

Elder Law Issues for Real Estate Practitioners

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I. Capacity and surrogacy issues.

A. Seller / Donor Capacity.

1. Mental capacity.

“The test for determining whether one lacks sufficient capacity to become bound absolutely by deed or contract is whether, at the time the instrument was executed, the grantor possessed sufficient mental capacity to understand the nature of the transaction and to agree to its provisions. Mental ability varies from one individual to another; therefore, no specific degree of mental acuteness is to be prescribed as the measure of one's capacity to execute a deed. And, when mental capacity is in issue, the outcome of every case must depend mainly on the facts surrounding the execution of the deed in question. Hence, the testimony of witnesses who were present when the instrument was executed is entitled to greater weight than the testimony of those witnesses not present,” *Brown v. Resort Developments*, 238 Va. 527,529, 385 S.E.2d 575, 576 (1989), cited with approval in *Hill v. Brooks*, 253 Va. 168, 175; 482 S.E.2d 816, 821 (1997), and also citing *Nelms v. Nelms*, 236 Va. 281, 287, 374 S.E.2d 4, 8 (1988) (testimony of those present at deed signing entitled to great weight); *Price v. Barham*, 147 Va. 478, 481, 137 S.E. 511, 512 (1927) (testimony of those present at execution of documents entitled to peculiar weight)” *Id.*¹

2. Attorney / notary evidence.

- a. *Nelms v. Nelms, supra.*
- b. *Price v. Barham, supra.*

B. Red flags for the practitioner.

1. Great weakness of mind *with* gross inadequacy of sales price.²

¹ “No particular degree of mental acumen is to be prescribed as the measure of one's capacity to execute deeds or wills. The test is whether the party had at the time of the execution of the instrument sufficient mental capacity to understand the nature of the transaction he was entering into, and to assent to its provisions. *Greer v. Greers*, 50 Va. 330, 9 Gratt. 330; *Beverly v. Walden, supra.*” *Wampler v. Harrell*, 112 Va. 635, 641; 72 S.E. 135, 138 (1911).

² “Where . . . great weakness of mind concurs with gross inadequacy of consideration, or circumstances of suspicion, the transaction will be presumed to have been brought about by undue influence,” *Fishburne v. Ferguson*, 84 Va. 87, 111, 4 S.E. 575, 582 (1887), cited as “seminal case” in *Friendly Ice Cream Corporation V. Beckner*, 268 Va. 23, 31; 597 S.E.2d 34; (2004). See also *Payne v. Simmons*, 232 Va. 379, 350 S.E.2d 637 (1986)(actual fraud)(“While a contract made by a person of fair understanding should not be set aside merely because it was a rash, improvident or hard bargain, yet if made with a person of impaired mind or feeble intelligence, the inference is that it was obtained by imposition, deception or undue influence, so as to cast upon the other party the burden of

2. Confidential relationship between the parties, *e.g.*, trustee and beneficiary, guardian and ward, agent and principal, *without weakness of mind*.³

C. Weakness of mind.

1. Signs and possible reasons.
 - a. Apparent incomprehension.
 - b. Hallucinations: false visual, auditory, olfactory, or tactile perceptions. Visual or auditory ones may be elicited by asking, "Do you hear voices or see visions? If you hear voices, are they similar to my voice in your ear?"
 - c. Delusions: false, fixed, idiosyncratic ideas. Patients may reveal delusional thoughts when questioned (eg, "Are people treating you kindly? Is anyone trying to harm you?"). Delusions of harm (eg, of food poisoning) or of harassment may occur in elderly persons with paranoid schizophrenia or a paranoid disorder.
 - (i). Delusions also occur in 40% of persons with dementia.
2. Benign Causes.
 - a. Deafness.
 - (i). Sit closer.
 - (ii). Speak slowly, looking directly at the client. Use low, modulated voice.
 - (iii). Office amplifier.⁴
 - b. Impaired sight.

