for Aging and Rehabilitative Services
• Yahne Miorini, LL.M, Miorini Law PLLC, President –Elect of Virginia Chapter of the Academy of Elder Law Attorneys
• Kathy Pryor, Elder Law Attorney, Virginia Poverty Law Center
Agenda

1. Opportunities for Pro Bono – David Hominik
2. Assessing the Capacity of a Client – Yahne Miorini
3. Advanced Medical Directives – Kathy Pryor
4. Powers of Attorney – Kathy Pryor
5. Doing a Simple Will – Yahne Miorini
6. Questions and Answers
Opportunities for Pro Bono

David Hominik, Virginia Department for Aging and Rehabilitative Services
First: Why Pro Bono?

*Virginia Rule of Professional Conduct 6.1* and *ABA Model Rule 6.1* generally establish the principle that ensuring “Access to Justice” (for those unable to pay) is a key responsibility of the organized bar.
(a) A lawyer **should** render **at least two percent** per year of the lawyer’s professional time to pro bono publico legal services. Pro bono publico services include poverty law, civil rights law, public interest law, and volunteer activities designed to increase the availability of pro bono legal services.

(b) A law firm or other group of lawyers **may satisfy** their responsibility **collectively** under this Rule.

(c) **Direct financial support** of programs that provide direct delivery of legal services to meet the needs described in (a) above is an alternative method for fulfilling a lawyer’s responsibility under this Rule.
Every lawyer, regardless of professional prominence or professional work load, has a personal responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.
1. There is a “justice gap” in Virginia – only 20% of the legal needs of the indigent are presently being served by legal services organizations.

2. Data also supports that represented litigants are two to three times more likely than unrepresented litigants to have a favorable outcome in cases frequently involving low-income individuals, i.e. eviction, consumer, unemployment, and child custody and support cases. Yet the poor usually lack access to counsel and often appear in court without representation.

3. LSC funding for legal aid has been significantly cut in recent years plus there has been a significant reduction in IOLTA funding. This has resulted in a 20% reduction in number of legal aid attorneys and staff statewide – while poverty population in VA has increased by 32% since last census.

4. In addition, Virginia’s population of persons 60 and older will increase dramatically between 2010 and 2030 – from 1.4 million to 2.3 million, with many of those individuals expected to have high medical-related costs while on low-moderate fixed incomes.

Bottom Line: Legal Aid cannot meet increased need – Pro Bono can help fill the gap.

Source for 4: Commonwealth of Virginia, Department for Aging and Rehabilitative Services (Project 2025) based on U.S. Census Bureau statistics.
Volunteer Opportunities

- Virginia legal aid programs offer pro bono volunteers the opportunity to provide legal services to persons in non-fee generating, civil matters who otherwise would most probably not be able to obtain legal representation due to their limited income and resources.
Volunteer Opportunities

- In addition, most of Virginia’s legal aid programs work with their local senior centers (or Area Agencies on Aging) to identify elder Virginians in the greatest economic need with legal problems.
- Frequently, these individuals need legal assistance with simple wills and advance directives – the topics for today’s webinar.
If you practice in a particular geographic area, you can directly contact the local legal aid office about pro bono opportunities.
Blue Ridge Legal Services

- Main office in Harrisonburg, offices in Winchester, Lexington, and Roanoke (http://www.brls.org/).
- Provides routine assistance to low-income individuals dealing with legal issues arising from serious illness including health care and health insurance related problems, Medicaid, housing, consumer/finance issues, predatory lending, employment issues (FMLA), family law issues, advance directives, wills, and health care powers of attorney.
Central Virginia Legal Aid Society

- Main office in Richmond, offices in Petersburg, and Charlottesville (http://cvlas.org/)
- CVLAS handles a variety of cases including bankruptcy, debtor rights, consumer/finance, employment, family law, health care and insurance, housing, public benefits, SSI, unemployment compensation
Legal Aid Justice Center

- Main office in Charlottesville, offices in Richmond, Petersburg, and Falls Church (https://www.justice4all.org/)
- Cases handled may vary by office but LAJC generally handles housing, consumer, employment, elder, and public benefits
Legal Aid Society of Eastern Virginia

- Main office in Norfolk, offices in Hampton, Virginia Beach, Belle Haven, and Williamsburg (www.laseva.org)
- LASEVA handles many types of civil cases including family law, housing cases, SSI appeals, collections, public benefit denials, and powers of attorney/wills
Legal Aid Society of Roanoke Valley

- LASRV handles family law, consumer/finance, income maintenance, housing, employment, health and other civil cases.
- NOTE – BRLS handles pro bono recruiting for Roanoke Valley service area
Legal Services of Northern Virginia

- Main office in Falls Church, offices in Arlington, Alexandria, Fairfax, Leesburg, Manassas, and Fredericksburg (http://www.lsnv.org/home.htm)

