

A Guide to the Administration of Decedents' Estates in Virginia

A cooperative project
of The Wills, Trusts and Estates Section
of The Virginia Bar Association
and the Wills, Trusts and Estates Legislative Committee
of The Virginia Bar Association

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Introduction

This manual is intended to assist persons who are involved in the administration of a decedent's estate in Virginia. It is particularly directed to those persons who desire to know in a general way what is involved before agreeing to serve as a personal representative of a decedent's estate and to those persons for whom the time has come to assume the responsibilities of administering an estate who need additional information. The following chapters discuss the various steps involved in probating a will, paying debts and claims, filing tax returns, and carrying out other duties and responsibilities of a personal representative of a decedent's estate.

Certain exceptions to the general rules and procedures described in this manual have been omitted, as well as some general rules which may apply only in certain circumstances. Accordingly, the material will not necessarily be applicable or complete with respect to any particular estate, and it is not intended to be a substitute for specific legal or tax advice applicable to a particular circumstance. It is designed to assist the layperson in carrying out some of the routine requirements of estate administration without the necessity of consulting an attorney every step of the way and to point the way in those areas where expert advice should be solicited. We hope it will give you an idea of duties you may carry out on your own and help you to be an informed client for those duties that you delegate to attorneys or other professionals.

The opinions expressed herein are those of the authors, whose reference point is Virginia law and practice as of July 1, 2005. Laws are subject to change and the reader is advised always to seek updated information on specific issues. There will certainly be local variations in some of the procedures described. Your local Clerk's Office handling probate should have additional information and instructions available to you at the time of probate and qualification.

The material is provided with the understanding that the authors and The Virginia Bar Association will not be liable for any direct, indirect, or consequential damages resulting from the use of this material. It is not to be construed as providing legal, accounting or tax advice to the user.

A Word About Terminology

Some of the words or phrases used in the following chapters may be unfamiliar to the reader but are frequently used in the context of estate administration. Many of the words are explained in the text, but in case the reader reviews only certain chapters or skips about in the manual, a brief description of some of the key words used follows:

Administrator: the person appointed by and qualified before the Clerk to administer the decedent's estate when the decedent has no will or has a will which does not name an executor or names an executor who for some reason does not serve.

Beneficiary: a person or organization entitled to receive a portion of the estate.

Clerk or Clerk's Office: the Clerk of the Circuit Court that has jurisdiction to probate the will and appoint the administrator or executor of the estate.

Commissioner of Accounts: the person appointed by the Court to oversee the reports and activities of personal representatives.

Court: the Circuit Court which has jurisdiction to probate wills and qualify administrators and executors.

Creditor: a person or organization owed money by the decedent.

Decedent: the deceased person.

Estate: the decedent's property, including real estate, personal property and any other assets owned or controlled by the decedent at the time of his or her death.

Executor: the person named in the decedent's will to administer the estate who accepts appointment by qualifying before the Clerk.

Fiduciary: a person in a position of trust with respect to another's property; a general term used to refer to executor, administrator or trustee.

Heirs/Heirs at Law: determined at the time of the decedent's death, the persons who would inherit the decedent's estate if the decedent died without a will.

Intestate: dying without a will.

Intestate succession: the order, as provided by Virginia law, in which family members are in line to inherit property from a decedent who died intestate.

Legatee: a person who may inherit property under a will; a more technical name for beneficiary.

Notice of Probate: the requirement to give notice of certain information to beneficiaries and heirs.

Personal Representative: a term used to mean either the executor or the administrator of the estate, as the context requires.

Probate: the procedure whereby a will is admitted to record in the Clerk's Office; the process of qualifying a person as executor or administrator of an estate; also sometimes refers to the entire process of administering an estate.

Qualification: the procedure whereby a person is appointed by the Clerk to serve as executor or administrator of a decedent's estate.

Testate: dying with a will.

Testator: a person who makes a will.

Will: a written document that directs how, when, and to whom, the Testator wants his or her property distributed after death.

CHAPTER I

Funeral and Burial Arrangements; Pre-Qualification Responsibilities of the Executor

Q: Who is responsible for making the funeral arrangements and how should funeral arrangements be handled?

A: Virginia law provides that a person may designate in a writing, signed and notarized and accepted in writing by the individual so designated, an individual to make arrangements for his or her burial or the disposition of his or her remains upon death. The individual so designated, if any, is responsible for making the arrangements.

If the decedent gives instructions in a will or in a separate letter to the executor or to a family member, the body should be buried in accordance with those instructions to the extent practical and reasonable under the circumstances. The person named in a will as executor has the power to provide for the burial even before qualifying as executor to administer the estate.

If no instructions are found regarding the disposition of the body or if arrangements were not made in advance, the surviving spouse or next of kin should make the funeral arrangements. Payment is discussed in the next question.

The person making the arrangements may need to locate the deed or other evidence of ownership of the family cemetery plot to determine the decedent's right to burial there.

Q: Who is responsible for the payment of funeral and burial expenses?

A: Often the funeral and burial take place before anyone locates and reads the will or qualifies to administer the estate. If there is a will, it usually is not admitted to probate until after the funeral. This means that there may not be access to the decedent's money in order to pay for the funeral at the time the arrangements are made.

However, the person who is named as executor in a will has the power to provide for the burial of the decedent and to pay reasonable funeral expenses even before that person has been formally qualified as executor.

If there is no will and no other means of access to the decedent's accounts, a family member usually advances the necessary money and then seeks reimbursement from the person who later qualifies as administrator and who then is authorized to use the decedent's assets to pay the bill or to reimburse the family member who advanced the money.

If the decedent has left no funeral or burial instructions, the person making arrangements with the funeral home should be careful about the amount of funeral expenses incurred for which that person will later seek reimbursement from the decedent's estate. Normally the expenses should be "reasonable," which will depend upon the decedent's financial and personal situation. However, if there is reason to think that the decedent's debts are greater than his or her assets, then it is possible that reimbursement of the funeral expenses will be

CHAPTER I: FUNERAL AND BURIAL ARRANGEMENTS; PRE-QUALIFICATION RESPONSIBILITIES OF THE EXECUTOR

limited to \$3,500 and no further reimbursement or payment can be made by the personal representative of the estate for funeral expenses. The limitation on the amount of estate assets that can be used to cover funeral and burial expenses occurs when the assets of a decedent's estate are not sufficient to satisfy all of the demands and claims against the estate. In such case, Virginia law specifies an order of payment of debts. Not following the order of payment set by law can cause the personal representative to be personally liable to creditors of the decedent.

Q: What should be done to keep safe the decedent's assets?

