

2012 ADDENDUM

to

CHAPTER 5

MANAGING INCAPACITY

by

Matthew C. Sunderlin, Certified Elder Law Attorney
Clark & Bradshaw, P.C.
Harrisonburg, Virginia
Telephone: (540) 433-2601

5.301 Testamentary Capacity. No person of unsound mind or under 18 years of age, unless emancipated,¹ can make a last will and testament (“will”).² “Neither sickness nor impaired intellect is sufficient, standing alone, to render a will invalid” on the grounds of mental incapacity of the testator.³ Weakness of understanding alone is insufficient to show mental incapacity to make a will,⁴ and weakness of intellect alone is likewise insufficient.⁵ The testator need not have “all the force of intellect which he may have had at a former period.”⁶ In order to make a will, a testator must be capable of “recollecting her property, the natural objects of her bounty and their claims upon her, [knowing] the business about which she is engaged, and how she wishes to dispose of her property.”⁷ The testator must have testamentary capacity at the moment when he or she executes the will.⁸ The testimony of witnesses as to the mental capacity of the testator at the time of the execution of the will carries great weight for determining the testator’s capacity.⁹ Moreover, “[a] pending competency

¹ Va. Code § 16.1-331 *et seq.*

² Va. Code § 64.1-47.

³ *Tate v. Chumbley*, 190 Va. 480, 495, 57 S.E.2d 151, 158 (1950); *Gilmer v. Brown*, 186 Va. 630, 639, 44 S.E.2d 16, 18 (1947).

⁴ *Ferguson v. Ferguson*, 169 Va. 77, 192 S.E. 774 (1937).

⁵ *Porter v. Porter*, 89 Va. 118, 15 S.E. 500 (1892).

⁶ *Woody v. Taylor*, 114 Va. 737 (1913).

⁷ *Tabb v. Willis*, 155 Va. 836, 156 S.E.2d 556 (1931).

⁸ *Fields v. Fields*, 255 Va. 546, 499 S.E.2d 826 (1998).

⁹ *Id.*

hearing or subsequent determination of incompetency does not determine whether testamentary capacity existed at the time the will was executed. The appointment of a guardian (discussed below) cannot be regarded as *prima facie* evidence of mental incapacity.”¹⁰ *Gilmer v. Brown* succinctly states:

“These decisions are in accord with the general rule that, in the absence of a controlling statute, the mere fact that one is under a guardianship does not deprive him of the power to make a will...[m]ental weakness is not inconsistent with testamentary capacity. A less degree of mental capacity is requisite for the execution of a will than for the execution of contracts and the transaction of ordinary business. One may be capable of making a will yet incapable of disposing of his property by contract or manage his estate....The condition of being unable, by reason of weakness of mind, to manage and care for an estate, is not inconsistent with capacity to make a will.”¹¹

5.521 Advance Health Care Directive Registry. The Department of Health has created an Advance Health Care Directive Registry ("Registry").¹² The Registry can be found at www.virginiaregistry.org. An individual who creates a health care power of attorney, an AMD, or a declaration of an anatomical gift¹³ may submit it to the Registry. The person registering documents must designate a legal representative or other persons (such as healthcare professionals) to have access to the Registered documents. There is no fee required for registration. If a document is submitted to the Registry, any revocation of the document should also be forwarded to the Registry. Failure to submit the revocation to Registry will not invalidate the revocation if it is otherwise properly revoked.

5.803 Jurisdiction. Virginia adopted the Uniform Adult Guardianship and Protective Proceeding Jurisdiction Act (“UAGPPJA”) effective July 1, 2011.¹⁴ The UAGPPJA provides the exclusive jurisdictional basis for a Virginia court to appoint a guardian or conservator for an adult.¹⁵ The UAGPPJA is designed to clarify and codify which state has jurisdiction over an individual who is the subject to a guardianship or conservatorship proceeding. When there is a question of jurisdiction, the statute applies when both states attempting to acquire jurisdiction over a matter have enacted the

¹⁰*Gibbs v. Gibbs*, 239 Va. 197, 202, 387 S.E.2d 499, 502 (1990) citing *Gilmer v. Brown*, 186 Va. 630, 641, 44 S.E.2d 16, 21 (1947).

¹¹ *Gilmer v. Brown*, 186 Va. 630, 637 (1947).