- Pro Bono opportunities include bankruptcy, consumer protection, employment, family law, housing, public benefits, social security, wills, arbitration and mediation.
Rappahannock Legal Services

- Main office in Fredericksburg, offices in Culpeper, and Tappahannock ([http://www.rapplegal.com](http://www.rapplegal.com/))
- RLS handles health law cases, social security, SSI benefits, unemployment claims, family law cases, housing/landlord-tenant, consumer problems including bankruptcies, garnishments and debt collection
Southwest Virginia Legal Aid Society

- Main office in Marion, offices in Castlewood and Christiansburg ([http://www.svlas.org/](http://www.svlas.org/))
- SVLAS offers advice and referral on most civil issues and handles cases involving debtor relief (predatory lending to bankruptcy), government (public) benefits programs, health, housing, family law. Will expand representation priorities for someone dealing with serious illness.
- Wills and Powers of Attorney are not part of routine representation but assistance in these matters is available through pro bono clinics
Main office in Lynchburg, offices in Danville, Farmville, and Suffolk (http://www.vlas.org/) 

VLAS handles health care (Medicare, Medicaid, FAMIS, health insurance), public benefits, housing, family relations, advance directives and wills, consumer matters
Other Opportunities

- JusticeServer (Central Virginia) – Case management and referral system for attorneys. Attorneys are able to create a confidential profile, view pro bono opportunities available in designated practice areas/jurisdictions, and find the resources to assist with handling the legal matter. (http://www.justiceserver.org/)
Pro Bono Resources

- Probono.net/va is another computer system that permits attorneys to search for pro bono opportunities with legal aid and other organizations using various qualifiers such as geographic location and type of legal matter. Non-legal service programs will be identified, where applicable, with a search.
Volunteer

The **Pro Bono Opportunities Guide** is for lawyers, law students and paralegals interested in pro bono work specifically with legal aid organizations in Virginia. It is a joint project of legal services organizations in Virginia.

To find a volunteer legal opportunity that is tailored to your specific requirements, please select your preferences from the following options and then click the Search button:

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- Include National Organizations

powered by probono.net

VaLegalAid.org
Other Opportunities

• A simple web search for “pro bono Virginia” will identify other non-legal aid program organizations that use pro bono attorneys to assist clients.

• The largest legal area for non-legal aid program pro bono work in Virginia is immigration law – though many organizations require and sometimes recruit pro bono legal assistance on other matters as well.
For More Information

PLEASE CONTACT:

• Karl A. Doss, Virginia State Bar, (804) 775-0522, doss@vsb.org.

• Click on Virginia at the American Bar Association’s Directory of Pro Bono programs map: http://apps.americanbar.org/legalservices/probono/directory.html#.

• Or click on the following for a list of Virginia legal aid programs with links to their individual websites: http://www.vlas.org/RTF1.cfm?pagename=Legal%20Services%20Directory%20in%20US
Assessing the Capacity of your Client

YAHNE MIORINI, ESQ.
Assessing Client Capacity

1. Capacity is presumed

2. Dealing with individuals with diminished capacity
   a) Dementia is estimated to double every five years among the elderly; growing from a disorder that affects 1 percent of persons who are 60 years old to a condition afflicting approximately 30 percent to 45 percent of persons who are 85 years old.
   b) Alzheimer’s disease is the most common cause of dementia, accounting for 60 to 70 percent of cases.
Lawyer's liability

1. Legal malpractice for failure to address capacity questions in appropriate cases is no longer a remote possibility.

2. Traditionally, the courts have been reluctant to fine lawyers, in part due to the lack of “privity of contract” between the lawyer and the disinherited third party.

3. However, the principle of privity has eroded over the years, and standards of practice continue to evolve as the prevalence of incapacity rises and as a greater awareness of the need to address capacity issues has emerged.
Testamentary Capacity

The client should have the ability to appreciate the following elements in relation to each other:

(1) understanding the nature of the act of making a Will;
(2) having a general understanding of the nature and extent of his/her property;
(3) having a general recognition of those persons who are the natural objects of his/her bounty; and
(4) understanding a distribution scheme.
Donative Capacity

The client should have an intelligent perception and understanding of the dispositions made of property and the persons and objects one desires shall be the recipients of one’s bounty.
Contractual Capacity

The client should have the ability to understand the nature and effect of the particular agreement and the business being transacted.
Rule 1.14 of the Rules of Professional Conduct of the Supreme Court of Virginia

When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.
Functional factors of Peter Margulies

1. The client’s ability to articulate reasoning leading to a decision. The client should be able to state the basis for his or her decision. The stated reasons for the decision should be consistent with the client’s overall stated goals and objectives.

