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As of: September 24, 2020 1:42 PM Z

Williams v. Machen

Circuit Court of Fairfax County, Virginia

December 16, 2019, Decided

Case No. CL 2019-02656, Case No. CL 2019-11031

Reporter

104 Va. Cir. 70 *; 2019 Va. Cir. LEXIS 1189 **

David Harold Williams et. al. v. Robert B. Machen, et. al.; Robert B. Machen et. al. v. Leonard Guy Rainey, et. al.

Civil Procedure > Settlements > Releases From Liability

Core Terms

probate, credibility, impeach, satisfaction, procured

[HN1](#) [v] Settlements, Releases From Liability

A necessary component of an enforceable release is that it derives from a valid authority to enter into the release and does not otherwise arise from a void instrument.

Case Summary

Overview

HOLDINGS: [1]-The evidence failed to show that the documents in question were properly executed as required under [Va. Code Ann. § 64.2-403\(A\)](#), [\(C\)](#), and more importantly, the evidence was overwhelming that the documents had been procured by undue influence and fraud; the executor essentially self-appointed himself under an impeached will, and it was in the estate's interest to investigate where the testator's personal belongings had gone.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Estate, Gift & Trust Law > ... > Probate > Probate Proceedings > Jurisdiction

Estate, Gift & Trust Law > Wills > Will Contests

[HN2](#) [v] Jury Trials, Province of Court & Jury

A complaint to impeach a will pursuant to [Va. Code Ann. § 64.2-448\(E\)](#) is heard and decided by a jury. The jury's verdict is generally binding. However, it is up to the court to decide whether to admit a will to probate.

Outcome

Documents not admitted to probate.

Estate, Gift & Trust Law > Wills > Will Contests > Execution

Estate, Gift & Trust Law > Estate Administration > Probate > Probate Proceedings

Estate, Gift & Trust Law > Wills > Will Contests > Testamentary Capacity

LexisNexis® Headnotes

[HN3](#) [v] Will Contests, Execution

The admission of a document to probate by the clerk of the court under [Va. Code Ann. § 64.2-444](#) is an acknowledgement the document is testamentary in character and not subject to a demurrer or collateral attack. Under [Va. Code Ann. § 64.2-448](#) a party interested in the probate of a will may nonetheless file a complaint to impeach or establish a will admitted to probate within one year of the clerk's order admitting the will. Despite having been admitted to probate, once the will is challenged, the burden remains on the propounder of the will to prove the due execution and competency of the testator, as though no probate had ever been granted.

Civil Procedure > Settlements > Releases From Liability

Estate, Gift & Trust Law > ... > Probate > Personal Representatives > Claims Against & By

Estate, Gift & Trust Law > ... > Personal Representatives > Duties & Powers > Fiduciary Responsibilities

[HN4](#) **Settlements, Releases From Liability**

Although approval of the settlement of claims is permissive, such releases procured by the executor may be set aside, if the executor did not act in good faith, with ordinary prudence and with due regard for the estate's interest.

Legal Ethics > Professional Conduct

[HN5](#) **Legal Ethics, Professional Conduct**

[Va. Sup. Ct. R. pt. 6, § II, R. 4.3](#) reminds lawyers who communicate with unrepresented parties that they are not to offer legal advice to an unrepresented party.

Legal Ethics > Client Relations > Conflicts of Interest

[HN6](#) **Client Relations, Conflicts of Interest**

Although violations of the ethical rules will not give rise to a cause of action, an ethical lapse may be based upon concurrent facts that can affect the bona fides of a transaction, similar to actions taken with a clear conflict

of interest.

Estate, Gift & Trust Law > Wills > Will Contests > Undue Influence

[HN7](#) **Will Contests, Undue Influence**

A document found not to be the last will and testament of the decedent and a document that is found to be the product of fraud and undue influence **is a void instrument if timely impeached**. As a void instrument, it never creates an Estate and any Executors named under the invalidated document cannot assume the authority provided to executors of a decedent's estate. The Virginia Supreme Court has recognized that when a will is invalid, such as, for example a will written by an insane person, then the executor if he disposes of property under the will in a manner different from what would be the proper distribution of its, when the will is set aside, as if he paid a legacy, the payment cannot be valid.

