



Virginia Elder Law  
Recent Developments  
July 1, 2018 through ~ July 1, 2019

Verily the works of those  
gone before us have become  
instances and examples to  
men of our modern day,  
that folk may view what  
admonishing chances befel  
other folk and may there-  
from take warning.  
INTRODUCTION TO THE ARABIAN NIGHTS

**Virginia General Assembly  
2019**

	Subject Area	2019 Bill & Title	Summary	Statute / Act	Notes / Text
1.	Wills, Trusts, & Fiduciaries	<u>HB 1954</u> Uniform Power of Attorney Act; recovery of attorney fees.	Uniform Power of Attorney Act; breach of fiduciary duty; recovery of attorney fees. <sup>1</sup>	Va. Code § <u>64.2-1614</u>	
2.	Wills, Trusts, & Fiduciaries	<u>SB 1144</u> Guardianship; annual report filed by guardian.	Guardianship; annual report. <sup>2</sup>	Va. Code § <u>64.2-2020</u>	Adds ¶ C: “If the local department of social services files notice that the annual report has not been timely filed in accordance with subsection A with the clerk of the circuit court, the court may issue a summons or

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					rule to show cause why the guardian has failed to file such annual report.”
3.	Wills, Trusts, & Fiduciaries	<u>SB 1186</u> Financial institution; payment or delivery of small asset by affidavit, check, etc.	Payment or delivery of small asset by affidavit; check, draft, or other negotiable instrument; financial institution. <sup>3</sup>	Va. Code § <u>64.2-601 (E)</u>	Amends <u>64.2-601 (E)</u> , which allows up to \$50,000 to be paid without administration to a designee. <sup>4</sup>
4.	Wills, Trusts, & Fiduciaries	<u>SB 1307</u> Uniform Transfers to Minors Act; transfer of property.	Uniform Transfers to Minors Act; age 25. <sup>5</sup>	Va. Code §§ <u>64.2-1908</u> and <u>64.2-1919</u>	Changes maximum designated payment date from 21 to 25
5.	Wills, Trusts, & Fiduciaries	<u>SB 1426</u> Clerks of circuit courts; retention of wills lodged in clerk's	Permits the clerk of a circuit court to destroy a	Va. Code § <u>64.2-409</u>	Poor <u>Methuselah</u> . <sup>6</sup>

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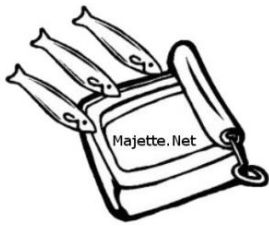
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		office for safekeeping.	will lodged in his office for safekeeping for 100 years or more.		
6.	Health	HB 1639 Medical Assistance Services, Department of; payment for certain services to hospice patients.	Requires DMAS to implement a process for payments for certain services to hospice patients	There is no corresponding Va. Code provision for the Act. <sup>7</sup>	
7.	Health	HB 2219 Nursing homes; truth in advertising for inspections, surveys, and investigations.	When inspection, survey, or investigation data is used in an advertisement regarding nursing	Va. Code §§ <u>32.1-126</u> , <u>59.1-198</u> , and <u>59.1-200</u>	Failure to comply with the statute constitutes a violation of the Virginia Consumer Protection Act.

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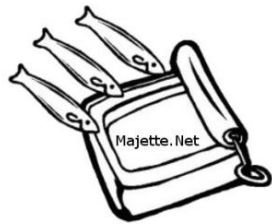


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			homes, the advertisement must contain various elements.		
8.	Health	HB 2474 Long-term care; expediting review of applications, report.		Va. Code § <u>32.1-330</u>	Requires that DMAS report (1) the number of screenings for eligibility for community-based and institutional long-term care services conducted by DMAS or the public or private entity with which DMAS has entered into a contract to conduct such screenings and (2) the number of cases in which DMAS or the public or private entity with which DMAS has entered into a contract to conduct such screenings fails to complete such screenings within 30 days.
9.	Domestic Relations	HB 1988 Military retirement benefits; marital share.	Requires that the determination of military retirement benefits in a	Va. Code § <u>20-107.3</u>	

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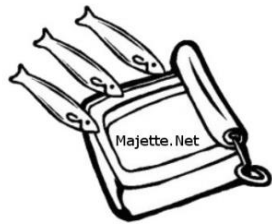


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			divorce be made in accordance with the federal Uniformed Services Former Spouses' Protection Act (10 U.S.C. 1408 et seq.).		
10.	Domestic Relations	HB 1945 No-fault divorce; waiver of service of process	In a no-fault divorce, waivers of service of process may occur within a reasonable time prior to or after the suit is filed.	Va. Code §§ <u>20-99.1:1</u> and <u>20-106</u>	Va. Code § <u>64.2-2019</u> (D) provides that a guardian may, with prior court authorization, “initiate a change in the person's marital status.” Especially when qualified plan tax or other considerations diminish the utility of funding a single premium income annuity (SPIA) for a community spouse, such a change – divorce - can be helpful.
11.	Domestic Relations				

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12.	Domestic Relations	SB 1758 Juvenile and domestic relations district courts; jurisdiction, specific findings of fact	Jurisdiction of juvenile and domestic relations district courts; state or federal benefit. Grants the juvenile and domestic relations district courts jurisdiction to make specific findings of fact required by state or federal law to enable a child to apply for or receive a state or federal benefit.	Va. Code § <u>16.1-241</u>	The statute as amended ¶ A.1, providing the JDR court with jurisdiction “over all cases, matters and proceedings involving .... making specific findings of fact required by state or federal law to enable a child to apply for or receive a state or federal benefit.” The writer questions whether this statute can supersede (or obviate) a determination of disability for SSI or continuing Medicaid benefits, immigration status, and dependence issues.
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13.	Real Estate and Real Estate Tax	<u>HB 2060</u> Real estate with delinquent taxes or liens; appointment of special commissioner, etc.	Real estate with delinquent taxes or liens; appointment of special commissioner ; increase required value. <sup>8</sup>	Va. Code § <u>58.1-3970.1</u>	Of importance to conservators for insolvent estates.
14.	Behavioral Health and Developmental Services	<u>HB 1933</u> Prisoners; medical and mental health treatment of those incapable of giving consent.	Amplifies process for medical and mental health treatment of prisoners incapable of giving consent. <sup>9</sup>	Va. Code §§ <u>17.1-406</u> , <u>17.1-410</u> , and <u>37.2-803</u>	Clients, or their kindred, are sometimes incarcerated. The law expressly permits the locally appointed special justice of the relevant district court to adjudicate these petitions. Establishes § <u>53.1-133.04</u> . Medical and mental health treatment of prisoners incapable of giving consent, which generally tracks existing process in civil direct judicial consent, Va. Code § 37.2-1100 et seq.

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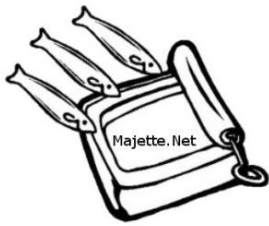
15.	Behavioral Health and Developmental Services	<u>SB 1488</u> State hospital for individuals w/ mental illness; SHHR to examine cause of high census at hospital.	Department of Behavioral Health and Developmental Services; causes of high state hospital census; report. <sup>10</sup>	2019 Acts of Assembly, c. <u>609</u> .	The work group shall develop recommendations by November 1, 2019.
16.	Behavioral Health and Developmental Services	SB 1135 Community Living Waiver wait list; child identified as having a developmental disability	Local departments of social services; foster care; notice of developmental disability. <sup>11</sup>	2019 Acts of Assembly, c. <u>301</u> .	Requires the local department of social services to “notify the appropriate community services board as soon as it is known that a child in the foster care system has a developmental disability so that the community services board may screen the child for placement on the statewide developmental disability waiver waiting list.”
17.	Persons with Disabilities	<u>HB 1674</u> Abuse and neglect of incapacitated adults; informed consent.	Abuse and neglect of incapacitated adults;	Va. Code § <u>18.2-36</u>	Amends 18.2-369. <sup>13</sup>  Criminal procedure can sometimes be helpful in an exploitation case; while impermissible for civil advantage a

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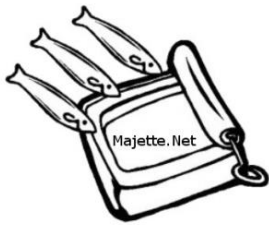




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			informed consent. <sup>12</sup>		complaint with reasoned analysis of the failure of the alleged victim's alleged consent, often pled as a defense, may help stiffen the sinew and summon the blood of the local Commonwealth's Attorney.
18.	Persons with Disabilities	HB 1987 Aged or incapacitated adults; financial exploitation, authority to refuse transactions.	Financial exploitation. <sup>14</sup>	Va. Code § <u>63.2-1606</u>	<p>Exercise of this discretion by the bank can result in at least six weeks of retention of funds. Add an intervening bank holiday or two, and there will be two months of excess countable resource inclusion which the account-holder's fiduciary will be forced to address.</p> <p>Imagine an institutionalized Medicaid applicant whose agent is attempting to deploy assets for funeral provisions, lawful transfers for the protection of the community spouse's income annuity, or to custodians for the benefit of minor children, etc.</p>

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					Will the bank's refusal to pay make the retained funds unavailable resources?
19.	Persons with Disabilities	SB 1286 Auxiliary grants; supportive housing.	Auxiliary grants; supportive housing; elimination of waiting period. <sup>15</sup>	Va. Code § <u>51.5-160</u>	
20.	Professions and Occupations	HB 2238 Cemeteries; removal of remains, etc., of previously unidentified	An Act to amend and reenact §§ <u>57-36</u> , <u>57-38.1</u> , and <u>57-38.2</u> of the Code of Virginia and to amend the Code of Virginia by adding in Article 4 of Chapter 3 of Title 57 a	Va. Code §§ <u>57-36</u> , <u>57-38.1</u> , and <u>57-38.2</u> . New § <u>57-35.35:1</u> created.	Previously unidentified cemeteries. Adds the category of previously unidentified cemetery to the laws allowing for the removal of remains from graveyards or family cemeteries that have been abandoned or are unused and neglected by their owners. <sup>16</sup>

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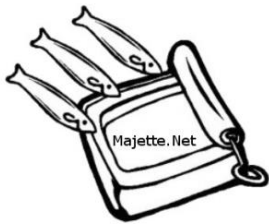
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			section numbered 57-35.35:1, relating to previously unidentified cemeteries.		
21.	Professions and Occupations	<u>HB 1828</u> Sale of caskets; preneed arrangements for funeral services.	Funeral services; sale of caskets. <sup>17</sup>	Va. Code § <u>54.1-2808.3</u>	See <u>Va. Medicaid Manual M 1130.400</u> (B), relating to burial space items. Is there a conflict, esp. when the family acquires its casket from a third party (non-Virginia licensee) vendor? Bye-bye, Costco? <sup>18</sup>
22.	Professions and Occupations	HB 2116 Disposition of the remains of a decedent; right to control.		None, bill <b>failed</b> . <sup>19</sup>	Failed bill included to emphasize the importance of preplanning for both the funding and the direction of final arrangements, especially for guardians plopped into the center of internecine family feuds. <sup>20</sup>
23.	Property & Conveyances	<u>SB 1080</u> Property & Conveyances; revision of Title 55 to create Title 55.1,	Revision of Title 55. <sup>21</sup>	<u>Revision of Title 55. Creates Title 55.1 (Property and</u>	Effective date is 10-1-2019. Lawyers need to change deed and related deed of trust forms for statutory reference compliance.