A: Steps to preserve and safe-keep the decedent's assets should be taken as soon as possible. Even prior to qualification before the Clerk, the executor named in the will has the power to preserve the estate from waste.

If the decedent lived alone, remove perishable property, arrange for the care of pets and safeguard the premises until the remaining property can be removed. As soon as possible, make sure that all personal property, especially jewelry, antiques, silver and valuable works of art, is securely and safely stored and adequately covered by casualty insurance.

All home deliveries should be terminated if the decedent's house is unoccupied. Cancel all newspaper and magazine subscriptions and determine whether a refund is available for unused subscriptions. If necessary, direct the post office to withhold delivery of the decedent's mail until the personal representative has been appointed. Upon appointment, the personal representative can then make an appropriate change of address with the post office.

Q: Who should be notified of the fact of death?

A: The requirement to notify beneficiaries and heirs at law is discussed in Chapter IV. In addition, the Social Security Administration, the Department of Veterans' Affairs (for any deceased veteran), other similar agencies, and employers that may have been sending monthly checks to the decedent should be notified to discontinue the payments. There may be death benefits payable by Social Security, the Department of Veterans Affairs, or the decedent's last employer that will be processed only after notice is given. If monthly benefits were being paid via direct deposit, notify the bank of the death so that any amounts paid in error after the death can be returned.

Notify insurance companies with which the decedent maintained life insurance policies so that the company can contact the designated beneficiaries and begin to process the insurance claims. Request Form 712 from each insurance company.

Consider sending a letter to all creditors notifying them of a possible delay in payment of amounts owed the creditors because of the death. Request verification and evidence of the nature and amount owed.

If the decedent executed a power of attorney during lifetime naming an agent to handle his or her financial affairs, notify the agent under the power of attorney that the power of attorney terminated as of the decedent's death.

CHAPTER II

Locating and Reading the Will

Q: Where is the will likely to be found?

A: Wills are frequently kept in safe deposit boxes at banks, at home in a lock box or similar place where valuable papers might be maintained, or at the office of the attorney who prepared the will. Begin the search at the decedent's home. If the will is not located there, see if the decedent rented a safe deposit box and check it. If anyone other than the decedent was authorized to enter the box, that person is entitled to open the box after the decedent's death to look for the will. If only the decedent (or the agent acting under a power of attorney whose authority terminated at the decedent's death) had access to the box, Virginia law allows a bank to permit certain other people access to the box for the sole purpose of locating the will.

After the personal representative is appointed, he or she will be allowed into the safe deposit box for the purpose of inventorying, removing, and securing any papers or property in the box.

If the decedent had no safe deposit box, or its location is undetermined, check with other family members, financial and legal advisors, local bank personnel, and friends to determine where a will might have been kept.

If no will is found but the family believes that the decedent had a will, a family member or other person may have to call or write all local banks, trust companies, and lawyers' offices to inquire whether the decedent left a will in their safekeeping.

Q: What happens if the will cannot be found?

A: If the original of the will cannot be found but it is believed that it was signed and never revoked or destroyed by the decedent, there is a procedure under which a copy of a lost will may be admitted to probate. There is also a procedure for dealing with a will that is unexpectedly found after the estate has been administered under the incorrect assumption that a will did not exist. These procedures involve filing a petition with the Court.

Q: If the will is located, does it have to be read to the family members?

A: There is no requirement in Virginia for a "reading of the will" that is frequently seen in movies. If a will is located, however, it may be helpful provide a copy to family members or other beneficiaries or to read it to them while they are available around the time of the funeral. This is not required by law and may not be practical in every situation. This should be considered as a way to reduce curiosity and questions about its contents and to eliminate suspicions that something is being hidden. The legal requirements for notifying heirs and beneficiaries named in the will are discussed in Chapter IV.

Probate and Qualification

Q: What is probate?

A: “Probate” refers to the action of submitting the will to the Clerk of the appropriate Circuit Court or to the Court itself and “proving” with appropriate documentation or testimony from witnesses that the will is valid (that is, it was properly signed and witnessed). The term “probate” is also used to refer in a general way to the process of qualifying as a personal representative, i.e., as an executor named in a will, or as an administrator if there is no will, to carry out the terms of the will and otherwise administer the decedent’s estate. The term “probate” is also used to refer to the general process of administering an estate.

Q: How is a will probated?

A: The person who intends to qualify as personal representative of the estate of the decedent takes the original will and a certified death certificate to the Clerk’s Office of the Circuit Court that has jurisdiction over the will. Jurisdiction is determined by the decedent’s residency at the time of his or her death and is discussed later in this Chapter. In proving that the will is valid, the Clerk or Deputy Clerk will review the provisions of the will and, more particularly, the circumstances under which it was signed. If it appears from a self-proving affidavit (discussed later in this Chapter) attached to the will or from the testimony of witnesses that the decedent signed the will in proper fashion, the will is admitted to probate, or “probated.” The probate process includes the completion and filing of several other forms which are discussed later in this Chapter. In most localities it is advisable to call the Clerk for an appointment for probate and to determine ahead of time whether there are any special procedures or requirements.

There are methods of probate, other than the procedure described in this Chapter, which will require appearance in the Circuit Court rather than before the Clerk of Court. A probate proceeding before the Clerk is the method most frequently used.

Q: When is probate required?

A: The probate of a will is not always required. For example, there may be no property which passes by will. However, since it is a relatively simple process, the better approach is to probate the will. If a person intentionally destroys or conceals a will in order to prevent its probate, he or she is guilty of a felony, and if a person has custody of a will and refuses to produce it, the Court has the authority to summons that person and compel the production of the will.

Q: Who is responsible for presenting the will for probate?

A: Anyone can present a will for probate. Usually the person who intends to qualify as executor is the one who presents the will for probate.

Q: What is required to prove a will?

A: The proving of a will is usually fairly simple. To be valid, the will must be in writing, signed by the decedent or at his or her direction, and either wholly in the decedent’s handwriting or witnessed by at least two competent witnesses, both present at the same time.

Some wills are “self-proved” which means that the will has an affidavit attached to it in which a Notary Public acknowledges by a recital of certain information that the will was properly executed. This is referred to as a “self-proving affidavit.” The self-proving affidavit is usually a separate page found at the end of the will.

CHAPTER III: PROBATE AND QUALIFICATION

Q: In addition to the will itself, what information does the Clerk require in order to probate a will?

A: The Clerk requires that information requested on several forms be provided. The forms can be completed ahead of time or with the assistance of the Clerk at the time of the appointment. The Clerk's Office will provide blank forms. These forms can also be downloaded from the Commonwealth of Virginia website at: www.courts.state.va.us/forms/circuit. These generally are:

1. Probate Information or Memorandum of Facts. Information about the decedent is requested, including the full name, address, place and date of death and marital status, which can be found on the death certificate. Other information requested can be found in the will itself, if there is one. Certain personal information about the person seeking appointment is also requested.