Business & Corporate Compliance > ... > Contracts Law > Contract Formation > Consideration

Civil Procedure > Settlements > Releases From Liability

[HN8](#) **Contract Formation, Consideration**

The failure of consideration can nullify a release or any contract.

Civil Procedure > Settlements > Releases From Liability

[HN9](#) **Settlements, Releases From Liability**

Releases may be rescinded for fraud in its procurement.

Headnotes/Summary

Headnotes

A release that is pleaded as an accord and satisfaction

is invalid if it is the byproduct and tool of a fraudulent scheme and lacks the necessary consideration to be an enforceable instrument.

Lawyers who communicate with unrepresented parties cannot offer legal advice to those unrepresented parties.

Counsel: [****1**] Mark D. Obershain, Esq., Justin M. Wolcott, Esq., OBENSHAIN LAW GROUP, Harrisonburg, Virginia.

George O. Peterson, Esq., Tania Saylor, Esq., Peterson Saylor, PLC, Fairfax, Virginia.

Judges: John M. Tran, Judge.

Opinion by: John M. Tran

Opinion

[*70] This letter addresses the issue of accord and satisfaction the Court kept under advisement pending the jury's verdict on the Will contest between the parties — *devisavit vel non*. Specifically, one of the Plaintiffs in this consolidated action, Nell Willis, had executed a release of claims against the Defendant Robert B. Machen, individually and as Executor of the Estate of Wilma R. Williams, his attorney, and the Estate itself. In return for executing the release, she received \$30,000 as an early distribution and has since retained those funds. The Defendant raised, as a plea in bar and received by the Court as an affirmative defense, the claim of accord and satisfaction and release.

The Court reserved ruling on the issue of accord and satisfaction and release because [HN1](#)^[↑] a necessary component of an enforceable release is that it derives from a valid authority to enter into the release and does not otherwise arise from a void instrument. A finding that the Will is invalid nullifies [****2**] all actions taken by the Executor under that instrument, including the release.

[*71] Background and Standards

In an uncommon procedural posture, this consolidated case presented overlapping issues to be decided at trial, including the request that the jury determine whether any of the documents produced on July 31, 2018 constituted the last Will and Testament of Wilma R. Williams.

[HN2](#)^[↑] A complaint to impeach a Will pursuant to [Va. Code § 64.2-448\(E\)](#) is heard and decided by a jury. The jury's verdict is generally binding. [Hartman v. Strickler](#), 82 Va. 225 (1886); [Kirby v. Kirby](#), 84 Va. 627, 5 S.E. 539 (1888). However, it is up to the Court to decide whether to admit a Will to probate. [Va. Code § 64.2-448\(E\)](#) provides:

Upon the filing of a complaint to impeach or establish the will pursuant to this section, the court shall order a trial by jury to ascertain whether what was offered for probate is the will of the testator. The court may require all testamentary papers of the testator to be produced and direct the jury to ascertain whether any paper produced is the will of the testator. The Court shall decide whether to admit the will to probate.

The decedent, Wilma R. Williams, died on August 10, 2018. Ten days before she died, she purportedly signed three documents, dated July 31, 2018. The documents are purportedly three originals [****3**] of her last Will and Testament. On August 17, 2018, seven days after her death, Defendant Robert Machen admitted to probate one of the July 31, 2018 documents and received an appointment as the Executor of the Estate of Wilma R. Williams.

[HN3](#)^[↑] The admission of a document to probate by the Clerk of the Court under [Va. Code § 64.2-444](#) is an acknowledgement the document is testamentary in character and not subject to a demurrer or collateral attack. [First Church of Christ, Scientist v. Hutchings](#), 209 Va. 158, 161, 163 S.E.2d 178 (1968). Under [§ 64.2-448](#) a party interested in the probate of a will may nonetheless file a complaint to impeach or establish a will admitted to probate within one (1) year of the Clerk's Order admitting the will. Despite having been admitted to probate, once the Will is challenged, the burden remains on the propounder of the Will to prove the due execution and competency of the testator, as though no probate had ever been granted. [Dickens v. Bonnewell](#), 160 Va. 194, 206, 168 S.E. 610 (1933).