showing its fairness. And it is said that a comparatively slight degree of mental incapacity will justify a court in setting aside a contract for which no valuable consideration has been received. In these cases, also, it is not necessary that the inadequacy of consideration should be such as to 'shock the conscience.' *A court of equity will see to it that a bargain made with a person of weak intellect shall be fair.*" *Long v. Harrison*, 134 Va. 424, 441-42, 114 S.E. 656, 661-662 (1922) (citations omitted [in original]) (emphasis added [in original]). Thus, although Payne was not found to be legally incompetent, his diminished mental capacity, recognized by the chancellor's findings, in combination with the grossly inadequate consideration he received, entitled him to the remedy of rescission. See *Cook v. Hayden*, 183 Va. 203, 223, 31 S.E.2d 625, 633 (1944); *Bibby v. Thomas*, 165 Va. 248, 253, 182 S.E. 226, 229 (1935); *Fishburne and Wife v. Ferguson's Heirs*, 84 Va. 87, 110, 4 S.E. 575, 581 (1887).")

³ "Where one person stands in a relation of special confidence towards another, so as to acquire an habitual influence over him, he cannot accept from such person a personal benefit without exposing himself to the risk, in a degree proportioned to the nature of their connection, of having it set aside as unduly obtained." *Fishburne*, 84 Va. at 112-13, 4 S.E. at 582. Here, equity considers the benefit to the person in the relation of special confidence presumptively invalid and, once that relationship and benefit is established, the burden of going forward with evidence that the transaction was fair rests on the proponent of the transaction. See also *Economopoulos v. Kolaitis*, 259 Va. 806, 812, 528 S.E.2d 714, 718 (2000) (the presence of a confidential relationship creates a presumption of fraud.); *Nuckols v. Nuckols*, 228 Va. 25, 34-38, 320 S.E.2d 734, 739-41 (1984) (one seeking rescission has burden to prove confidential or fiduciary relationship or other direction and control depriving grantor of free volition); *Nicholson v. Shockey*, 192 Va. 270, 275, 64 S.E.2d 813, 816 (1951) (gift from mother to son acting as attorney and confidential advisor in transaction is 'presumptively invalid; donee must overcome this presumption by clear and convincing evidence); *Waddy v. Grimes*, 154 Va. 615, 647, 153 S.E. 807, 817 (1930) (where a deed is made to the wife of the grantor's duly appointed committee, the burden of proving that the transactions are valid falls on the party seeking to uphold the deed)." *Friendly*, at 268 Va. 32.

⁴ SuperEar® Plus Personal Sound Amplifier, ~\$65.00. Online: <http://www.healthsafetypro.com>.

- (i). Use larger **san serif fonts**
- (ii). Double or triple space documents.
- (iii). Read documents to client.
- (iv). Strong magnifying glass.
- c. Poor oral communication.
 - (i). Poor dental health, embarrassment.
 - (ii). Poor denture adhesives.
- 3. Pathological organic.
 - a. Delirium.⁵
 - (i). Medicine induced?
 - (ii). Diabetes induced?
 - b. Depression.
 - (i). Situational.
 - (ii). Clinical.
 - (iii). Either can be well treated with medicine.
 - c. Mental retardation.
 - d. Schizophrenia.
 - (i). Symptoms include hallucinations, voices, etc.
 - (ii). Symptoms can be well controlled in some patients by medicines.
 - e. Bi-polar / manic-depressive disorder/ schizo-affective disorder.
 - (i). Symptoms include hallucinations, voices, etc.
 - (ii). Symptoms can be well controlled in some patients by medicines.
 - f. CVA/Stroke.
 - g. Dementia.
 - (i). The Alzheimer's Association checklist of common symptoms.⁶
 - (ii). Depression can cause dementia, in which case it may be referred to as dementia of depression or pseudodementia.
 - (iii). Patients improve after their depression is treated.
 - (iv). Depression can also worsen the dementia symptoms, making incipient or mild dementia more pronounced.
 - (v). Tests (See Appendix E for author's preferred form).⁷

⁵ http://www.psych.org/psych_pract/treatg/quick_ref_guide/delirium_qrg9402.pdf.

