In The

Supreme Court of Virginia

RECORD NO. 170521

JAMES D'AMBROSIO,

Appellant,

v.

JANE WOLF and ELECTRA D'AMBROSIO,

Appellees.

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

COME NOW, **JANE WOLF and ELECTRA D'AMBROSIO**, Appellees, by counsel, and file this Brief of Appellees, and respectfully request that the decision of the Fairfax County Circuit Court be affirmed, and further, that Appellees' costs be taxed against Appellant in this behalf expended, pursuant to Rule 5:37 of the Rules of the Supreme Court of Virginia.

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

The Statement of the Case and Material Proceedings stated by Appellant, James D'Ambrosio, Jr. ("James"), in his Opening Brief is generally agreed upon, with the following additions. The Complaint filed by James on July 29, 2016 in the Circuit Court of Fairfax County contains two causes of action: Count 1 - Nancy Lacked testamentary capacity to execute the 2014 Will; and Count 2 - the 2014 Will was the product of undue influence ("2016 Case"). (J.A. 1-7.) In response, Electra D'Ambrosio ("Leck") and Jane Wolf ("Jane") filed a Plea in Bar, with a supporting Memorandum, on August 24, 2016, alleging *res judicata* barred James's Complaint as a matter of law. (J.A. 20-27.)

An evidentiary hearing on Leck and Jane's Plea in Bar was convened on December 8, 2016 before the Honorable John M. Tran (hereinafter the "Plea in Bar Hearing"). (J.A. 100-169.) In particular, Leck and Jane

presented key pleadings and transcripts from the lawsuit that predated the present action. (*See id*.) After taking evidence and hearing argument, Judge Tran issued his letter opinion on December 15, 2016, and a final order was entered in this case on January 23, 2017. (J.A. 692-705.) Thereafter, this Appeal ensued.

STATEMENT OF FACTS

Leck and Jane adopt the facts as found by the Trial Court, with the following additions. (J.A. 695-698.) This case involves two separate lawsuits – the 2016 Case, and an action commenced by Leck and Jane on June 19, 2014 in the action styled *In re: Nancy H. D'Ambrosio*, CL 2014-08232 (hereinafter the "2014 Case").

2014 Case – Initiation & Procedural History:

In the 2014 Case, Leck and Jane initiated a guardianship action by filing a petition seeking an order finding that Nancy D'Ambrosio, their mother, (hereinafter "Nancy") was incapacitated. (J.A. 177-183.) They also sought appointment of Leck and Jane as Co-Guardians, and appointment of an independent third party as Conservator for Nancy. (*See id*.)

On July 28, 2014, James (Leck and Jane's brother) filed an Answer and Counterclaim to the 2014 initial petition. (J.A. 207-224.) In his Counterclaim, James sought declaratory judgment regarding the validity and

effectiveness of a Durable General Power of Attorney executed in September 2013 (Count I), declaratory judgment regarding the validity and effectiveness of the Advance Directive executed May 31, 2014 (Count II), and, in the event the Court determined his mother to be incapacitated, appointment as guardian and conservator for his mother Nancy. (*See id*.)

The pleadings and orders entered in the 2014 Case tell a story, and that story had an impact upon the 2016 Case. The 2014 Case was not just about the appointment of a guardian and conservator for Nancy; rather, it was to determine the validity of certain documents and actions. Discovery in the 2014 Case was extensive, particularly as to the 2014 Will. Looking back upon the major events of the 2014 Case, discovery aimed at the 2014 Will was a primary objective for James. First, James J. D'Ambrosio's Seventh Request for Production of Documents requested all documents related to any will made or executed by Nancy in February 2014 and the 2014 Will itself. (J.A. 251-257.) Thereafter came the depositions and extra discovery that was permitted by the court in allowing Leck and Jane the ability to amend their petition.

Discovery in the 2014 Case Centering On the 2014 Will:

On December 11, 2014, the deposition of Marna Lynn McClure took place and was noticed by James's counsel.[1] (J.A. 128, ll. 3-9; J.A. 261-296.) At the Plea in Bar Hearing, Leck testified that:

- Ms. McClure was a witness to the 2014 Will. (J.A. 126, ll. 22-23.)
- Ms. McClure was only acting as a witness to the 2014 Will and was not involved with Nancy in any way. (J.A. 128, ll. 1-2 and J.A. 129, ll. 21-23.) In other words, her testimony was not necessary for any counts in either the Petition or Counterclaim.

On December 12, 2014, the deposition of Elizabeth Murphy[2] was taken by James's counsel. (J.A. 297-340; s*ee also* J.A. 128, ll. 18-21.) Again, as with the testimony about Ms. McClure, the only dealings or information that Elizabeth Murphy had related solely to the 2014 Will. (J.A. 128, ll. 22-23, and J.A. 129, ll. 1-2.)

Thereafter, on February 23, 2015, the deposition of Evelyn E. Shelton was taken by James's counsel. (J.A. 130, ll. 2-7; J.A. 344-386.) As with Marna McClure and Elizabeth Murphy, Ms. Shelton had no dealings with or

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[1] Looking at pages 6 and 7 of the 2014 Will, there are two witnesses signing, to wit: Marna Lynn McClure and Lissa Murphy. (J.A. 175-176.) There is also a Notary Public, whose name appears on page 7 of the 2014 Will – Ms. Evelyn E. Shelton. (J.A. 176.)

[2] Elizabeth Murphy is Lissa Murphy. (J.A. 132, ll. 1-3.)

information about Nancy outside of the 2014 Will. (J.A. 130, ll. 2-7.) It is clear that the sole purpose of these depositions was to learn about the execution of the 2014 Will.