2. Variability of state of mind. To what extent does the individual’s cognitive functioning fluctuate?

3. Ability to appreciate consequences of a decision.
Substantive factors of Peter Margulies

1. **The substantive fairness of the decision.** Mr. Margulies maintains that while lawyers normally defer to client decisions, a lawyer nonetheless cannot simply look the other way if an older individual or someone else is being taken advantage of in a blatantly unfair transaction.

2. **The consistency of a decision with the known long-term commitments and values of the client.** The decision normally should reflect the client’s lifelong or long-term perspective. However, individuals can change their values framework as they age. The distinction is important and usually the client will recognize his/her change of mind.

3. **Irreversibility of the decision.** Mr. Margulies notes that “the law historically has attached importance to protecting parties from irreversible events,” and that “doing something that cannot be adjusted later calls for caution on the part of the attorney.”
American Bar Association Guidelines

1. Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers, to provide conceptual background and to offer systematic steps in making assessments of capacity.

2. 3 levels of screening
Screening Level 1

Preliminary Screening. This is a “red flags” checklist to assess what level of concern the lawyer shall have:

(1) there is no or very minimal evidence of diminished capacity and representation can proceed;

(2) there are some mild capacity concerns, but they are not substantial and representation can proceed;

(3) capacity concerns are substantial or at least more than just mild, and professional consultation or formal assessment may be requested before any representation can proceed; and

(4) capacity is lacking and representation cannot proceed.
Consultation or Referral. For mild or substantial capacity concerns, the practitioner should require a professional consultation or request a referral for formal assessment.
Making the Legal Judgment. The final responsibility rests on the shoulders of the attorney to decide whether representation can proceed. In addition, the level of legal capacity varies depending on the legal transaction sought. Testamentary capacity requirements are very minimal. The client must have the capacity to know the natural objects of his or her bounty, to understand the nature and extent of his or her property, and to inter-relate these elements sufficiently to make a disposition of property accounting to a rational plan. The capacity is required at the time the will is executed.
Cognitive Functioning Signs

The client may have short-term memory problems. For instance, she/he may remember events of the past few days but forget what has been discussed within the past 15-30 minutes, or frequently repeat the same questions. The client may have communication problems shown by difficulties in finding words, trouble staying on topic, or bizarre statements or reasoning. The client may show disorientation such as trouble navigating in the office or be confused about day/time/year/season. However, an inability to write checks may be merely a physical deficit, the failure to remember payment obligations, or misunderstanding the bill.
Signs of Emotional Functioning

Significant emotional distress exists when the client stays in persistent emotional distress and has emotions beyond what is expected given the circumstances. For example, the client may be tearful, distressed, excited, pressured, or manic. The client may suffer from emotional swings by moving quickly between laughter and tears, and having feelings inconsistent with the topic.
Examples of delusional behavior would be the client’s feeling that others are spying or organized against him/her, being fearful, or feeling unsafe. Hallucinatory behavior would be when the client appears to hear or talk to things not there, see things not there, or misperceive things. Another behavior functioning sign would be poor grooming or hygiene. The client may be unusually unclean or inappropriately dressed. For instance, the client may not brush his/her hair, shave, or shower regularly, or have other grooming issues. A common behavior for individuals suffering from dementia is to wear multiple pairs of pants or several shirts. Attention to the appearance, clothing, and smell of a client gives clues to possible mental status changes.
PLANNING AHEAD FOR DISABILITY: LIFETIME DECISION-MAKING

KATHY PRYOR, ELDER LAW ATTORNEY
The statewide support center for legal aid in Virginia providing support in

**ADVOCACY**

**TRAINING**

**LITIGATION**

on the civil justice issues faced by low-income Virginians
Why Draft Advance Directives and Powers of Attorney?

- Remember the names of Terri Schiavo, Karen Ann Quinlan, Nancy Cruzan, and Hugh Finn?
- Do you want the courts, the state legislature—and even Congress and the U.S. Supreme Court—getting involved in deciding how your life ends—whether or not to disconnect a feeding tube or respirator?
- In these cases, everyone had an opinion about what the right thing was for them. The main voice that was not heard was the person whose life was at issue.
- These documents help ensure that voice is heard and honored.
Why Pre-plan?

- Those kind of courtroom battles and intra-family disputes can be avoided by planning ahead, having discussions with family members, signing documents, and making sure your family, friends, and doctors know what you want and who you want to make decisions if you can’t make them yourself.

- Like an insurance policy.

- Empowering because you call the shots and decide who will decide if you are incapacitated.

- Avoid the cost, time and emotional toll of a guardianship proceeding.
Advance Medical Directives

Living Will

I HAD A LIVING WILL DRAWN UP...

IF I EVER BECOME BRAIN-DEAD I'M TO BE DENIED LIFE SUPPORT.

WHAT ARE YOU DOING?

LOOKING FOR THE PLUG.

