In The

# Supreme Court of Virginia

**RECORD NO. 170521**

## JAMES D'AMBROSIO,

*Appellant*,

**v.**

## JANE WOLF and ELECTRA D'AMBROSIO,

*Appellees.*

## BRIEF OF APPELLANT

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## STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

Plaintiff, James D'Ambrosio, filed a Complaint challenging the validity and enforceability of the Last Will & Testament of Nancy H. D'Ambrosio (the "Will"). (JA 9-15). The Will was executed on February 7, 2014 and admitted to probate following Nancy D'Ambrosio's death on July 1, 2015. (JA 8).

On August 24, 2016 Defendants filed a Plea in Bar asserting that Plaintiff's Complaint was barred by the doctrine of res judicata. (JA 20-27). In support of this position, Defendants pointed to a Petition filed in 2014 prior to Nancy D'Ambrosio's death or the admission of the Will to probate. *Id*. Even though the Will did not become an operative document until after Nancy D'Ambrosio's death, Defendants argued that the Petition filed in 2014 barred the present challenge to the Will. *Id*.

In 2014 Defendants filed a Petition for Appointment of a Guardian and Conservator (the "2014 Petition"). (JA 177-83). In their Petition, Defendants sought a declaration that Nancy D'Ambrosio was incapacitated, the appointment of Electra D'Ambrosio and Jane D'Ambrosio Wolf as co-guardians, and the appointment of an independent third-party conservator for Nancy D'Ambrosio. *Id*. Thereafter, Defendants amended the 2014 Petition to request that the Court declare a medical power of attorney void,

and to revoke all other powers of attorney executed by Nancy D'Ambrosio. *Id*.

On July 28, 2014 Plaintiff filed an Answer and Counterclaim in response to this Petition. (JA 207-250). Plaintiff sought declaratory judgment regarding the validity of a 2013 General Power of Attorney and a 2014 Advance Medical Directive. *Id*. These documents appointed Plaintiff as attorney-in-fact and authorized agent. (JA 225-32, 239-50). In considering whether the 2014 Petition barred Plaintiff's present Complaint, the Fairfax Circuit Court concluded that the issue was "a matter of first impression," but ultimately granted Defendants' Plea in Bar on January 23, 2017. (JA 692-705).

## ASSIGNMENTS OF ERROR

**I. The Circuit Court erred when it sustained the Defendants' Plea in Bar and dismissed all counts of the Complaint with prejudice for the reasons asserted in the Memorandum Opinion. (JA 692-705)(specifically JA 692).**

**II. The Circuit Court erred in holding that a party may bring a declaratory judgment action to declare a will invalid before the testator has died and before a will has become an operative instrument. (JA 692-705)(specifically JA 695).**

**III. The Circuit Court erred in holding that a declaratory judgment action must be brought in a prior litigation or else it is precluded in any subsequent action. (JA 692-705)(specifically JA 695).**

**IV. The Circuit Court erred in holding that all of Plaintiff's claims were barred by Claim Preclusion. (JA 692-705)(specifically JA 699).**

**V. The Circuit Court erred in holding that a declaratory judgment action challenging the validity of a will can be asserted upon the appointment of a conservator, or, durable power of attorney for the testator. (JA 692-705)(specifically JA 699-700).**

**VI. The Circuit Court erred in holding that Plaintiff, as an attorney-in-fact for the decedent, had an interest in the Will and thus standing to challenge its validity prior to the testator's death. (JA 692-705)(specifically JA 700).**

**VII. The Circuit Court erred in holding that Plaintiff's assertion of the affirmative defense of 'clean hands' in Plaintiff's Answer to Defendant's Third Amended Petition in the 2014 Petition placed at issue the validity of the Will. (JA 692-705)(specifically JA 701-02).**

**VIII. The Circuit Court erred in holding that the present litigation involved the same conduct, transaction and occurrences of the prior litigation. (JA 692-705)(specifically JA 701-02).**

**IX. The Circuit Court erred in holding that all of Plaintiff's claims were barred by Issue Preclusion. (JA 692-705)(specifically JA 703).**

**X. The Circuit Court erred in holding that Plaintiff assumed inconsistent positions in successive litigations and that such positions "trigger[ed] the doctrine of judicial estoppel." (JA 692-705)(specifically JA 703-05).**

