



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II  
Attorney General

March 16, 2012

900 East Main Street  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

The Honorable Michele B. McQuigg  
Clerk of Court  
Prince William County Circuit Court  
9311 Lee Avenue  
Manassas, Virginia 20110

Dear Ms. McQuigg:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

## Issue Presented

You inquire whether § 49-4 of the *Code of Virginia* authorizes the clerk of court to perform specified actions requested by out of state governing bodies. You provide two examples of these requests. First, you cite the State of Maryland's requirement that non-residents seeking to get married in Maryland obtain an affidavit sworn before the clerk of court in the county where they reside. You also cite the requirement by Pennsylvania that the clerk's office provide an oath of office to Commissioners who need to act in certain fiduciary matters before Pennsylvania courts. You ask whether you are authorized to fulfill these requests.

## Response

It is my opinion that § 49-4 authorizes the clerk of court to administer oaths requested by out of state governing bodies, provided that the oath or affirmation is "required by law" in the foreign jurisdiction.

## Applicable Law and Discussion

Section 49-4 provides:

Any oath or affidavit required by law, which is not of such nature that it must be made in court, may be administered by a magistrate, a notary, a commissioner in chancery, a commissioner appointed by the Governor, a judge or clerk or deputy clerk of a court, a commissioner or clerk or deputy clerk of the State Corporation Commission, or clerks of governing bodies of local governments.

The first issue presented by the statute is whether the term "required by law" includes the laws of other jurisdictions. Under basic rules of statutory construction, Virginia courts determine the General

Assembly's intent from the words contained in the statute.<sup>1</sup> In construing a statute, Virginia courts apply the plain meaning of the words used and are not free to add language, or to ignore language, contained in the statute.<sup>2</sup>

The statute in question authorizes the clerk to administer oaths that are "required by law," but it does not specify whether the term "required by law" is limited to the laws of the Commonwealth or includes the laws of other jurisdictions. A review of other Virginia statutes, however, shows that when the General Assembly intends to limit a statutory reference to the "laws of the Commonwealth," it does so explicitly.<sup>3</sup> In the absence of such language, the term "required by law" refers to the laws of the Commonwealth and the laws of other jurisdictions. To conclude otherwise would in effect add the words "of the Commonwealth" to the statute, a result that would violate basic principles of statutory construction.

It also should be noted that Virginia recognizes oaths and affidavits administered in another state or country.<sup>4</sup> The Commonwealth also gives full faith and credit to the records of judicial proceedings and other official records of foreign courts.<sup>5</sup> It would be inconsistent for Virginia to recognize affidavits from other jurisdictions, while at the same time prohibiting its clerks from administering affidavits for use in other jurisdictions. Statutes concerning the same subject are to be read together, and construed, wherever possible, so as to avoid conflict between them and to permit each of them to have full operation according to their legislative purpose.<sup>6</sup> Accordingly, these statutes provide further support for the conclusion that § 49-4 authorizes the clerk to administer oaths required by the law of another jurisdiction.

The second issue raised by the statute is whether a clerk of court is authorized to administer oaths that, although permitted by foreign law, are not technically "required." To answer that question, it is necessary to examine the source and scope of the clerk's authority.

Article VII, § 4 of the Constitution of Virginia creates the office of circuit court clerk and provides that a clerk's duties "shall be prescribed by general law or special act." As a general rule, circuit court clerks have no inherent powers, and the applicable statutes determine the scope of the clerk's powers.<sup>7</sup> If a particular action does not fall within the express statutory authority, the clerk has no authority to perform that action.<sup>8</sup>

The Supreme Court of Virginia addressed this issue in *Mendez v. Commonwealth*,<sup>9</sup> in which the appellant challenged the validity of a sworn statement that he affirmed under oath before the Clerk of the General District Court of Southampton County. The statement formed the basis for a perjury charge, for

---

<sup>1</sup> *Alger v. Commonwealth*, 267 Va. 255, 259, 590 S.E.2d 563, 564 (2004).

<sup>2</sup> *BBF, Inc. v. Alstom Power, Inc.*, 274 Va. 326, 331, 645 S.E.2d 467, 469 (2007) (citing *Signal Corp. v. Keane Federal Sys., Inc.*, 265 Va. 38, 46 (2003)).

<sup>3</sup> *See, e.g.*, VA. CODE ANN. §§ 6.2-892 (2010); 8.01-465.22 (2007); 38.2-2405 (2007); 49-15 (2009); 49-18 (2009); 64.1-132.2 (2007) & 64.1-132.3 (2007).