2. Probate Tax Return. If the estate is worth more than \$15,000, the Clerk will assess a tax based on the estimated value of the decedent's real estate in Virginia and personal property owned by the decedent, such as furniture, livestock, machinery, vehicles, cash, bank accounts, stock, bonds, etc. (but excluding certain assets such as life insurance, IRAs and retirement plan benefits which pass to a named beneficiary other than the estate; and survivorship property (explained in Chapter XI)). This amount is the "probate tax" (different from the "estate tax" discussed in Chapter VIII) and must be paid at the time of probate.

3. List of Heirs. The List of Heirs identifies the decedent's family members who would be entitled to inherit the estate if there were no will. The names, addresses, ages (or at least a designation whether such persons are 18 or older) and degree of kinship of these persons must be provided. If the decedent is survived by a spouse, then the spouse is listed as the heir unless there are children of the decedent who are not also the children of the surviving spouse. In that case, all

of the children are also listed. If there is no surviving spouse, then all of the living children, and the descendants of any deceased children, are listed. The remaining order of inheritance is discussed in Chapter X. The order of priority in which the decedent's relatives are determined to be heirs is contained in Virginia Code Section 64.1-1.

Some Clerks have different requirements regarding the persons who are to be identified on the List of Heirs, and in some locales in Virginia the Clerk always requires that the children be listed.

Q: What witnesses are needed at probate?

A: If the will has a self-proving affidavit attached to it, witnesses need not appear before the Clerk or Court.

If the will is not self-proving, check with the Clerk to determine whether the persons who witnessed the decedent's signing of the will must appear or whether the Clerk will accept a sworn statement from the witnesses. The Clerk will tell you whether one or two witnesses will be required and whether the testimony must be given in person or in a sworn statement. The procedure by which witnesses to the will give their testimony (whether in person or in a sworn statement) may differ significantly from one Clerk's Office to another.

If the will is not witnessed but is wholly in the testator's handwriting, two people with no interest in the estate who can identify the testator's handwriting must appear at probate.

Q: What else is needed at the time of probate?

A: In addition to the information needed to complete the above forms, the following should be provided:

1. The original of the will, if there is one.

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2. Unless the will waives surety on the bond of the personal representative, arrange to have a representative of an insurance company come to probate to provide **surety on the personal representative's bond**. In some jurisdictions the Clerk will make the arrangements for surety. The requirement of surety is discussed in a later question.

3. A **check** with which to pay the Clerk's fee and the probate tax.

4. If a person nominated as executor declines to serve, a **letter to that effect** from the person so nominated.

5. A **certified death certificate** or, in certain cases, a death notice from the newspaper. Check with the Clerk's Office involved ahead of time.

Q: What is qualification?

A: Qualification of the executor or administrator usually occurs at the same time as probate of the will. It involves the swearing in of the personal representative of the estate by the Court or the Clerk. Once qualified, the personal representative has the authority as well as the responsibility to administer the estate, and his or her performance is reviewed by the Commissioner of Accounts through certain written reports discussed later.

Q: When is qualification required?

A: Qualification of an executor or administrator is not required by law but, as a practical matter, it may be necessary in order to administer the estate. For example, it may be necessary for someone to be able to sign as personal representative in order to transfer assets from the decedent's name into the name of a beneficiary or to use the decedent's assets to pay claims against the estate.

Examples of assets that frequently can be transferred without qualification are:

1. **Assets owned jointly with another** with survivorship rights.

2. **Real estate** in the decedent's name that is specifically given to a beneficiary in the decedent's will or that passes automatically to heirs by way of intestate succession. (Even though qualification may not be required in order for ownership to be transferred, the will, if any, should be probated or, in the case of intestacy, an affidavit filed with the Clerk to establish evidence of the change in ownership. See Chapter XI for further details on real estate in an estate.)

3. **Assets of estates not exceeding \$50,000** if certain requirements are met.

4. **Small sums in banks, trust companies, savings and loans, and credit unions**, if the amount does not exceed \$50,000 and certain requirements are met.

5. **Motor vehicles**, if certain Department of Motor Vehicles forms are completed.

6. **Life insurance, IRAs and retirement plan benefits** payable to a named beneficiary rather than to the estate.

Further information on transferring assets without qualification of an executor or administrator is provided in Chapter VI.

Q: Who may qualify as a personal representative?

A: *Individuals* who qualify as either executor or administrator:

1. **must be 18 years of age** or older;

2. **must be able to obtain surety**, if required;

3. **no longer are required to be residents of Virginia** but when a nonresident qualifies, bond with surety will be required unless a resident personal representative qualifies at the same time or the Court or Clerk waives surety because the value of the estate does not exceed \$15,000; and

4. **must satisfy the Court or Clerk** that he or she is suitable and competent to perform the duties required of a personal representative.

Institutions such as banks or trust companies may serve if authorized to conduct trust business in Virginia.

CHAPTER III: PROBATE AND QUALIFICATION

Q: Where do probate and qualification take place?

A: If a will is to be offered for probate, or if a person intends to qualify as personal representative, the proper place to do so is in the Circuit Court, usually before the Clerk or Deputy Clerk, for the County or City in which:

1. **the decedent had a house or residence;** or
2. **if none, where the decedent had other real estate;** or
3. **if none, where the decedent died or had other property.**

If the decedent resided in a nursing home because of advanced age or impaired health at the time of his death, then usually proper jurisdiction for probate and qualification is determined by the location of the decedent's residence prior to admission to the nursing home. If the decedent resided in a retirement complex (but not a nursing home) at the time of his death, then usually the location of the retirement complex determines which court has jurisdiction.

Q: What is a personal representative's bond and surety on the bond?

A: When a personal representative qualifies, he or she is required to take an oath to carry out the duties of that office, and to post a bond promising to be responsible for paying the amount of any loss to the estate that results from improper acts or actions of the personal representative. The amount of the bond will at least equal the value of the personal estate and in most cases is double that amount. If the will authorizes the sale or rental of real estate, the value of the real estate or its rents and profits is taken into account in calculating the amount of the bond. The bond may be set in an amount greater than these values. If surety on the bond is required, it can be provided by the agreement of an insurance company to back up the bond. This insures that there will be funds to cover any loss due to the personal representative's improper acts if the personal representative cannot or will not make restitution. The premium for surety is paid from estate assets.

