

Caselaw Affecting Ownership of Real Estate in Virginia â?? Part Two

Description

Case # 1: [*Austin v. City of Alexandria*, 374 SE 2d 289, 265 VA 89 \(2003\).](#)

Principle: It is crucial to make sure that a trustee signs in their capacity as trustee and not as an individual. If a trustee signs in his capacity as an individual and not as trustee when the property is held in a trust, he is not conveying anything. You cannot convey what you do not own. Therefore, if a property is held in a trust, the trustee does not own the property individually, only in a fiduciary capacity for the trust. Therefore, the trustee must sign the deed in his capacity as trustee and not as an individual.

Summary of Facts: James M. Duncan, III executed a trust establishing â??The James M. Duncan, III, Living Trustâ?• (known as the â??Living Trustâ?•). Duncan was named the initial trustee of the trust. He also executed a â??Deed in Trustâ?• conveying the property at issue (commercial property in the City of Alexandria, Virginia) to himself as trustee of the Living Trust.

Duncan later amended the Living Trust providing that, upon his death or resignation as trustee, Burke & Herbert Bank & Trust Company and William Y. Austin should succeed him as co-trustees. Austin was the lifetime beneficiary of one of the charitable remainder trusts established under the Living Trust.

Then, Duncan individually executed a *second* deed purporting to convey the same real property to himself as trustee of a separate trust; Duncan as grantor (as an individual, NOT as trustee) to â??James M. Duncan, III, Trustee for the J.M. Duncan, III Charitable Remainder Unitrust,â?• Grantee. The legal description of the property in the deed contained no reference to Duncanâ??s prior transfer of this same property to the Living Trust or to any reversion of the title of this property to Duncan in his individual capacity. The deed was signed by Duncan but did not specify the capacity in which he executed it.

The day after Duncan executed the second deed, he created the â??J.M. Duncan, III Charitable Remainder Unitrustâ?• (â??Unitrustâ?•). Attached to the Unitrust agreement as â??Exhibit Aâ?• was a legal description of the property to be held in the trust. The property described was substantially the same property previously deeded to the Living Trust. However, as with the deed purporting to convey the property to the Unitrust, no mention was made of Duncanâ??s prior conveyance of this same property to the Living Trust or of any reversion of the title of the property to Duncan individually.

Duncan then executed a contract, in his capacity as trustee of the Unitrust, to sell the property to Nationwide CH, LLC (â??Nationwideâ?•). Before the settlement occurred, Duncan passed away.

Burke & Herbert Bank & Trust Company declined its appointment as successor co-trustee for the Living Trust, and Austin was instead confirmed as the trustee. Austin filed a complaint in his capacity as trustee of the Living Trust alleging that the deed to the Unitrust was ineffective because of the previous deed from Duncan to the Living Trust.

Holding: The Court held that both the legal and equitable title of the property remained with Duncan as trustee of the Living Trust until his death and that the 1999 deed purporting to convey the property to the Unitrust was ineffective because Duncan did not make the conveyance as trustee of the Living Trust and he had no legal title in the property to convey in his individual capacity.

Discussion: Whenever you are dealing with a situation where the property is held by the trust, make sure that the trustee signs the deed in their capacity as the trustee and not as an individual to avoid a title insurance claim, an angry purchaser, and damage to your company's reputation.

Similar Principle: A grantor who retains the sole discretionary power to revoke the trust owns the right to eliminate the trust and thereby own the trust property outright any time she chooses to do so.^[1]

Case # 2: [*Deutsche Bank National Trust Company v. Arrington*, 772 S.E.2d 571, \(Va. 2015\)](#).

Principle: The after-acquired property statute only applies between the parties to a deed and does not affect the rights of third parties or influence the relative priority of their interests.

Summary of Facts: Lynore Arrington (Arrington) and William Plucky (Plucky) acquired by property located in Moneta, Virginia, as tenants by the entireties with the right of survivorship. Upon their divorce, Arrington conveyed her interest to Plucky by deed of gift executed on July 15, 2004, and recorded on July 29, 2004.

On July 7, 2005, Plucky conveyed the property by general warranty deed to Donald L. Riemenschneider (Riemenschneider), recorded on July 12, 2005.

On August 22, 2006, Plucky executed a deed of trust purporting to convey the property to Deutsche Bank (the Deutsche Bank Deed of Trust). The Deutsche Bank Deed of Trust was not recorded until May 21, 2008.

On March 19, 2009, Plucky executed a deed of trust in favor of Arrington to purge a contempt order for failing to pay debts set forth in the divorce decree.

On July 6, 2009, Riemenschneider executed a general warranty deed re-conveying the property to Plucky. This deed was recorded on July 17, 2009 at 1:10 pm. Arrington recorded her deed of trust on July 17, 2009 at 1:11 pm.