On February 25, 2018, David Harold Williams, a beneficiary named under the probated Will and a nephew related by marriage to Ms. Williams, timely filed a Complaint to impeach the Will under [Va. Code § 64.2-448](#). He was joined by and his first cousin, Nell Willis, who is Ms. William's niece.

Later, on August 9, 2019, Mr. Machen timely filed a Complaint to establish one of **[**4]** three documents or a fourth document represented as a holographic will in the event Mr. Williams and Ms. Willis succeeded in **[*72]** impeaching the one Will admitted to probate. At the conclusion of Mr. Machen's case-in-chief, he took a nonsuit of Count III that sought to admit, as an alternative relief, a document that he claimed was Ms. Williams' holographic Will. The three typewritten Wills remain at issue.

Prior to the case being presented to the jury, the parties agreed upon the order of presentation of the evidence and the burden of proof. The Court instructed the jury that Mr. Machen had the burden of proving by the greater weight of the evidence that any of the three documents was Wilma Williams' Will. The higher standard of proof of clear and convincing remained upon David Williams and Nell Willis to prove the documents purporting to be her Will were procured by undue influence and fraud.

At trial, the evidence failed to show by the greater weight of the evidence that the July 31, 2018 documents were properly executed as required under [Va. Code § 64.2-403\(A\)](#) and [\(C\)](#). More importantly, the evidence was overwhelming that the July 31, 2018 documents had been procured by undue influence and fraud. The jury's verdict **[**5]** is wholly consistent with the findings of this Court.

Upon the impeachment of the Will, the actions of the Executor are nullified because he lacks authority to dispose of the assets of the Estate or take any action with respect to the Estate, including obtaining releases. The release that is the subject of an accord and satisfaction defense is also unenforceable because it is the byproduct and tool of a fraudulent scheme and lacks the necessary consideration for an enforceable instrument.

The release is lastly not a bargain this Court would approve under [Va. Code § 8.01-425](#), [HN4](#)^(↑). Although approval of the settlement of claims is permissive, such releases procured by the executor may be set aside, if the executor "did not act in good faith, with ordinary prudence and with due regard for the estate's interest".

[Kelly v. R.S. Jones, Inc., 242 Va. 79, 84, 406 S.E.2d 34, 7 Va. Law Rep. 2847 \(1991\)](#).

The Court finds here that the executor essentially self-appointed himself under an impeached Will and it is in the true Estate's interest to investigate where Wilma Williams' personal belongings have gone — especially those items moved out to a storage facility, to consider all claims against Mr. Machen, to recover the distributions that have been made without authority and to distribute the Estate as **[**6]** an intestate Estate.

Summary of Material Facts

Wilma R. Williams was 93-years old when she died. In the years leading up to her death, she was known to be independent and private. From all accounts, wherever she went, she made friends and developed for herself a community of friends from her church group and neighborhood. Her relatives lived in Georgia, North Carolina, Texas and Nebraska. By the time of her death in 2018, she had lost her brother and sister, had no children of her own and was survived only by nephews and nieces.

[*73] Leading up to Ms. William's death, there were signs that she had health issues as she approached her 90's. By 2015, she had fallen, had to rely on meals on wheels and vacate her house which was then overflowing with clutter. Her recovery, aided by Mr. Machen's involvement in having her return to her home, may have restored her in the eyes of her friends, neighbors and church associates, but it did not prevent her decline.

As convincing as the evidence was that Wilma Williams had capacity up to the 2018, the events of July 2018 produced a profound change and the evidence of the change far outweighed evidence to the contrary.

The downturn began with a call in the **[**7]** late evening to Dr. Laurie Flint — a neighbor and daughter of long-time friend. Dr. Flint testified that she was awakened by a garbled phone message sounding like Ms. Williams but retaining none of clarity or articulateness that Ms. Williams previously enjoyed.