PROMETHEUS!

prometheuscomic.wordpress.com/

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Advance Medical Directives

- What is an advance medical directive?
  - Under the Virginia Health Care Decisions Act, Va. Code 54.1-2981 et. seq., an advance medical directive combines into one document a living will with a health care power of attorney, medical power of attorney, or health care proxy (different names for the same thing).
  - The living will portion of the document gives instructions about the type of care the person wants or does not want—no longer limited to end of life decisions.
  - The health care proxy portion appoints an agent to make health care decisions if (and only if) the declarant becomes unable to make an informed decision at some time in the future. 54.1-2986.1.
Advance Directives

- **What kinds of instructions can be included?**
  - No longer just end-of-life decisions.
  - “Health care” is now broadly defined to include medications, surgery, chemotherapy, radiation therapy, blood transfusions, admission to a hospital, nursing home, assisted living facility or other health care facility, psychiatric or other mental health treatment, and life-prolonging procedures and palliative care. 54.1-2982.
  - Some limitations—agent under an advance directive cannot consent to abortion, non-therapeutic sterilization, or psychosurgery. 54.1-2983.3.
Advance Directives

• Is there a form and how must an advance directive be executed?
  ○ The Code does provide an optional suggested form at 54.1-2984 which allows the declarant to appoint a primary and successor agent; designate the powers the agent has; provide specific instructions regarding care, including but not limited to the provision of life-prolonging procedures; and appoint an agent to make an anatomical gift or organ donation.
  ○ Generally, an AD must be in writing, signed by the individual and two adult witnesses, but an individual diagnosed with a terminal condition may make an oral AD in the presence of the attending physician and 2 witnesses. Need not be notarized. 54.1-2983 and -2984.
Advance Directives

- Once you sign an advance directive, can you change your mind?
  - Yes, an advance directive or a portion of it (including the agent designation) can be revoked at any time as long as the individual is capable of understanding the nature and consequences of her actions.
  - Can revoke with a signed, dated writing, or by physical cancellation or destruction, or by oral revocation; but it is only effective when communicated to the attending physician, and there is no liability if a health care provider fails to act on a revocation if it had no actual notice of the revocation. 54.1-2985.
Advance Directives

- Threshold question is when does the AD kick in?
  - Only applies if the individual is “incapable of making an informed decision”—that is, “unable to understand the nature, extent, or probable consequences of the proposed health care decision or to make a rational evaluation of the risks and benefits of alternatives.” 54.1-2982.
  - Presumption of capacity—a person is presumed capable of making his own decisions unless he is found to be incapable. 54.1-2983.2.
  - A person is not deemed incapable of making an informed decision on the sole basis of a particular diagnosis—e.g., the fact that a person is diagnosed with Alzheimer’s does not necessarily mean she lacks capacity to make an informed decision about health care. 54.1-2983.2.
Advance Directives

Who decides whether a person has the capacity to make an informed decision?

- The individual’s attending physician and a second physician or licensed clinical psychologist must make the assessment of capacity in writing based on a personal examination of the individual. 54.1-2983.2. Generally the second physician must not be involved in the patient’s treatment unless an independent assessor is not reasonably available.

- The second certification is not required if the patient is unconscious or experiencing a profound impairment of consciousness due to trauma, stroke, or other acute physiological condition.

- Only one physician is needed to determine that a previously incapacitated person is currently capable of making an informed decision. 54.1-2983.2.
Advance Directives

- How does the agent under an AD make the decision?
  - The agent is supposed to assess the risks and benefits of the proposed treatment and alternatives and should make the decision based on the beliefs, values and preferences of the patient. Only if the patient’s values, beliefs and preferences are not known, should the agent base the decision on the patient’s best interests. 54.1-2986.1.
Advance Directives

- What if the patient protests the treatment the agent has authorized?
  - Generally, health care is not provided if the patient protests, but as of 2009, there are 2 exceptions to this rule. 54.1-2986.2.

  - (1) So-called Ulysses clause: where the AD expressly states that the provisions of the directive should continue to apply despite the later protest, the patient’s physician signed the AD affirming the patient understood the consequences of the provision and was capable of making an informed decision at that time, and doctor determines the proposed care is medically appropriate.

  - (2) There is no AD or the AD lacks instruction about a later protest: treatment can be provided over protest if the decision doesn’t involve admission to a mental hospital or care subject to human rights regs and the decision is based on patient’s religious beliefs, basic values, and any previously expressed preferences, or, if not known, on patient’s best interests, and the recommended treatment is determined to be ethically acceptable by a patient care consulting committee or two doctors uninvolved in patient’s care or capacity evaluation.

  - Neither “under protest” exception can be used to withhold or withdraw life-prolonging procedures.
Advance Directives

- What if the patient protests the authority of the named agent or the decision-maker under 54.1-2986?