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		pertains to rental property, etc.		<u>Conveyances</u> <u>as a revision of</u> <u>existing Title</u> <u>55 (Property</u> <u>and</u> <u>Conveyances).</u> <u>Proposed Title</u> <u>55.1 consists of</u> <u>29 chapters</u> <u>divided into</u> <u>five subtitles:</u> <u>Subtitle I</u> <u>(Property</u> <u>Conveyances),</u> <u>Subtitle II</u> <u>(Real Estate</u> <u>Settlements</u> <u>and</u> <u>Recordation),</u> <u>Subtitle III</u> <u>(Rental</u> <u>Conveyances),</u> <u>Subtitle IV</u> <u>(Common</u>	
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				<u>Interest Communities), and Subtitle V (Miscellaneous).</u>	
24.	Property & Conveyances	<u>SB 1292</u> Virginia Residential Property Disclosure Act; required disclosures, mineral rights	Mineral rights disclosures or waivers will now be required in land conveyance process. <sup>22</sup>	Va. Code § <u>55-519</u>	Terms of the statute require that the Real Estate Board post specific terms of the disclosure on its website. <sup>23</sup>
25.	Property & Conveyances	<u>SB 1449</u> Virginia Residential Executory Real Estate Contracts Act; created.	Executory real estate contracts. <sup>24</sup>	<u>Residential Executory Real Estate Contracts Act, Va. Code § 55-252.1, 2, 3, and 4</u>	When the conservator discovers that his incapacitated person has sold or purchased residential real estate using an installment sales agreement, it is important to know that the provisions of the Virginia Residential Landlord and Tenant Act will apply to the relevant parts of the agreement. These provisions cannot be waived by contract; the agreement itself

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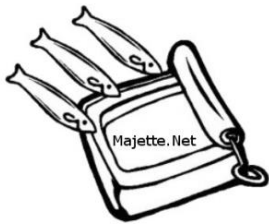
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					can be recorded with the Clerk in the deed records.
26.	Property & Conveyances	<u>HB 2150</u> Real property tax; exemption for the elderly and disabled, improvements to a dwelling.	Real property tax exemption for the elderly and disabled. <sup>25</sup>	Va. Code § <u>58.1-3210</u>	
27.	Property & Conveyances	<u>HB 1937</u> Real property tax; exemptions for elderly and handicapped, computation of income limitation	Real property tax; exemptions for elderly and handicapped; computation of income limitation. <sup>26</sup>	Va. Code § <u>58.-3212</u>	Provides that, if a locality has established a real estate tax exemption for the elderly and handicapped and enacted an income limitation related to the exemption, the locality <i>may</i> exclude, for purposes of the limitation, any disability income received by a family member or nonrelative who lives in the dwelling and who is permanently and totally disabled.
28.	Civil Actions	<u>SB 1543</u> Wrongful death beneficiaries; parents of decedent	Parents who received support or services from	Va. Code § <u>8.01-53</u>	A caretaker child whose death will cause a material hardship to the parent. This change permits a court to apportion damages to a parent who “within 12

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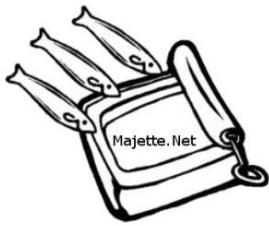
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		who receive support or services, etc.	the deceased for necessities now included as a potential beneficiaries. <sup>27</sup>		months prior to the decedent's death, regularly received support or regularly received services from the decedent for necessities, including living expenses, food, shelter, health care expenses, or in-home assistance or care.” <sup>28</sup>
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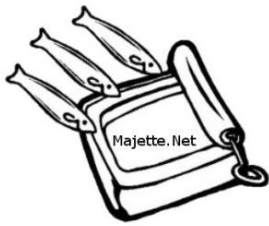


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29.	Civil Actions	<u>SB 1619</u> Evidence; establishes that a party or potential litigant has a duty to preserve.	Spoliation of evidence; range and array of remedies for spoliation. <sup>29</sup>	§ <u>8.01-379.2:1</u>	Requires a party <i><b>or potential litigant</b></i> to preserve evidence that may be relevant to reasonably foreseeable litigation. The bill specifies a range of remedies.  In will or guardianship contests, either contestant may possess evidence (medical reports, etc.) damaging to the contestant's position at trial. Destruction of such evidence before commencement of a proceeding can now be remedied. <sup>30</sup>
30.	Civil Actions	HB 2242 Statute of limitations; action based on an	Provides that the statute of limitations for an action based on an	§ <u>8.01-246</u>	Personal service agreements can be reduced to judgment (and be docketed to encumber real estate) when necessary to prove the value of services provided by a family member, especially when a hapless

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		unsigned, written contract. <sup>1</sup>	unsigned, written contract is three years after the cause of action has accrued.		caretaker has been snared in the trap set in <u>Va. Medicaid Manual M 1450.570</u>
31.	Civil Actions	HB 1675 Servicemembers Civil Relief Act; attorney fees	Where appointment of counsel is necessary pursuant to the Servicemembers Civil Relief Act, any attorney fees assessed shall not exceed \$125, unless the	§ <u>8.01-15.2</u>	Notice provisions for estate planning, <u>Va. Code § 64.2-2023</u> applies, since a judgment in favor of estate planning could effectively deprive a servicemember of an estate expectancy. Because remedial, the Act should be construed liberally to effect enhanced due process protection for the servicemember. <sup>31</sup>

<sup>1</sup> Why included? Personal service agreements can be reduced to judgment (and be docketed to encumber real estate) when necessary to prove the value of services provided by a family member, especially when a hapless caretaker has been snared in the trap set in [Va. Medicaid Manual M 1450.570](#)

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			court deems a higher amount appropriate.		
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**Virginia Cases**

	Subject Area	Style	Issue – Area of Law	Discussion	Notes / Text
1.	Elective Share; Statutes of Limitation	<i>Ray v. Ready</i> , ___ Va. ___ 180060, ___ S.E.2d ___ (2018)	In a widow's action to claim an elective share of the augmented estate of her deceased husband, the complaint naming his “Estate” was a nullity and could not toll the running of the statute of limitations on that claim. <sup>32</sup>	The circuit court did not err in denying the plaintiff's motion to amend the complaint to name the personal representative, or in dismissing the action as time-barred.	Claim is against the personal representative, not the estate of the decedent. <sup>33</sup>

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2.	Duty of impartiality of Trustee in deed of trust, application of non-applicable Virginia Trust Act.	<u>Crosby v. ALG Trustee, LLC</u> , ___ Va. ___ 180062, ___ S.E.2d ___ (2018).	Fiduciary duties of trustee in deed of trust <i>outside</i> the Virginia Trust Act. <sup>34</sup>	A trustee in a deed of trust breached implicit duties of fidelity to borrower even while complying with Title 55 requirements.	Footnote 2 of the opinion is of interest, as is the dissent of two Justices. <sup>35</sup>
3.	<i>Qui Tam</i> relators in Medicaid fraud proceeding.	<u>Commonwealth v. Hunter Laboratories, LLC</u> , 296 Va. 32, 817 S.E.2d 318 (2018).	Is the 28% contingency fee of relators assessed against the gross or net Virginia recovery?	The fee is assessed against the gross recovery. <sup>36</sup>	Va. Code § 8.01-216.5, <i>Civil actions filed by private persons; Commonwealth may intervene.</i>
4.	Power of attorney, bank liability; applicable statute of limitations analysis.	<u>Lance v. Wells Fargo Bank, N.A.</u> , 1 Cir. [Norfolk Circuit Court]	Common Law Conspiracy with bank. <sup>37</sup> Violation of the POA Act. <sup>38</sup>		

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		CL173056 (2018)			
5.	Will statute, execution and computer generated form of will; fraud allegations.	<i>Canody v. Hamblin</i> , 295 Va. 597, 816 S.E.2d 286 (2018).	After the clerk of court <sup>39</sup>	The party <sup>40</sup>	Computer generated fraud may be easier <sup>41</sup>
6.	<u>Virginia Uniform Power of Attorney Act</u> agent liability: Agent 1 not responsible for fraud of <sup>42</sup>	<i>Mangrum v. Chavis</i> , 18 Va. S. Ct. UNP 160782 (2018).	When husband is agent for Principal, and husband's wife breaches her duties to Principal in a <sup>43</sup>	Principal's attorney fees not recoverable; exception. <sup>44</sup>	This holding is on its way to modification by <u>statute</u> in the 2019 General Assembly. <sup>45</sup>
7.	Issue preclusion in suit to challenge will; <sup>46</sup>	<i>D'Ambrosio v. Wolf</i> , 295 Va. 48, 809 S.E.2d 625 (2018).	A decedent's son named in his parent's power of attorney had a contentious and mistrusting relationship <sup>47</sup>	The Supreme Court reversed preclusion. Son's argument in the prior litigation that his mother <sup>48</sup>	

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8.	Arbitration clause in nursing home negligence / wrongful death cases; determination by court whether a valid agreement to arbitrate; <sup>49</sup>	<i>Stevens v. Medical Facilities of America XXXII</i> [Nelson County Circuit Court] 24 Cir. CL1700020800 (2018).	Whether Court or arbitrator should decide the question of whether the parties agreed to arbitrate; whether Defendants not named in the alleged arbitration <sup>50</sup>	The Supreme Court of Virginia has recognized that “the public policy of Virginia favors arbitration.” <sup>51</sup>	Counsel for nursing homes and insurance carriers for nursing homes, beware; battle of forms and lax oversight in completion of them can cost dearly.
9.	Fraud, undue influence, duress in marital agreement	<i>Kesser v. Kesser</i> , 4 Cir. CL16790700 (2018).			Useful for survey of necessary evidence, and standard of proof to overcome presumptions.
10.	Will contest; undue influence presumption, effect of presumption.	<i>Parson v. Miller</i> , ___ Va. ___ 171393, ___ S.E.2d ___ (2018).	Having clarified the “type <sup>52</sup> of presumption that applies in cases alleging undue influence in the creation of a will, <sup>53</sup>		

Federal Entitlements (SSI) and Virginia Medicaid

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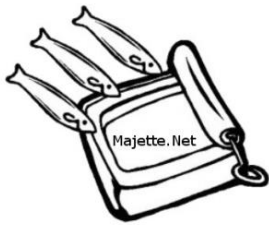
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1.	<u>GN 03920.007 – Legal and Specialized Services Not Subject to Fee</u>	<p><b>MUST SEE for estate planning in which SSI is even a peripheral issue.</b></p> <p>Attorney Fees when SSI qualification or retention is an issue, <u>GN 03920.007 – Legal and Specialized Services Not Subject to Fee.</u></p> <p>See also examples at part D <u>GN 03920.001 SSA’s Fee Authorization Processes generally</u></p> <p>Members of NAELA can (and should) read “New POMS on Attorney Fees: Is every attorney who drafts a special needs trust required to obtain the Social Security Administration’s permission to be paid or risk going to jail?,” by Kevin Urbatsch, Esq., published in <u>NAELA News Online, August, 2019.</u><sup>54</sup></p>
2.	<u>SI 01120.201 Trusts Established with the Assets of an Individual on or after 01/01/00 SSI</u>	<p>Several clarifications and updates of interest to attorneys crafting special needs trusts, especially concerning distributions to ABLE Accounts, use of Administrator-managed prepaid cards (such as <u>TrueLink</u>); and universal 90 day cure interval.<sup>55</sup></p>