An ambulance arrived at the scene and the first responders were able to gain access to her home. Ms. Williams moved from her house where she had lived for at least 45 years into the rehabilitation center known as "The Fairfax" near Ft. Belvoir in Fairfax, Virginia. During her stay, Ms. Williams stabilized but soon learned that she would not be returning home. Whether it was from

realizing the catastrophic changes in her life or the effects of gradual deterioration, the overwhelming credible evidence was that by July 31, 2018, the date of the purported Will signing, Wilma R. Williams was a shadow of herself, confined to a wheelchair and reliant on a hearing enhancement device that looked like large headphones.

The fact that Ms. Williams died 10 days after she purported signed her Will is unfortunate but not surprising given the credible evidence provided by Dr. Flint, Ron Fitzgerald, her financial advisor, and Toni Foreman, a complete **[**8]** stranger and unwitting good Samaritan. These witnesses all provided an alarming appraisal of Ms. Williams' condition.

The credibility of witnesses is put at issue whenever they testify. There were generally three categories of witnesses who appeared before the Court in terms of their assessed credibility. There were witnesses such as Dr. Laurie Flint, whose earnest demeanor and clarity of thought and expression left the Court with no doubts that even when she had trouble recalling or when her testimony was imperfect, that it was evident Ms. Williams had been taken advantage of.

Mr. Machen argued that if Dr. Flint were to be believed, then it must be a proven fact that Wilma Williams trusted Mr. Machen. Dr. Flint's testimony had to be considered in context. It is not enough that she spoke softly when conceding that Wilma Williams had stated she "trusted" Bob Machen — but Dr. Flint added that Ms. Williams had warned her that Mr. Machen should be "watched." When weighed against the convincing manner in which Dr. Flint described the deteriorated appearance of her friend of many decades, there could be no doubt that the concerns voiced by Ron Fitzgerald echoed **[*74]** the doubts over Mr. Machen's **[**9]** trustworthiness and Ms. Williams growing suspicions of his involvement in her life. Since 2016, Mr. Machen had held a Power of Attorney and the keys to her home, not once making use of certain items. His actions quickened at the same time he came to learn of Ms. Williams' extensive investment holdings.

Both Ron Fitzgerald and Toni Foreman were convincing in the manner in which they presented their testimony. Their explanation of events was far more reasonable than that offered by witnesses called to support Mr. Machen.

In contrast to the three witnesses above, the credibility of the witnesses who spoke up in support of Mr. Machen's case fell far short of being persuasive. The

notary appeared to be a witness inclined to say whatever she thought needed to be said, regardless of whether her testimony was true. The only certainty from her testimony is that she signed and affixed her notary seal, an act that can be described as more ministerial than substantive in this case.

William Bournes, the other witness who purportedly witnessed a proper execution of the Will by Wilma Williams, was afflicted as a self-described lifelong friend of Mr. Machen. Mr. Bournes failed to question the propriety **[**10]** of coming into the rehabilitation facility and surrounding a patient with virtual strangers to witness the signing of three Wills. Ms. Foreman's description of Mr. Machen and Mr. Bournes engaged in self-absorbed banter regarding their experiences in the military while Ms. Williams sat mute and detached was a much more credible description of the events of July 31, 2018 than that offered by Mr. Bournes.

Consequently, this was not a case where the jury focused on the wrong witness or a witness to a Will who suffers the lack of recall in the formalities of the execution of the Will as had occurred in [Martin v. Coleman](#), 234 Va. 509, 512, 362 S.E.2d 732, 4 Va. Law Rep. 1367 (1987). This case presented an instance where the credibility of the supporting witnesses to the Will was so strained that even standing alone, they could not be believed and when weighed against the testimony of the other witness, offered no support to Mr. Machen's claims.

Although his claims were aided by medical records that recorded Ms. Williams as being "alert", the records were admitted without explanation and the weight afforded to them could not overcome the strength of evidence proving that Ms. Williams, on the day of the signing, lacked the capacity to understand the documents shown her **[**11]** and that it was probable that she signed the papers before the witnesses arrived in her room.