  - The agent or decision-maker would lose the authority to make decisions unless the AD expressly confers continuing authority for the agent over protest. The other terms of the AD or 54.1-2986 would then determine decision-making authority. 54.1-2986.2.
No Advance Directive

- What if there is no AD and the individual is incapacitated to make decisions? Does the family have to petition the court for guardianship?
  - Not necessarily. 54.1-2986 provides a prioritized list of persons who can make health care decisions in the absence of an AD or where the AD doesn’t indicate the person’s wishes and no agent is appointed.
  - The decision-maker is supposed to make the decision based on the patient’s religious beliefs, basic values, and expressed preferences, or if not known, on the basis of the patient’s best interests. 54.1-2986.1.
No Advance Directive

- Under 54.1-2986, who decides?
  - Guardian
  - Patient’s spouse (unless divorce action filed)
  - Adult child(ren)
  - Parent
  - Adult sibling
  - Any other relatives in descending order of blood relationship
  - Any adult (except current health care provider) who has exhibited special care and concern for the patient and is familiar with her religious beliefs, basic values and previously expressed preferences. Patient care consulting committee or 2 physicians not involved in care determine whether the person meets these criteria.
No Advance Directive

- Limitations on decision-making ability under 54.1-2986.
  - Decision is made by highest class of person available.
  - If there are 2 or more in the same class and disagreement among them, then doctor can rely on the authorization of the majority of those reasonably available.
  - Those authorized to make decisions under 54.1-2986 do not have authority to restrict visitation.
  - The seventh class (any adult exhibiting special care and concern) cannot make a decision to withhold or withdraw life-prolonging procedures.
The Department of Health has established an online central registry for advance directives which is accessible to health care providers. 54.1-2994 and -2995.

A person can create an account to store their AD at https://www.virginiaregistry.org.

Effective July 1, 2014, the person’s legal representative or designee, as well as the person who executed the document, will be able to submit the document to the registry. 54.1-2995.
Surrogate Decision-making: Who Decides; What do they Decide?

- What are the key questions in any surrogate decision-making issue?
  - “Does the individual have capacity to make the decision herself?” should always be the first question.
  - If the person lacks capacity, what document, if any, has the person executed and what specific authority is given in that document? Is the person authorized to make the decision or take the action at issue? Never assume a person is using the right terminology or that the name of the document accurately reflects what the document actually says.
  - If there are no legal documents, what then? What can be done?
    - Does the person still have capacity to sign documents now?
    - If health care, does an ‘over protest’ option apply? Or are persons authorized to make decisions under 54.1-2986?
    - Guardianship/conservatorship as last resort.
Powers of Attorney
Powers of Attorney

What is a power of attorney?

- A POA is a legal document which “the principal” signs authorizing another—the “agent”—to act on his or her behalf to handle certain financial or business matters—e.g., to handle bank accounts, manage real property, stocks and bonds, insurance and annuities, taxes, governmental benefits, etc.

- A principal can designate 2 or more agents with each co-agent able to exercise authority independently unless POA says otherwise. A principal can also designate a successor agent(s) to act should the named agent resign, die, become incapacitated, is not qualified to serve or declines to serve. 64.2-1609.

- The scope of authority can be limited to one transaction or can be very broad to include most types of financial matters.

- There is always tension between the need for flexibility and for the agent to be authorized to take necessary actions and the need to protect the principal from the risk of abuse/exploitation; limited oversight. **Most important: carefully select a trustworthy and competent agent.**
What is the Uniform Power of Attorney Act?

- UPOAA codifies state legislative trends and best practices and attempts to strike a balance between the need for flexibility and acceptance of an agent’s authority by third parties and the need to prevent and redress financial abuse or exploitation.
- UPOAA provides a set of default rules which a principal can alter in order to choose the scope of the agent’s authority and the rules that govern the agent’s conduct.
- Virginia passed the UPOAA, with a few alterations to conform with existing state law, in 2010 and it became effective 7/1/10. It is found at 64.2-1600 et. seq.
Powers of Attorney

- When does a POA become effective and when is it ‘durable’?
  - A POA is effective when executed unless the document provides for a future or contingent effective date. If it is to take effect in the future the principal can authorize who is to decide when that event or contingency has occurred. 64.2-1607.
  - POA is considered to be “durable”—meaning it does not terminate if the principal later becomes incapacitated—unless it expressly states that it is terminated by the principal’s incapacity. 64.2-1602.
  - In the event a POA is only to become effective when the principal becomes incapacitated and the principal has not designated who is to make that determination, then incapacity will be determined by the principal’s attending physician and a second physician or licensed clinical psychologist, or by an attorney, judge or appropriate governmental official. 64.2-1607.
Powers of Attorney

How must a POA be executed and how can it be terminated?

- Must be signed by the principal or in the principal’s conscious presence by someone else at the principal’s direction. The signature is presumed genuine if acknowledged by the principal before a notary. 64.2-1603.