On February 25, 2015, Leck and Jane filed a Motion to Amend their Petition to include an additional count to void the May 3, 2014 and the May 31, 2014 medical powers of attorney on the basis of undue influence and to reinstate the 1996 Medical Power of Attorney, in the event the court found that Nancy did not suffer from an incapacity. (J.A. 387- 399.) The Motion to Amend was granted, and James was permitted to take additional depositions of any new facts alleged in the Third Amended Petition, and he was also granted leave to propound additional written discovery. (J.A. 400-401.) That order was entered on March 6, 2015. (*See id.*)

On March 20, 2015, upon Leck and Jane's Motion to Quash/Motion for Protective Order, the parties executed an agreed order, providing for the following:

> IT IS ORDERED that the following depositions will be taken by counsel for James D'Ambrosio, Jr. at the dates, times and locations noted, **and the scope of these depositions is limited to the document titled Last Will and Testament of Nancy H. D'Ambrosio dated February 7, 2014**, and the subject matter identified in this Court's Order entered on March 6, 2015 . . . .
>
> (J.A. 403) (Emphasis added.)

In response to Leck and Jane's Third Amended Petition, James filed an Answer to Third Amended Petition, with the following averred under the portion of the pleading containing the heading "Affirmative Defenses": "Son will rely upon the defense of 'clean hands' because in February 2014, the Daughters' [sic.] procured and participated in a new will for their Mother without the knowledge of Son." (J.A. 413, ¶ 42.)

In the meantime, the additional depositions commenced. On March 23, 2015, James's deposition of Leck over the 2014 Will commenced. (J.A. 131, ll. 1-9; J.A. 416-479.) Leck, Jane and John Courtney were all deposed twice, with the second deposition being strictly about the 2014 Will. (J.A. 130, ll. 20-23; J.A. 131, ll. 1-3; J.A. 131, ll. 19-22; J.A. 132, ll. 17-23; J.A. 133, l. 1; J.A. 480-549; J.A. 550-597.)

The draftsman, Lisa Hughes, Esquire, was subpoenaed for the production of records. (J.A. 133, ll. 17-19; J.A. 598-599.) Lisa Hughes had no other purpose for being subpoenaed except due to the fact that she was the draftsman of the 2014 Will. (J.A. 134, ll. 4-13.) In fact, the subpoena was the subject of a Motion, which was disposed of by an order requiring the production of the 2014 Will and other documents in the care, custody and control of Yates, Campbell and Hoeg, the law firm for which Lisa Hughes

worked. (J.A. 134, ll. 1-6; J.A. 653-656.) Lisa Hughes was thereafter deposed on April 20, 2015. (J.A. 135, ll. 3-12; J.A. 600-647.)

Conclusion of the 2014 Case:

The 2014 case was decided on the merits per the Order Appointing Guardian and Conservator entered by the Fairfax County Circuit Court on May 22, 2015 (hereinafter the "Guardianship Order")[3]. A copy of the Guardianship Order was entered into evidence at the Plea in Bar Hearing as Exhibit number 20. Pursuant to the terms of the Guardianship Order, Nancy was adjudged incapacitated, Kenneth E. Labowitz was appointed as her guardian and conservator, and all counts of James D'Ambrosio's Counterclaim were dismissed with prejudice. (J.A. 650-651.) Specifically, the Order states "Upon clear and convincing evidence satisfactory to the Court, the Court finds that . . . ." and then goes through specific findings and then the operative portions of the order. (J.A. 648-652.) Less than two months later, Nancy passed away on July 1, 2015. (J.A. 3, ¶8.)

In light of the substantial evidence showing that not only was the 2014 Will the subject of one of James's defenses, significant efforts were

[3] There was a subsequent order that made the matter final (a hearing on award of attorneys' fees set for June 1, 2015). (J.A. 651, ¶H.) Notwithstanding, none of the parties dispute that a final order was entered in the 2014 Case.

expended in discovery with respect to the 2014 Will. Further, the allegations put forth in James' Complaint filed in the 2016 Case are, on the one hand, entirely inapposite of the factual allegations he made in his Answer and Counterclaim filed in the 2014 Case, while on the other hand, covering the same subject matter as the 2014 Case:

JAMES'S INCONSISTENT POSITIONS

The Complaint to Impeach the Will (2016 Case):

- "Plaintiff brings this action against the Defendants to contest the validity and enforceability of a February 7, 2014 will . . . on the grounds that the settlor, Nancy H. D'Ambrosio (the "Decedent"), lacked testamentary capacity and was the victim of undue influence." (J.A. 2, ¶1.)
- . . . . Decedent suffered a stroke that significantly affected her memory. (J.A. 2, ¶11.)
- "As a result, the Decedent's physical and mental health diminished over the years prior to the Decedent's passing, **which severely restricted her mental capacity**. (J.A. 2, ¶13) (emphasis added.)
- "Upon information and belief, prior to the execution of the Will the Decedent suffered from cognitive deficiencies and loss of memory. These issues persisted until the time of her death." (J.A. 2, ¶14.)

- "Upon information and belief, the Decedent was unaware or unable to understand the provisions or content of the purported will." (J.A. 2, ¶18.)
- "Upon information and belief, the Decedent was not aware of the nature or extent of her estate and property or of the objects of her bounty." (J.A. 3, ¶21.)
- "The Decedent was of such mental and physical weakness, that she passed away a short time later in July 2015." (J.A. 3, ¶28.)

<u>James's Answer to Third Amended Petition (2014 Case)</u>:

- ". . . Son admits that . . . Mother suffered a stroke in June 2012, that she has some difficulty with her short-term memory . . . ." (J.A. 408, ¶6.)
- Throughout his Answer, James "admits that Mother suffers from the residual effects of her stroke and old age", but then alleges she was capable of making decisions and signing powers of attorney. (J.A. 409, 410 & 412.)
- " . . . Son denies that his mother is enfeebled in mind." (J.A. 412, ¶ 34.)