**XI. The Circuit Court erred in considering arguments and matters never raised in Defendants' Plea in Bar, Memorandum in Support, or at the hearing for the Plea in Bar, including issue preclusion and judicial estoppel. (JA 692-705)(specifically JA 703-05).**

## STATEMENT OF FACTS

The decedent, Nancy D'Ambrosio, was the mother of Plaintiff, James D'Ambrosio, and Defendants, Electra D'Ambrosio and Jane Wolf. (JA 696). In 2016, Plaintiff filed the underlying Complaint challenging the validity and enforceability of the Last Will & Testament of Nancy D'Ambrosio (the "Will"). (JA 1-19). The Will was executed on February 7, 2014 and admitted to probate following Nancy D'Ambrosio's death on July 1, 2015. JA 9-15). At the time the Will was signed, Nancy D'Ambrosio was in a severely diminished state and required full-time care and attention. (JA 1-19). Consequently, as a result of her condition Plaintiff contends that she was unaware or unable to understand the provisions or contents of the Will. (JA 1-19).

Prior to Nancy D'Ambrosio's death, the Defendants petitioned the Circuit Court for the appointment of a guardian and conservator for Nancy D'Ambrosio. (JA 22-23). This Petition was filed in 2014 (the "2014 Petition") and alleged that Nancy D'Ambrosio was incapacitated and unable to manage any of her personal or financial affairs. (JA 177-83). Defendants

sought the removal of Plaintiff as Nancy D'Ambrosio's attorney-in-fact, which was established through a Durable General Power of Attorney executed in 2013. (JA 22-23). They likewise sought the removal of Plaintiff as authorized agent, which was established through a Durable Advance Health Directive executed in 2014. *Id*.

In response to the 2014 Petition, Plaintiff filed an Answer and Counterclaim opposing his removal as attorney-in-fact and authorized agent. (JA 28, 34-71). In his Counterclaim, Plaintiff asserted that both the 2013 General Power of Attorney and 2014 Advance Health Directive were valid documents. *Id*. Plaintiff also requested that he be appointed guardian and conservator if the Court believed Nancy D'Ambrosio needed such assistance. *Id*.

Ultimately, Nancy D'Ambrosio was adjudged incapacitated and a neutral third party was appointed as her guardian and conservator. (JA 82-86). In sustaining Defendants' Plea in Bar, the Circuit Court concluded that Plaintiff should have sought declaratory relief that the Will was invalid in his Counterclaim to the 2014 Petition. (JA 695). Plaintiff's Counterclaim, however, was filed prior to Nancy D'Ambrosio's death and prior to the Will becoming an operative document. (JA 696-97). Because Plaintiff did not

challenge the Will in 2014, the Circuit Court found that Plaintiff's Complaint was barred by res judicata. (JA 695).

## STANDARD OF REVIEW

As to all assignments of error, this Court should apply a de novo standard of review. *See Smith v. McLaughlin*, 289 Va. 241, 251 (2015) (explaining that the Court applies a de novo standard of review when "[t]here are no disputed facts relevant to the plea in bar and it presents a pure question of law"). Further, whether a claim is precluded by res judicata is a question of law reviewed de novo. *Caperton v. A.T. Massey Coal Co*., 285 Va. 537, 548 (2013). Because judicial estoppel is an equitable doctrine, "invoked in the discretion of the [trial] court," this Court has applied an abuse of discretion standard. *Bentley Funding Grp., L.L.C. v. SK & R Grp., L.L.C*., 269 Va. 315, 324 (2005).

## ARGUMENT

Following Nancy D'Ambrosio's death and the admission of her Will to probate, Plaintiff filed the underlying Complaint challenging the validity of the Will. (JA 1-19). Because a will has no effect until the death of its maker, Plaintiff could not have challenged the validity of the Will at any time prior to Nancy D'Ambrosio's death in July 2015. Thus, any litigation prior to July 2015 cannot serve as a basis to preclude Plaintiff's claims.

Res judicata encompasses four preclusive effects, each conceptually distinct, which may affect subsequent litigation: merger, direct estoppel, bar, and collateral estoppel. *Bates v. Devers*, 214 Va. 667, 670 (1974). These preclusive effects may, in turn, be divided into two categories: claim preclusion and issue preclusion. *Lee v. Spoden*, 290 Va. 235, 245 (2015). Under the doctrine of claim preclusion, a final judgment forecloses successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. *Id*. Claim preclusion is encompassed by Rule 1:6. *Id*. Pursuant to Va. Sup. Ct. R. 1:6:

> A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, shall be forever barred from prosecuting any second or subsequent civil action against the same opposing party or parties on any claim or cause of action that arises from that same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit.