The requirement of a surety is sometimes waived by specific language in the will. Surety is not required if all the beneficiaries of a decedent's estate are personal representatives of the decedent's estate. Also, surety is not required if the value of the personal estate does not exceed \$15,000 and the person seeking qualification will have no power of sale over real estate. No surety is required on an individual serving jointly with a bank or trust company exempt from the surety requirement. Under current Virginia law, one or more nonresident individuals serving as personal representative without a resident personal representative will be required to have surety unless the value of the estate does not exceed \$15,000.

Q: What is the "certificate of qualification " or "letters testamentary"?

A: The certificate of qualification, sometimes referred to as "letters testamentary," is the paper that the personal representative receives from the Clerk at the time of qualification which states that the person has qualified as executor or administrator and has authority to act on behalf of the estate.

Q: What is the role of the Commissioner of Accounts?

A: The Commissioner of Accounts is a person appointed by the Court to oversee the work of personal representatives and other fiduciaries. The Commissioner reviews the Inventory prepared by the personal representative before it is filed in the Clerk's Office. (The Inventory is explained in Chapter IX.) The personal representative must also prove to the Commissioner, in accordance with Virginia law, that all property shown on the Inventory or later received by the estate is properly handled. The personal representative provides this information in the form of an annual account of each receipt and each disbursement made or, in certain cases, by a sworn affidavit of the personal representative. (The annual account is discussed further in Chapter IX.)

Notifying the Beneficiaries

Q: What is notice of probate?

A: A personal representative or person offering a will for probate is required to provide written notice of probate and qualification and entitlement to copies of the will, inventories, accounts and other reports, to beneficiaries and heirs. At the time of probate or qualification, the Clerk will provide the form for the notice, with appropriate instructions regarding its use. After notice is given, the person who was responsible for sending out the notice must file with the Clerk an affidavit that notice has been given.

Q: Is notice of probate always required?

A: No. The notice procedures are required only when the known assets passing under the will or by intestacy exceed \$5,000. Some persons are not required to receive notice, such as the personal representative who is also a beneficiary, trust beneficiaries (if the trustee is notified), and persons who receive bequests worth less than \$5,000 who are not heirs at law of the decedent. There are other categories of persons who are not required to receive notice.

Q: Who has the responsibility of sending notice of probate?

A: The personal representative of the estate must send a notice of probate. If no personal representative qualifies, the responsibility shifts to the person who offered the will for probate. If there is no will, any person having an interest in the estate may give the notice.

Q: When does the notice of probate have to be filed?

A: The notice of probate must be sent within thirty (30) days from the date the personal representative qualified or the will was admitted to probate.

Q: Who is entitled to notice?

A: The following persons:

- 1. the surviving spouse** of the decedent, if any;
- 2. all heirs at law of the decedent**, whether or not there is a will;
- 3. all living and ascertained beneficiaries** under the will of the decedent and the beneficiaries of any trust created by the will; and
- 4. all living and ascertained beneficiaries** under any will of the decedent previously probated in the same court.

Q: What information must the notice of probate contain?

A: The notice must contain the following information:

- 1. the name and date of death of the decedent;**
- 2. the name, address and telephone number of a personal representative** or a proponent of a will;
- 3. the mailing address of the Clerk of Court** in which the personal representative qualified or the will was probated;
- 4. the following statement:** "This notice does not mean that you will receive any money or property."
- 5. the following statement:** "If personal representatives qualified on this estate, they are required by law to file an inventory with the commissioner of accounts within four months after they qualify in the clerk's office, to file an account within sixteen months of their qualification, and to file additional accounts within sixteen months from the date of their last account period until the estate is settled. If you make written request therefor to the personal

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representatives, they must mail copies of these documents (not including any supporting vouchers, but including a copy of the decedent's will) to you at the same time the inventory or account is filed with the commissioner of accounts unless (i) you would take only as an heir at law in a case where all of the decedent's probate estate is disposed of by will, or (ii) your gift has been satisfied in full before the time of such filing. Your written request may be made at any time; it may relate to one specific filing or to all filings to be made by the personal representative, but it will not be effective for filings made prior to its receipt by a personal representative. A copy of your request may be sent to the commissioner of accounts with whom the filings will be made. After the commissioner of accounts has completed work on an account filed by a personal representative, the commissioner files it and a report thereon in the clerk's office of the court wherein the personal representative qualified. If you make written request therefore to the commissioner before this filing, the commissioner must mail a copy of this report and any attachments (excluding the account) to you on or before the date that they are filed in the clerk's office."

6. the mailing address of the Commissioner of Accounts with whom the inventory and accounts of the personal representative must be filed, if they are requested.

The Clerk will provide a form with the required information that can be used to notify the appropriate persons.

Q: Are there any other notice of probate requirements?

A: Yes. The personal representative or proponent of the will, within four months after qualification or admission of the will to probate, must record in the Clerk's Office where the will is probated an affidavit stating the names and addresses of the persons to whom notice was sent and the date such notice was sent. The Clerk must be paid a fee when the affidavit is filed. The Clerk will provide a special form for this affidavit.

Q: What happens if proper notice of probate is not given?

A: The failure to give the required notice does not affect the validity of the will nor does it make any person required to give notice, acting in good faith, liable to any person entitled to receive notice. However, the Commissioner of Accounts will not approve the accounts of the personal representative who fails to give notice and to file the affidavit. Moreover, if the affidavit has not been filed within the required four months, the Commissioner of Accounts shall issue a summons requiring the fiduciary to comply. If the fiduciary still fails to comply, the Commissioner of Accounts shall report the fact to the Court for further action.

Rights of the Surviving Spouse and Children

Q: Does the surviving spouse have any special rights to property in the estate of the deceased spouse?

A: The surviving spouse of a Virginia decedent may claim an “elective share” of the decedent’s estate, whether or not any provision is made for the spouse in the decedent’s will, and whether or not the decedent dies intestate. This election must be made within six (6) months from the later of (i) date of probate or (ii) date of qualification of a person to administer an intestate estate. The six-month limitation period in which the surviving spouse makes the election may be extended in certain circumstances. The spouse’s election must be made in person before the court having jurisdiction over the estate or in a writing filed with the Clerk of the Court having jurisdiction over the estate. In addition to claiming an elective share, the surviving spouse may claim certain exemptions and allowances that are discussed later in this Chapter.

Q: What is the elective share of the surviving spouse and how is it calculated?