<u>James's Counterclaim (2014 Case)</u>:

- "At the time she executed the 2013 General Power of Attorney, Mother retained sufficient decision-making capacity to legally and effectively make Son her sole agent and attorney-in-fact for the purposes stated in the 2013 General Power of Attorney." (J.A. 212, ¶29.)
- "Mother's execution of the 2013 General Power of Attorney was a product of her free and independent will and volition." (J.A. 212, ¶30.)
- "At her request, Son has regularly and frequently assisted Mother in the management of her financial affairs." (J.A. 212, ¶ 31.)
- "Son has been rendering financial management assistance to Mother under her guidance without incident or difficulty." (J.A. 212, ¶ 33.)
- "Despite her weakened condition, Mother retained sufficient decision-making capacity to legally and effectively revise her health care power of attorney to put Son in control of her care." (J.A. 216, ¶48.)
- ". . . Son further contends that Mother possessed sufficient mental and legal capacity to execute and grant the Current Advance Directive . . . ." (J.A. 218, ¶56.)
- "It is the position of Son that under the proper construction and interpretation of the 2013 General Power of Attorney, and under the facts alleged, he is the duly constituted agent and attorney-in-fact

exclusively empowered and authorized to act in accordance with the 2013 General Power of Attorney. Son further contends that Mother possessed sufficient mental and legal capacity to execute and grant the 2013 General Power of Attorney." (Defs.' Plea in Bar Hr'g Ex. 3 at 11, ¶ 53.)

- James then made a request using the 2013 General Durable Power of Attorney: "On behalf of Mother, with sufficient power and authority to so act granted in the 2013 General Power of Attorney, son requests that a jury hear all matters allowed to be determined by a jury under section 64.2-2007 of the Code of Virginia." (J.A. 221, ¶69.)

IDENTICAL SUBJECT MATTER

In addition to the references to the pleadings set forth above under "JAMES'S INCONSISTENT POSITIONS", it is clear the subject matter between the 2014 Case and 2016 Case is identical:

Overlapping Time Periods & Documents:

The time period at issue in the 2014 Case was September 2013 through 2015. The time period at issue in the 2016 Case is February 2014.

The following documents were at issue in the 2014 Case:

- Durable General Power of Attorney signed by Nancy on September 9, 2013, appointing James as agent (J.A. 217-218, 225-232);

- Durable Power of Attorney for Health Care signed by Nancy on August 8, 1996, appointing all three children (James, Leck and Jane) as agents (J.A. 218, 239-242);
- Durable Medical Power of Attorney signed by Nancy on May 3, 2014, appointing James D. D'Ambrosio, Jr. as agent (J.A. 393, ¶13); and Durable Medical Power of Attorney signed by Nancy on May 31, 2014, appointing James D. D'Ambrosio, Jr. as the agent (J.A. 218, 243-250.)
- The 2014 Will was also at issue. (J.A. 413, ¶42; see also facts set forth *supra* in "Discovery in 2014 Case – 2014 Will")
- Nancy's susceptibility to undue influence and Nancy's incapacity were also at issue. (J.A. 391-399.)

Leck & Jane's Petition (2014 Case):

- ". . . Respondent had a stroke in June of 2012. It destroyed her short term memory. She cannot recall what occurred or was said after ten or fifteen minutes. She has in-home assistance from private duty aides twenty-four hours per day, seven days per week through Life Matters, a home care agency." (J.A. 392, ¶ 6.)
- ". . . James claims Respondent handles her own finances. On information and belief, James handles her finances and simply has

Respondent sign checks and documents as he directs." (J.A. 392, ¶ 8.)

- "Respondent has trouble reading and remembering or recalling what she has read." (J.A. 393, ¶ 12.)
- "The new Medical powers of attorney are void as Respondent lacked the capacity to execute the document, or alternatively, as the product of undue influence. (J.A. 394, ¶ 19.)

In light of these specific facts, as well as the supporting case law, the decision of the Trial Court should be affirmed.

STANDARD OF REVIEW

As to the Appellant's Assignments of Error related to res judicata and collateral estoppel (Assignment numbers I-XI), because these doctrines present mixed questions of law and fact, the standard of review as to the applicability of res judicata and collateral estoppel is de novo, but findings of fact by the Trial Court are reviewed by the abuse of discretion standard. *See Loudoun Hospital Center v. Stroube*, 50 Va. App. 478, 650 S.E.2d 879 (2007) (quoting *See Gilbane Bldg. Co. v. FRB,* 80 F.3d 895, 905 (4th Cir.1996) ("We review [mixed questions of law and fact] under a hybrid standard, applying to the factual portion of each inquiry the same standard applied to questions of pure fact and examining *de novo* the legal conclusions derived from those facts.") *Cf. Conyers v. Martial Arts World,* 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007) ("an issue of statutory interpretation is a pure question of law which we review de novo")). The question of whether the doctrine of res judicata even applies is reviewed *de novo*. *See e.g*. *Rhoten v. Commonwealth*, 286 Va. 262, 267, 750 S.E.2d 110, 112 (2013). With regard to Assignments of Error numbers I, X and XI, this Court reviews a trial court's application of judicial estoppel using an abuse of discretion standard. *See Bentley Funding Group, L.L.C. v. SK & R Group*, L.L.C., 269 Va. 315, 609 S.E.2d 49 (2005).

SUMMARY OF THE ARGUMENT

Simply, this is a case in which a litigant in a prior matter is talking out of both sides of his mouth, by conducting himself one way in a prior matter, and then altering his position by 180 degrees in another. James claimed in the 2014 Case that Nancy, his mother, had capacity to make decisions and execute powers of attorney. James litigated and sought discovery as to his mother's capacity and the 2014 Will. Ultimately, though, he lost the 2014 Case. However, when Nancy died, his story changed and he contended that Nancy lacked even testamentary capacity, and that he should get another chance because he could not have attacked the 2014 Will in the 2014 Case.

Leck and Jane fought one long lawsuit against James. James should not be permitted to engage in a "do over" because the outcome in 2014 Case was not as he hoped. He should not be permitted to profit from the technicalities he urges this Court to accept. Therefore, the Trial Court's decision in dismissing the 2016 Case should be affirmed.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT JAMES D'AMBROSIO'S COMPLAINT WAS BARRED BY *RES JUDICATA* (ASSIGNMENTS OF ERROR I, II, III, IV, V, VI, VII, VIII).