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<p>3. <u>CMS bans compulsory arbitration in nursing home admission agreements.</u><sup>56</sup></p>	<p>Effective July 16, 2019, “CMS ... issued a final rule updating the requirements nursing homes must meet to use binding arbitration agreements. Pre-dispute binding arbitration agreements are arrangements, whereby two parties agree to settle future disputes through an arbitration process rather than through litigation, and requires both parties to accept the arbitration process’ outcome. In October 2016, the previous administration banned the use of pre-dispute binding arbitration agreements in long term care facilities, but was unable to enforce it due to a legal challenge and subsequent injunction.<sup>57</sup> In June 2017, in accordance with the injunction, CMS published a proposed rule that would remove the ban on pre-dispute binding arbitration agreements, and solicited public comments. CMS determined that resident rights must be protected by allowing them the ability to choose their method of dispute resolution, while preserving access to all possible choices, including arbitration, a method that often cost resident much less than litigation.</p> <p><b><u><i>The CMS proposal supports patients and their caregivers by removing the ban on binding arbitration agreements while requiring nursing homes to ensure residents have the ability to choose the method of dispute resolution they want. CMS is allowing binding arbitration agreements, but will prohibit nursing homes from requiring residents to sign binding arbitration agreements as a condition for receiving care, and</i></u></b></p>
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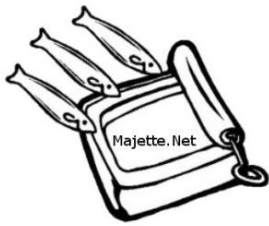
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		<p><b><u>will require nursing homes to inform residents or their representatives that they are not required to sign a binding arbitration agreement.</u></b> Finally, CMS is prohibiting nursing home arbitration agreements from including language preventing residents or anyone else from communication with federal, state, or local officials.”</p> <p>The text of the rule in the Federal Register is <a href="#">here</a>.<sup>58</sup></p>
4.	<p><u>Medicaid Planning (1-13-2019)</u></p>	<p>The outline is current through transmittal DMAS-11, including 2019 Medicaid, SSI and Substantial Gainful Activity Limits as Appendix A</p> <p>The writer’s annual survey with extensive footnoting to specific policy provisions.</p>
5.	<p><u>Compiled 2019 Medicaid Manual</u></p> <p><u>MAGI References.</u><sup>59</sup></p>	<p>The writer’s annual compilation of the Medicaid Manual.<sup>60</sup></p> <p>The writer’s first extract of all references to Medicaid expansion beneficiaries.</p>

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The writer thanks the long suffering Mrs. Majette for her loving forbearance, and acknowledges his debt to colleagues the Thompson McMullan [Elder Law Practice](#), his perch for nearly 22 years, especially the astonishing work of the Assistants for whom he has toiled for more than 30 years, Mary Beth Rawls and Cheryl Tanner.

He again gratefully remembers the hospitality of the Georgetown Public Library in Pawley's Island, South Carolina, where much of the editing of this work was concluded on his 34<sup>th</sup> annual visit to this part of [Wonderland](#). He's a proud library member and rarely misses an opportunity to [while away](#) happy hours there, illumined by [friendships](#) draped in words.

## Endnotes

RSM  
August 17, 2019  
[Reedville, Virginia](#)

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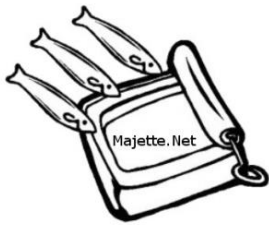
<sup>1</sup> Provides that in a judicial proceeding involving a claim for breach of fiduciary duty against an agent brought under the Uniform Power of Attorney Act commenced on or after July 1, 2019, the court may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or from the principal's property. Legislatively reverses the Supreme Court refusal to allow prevailing party fees in *Mangrum v. Chavis*, 18 Va. S. Ct. UNP 160782 (2018).

<sup>2</sup> Provides that, upon receiving notice from the local department of social services that a guardian has not filed the required annual report within the prescribed time limit, the court may issue a summons or rule to show cause why the guardian has failed to file such report.

<sup>3</sup> Provides that a financial institution accepting a small asset that is a check, draft, or other negotiable instrument presented by an affidavit is discharged from all claims for the amount accepted.

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<sup>4</sup> E. Upon the presentation of an affidavit as provided in subsection A, the designated successor may endorse or negotiate any small asset that is a check, draft, or other negotiable instrument that is payable to the decedent or the decedent's estate. Notwithstanding the provisions of §§ 8.3A-403, 8.3A-417, and 8.3A-420, a financial institution accepting such check, draft, or other negotiable instrument presented in such manner is discharged from all claims for the amount accepted.

<sup>5</sup> Permits a transferor to transfer property under the Uniform Transfers to Minors Act to an individual under the age of 21 to be paid, conveyed, or transferred to such individual upon his attaining 25 years of age, unless the minor attaining age 21 years of age delivers a written request therefor to the custodian. Under current law, such property must be paid, conveyed, or transferred upon the individual's attaining 18 years of age, or 21 years of age if specifically requested by the custodian.

<sup>6</sup> Methuselah's lifespan was Sportin' Life's opening gambit in "*It Ain't Necessarily So*." Modeled after the Serpent's unfortunate sales spiel in Eden (the regrettable episode inducing his cordial dislike by so many of the right sort), Bess fell for it under the influence of the dust. The Brothers Gershwin wrote, perspired "and scratched" out what became Porgy and Bess in a sweltering cottage on Folly Beach, South Carolina, just about 90 miles from the writer's present nook in the Georgetown Public Library.

<sup>7</sup> The text of the Act is: "That the Department of Medical Assistance Services shall, to the extent permitted by federal law, implement a process for payment of the nursing facility or ICF/MR share of payments directly to the nursing facility or ICF/MR rather than to the hospice care provider for hospice services furnished to an individual who is a resident of a nursing facility or ICF/MR and who would be eligible under the Commonwealth's program of medical assistance for nursing facility services or services in an ICF/MR had he not elected hospice care. Payments made directly to a nursing facility or ICF/MR shall be the full amount that would be paid to the nursing facility or ICF/MR if the individual was not receiving hospice services, and shall not reflect any discount to such rates."

<sup>8</sup> Increases the required assessed value of property for the purpose of a locality appointing a special commissioner to convey property with delinquent taxes or liens to the locality in lieu of sale at public auction (i) from \$100,000 to \$150,000 in Norfolk, Richmond, Hopewell, Newport News, Petersburg, Fredericksburg, and Hampton and (ii) from \$50,000 to \$75,000 in all other localities.

<sup>9</sup> Establishes a process for the sheriff or administrator in charge of a local or regional correctional facility to petition a court to authorize medical or mental health treatment for a prisoner in such facility who is incapable of giving informed consent for such treatment. The process parallels the existing process for the Director of the Department of Corrections to seek authorization to provide involuntary treatment to prisoners in state correctional facilities. The bill requires the court to authorize such treatment in a facility designated by the sheriff or administrator upon finding that the prisoner is incapable, either mentally or physically, of giving informed consent; that the prisoner does not have a relevant advanced directive, guardian, or other substitute decision maker; that the proposed treatment is in the best interests of the prisoner; and that the jail has sufficient medical and nursing resources available to safely administer the treatment and respond to any adverse side effects that might arise from the treatment.

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<sup>10</sup> Directs the Secretary of Health and Human Resources to convene a stakeholder work group to examine the causes of the high census at the Commonwealth's state hospitals for individuals with mental illness, including (i) the impact of the practice of conducting evaluations of individuals who are the subject of an emergency custody order in hospital emergency departments, the treatment needs of individuals with complex medical conditions, the treatment needs of individuals who are under the influence of alcohol or other controlled substances, and the need to ensure that individuals receive treatment in the most appropriate setting to meet their physical and behavioral health care needs on the census at the Commonwealth's state hospitals for individuals with mental illness, and (ii) the potential impact of extending the time frame during which an emergency custody order remains valid, revising security requirements to allow custody of a person who is the subject of an emergency custody order to be transferred from law enforcement to a hospital emergency department, diverting individuals who are the subject of an emergency custody order from hospital emergency departments to other more appropriate locations for medical and psychological evaluations, and preventing unnecessary use of hospital emergency department resources by improving the efficiency of the evaluation process on the census at the Commonwealth's state hospitals for individuals with mental illness.

<sup>11</sup> Directs local departments of social services to notify the appropriate community services board as soon as it is known that a child in the foster care system has a developmental disability so that the community services board may screen the child for placement on the Family and Individual Supports waiver waiting list.

<sup>12</sup> Clarifies, for the purposes of the exemptions to abuse and neglect of incapacitated adults, that the informed consent or a declaration of the incapacitated person must have been given when such person was not incapacitated and that any wishes of the incapacitated person relied upon must have been made known when such person was not incapacitated. The bill provides that its provisions are declaratory of existing law.

<sup>13</sup> “D. No responsible person shall be in violation of this section whose conduct was (i) in accordance with the informed consent of the incapacitated person that was given *when he was not incapacitated* or a person authorized to consent on his behalf; (ii) in accordance with a declaration by the incapacitated person under the Health Care Decisions Act (§ 54.1-2981 et seq.) that was given when he was not incapacitated or with the provisions of a valid medical power of attorney; (iii) in accordance with the wishes of the incapacitated person that were made known when he was not incapacitated or a person authorized to consent on behalf of the incapacitated person and in accord with the tenets and practices of a church or religious denomination; (iv) incident to necessary movement of, placement of or protection from harm to the incapacitated person; or (v) a bona fide, recognized or approved practice to provide medical care.” Because this is a criminal statute, it must be strictly construed.

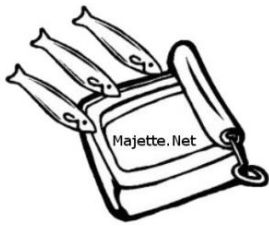
<sup>14</sup> Financial exploitation of aged or incapacitated adults; authority to refuse transactions or disbursements. Allows financial institution staff, pursuant to an internal policy, to refuse to execute a transaction, delay a transaction, or refuse to disburse funds if the financial institution staff (i) believes in good faith that the transaction or disbursement may involve, facilitate, result in, or contribute to the financial exploitation of an adult or (ii) has actual knowledge that a report was made by any person to the local department of social services or adult protective services hotline stating a good faith belief that the transaction or disbursement may involve, facilitate, result in, or contribute to the financial exploitation of an adult. The measure authorizes financial institution staff, upon request and to the

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extent permitted by state and federal law, to report any information or records relevant to the report or investigation. The measure provides that a financial institution and its staff are immune from civil or criminal liability for refusing to execute a transaction, delaying a transaction, refusing to disburse funds, or making a report to the local department of social services or the adult protective services hotline in good faith.

<sup>15</sup> Persons with disabilities; auxiliary grants; supportive housing. Allows individuals receiving auxiliary grants to select supportive housing without any requirement that such individuals wait until their first or any subsequent annual reassessment to make such selection. The bill directs the Commissioner for Aging and Rehabilitative Services to (i) promulgate regulations to implement the provisions of the bill within 180 days of its enactment and (ii) develop guidance documents for implementation of the provisions of the bill no later than February 1, 2020. The bill establishes that the number of auxiliary grant recipients in the supportive housing setting shall not exceed 90 unless the waiting list for supportive housing consists of 30 individuals or more on October 1, 2020, in which case the maximum number of auxiliary grant recipients in supportive housing shall be increased to 120.

<sup>16</sup> Why included? When the fiduciary conveys or assists the memory impaired principal in conveying real estate, previously unknown graves have been known to manifest. Think of poor Fortunato. In the writer's personal experience, this has been nightmarish. This amendment amplifies the statutory process for exhuming and reburying such remains.