Ultimately, the silent witnesses — the circumstantial evidence of undue influence and fraud that did not need to explain themselves, left the Court with the unshakeable conclusion the 2018 documents were not signed by Wilma Williams or if she had affixed her scribbled signatures that she lacked the testamentary capacity to understand the extent of her assets, the **[*75]** scope of her affections and the consequences of the documents presented to her.

The several instances of circumstantial evidence of undue influence and fraud included but are not limited to the following:

- Mr. Machen's recording of a false power of attorney in July 2018¹ to be able to represent to Ron Fitzgerald that he had a power of attorney which would entitle him to obtain copies of Ms. Williams UBS Statements. His taking the statements home and from which he discovered to his surprise that this elderly widow whose only asset appear to be a home in Fairfax (which was itself valuable) was actually a millionaire.

The recorded power of attorney was a false document because it was the same 2016 Power of Attorney that Wilma Williams in [**12] September of 2017 had written upon to note the resignation of Mark Machen, the son of Robert Machen, as alternative agent under the Power of Attorney. The 2018 recorded Power of Attorney did not have the strike-out and moreover, it contained an additional strike out of the provision that would have made the Power of Attorney operable only upon Ms. Williams' incapacity. Compare Defendant's Exhibit #44 with Exhibit #44A. The Court has no doubts that Wilma Williams did not strike out that sentence that removed the condition of her being incapacitated or initial the strikeouts in the recorded Power of Attorney, allowing Mr. Machen to act under the Power of attorney.

With the 2016 Power of Attorney so manipulated, Bob Machen placed himself in a position to exercise control of Ms. Williams UBS Account and all other assets.

- Bob Machen moved with an unnatural sense of urgency to obtain and probate Ms. Williams Will in July 2018². in just 20 days after she had fallen and suffered a stroke, he had her execute a Will that for the past 93 years, she had not thought to do. If it were to be believed that Wilma Williams and no one else, and thought that she was in imminent danger of death, the question [**13] arises why it was so urgent for Mr. Machen to have her sign a Will on July 31, 2018. Having waited 93 years, she could have just as easily executed a Will after moving to an assisted living center where she had been

heading in early August³. She could have certainly waited until after she consulted with her financial advisor.

If it were true that Mr. Machen held a valid Power of Attorney and if he did not believe she was seriously ill and could live for years longer, there was no need to have her execute a document so important as her last Will and Testament in the sterile setting of the rehabilitation center.⁴

[*76] • Bob Machen sought and inexplicably failed to use an experienced lawyer to draft her Will. Mark Kellogg, Esq. - a lawyer with whom he had been friends for decades and who was available up to and including July 31, 2018 to draft the Will was abundantly clear that he could have drafted the Will at any time before his planned European vacation on August 15, 2019. By sidestepping Mr. Kellogg, while asking for his help, it set up an easy excuse for Mr. Machen to claim that he sought out help from an impartial draftsman.

- A mere ten (10) days after Wilma R. Williams' death, Mr. Machen [**14] admitted the Will to probate and received his appointment as Executor, Within a short time after Mr. Kellogg's return from this extended European Vacation, Mr. Machen collaborated with his attorney to send out a Final Release and Receipt letter to all the beneficiaries named under the "Will" admitted to probate. Although Mr. Kellogg's presence was not sought in the drafting of and execution of the Will, his appearance does nothing more than lend an air of legitimacy to an illegitimate enterprise.

The haste with which both men acted is apparent from the cover letters sending the release to each of the identified distributee.⁵

¹ Compare Defendants' Exhibit #44A with Exhibit #44

² See Defendants' Exhibits #1, #4 and #5 dated 07/31/18 as compared to Defendants' Exhibit 58, Admission record of 7/11/2018 for The Fairfax, bates number THEFAIRFAX 246.

³ Defendants' Exhibit #16 (08/05/18 Application to BrightView Senior Living — Assisted Living Facility).

⁴ Defendants' Exhibit # 18 — Photo of bed at The Fairfax.