A: The surviving spouse has a statutory right to elect to take a specified share of the decedent’s estate. If the surviving spouse claims the elective share, he or she is entitled to an amount equal to one-third ($\frac{1}{3}$) of the decedent’s “augmented estate” if the decedent had any children or other descendants to survive him or her. The elective share is an amount equal to one-half ($\frac{1}{2}$) of the decedent’s “augmented estate” if the decedent had no children or other descendants to survive him or her. The elective share is calculated by determining the value of the decedent’s “augmented estate” and then applying the

appropriate fraction ($\frac{1}{3}$ or $\frac{1}{2}$) to the value of the augmented estate. When the value of the elective share has been determined, the value of any assets that are considered to be a part of the “augmented estate” and that pass to the surviving spouse anyway, regardless of the election (e.g., joint property, certain property already given to the surviving spouse by the decedent, etc.) are credited against the value of the elective share and the remaining value of the elective share is satisfied from other property in the estate. When a surviving spouse claims an elective share, other beneficiaries of the estate may receive less than they otherwise would have. Factors such as the kind of property held in the decedent’s estate, the value and kind of transfers made by the decedent during life, and the reductions made in other beneficiaries’ shares can make the calculation very complex. The personal representative is advised to seek legal and accounting advice if the surviving spouse advises that he or she is going to, or in fact does, claim the elective share. The personal representative should also be very cautious about distributing property from the estate during the period when the surviving spouse still has the right to claim the elective share.

Q: What is the “augmented estate”?

A: The “augmented estate” is a means of preserving a fair share of the decedent’s property for the surviving spouse, regardless of whether the decedent chooses to benefit the spouse by will. The calculation of the augmented estate is required only if the surviving spouse claims the “elective share” discussed above. In very general terms, the augmented estate consists of the decedent’s estate under the control of the personal

CHAPTER V: RIGHTS OF THE SURVIVING SPOUSE AND CHILDREN

representative, to which is added certain property over which the personal representative might not otherwise have control, and from which certain property is excluded. The personal representative must contribute, from the decedent's property under his or her control, whatever is necessary to make up the elective share, once the personal representative has been notified that the surviving spouse has claimed an elective share.

Q: Does a surviving spouse who is omitted from the deceased spouse's will have any special rights to the property in the estate?

A: A surviving spouse who is omitted from the will of the decedent is entitled to the same share as a surviving spouse of a decedent who dies without a will (which is explained in Chapter X), if the will in which the surviving spouse is omitted was signed prior to the marriage and there is no premarital or post-marital agreement to the contrary. In some cases, the omitted spouse share may be different from the elective share discussed above. A surviving spouse who has any questions about the share passing to him or her should contact an attorney immediately.

Q: Does the surviving spouse have any rights in the marital residence?

A: Often the marital residence is titled in such fashion that it will pass automatically to the surviving spouse, regardless of what the will provides. If the title to the marital residence, as expressed in the deed, is "joint with right of survivorship" with the surviving spouse or "tenants by the entirety," then the surviving spouse automatically becomes the sole owner, subject to any mortgage or other liens on the house. If the spouse's rights in the marital residence cannot immediately be determined, then the spouse is entitled to reside in the marital residence for a period of time, without any charge for rent, until the spouse's rights can be determined. A surviving spouse will have this right to reside in the marital residence if the decedent died intestate and is survived by one or more children or other descendants from a

prior marriage or if the surviving spouse decides to claim the elective share.

Q: Do the surviving spouse and/or children of a decedent have any rights in the property of the estate that are superior to the rights of creditors or of other beneficiaries named in the will?

A: The surviving spouse and minor children of a decedent are entitled to claim one or more of: a Family Allowance, an Exempt Property Allowance and a Homestead Allowance. Often these allowances are claimed only when the estate is very small or is insolvent because the allowances are superior to the rights of certain creditors and beneficiaries named in the will. However, the allowances may be claimed even in large and solvent estates. These allowances are explained in the following questions and answers.

Q: What is the Family Allowance and how is it claimed?

A: The Family Allowance is a sum paid from the estate for the support of the surviving spouse and minor children. The Allowance is paid for no longer than a period of one year if the estate is insolvent. It is payable to the spouse, if living, for the use and benefit of the spouse and minor children. If the spouse is not living, it is payable to the person having care and custody of the minor children. The amount of the Allowance generally will not exceed \$18,000, but this may vary on a case-by-case basis. The amount has been increased by action of the General Assembly in recent years and is subject to further change. The Allowance must be claimed within one year of the death of the decedent, either in person in the court having jurisdiction over the estate or by a notarized writing filed in the Clerk's Office of the court having jurisdiction over the estate. The Family Allowance is paid in addition to any share given to the spouse or minor children by will or by intestate succession or the elective share. It has priority over all other claims against the estate.

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Q: What is the Exempt Property Allowance and how is it claimed?

A: The Exempt Property Allowance entitles the spouse, if living, and if not, the minor children of the decedent, to select up to \$15,000 worth of household furniture, automobiles, furnishings, appliances and personal effects from the estate. The Exempt Property Allowance is in addition to the Family Allowance and is also in addition to any share given to the spouse or minor children by will or by intestate succession or by the elective share. It has priority over all other claims against the estate except the Family Allowance. It is claimed in the same manner and in the same time frame as the Family Allowance.

Q: What is the Homestead Allowance and how is it claimed?

A: The Homestead Allowance entitles the spouse, if living, and if not, the minor children of the decedent, to an allowance of \$15,000 from the estate. The Homestead Allowance is in addition to the Family Allowance and the Exempt Property Allowance but it replaces any share given to the spouse or minor children by will or intestate succession unless that share is less than \$15,000. If the surviving spouse claims the elective share (discussed in this Chapter), then the surviving spouse is not entitled also to the Homestead Allowance.

Q: Does every surviving spouse of a decedent have a right to claim the elective share or any of the other allowances discussed above?

A. Every spouse has the right to claim the elective share and the allowances discussed above unless the spouse waived the right to claim any of these during the lifetime of the decedent by a signed agreement. However, the agreement must comply with certain requirements set out by law in order to be an effective waiver of the allowances or elective share.

Q: Does a child who is omitted from the will of a parent have the right to make a claim for a share of the deceased parent's estate?

A: If the deceased parent made a will that was signed before any children were born to the parent, then a child may claim the same share the child would have received had the parent died without a will. Under current Virginia law, if a deceased parent dies without a will then a child is entitled to a share only if (i) there is no surviving spouse, or (ii) the decedent left children who are not also the children of the surviving spouse. This means that in many cases a child omitted from a will has no claim to a share of the deceased parent's estate.

If the deceased parent's will was signed when the parent had at least one living child who was provided for in the will, then any child subsequently born who is not provided for in the will is entitled to the smaller of (i) the same share as the child who was provided for in the will, or (ii) the share the child would have received had the parent died without a will.

If the deceased parent made a will after the birth of all the children born to the parent and omitted one or more of the children from the will, the omitted child or children have no claim against the estate by virtue of being "omitted."