<sup>17</sup> Prohibits any person except a licensed funeral service establishment or funeral service licensee from offering for sale or selling a casket when preneed arrangements for funeral services are being made, including preneed funeral contracts and preneed funeral planning. The bill provides that the requirement that a funeral service licensee accept a casket provided by a third party applies only in cases in which funeral arrangements are made at-need. This bill is identical to SB 1247.

Note: HB 2116 *Disposition of the remains of a decedent; right to control* died in the House's HWI Committee. It would have established a priority order for the right to control the disposition of the remains of a decedent; the location, manner, and condition of disposition; and the arrangements for funeral goods and services to be provided, as well as circumstances that would forfeit this right.

<sup>18</sup> <https://www.costco.com/funeral-caskets.html>. Relatives in West Virginia, perhaps, can [click here](#).

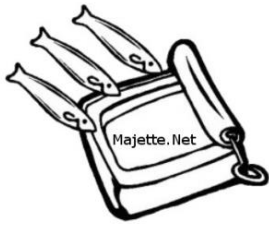
<sup>19</sup> The failed bill would have amended Va. Code §§ 32.1-309.1, 54.1-2800, 54.1-2807, and 54.1-2825 of the Code of Virginia, and repealed §§ 54.1-2807.01 and 54.1-2807.02

<sup>20</sup> Why included? This failed bill reflects the continuing importance of pre-planning (and when possible, pre-paying) for final dispositions. While especially important for guardians and conservators when it's known that funds will be limited (in which case, when possible, a bare minimum should be set aside as a Medicaid (or SSI) fund to remove and store the remains in a funeral setting pending Va. Code § 32.-309.2 determinations and delays), it's also a good idea to

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avoid the horrible issue by preparation of advance directives for final arrangements prepared in accordance with [Va. Code § 54.1-2485](#). The writer's form is posted at this [link](#).

<sup>21</sup> Revision of Title 55. Creates proposed Title 55.1 (Property and Conveyances) as a revision of existing Title 55 (Property and Conveyances). Proposed Title 55.1 consists of 29 chapters divided into five subtitles: Subtitle I (Property Conveyances), Subtitle II (Real Estate Settlements and Recordation), Subtitle III (Rental Conveyances), Subtitle IV (Common Interest Communities), and Subtitle V (Miscellaneous). The bill organizes the laws in a more logical manner, removes obsolete and duplicative provisions, and improves the structure and clarity of statutes pertaining to real and personal property conveyances, recordation of deeds, rental property, common interest communities, escheats, and unclaimed property. The bill has a delayed effective date of October 1, 2019, and is a recommendation of the Virginia Code Commission.

<sup>22</sup> Virginia Residential Property Disclosure Act; required disclosures; mineral rights. Adds to the required residential property disclosure that is furnished by the owner to a buyer that the owner of residential real property makes no representations or warranties as to the condition of the real property with regard to any conveyances of mineral rights.

<sup>23</sup> Va. Code § 55-519 (B)(1) and (10) is the new language to inform the purchaser of his due diligence duty to explore mineral and flood insurance rights and issues.

<sup>24</sup> Virginia Residential Executory Real Estate Contracts Act. Creates the Virginia Residential Executory Real Estate Contracts Act establishing provisions applicable to such contracts. The bill defines a residential executory real estate contract as an installment land contract, lease option contract, rent-to-own contract, or other real estate contract by which a purchaser (i) acquires any right or interest in real property other than a right of first refusal and (ii) occupies or intends to occupy the property as his primary residence. The bill also provides for the Board for Housing and Community Development to develop and make available on its website best practice provisions for residential executory real estate contracts. This bill is a recommendation of the Virginia Housing Commission.

<sup>25</sup> Provides that, for purposes of the real property tax exemption for the elderly and disabled, certain improvements to exempt land and the land such improvements are situated on shall be included as part of the dwelling and exempt from tax.

<sup>26</sup> Provides that, if a locality has established a real estate tax exemption for the elderly and handicapped and enacted an income limitation related to the exemption, the locality may exclude, for purposes of the limitation, any disability income received by a family member or nonrelative who lives in the dwelling and who is permanently and totally disabled.

<sup>27</sup> Adds parents who received support or services from the deceased for necessities within 12 months prior to the decedent's death to the primary list of beneficiaries who may receive a distribution of wrongful death damages. The bill applies only to causes of action arising on or after July 1, 2019.

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<sup>28</sup> The writer had this case issue in 2019 before July 1.

<sup>29</sup> Establishes that a party or potential litigant has a duty to preserve evidence that may be relevant to reasonably foreseeable litigation. The bill further provides that a court (i) upon finding prejudice to another party from loss, disposal, alteration, concealment, or destruction of such evidence, may order measures no greater than necessary to cure the prejudice or (ii) only upon finding that the party acted with the intent to deprive another party of the evidence's use in the litigation, may (a) presume that the evidence was unfavorable to the party, (b) instruct the jury that it may or shall presume that the evidence was unfavorable to the party, or (c) dismiss the action or enter a default judgment.

<sup>30</sup> For a form letter to prevent spoliation, see [http://www.delmarlearning.com/companions/content/1428323449/downloads/Exhibits\\_7-1\\_thru\\_7-7.pdf](http://www.delmarlearning.com/companions/content/1428323449/downloads/Exhibits_7-1_thru_7-7.pdf).

<sup>31</sup> More about the Act and the major protections (including from default judgments) is found at the United States Department of Justice posting, <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-sdra>

<sup>32</sup> “Even though the complaint against the ‘Estate’ was served on the personal representative, it was a nullity, not curable by amendment to insert the personal representative as a defendant, and it was not saved by the provisions of Code § 8.01-6.3 because the complaint, read as a whole, did not otherwise identify the personal representative.”

<sup>33</sup> “The party filing a civil action has the fundamental obligation ‘to express the nature of the claim being asserted, and the identity of the party against whom it is asserted, in clear and unambiguous language so as to inform both the court and the opposing party of the nature of the claim.’ James v. Peyton, 277 Va. 443, 450 (2009) (emphasis added); see Rule 1:4. Furthermore, it is well established under Virginia law that ‘[a]ll suits and actions must be prosecuted by and against living parties, in either an individual or representative capacity.’ Rennolds v. Williams, 147 Va. 196, 198 (1927); see Swann v. Marks, 252 Va. 181, 184 (1996) (quoting Rennolds); Idoux v. Estate of Helou, 279 Va. 548, 556 (2010) (same). That is because ‘[t]here must be such parties to the record as can be affected by the judgment and from whom obedience can be compelled.’ Rennolds, 147 Va. at 198-99. Whether a pleading has adequately identified the proper party to be sued is a question of law, which we review de novo. James, 277 Va. at 447.”

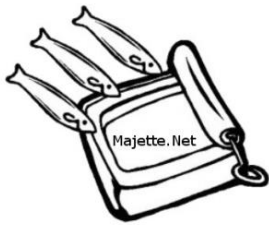
<sup>34</sup> In a debtor's action against the trustee under a deed of trust, alleging breaches of fiduciary duties in foreclosure sale proceedings by selling property assessed at \$436,800 for approximately \$21,000, plaintiff's claim sounded in contract, not tort, and the trial court erred in characterizing it as a common law negligence claim. The requirement of impartiality means that a trustee under a deed of trust must balance the conflicting positions of the creditor and debtor such that a benefit to one cannot come at a disproportionate expense of the other. Sale of property at a price that is so grossly inadequate as to shock the conscience will raise a presumption of fraud. Since the duty of impartiality is a common law duty that exists as an implied term of the deed of trust, the circuit court's ruling that the duties of the trustee in this case were limited to the four corners of the contract and there is no duty by the trustee under the common law was erroneous.

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<sup>35</sup> “ALG also argues that the fiduciary duties of a trustee under a deed of trust arising from common law have been abrogated by statute. It is true that a trustee under a deed of trust is different from a trustee under a general trust agreement, and their fiduciary duties are not the same. See Code § 64.2-700(A)(1) (expressly excluding trustees under deeds of trust from the provisions of the Uniform Trust Code, Code §§ 64.2-700 through -808). The Uniform Trust Code expressly supplements, rather than supplants, the common law of trusts. Code § 64.2-777(B). The same may or may not be true of the statutes codified in Title 55 that specify the duties of trustees under deeds of trust. However, we need not consider that issue in this case because a trustee's duties certainly may be limited by the terms of the deed of trust, unless prohibited by statute. The deed of trust limits them here and there is no statutory prohibition.”

Va. Code § 64.2-777 (B) states “[t]he exercise of a power is subject to the fiduciary duties prescribed by this article.” If “prescribed” means “la[id] down as a rule, dictate[d],” and the deed of trust statutes were applied as *dictated*, wouldn't the conclusion be exactly the opposite; i.e., since the Trustee complied with the duties prescribed by the express terms of Title 55, it was required to proceed with the sale to *avoid* bias in favor of the borrower?

Not mentioned in the case but obliquely relevant is the recollection that “statutory or even judge-made rules of law are on which people must rely in making decisions and in shaping their conduct.” *Lemon v. Kurtzman*, 411 U.S. 192, 197 (1973).

Two justices dissented in *Crosby*.

<sup>36</sup> The relators filed this *qui tam* action alleging that several laboratories illegally inflated the bills they submitted to Virginia's Medicaid program. The case ultimately settled and the Commonwealth approved the settlement. The relators and the Commonwealth agreed that the relators are entitled to 28% of the proceeds of the settlement, but disagreed over whether that share should come out of the total, or gross, proceeds of the settlement, or only from of the Commonwealth's net share of the proceeds, after refunding a portion of the proceeds to the United States. Since the statute does not speak of “net proceeds,” the trial court did not err in concluding that the relators were entitled to receive 28% of the gross proceeds of the settlement. The judgment of the circuit court is affirmed.

<sup>37</sup> Common law conspiracy is a means for establishing vicarious liability for an underlying tort. *Dunlap v. Cottman Transmission Sys., L.L.C.*, 287 Va. 207, 216, 754 S.E.2d 313, 318 (2014). The limitations period for common law conspiracy is that which applies for the underlying injury. This Court agrees with the Circuit Court for the City of Norfolk that while there must be proof of the underlying tort, the plaintiff is not required to plead a separate count, or be awarded a recovery, for the underlying tort. *Witcher v. Reid*, 4 Cir. CH051974, 70 Va. Cir. 415, 418 (Norfolk City 2006). Wells Fargo argues that the underlying tortious act was fraud, which is an injury to the person, while Wayne argues that he suffered injury to his property. Wayne did not plead sufficient factual allegations to prove fraud in this case. He alleged that Wilson misrepresented to Thomas the purpose for the second visit to the bank. Wayne did not allege that Wells Fargo made any misrepresentation to Wayne on which Wayne was induced to rely to his detriment. Because fraud is apparently not alleged as the underlying tort, the two-year limitations period for fraud does not apply. Wayne did, however, plead sufficient allegations to prove the underlying tort of conversion. Although the

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conversion count, alleging that Wells Fargo wrongfully exercised dominion over Wayne's property by rejecting the POA in 2014, was insufficient to state a claim, the factual allegations do set forth the elements of conversion when the defendants transferred the funds in 2013. The Supreme Court of Virginia has held, on summary judgment, that where a bank "wrongfully exercised authority over [plaintiff's] funds and, thus, [plaintiff] was deprived of possession and use of those monies," the alleged act is one for conversion aimed at the plaintiff's property and not at the person. *Bader v. Central Fidelity Bank*, 245 Va. 286, 290, 427 S.E.2d 184, 187 (1993). In this case, Wilson wrongfully deprived Wayne of joint ownership of the funds by transferring them into the new accounts contrary to the understanding of himself, Thomas and Wayne, that he and Wayne would remain joint owners of the funds through Thomas's death. The elements of conversion are thus alleged as against Wilson. Peele allegedly conspired with Wilson in the conversion by opening unauthorized accounts to facilitate the transfer. While the U.C.C. may shield Wells Fargo from liability for honoring a withdrawal by any joint owner of an account, Va. Code § 6.2-612, it does not shield a bank from colluding with a joint owner to open unauthorized accounts into which to transfer those funds. Had it been alleged that Peele simply assisted Wilson in transferring funds into another existing account, or even withdrawing the funds entirely for Wilson's own benefit, there could be no conspiracy to commit conversion. However, the added allegation that Peele opened new accounts in Thomas's name without his authorization provides the necessary element of unlawful means on Wells Fargo's part to support a claim for common law conspiracy in the underlying tort of conversion. Conversion is an injury to property subject to the five-year statute of limitations, *Bader*, 245 Va. at 290, 427 S.E.2d at 187, and likewise a conspiracy to commit conversion. "A cause of action for conspiracy accrues when the actions committed in furtherance of the conspiracy result in damage." *Eshbaugh v. Amoco Oil Co.*, 234 Va. 74, 360 S.E.2d 350 (1987). After Peele colluded with Wilson to open the unauthorized accounts, he acted in furtherance of the conspiracy by assisting Wilson to transfer the funds to those accounts. Because that alleged act in furtherance of the conspiracy caused Wayne damage, the cause of action against Wells Fargo accrued on December 19, 2013, the date of transfer. Applying the five-year statute of limitations, this Court finds that the common law conspiracy claim was timely filed in 2017.