⁵ The cover letter violates [Rule 4.3 of the Virginia Rules of Professional Conduct](#). It contains legal advice, notifying the recipients that the Executor did not have to pay out distributions earlier than the one-year anniversary of his qualification and that the Will contained an enforceable *in terrorem* clause that is triggered by complaints over the administration of the Estate. [HNS\[↑\]](#) Setting aside the accuracy of such representations, [Rule 4.3](#) reminds lawyers who communicate with unrepresented parties that they are not

There were two versions of the October 15, 2018 letter and both contain typos, some of which were repeated and others were not. The letter sent to [*77] Nell Willis starts off with the first word totally capitalized as in "AS" and contains other typos throughout.⁶

The form letter sent to nieces and nephews of Ms. Williams contained some of the same typos and used language that was curious for a legal notice. And given the relatively small number of letters sent, it was suspicious the authors did not even bother to address them specifically to the recipient.

The cover letter [**15] was threatening and left Nell Willis and Leonard Rainey with the clear impression that they had no choice but to agree to the release.

The cover letter was false because it did not inform the recipients that the Will was not a valid Will.

The Release⁷ itself contained untruths. It stated that the releasee had "confirmed" with her own independent counsel the need to sign the release. When the release was drafted, the author(s) had no idea that statement would be true. It was, however, apparent and known that Nell Willis did not consult with a lawyer. It would have been truthful for the release to state that the releasee had "an opportunity to consult with a lawyer."

to offer legal advice to an unrepresented party. Moreover, the letter is framed in a manner to suggest the Executor is acting against the advice of counsel, suggesting the attorney is actually disinterested, especially where the letter states that "[W]e have determined there are sufficient assets . . . and closes with "Thank you for . . . assisting us in this matter".

The letter defines the signatory as an attorney for the Estate, identifying for the non-represented addressee of the letter what appears to be three distinct entities — "The Decedent" — "The Estate" and "The Executor". It confers a false assurance of independent legal analysis because Robert Machen is identified in the Will as a lawyer — indeed Wilma Williams' trusted lawyer and friend - who presumably could have sent the same letter. The cover letter does not disclose that Mr. Machen drafted the Will. HNG[↑] Although violations of the ethical rules will not give rise to a cause of action, an ethical lapse may be based upon concurrent facts that can affect the *bona fides* of a transaction, similar to actions taken with a clear conflict of interest.

⁶ Plaintiffs' Exhibits #11 and #12.

⁷ Defendants' Exhibit#19.

To purposely insert the statement that the person who signed the release actually consulted (or confirmed) with a lawyer is to prepare a document that will probably be false and is then afterwards actually known to be false when it is returned, known to be constructively false, or is a document whose falsity is allowed to be perpetrated by willful blindness.

- Mr. Machen's refusal to show Dr. Flint the document he had Wilma Williams sign under the poor excuse that "Dr. Flint" was in the document. It is more credible that if, [**16] in fact, Ms. Williams signed or scribbled on the documents that were eventually presented as her Wills, that Mr. Machen was simply concealing from Dr. Flint the fact that he had drafted a document in which he was ultimately the largest beneficiary.⁸

- Mr. Machen's rush in having the so-called Will witnessed by a lifelong friend and a stranger rather than any other of the number of visitors who purportedly visited Ms. Williams. Mr. Machen could have called upon any number of friends or acquaintances that he brought to testify. He could have called on Ron Fitzgerald who had been Ms. Williams' financial advisor for years. He chose instead to rely on a friend, a young notary and a stranger.⁹

- Mr. Machen's inclusion of his son Mark Machen as a contingent beneficiary in a document purported to be Ms. Williams' last Will and Testament.¹⁰

- The noticeable difference in the July 31, 2018 Will compared to the written drafts known to be prepared by Wilma Williams in which she could not decide how to distribute her assets. The sudden inclusion of the no-contest clause with the draft separately written in a [*78] handwriting that does not appear to belong to Ms. Williams.¹¹

- The errors in identifying surviving [**17] family members in the so-called holographic Will,

⁸ Credible and persuasive testimony of Dr. Flint.

⁹ Testimony of Ron Fitzgerald, William Bourne, Rev. Joseph Acanfara, Raffie Shahrigran. Tina Connor, Pad Wade, and Marilyn Henretty.