CHAPTER VI

Administration of Small Estates

Q: Is there any way to avoid the need to qualify as executor or administrator if there are only a few assets to transfer?

A: There are several Virginia statutes, including the ones referred to as the “Virginia Small Estate Act” that permit transfer of certain assets in a decedent’s estate without an executor or administrator. Some of these statutes are discussed below. The transfer of jointly held assets is discussed in Chapter XI.

Q: How is money owed to the decedent collected if no one qualifies as executor or administrator?

A: The Commonwealth of Virginia, the United States, labor unions, employers, and certain other agencies may pay tax refunds, death benefits, or certain other types of benefits owed to the decedent and not exceeding \$50,000, directly to the surviving spouse of the decedent, or if there is no surviving spouse, to the persons who are entitled to the estate. They may withhold payment for sixty days from the date of death, in order to see if anyone qualifies during that time period, and thereafter, may pay the benefits upon a request from the surviving spouse or other persons entitled to them. Bank accounts, savings and loan accounts, and credit union accounts with balances of not more than \$50,000 may also be transferred to the surviving spouse, or if none, to the persons entitled to the estate when there has been no qualification on the estate within 60 days of death.

Q: Can stock certificates be transferred if no one qualifies as executor or administrator?

A: If the value of a stock in the decedent’s estate is \$50,000 or less, and no one qualifies within the first sixty days following death, the corporation

issuing the stock certificates, or its transfer agent, may, upon receiving the stock certificates, make a transfer to the surviving spouse, or if there is no surviving spouse, to the persons who are entitled to the estate. However, the corporation may, in its discretion, require someone to qualify as executor or administrator before making the transfer.

Q. What about automobiles and boats?

A: The Virginia Department of Motor Vehicles will permit title to a vehicle to be reregistered in the name of the surviving spouse or other persons entitled to it upon receiving a certification that no one has qualified to administer the estate and that all debts have been paid or will be paid from the proceeds from a sale of the vehicle. The DMV has the necessary forms to make the transfer but will need for the title to the vehicle to be presented. The U. S. Bureau of Customs has a similar procedure for transferring boats and water craft registered with it.

Q: What is the Virginia Small Estate Act and how does it simplify administration of an estate?

A: The Virginia Small Estate Act provides another means for a decedent’s assets to be transferred without the necessity of qualifying a personal representative. The person seeking transfer of the assets must provide an affidavit stating that the value of the entire personal probate estate is \$50,000 or less; that a sixty-day period has passed since the death of the decedent and no one has qualified or applied to qualify as personal representative; that the will, if any, was probated and the list of heirs filed; and that the person seeking transfer is entitled to the assets and why. The affidavit is presented to the person in possession of the property with a request that

CHAPTER VI: ADMINISTRATION OF SMALL ESTATES

it be transferred. If the person in possession refuses to deliver the property, the claimant may seek recovery through a court proceeding.

Q: What is required if real estate is the only asset in the estate ?

A: If the decedent died with a will, the will should be probated in order to pass title to the decedent's real property to the new owner. It is not necessary to qualify an executor if there is no need to sell the real estate and all debts and claims can be otherwise satisfied. If the decedent died without a will, any interested person may file an affidavit describing the real estate, acknowledging there is no will, and providing the names and addresses of the heirs at law. The affidavit is filed in the court where the real estate is located and serves as evidence of ownership passing to the heirs. Most Clerks have a preprinted form of affidavit to be used for this purpose.

CHAPTER VII

Paying Debts and Claims Against the Estate

Q: Is there a particular order of priority for the payment of debts and claims against the estate?

A: When a decedent's estate has sufficient assets to pay all debts and claims, the order in which debts and claims against the estate are paid makes no real difference so long as the executor is careful to follow any directions in the will regarding assets that are to be preserved for distribution rather than sold to pay debts and claims. Insolvent estates, i.e., estate in which debts, expenses and claims will exceed the value of the assets of the decedent under the control of the personal representative, must pay debts and claims in the following order:

1. **Costs and expenses** of administration;
2. **Certain family and homestead allowances** (discussed in Chapter V above);
3. **Funeral expenses** not to exceed \$3,500;
4. **Debts and taxes** given priority under federal law;
5. **Medical and hospital expenses** of the last illness of the decedent, including compensation of persons attending the decedent, not to exceed \$400 for each hospital and nursing home and \$150 for each person furnishing services or goods;
6. **Debts and taxes** due Virginia;
7. **Debts due by the decedent** was acting in a fiduciary capacity for another; and
8. **All other claims.**

Q: Is the executor personally liable for any debts and claims against the estate?

A: As a general rule the personal representative of a decedent's estate is not personally liable for the decedent's debts or claims against the decedent's estate. Liability could, however, arise, for example, if the personal representative did not act in good faith, failed to distribute in accordance with the directions in the will or in accordance with an Order of Distribution (discussed in Chapter IX) or, in the case of an insolvent estate, if the personal representative did not follow the order of priority for payment of debts and claims.

Paying Taxes

Q: Must all estates pay a probate tax?

A: No. When the value of the estate exceeds \$15,000, a state probate tax is imposed on the probate of every will or grant of administration at a rate of 10¢ for every \$100 of value of assets in the estate. In addition, the city or county may impose a local tax of one-third of that amount. The state probate tax is not imposed on estates of less than \$15,000.

Q: Must all estates file a federal estate tax return?

A: No. A federal return must be filed when the gross estate exceeds the amount specified in federal law to be the “applicable credit amount” for the year of the decedent’s death. This amount is \$1,500,000 in 2004 and 2005, \$2,000,000 in 2006-2008, and \$3,500,000 in 2009. Under federal law as it exists in 2005, there will be no federal estate tax in 2010, but in 2011 the estate tax returns and the applicable credit amount drops back to \$1,000,000. Therefore, it is important to check the law for the year of the decedent’s death. When a federal estate tax return has to be filed, a Virginia estate tax return should also be filed. If the decedent owned real property in another state, a state tax return may need to be filed in that state as well.

Q: What is the gross estate?

A: The gross estate, a tax term, includes all property owned by the decedent at death and includes, for example, such items as life insurance even though payable to a beneficiary other than the decedent’s estate, jointly-owned property which, by virtue of the way title is held, passes automatically to a survivor, and certain annuities and retirement benefits. If the gross estate, less allowable deductions, exceeds the applicable

credit amount, i.e., the amount not subject to estate tax in the year of the decedent’s death, federal and state estate taxes may be due. The gross estate is often larger than the estate reported for probate purposes. The personal representative needs to understand the difference between the probate estate and the gross estate to be able to file the proper reports and returns.