The Trial Court correctly determined that James's Complaint was barred by the doctrine of *res judicata* and dismissed his action. "Res judicata encompasses four preclusive effects, each conceptually distinct, which a final personal judgment may have upon subsequent litigation. These are merger, direct estoppel, bar, and collateral estoppel." *Bates v. Devers*, 214 Va. 667, 670, 202 S.E.2d 917, 920 (1974). *Res judicata*-bar is defined as, "A valid, personal judgment on the merits in favor of defendant bars relitigation of the *same cause of action,* or any part thereof which could have been litigated, between the same parties and their privies." *Id.* at 670-71, 202 S.E.2d at 920-21. At its core, *res judicata* prevents duplicative and vexatious litigation. "Courts have imposed a rule prohibiting claim-splitting based on public policy considerations similar to those underlying the doctrine of *res judicata*: avoiding a multiplicity of suits, protecting against vexatious litigation, and avoiding the costs and expenses associated with numerous suits on the same cause of action." *Bill Greever Corp. v. Tazewell Nat'l Bank,* 256 Va. 250, 254, 504 S.E.2d 854, 856-57 (1998) (quoting *Jones v. Morris Plan Bank of Portsmouth*, 168 Va. 284, 291-92, 191 S.E. 608, 610 (1937)).

Under the doctrine of *res judicata*, a party is precluded from bringing an action that could have been litigated in a prior lawsuit. *See* Va. Sup. Ct. R. 1:6(a); *See also Bates v. Devers*, 214 Va. 667, 670-71, 202 S.E.2d 917, 921 (1974). Additionally, "[a] claim for relief pursuant to this rule includes those set forth in a complaint, counterclaim, cross-claim or third-party pleading." Va. Sup. Ct. R. 1:6(a).

It is clear that the parties are the same, and the decision in the 2014 Case was final. The fundamental issue is whether James could have brought an action disputing the validity of the 2014 Will during the 2014 Case. Since Virginia adheres to the "could-have-litigated-should-have-litigated" principle, the Trial Court correctly dismissed the 2016 Case, and its decision should be affirmed.

A. THE 2014 CASE AROSE OUT OF THE SAME CONDUCT, TRANSACTION OR OCCURRENCE AS THE 2016 CASE.

Nancy's capacity and susceptibility to undue influence between 2013 and 2014, particularly the validity of estate planning and life care documents during that time, formed the basis of the claims and positions taken by all of the parties in the 2014 Case. James asserted "clean hands" as an affirmative defense to the Third Amended Petition. (J.A. 413, ¶ 42.) Leck and Jane alleged undue influence as part of their causes of action contained in their Third Amended Petition. (J.A. 387- 399.) James also engaged in

extensive discovery related to the 2014 Will, leaving no stone unturned, and no possible avenue of discovery untouched.

The "same conduct, transaction or occurrence" is a fact-intensive inquiry. While there is not substantial case law on this particular issue, the following description from the U.S. District Court for the Eastern District of Virginia summarizes Virginia law succinctly on the subject:

> [t]he present trend is to *See* [a] claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff . . . .
>
> *Dunston v. Huang*, 709 F. Supp. 2d 414, 420 (E.D. Va. 2010).

The 2016 Case and the 2014 Case arise out of the same transaction or occurrence – i.e., Nancy's capacity and the validity of documents signed by Nancy during the 2013-2014 time period. The extensive discovery taken by James about the 2014 Will, allegedly taken to prove the defense of "clean hands", simply illustrates that fact. The orders entered on March 6, 2015 and March 20, 2015 by the court in the 2014 Case, along with the extensive discovery clearly indicate that the 2014 Will was a major issue in the 2014 Case.

The time periods complained of between the 2014 Case and the present case are the same (i.e., 2013 to 2014 for the execution of documents, particularly the 2014 Will executed three months prior to the

Medical powers of attorney that James claimed were valid). Nancy's physical and mental ailments are the same. The case involves the same witnesses, documents and evidence. The same allegations were at issue, except that now, James claims Nancy lacked testamentary capacity and she was unduly influenced by Leck and Jane.

This Court has held, "Thus, if the underlying dispute produces different legal claims that can be joined in a single suit under the joinder statutes, Rule 1:6 provides that they should be joined unless a judicially-recognized exception to res judicata exists." *Funny Guy, LLC v. Lecego, LLC*, 795 S.E.2d 887, 895 (Va. 2017). Therefore, since the facts of this case arose out of the same transaction or occurrence, the inquiry must now shift to whether James could have brought his claims in the 2014 Case.

B. JAMES COULD HAVE AND SHOULD HAVE BROUGHT A CLAIM QUESTIONING THE VALIDITY OF THE 2014 WILL.

James argues that he lacked standing to question the validity of the 2014 Will. He cites to the case of *Schilling v. Schilling*, 280 Va. 146, 695 S.E.2d 181 (2010) as support. However, while it is true that a Will is an ambulatory document which does not take effect until the testator dies, it is not true that James could not seek legal redress to declare the 2014 Will void.

1. **James's position as agent under power of attorney conferred upon him the requisite standing to challenge the 2014 Will while Nancy was alive.**

James was acting as agent under the 2013 General Power of Attorney during the 2014 Case. His court filing in the 2014 Case shows that he made judicial representations in that capacity by invoking his mother's right to a jury, using his 2013 General Power of Attorney. (J.A. 221, ¶69.) A power of attorney is valid until it is proven invalid. *See* Va. Code § 64.2-1604.

In addition, the 2013 General Power of Attorney conferred proper authority upon James to ask the court for a determination as to the validity of the 2014 Will. (J.A. 228 & 229, ¶¶ 20 & 27.) Paragraph 27 of the 2013 General Power of Attorney incorporates the powers contained in Va. Code 64.1-57, the predecessor to Virginia Code Section 64.2-105. Subsection (B)(9) allows a fiduciary to commence lawsuits.