¹² Va. Code § 54.1-2944 *et seq.*

¹³ Va. Code § 32.1-291.1 *et seq.*

¹⁴ Va. Code § 37.2-1031 *et seq.*

¹⁵ Va. Code §§ 37.2-1001B and 1038.

statute.¹⁶ The statute sets out several avenues for Virginia acquire jurisdiction in a case. Virginia can have “home state,” “significant-connection state,” or “special” jurisdiction. In all instances, Virginia must be an appropriate forum. For purposes of the UAGPPJA, a "protective order" means an order appointing a conservator. The UAGPPJA also facilitates the transfer of an existing guardianship or conservatorship when the protected person moves into or out of Virginia.

5.803.1 Appropriate Forum. The factors to be utilized in determining if a Virginia court is an appropriate forum are as following: any expressed preference by the respondent; whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation; how long the respondent was physically present in or was a legal resident of Virginia; the respondent’s distance from the court; the respondent’s financial circumstances; the nature and location of the evidence; the ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence; the familiarity of the court with the facts and issues in the proceeding; and if an appointment is made, the court's ability to monitor the conduct of the guardian or conservator.¹⁷

5.803.2 Home State Jurisdiction. A Virginia court has “home state” jurisdiction to appoint a guardian or issue a protective order if the respondent was physically present in Virginia, (including any temporary absence) for at least 6 consecutive months immediately before the filing of a petition or at least 6 consecutive months ending within 6 six months immediately prior to the filing of the petition.¹⁸

5.803.3 Significant-Connection State Jurisdiction. A significant-connection state is defined as a state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available. To determine if Virginia has a significant-connection to the respondent, the court should weigh the following factors: the location of the respondent's family and other persons required to be notified of the proceeding, the length of time the respondent was physically present in Virginia and the duration of any absence, the location of the respondent's property, and the extent to which the respondent has ties to Virginia such as voting registration, state or local tax return filing, vehicle registration, driver's license, social relationship, and receipt of services.¹⁹

Virginia has “significant-connection state” jurisdiction if the respondent does not have a home state or a court of the respondent's home state has declined to exercise jurisdiction because the Virginia is a more appropriate forum. Virginia has “significant-connection state” jurisdiction even

¹⁶ Va. Code § 37.2-1051.

¹⁷ Va. Code § 37.2-1042.

¹⁸ Va. Code § 37.2-1039(1).

¹⁹ Va. Code § 37.2-1037.

if the respondent has a home state under the following circumstances: a petition for an appointment or order is not pending in the home state or another significant-connection state, and, before the Virginia court makes the appointment or issues the order: a petition for an appointment or order is not filed in the home state, no objection to the Virginia court's jurisdiction is not filed by a person required to be notified of the proceeding; and Virginia is an appropriate forum. Even if Virginia does not have “home state” or “substantial-connection state” jurisdiction, it has jurisdiction if the respondent's home state and all significant-connection states have declined to exercise jurisdiction because Virginia is the more appropriate forum.²⁰

5.803.4 Special Jurisdiction. Even if a Virginia court does not have “home state” or “significant connection state” jurisdiction, it may still have “special” jurisdiction.²¹

5.803.4.1 Emergency. In the case of an emergency, a Virginia Court will have “special” jurisdiction to appoint a guardian lasting for no more than 90 days. An “emergency” is a circumstance wherein the respondent will probably incur substantial harm to his health, safety, or welfare and the appointment of a guardian is necessary because there is no other person has authority or is willing to act on the respondent’s behalf.²² The respondent must be physically present in Virginia. Even if there is a “special” jurisdiction based on an emergency, a Virginia court must dismiss the proceeding at the request of the state with home state jurisdiction even if the dismissal is requested after the appointment.

5.803.4.2 Property in Virginia. A Virginia court always has “special” jurisdiction to issue a protective order over real or tangible personal property in Virginia.

5.803.4.3 Provisional Order. Before entry of a final order transferring a foreign order to Virginia, a Virginia court has “special” jurisdiction to appoint a guardian or conservator for an incapacitated person for whom a provisional order to transfer the proceeding from another state has been issued.

5.803.5 Unjustifiable Conduct. A Virginia court has discretion to decline jurisdiction over a case if the person seeking to invoke its jurisdiction has engaged in unjustifiable conduct. If a Virginia court determines that it acquired jurisdiction because of an individual’s unjustifiable conduct, it may assess against that individual the necessary and reasonable expenses including attorney fees, investigative fees, court costs, communication expenses, witness fees and expenses, and travel expenses. Instead of declining jurisdiction because of an individual’s unjustifiable

²⁰ Va. Code § 37.2-1039(2).

²¹ Va. Code § 37.2-1040.