¹⁰ Defendants' Exhibits #1 at MACHEN01016 and MACHEN1017.

¹¹ Compare Defendants' Exhibits #1, #4 and #5 with Defendants' Exhibit #3 and #7 (and Plaintiffs' Exhibit #27).

suggesting it was not the product of Ms. Williams' thoughts or intentions.¹²

- The July 31, 2018 explanation of why Robert Machen was named as a beneficiary reads more like an opening statement a lawyer would make arguing his case than what a layperson would have written in disposing of her property.
- Mr. Machen's assertion of control over the UBS financial statements that revealed that Ms. Williams had over a million dollars in investments. The shielding off of Ron Fitzgerald and demands made upon Mr. Fitzgerald to send the statements over to Mr. Machen's address in the absence of any evidence suggesting that Wilma Williams had been consulted and approved of the address change supports the claims of undue influence.¹³

As the evidence in this case unfolded and while the jury was deliberating, the Court had to consider the possibility that the jury's verdict would be inconsistent with the weight of the evidence. Fortunately, that inconsistency did not occur.

Additional Legal Analysis

[HN7](#)^[↑] A document found not to be the last Will and Testament of the decedent and a document that is found to be the product of fraud **[**18]** and undue influence is a void instrument if timely impeached. As a void instrument, it never creates an Estate and any Executors named under the invalidated document cannot assume the authority provided to executors of a decedent's estate. As long ago as 1844, the Virginia Supreme Court recognized that when a Will is invalid, such as, for example a Will written by an insane person, then the executor ". . . if he disposes of property under the will in a manner different from what would be the proper distribution of its, when the will is set aside, as if he paid a legacy, the payment cannot be valid." [Coalter's Ex'r v. Bryan, 42 Va. 18, 1844 Va. LEXIS 17, 88-90 \(1844\)](#).

In the *Coalter* case it was noted that even if an Executor did not have notice that Will was invalid and the property he held could not be distributed, that the Executor could still be held responsible to the true owner of the property.

Assuming, but not concluding, that consideration¹⁴ existed in the first place for the release, whatever consideration may have existed failed because except for bona fide purchasers for value, the distributees will have to return the disbursements made by Mr. Machen. Some of the distributees are not entitled to receive a distribution from the estate and are **[**19]** technically holding stolen funds.

[HN8](#)^[↑] The failure of consideration can nullify a release or any contract. See, [Planters Nat. Bank of Federicksburg v. E.G. Heflin Co., 166 Va. 166, 184 S.E. 216 \(1936\); Neely v. White, 177 Va. 358, 366-67, 14 S.E.2d 337 \(1941\) superseded on other grounds by statute, Cummings v. Fulghum, 261 Va. 73, 540 S.E.2d 494 \(2001\)](#). Given that the distributees may be required to return the monies they received, their consideration for the release has failed.

Moreover, the release is a fraud upon the heirs at law of the intestate estate. [HN9](#)^[↑] Releases may be rescinded for fraud in its procurement. [Nationwide Mut. Ins. Co. v. Martin, 210 Va. 354, 357-58, 171 S.E.2d 239 \(1968\)](#). Generally, adversaries in litigated or disputed proceedings cannot reasonably rely on representations made by their opponents during settlement or compromise negotiations. [Jared and Donna Murayama 1997 Trust v. NISC Holdings, LLC, 284 Va. 234, 248, 727 S.E.2d 80 \(2012\) citing Facebook, Inc. v. Pacific Nw. Software, Inc. 640 F.3d 1034, 1039 \(9th Cir. 2011\)](#). That same adversarial relationship, however, does not exist between a named distributee under a Will and an Executor who appears to be working on behalf of the distributee over the advice of counsel for the Estate. To the lay person, it is reasonable to perceive that the Executor or the attorney for the Estate, either or both, represent the interest of the lawful beneficiaries of the Estates.

Ultimately, however, the facts of this case more closely resemble [Carter v. Williams, 246 Va. 53, 431 S.E.2d 297, 9 Va. Law Rep. 1438 \(1993\)](#) than [Parson v. Miller,](#)

¹² Defendants' Exhibit #3.)

