

## Estate Planning: Caveat Venditor vs. Caveat Emptor – Thorsen Case Highlights How Attorney and Client Must Beware

Article By:

Catherine F. Schott Murray,

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The recent opinion from the *Virginia Supreme Court* in the case of [\*Thorsen, et al. vs. Richmond Society for the Prevention of Cruelty to Animals\*](#) (RSPCA) contains lessons for attorneys and clients surrounding the preparation of estate planning documents.

The case involved the preparation of a Last Will and Testament in 2003 in which Alice L. Cralle Dumville, the testatrix (or creator of the will) desired to make sure that her estranged husband did not receive any of her estate should she die during the pendency of the divorce. To that end, she asked an attorney, James B. Thorsen, to prepare a will leaving her assets to her mother, and if her mother predeceased, to the RSPCA. Ms. Dumville died in 2008 having had her mother predecease her in 2007. The RSPCA was notified that they were the beneficiary of Ms. Dumville's estate, except a problem was discovered with the will. The will left only Ms. Dumville's tangible personal property to the RSPCA and made no provision for her real property, which would pass by intestacy to Ms. Dumville's two heirs at law.

Mr. Thorsen filed suit to correct the 'scrivener's error' in the Circuit Court of Chesterfield County, but the Circuit Court found that the language of the will was clear in that only the tangible personal property was to be distributed to the RSPCA, while the remainder of Ms. Dumville's assets would pass by intestacy. The RSPCA then sued Mr. Thorsen in Richmond Circuit Court for breach of contract-professional negligence stating that it was a third-party beneficiary to the agreement between Mr. Thorsen and Ms. Dumville. The Circuit Court agreed and Mr. Thorsen appealed to the Virginia Supreme Court arguing that (a) the RSPCA was not an intended third-party beneficiary, (b) a written agreement with any third-party beneficiary was required, and (c) the statute of limitations barred the RSPCA's action.

In short, the Virginia Supreme Court, in a 6-1 decision, disagreed with Mr. Thorsen and agreed with the Circuit Court finding for the RSPCA. By doing so, the Virginia Supreme Court found that a third-party beneficiary who is 'clearly and definitely' the intended beneficiary of a contract (even one where no written agreement exists) may sue to enforce its rights derived from the contract even though the third-party beneficiary may not know it is a beneficiary for many years (as is the case in most estate planning documents). The lone dissenter argued that the majority was establishing a new cause of action against attorneys that should be created by way of legislation, not through the

judiciary. Furthermore, the dissent believes that the majority's decision does not simply apply with respect to third-parties in an estate planning context, but will be applied to all legal malpractice actions.

So, what does this mean for individuals looking to have estate planning documents prepared? First, you should make sure you have read and understand your documents. Otherwise, there is a chance that the estate planning documents do not capture your wishes and the result could be that unintended beneficiaries receive your estate. Next, you may find that the estate planning process is more involved to ensure that you do understand your documents and have read them thoroughly. And ultimately you should be working with an attorney who routinely prepares estate planning documents unlike in this case where it appears that Mr. Thorsen may not have regularly prepared wills.

For attorneys, various commentators have said that likely there is a legislative fix in the works for the 2017 General Assembly session that may include passing a statute that allows for the correction of mistakes in wills, similar to the [statute](#) that applies to revocable living trusts. But until then, practitioners may be unwilling to prepare wills and may only be willing to prepare revocable trusts. Furthermore, practitioners will be watching to see if this decision is applied to other situations in which there is a potential third-party beneficiary. Going forward, this is a case which highlights how both the attorney and the client should beware as the possibility for unintended consequences exists on both sides.

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