- POA terminates when the principal dies, becomes incapacitated (if not durable), or revokes, or if principal revokes the agent’s authority, agent dies, resigns, or becomes incapacitated and a successor agent has not been named. Agent’s authority also terminates if an action is filed for divorce or annulment of agent’s marriage to the principal, legal separation, separate maintenance from one another, or custody or visitation of a child in common (unless POA provides otherwise). 64.2-1608.

- Agent’s authority continues, regardless of passage of time, until authority terminates. Termination is not effective if agent or another person acts in good faith without actual knowledge of termination.

- Execution of a POA does not revoke or terminate a previous POA unless it expressly says the previous POA or all other POAs are revoked. 64.2-1608.
Powers of Attorney

How do you know if the POA is valid and what law determines its effect and meaning?

- If executed in Virginia on or after 7/1/10, POA is valid if it complies with 64.2-1603. Before 7/1/10, POA is valid if executed in compliance with law at the time of execution.
- If POA is executed outside Virginia, it is valid in Virginia if, when executed, execution complied with the law of the jurisdiction that determines meaning and effect of document, or requirements of a military POA, or if executed according to laws of Virginia. 64.2-1604.
- If agent holds the POA and POA is otherwise valid, agent is considered to have authority—don’t have to look into delivery.
- Photocopy or electronically transmitted copy has same effect as original.
- Effect and meaning is determined by law of jurisdiction indicated in POA or, if not indicated, by law of jurisdiction where executed. 64.2-1605.
What authority does the agent have?

- Under the uniform act, agent can do certain actions only if the POA expressly grants that authority (‘specific grant’), e.g.:
  - Create, amend, revoke or terminate an inter vivos trust;
  - Make a gift;
  - Create or change rights of survivorship;
  - Create or change a beneficiary designation;
  - Delegate authority granted under a POA;
  - Waive principal’s right to be a beneficiary under a joint and survivor annuity or retirement plan;
  - Exercise fiduciary powers that the principal has authority to delegate. 64.2-1622.
Powers of Attorney

- Other authority may be given by a grant of general authority and can be granted by using the descriptive term or by citing the section—either way the agent is given full authority set out in that section (64.2-1624), e.g.:
  - Real property (64.2-1625);
  - Tangible personal property (-1626);
  - Banks and other financial institutions (-1629);
  - Insurance and annuities (-1631);
  - Estates, trusts, and other beneficial interests (-1632);
  - Benefits from governmental programs or civil or military service (-1635);
  - Retirement plans (-1636);
  - Taxes (-1637);
  - Gifts (-1638) but unless otherwise provided only to extent allowed as federal gift tax exclusion under IRS and only as consistent with principal’s objectives, best interests (considering value of property, foreseeable obligations and need for maintenance, eligibility for benefits, personal history of making gifts).
Powers of Attorney

- What are the agent’s duties?
  - Agent must act in accordance with principal’s reasonable expectations, best interests, in good faith, within scope of authority granted, and must act loyally, without conflict of interest, and with care and diligence. 64.2-1612.
  - Duty to cooperate with person with authority to make health care decisions.
  - Agent has duty to keep a record of all receipts, disbursements and transactions and to disclose such information if requested by principal, guardian, conservator or other fiduciary acting for the principal, or personal representative of the estate within 30 days of a request or give a reason additional time is required. 64.2-1612.H.
  - If principal is incapacitated, various named persons may request and the agent must permit reasonable inspection of the records regarding actions taken within 5 prior years. 64.2-1612.I.
Powers of Attorney

- Is there any recourse if an agent seems to be violating his duties to the principal?
  - Various persons can petition a court to construe a POA or to review the agent’s conduct and grant appropriate relief. 64.2-1614.
  - If an agent has failed to disclose records according to 64.2-1612, a person entitled to disclosure may petition a circuit court for discovery to determine the need to petition for guardianship or conservatorship, to terminate, suspend or limit the authority of the agent, or to hold the agent liable for breach of fiduciary duty or to recover certain assets or their value. 64.2-1614.
  - An agent who violates the Act is liable to the principal for the amount required to restore the value of the principal’s property to what it would have been if the violation hadn’t occurred and for reimbursement of attorney’s fees and costs. 64.2-1615.
Powers of Attorney

What is the obligation of third parties to accept a POA and is there any liability for refusal to accept an acknowledged POA?

- In order to encourage greater acceptance of POAs by third parties, the Act places the risk that a POA is invalid on the principal. Except for a forged signature of the principal, someone who, in good faith, accepts a properly executed POA without actual knowledge that the POA is void, invalid, or terminated, or that the agent is exceeding his authority, can rely upon the POA as if it were genuine, valid and still in effect. 64.2-1617.