The preclusive effects of bar and merger fall under the category of claim preclusion. *Lee*, 290 Va. at 245.

"Issue preclusion, on the other hand, bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Lee*, 290 Va. at 246. The preclusive effects of

direct estoppel and collateral estoppel fall under the category of issue preclusion. *Id*.

## I. The Circuit Court Erred In Ruling That Plaintiff's Complaint Was Barred By Res Judicata Claim Preclusion.

In the prior litigation, the 2014 Petition and Plaintiff's subsequent Answer and Counterclaim were filed before Nancy D'Ambrosio's death or the Will's admission to probate. (JA 696-97). Consequently, Plaintiff could not have challenged the validity of the Will during the 2014 Petition and his claims are not barred by claim preclusion.

### A. The Circuit Court erred in holding that a party may bring a declaratory judgment action to declare a will invalid before the testator has died and before a will has become an operative instrument.

The Circuit Court opined that an action for declaratory judgment could have been brought in 2014, during the prior litigation, to declare the Will invalid. (JA 695). However, a will is not operative until the death of its maker. Until that time, any interest in the will is entirely speculative. Thus, there was no "interested party" capable of asserting a justiciable controversy prior to the death of Nancy D'Ambrosio.

"A will is an ambulatory instrument, not intended or allowed to take effect until the death of the maker.... While [s]he lives [her] written will has no life or force, and is not operative or effective for any purpose."

*Schilling v. Schilling*, 280 Va. 146, 149–50 (2010) (citing *Timberlake v. State–Planters Bank of Commerce & Trusts*, 201 Va. 950, 957 (1960)) (emphasis added). "The death of the maker for the first time establishes the character of the instrument." *Id.* (citing *Spinks v. Rice*, 187 Va. 730, 740, 47 S.E.2d 424, 429 (1948)); *see also First Church of Christ, Scientist v. Hutchings*, 209 Va. 158, 159–60 (1968) (stating that a will is a paper offered for probate to control the disposition of the testator's property that takes effect after his death). Thus, the Will was not operative or in effect, for any purpose, at the time of the 2014 Petition.

As an inoperable document with no effect, the Will did not create or transfer any interest inter vivos. *See e.g. Bickers v. Shenandoah Val. Nat. Bank of Winchester*, 197 Va. 732, 732 (1956). Instead, the Will was an ambulatory instrument concerning the disposition of certain interests after the death of Nancy D'Ambrosio. To impeach or establish a will pursuant to Code § 64.1–90, a party must, inter alia, be a "person interested." *Martone ex rel. Martone v. Martone*, 257 Va. 199, 205 (1999). "An individual must have a legally ascertainable, pecuniary interest, which will be impaired by probating a will or benefited by setting aside the will, and not a mere expectancy." *Id*. (explaining that to maintain a will contest, it is essential that the contestant have a real, beneficial interest, not simply an

expectancy or an inchoate right). No real, pecuniary interest existed in 2014 or during the life of Nancy D'Ambrosio, for any party.

Until the death of the testator, any interest as a beneficiary, heir or otherwise is entirely hypothetical as the Will could be modified, a new will overwriting it could be executed, or it could be intentionally destroyed. An expectancy in a will is a mere possibility. In merely signing a will, "the author has parted with no rights nor divested himself of no interest in or control over his property, and no rights have accrued to, and no estate has vested in, any other person." *Spinks v. Rice*, 187 Va. 730, 740 (1948). Because no rights accrue or vest in any person upon the signing of a will, none of the parties had standing to challenge the Will in 2014. "A hypothetical or abstract interest is insufficient to confer standing to bring a declaratory judgment action." *Mosher Steel-Virginia v. Teig*, 229 Va. 95, 100 (1985).

*i. Prior to the death of the testator, there can be no justiciable controversy regarding a Will's validity.*

A declaratory judgment was unavailable to the parties prior to the Decedents death because there was no justiciable controversy regarding the Will's validity. (JA 97, 98, 108, 109, 114, 165). Pursuant to Va. Code § 8.01-184 courts may only make binding adjudications of right in "cases of

actual controversy." Likewise, the power to issue declaratory judgments only extends to instances of "actual antagonistic assertion and denial of right." Va. Code § 8.01-184. "The controversy must be one that is justiciable, that is, where specific adverse claims, <u>based upon present rather than future or speculative facts</u>, are ripe for judicial adjustment." *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cty. Bd. of Sup'rs*, 285 Va. 87, 98 (2013) (emphasis added). If there is no actual controversy between the parties regarding the adjudication of rights, the declaratory judgment is an advisory opinion that the court does not have jurisdiction to render. *Id*.