Deutsche Bank filed a complaint in the Circuit Court of Bedford County seeking a declaratory judgment that the Deutsche Bank Deed of Trust was a valid first priority lien on the property. Deutsche Bank argued that when Riemenschneider conveyed the property to Plucky on July 6, 2009, Virginia Code Â§ 55-52^[2] cured the title defect in the Deutsche Bank Deed of Trust retroactive to August 22, 2006, and with respect to Arrington's deed, Plucky conveyed only what he held, resulting in Arrington's deed of trust being inferior to the Deutsche Bank Deed of Trust.

The Circuit Court ruled that Arrington's deed of trust had priority over the Deutsche Bank Deed of Trust because, even though the Deutsche Bank Deed of Trust was recorded *before* Arrington's deed:

- Virginia Code Â§ 55-52 (now [Virginia Code Â§ 55.1-301](#)) does not affect the deeds of third parties or influence the relative priority of their interests,

- the Deutsche Bank Deed of Trust was void against Arrington as a judgment lien creditor under Virginia Code Â§ 55-96(A) (now [Virginia Code Â§ 55.1-407](#)), and
- pursuant to Virginia Code Â§ 55-105 (now [Virginia Code Â§ 55.1-414](#)), the Deutsche Bank Deed of Trust was not properly recorded in Arrington's chain of title.

Holding: The Supreme Court affirmed the Circuit Court's decision and held that the after-acquired property statute, which validated prior conveyances where the grantor subsequently obtains an interest in property, "only applies between the parties to a deed and does not affect the rights of third parties or influence the relative priority of their interests."

The Supreme Court held that Virginia Code Â§ 55-52 (now [Virginia Code Â§ 55.1-301](#)) governs the rights between a grantee and a grantor (here, Riemenschneider and Plucky); it does not affect the rights of third parties (here, Arrington). Under Virginia Code Â§ 55-96(A) (now [Virginia Code Â§ 55.1-407](#)), which addresses priority, the Deutsche Bank Deed of Trust did not impair Arrington's priority because she was a lien creditor and the Deutsche Bank Deed of Trust was not admitted to record before Arrington qualified as a lien creditor.

Discussion: Virginia Code Â§ 55.1-301 provides that "when a deed purports to convey property, real or personal, describing it with reasonable certainty, which the grantor does not own at the time of the execution of deed, but subsequently acquires, such deed shall, as between the parties thereto, have the same effect as if the title which the grantor subsequently acquires were vested in him at the time of the execution of such deed and thereby conveyed."

The Deutsche Bank Deed of Trust was recorded before Plucky acquired legal title of record; therefore, it was outside Arrington's chain of title. The Deutsche Bank Deed of Trust was not properly recorded in Arrington's chain of title, and therefore, it was not "duly admitted to record" even though it was recorded before Arrington's deed. As a result, Arrington, a lien creditor, had priority over the Deutsche Bank Deed of Trust because it was recorded outside Arrington's chain of title, and was therefore void as to her.

As a result of Arrington, Old Republic is exceedingly reluctant to rely on after-acquired title statute and more frequently requires a deed to correct or confirm the situation, or a court order confirming title in the current owners.

Case # 3: [White v. Llewellyn, 299 Va. 658 \(2021\)](#).

Principle: A fraudulent conveyance has the "intent to delay, hinder, or defraud creditors," according to Virginia Code Â§ 55.1-400. When determining whether a conveyance was fraudulent, the court looks at several factors.

Summary of Facts: In 2013, Ann White was injured when her car was struck by a vehicle driven by Ann Llewellyn exiting the driveway of property that Ann Llewellyn then owned with her husband, Brad Llewellyn. White sued the Llewellyns for damages.

In 2015 while the personal injury suit was pending, the Defendants finalized their divorce. In 2016, the husband was dismissed from the suit and, several months later, wife executed a deed of gift transferring title to the marital home as part of their property settlement agreement. Even though the property now belonged solely to Brad, both Ann Llewellyn and her children lived at the house, rent free.

After obtaining a \$1.5 million judgment in the personal injury suit against Ann, White filed suit to avoid Ann's transfer of the property to her ex-husband, Brad, on the grounds that Ann made the transfer with actual intent to hinder, delay, or defraud her.

White presented evidence that:

- (a) Ann transferred the property to Brad after White sued her;
- (b) Ann transferred the property for no consideration;
- (c) Ann had a close relationship with Brad; and
- (d) Ann continued to use and enjoy the property after she transferred it to Brad.

The Llewellyns both testified that the transfer of the property was unrelated to White's pending suit and was instead part of the division of property resulting from the divorce, and that Ann and the children continued to live in the property to minimize the trauma of the divorce to the children and spare them from having to change schools.