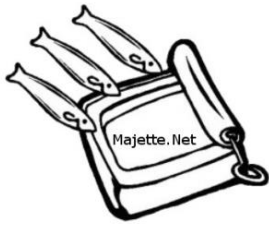
<sup>38</sup> The alleged conspiracy did not end in 2013. After the initial act of transferring the funds in furtherance of the conspiracy, Wayne alleges that Wells Fargo committed the additional act of rejecting a lawful power of attorney. It is unknown whether Wells Fargo obtained the necessary legal opinion to afford it safe harbor from liability under the POA Act. Wells Fargo argues that, regardless of whether it obtained an opinion from its legal department, the right to act as an agent under a power of attorney is a personal right subject to the two-year limitation on personal actions and this claim is time-barred. Wayne argues that the right to act under a power of attorney is a property right, which Wells Fargo injured when it rejected the POA, within the five year limitation period prior to filing. Similarly to the UCC conversion statute in *Bader*, the POA Act does not contain a statute of limitations provision. See *id.* at 289, 427 S.E.2d at 186; see also Va. Code § 64.2-1614. Therefore this Court will look to the nature of the injury to determine the applicable limitations period. See *Willard v. Moneta Building Supply*, 262 Va. 473, 482, 551 S.E.2d 596, 600 (2001) ("The applicable statute of limitations is determined by the type of injury alleged."). The Court agrees with Wells Fargo that the right to act as agent under a power of attorney is personal, and is not a property right. An agent's authority to act is distinguished from "the right to performance of a contract and the right to reap profits therefrom," which are property rights. *Dunlap v. Cottman Transmission Sys., L.L.C.*, 287 Va. 207, 220, 754 S.E.2d 313, 320 (2014) (citing *Worrie v. Boze*, 198 Va. 533, 536, 95 S.E.2d 192, 196 (1956)). The POA entitled neither Wayne nor Thomas to any performance or profits therefrom. This case is also distinguishable from cases holding that violation of a statutory right constituted an injury to property. See

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Lavery v. Automation Management Consultants, Inc., 234 Va. 145, 360 S.E.2d 336 (1987); Willard, 262 Va. at 482, 551 S.E.2d at 600. Lavery involved misappropriation of the right to use one's name or likeness for advertising or trade purposes pursuant to Virginia Code § 8.01-40, and Willard involved failure to provide a stockholder with notice of dissenter's rights. *Id.* The Lavery Court noted that use of a name or likeness was actionable precisely because it is a "thing of value," which can be "made a matter of merchandise" or taken "for commercial benefit." 234 Va. at 153, 360 S.E.2d at 341 (citations omitted). The Willard Court observed that it was the "[o]wnership of stock" which "provides the shareholder with a bundle of rights." 262 Va. at 481, 551 S.E.2d at 599. Unlike these rights, the right to act as agent under a POA does not confer an ownership interest of any commercial value. Although an agent has no property interest in a power of attorney, an agent may, incidentally, be a beneficiary of some property of the principal. In the capacity of beneficiary, the POA Act does recognize a property interest. In addition to "descendants," which Wayne is, the POA Act confers standing on a "person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate." Va. Code §§ 64.2-1621(A)(4), 64.2-1621(A)(6). By conferring standing on next of kin and named beneficiaries, the POA Act recognizes a class of persons who have a property interest to assert on their own behalf. In addition to acting as agent under the POA, Wayne was such a beneficiary. As alleged, Thomas designated Wayne as a joint owner of his accounts with a right of survivorship. In doing so, Thomas was using a common legal means of effecting a nonprobate transfer whereby both Wilson and Wayne would be beneficiaries of the funds in that account upon his death. Thomas chose this means of designating his beneficiaries rather than a will or a trust, and the POA Act's recognition of a "beneficiary" is sufficiently broad to encompass the benefit that Thomas intended to confer on Wayne. Even after Wilson and Peele allegedly transferred the funds into unauthorized accounts, Thomas directed Wayne to use the POA to restore his original intent of conferring that benefit on Wayne and preventing the funds from going to probate upon his death. Thus, when Wayne presented the POA to Wells Fargo, he was acting not only as agent, but as Thomas's intended beneficiary. The POA Act recognizes a property interest in such a beneficiary and confers standing on Wayne to assert that property interest. Wayne incurred damages sometime after May 22, 2014 as a result of the alleged violation of the POA Act, well within the five-year limitation period for property damage.

<sup>39</sup> refused to probate a document offered as her father's last will and testament, a daughter petitioned the circuit court to have the document probated.

<sup>40</sup> alleging fraud bears the burden of proving it.

The argument that the trial court failed to require the proponent of the will to authenticate all three pages of the will, urging adoption of a rule that the proponent of the will must show no alterations or changes either before or after execution, is rejected.

There is no requirement in the law for the witnesses to read the will or examine it with such care as to be able, upon application to admit to probate, to say that all the pages or clauses of the proposed will were the pages and clauses signed by the testator and attested by them.

Forgetfulness of the accessible subscribing witness as to certain necessary facts of execution does not avoid a prima facie case made out by proof of the genuineness of the signature of the testator and the subscribing witnesses.

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*Where the subscribing witnesses identify their signatures, but have no recollection of having attested the instrument, or the circumstances of execution, the presumption that it was properly executed will uphold it in the absence of clear and satisfactory proof to the contrary. [Emphasis added.]*

The possibility that one or more sheets might be removed and others substituted is not sufficient to justify denying admission of a will to probate.

*While computers make forgery and substitution of pages easier than when a will was written by hand or even on a typewriter, fraud and forgery are relatively rare and imposing heightened requirements for submitting a will to probate, based on the outlier possibility of forgery, would thwart the salutary simplicity found in our statutory scheme, which facilitates the ability of property owners to devise their estate by means of a will.*

*The purpose of the statutory requirements with respect to the execution of wills is to throw every safeguard deemed necessary around a testator while in the performance of this important act, and to prevent the probate of a fraudulent and supposititious will instead of the real one. It is, however, quite as important that these statutory requirements should not be supplemented by the courts with others that might tend to increase the difficulty of the transaction to such an extent as to practically destroy the right of the uninformed layman to dispose of his property by will. [Emphasis added.]*

The proponent of a will is required to prove compliance with statutory requirements for the execution of a will and, once that has been done, the burden is on the challenger to prove fraud.

In this case, the son's evidence established, at most, the opportunity for fraud due to the lack of initials on each page, 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. He never came close, however, to establishing that the will actually was fraudulent. Other than pure supposition, there is not one shred of evidence to support the argument that a page or pages have been substituted.

The evidence offered to refute the fraud claim showed that the will tendered for probate was consistent with the expressed wishes of the testator. ***Fraud must be proved, and in the absence of proof, the court will not imagine that fraud may possibly have been occurred, and act upon that imagination. [Emphasis added.]***

<sup>41</sup> but it must still be proven by the party claiming fraud.

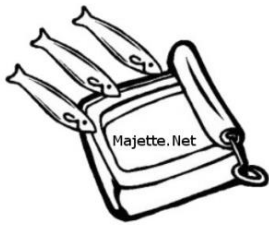
<sup>42</sup> Agent 2; equitable or legal remedy in order that agent restore property; attorney fees for restoration of property.

<sup>43</sup> in a multiple party account to which she is a party (Va. Code §6.2-619; see also Parfitt, 277 Va. at 341-42, 672 S.E.2d at 830 (citing prior statute, former Code § 6.1-125.15:1)), defendant husband is not liable as agent under Principal's power of attorney to defendant husband; when defendant husband is liable for

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withdrawing funds in Principal's account, the remedy for restoration authorized by Va. Code § 64.2-1615(1) sounds in law, not in equity; attorney's fees incurred by Plaintiff for restoration of funds taken by agent is not permitted by the statute.

<sup>44</sup> Attorney's fees are recoverable only as "required to [r]eimburse the principal or the principal's successors in interest for the attorney [sic] fees and costs *paid on the agent's behalf*." (Emphasis added). . . . [P]laintiffs have [not] paid any attorney's fees or costs on [defendant husband's] behalf, nor is there any evidence that [defendant husband] paid any attorney's fees from [Principal's] property. If the General Assembly had intended to authorize courts to award attorney's fees to principals or their successors-in-interest to reimburse their own expenditures in actions against attorneys-in-fact against whom they alleged violations of the Act, it could have included language in the statute to that effect. It did not do so."

<sup>45</sup>HOUSE BILL NO. 1954, which has passed both chambers in general format, changes this outcome by adding subsection E to Va. Code § 64.2-1614, as follows: "E. In a judicial proceeding under this chapter, if the court finds that the agent breached his fiduciary duty in violation of the provisions of this chapter, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any person who petitions the court for relief under subdivisions A 1 through 8, to be paid by the agent found in violation. This provision applies to a judicial proceeding concerning a power of attorney commenced on or after July 1, 2019."

<sup>46</sup> Effect of challenge to power of attorney while testator still living.

<sup>47</sup> with his sisters, who — in a prior proceeding — petitioned the court for a declaration that the testator was incapacitated, and for appointment of a guardian. At one point, the son lodged a counterclaim, but later made his arguments as affirmative defenses to his sisters' amended petition, claiming that the sisters had unclean hands in procuring the will. After extensive discovery, the circuit court entered a consent order finding that the testator was incapacitated and appointed a neutral third-party to serve as her guardian and the conservator of her estate. The order also voided previously executed powers of attorney and dismissed the son's counterclaims with prejudice. After the testator's death, the son filed the present complaint seeking to impeach the will on the grounds of undue influence and lack of testamentary capacity. The sisters filed a plea in bar, arguing that their brother's claims were barred by the doctrine of claim preclusion because they arise from the same conduct, transaction, or occurrence underlying the claims asserted in the prior litigation. The circuit court sustained the plea in bar on the grounds of claim preclusion, issue preclusion, and judicial estoppel.

<sup>48</sup> was capable of executing the power of attorney is not fatally inconsistent with his present argument that she lacked the requisite testamentary capacity to execute her will. Thus, judicial estoppel does not apply.