- Person must accept the POA or request a certification or translation or opinion of counsel within 7 business days and may only refuse a POA for limited reasons, e.g. actual knowledge of termination of POA or agent’s authority, or actual knowledge that someone has reported to APS a good faith belief that principal may be the victim of abuse, neglect or exploitation. 64.2-1618.

- A person who refuses to accept a POA in violation of this section may be subject to a court order mandating acceptance and be liable for reasonable attorney’s fees and costs. 64.2-1618.
Bottom Line: We don’t know what’s ahead so plan, act, and be prepared!!
Thank You

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Simple Wills – How to Do Them

YAHNE MIORINI, ESQ.
Do You Need a Will?

1. Non-probate assets
2. Small estate
3. Surviving spouse’s rights
Non-Probate Assets

1. Joint tenants with right of survivorship
2. TOD deeds
3. POD or TOD accounts
4. Retirement accounts
5. Life insurance policies
6. Assets held in trust
Small Estate

1. Small estate affidavit for estate under $50,000. See Va Code Sect. 64.2-601
   a) 60-day waiting period
   b) Probate the Will

2. Assets under $15,000, no affidavit required. See Va Code Sect. 64.2-602
Rights of the Surviving Spouse

1. Family Allowance: for the spouse and/or minor children, up to $18,000

2. Exempt Property Allowance: for the spouse and/or minor children on the tangible property including household furniture, furnishings, automobiles, appliances, and personal effects. Up to $15,000

3. Homestead Allowance: in lieu of any share passing by will, intestate succession, or election by the surviving spouse. Up to $15,000 for the surviving spouse, then the minor children

4. Right to Elect Against the Estate
Real Estate Property

- Real estate property drops “like a rock” meaning that in absence of a will, the heirs-at-law become owners of the property without the need for opening a probate procedure. One of them needs to file the list of interested persons with the probate department of the court, file the Will if any, but there is no need to be appointed executor of the estate unless there are other assets.
Probate Simple Procedure

Statement in Lieu of Settlement of Accounts (Va. Code Sect. 64.2-1314): only file the inventory, then the statement instead of the accountings

Requirements:

1. All the residual beneficiaries under the Will or all intestate distributees also qualify as personal representatives of the estate

2. Assets in excess of all debts and taxes
Drafting the Will

SECTION BY SECTION
**Exordium Clause**

1. Opening clause should include the following:
   a) Identifies the testator
   b) Establishes his or her domicile
   c) Declares the instrument to be a will
   d) Revokes all other prior wills and codicils.

2. *I, JOHN TESTATOR, a resident of Fairfax County, Virginia, declare that this is my Last Will and Testament, hereby revoking all prior Wills and Codicils.*
Testator’s Family

1. Very important to describe the family and not limit to spouse or children particularly when there are none. Add the immediate present family.

2. Get the contact information of the current family. It is very helpful when we open the probate because we have to notify family members.

3. “Family. I am an unmarried man. I have one child now living; namely, SON OF TESTATOR.”

4. Additional declarations:
   - *Any child or children born after the date of this Will shall be treated as though they were named in this Paragraph, and all provisions of this Will shall be interpreted as if any children born after the date of this Will had been so named with all other children of mine in the provisions of this Will.*
Testator’s family – omitted children

It is important to declare that testator is aware of omitting his children so that there is no challenge of the Will afterward.

Samples:

*I have intentionally, and not as a result of any mistake or inadvertence, omitted in this Will to provide for any other children and/or issue of mine, if any, however defined by law, presently living.*

*...it is not out of love but for reasons that are personal to mine.*
Nomination of the Fiduciaries

The fiduciary/executor/personal representative should be a person who is financially responsible.

Too often, the Commissioner of Accounts will share his frustration with lay executors unable to comply with filing obligations. He might have to remove them and name a successor professional executor.

Sample language:

**Executors.** *I nominate my friend MARY EXECUTOR as Executor of my Will. If she shall fail to qualify or shall cease to act, I nominate my friend PAUL EXECUTOR 2 as successor Executor. The term "my Executor" as used in this Will shall include any personal representative of my estate.*
Fiduciary Compensation

- Standard fee schedule
- Can opt out
Out-of-State Fiduciaries

- If the named fiduciary is living out-of-state, then a registered agent living in Virginia will be appointed.

- If there are assets outside of Virginia, an ancillary estate will be opened. Often the following language is added to the Will for this purpose:

  **Appointment of Special Executor.** If for any reason my Executor is unwilling or unable to act as Executor with respect to any provision of my Will or the administration of my Estate, my Executor shall appoint, in writing, an individual, a bank, or a trust company that is not related or subordinate to my Executor within the meaning of §672(c) of the Internal Revenue Code (hereinafter referred to as “the Code”) to act as a substitute or special Executor for such purpose, and may revoke any such appointment at will. Each substitute or special Executor so acting shall exercise all administrative and fiduciary powers granted by my Will unless expressly limited by the delegating Executor in the instrument appointing such substitute or special Executor. Any substitute or special Executor may resign at any time by delivering written notice to my Executor to that effect.
Bond Waiver

If there is no bond waiver language, the probate court will request that a bond of $1 + 1/3$ of the value of the probate assets be posted. Often, the bond requirement is waived.