²² Va. Code § 37.2-1037(a).

conduct, the Virginia court may make appropriate orders to assure the respondent's health, safety, welfare, and property is protected or to prevent a repetition of the unjustifiable conduct. The court may stay the Virginia proceeding until a petition for the appointment of a guardian or issuance of a protective order is filed in another state's court with jurisdiction.²³

5.803.6 Declination of Jurisdiction. Even though a Virginia court has jurisdiction it may decline to exercise its jurisdiction if it determines at any time that a foreign court is a more appropriate forum. If jurisdiction is declined, the Virginia court must dismiss or stay the proceeding. The court may the condition declination on the filing of a petition for the appointment of a guardian or issuance of a protective order in another state.²⁴

5.803.7 Notice. If a petition for the appointment of a guardian or issuance of a protective order is brought in Virginia and if Virginia is not the respondent's home state when the petition was filed, in addition to complying with the Virginia notice requirements, notice of the petition must be given to those persons who would be entitled to notice of the petition if a proceeding were brought in the respondent's home state.²⁵

5.803.8 Proceedings in More than One State. Generally, if a petition for the appointment of a guardian or issuance of a protective order is simultaneously pending in Virginia and in another state, the Virginia court may proceed with the case if it is the appropriate forum and has "home state," "significant-connection state" or "special" jurisdiction. If the Virginia court does not have jurisdiction when a petition is filed, or before it issues an order, it must stay the case and communicate with the other court. If the other court has jurisdiction, the Virginia court must dismiss the case unless the other court determines that the Virginia court is a more appropriate forum. Even if there are two pending cases, the Virginia court may still assert jurisdiction over the case to appoint a guardian of a respondent who is physically in Virginia in an emergency or to issue a protective order with respect to real or tangible personal property located in Virginia.²⁶

5.803.9 Transfer of a Foreign Guardianship or Conservatorship to Virginia. In order to transfer a foreign guardianship or conservatorship to Virginia, the guardian or conservator must petition the Virginia court to accept the guardianship or conservatorship (previously, the foreign guardian or conservator must petition the foreign court for provisional approval to move it to

²³ Va. Code § 37.2-1043.

²⁴ Va. Code § 37.2-1042.

²⁵ Va. Code § 37.2-1044.

²⁶ Va. Code § 37.2-1045.

Virginia). The petition must include a certified copy of the other state's provisional order of transfer. Notice of a petition to transfer must be given to those persons entitled to notice under the Virginia and foreign state's statutes. A hearing in the Virginia court is required if requested by the court, the guardian, the conservator, the respondent, or any other person notified. Even if the Virginia court refuses to accept the foreign guardianship or conservatorship, an individual may still petition for a Virginia guardianship or conservatorship under Virginia Code § 37.2-1000 *et seq.*²⁷

5.803.9.1 Provisional Order. The Virginia court shall provisionally accept the foreign order unless it finds that the transfer is contrary to the respondent's interests or that guardian or conservator is ineligible for appointment in the Commonwealth.

5.803.9.2 Final Order. When the Virginia court receives confirmation from the foreign court that it has transferred the conservatorship or guardianship to Virginia, it shall enter a final order accepting the foreign guardianship or conservatorship. In the final order accepting transfer, the Virginia court must determine if the guardianship or conservatorship needs to be modified to conform to Virginia law. The final acceptance of a foreign order acts as a Virginia adjudication of the respondent's incapacity and the appointment of the guardian or conservator.

5.803.10 Transfer of Guardianship or Conservatorship to Another State. A guardian or conservator appointed by a Virginia court may petition a Virginia court to transfer the guardianship or conservatorship to another state. Notice of the petition must be provided to those whom are entitled to give notice in the original Virginia petition.²⁸ The court, the guardian, the conservator, or any person entitled to notice may request a hearing on the proposed transfer.

5.803.10.1 Provisional Order. The Virginia court shall provisionally order the transfer of a guardianship and shall direct the guardian to petition for guardianship in the other state if the Virginia court is satisfied that the guardianship will be accepted by the out of state court. To provisionally order transfer of the guardianship, the Virginia court, must find that the respondent is physically present in or is reasonably expected to move permanently to the other state and that the plan for care and services for the respondent in the other state are reasonable and sufficient. The Virginia court shall provisionally transfer of a conservatorship and shall direct the conservator to petition for conservatorship in the other state if the Virginia court is satisfied that the conservatorship will be accepted by the out of state court. To provisionally order transfer of the conservatorship, the Virginia court, must find that the respondent is physically present in or is reasonably expected to move permanently to the other state, or the protected person has a significant connection to the other state and that appropriate plans are set for the management of the respondent's assets in the other

²⁷ Va Code § 37.2-1045.