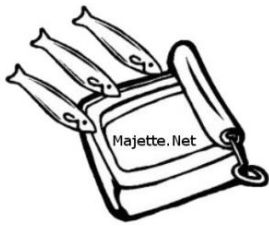
Even if the son's positions are factually inconsistent, the doctrine of judicial estoppel is still inapplicable because the court did not rely upon his assertions in rendering its decision in the prior litigation.

<sup>49</sup> in context of signing as "responsible party" and not as "power of attorney;" inapplicability of arbitration clause to independent wrongful death action, etc.

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<sup>50</sup> clause may assert rights under it;

<sup>51</sup> Nevertheless, that policy does not impair the constitutional right of a party to have access to the courts, including the right to a jury trial if requested, unless that party has, by contract, voluntarily waived those rights.” *Doyle & Russell, Inc. v. Roanoke Hospital Ass'n*, 213 Va. 489, 494 (1973). The Virginia Supreme Court held in *Mission Residential, LLC v. Triple Net Props, LLC*, 275 Va. 157, 161 (2008): A party cannot be compelled to submit to arbitration unless he has first agreed to arbitrate. *When the question before the court is whether the parties have agreed to arbitrate, there is no presumption* in favor of arbitrability. Rather, the party seeking arbitration has the burden of proving the existence of the agreement. A presumption in favor of arbitrability arises only after the existence of such an agreement has been proved, and the remaining question is whether the scope of the agreement is broad enough to include the disputed issue. *Mission Residential, LLC* at 161 (Emphasis added) .

Thus, the *Code of Virginia* and Supreme Court of Virginia in *Mission Residential* make it clear that the determination of the validity of an Arbitration Agreement is for the court to decide.

... [D]efendants may not raise a Plea in Bar nor Compel Arbitration based upon the Arbitration Addendum to which neither ... was a party.

<sup>52</sup> “The actual effect of presumptions has been widely debated by legal scholars and courts for decades, if not longer. *See* 2 McCormick on Evidence § 344 (John W. Strong ed., 4th ed. 1992). There are two competing theories of presumptions. On one side is the ‘Thayer theory,’ set forth by Professor James B. Thayer, and also known as the ‘bursting bubble theory.’ *See id.* at 462. This theory states that the only effect of a presumption is to shift the burden of production with regard to the presumed fact. *Id.* Under this theory, once the party against whom the presumption operates introduces countervailing evidence, the presumption ‘disappears like a bursting bubble and no longer has any impact on the trial.’ 1 Clifford S. Fishman, *Jones on Evidence: Civil and Criminal* § 4:10 (7th ed. 1992). The party who initially benefitted from this presumption still retains the burden of persuasion on the factual issue in question. *Id.* The competing theory of presumptions is often referred to as the ‘Morgan theory,’ credited to Professor Edward Morgan, and under this theory a presumption has the effect of shifting both the burden of production and the burden of persuasion on the factual issue in question against whom the presumption operates. 2 McCormick on Evidence § 344, at 471; 1 *Jones on Evidence* § 4:11.”

<sup>53</sup> “[W]e will take this opportunity to set forth the legal effect of this presumption in such cases. If a contestant of a will pleads sufficient facts to allege that (1) the testator was old when his will was established; (2) he named a beneficiary who stood in a relationship of confidence or dependence; and (3) he previously had expressed an intention to make a contrary disposition of his property, such allegations would be sufficient to survive demurrer. At trial, if a contestant of a will puts forth evidence to prove these three elements, the presumption would be established and the contestant would survive a motion to strike his evidence at the close of the plaintiff’s evidence.

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Once the presumption of undue influence is established, the burden of production then shifts to the proponent of the will. If the proponent of the will puts forth no evidence at this point, the presumption of undue influence is sufficient to form the basis of a verdict in the contestant's favor. In order to rebut the presumption, the proponent of the will is required to put forth countervailing evidence tending to prove that the decedent's will was not overborne. We have explained that 'not all influence is undue in the legal sense. To be classified as 'undue,' influence must place the testator in the attitude of saying, 'It is not my will but I must do it.'" *Weedon*, 283 Va. at 255-56. If the proponent of the will produces evidence tending to prove that the decedent's will was not overborne, the presumption 'disappears like a bursting bubble.' 1 Jones on Evidence § 410. See *Martin*, 235 Va. at 529. The contestant of the will then retains the burden of proving undue influence by clear and convincing evidence. *Weedon*, 283 Va. at 256."

<sup>54</sup> NAELA members may access the PowerPoint of the similar title prepared and presented by Kevin and our NAELA colleague Blaine Brockman in August. I request pends (as of August 28, 2019) for permission from possible copyright holders to post the PowerPoint on Majette.net or through the Virginia Law Foundation.

<sup>55</sup> K.2.b., which now provides if due to a change in policy, a policy clarification, or the reopening of a prior erroneous trust determination, a trust that was previously determined to be exempt from resource counting under Section 1917(d)(4)(A) or (C) is determined to be a resource, offer a 90-day amendment period.

<sup>56</sup> "An LTC facility must:

- Not require that a resident or his or her representative sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility. This must be explicitly stated in the agreement to ensure. This ensures that no resident or his or her representative will have to choose between the resident obtaining the skilled nursing care he or she needs and signing an agreement for binding arbitration.
- Ensure that the agreement is explained to the resident or his or her representative in a form and manner that he or she understands, including in a language that he or she understands, and that the resident or his or her representative acknowledges that he or she understands the agreement. These two requirements ensure that the arbitration agreement is transparent and the resident or his or her representative understand what he or she is agreeing to.
- Ensure that the agreement provides for the selection of a neutral arbitrator agreed upon by both parties and a venue that is convenient to both parties. These requirements help to ensure that the arbitration process is fair to both parties, especially the residents.
- Ensure that the agreement does not contain any language that prohibits or discourages the resident or anyone else from communicating with federal, state, or local officials, including Federal or state surveyors, other federal or state health department employees, or representative of the Office of the

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State Long-Term Care Ombudsman. This protects the resident and his or her representative from any undue influence by the LTC facility to not discuss the circumstances surrounding a concern, complaint or grievance.

- Retain copies of the signed agreement for binding arbitration and the arbitrator's final decision for 5 years after the resolution of any dispute resolved through arbitration with residents, and make these documents available for inspection upon request by CMS or its designee. This will ensure that CMS will be able to obtain information on how the arbitration process is being used by LTC facilities, and on the outcomes of the arbitrations for residents.”

See <https://www.cms.gov/newsroom/fact-sheets/medicare-and-medicaid-programs-revision-requirements-long-term-care-facilities-arbitration> and link therein for further information.

<sup>57</sup> The watershed case, *Kindred Nursing Centers LLC v. Clark*, 581 US 1632 (2017), upheld arbitration clauses. The probable issue will be the authority of the CMS to condition participation in Medicaid / Medicare upon compliance with the rule imposing a ban. In other words, the parties are free to enter into any agreement they wish, but so is CMS, and it has declined to certify nursing homes from Medicaid / Medicare participation if they include such clauses.

<sup>58</sup> Note that the actual date of publication in the FR is July 18, not July 16. The link: <https://www.federalregister.gov/documents/2019/07/18/2019-14945/medicare-and-medicaid-programs-revision-of-requirements-for-long-term-care-facilities-arbitration>

<sup>59</sup> See Ed Zetlin's outline on the topic of Virginia's Medicaid expansion, referred to as "MAGI" adults in Virginia. The writer's Manual excerpt is a compilation of every citation in the Virginia Medicaid Manual to this new group topic. **Particular references are made for long term care services for persons covered in this category.**

<sup>60</sup> The present work incorporates and references the 2019 mental health initiative, the Governor's Access Project (GAP), and Virginia Medicaid Expansion.

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# COMMONWEALTH of VIRGINIA

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April 1, 2019

### Virginia Medical Assistance Eligibility Manual Transmittal #DMAS-12

- BCCTA-Breast and Cervical Treatment Act
- CCC- Commonwealth Coordinated Care
- FPL – Federal Poverty Level
- GAP- Governor’s Access Plan
- MAGI—Modified Adjusted Gross Income
- TN – Transmittal

TN #DMAS-12 includes policy clarifications, updates and revisions. Unless otherwise noted in the Cover Letter and/or policy, all provisions included in this transmittal are effective with eligibility determinations and post-eligibility (patient pay) calculations made on or after April 1 2019.

The following changes are contained in TN #DMAS-12:

Changed Pages	Changes
Subchapter M0110 Table of Contents Pages 1, 2, 9 Page 2a is a runover page.	Updated the Table of Contents. On page1, added statement that local agency must establish office procedures and operations that accommodate the needs of the population it serves and provide bilingual staff and interpreter services to households with limited English proficiency. On page 2, added a reference to the Cover Virginia Incarcerated Unit and DSS/Cover Virginia processes. On page 9, added the definition of incarcerated individual.
Subchapter M0120 Pages 2, 12-13, 15, 20a	On page 2, clarified the mailing address for offender applications. On page 12, clarified where applications may be accepted. On page 13, clarified what physical address is used for an offender’s application. On page 15 clarified the mailing address for offender’s applications. Page 20a, explained that the GAP Program ends on March 31, 2019 .

Changed Pages	Changes
Subchapter M0220 Pages 20, 21, 23	On page 20, clarified the covered group requirement for emergency services only non-citizens. On pages 21 & 23, added verbiage regarding eligibility worker ability to process certain Emergency Services coverage.
Subchapter M0310 Pages 8, 9, 13	On pages 8, 9, and 13, clarified the requirements for a parent to be considered living in the home with a dependent child.
Subchapter M0320 Pages 21, 22, 25-27	On pages 21 and 22, clarified that the group of Protected SSI Disabled Children is no longer applicable as all affected children are over age 18; however, it remains in federal regulations. On page 25, revised text for clarity. On pages 26 and 27, updated the Medicaid Works resource limit for 2019.
Subchapter M0330 Pages 26, 28	On page 26, added website for BCCPTA screening locations. On page 28, clarified no limitations on the length of time person can be enrolled in BCCPTA covered group.
Chapter M04 Pages 3,5 - 8, 15-16, 19, 32-37 Page 16a was added as a runover page. Appendices 1, 2, 5, 7,	On page 2, added note regarding MAGI Adults LTC procedures in M14. On page 5, clarified the definition of a dependent child. On page 6, added the definition of a tax filing threshold. On page 8, clarified gap-filling rules. On pages 15- 16, clarified countable and non-countable income. On page 19, updated the list of excluded income. On pages 32-36, clarified gap-filling rules and revised the examples. In Appendices 1, 2, 5, and 7, updated the income limits based on the FPL.
Subchapter M0520 Pages 1, 2	Clarified the requirements for a parent to be considered living in the home with a dependent child.
Subchapter M0610 Page 1	Added reference of categorically needy to subchapter M0330.
Subchapter M0810 Page 2	Updated the income limits based on the FPL.
Subchapter M0820 Page 21	Corrected misspelling.
Subchapter M0830 Page 113	Corrected grammatical error
Subchapter M1110 Pages 10-10a	Clarified that the appraised value is valid up to six months prior to application and clarify when the appraised value differs from tax assessed value, the amount which is most beneficial to individual is used.
Subchapter M1130 Page 13	Clarified use of certified appraisal is valid up to six months prior to date of application.
Subchapter M1320 Page 3	Clarified that there is no time limit for when an applicant can submit medical expenses for a spenddown.
Subchapter M1340 Page 2	Added subchapter reference regarding health insurance expenses.
Subchapter M1360 Pages 4, 4a.	On page 4, clarified spend down procedure when individual is incarcerated. On Page 4a, updated example 3 and additional example is added.
Subchapter M1410 Pages 4, 10, 11 Page 4a is a runover page.	On page 4, add clarification an offender in a public institution is not eligible for LTSS while incarcerated. On page 10 & 11, update acronym of LTC to LTSS.
Subchapter M1420 Page 2	Clarified that individuals in non-hospital facilities will be screened by the community-based team in the locality in which the facility is located.