¹³ Credible and persuasive testimony of Ron Fitzgerald.

¹⁴ The amount of consideration is less than a peppercorn where an Executor obtains a release by paying out to distributees sums that they are already entitled to receive **[*79]** and the assets in the estate far exceeds its liabilities. Although as Mr. Machen had argued in his plea-in-bar, a peppercorn is all that is usually needed, some consideration may fall short of even a peppercorn such that the conveyance can only be construed as a gift. See, [Sfreddo v. Sfreddo, 59 Va. App. 471, 488-89, 720 S.E.2d 145 \(2012\) citing Hockett v. Emmett, 215 Va. 726, 729, 214 S.E.2d 139 \(1975\)](#).

[296 Va. 509, 822 S.E.2d 169 \(2018\)](#). The failure of consideration and the fraud in the procurement of the release renders **[**20]** the release executed by Nell Willis unenforceable and offers no opportunity for Mr. Machen to raise it as a defense here or elsewhere.

Conclusion

The July 31, 2018 document is not Wilma R. Williams last Will and Testament. None of the other documents are her Will. At present, Ms. Williams has left behind an Intestate Estate and consequently, the Court will enter a final Order confirming the jury's verdict and declining to admit any of the documents to probate.

The Court asks Mr. Obenshain to prepare and circulate a Final Order that confirms the jury's verdict and final Order adopting and incorporating this letter opinion as it addresses the issue of the Nonsuit, and then the accord and satisfaction. The parties should advise the Court whether there are any other outstanding issues to be addressed before the Court enters a Final Order.

This matter had been continued to **Thursday, December 19, 2019 at 9:30 a.m.** The parties may ask that the hearing be moved to a more convenient date by reaching out to the Court's law clerk. If the parties are unavailable on Friday — 01/03/2020 at 9:30 a.m. or 01/17, the Court will schedule a 9:30 a.m. hearing on other days the courthouse is open.

Thank you. **[**21]**

/s/ John M. Tran

John M. Tran

Judge, Fairfax Circuit Court



Neutral

As of: September 24, 2020 1:42 PM Z

Canody v. Hamblin

Supreme Court of Virginia

July 19, 2018, Decided

Record No. 170747

Reporter

295 Va. 597 *; 816 S.E.2d 286 **; 2018 Va. LEXIS 93 ***; 2018 WL 3471372

ROBERT LEE CANODY, II v. CHERYL A. HAMBLIN,
ET AL.

Subsequent History: As Corrected July 26, 2018.

Prior History: [***1] FROM THE CIRCUIT COURT OF
NELSON COUNTY. Michael T. Garrett, Judge.

of a will the burden of proving fraud; [2]-In this case, appellant's evidence established, at most, the opportunity for fraud due to the lack of initials on each page of the will, the absence of page numbers, the fact that paragraphs did not carry over on successive pages, and the unfamiliarity of the witnesses with the contents of the first two pages of the will; appellant never came close to establishing that the will actually was fraudulent, and the evidence offered to refute the fraud claim showed that the will tendered for probate was consistent with the expressed wishes of the testator, and thus the admission of the will to probate was proper.

[In re Canody Estate, 2017 Va. Cir. LEXIS 21, 95 Va. Cir. 92 \(Jan. 25, 2017\)](#)

Outcome

Judgment affirmed.

Disposition: Affirmed.

LexisNexis® Headnotes

Core Terms

probate, testamentary, proponent, genuineness,
fraudulent, forgery

Estate, Gift & Trust

Law > Wills > Interpretation > Intent of Testator

Case Summary

[HN1](#) Interpretation, Intent of Testator

Overview

HOLDINGS: [1]-The court adheres to case law that requires the proponent of a will to prove compliance with statutory requirements for the execution of a will, and, once that has been done, places on the challenger

Under settled law, testamentary intent must be ascertained from the face of the paper, extrinsic evidence being not admissible either to prove or disprove it. The indicia of testamentary intent must be found in the paper itself, and evidence aliunde (from another source) to supply this vital and necessary