²⁸ Va. Code § 37.2-1004.

state. The Virginia court cannot provisionally order transfer of the conservatorship or a guardianship if the court finds that the transfer is contrary to the respondent's interests.

5.803.10.2 Final Order. When the Virginia court receives confirmation that the foreign court has accepted the Virginia provisional order,²⁹ the Virginia court shall enter a final order confirming the transfer of the conservatorship and guardianship to the other state and terminating the Virginia guardianship or conservatorship.

5.803.11 Communication Between the Courts. A Virginia court and another state's court may communicate concerning schedules, calendars, court records, and other administrative matters without making a record. Otherwise, the communication between the courts shall be on the record and the court may allow the parties to participate in the communication. The record may be limited to the fact that the communication occurred.³⁰

5.803.12 Cooperation Between the Courts. The Virginia court can request the court of another state to hold an evidentiary hearing, order a person in that state to produce evidence or give testimony pursuant to procedures of that state, order that an evaluation or assessment be made of the respondent, order any appropriate investigation of a person involved in a proceeding, issue any order necessary to assure the appearance in the proceeding of a person whose presence is necessary for either court to make a determination, including the respondent, or issue an order authorizing the release of medical, financial, criminal, or other relevant information in that state, including protected health information. If a foreign court requests assistance of the same kind, a Virginia court has limited jurisdiction to grant the request or make reasonable efforts to comply with the request.³¹

5.803.13 Taking Testimony in Another State. Testimony of a witness located in another state and taken in the other state may be offered by deposition in a Virginia proceeding. The Virginia court may prescribe the manner in which and the terms upon which the testimony is to be taken. A witness located in another state may be deposed or testify by telephone or audiovisual or other electronic means. A Virginia court must work with the other court to coordinate an appropriate location for the deposition or testimony. The best evidence rule cannot bar the admission of documentary evidence transmitted from another state to the Virginia court by technological means that does not produce an original writing.³²

²⁹ Va. Code § 37.2-1047.

³⁰ Va. Code § 37.2-1034.

³¹ Va. Code § 37.2-1035.

³² Va. Code § 37.2-1036.

5.803.14 **Registration of Orders.** Unless a petition for the appointment of a guardian is pending in Virginia, the guardian appointed in the other state, after giving notice to the appointing Court of an intent to register, may register the guardianship order in Virginia by filing it as a foreign judgment in an appropriate city or county. Unless petition for a protective order is pending in Virginia, the conservator appointed in the other state, after giving notice to the appointing Court of an intent to register, may register the protective order in Virginia by filing as a foreign judgment, in any county or city in which the protected person owns property. When an order is registered, the guardian or conservator may exercise all powers authorized in the order except as prohibited Virginia law. The guardian or conservator may bring actions and maintain proceedings in Virginia. If the guardian or conservator is a nonresident, such actions and proceeding shall be subject to any conditions imposed upon nonresident parties.³³

5.803.15 **Venue.** A circuit court may transfer the case to a different venue within or without Virginia if the transfer is the best interest of the respondent.³⁴ A petition may be filed in the circuit court of the county or city where the respondent lives, is located, or lived immediately before becoming a patient in a hospital or a resident in a nursing facility or similar institution. If the petition is solely for the appointment of a conservator for a nonresident who owns property in the state, the petition should be filed in the city or county where the property is located.³⁵

5.803.15 **Minor.** A parent or legal guardian of a minor may file a petition for guardianship or conservatorship against the minor up to 6 months prior to the minor's 18th birthday. If the petition is brought by any other person, the petition cannot be filed earlier than the individual's 18th birthday.³⁶

³³ Va. Code § 37.2-1050.

³⁴ Va. Code § 37.2-1001E.

³⁵ Va. Code § 37.2-1001A.

³⁶ Va. Code § 37.2-1001C.

APPENDIX 5-3
GENERAL DURABLE POWER OF ATTORNEY

Revised Language

8.31 **Government Securities.** My Agent is authorized to sell, buy, cash in, or redeem government securities. My Agent is specifically authorized to open a Treasury Direct® account with the U.S. Department of Treasury. **OPTIONAL:** *[The Agent is specifically authorized to name an individual (whom my Agent is authorized to make a gift to, as set out in the paragraph(s) above, and / or whom may also be named my Agent), as “payable upon death” or “POD” on said Government Securities or Treasury Direct® Account.]*³⁷

³⁷ See 31 C.F.R. 363.33.