Q: Who must file the decedent’s final income tax return and when must it be filed?

A: The final income tax return for the decedent covers that portion of the last calendar year that the decedent was alive and must be filed by the personal representative of the decedent’s estate or by any other person responsible for the property of the decedent. For a calendar year taxpayer, the final federal income tax return is due on April 15 of the year following the decedent’s death, and the Virginia income tax return is due on May 1 of that year. In many cases, the personal representative will elect to file a joint return with the surviving spouse for the final income tax return.

Q: Is income that is earned during the administration of an estate taxable?

A: Yes. An estate is a separate taxable entity for income tax purposes. The personal representative must file a “fiduciary income tax” return and pay any tax owed (from the estate’s assets) if the income of the estate is \$600 or more in each taxable year of the estate.

Q: If the decedent made gifts, must gift taxes be paid?

A: Not necessarily. Gifts made by the decedent prior to his death in excess of the annual exclusion

CHAPTER VIII: PAYING TAXES

require that a gift tax return be filed. The gift tax annual exclusion is the amount which the IRS excludes from reporting and taxing requirements. Currently the annual gift tax exclusion amount is \$11,000 per recipient per year (but this amount is subject to change based on an inflation adjustment formula under federal tax law). The personal representative of the decedent's estate is responsible for the filing of the decedent's final gift tax returns.

Responsibilities, Powers and Rights of the Personal Representative

Q: What should the executor or administrator do after qualification?

A: In general terms, it is the duty of the executor or administrator to gather the assets of the decedent, satisfy the decedent's debts, and then distribute remaining assets as provided by law or, if there is a will, as directed in the will.

There are many specific actions involved in performing this general duty, some being required by law and others being practical necessities. Reference should be made to the Table of Contents of the manual for many of these responsibilities. The requirements to notify beneficiaries and heirs is discussed in Chapter IV. Safeguarding the assets is discussed in Chapter I.

If there is a will that has been probated, the personal representative should review the will to determine who the beneficiaries are, what property is being disposed of by the will, what powers are granted to the personal representative by the will, and whether there are any restrictions set out in the will itself regarding the transfer of the property to the named beneficiaries. The personal representative should also be mindful of provisions in the will or other circumstances that may cause problems, such as underage beneficiaries, beneficiaries named who are deceased or cannot be located, beneficiaries who are incompetent or under some disability, those whom one would expect to be beneficiaries (such as spouse and children) but have been omitted, and unusual or ambiguous provisions which are difficult to interpret.

If the personal representative is uncertain how to proceed, the personal representative will need

further advice and counsel. This may be obtained from the Court, if necessary.

The personal representative should establish a checking account for the estate and, depending upon the size, establish additional savings or money market accounts. The personal representative will need to present a death certificate and a certificate of qualification to the bank at the time the account is opened. A tax identification number must be obtained for the estate from the Internal Revenue Service if the estate's assets will generate income. The number is obtained by filing federal form SS-4. Consideration should also be given to filing of IRS Form 56, Notice Concerning Fiduciary Relationship. This form is filed when a fiduciary relationship is created or terminated. These forms may be obtained from the IRS web site: www.irs.gov.

The personal representative should transfer the contents of the decedent's personal bank accounts to the estate account, reimburse any estate expenses which were advanced by others prior to qualification and maintain detailed records for each transaction in the bank account. The records for the bank accounts should contain all information that is needed for the required report to the Commissioner of Accounts, including the amount and source of each deposit and the payee, amount, and purpose of each check written. All receipts, statements and invoices and bills which are paid should be saved as supporting documentation.

Q: Who handles the collection and valuation of assets?

A: This responsibility falls upon the personal representative. Personal representatives must file

CHAPTER IX: RESPONSIBILITIES, POWERS AND RIGHTS OF THE PERSONAL REPRESENTATIVE

with the Commissioner of Accounts an Inventory listing all of the decedent's personal estate under the supervision and control of the personal representative, any real estate over which the personal representative has the power of sale, and other real estate of the decedent of which the personal representative has knowledge. The Inventory also requires additional information regarding joint accounts and real estate outside Virginia. The personal representative may select appraisers to value any assets of uncertain or unknown value. If the decedent's estate is of sufficient size to require the filing of a federal estate tax return, appraisals of certain assets listed on the estate tax return will be required.

Even if no formal appraisals are required, the personal representative is responsible for determining and establishing the value of the decedent's property as of the date of the decedent's death. This date-of-death value is reported on the Inventory and establishes a new income tax basis in the assets. The date-of-death value is especially important for tax purposes because when estate property is sold, whether by a personal representative or by a beneficiary to whom the property has been distributed, the date-of-death value is the basis used to determine whether there is a gain or loss at the time of sale.

Q: Who is responsible for the investment, management and preservation of the assets in the estate?

A: The personal representative is responsible for the management, preservation and care of the assets under his control. The personal representative must exercise the same degree of care, skill, prudence and diligence that a prudent person familiar with such facts and acting on his or her own behalf would exercise under similar circumstances. The personal representative must invest estate assets within four months of receiving them. After four months the personal representative will be responsible for generating interest on the assets.

Q: May assets in the estate be sold?

A: If the decedent's will directs that certain assets not be sold (this would include specific bequests of property owned by the decedent), those assets should not be sold unless necessary for the payment of funeral expenses, charges of administration or debts. Other assets under the personal representative's control should be sold as soon as convenient if they are likely to decline in value. The personal representative has no authority over the decedent's real estate unless the authority was granted by will.

Q: What types of reports, if any, must the personal representative file, and what are the filing dates?

A: *Notice of Probate.* Within thirty (30) days after probate and qualification, the personal representative should send notice to beneficiaries and heirs that the will has been probated and/or that a personal representative has qualified. More detail on the procedure of notifying beneficiaries and heirs is provided in Chapter IV.

Small Estates. When the decedent's estate does not exceed the statutory amount (\$15,000 as of January 1, 2004) and the personal representative does not have power of sale over real estate owned by the decedent, the requirement for filing an inventory and an accounting is waived. In many instances it would not be necessary to even have any qualification of a personal representative even though there might be reason to probate or file the will.

Inventory. The Inventory must be filed with the Commissioner of Accounts within four (4) months after the qualification date. It lists all assets in the decedent's name or payable to the estate at their date-of-death value.

Accountings. Unless the estate is of a type for which the requirement to account to the Commissioner is satisfied by a sworn affidavit, an account of what has occurred in the estate during the year must be filed annually. The first account is due sixteen (16) months after the

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qualification of the personal representative and should cover the first twelve (12) months following qualification. After the first account has been filed by the fiduciary, second and subsequent accounts must be filed annually, each due within four months after the end of the particular accounting period involved.