There can be no antagonistic assertion, denial of right, or case of actual controversy arising from a nonexistent and speculative interest set forth in a document with no force or effect. Only upon the death of the testator do any rights created by the will vest, thus creating, for the first time, the opportunity for an actual antagonistic assertion or denial of right. Any purported interest prior to such time is insufficient to confer standing to bring a declaratory judgment action. Because no justiciable controversy existed in 2014, Plaintiff could not have asserted a declaratory judgment action in the prior litigation.

Further, the determination whether a writing offered for probate is a valid will applies the law in effect on the date of the maker's death. *Id*. The language in a will is construed as if the testator executed it immediately before death. *McGehee v. Edwards*, 268 Va. 15, 19 (2004) (explaining that wills are construed in this fashion in recognition that the interests of beneficiaries accrue only at the testator's death). Plaintiff simply could not have challenged the validity of the Will during the life of Nancy D'Ambrosio. As a result, the Circuit Court's rulings with regards to Res Judicata for both claim and issue preclusion were in error and should be reversed, the plea in bar denied, and the case remanded to the trial court for further proceedings. The claim could not have arisen from the same transaction or occurrence for purposes of Res Judicata as the claim could not have been brought by Plaintiff during the prior lawsuit (i.e. while Nancy D'Ambrosio was alive).

*ii. During the Prior Litigation, there was no actual controversy over the validity of Nancy D'Ambrosio's Will.*

"The purpose of a declaratory judgment proceeding is the adjudication of rights; <u>an actual controversy</u> is a prerequisite to a court having authority." *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cty. Bd. of Sup'rs*, 285 Va. 87, 98 (2013) (emphasis added). "If there is no actual controversy between the parties regarding the

adjudication of rights, the declaratory judgment is an advisory opinion that the court does not have jurisdiction to render." *Id*.

In the Prior Litigation, there was no actual controversy with respect to the Will. Specifically, there was never any assertion in the Prior Litigation that any party had any affirmative or vested interest in the Will, that either party challenged the validity of the Will, or that any party claimed an ownership interest in those assets discussed in the Will. Thus, there were no present facts before the circuit court supporting adverse claims between the parties. *See e.g. Martin v. Garner*, 286 Va. 76, 84 (2013). A declaratory judgment action could not have stood.

B. The Circuit Court erred in holding that a conservator may use the remedy of declaratory judgment to challenge a Will's validity prior to the testator's death. (JA 699).

The 2014 Petition ultimately resulted in the appointment of a conservator and guardian for Nancy D'Ambrosio at the conclusion of the case. (JA 82-86). The Circuit Court opined that upon the appointment of a conservator, a testator no longer has the ability to apportion her property. (JA 699-700). Under such reasoning, it would follow that an heir or beneficiary's interest would be vested and thus no longer speculative because the testator could not change her will. *Id*.

Although this reasoning is flawed, even if applied to the present case, a conservator was only appointed upon the conclusion of the 2014 Petition. (JA 82-86). Accordingly, Nancy D'Ambrosio still maintained control and direction of her assets throughout the duration of the 2014 Petition, or, at a minimum was not deemed to be incapacitated until that time. Thus, the prospective interests set forth in the Will were still speculative and insufficient to create a justiciable controversy, as such future interests could have been modified or revoked by Nancy D'Ambrosio.

More importantly, however, the mere fact that one is under a guardianship [or conservatorship] does not necessarily deprive that individual of the power to make or alter a will. *See Gilmer v. Brown*, 186 Va. 630, 637 (1947). Thus, even if a guardian/conservator was appointed, there is still a possibility that a will could be modified or destroyed, and a new will executed. Similarly, the appointment of a conservator does not affirmatively vest those interests set forth in a will. If adjudged to be incapacitated at one point in time, an individual could regain capacity or vice versa within the remaining period of his or her life. Testamentary capacity does not proceed in a purely linear fashion. If an individual loses capacity, he or she can still regain it. Likewise, the test of whether an individual unduly influenced a testator is dependent on the particular actions undertaken prior to or at the

signing of that particular document. Whether an individual was unduly influenced during the execution of one document is an entirely separate inquiry from the influence, or lack thereof, exercised during the execution of another document. The appointment of a conservator following the execution of such documents bears no relation to their validity. Nor does it affirmatively vest a party's future, speculative interests set forth in the will, thus creating a justiciable controversy.