⁶ <http://www.alzmdak.org/items/ccnadpdfs/tensigns.pdf>.

- (1). [10 Point Clock Drawing Test](#) - Manos⁸
- (2). [Clock Drawing Test](#) – Shah⁹
- (3). [The 7 Minute Screen](#) - Solomon¹⁰

4. Documentation Issues.

- a. Negative inferences?
- b. Confidentiality?

D. Powers of attorney.

1. Capacity requirement same as for contract. *Hill v. Brooks, supra*.
2. Confidential relationship (and resultant presumptions) automatically created.
 - a. Gifts from principal, *executed by the principal*, to agent, while not prohibited, are presumed fraudulent. *Fishburne, supra*.
 - b. Gifts from principal, *executed by the agent*, to the agent, invalid by statute, Va. Code § 11-9.5.
 - (i). With typical “durable” general power of attorney, a circuit court can determine whether a subsequently incapacitated grantor intended to confer gift giving authority upon the principal.
 - (ii). Disclosure and discovery; enforcement.
 - (1). Va. Code § 11-9.6. Certain duties of attorneys-in-fact and agents empowered to act under § [11-9.1](#).
An attorney-in-fact or other agent empowered to act under § [11-9.1](#) shall, on reasonable written request made by a person interested in the welfare of a principal who is unable to properly attend to his affairs, as set forth in § [37.1-134.22](#), disclose to such person the extent to which he has chosen to act and the actions taken on behalf of the principal within the two years prior to either (i) the date of the request or (ii) the date of the death of the principal, if the principal is deceased at the time such request is made, and shall permit reasonable inspection of records pertaining to such actions by such person unless such disclosure or inspection is specifically prohibited by the terms of the instrument under which he acts. In all cases where the principal is deceased at the time such request is made, such request shall be made within one year after the date of the death of the principal.
 - (2). § 37.1-134.22. Discovery of information and records regarding actions of certain agents and attorneys-in-fact.
 - A. After having first made a request to an agent or attorney-in-fact for

⁷ The Folstein, Folstein, and McHugh mini-mental status examination (1975) is found at <http://majette.net>, or directly, at <http://www.medafile.com/mmses.htm>.

⁸ <http://www.psychiatrictimes.com/p981049.html>.

⁹ <http://cpmcnet.columbia.edu/news/review/pdf/p30-34.pdf>.

¹⁰ <http://www.rochelink.roche.com.ar/pub/rnarg/pdf/vol253/solomon.pdf>.

disclosure under § [11-9.6](#), any person interested in the welfare of a principal believed to be unable to properly attend to his affairs, may, for the purpose of obtaining information pertinent to the need or propriety of (i) instituting a proceeding under this chapter or (ii) terminating, suspending or limiting the authority of an attorney-in-fact or other agent, petition a circuit court for discovery from the attorney-in-fact or other agent of information and records pertaining to actions taken within the past two years from the date the request under § [11-9.6](#) was made pursuant to powers or authority conferred by a power of attorney or other writing described in § [11-9.1](#).

....

C. A "principal believed to be unable to properly attend to his affairs" means an individual believed in good faith by the petitioner to be a person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other causes to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions. A "person interested in the welfare of a principal" is any member of the principal's family; a person who is a co-agent or co-attorney-in-fact, an alternate agent or attorney-in-fact, or a successor agent or attorney-in-fact designated under the power of attorney or other writing described in § [11-9.1](#); and if none of these persons is reasonably available and willing to act, the adult protective services unit of the local social services board for the city or county where the principal resides or is located at the time of the request. A "member of the principal's family" is an adult parent, brother or sister, niece or nephew, child or other descendent, spouse of a child of the principal, spouse or surviving spouse of the principal.