<sup>4</sup> VA. CODE ANN. § 49-5 (2009).

<sup>5</sup> VA. CODE ANN. § 8.01-389 (Supp. 2011). This includes the records of both sister states and other countries.

<sup>6</sup> *See, e.g.*, *Hood v. Commonwealth*, 280 Va. 526, 541-42 (2010).

<sup>7</sup> *Mendez v. Commonwealth*, 220 Va. 97, 102, 255 S.E.2d 533, 535 (1979).

<sup>8</sup> *Id.*

<sup>9</sup> 220 Va. 97 (1979)

which the appellant was convicted by the trial court. Appellant argued on appeal that the clerk did not have the authority to administer the affidavit, so it could not form the basis for a perjury charge.

The Court reversed the conviction, holding that the affidavit could not sustain a conviction of perjury. The Court noted that the affidavit was not “required by law” but was instead executed by agreement of the appellant and the Commonwealth’s Attorney. The Court stated that “the authority of a clerk of court to administer an oath or take an affidavit is purely a creature of statute.”<sup>10</sup> Citing the explicit language of § 49-4, the Court held that the clerk was authorized to administer only those oaths “required by law.” Accordingly, the affidavit in question fell outside the scope of the clerk’s statutory authority, and it could not form the basis for a perjury charge.<sup>11</sup>

Maryland Family Law Article 2-402 requires an applicant for a marriage license to appear before the clerk and provide, under oath, certain personal information to support the application. As an alternative to appearing in person, the statute allows non-residents to obtain an affidavit “sworn to under oath before a clerk or other comparable official in the county, state, province, or country where the party resides.”

Based on the foregoing analysis, the clerk is authorized to administer the Non-Resident Affidavit because the affirmation contained in the affidavit is required by Maryland law. Applicants for marriage licenses in Maryland are required to provide the information under oath; they simply have more than one way to provide the information. This is different from the situation in *Mendez*, where the affidavit was purely an agreement between two parties and not pursuant to any legal requirement. The Maryland statute *requires* that the information be provided under oath, and the Non-Resident Affidavit simply offers an alternative means to provide the required oath.

The clerk is also authorized to administer oaths to commissioners appearing in Pennsylvania courts. Pennsylvania law authorizes out of state commissioners to acknowledge the execution of a deed or other conveyance of land in Pennsylvania.<sup>12</sup> Such commissioners are also authorized to acknowledge any contract or other writing, under seal or not, to be used and recorded in Pennsylvania.<sup>13</sup> Pennsylvania requires every such commissioner to “take and subscribe an oath or affirmation before a judge or clerk of one of the courts of record of the state, kingdom, or country in which said commissioner shall reside.”<sup>14</sup> The oath is required for all out of state commissioners, so § 49-4 authorizes the clerk of a Virginia court to administer that oath.

In sum, I conclude that § 49-4 authorizes the clerk to administer oaths required by law in other jurisdictions, but it does not authorize the clerk to administer oaths or affidavits that are requested pursuant to an agreement between private parties. If a request is made pursuant to specific statutory or other legal authority from another jurisdiction, then the clerk is authorized to fulfill that request. Nonetheless, because the statute provides only that the listed officers “may” rather than “shall” administer such oaths, I note that the decision to do so remains within the sound discretion of the clerk.<sup>15</sup>

---

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 102.

<sup>12</sup> 21 P.S. § 978 (LexisNexis 2012).

<sup>13</sup> *Id.*

<sup>14</sup> 21 P.S. § 979 (LexisNexis 2012).

<sup>15</sup> “Unless it is manifest that the purpose of the legislature was to use the word ‘may’ in the sense of ‘shall’ or ‘must,’ then ‘may’ should be given its ordinary meaning — permission, importing discretion.” *Masters v. Hart*, 189

**Conclusion**

Accordingly, it is my opinion that § 49-4 authorizes the clerk of court to administer oaths requested by out of state governing bodies, provided that the oath or affirmation is “required by law” in the foreign jurisdiction.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II  
Attorney General

---

Va. 969, 979, 55 S.E.2d 205, 210 (1949), *quoted in* Bd. of Supvrs. v. Weems, 194 Va. 10, 15, 72 S.E.2d 378, 381 (1952); *see* 2010 Op. Va. Att’y Gen. 10, 12 n.3 and opinions cited therein (noting that use of “may” in statute indicates statute is permissive and discretionary, rather than mandatory). *See also* 2010 Op. Va. Att’y Gen. 17 (describing discretionary authority of clerks as constitutional officers).