C. The Circuit Court erred in holding that Plaintiff, as an attorney-in-fact for the decedent, had an interest in the Will and thus standing to challenge its validity prior to the testator's death.

In recognizing the fact that a conservator was not appointed until the conclusion of the 2014 case, the Circuit Court found that the 2013 General Power of Attorney appointing Plaintiff attorney-in-fact was analogous to appointment as conservator. (JA 700). Thus, the Circuit court concluded that Plaintiff, as a pseudo-conservator, had an interest in the Will and therefore standing to challenge it. *Id*. The Circuit Court did not explain, however, what interest an attorney-in-fact maintains in a will. Nor can it, as no such interest exists. A "person interested" has been defined as "a legally ascertainable, pecuniary interest, which will be impaired by probating a will or benefited by setting aside the will, and not a mere expectancy." *Martone ex rel. Martone v. Martone*, 257 Va. 199, 205 (1999).

*i. Plaintiff's appointment as attorney-in-fact did not have any effect on the interests set forth in the Will.*

First, Plaintiff was not appointed as a conservator by the court. He was designated as attorney-in-fact prior to Nancy D'Ambrosio's incapacity or any determination thereof. (JA 51-58). Nancy D'Ambrosio retained the ability to revoke or modify both the General Power of Attorney and the Will throughout the duration of the 2014 litigation. Thus, she still retained the ability to control the disposition of her assets. It was not until the conclusion of the 2014 Petition that the court determined that she was incapacitated and appointed a conservator. (JA 82-86).

As attorney-in-fact during the 2014 Petition, Plaintiff did not maintain any interest in the Will. Nor did his appointment as attorney-in-fact have any effect on the abstract interests set forth in the Will. As discussed above, the Will was still an inoperable and theoretical document before Nancy D'Ambrosio's death. The Power of Attorney simply provided authority to handle certain financial affairs for Nancy D'Ambrosio. (JA 51-58). Again, the signing of the Will and the Power of Attorney did not divest Nancy D'Ambrosio of any interest in or control over her property. No rights accrued to, or vested in, any other person. *See Spinks v. Rice*, 187 Va. 730, 740 (1948). The act of appointing Plaintiff as attorney-in-fact did not somehow create a justiciable controversy. The parties' future interest in

the Will remained merely speculative. Without any tangible, actual interest there could not exist any "rights" that would be effected. *See Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cty. Bd. of Sup'rs*, 285 Va. 87, 98 (2013) (explaining that a "justiciable interest" requires a showing that the parties' rights will be affected by the outcome of the case). "The declaratory judgment acts do not create or change any substantive rights, or bring into being or modify any relationships, or alter the character of controversies." *Id.* at 99. Until the Will operated, there was no person with any actual interest in the Will, and; therefore, no one with standing to challenge the Will.

*ii. Plaintiff was not "a person interested in the probate of the Will," and therefore lacked standing to challenge it.*

Notably, Va. Code Ann. § 64.2-448 sets forth certain guidelines and requirements for contesting a will. Specifically, it provides that, "[a] person <u>interested in the probate of the will</u> . . . may file a complaint to impeach or establish the will." Va. Code Ann. § 64.2-448 (emphasis added). Again, prior to Nancy D'Ambrosio's death no one maintained any actual pecuniary interest capable of being effected. Such interests vest only after the testator's death, and the will's admission to probate. For these reasons, the statutory language only permits individuals "interested in the probate of the

will" to contest a will. Any challenge prior to such period would not be ripe for adjudication, and result in an advisory opinion.

It appears that the Circuit Court concluded that Plaintiff maintained a definitive interest in the Will as Nancy D'Ambrosio's attorney-in-fact. (JA 700). This interest, it follows, would stem from Plaintiff's position standing in the shoes of the principal, Nancy D'Ambrosio. The Circuit Court concluded that because of this interest, Plaintiff could have challenged the Will. *Id*. This position would result in the absurd conclusion that a testator's interest in a will permits that testator to challenge the will's validity during her own life. Rather, a testator or attorney-in-fact could simply rescind or destroy the document, thus highlighting the ambulatory nature of an inoperable document. It also illustrates the sound reasoning behind the statutory requirement that only "a person <u>interested in the probate of the will</u> . . . may file a complaint to impeach or establish the will." Va. Code Ann. § 64.2-448 (emphasis added). No justiciable interest exists prior to that time.