Manual Title <b>Virginia Medical Assistance Eligibility</b>	Chapter <b>M11</b>	Page Revision Date <b>April 2019</b>
Subchapter Subject <b>ABD RESOURCES - GENERAL</b>	Page ending with <b>M1110.400</b>	Page <b>10</b>

## S1110.310 RESOURCES ASSUMED TO BE NONLIQUID

- A. Introduction** Certain non-cash resources, though they may occasionally be liquid, are nearly always non-liquid.
- B. Operating Policy**
- 1. Assumption of Nonliquidity** Absent evidence to the contrary, we assume that the following type of resources are non-liquid.
- automobile, trucks, tractors, and other vehicles;
  - machinery and livestock;
  - buildings, land and other real property rights; and
  - non-cash business property.
- 2. Evidence to The Contrary**
- a. If there is no apparent evidence to the contrary of the assumptions in 1. above, we do not seek out any evidence to the contrary. There is no need to document a lack of evidence to the contrary.
- b. In very rare situations an individual may volunteer firm evidence that one of the above types of resources is liquid (i.e., its sale has been accomplished or arranged within 20 workdays). Document the file *in the VaCMS case record* and proceed accordingly only if the distinction is material.
- C. Operating Policy-- Life Insurance** This subchapter provides no categorical assumption regarding the liquidity or non-liquidity of life insurance policies.

## VALUATION OF RESOURCES

### M1110.400 WHAT VALUES APPLY TO RESOURCES

#### A. Policy Principles

##### 1. Definitions

- a. The current market value (CMV) or fair market value (FMV) of a resource is:

- ~~Real property~~ – 100% of the local tax assessed value **or** effective 10/4/16, the certified value as determined by an appraiser licensed in the state in which the real property is ~~located~~. The use of an appraisal is applicable only to non-commercial real property. *A licensed appraiser's certified value can be used if the appraisal was completed no more than six months previous to the date of the application.*

Renders new rule troublesome when filing is not imminent. Solution: file Medicaid application immediately upon sale of real estate regardless of the likelihood of eligibility.

TIN # DMAS-12 Eff. 4-1-2019	RSM Added Page Number 76	Chapter	RSM Notes and Added Bookmarks
<b>Virginia Medical Assistance Eligibility</b>		<b>M11</b>	<b>Page Revision Date</b> <b>April 2019</b>
Subchapter Subject <b>M1130.000 ABD RESOURCE EXCLUSIONS</b>		Page ending with <b>M1130.140</b>	Page <b>13</b>

## **M1130.140 REAL PROPERTY FOLLOWING REASONABLE BUT UNSUCCESSFUL EFFORTS TO SELL**

### **A. Policy Principles**

#### **1. Exclusion**

Real property, including a life estate in real property created on or after August 28, 2008 but before February 24, 2009, that an individual has made reasonable but unsuccessful efforts to sell, will continue to be excluded for as long as:

- the individual continues to make reasonable efforts to sell it; and
- including the property as a countable resource would result in a determination of excess resources.

This exclusion is effective the first of the month in which the most recent application was filed or up to three months prior if retroactive coverage is required.

### **B. Operating Procedure**

The "current market" value (CMV) of real property located in Virginia is the tax assessed value of the property **or**, effective 10/4/16, the certified value as determined by an appraiser licensed in Virginia.

See planning note above. When a sale is made for less than TAV file a protective Medicaid application within six months of sale.

For property located outside of Virginia the CMV is determined by applying the tax assessed value of the property to the local assessment rate, if the rate is not 100%, **or the certified value as determined by an appraiser licensed in the state in which the real property is located.**

*A licensed appraiser's certified value can be used if the appraisal was completed no more than six months previous to the date of the application. The use of an appraisal is applicable only to non-commercial real property. See M1110.400.*

#### **1. Initial Effort Established**

The following criteria define reasonable efforts to sell. The listing price must not exceed 100% of CMV in order for the initial effort to sell to be met.

A reasonable effort to sell is considered to have been made:

- a. As of the date the property becomes subject to a realtor's listing agreement (must be actively marketed) if it is listed at no more than current market value **AND** the listing realtor verifies that it is unlikely to sell within 90 days of listing given particular circumstances involved; for example
  - owner's fractional interest;
  - zoning restrictions;
  - poor topography;
  - absence of road frontage or access;
  - absence of improvements;
  - clouds on title;
  - right of way or easement;
  - local market conditions; or



# COMMONWEALTH of VIRGINIA

## Department of Medical Assistance Services

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July 1, 2019

### **Virginia Medical Assistance Eligibility Manual Transmittal #DMAS-13**

The following acronyms are contained in this letter:

- DDS – Disability Determination Services
- F&C – Families and Children
- HCBS – Home and Community-based Services
- LIFC – Low Income Families with Children
- MN – Medically Needy
- SSI – Supplemental Security Income
- SSN – Social Security Number
- TN – Transmittal

TN #DMAS-13 includes policy clarifications, updates and revisions. Unless otherwise noted in the Cover Letter and/or policy, all provisions included in this transmittal are effective with eligibility determinations and post-eligibility (patient pay) calculations made on or after July 1 2019.

The following changes are contained in TN #DMAS-13:

Manual Title <b>Virginia Medical Assistance Eligibility</b>	Chapter <b>M08</b>	Page Revision Date <b>July 2019</b>
Subchapter Subject <b>M0810 GENERAL - ABD INCOME RULES</b>	Page ending with <b>M0810.002</b>	Page <b>2</b>

**3. Categorically  
Needy 300% of  
SSI**

For the covered groups that use the 300% of SSI income limit, all income is counted (even excluded income) when screening at 300% of SSI. Do not count any monies which are defined as “what is not income” in S0815.000.

Family Size Unit	2018 Monthly Amount	2019 Monthly Amount
1	\$2,250	\$2,313

**4. ABD Medically  
Needy**

a. Group I	7/1/2018 – 6/30/19		7/1/2019	
Family Unit Size	Semi-annual	Monthly	Semi-annual	Monthly
1	\$ 1,904.55	\$317.42	\$1,957.87	\$326.31
2	2,424.75	404.12	2,492.57	415.42

b. Group II	7/1/2018 – 6/30/19		7/1/2019	
Family Unit Size	Semi-annual	Monthly	Semi-annual	Monthly
1	\$ 2,197.56	\$366.26	\$2,259.09	\$376.51
2	2,706.04	451.00	2,781.69	463.61

c. Group III	7/1/2018 – 6/30/19		7/1/2019	
Family Unit Size	Semi-annual	Monthly	Semi-annual	Monthly
1	\$ 2,856.84	\$476.14	\$2,936.83	\$489.47
2	3,444.33	574.05	3,540.71	590.11

**5. ABD  
Categorically  
Needy**

**For:**

**ABD 80% FPL,  
QMB, SLMB, &  
QI without Social  
Security income;  
all QDWI;  
effective 1/11/19**

**ABD 80% FPL,  
QMB, SLMB, &  
QI with Social  
Security income;  
effective 3/1/19**

All Localities	2018		2019	
ABD 80% FPL	Annual	Annual	Annual	Monthly
1	\$9,712	\$9,712	\$9,992	\$833
2	13,168	13,168	13,528	1,128
QMB 100% FPL	Annual	Annual	Annual	Monthly
1	\$12,140	\$12,140	\$12,490	\$1,041
2	16,460	16,460	16,910	1,410
SLMB 120% of FPL	Annual	Annual	Annual	Monthly
1	\$14,568	\$14,568	\$14,988	\$1,249
2	19,752	19,752	20,292	1,691
QI 135% FPL	Annual	Annual	Annual	Monthly
1	\$16,389	\$16,389	\$16,862	\$1,406
2	22,221	22,221	22,829	1,903
QDWI 200% of FPL	Annual	Annual	Annual	Monthly
1	\$24,280	\$24,280	\$24,980	\$2,082
2	32,920	32,920	33,820	2,819

IN # 13-13 Eff. 7-1-2019	RSM Added Page Number 61	Chapter	RSM Notes and Added Bookmarks
Manual Title	<b>Virginia Medical Assistance Eligibility</b>	<b>M14</b>	Page Revision Date <b>July 2019</b>
Subchapter Subject	<b>M1480 MARRIED INSTITUTIONALIZED INDIVIDUALS</b>	Page ending with	Page
		<b>M1480.420</b>	<b>66</b>

After eligibility is established, the usual reporting and notification processes apply. Send written notice for the month(s) during which the individual establishes Medicaid eligibility. VaCMS will generate the “Notice of Obligation for LTC Costs” and it will be sent to the individual or his authorized representative.

## **M1480.400 PATIENT PAY**

**Introduction** This section contains the policy and procedures for determining an institutionalized spouse’s (as defined in section M1480.010 above) patient pay in all covered groups.

**B. Married With Institutionalized Spouse in a Facility** For a married long-term services and support (LTSS) patient with an institutionalized spouse in a facility, **NO** amount of the patient’s income is deducted for the spouse’s needs in the patient pay calculation.

## **M1480.410 MAINTENANCE STANDARDS & ALLOWANCES**

**Introduction** This subsection contains the standards and their effective dates that are used to determine the community spouse’s and other family members’ income allowances. The income allowances are deducted from the institutionalized spouse’s gross monthly income when determining the monthly patient pay amount. Definitions of these terms are in section M1480.010 above.

<b>B. Monthly Maintenance Needs Allowance</b>	\$2,057.50	7-1-18	
	\$2,113.75	7-1-19	
<b>C. Maximum Monthly Maintenance Needs Allowance</b>	\$3,090.00	1-1-18	
	\$3,160.50	1-1-19	
<b>D. Excess Shelter Standard</b>	\$617.25	7-1-18	
	\$634.13	7-1-19	
<b>E. Utility Standard Deduction (SNAP)</b>	\$306.00	1 - 3 household members	10-1-17
	\$381.00	4 or more household members	10-1-17
	\$311.00	1 - 3 household members	10-1-18
	\$387.00	4 or more household members	10-1-18

## **M1480.420 PATIENT PAY FOR ABD 80% FPL AND 300% SSI INSTITUTIONALIZED SPOUSE**

**A. Policy** After a 300% SSI or ABD 80% FPL institutionalized spouse has been found eligible for Medicaid, determine his patient pay (post-eligibility treatment of income).



**COMMONWEALTH of VIRGINIA**  
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**DRAFT**

October 1, 2019

**Virginia Medical Assistance Eligibility Manual**  
**Draft Transmittal #DMAS-14**

The following acronyms are contained in this letter:

- DMAS – Department of Medical Assistance Services
- DDS – Disability Determination Services
- LDSS – Local Department of Social Services
- LTSS – Long-term Services and Supports
- PACE – Program of All-inclusive Care for the Elderly
- QMB – Qualified Medicare Beneficiaries
- SSI – Supplemental Security Income
- TN – Transmittal
- VCU – Virginia Commonwealth University

TN #DMAS-14 includes policy clarifications, updates and revisions. Unless otherwise noted in the Cover Letter and/or policy, all provisions included in this transmittal are effective with eligibility determinations and post-eligibility (patient pay) calculations made on or after October 1 2019.