Essentially, James, while acting as attorney-in-fact under the 2013 General Power of Attorney during the 2014 Case, had the ability to claim and file pleadings challenging the validity of the 2014 Will on behalf of Nancy. Not only did he request a jury trial on behalf of his mother, using the 2013 General Power of Attorney, he alleged he was authorized to act pursuant to said document. (J.A. 217, ¶ 53.)

James had already invoked the declaratory judgment statute to declare that he was rightfully and properly the attorney-in-fact under the 2013 General Power of Attorney. Why could he not have invoked that same statute to declare the 2014 Will void, particularly since he was authorized to act on behalf of Nancy?

James definitely had standing to bring the action. This Court has held that, "A plaintiff has standing to bring a declaratory judgment proceeding if he has 'a justiciable interest' in the subject matter of the litigation, either in his own right or in a representative capacity." *Cupp v. Board of Supervisors*, 227 Va. 580, 590, 318 S.E.2d 407, 412 (1984). If an agent's principal has been aggrieved by the acts of others, how is he not interested in the subject matter of the dispute? Nancy, in her own right, would have had the ability to void the 2014 Will. While James did not possess that authority under the 2013 Durable General Power of Attorney, he did have the power to litigate the matter.

Further, not only did the language of the actual 2013 General Power of Attorney permit James to bring an action to determine the validity of the 2014 Will, so did the statutes governing powers of attorney. Starting with the more general, the Uniform Power of Attorney Act allows an agent to bring actions

and assert claims on behalf of the principal, unless the power of attorney otherwise provides. *See* Va. Code § 64.2-1633(1) & (2) (2016).

Additionally, the 2013 General Power of Attorney contained a general grant of authority, and as such, certain other duties and powers were conferred upon James. (J.A. 230); *See also* Va. Code § 64.2-1622(C) (2016) (stating, "Subject to subsections A, B, D, and E, if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in §§ 64.2-1625 through 64.2-1637".) Reading Va. Code § 64.2-1622(C), it is clear that with a general grant of authority, additional authority contained in Va. Code § 64.2-1632 is also conferred upon an agent. That authority provides that an agent can initiate and/or participate in litigation to ascertain the validity of a will. *See* Va. Code Ann. § 64.2-1632 (2016). Further, Va. Code § 64.2-1612(B)(6) requires an agent to attempt to preserve the principal's estate plan.

Taking all of the powers, duties and authority together, both stated in the 2013 General Power of Attorney and the provisions of the Uniform Power of Attorney Act, and combining them with the allegations and scope of the counterclaim brought by James in the 2014 case, it is clear that he could have brought an action to determine the validity of the 2014 Will. Therefore,

the Trial Court properly dismissed James's complaint in this action on the basis of *res judicata*.

2. <u>James had sufficient interest in determining the validity of the 2014 Will due to statutes that were invoked to place Nancy's capacity in question</u>.

Declaratory judgments can be used for a variety of issues, and courts should liberally interpret and administer these statutes with a view toward making the courts more serviceable to the people. *See* Va. Code §§ 8.01-184 & 190 (2017).

Any person may file a petition for the appointment of a guardian and/or conservator for a respondent. *See* Va. Code § 64.2-2002(A) (2017). A determination of whether the respondent is incapacitated is part of the inquiry. *See* Va. Code § 64.2-2007 (2017). Further, as part of the court's examination of the evidence, an evaluation report must be submitted that describes the nature and extent of the incapacity. *See* Va. Code § 64.2-2005 (2017). This report can be used in court in determining whether the respondent is incapacitated. A determination is also to be made as to "the extent to which it is necessary to protect the respondent from neglect, exploitation, or abuse . . . Va. Code Ann. § 64.2-2007(C)(4) (2017). Given that anyone can file an action that determines whether a respondent is incapacitated, and further, during the course of such proceeding, evidence

is taken as to the nature and extent of such incapacity, it is certainly ripe for adjudication whether such respondent lacks even testamentary capacity.

a. A determination as to testamentary capacity and susceptibility to undue influence is a logical extension of the "nature and extend of incapacity" and whether a respondent was subject to abuse or exploitation.

It is true that testamentary capacity is not synonymous with the term "incapacitated", which means:

> incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of a conservator.
>
> Va. Code Ann. § 64.2-2000 (2017).

In addition, "[m]ental weakness is not inconsistent with testamentary capacity. A less degree of mental capacity is requisite for the execution of a will than for the execution of contracts and the transaction of ordinary business." *Gilmer v. Brown*, 186 Va. 630, 637-38, 44 S.E.2d 16, 19 (1947) (internal citations omitted).

However, in order to determine whether a respondent may be subject to neglect, abuse or exploitation, it would seem logical that a court, during the course of a guardianship/conservatorship proceeding, is able to

determine the validity of documents signed while an individual was incapacitated upon the request of a moving party. James makes the argument that an incapacitated person retains estate planning authority and power, and as such, he lacked interest in bringing an action to determine the validity of the 2014 Will. First, given that James was acting under the 2013 Durable General Power of Attorney (as argued extensively in the previous section), he had standing. Second, James had standing due to the nature of the proceedings brought in the 2014 Case.

It is certainly true that an individual under a conservatorship is not presumed to lack testamentary capacity. *See Parish v. Parish*, 281 Va. 191, 198-199, 704 S.E.2d 99, 103 (2011). However, it is also true that James used the 2014 Will as a defense, and that he sought guardianship and conservatorship over his mother. Nancy's capacity and the 2014 Will itself were very much part of the 2014 Case.

If a case involves the question of a respondent's capacity, then certainly questions as to the respondent's susceptibility to abuse and financial exploitation (which can very well include undue influence) must be adjudicated pursuant to Va. Code § 64.2-2007, and thus, by extension, the validity of certain documents executed by a respondent during a time period when she is allegedly incapacitated must also be handled in some way.