Further, the Circuit Court's ruling defies the "rule of differing capacities," which is generally understood to mean that defendants in their official and individual capacities are not in privity with one another for purposes of res judicata. *Brooks v. Arthur*, 626 F.3d 194 (4th Cir. 2010) (recognizing that the real party in interest was distinct from the individual's

interest). In this case, assuming arguendo that any action could have been taken by Plaintiff but was not, Plaintiff would not have actually been the real party in interest as attorney in fact. The real party in interest as it relates to the use of the power of attorney is the principal, Nancy D'Ambrosio.

D. The Circuit Court erred in holding that the present litigation involved the same conduct, transaction and occurrences of the prior litigation.

The Circuit Court held that the Complaint was barred by claim preclusion, having arisen from the same conduct transaction or occurrence. (JA 703). While the prior litigation involved the same parties, the claims did not arise from the same conduct, transaction or occurrence. Further, as discussed above, the present claim could not have been litigated during the prior litigation.

Under Virginia Supreme Court Rule 1:6, a plaintiff is barred from bringing a subsequent claim for relief against a defendant on the same cause of action, if: (1) the subsequent claim arises from the same conduct, transaction, or occurrence, (2) the prior claim was decided on the merits by a final judgment, and (3) the opposing party or parties were the same in both actions. *Kearney v. Robinson Land Trust*, 80 Va. Cir. 467 (2010). The doctrine of res judicata bars subsequent causes of action which *could* have been litigated during the original action. *Id*. (emphasis in original). However,

it does not bar those claims that could not have been litigated during the original action. *Id*. (finding that claims for liquidated damages could not have been raised in the lower court, and were therefore not barred by res judicata).[1]

Plaintiff's Answer and Counterclaim to the 2014 Petition sought declaratory judgment that the General Power of Attorney executed in September 2013 and the Advance Medical Directive executed in May 2014 were valid. (JA 28, 34-71). The execution of the Will in February 2014 is an entirely separate transaction, independent from the two documents specifically addressed in Plaintiff's Counterclaim. The purpose, language and intent of the three documents are distinct. (JA 9-15, 51-58, 60-71). Each document was signed as part of a separate transaction, and to accomplish different goals. *Id*. Similarly, the documents do not arise out of the same occurrence. The documents were signed at different times, with different witnesses, and as the Decedent's health and capacity fluctuated throughout the final years of her life. *Id*. Several months separated the execution of each document. *Id*. Finally, the validity of the three separate documents do not arise from the same conduct. The capacity of the decedent and the influence asserted over her during the execution of each

[1] For the reasons set forth above, the validity of the Will could not have been challenged in the prior litigation.

document are all distinctly independent. The conduct giving rise to the validity of the General Power of Attorney executed in September 2013 was the capacity of Nancy D'Ambrosio, at that time, and the influence asserted over her, at that time. The same is true for the other documents. Thus, the validity of the Will was separate from that of any other document.

As a result, the Circuit Court's rulings with regards to Res Judicata for both claim and issue preclusion were in error and should be reversed, the plea in bar denied, and the case remanded to the trial court for further proceedings. The claim could not have arisen from the same transaction or occurrence for purposes of Res Judicata as the claim could not have been brought by Plaintiff during the prior lawsuit (i.e. while Nancy D'Ambrosio was alive).

## II. The Circuit Court Erred In Ruling That Plaintiff's Complaint Was Barred By Issue Preclusion.

Collateral estoppel is a narrower doctrine than claim preclusion, as it applies only to issues that were actually litigated. *Winchester Neurological Consultants, Inc. v. Landrio*, 74 Va. Cir. 480 (2008). To establish the defense of collateral estoppel, a party must establish the following: (1) the parties to the prior and subsequent proceedings, or their privies, must be the same, (2) the factual issue sought to be litigated actually must have been litigated in the prior action, (3) the factual issue must have been

essential to the judgment in the prior proceeding, and (4) the prior action must have resulted in a judgment that is valid, final, and against the party against whom the doctrine is sought to be applied. *AKAK, Corp. v. Com.*, 38 Va. App. 634, 639 (2002).