The trial court found that White established a prima facie case, thereby establishing a presumption of a fraudulent conveyance and shifting the burden of production to the defendants—but not the burden of persuasion. The trial court found that the defendants satisfied their burden of production of countervailing evidence showing that the conveyance was not done with the intent to evade the plaintiff. The trial court then held that White failed to satisfy her burden of persuasion and entered judgment for defendants.

Holding: The Supreme Court of Virginia reversed and remanded the case back to the trial court. The Court held that once a presumption of a fraudulent conveyance is established upon the proof of a badge of fraud, the burdens of both production and persuasion shift to the defendant to uphold the validity of the transaction by rebutting the presumption by establishing the bona fides of the transaction by strong and clear evidence.

Discussion: The Court on this issue of first impression found that the trial court erred by only shifting the burden of production and not the burden of persuasion to defendants once White established a badge of fraud. Once a presumption of a fraudulent conveyance is established, the defendant has to prove that the transaction was not a fraudulent conveyance.

Case # 4: [*Washington v. Prasad*, 292 Va. 658, \(2016\).](#)

Principle: A person with notice, actual or constructive, of a defect in his title is not entitled, upon being dispossessed by the rightful owner, to recover compensation for permanent improvements made on the premises.

Summary of Facts: Ravi Prasad purchased a property at a tax sale. Prasad purchased Parcel 8-C (17211 Shads Road) at the tax sale. Before the sale, Prasad viewed the County Assessor's records for Parcel 8-C. The County tax card incorrectly included a photograph of the house on Parcel 9-A (17201 Shads Road), which was owned by Washington. Prasad also obtained a copy of the tax map which showed both parcels. Prasad went to view the property before the sale, but believing Parcel 9-A to be Parcel 8-C, he viewed the house shown in the photograph on the County tax card.

Making matters worse, the Washington house displayed both on the house and on the mailbox that 17221 was the house number (the number had been changed, but Washington never changed the numbers on the house).

Prasad mistakenly made improvements to this house owned by Washington, without their knowledge or approval of these improvements. Prasad spent approximately \$23,500 on renovations to the Washington's house. Approximately two months after Prasad had begun these renovations, he received a letter from the Washington's attorney directing him to vacate the premises and end working on the renovations to the house.

Prasad filed a suit against the Washingtons seeking to be paid for the money he spent on the renovations to the house. He filed a two-count action against the Washingtons in the Circuit Court of Prince George County, seeking the creation of a constructive trust on Parcel 9-C and the improvements and sale of the property and an award of damages, claiming that the Washingtons had been unjustly enriched as a result of the fraud perpetrated by them by misrepresenting the address of their house.

Prasad testified that, in purchasing Parcel 8-C at the tax sale, he did not think it was necessary to be represented by a lawyer, or to obtain a title search and/or a survey of the property. Prasad began flipping houses after retiring from his job as a chemical engineer, he further explained, and "[o]ut of the 20 or 30 properties I have purchased, I have never taken title insurance, because I trust the courts and I trust the County." He nonetheless acknowledged that his contract of sale was for Parcel 8-C and that the contract stated, "this property is offered for sale as-is, with all faults and without any warranty, either expressed or implied." When asked whether he looked at his deed to Parcel 8-C, Prasad responded, "[w]hen this whole thing blew up, I looked at every line of every page, yes, sir. But not before."

The trial court imposed a constructive trust on Parcel 9-C with a judgment in the amount expended on the house totaling \$23,508.00. The trial court concluded that in equity the failure of Prasad to do appropriate due diligence was not a bar to his recovery. The Washingtons appealed.

Holding: The Supreme Court of Virginia held that a purchaser could not recover compensation for permanent improvements made to neighboring property he mistakenly believed was his. **Discussion:** The Supreme Court found that based on the undisputed facts, Prasad had at least constructive notice of the actual location of both lots. The Supreme Court found that "a purchaser must look to every part of the title which is essential to its validity. The law requires reasonable diligence in a purchaser. . . . Absent such due degree of caution, the purchaser is not entitled to protection. The Supreme Court concluded that it was Prasad's failure to exercise due diligence that resulted in his misidentification of Parcel 9-A as Parcel 8-C. Prasad proceeded "at his peril." With knowledge imputed to him, Prasad was not entitled to recover compensation for the improvements made to the Washington's property.

[1] [Murnan v. Stewart Title Guar. Co., 585 F.Supp.2d 825](#), 834 (E.D. Va. 2008). Note that this case has been *vacated in part on other grounds*, [607 F.Supp.2d 745 \(E.D. Va. 2009\)](#). This means that the principles outlined in this presentation are still the precedent, but not all of the principles discussed in the entire case text are still the precedent.

[2] Virginia Code Â§ 55-52 is now Virginia Code Â§ 55.1-310.



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