- Advantage of the waiver: save the cost of the premium
- Disadvantage: no insurance if the executor steals or mishandles the probate funds

Sample language:

*No Bond Required.* Any fiduciary appointed under this Article Two shall serve without bond being required.
Payment of the Estate Expenses

**Payment of Estate Expenses.** My Executor may pay from my Estate all debts which are then due and enforceable against my Estate, the expenses of my last illness, the expenses of my final disposition without the necessity of prior court approval, the expenses of administering my Estate, and all death taxes and governmental charges imposed upon and made payable from my Estate under the laws of the United States or of any state or country by reason of my death.

Note that the taxes can be either paid from the estate or apportioned to the beneficiaries.
Tangible Personal Property

Very important part of the Will when the individuals have little as the issue generates a lot of disputes among family members.

An option is to have a Tangible Personal Property Directive that will be attached to the Will and can be changed or updated at any time – thus removing the need to update the Will.

Sample language:

**Tangible Personal Property.** I give my tangible personal property in accordance with any written instructions left by me and the remainder of the personal property, or all of it if no such instructions are left, to my Son. I direct that all costs of safeguarding, insuring, storing, and delivering my tangible personal property to the beneficiaries entitled thereto be paid out of my estate as an expense of administration.
Joint property & Mortgages

- Joint property with right of survivorship passes directly to survivor
- Mortgage stays personal debt of testator and goes to probate
- Add declaration in the Will that mortgage follows the joint property and shall be paid by the survivor
Special Bequest

- Per capita or per stirpes?

- Non-profit organizations:
  ◦ Address
  ◦ Check the name registered with the IRS. Check IRS website
  ◦ “Or its successors and assigns”
  ◦ Watch out for several chapters: give power for the executor to select the right chapter.
Beneficiary is a minor

- Create a trust (if more than $100,000)
- Authorize the executor to distribute to a UTMA or 529 Plan

Sample language:

*If a beneficiary has not yet attained the age of twenty-one (21), this distribution shall be held for such beneficiary in a custodial account under the provisions of the Virginia Uniform Transfer to Minors Act with ***Will UTMA1 Custodian*** as the custodian.*
Beneficiaries of the Reminder

I give the remainder of my Estate to my Son; provided, however, if he shall not survive me, then to his then-living issue, per stirpes.
Remote Beneficiaries

If prior to the distribution of the whole of my Estate, no issue of mine shall be living, I give my Estate (or the undistributed portion thereof) to my heirs; the identities and respective shares of such heirs to be determined according to the laws of the Commonwealth of Virginia in effect at the date of execution of this Will.
Powers of the Executor

1. You need to refer to the Virginia Code in order to give real estate selling powers to the Executor, if not the executor cannot sell any real estate property.

   **General Powers of Executor.** My Executor shall have, in addition to all of the powers now or hereafter conferred on an Executor §64.2-105 of Code of Virginia Annotated, and any powers enumerated elsewhere in this Will, the power to perform any of the acts specified in this section without the necessity of court approval:
Period of survivorship

1. There is no provision in the Code of a period of survivorship while in other state, you may have one.

2. Option: state one. Do not go over 6 months because it is making it hard to administer the estate and because of election rights statute of limitation.

Sample language:

**Period of Survivorship.** For the purposes of this Will, a beneficiary shall not be deemed to have survived me if that beneficiary dies within three (3) months after my death.
No contest provision

1. Not necessary but you may want one
Will execution

1. Virginia recognizes holographic wills. It needs to be entirely handwritten by the testator and signed to be valid. See Va. Code Sect. 64.2403 (B).

2. Typed written will need to be witnessed by 2 witnesses to be valid. See Va. Code Sect. 64.2403 (C)
   ◦ No disqualification of an interested person to be a witness. May be different in other states.
Self-Proving Will

Will needs to meet the requirements of Va Code Sect. 64.2-452 and 64.2-453
Safekeeping

- Fireproof box or safe-deposit box

- Presumptions:
  ◦ Testator lost the Will: presumed to be revoked
  ◦ Third person lost the Will: presumed to have been lost
QUESTIONS?
CONTACT INFORMATION

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UPCOMING VSB WEBINARS

• **Meeting the Legal Needs of Individuals Facing Serious Illness Through Pro Bono, Part 3: Health Insurance Issues,** Thursday, May 15, 2014 @ 2:00 pm
• **Part 4: Social Security Benefits,** Thursday, June 19, 2014 @ 2:00 pm
• **Part 5: Housing Law,** July 2014 (Date and Time TBD)