The issue of claim preclusion was never raised, briefed, or argued by any party in any court, and represents a creation sua sponte for the first time in the Circuit Court's opinion.

A. Undue influence and mental incapacity of Nancy D'Ambrosio, at the time of the execution of the Will, were never litigated in the prior action.

For the reasons set forth in Section I, the validity of the Will was not actually litigated in the prior action, nor could it have been. However, the Circuit Court found that Plaintiff's affirmative defense of [un]clean hands barred subsequent litigation challenging the validity of the Will. (JA 703). In the prior litigation, Plaintiff asserted that "in February 2014, the [Defendants] procured and participated in a new will for [Nancy D'Ambrosio] without the knowledge of [Plaintiff]." (JA 93). Nowhere in any pleading did Plaintiff argue that the Will was invalid due to Nancy D'Ambrosio's lack of mental capacity or that the Defendants had exerted undue influence over their mother. Nevertheless, the Circuit Court determined that the defense of unclean hands affirmatively raised the issue

of undue influence. (JA 703). Notably, undue influence is one of the two claims asserted in the present Complaint. The Circuit Court did not address how the defense of unclean hands also raised the issue of Nancy D'Ambrosio's mental incapacity at the time of the execution of the Will.

The prior litigation involved Defendants' request for appointment of a Guardian and Conservator. (JA 22-23). In their Petition, Defendants also requested that the Circuit Court declare a medical power of attorney void, and to revoke all powers of attorney executed by Nancy D'Ambrosio. *Id*. In Plaintiff's Answer and Counterclaim, he sought declaratory judgment regarding the validity of a 2013 General Power of Attorney and a 2014 Advance Medical Directive. (JA 28, 34-71). The validity of the Will, the undue influence asserted over Nancy D'Ambrosio at its signing, and her capacity at that time were never presented, litigated or ruled upon. Importantly, the factual issues litigated with respect to the validity of a 2013 General Power of Attorney and a 2014 Advance Medical Directive are not identical to the issues sought to be litigated in the present Complaint. *See e.g. Angstadt v. Atl. Mut. Ins. Co*., 249 Va. 444, 447 (1995).

The time at which a will is executed is the vital time that mental capacity must exist. *Forehand v. Sawyer*, 147 Va. 105, 121 (1927). Thus, whether Nancy D'Ambrosio had capacity or was unduly influenced during

the Will signing on February 7, 2014 is entirely independent of her capacity or the undue influence asserted on September 9, 2013 or May 31, 2014.

B. Undue influence and mental capacity during the execution of the Will was not essential to the prior litigation or final order.

To establish the defense of collateral estoppel, the factual issue sought to be litigated must have been essential to the judgment in the prior proceeding. *Lee v. Spoden*, 290 Va. 235, 246 (2015) (explaining that issue preclusion "bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment"). The Circuit Court determined that because the Final Order in the prior litigation (1) permitted Defendants an opportunity to submit their requests for reimbursement of fees, and (2) appointed a neutral third-party conservator, then the court must have considered the issue of unclean hands. Such labored inferences are not supported by the record. The issues of capacity or undue influence, as of February 2014, were never raised in any pleading or presented as any cause of action. Because these issues were never litigated, they were never resolved or ruled upon. The court made no mention of any issue with respect to the Will, or the occurrences surrounding the signing of the Will on February 7, 2014. (JA 82-86). Similarly, in appointing a conservator the Court made no mention of the purported unfitness of any other party, any undue influence asserted

over the decedent, or anything remotely related to the affirmative defense of unclean hands. The Final Order was a consent order resolving the conservatorship issue between the parties. The factual issues regarding undue influence and mental capacity at the time of the signing of the Will were never litigated in the prior action. Nor were these issues related, let alone essential, to the Final Order in the prior proceeding. Consequently, Plaintiff's claim should not be estopped.

As a result, the Circuit Court's rulings with regards to Res Judicata for issue preclusion and collateral estoppel were in error and should be reversed, the plea in bar denied, and the case remanded to the trial court for further proceedings. The claim could not have arisen from the same transaction or occurrence for purposes of Res Judicata as the claim could not have been brought by Plaintiff during the prior lawsuit (i.e. while Nancy D'Ambrosio was alive).