A court in New Jersey held in a very similar situation in which the respondent was still living at the time the question as to the validity of the will was raised: "We agree with Judge Waugh that, in the context of the guardianship action, it was appropriate to adjudicate whether Suzanne exercised undue influence over Lillian in connection with the December 2002 will." *In re Glasser*, Nos. A-0500-08T3, A-0505-08T3, A-0509-08T3, 2011 N.J. Super. Unpub. LEXIS 1959, at *28-29 (Super. Ct. App. Div. July 21, 2011) (internal citations omitted).

This theory is, indeed, further rooted in Virginia law. This Court has held that neither a committee nor a court can revoke a will of an "incompetent", but there is certainly an inference that when an individual, during life, lacks capacity, a court may step in:

> The ownership of property of an insane person remains in him. Only the management of the property is transferred to his committee who has no authority over the same except to manage and care for it during the disability of the incompetent. *Shands* v. *Shands,* 175 Va. 156, 7 S.E.2d 112. See also *Lake* v. *Hope,* 116 Va. 687, 696, 82 S.E. 738.
>
> Since the ownership of the property remains in the incompetent, where it has been disposed of by a valid will, prior to incompetency, as in the instant case, neither the committee nor the court can rewrite the will or change the beneficiaries named therein. The form of the property may be changed for certain purposes but the will cannot be revoked or modified.
>
> *Bryson v. Turnbull*, 194 Va. 528, 537-38, 74 S.E.2d 180, 186 (1953).

The mechanism for bringing such an action must be based upon a guardianship proceeding. If the respondent is out executing documents – documents that clearly favor an individual perpetrating undue influence or documents signed when the respondent clearly lacks testamentary capacity, how can it be said that neither the court, nor any of the parties *ante atrium* lack the ability to adjudicate the document's validity? Such a rule would lead to inequitable results, particularly in cases with facts such as the ones present in this matter.

b. A declaratory judgment is a vehicle that can be used in conjunction with an action seeking guardianship and conservatorship.

A declaratory judgment is one vehicle available for parties to use, in connection with guardianship proceedings, provided that the documents at issue were executed during the time of the alleged incapacity. It was not merely a future right that should have been adjudicated in the 2014 (i.e., contest based solely upon James's inheritance) – Nancy's capacity was very much an issue before the court. In fact, the order entered in the 2014 Case states not only that Nancy was "relieved of all authority and power to manage . . . her property and person", but that she was relieved of all authority and power to . . . perform legal acts in respect to her property and person." (J.A. 650, ¶E.) It appears that she would not be permitted to execute any more

wills, as that would be authority and power to perform a legal act in respect to her property. It is a significant finding because it is contrary to James's position that his mother could have executed another testamentary document post May 22, 2015. Moreover, both the 2013 Durable Power of Attorney and the 2014 Durable Medical Power of Attorney were both voided (essentially granting the relief sought by Leck and Jane). (J.A. 651, ¶l.)

Furthermore, this Court has held that the purpose of declaratory judgments is:

> Declaratory judgments 'are intended to supplement rather than to supersede ordinary causes of action . . .. Preventive relief is the moving purpose. Whether or not jurisdiction shall be taken is within the sound discretion of the trial court. Something more than an "actual controversy" is necessary. In common [***11] cases where a right has matured or a wrong has been suffered, customary processes of the court, where they are ample and adequate, should be adopted.' [Citing authorities.]
>
> "'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, which are the subject of judicial power, * * *.' 26 C.J.S., Declaratory Judgments, § 7, pages 59, 60.
>
> *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 419, 177 S.E.2d 519, 522 (1970).

While an heir does not have an interest in a will prior to the death of a decedent, a person *does* have an interest in whether a respondent in a guardianship action has been subjected to abuse or exploitation. And, if that

person has an interest in the determination of such facts, then the rights of the incapacitated person in executing questionable documents, as well as those of the alleged wrongdoers, appear to be proper and ripe for adjudication by courts under the declaratory judgment statutes:

> The General Assembly created the power to issue declaratory judgments to resolve disputes "before the right is violated." ("The manifest intention of the legislature . . . was to provide for a speedy determination of actual controversies between citizens, and to prune . . . the dead wood attached to the common law rule of 'injury before action.'"). "'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, which are the subject of judicial power.'". "Preventive relief is the moving purpose." The object of the declaratory judgment action must be the adjudication of rights.
>
> *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cty. Bd. of Supervisors*, 285 Va. 87, 98-99, 737 S.E.2d 1, 7 (2013) (internal citations omitted).

James claims he lacked standing, and yet, he never requested affirmative relief nor a ruling on the subject in the 2014 Case. He did, however, take seven depositions, three of which were second depositions of Leck, Leck's husband and Jane. He used the guardianship action as a tool to obtain discovery, only to lay in wait for another opportunity to sue his sisters. To hold that James could not have brought the validity of the 2014 Will up during the course of the 2014 Case would be to let parties conduct themselves exactly as James did – use the judicial system as a weapon for

future litigation. Looking at the allegations in the Petition (as amended) for Guardianship, the scope of the counterclaim brought by James, James's Answer and Grounds of Defense in the 2014 Case, and the allegations contained in his Complaint in the 2016 Case, it is clear that he could have brought an action to determine the validity of the 2014 Will. Therefore, the Trial Court properly dismissed James's complaint in this action on the basis of *res judicata*.