E. Conservatorship.

1. Transfers by incapacitated person.

- a. Before enactment of present conservatorship and guardianship statutes, at least, appointment of a fiduciary for an incapacitated person does not itself preclude the person so adjudicated from executing a deed or will. *Waddy v. Grimes*, 154 Va. 615, 647, 153 S.E. 807, 817 (1930).
- b. Thus, where a deed was made to the wife of the grantor's duly appointed committee (now conservator or guardian), the grantee or his successor bore (and sustained) the burden of proving the transactions valid:

In order that we may not be misunderstood we again reiterate the rule that where a deed is made by a *cestui que trust* to the wife of his trustee conveying a part of the trust estate, the presumptions are against the validity of the deed, and the burden is cast upon the grantee by her relationship to the trustee to prove by clear and convincing evidence that the transaction has been fair and equitable, and that the

confidence which has been reposed in her husband by the grantor has not been taken advantage of, abused or betrayed. *Waddy*, 154 Va. at 650-651.

2. Transfers by Conservator.

- a. The conservator may sell unless the conservator's authority is limited by the Court in the order appointing the conservator.
 - (i). A conservator has the powers set forth in Va. Code § 64.1-57 as of the date the conservator acts which may be exercised without prior court authorization except as otherwise specifically provided in the court's order of appointment. Va. Code § 37.1-137.4. (A).
 - (ii). Many courts (including the City of Richmond and Henrico County Circuit Courts) routinely restrict authority to sell real estate unless the sale is approved by the Commissioner of Accounts.¹¹
 - (iii). Estate is specifically defined to include *both* real and personal property, Va. Code § 37.1-134.6.
 - (iv). Va. Code § 64.1-57 (1)(b) specifically authorizes the fiduciary to “sell, assign, exchange, transfer and convey or otherwise dispose of, any or all of the investments and property, either real, personal or mixed, which may be included in, or may at any time become part of the trust or estate upon such terms and conditions as the fiduciary, in his absolute discretion, may deem advisable, at either public or private sale, either for cash or deferred payments or other consideration, as such fiduciary may determine.”
- b. Except for de minimis interests (under \$100 per donee, not to exceed an aggregate of \$500 in any calendar year), a conservator may not gift or disclaim real estate unless specifically authorized pursuant to Va. Code § 37.1-137.5.
 - (i). Authority may be granted incident to the proceeding to appoint a conservator, or in a separate proceeding following such appointment.
 - (ii). Presumptive heirs and testamentary beneficiaries are required to be given notice.
 - (iii). Useful when needed for Medicaid community spouse transfers,¹² tax or creditor avoidance (disclaimers).¹³

¹¹ Va. Code § 37.1-137.4 (B) as amended in 2004 incorporates language which closely tracks the local practice in Richmond and Henrico County: “[t]he court may impose requirements to be satisfied by the conservator prior to the conveyance of any interest in real estate, including but not limited to (i) increasing the amount of the conservator's bond, (ii) securing an appraisal of the real estate or interest, (iii) giving notice to interested parties as the court deems proper and (iv) consulting by the conservator with the commissioner of accounts and, if one has been appointed, with the guardian. If the court imposes any such requirements, the conservator shall make a report of his compliance with each requirement, to be filed with the commissioner of accounts. Promptly following receipt of the conservator's report, the commissioner shall file a report with the court indicating whether the requirements imposed have been met and whether the sale is otherwise consistent with the conservator's duties. The conveyance shall not be closed until a report by the commissioner of accounts is filed with the court and confirmed as provided in §§ [26-33](#), [26-34](#) and [26-35](#).”

¹² See 42 U.S.C. 1396r-5; Virginia Medicaid Manual § M 1480.

¹³ *Caveat*: disclaiming property considered a transfer of assets for Medicaid purposes.

II. Reverse Mortgages.

A. Generally.

1. A reverse mortgage is similar to an annuity in which the borrower's home equity is used to fund the premium.
2. The essence of the reverse mortgage is that the lender "pays" the borrower, and the loan is not due until a future event in which the date is not known (typically death, but often institutionalization).

B. Sources of general information.

1. AARP: <http://www.aarp.org/money/revmort/>.
2. National Center for Home Equity Conversion, which claims that it has been adjudged "scrupulously independent ... almost militantly uncommercial ... the first step for smart consumers," by the Washington Post, has several calculators and Q/A segments: <http://www.reverse.org/>.