## III. The Circuit Court Erred In Ruling That Plaintiff's Complaint Was Barred By Judicial Estoppel.

In the prior litigation, Plaintiff asserted that Nancy D'Ambrosio had capacity to execute valid documents in September 2013 and on May 31, 2014. (JA 28, 34-71). In the present case, Plaintiff has asserted that Nancy D'Ambrosio lacked capacity and was unduly influenced on February 7, 2014 when she executed the Will. (JA 1-19). The Circuit Court determined

that Plaintiff's Complaint was barred by judicial estoppel, finding that these positions were contradictory. (JA 704-05).

Again, mental capacity, if lost, can be regained and vice versa. Courts have recognized that individuals with cognitive impairments can experience periods of confusion with intervals of lucidity. *See e.g. Weedon v. Weedon*, 283 Va. 241, 249 (2012). The time at which a will is executed is the vital time that mental capacity must exist. *Forehand v. Sawyer*, 147 Va. 105, 121 (1927) (explaining that if it appears that the testator had mental capacity at that time, it is immaterial what his mental condition was before or after that time); *see also Brown v. Resort Developments*, 238 Va. 527, 529 (1989). Thus, whether Nancy D'Ambrosio had capacity (or was unduly influenced) on September 9, 2013, February 7, 2014, and May 31, 2014 are all separate inquiries. Nancy D'Ambrosio suffered from strokes, dementia, and other cognitive ailments causing her mental capacity to oscillate. (JA 1-7). An assertion that Nancy D'Ambrosio had capacity at one moment in time, and not at another does not inherently conflict. Thus, Plaintiff has never assumed any inconsistent positions. Further, Plaintiff's second count is claiming that his two siblings asserted undue influence against his mother in the drafting of the 2014 Will. There is no indication in

the record that he ever asserted that she was not unduly influenced on February 7, 2014 for the signing of the Will.

Because Plaintiff has not asserted inconsistent positions, his claims are not barred by judicial estoppel. The Circuit Court even seems to have acknowledged this point, stating that "[t]hese positions are not, however, fatally inconsistent [ . . .] [t]he status of a person's mental capacity can depend on the timing and circumstances of the particular instrument at issue." (JA 698).

Further, the consent order signed by all parties at the end of the prior litigation acknowledged that Nancy D'Ambrosio was, in fact, incapacitated as of the conclusion of that litigation. (JA 82-86). In his Counterclaim, Plaintiff requested, in the alternative, to be appointed conservator should the Court deem his mother incapacitated. Thus, he has never assumed inconsistent positions and his claims should be not estopped.

## CONCLUSION

For the reasons stated above, Appellant respectfully requests this Court to reverse the decisions of the Circuit Court, deny the plea in bar, and remand for further proceedings.

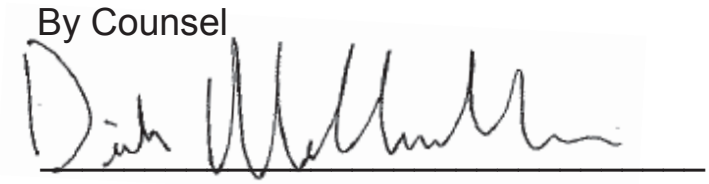
## ORAL ARGUMENT REQUESTED

Plaintiff requests oral argument for all matters addressed herein.

Dated: October 16, 2017

Respectfully submitted,
JAMES D'AMBROSIO

By Counsel



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## CERTIFICATE

Pursuant to Rule 5:26(h) of the Supreme Court of Virginia, I hereby certify the following:

1. The Appellant, James D'Ambrosio, is represented by:

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2. Appellees, Jane Wolf and Electra D'Ambrosio, are represented by:

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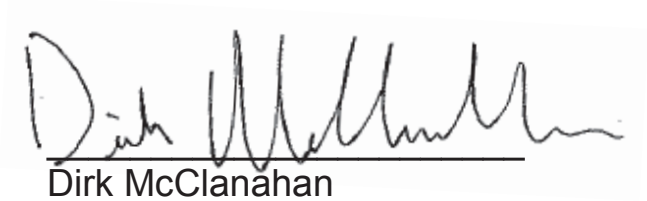
3. Electronic copies of the Brief of Appellant and Appendix were filed, via VACES, and three paper copies of the same were hand-filed with the Clerk of this Court. On this same day, an electronic copy of the Brief of Appellant was served, via email, and electronic copies on CD of the Brief of Appellant and Appendix were served, via UPS Ground Transportation, upon counsel to the above address.

4. Counsel for Appellant desire to state orally and in person to this Court the reasons why this Brief should be granted.



Dirk McClanahan

Date: October 16, 2017