C. ***RES JUDICATA*** **DOES APPLY TO DECLARATORY JUDGMENT ACTIONS.**

The 2014 Case was very much an adversarial proceeding. Even though James brought actions pursuant to Va. Code § 8.01-184 (declaratory judgment), res judicata and collateral estoppel (argued in Section infra.) apply. *See Restat 2d of Judgments*, § 33. A petition (and counterclaim) pursuant to Va. Code § 64.2-2000, et seq. is a coercive action. While it is true that declaratory judgments have limited preclusive effect (otherwise known as the "declaratory judgment exception"), that limitation disappears when combined with other coercive action:

> While it is true that courts have limited the preclusive effect of declaratory judgments, declaratory judgments have no limiting effect if coercive relief such as damages or an injunction is also sought. Federal courts have consistently held that the declaratory judgment exception applies only if the prior action solely sought declaratory relief. "By asking for coercive relief (the injunction) in the first suit, the plaintiff lost the right to invoke the

> declaratory judgment exception." *Stericycle, Inc. v. City of Delavan*, 929 F. Supp. 1162, 1164 (E.D.Wis. 1996)(citing *Cimasi v. City of Fenton*, 838 F.2d 298 (8th Cir. 1988) and *Mandarino v. Pollard*, 718 F.2d 845, 848 (7th Cir. 1983)). It is undisputed that, in *Maryland Aggregates*, Laurel sought both declaratory relief and an injunction against enforcement and implementation of the Dewatering Act. Thus, the declaratory judgment exception is inapplicable.
>
> *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 164 (4th Cir. 2008).

Other courts, in addition to the Fourth Circuit Court of Appeals, acknowledge and affirm the "declaratory judgment exception". Here is sampling of reported cases: *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190, 196 (2d Cir. 2010); *Mandarino v. Pollard,* 718 F.2d 845, 848 (7th Cir. 1983); *Stericycle, Inc. v. City of Delavan*, 929 F. Supp. 1162, 1164 (E.D. Wis. 1996); *Winter v. Northcutt*, 879 S.W.2d 701, 706-07 (Mo. Ct. App. 1994).

This Court touched on the issue of bar when dealing with coercive and declaratory relief in *Winborne v. Doyle*, 190 Va. 867, 871-73, 59 S.E.2d 90, 93-94 (1950). However, that case dealt solely with the issue of whether the failure to bring action to enforce the declaratory judgment in the same action as the declaratory judgment was barred. This Court held that such relief was incidental to the judgment, and thus, not barred.

This matter does not involve "incidental" relief, or a situation in which only a declaratory relief was sought. The 2014 Case was initiated by an action pursuant to Va. Code § 64.2-2000, *et seq*. Further, James filed a counterclaim, seeking relief under those very statutes. Thus, having requested coercive relief, *res judicata* can and does apply, and the Trial Court correctly dismissed the 2016 Case.

II. THE TRIAL COURT CORRECTLY HELD THAT JAMES D'AMBROSIO'S COMPLAINT WAS BARRED BY COLLATERAL ESTOPPEL (ASSIGNMENTS OF ERROR I, VI, VIII, IX, X, XI.)

Collateral estoppel is similar to *res judicata* – bar. It essentially precludes the relitigation of factual issues between the same parties. This Court has held that:

> For the doctrine of collateral estoppel to apply, the following requirements must be established:
>
> > (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.
>
> . . . .
>
> It is firmly established that the party who asserts the defenses of res judicata or collateral estoppel has the burden of proving by a preponderance of the evidence that the claim or issue is precluded by a prior judgment. *Bates*, 214 Va. at 671, 202 S.E.2d

> at 921. In order to prove that a claim or issue is precluded by a former adjudication, "'the record of the prior action must be offered in evidence.'"
>
> *Scales v. Lewis*, 261 Va. 379, 382-83, 541 S.E.2d 899, 901 (2001) (internal citations omitted).

As argued extensively in Section I above, these were, indeed, the same parties, and there was final judgment. The issue is whether the factual issues were actually litigated and whether those factual issues were essential to the judgment.

Nancy's lack of capacity and her susceptibility to undue influence were, indeed, litigated and were made part of the order disposing of the causes of action. First, Nancy was found to be "completely and permanently incapacitated" with "no possibility of improvement in the Respondent's condition in the foreseeable future". (J.A. 649, ¶¶3&4.) Additionally, both Counts I and II of James's counterclaim were dismissed with prejudice, and both the 2013 General Durable Power of Attorney and the 2014 Durable Medical Power of Attorney were declared <u>void</u>. (J.A. 651, ¶I.) That means, implicitly, that Leck and Jane's counts requesting that those documents be declared void were <u>granted</u>. They based their relief upon undue influence and lack of capacity.

It is also interesting to note that the doctrine of "clean hands" was used by James as a defense to the Third Amended Petition filed by Leck and Jane,

which sought not only the appointment of a guardian and conservator for Nancy, but also sought to void the two powers of attorney procured by James. The doctrine of "clean hands" is identical to the doctrine of "unclean hands". *See, e.g., Richards v. Musselman*, 221 Va. 181, 185-186, 267 S.E.2d 164, 166-67 (1980). Fundamentally, the doctrine states that:

> 'He who comes into equity must come with clean hands,' . . . the complainant seeking equitable relief must not himself have been guilty of any inequitable or wrongful conduct with respect to the transaction or subject matter sued on. Equity will not give relief to one seeking to restrain or enjoin a tortious act where he has himself been guilty of fraud, illegality, tortious conduct or the like in respect of the same matter in litigation.
>
> *Cline v. Berg*, 273 Va. 142, 147-48, 639 S.E.2d 231, 233-34 (2007).

If this defense had any impact upon the 2014 Case, then Leck and Jane's petition could have been denied based upon this defense. All the relief they sought in their Third Amended Petition was granted, and all the relief sought in James's counterclaim was denied and dismissed with prejudice. Thus, the facts as to Nancy's incapacity and whether James took advantage of Nancy's infirmities by procuring the powers of attorney were both decided and were directly relevant to the 2016 Case. For all the reasons set forth in Section I and herein, the Trial Court's decision should be affirmed and the case dismissed.