C. Major Types.

1. HUD Home Equity Conversion Mortgages.

- a. Homeowners 62 and older who have paid off their mortgages or have only small mortgage balances remaining are eligible to borrow against the equity in their homes.
- b. Payment options.
 - (i). Lump sum or line of credit.
 - (ii). Tenure (lifetime, while living in the home).
 - (iii). Term (certain number of years).
 - (iv). Homeowners whose circumstances change can restructure their payment options.
- c. Repayment.
 - (i). HUD reverse mortgages not payable until the last surviving borrower dies, sells the home, or permanently moves away.¹⁴
 - (ii). Lenders recover principal and interest when the home is sold.
 - (iii). The remaining value of the home goes to the homeowner or to his or her survivors.
 - (iv). The HECM loan promissory note is non-recourse. If the sales proceeds are insufficient to pay the amount owed, HUD pays the shortfall from the FHA mortgage insurance purchased at the HECM closing.

¹⁴ "Permanently" generally means twelve consecutive months of absence.

- d. Determining HECM mortgage amounts.
 - (i). The size of reverse mortgage loans is determined by the number of borrowers, their borrower's age(s), the interest rate, and the home's value. The older a borrower, the larger the percentage of the home's value that can be borrowed.
 - (ii). For example, based on a loan at an interest rate of approximately 9 percent, a 65-year-old could borrow up to 26 percent of the home's value, a 75-year-old could borrow up to 39 percent of the home's value, and an 85-year-old could borrow up to 56 percent of the home's value.
 - (iii). There are no asset or income limitations on borrowers receiving HUD's reverse mortgages.
 - e. HECM limitations.
 - (i). HUD imposes no limit on the value of homes qualifying for a HECM reverse mortgage.
 - (ii). However, the amount that may be *borrowed* is *capped* by the maximum FHA mortgage limit for the area, which varies from \$81,548 to \$160,950, depending on local housing costs.
 - (1). As a result, owners of higher-priced homes can't borrow any more than owners of homes valued at the FHA limit.
 - f. Charges.
 - (i). HUD's reverse mortgage program collects funds from insurance premiums charged to borrowers.
 - (ii). Borrowers are charged 2 percent of the home's value as an up-front payment plus one-half percent on the loan balance each year. These amounts are usually paid by the lender and charged to the borrower's principal balance.
 - (iii). HUD claims that the required FHA reverse mortgage insurance in the program makes it less expensive to borrowers than smaller reverse mortgage programs run by private lenders without FHA insurance.
 - g. Process.
 - (i). Independent counseling required through approved non-profit counseling service.¹⁵
 - (ii). Application at HUD approved HECM lender. See Appendix B. for qualified lenders, effective April 3, 2005.¹⁶
2. Fannie Mae “Home Keeper” & “Home Keeper for Home Purchase” loans.

¹⁵ HUD Home Equity Conversion Mortgage qualified counseling services, compiled as of March 21, 2005, are listed at <http://www.hud.gov/offices/hsg/sfh/hecm/states/virginia.txt>.

¹⁶ Updated qualifications as published by HUD available at this link at the Department's site: <http://www.hud.gov/ll/code/llplcrit.html>.

- a. Essentially similar to the HECM program (age 62, principal place of residence, etc.), but limit of home value for mortgage is increased to \$333,700 (in 2004).
 - b. The *Home Keeper for Home Purchase* reverse mortgage may be used to buy a home, ultimately eliminating monthly mortgage payments. This loan combines a home purchase mortgage with a reverse mortgage, often used by homeowners who want to sell their current home and acquire another.
 - c. More information is available online.¹⁷
- D. **Caveat:** family or other non-commercially funded reverse mortgages may trigger restrictions issued in December, 2004, Virginia Medicaid annuity clarifications.¹⁸