The following changes are contained in TN #DMAS-14:

Changed Pages	Changes
Subchapter M0110 Page 15	Clarified the information that must be maintained in the case record.
Subchapter M0120 Pages 7, 10, 11, 18, Page 20a was deleted.	On pages 7, 10, and 18, revised the links to online forms. On page 11, removed an obsolete link.

Manual Title <b>Virginia Medical Assistance Eligibility</b>	Chapter <b>M14</b>	Page Revision Date <b>October 2019</b>
Subchapter Subject <b>M1470 PATIENT PAY</b>	Page ending with <b>M1470.001</b>	Page <b>1</b>

## **M1470.000 PATIENT PAY-POST-ELIGIBILITY TREATMENT OF INCOME**

### **M1470.001 OVERVIEW**

- A. Introduction** “Patient pay” is the amount of the long-term care (LTC) patient’s income which must be paid as his share of the LTC services cost. This subchapter provides basic rules regarding the post-eligibility determination of the amount of the LTC patient's income which must be paid toward the cost of his care. **MAGI Adults have no responsibility for patient pay.** If an individual receiving LTC, also called long-term supports and services (LTSS, loses eligibility in the MAGI Adults covered group and is eligible in another full coverage group, patient pay will policy will apply.
- B. Policy** The state’s Medicaid program must reduce its payment to the LTC provider by the amount of the eligible patient's monthly income, after allowable deductions. Patient pay is calculated after an individual has been determined eligible for Medicaid and for Medicaid LTC services. A Medicaid recipient who is admitted to a nursing facility, facility for individuals with intellectual disability (ICF-ID) or Medicaid waiver services for less than 30 days must have a patient pay determined for the month(s) in which the recipient is in the facility or waiver services. The provider collects the patient pay from the patient or his authorized representative. Patient pay information is fed to the Automated Response System (ARS) and the MediCall Systems for provider verification of patient pay. These systems report the amount of patient pay and the date of service to the provider responsible for collecting patient pay.
- C. VaCMS Patient Pay Process** The patient pay calculation is completed in VaCMS. Refer to the VaCMS Help feature for information regarding data entry. The patient pay must be updated in the system whenever the patient pay changes, but at least once every 12 months. If VaCMS is not able to process required transactions, a Patient Pay Correction form (DMAS 9PP), available at <https://fusion.dss.virginia.gov/bp/BP-Home/Medical-Assistance/Forms>, should be submitted to [patientpay@dmas.virginia.gov](mailto:patientpay@dmas.virginia.gov).
- D. Patient Notification** The patient or the authorized representative is notified of the patient pay amount on the Notice of Obligation for Long-term Care Costs. VaCMS will generate and send the Notice of Obligation for LTC Costs. M1470, Appendix 1 contains a sample Notice of Obligation for LTC Costs generated by VaCMS. DMAS will generate and mail a Notice of Obligation for any changes input directly into MMIS.
- The provider is the only entity with the authority to take action when residents do not pay their patient pay amount. If a resident, or his authorized representative is negligent in paying his patient pay amount to the provider, the provider will provide written documentation regarding the requirement to pay the patient pay amount to the resident or authorized representative and follow the provider’s collection procedures to collect the funds. The provider will report the resident’s negligence in paying the patient pay amount to the LDSS.

The provider's failure to collect the patient pay, or the patient's failure to pay the patient pay, does not itself affect the patient's Medicaid eligibility. However, the

Manual Title <b>Virginia Medical Assistance Eligibility</b>	Chapter <b>M14</b>	Page Revision Date <b>January 2017</b>
Subchapter Subject <b>M1470 PATIENT PAY</b>	Page ending with <b>M1470.240</b>	Page <b>14</b>

Do not send requests for adjustments to DMAS when the patient has no available income for patient pay. Refer to M1470.230 C.5.c for notification procedures to be followed by the local worker.

When a request for an adjustment is approved or denied by DMAS, the local DSS worker will receive a copy of the letter sent to the recipient by DMAS:

- 1) If approved, adjust the patient pay using the VaCMS Patient Pay process.
- 2) If the adjustment request is denied, DMAS prepares the notification.

#### **b. DMAS Approval Not Required**

Determine if the expense is deducted from patient pay using the following sequential steps:

- 1) Upon receipt of the requested documentation, determine the amount of the bill that is a valid deduction. Do not deduct more than the available income that remains after the personal needs, dependent child allowance(s), and health insurance premiums are deducted.

If a noncovered service is already being deducted leaving no patient pay, and a new deduction for another noncovered service is requested, deduct the new noncovered services after the first noncovered service deductions have been completed.

- 2) Subtract the deduction for the month following the month the change is reported. If the deduction exceeds the available income, the remaining balance can be carried over to the following month(s).

#### **c. Notice Procedures**

Upon the final decision to allow the deduction, use the VaCMS Patient Pay process to adjust the patient pay. VaCMS will generate and send the Notice of Obligation for LTC Costs.

#### **6. Managed Care Organizations and CCC Plus (effective January 1, 2018)**

*As of January 1, 2018, the majority of Medicaid-eligible individuals who receive long-term care (LTC) services are covered under the CCC Plus program through one of six (6) managed care organizations (MCO). As part of the CCC Plus program, each health plan offers enhanced benefits, such as adult dental services or hearing aids, outside of the required contracted Medicaid services. Some of these enhanced benefits are frequently submitted to the LDSS as patient pay adjustment.*

*If there are other coverage sources available for these services or items, Medicaid policy requires the request for coverage first be submitted to those sources and exhausted there, before the LDSS/DMAS may consider or approve a patient pay adjustment.*



Manual Title <b>Virginia Medical Assistance Eligibility</b>	Chapter <b>M14</b>	Page Revision Date <b>October 2019</b>
Subchapter Subject <b>M1470 PATIENT PAY</b>	Page ending with <b>M1470.240</b>	Page <b>14a</b>

*A process is in development to develop a process for distinguishing MCO enhanced benefit services from allowable patient pay deductions. Until further notice, providers and nursing facilities will continue sending all patient pay adjustment requests to the patient's LDSS eligibility worker.*

*Eligibility workers will review and process patient pay adjustment requests without requiring submission of the request to the individual's CCC Plus plan.*

## **M1470.240 FACILITY - HOME MAINTENANCE DEDUCTION**

### **A. Policy**

A single institutionalized individual can be allowed a deduction for the cost of maintaining a home for not more than six months, if a physician has certified he or she is likely to return home within that period.

Home maintenance means that the individual has the responsibility to pay shelter costs on his former place of residence in Virginia, such as rent, mortgage, utilities, taxes, room and board, or assisted living facility (ALF) payments, and that the home, apartment, room or bed is being held for the individual's return to his former residence in Virginia. Individuals who have no responsibility to pay shelter costs are not permitted a home maintenance deduction. If responsibility for shelter costs is questionable, documentation must be requested and provided.

IN # DMS-14 Effective 10-1-2019 (DRAFT Stamp) Added Page Number 119 Manual Title	Chapter <b>M14</b>	Page Revision Date <b>October 2019</b>
Subchapter Subject <b>M1480 MARRIED INSTITUTIONALIZED INDIVIDUALS</b>	Page ending with <b>M1480.010</b>	Page <b>8a</b>

## M1480.200 RESOURCE ASSESSMENT RULES

### A. Introduction

A resource assessment must be completed when an institutionalized spouse with a community spouse applies for Medicaid coverage of long term care services and may be requested without a Medicaid application.

A resource assessment is strictly a:

- compilation of a couple's reported resources that exist(ed) at the first moment of the first day of the month in which the first continuous period of institutionalization began on or after September 30, 1989.
- calculation of the couple's total countable resources at that point, and
- calculation of the spousal share of those total countable resources.

A resource assessment does not determine resource eligibility but is the first step in a multi-step process. A resource assessment determines the spousal share of the couple's combined countable resources.

### B. Policy Principles

#### 1. Applicability

The resource assessment and resource eligibility rules apply to individuals who began a continuous period of institutionalization on or after September 30, 1989 and who are likely to remain in the medical institution for a continuous period of at least 30 consecutive days, or have been screened and approved for Medicaid CBC waiver services, or have elected hospice services.

The resource assessment and resource eligibility rules do **NOT** apply to individuals who were institutionalized before September 30, 1989, **unless** they leave the institution (or Medicaid CBC waiver services) for at least 30 consecutive days and are then re-institutionalized for a new continuous period that began on or after September 30, 1989.

*Resource Assessment policy does not apply to individuals eligible in the MAGI Adult covered group. However, a resource assessment may be needed when a married individual FORMERLY received LTSS as a MAGI Adult, and needs to be re-evaluated for LTSS in a non-MAGI group. If the individual is currently married but was not married on the first day of the first continuous period of institutionalization, no resource assessment is needed.*

#### 2. Who Can Request

A resource assessment without a Medicaid application can be requested by the institutionalized individual in a medical institution, his community spouse, or an authorized representative. See section M1410.100.

#### 3. When to Do A Resource Assessment

##### a. Without A Medicaid Application

A resource assessment without a Medicaid application may be requested when a spouse is admitted to a **medical institution**. Do not do a resource assessment **without** a Medicaid application unless the individual is in a medical institution.

##### b. With A Medicaid Application

The spousal share is used in determining the institutionalized individual's resource eligibility. A resource assessment must be completed when a married institutionalized individual with a community spouse who

IN # DMAS-14 Effective 10-1-2019 (DRAFT Stamp) Added Page Number 130	Chapter <b>M14</b>	Page Revision Date <b>October 2019</b>
Manual Title <b>Virginia Medical Assistance Eligibility</b>	Page ending with <b>M1480.420</b>	Page <b>66</b>
Subchapter Subject <b>M1480 MARRIED INSTITUTIONALIZED INDIVIDUALS</b>		

After eligibility is established, the usual reporting and notification processes apply. Send written notice for the month(s) during which the individual establishes Medicaid eligibility. VaCMS will generate the “Notice of Obligation for LTC Costs” and it will be sent to the individual or his authorized representative.

## M1480.400 PATIENT PAY

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## M1480.410 MAINTENANCE STANDARDS & ALLOWANCES

- Introduction** This subsection contains the standards and their effective dates that are used to determine the community spouse’s and other family members’ income allowances. The income allowances are deducted from the institutionalized spouse’s gross monthly income when determining the monthly patient pay amount. Definitions of these terms are in section M1480.010 above.
- |   |            |                             |         |
|---|------------|-----------------------------|---------|
| <b>B. Monthly Maintenance Needs Allowance</b>         | \$2,057.50 | 7-1-18                      |         |
|   | \$2,113.75 | 7-1-19                      |         |
| <b>C. Maximum Monthly Maintenance Needs Allowance</b> | \$3,090.00 | 1-1-18                      |         |
|   | \$3,160.50 | 1-1-19                      |         |
| <b>D. Excess Shelter Standard</b>                     | \$617.25   | 7-1-18                      |         |
|   | \$634.13   | 7-1-19                      |         |
| <b>E. Utility Standard Deduction (SNAP)</b>           | \$311.00   | 1 - 3 household members     | 10-1-18 |
|   | \$387.00   | 4 or more household members | 10-1-18 |
|   | \$303.00   | 1 - 3 household members     | 10-1-19 |
|   | \$379.00   | 4 or more household members | 10-1-19 |

*Note: the amounts decreased effective 10-1-19.*

## M1480.420 PATIENT PAY FOR ABD 80% FPL AND 300% SSI INSTITUTIONALIZED SPOUSE

- A. Policy** After a 300% SSI or ABD 80% FPL institutionalized spouse has been found eligible for Medicaid, determine his patient pay (post-eligibility treatment of income).