III. THE TRIAL COURT PROPERLY DISMISSED JAMES'S COMPLAINT BASED UPON JUDICIAL ESTOPPEL (ASSIGNMENTS OF ERROR I, X, XI).

The Trial Court *sua sponte* dismissed James's complaint based upon judicial estoppel. (J.A. 704.) Essentially, judicial estoppel is estoppel by inconsistent position. *See Lofton Ridge, LLC v. Norfolk S. Ry.*, 268 Va. 377, 380, (2004). Judicial estoppel is invoked at the discretion of the trial court. *See Bentley Funding Group, LLC v. SK&R Group, LLC*, 269 Va. 315, 324, 609 S.E.2d 49, 53 (2005). Further, judicial estoppel forbids parties from "assuming successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other, or mutually contradictory." *Id*. at 380-381 (quoting *Burch v. Grace Street Bldg. Corp*., 168 Va. 329, 340, 191 S.E. 672, 677 (1937)). Judicial estoppel may act as a bar to maintaining a new cause of action. *See id*.

The following factors have been considered by courts in ascertaining whether judicial estoppel is appropriate: (1) the parties are the same, (2) a prior inconsistent position of fact was put forth by a party, and (3) the previous court must have relied on the statement of fact. *See Bentley Funding Group, LLC*, 269 Va. at 326, 609 S.E.2d at 54. It is clear from all of the pleadings and evidence that James's complaint in the 2016 Case is 180 degree turn from the position he took in the 2014 Case. The parties are,

indeed, the same. Reviewing the other factors, it is clear that judicial estoppel should bar James's action in the 2016 Case.

A. JAMES'S ALLEGATIONS IN THE 2016 CASE ARE INCONSISTENT WITH THE ALLEGATIONS HE MADE IN THE 2014 CASE.

First and foremost, James claimed that while his mother had suffered from "the residual effects of her stroke and old age", she was still capable of signing the May 31, 2014 Durable Medical Power of Attorney. If she had the capacity to sign a power of attorney on May 31, 2014, how could she not have had the testamentary capacity to sign the 2014 Will, which was executed on February 7, 2014? A power of attorney establishes an agency relationship, and as such, the capacity required to execute a power of attorney is the same as that required to enter into a contract – essentially conducting one's business.

In the 2014 Case, James claimed that his mother was capable of doing a number of things – with assistance, but according to him, she had the requisite ability to participate in her own financial management, revise her health care power of attorney and execute a new one. (See J.A. 212, ¶¶ 31, 33 & 48; J.A. 218, ¶ 56.) Notwithstanding, in the 2016 Case, James claims the complete opposite, the most of absurd of which was, "Upon information

and belief, the Decedent was not aware of the nature or extent of her estate and property or of the objects of her bounty." (J.A. 3, ¶21.)

The difference between the capacity to contract and testamentary capacity has been clearly articulated by this Court:

> Mental weakness is not inconsistent with testamentary capacity. A less degree of mental capacity is requisite for the execution of a will than for the execution of contracts and the transaction of ordinary business. One may be capable of making a will yet incapable of disposing of his property by contract or of managing his estate. Mental strength to compete with an antagonist and understanding to protect his own interest are essential in the transaction of ordinary business, while it is sufficient for the making of a will that the testator understands the business in which he is engaged, his property, the natural objects of his bounty, and the disposition he desires to make of his property.
>
> *Gilmer v. Brown*, 186 Va. 630, 637-38, 44 S.E.2d 16, 19 (1947) (internal citations omitted).

James is clearly alleging facts in the 2016 Case that are inconsistent with the position he took in the 2014 Case. In the 2014 Case, he essentially argued that while his mother was physically infirm, she was still, for the most part, mentally intact. Now, when he wants to overturn the 2014 Will, he claims his mother lacked even the lowest form of capacity – that which is required to make a will. Further, when Leck and Jane claimed that their mother was incapacitated, their petition was met with vigorous defense by James. Ultimately, however, Leck and Jane were successful.

B. THE COURT IN THE 2014 CASE RELIED UPON JAMES'S POSITION IN FASHIONING ORDERS THROUGHOUT THE CASE.

The last factor to be considered is whether the court relied upon the prior inconsistent position in rendering its decision. *See Bentley Funding Group, LLC*, 269 Va. at 326, 609 S.E.2d at 54. This Court makes it clear, however, that reliance upon the prior inconsistent position need not be a favorable judgment:

> However neither *Bentley Funding Group* nor any other case has required that the non-moving party secure a favorable *judgment* based on the prior inconsistent position as a prerequisite for the application of judicial estoppel. Rather, our cases only require that the court *relied upon* the prior inconsistent position in rendering a prior judgment or ruling.
>
> *Va. Elec. & Power Co. v. Norfolk S. Ry. Co.*, 278 Va. 444, 463, 683 S.E.2d 517, 528 (2009).

Further, the entire premise of judicial estoppel is to prevent parties from speaking out of both sides of their mouth. *See Wooten v. Bank of America, N.A.*, 290 Va. 306, 310, 777 S.E.2d 848, 849 (2015).

As to court rulings, James asked for an extension of time to designate an expert witness (ostensibly to prove Nancy had capacity). (J.A. 258.) James received additional discovery into the 2014 Will. (J.A. 400-406; 653-656.) By maintaining the defense of "clean hands" and Leck and Jane's inequitable behavior, James benefitted from the ability of being able to probe

into all aspects of the 2014 Will's execution – all while alleging Nancy had the capacity to make decisions and participate in her financial management. *See, e.g.*, Va. Sup. Ct. R. 4:1(b). James simply should not profit from his "about face." Therefore, the Trial Court was correct in dismissing James's complaint in this matter.

CONCLUSION

WHEREFORE, the Appellees, ELECTRA D'AMBROSIO and JANE D'AMBROSIO WOLF, respectfully request that this Court affirm the Trial Court's decision; they request an award of attorney's fees and costs should they prevail; and for such other and further relief as this Honorable Court deems just and meet.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 2017, pursuant to Rule 5:26, three paper copies of this Brief of Appellees have hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of the Brief of Appellees was served, via email, upon:

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