III. Medicaid Issues

A. Sales.

- 1. Fair market value rule.
 - a. Mom sells home for less than tax assessed value.
 - (i). Sale considered an “uncompensated transfer of assets” which may incur a penalty.¹⁹
- 2. Contract / note valuation.
 - a. Mom sells home to child in exchange for promissory note.
 - (i). Owner held mortgage note presumptively valued at face.
 - (ii). Presumption rebuttable by “knowledgeable source.”²⁰

B. Gifts / uncompensated transfers of assets.

- 1. Exempt transfers.²¹
 - a. Spouse to spouse.
 - b. Children under 21
 - c. Disabled children

¹⁷ See Reversemortgage.org, at <http://www.reversemortgage.org/Default.aspx?tabid=233> (private consortium); official Fannie Mae frequently asked questions and answers, http://www.fanniemae.com/global/pdf/homebuyers/homekeeperstriper.pdf;jsessionid=KRHPLZXWUOBAFJ2FQS_HSFQG (and Appendix E).

¹⁸ See Appendix C, Virginia Medicaid Manual § M1140.260 ANNUITIES (Effective for All Applications Received On or After December 1, 2004), transmittal 79, available online at <http://www.dss.state.va.us/policymanual/medicaid/transmittal79.pdf> (Adobe page 37 of 94), see also Virginia Medicaid Manual § M 1140.260 at <http://www.dss.state.va.us/policymanual/medicaid/s11.pdf> (Adobe page 178 of 222).

¹⁹ Virginia Medicaid Manual § M 1450.000; Virginia Medicaid Manual § M 1110.400 A. (tax assessment rule).

²⁰ Virginia Medicaid Manual § S 1120.220.

²¹ Virginia Medicaid Manual § M 1450.502.

- d. Special Needs Trust for disabled persons under 65
 - e. Special Needs Trust for disabled child of any age
 - f. Transfer of parent's home to child taking care of parent for 2 years.
2. Non exempt transfers.
- a. Each spouse's transfer deemed transfer by other.
 - (i). Exception: post-eligibility transfers by community spouse.²²
 - b. Look-back.²³
 - (i). Non-trust donee, 36 months.
 - (ii). Trust donee, 60 months.
 - c. Penalty calculation.²⁴
 - (i). Equation : (Gift \$) / \$4,060 (\$5,403 in Northern Virginia²⁵) = months ineligible (rounded down).
 - (ii). Penalty commences:
 - (1). month of transfer for applicants.
 - (2). month following month of transfer for recipients.²⁶
- C. Life estate / remainder interest transactions.
- 1. Often seen because a life estate in real estate is not a countable resource in Virginia.²⁷
 - 2. Parent buys life estate from child in child's home.
 - a. If for actuarial life expectancy of parent,²⁸ compensated transfer.
 - b. Life estate is exempt.
 - c. Beware possible IRC 121 limitations for exclusion of gain.
 - 3. Parent conveys parent's remainder interest in parent's home to child.
 - a. Sale should be of calculated remainder interest of parent under table.
 - (i). Beware possible IRC 121 limitations for exclusion of gain.
 - b. Gift of the remainder interest is uncompensated.

²² Virginia Medicaid Manual § M 1450.500. However, should the community spouse become institutionalized and a Medicaid applicant, such transfers are considered.

²³ Virginia Medicaid Manual § M 1450.500.

²⁴ Virginia Medicaid Manual §M 1450.700, 702.

²⁵ Arlington, Fairfax, Loudoun, AND Prince William Counties, and the Cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park.

²⁶ Virginia Medicaid Manual § M 1450.702 A.

²⁷ Virginia Medicaid Manual § M 1110.515 B 1 a.

²⁸ The life estate table for Medicaid purposes is found at Virginia Medicaid Manual § S 1140.120.

IV. Appendices.

- A. HECM Loan Application.
- B. HUD Approved HECM lenders in Virginia (April 3, 2005).
- C. Virginia Medicaid Manual § M1140.260, Annuities.
- D. Fannie Mae approved Lenders for Home Keepers Loans in Virginia.
- E. Fannie Mae Fact Sheet for Home Keepers Loans.
- F. Print version of Shawn's Mini Mental Status Examination.