At the time of qualification, the Clerk will distribute to the personal representative forms and instructions for the filing of the Inventory and Accountings. The Clerk may also distribute any specific instructions the Commissioner of Accounts may issue regarding the format and filing of the Inventory and Accountings.

Tax Returns. If the estate's value exceeds the amount not subject to federal estate tax (discussed in Chapter VIII) (including not only assets in the hands of the personal representative, but also other assets over which the decedent had control at the time of death, such life insurance proceeds and property held jointly with another), the personal representative must file federal and Virginia estate tax returns within nine (9) months after the date of death.

The estate is a separate taxpayer for income tax purposes and must file annual income tax returns. In addition, federal and state income tax returns may need to be filed for the decedent for the year in which the decedent died as well as for any prior years where returns were due but have not been filed. The tax filing requirements are discussed in more detail in Chapter VIII.

Other. There are other important dates which are applicable only in certain estates, such as deadline for filing a suit to contest a will, the deadline for filing a disclaimer, the six-month alternate valuation date if an estate tax return is being filed, the deadline for the spouse to claim the elective share and the deadline for claiming special allowances and exemptions. Some of these are discussed elsewhere in this manual and others are outside the scope of this manual.

Chapter XV contains an estate administration checklist to help keep track of the reports discussed in this manual.

Q: Is there any particular time frame within which distributions (including the funding of trusts) and payment of bequests must be made?

A: Personal representatives cannot be compelled to pay any legacy, or bequest of property, given by will or make distribution of the estate of the decedent until after six months from the date of qualification of the personal representative. The personal representative may require the legatee, or beneficiary receiving a legacy, to sign a refunding bond. The refunding bond requires the beneficiary to refund the distribution proportionately to any debts or demands that might thereafter appear against the estate. In addition, no personal representative is required to transfer, pay over or distribute any property subject to a federal estate tax until the amount of the tax due has been paid, or adequate security is provided for such payment.

In simple terms, this means the personal representative can safely wait at least six months before making any distribution and in some cases should wait a longer period of time. However, interest must also be paid on any cash legacy beginning one year after the date of death.

Q: What precautions should be taken in dealing with debts and claims?

A: As noted in Chapter VII, a personal representative should be cautious in paying debts and claims against the estate. If the estate is insolvent so that available assets cannot fully satisfy all debts and claims, they must be paid in the order of priority set out in Chapter VII. Failure to do so could cause the personal representative to be liable to a creditor who should have been paid.

If the estate is solvent, personal liability of the personal representative could arise if, after all assets have been distributed, a debt or claim

CHAPTER IX: RESPONSIBILITIES, POWERS AND RIGHTS OF THE PERSONAL REPRESENTATIVE

becomes known and funds are no longer available to pay it. This potential threat is eliminated if the personal representative obtains an Order of Distribution from the court, discussed below. The process of obtaining an Order of Distribution involves a Debts and Demands hearing and a Show Cause motion and order.

Q: What is a Debts and Demands proceeding?

A: The greatest protection against personal liability is granted to the personal representative when the personal representative obtains an Order of Distribution from the court (see the discussion below). The first step in this procedure is a Debts and Demands hearing.

The procedure for a Debts and Demands hearing is as follows:

The personal representative requests the Commissioner of Accounts to establish a time and place for creditors or those having claims against the estate to appear and file their claims. The Commissioner of Accounts publishes a notice in the local newspaper and posts a notice of the hearing at the courthouse where the personal representative qualified. The personal representative must notify creditors if any of the debts known to the personal representative are contested. Claims are presented to the Commissioner in an informal manner. Following the hearing the Commissioner will make a report of the debts and demands that the Commissioner finds to have been sufficiently proved.

Q: What is a Show Cause motion and order?

A: If six months from the date of qualification have passed, an accounting has been filed by the personal representative and the Commissioner's report of the Debts and Demands hearing has been filed in the Clerk's Office, the personal representative may ask the court to issue an order requiring all creditors or those having claims against the estate to show why payment and delivery of the estate to the estate's beneficiaries should not be made. The Show Cause order is published in the local newspaper and requires creditors to appear in court on a certain day to state their objections, if there are any, to the personal representative distributing the estate. If there are no objections, the court will enter an Order of Distribution. Personal representatives who make distributions in reliance upon this order are fully protected against both creditors and those to whom distribution in accordance with the order has been made. In some jurisdictions in Virginia, the Order of Distribution actually names the distributees or legatees to whom distribution is authorized.

Q: Must there be a final Order of Distribution before the personal representative can close the estate?

A: There is no requirement that an Order of Distribution be obtained before the estate can be settled. However, as was mentioned previously, this procedure provides the personal representative the greatest degree of protection in the distribution of an estate.

Estates of Decedents Who Die Without a Will

Q: What happens to the property in the estate if a person dies without a will?

A: A person who dies without a valid will is said to die “intestate.” When there is no will, the decedent’s property passes to family members under a plan set out by law in each state.

These laws vary considerably from state to state, and which law applies generally depends upon where the decedent had his or her legal residence at the time of death. (However, real estate passes according to the laws of the state in which it is located, regardless of where its deceased owner lived.)

In Virginia, if a person dies intestate but survived by a spouse, the widow or widower is entitled to the entire estate passing by intestacy, unless the decedent had any children who are not also the children (by birth or adoption) of the surviving spouse. If the decedent had children (usually of a prior marriage) who are not also the children of the widow or widower, the spouse and the decedent’s children divide the estate, with the spouse taking one-third, and all of the decedent’s children sharing the other two-thirds.

Example 1. Harold dies intestate, survived by his wife, Wanda, and their two children, Alice and Bernard. Wanda inherits Harold’s entire estate.

Example 2. Herbert dies intestate, survived by his second wife, Winifred, and by Adelbert (Herbert’s son by his first marriage) and Beulah (the daughter of Herbert and Winifred). Winifred inherits one-third of Herbert’s estate; Adelbert and Beulah divide the other two-thirds between them.

If a person is not married when he or she dies but has children, the children or other descendants of the decedent generally inherit the entire estate. If there is no spouse or descendant surviving, the decedent’s parents (or parent) surviving inherit the property. If there are no parents living, the chain of relations in line to inherit the estate grows more remote (to include brothers and sisters, then nieces and nephews, then grandparents and their descendants) until at some point, the Commonwealth is entitled to the estate.

Q: Who administers the estate if there is no will?

A: If there is no will, then most likely the decedent did not properly select a personal representative to administer the estate. In this case, it is up to the Circuit Court in the county or independent city where the decedent lived to decide who will become personal representative.

During the first thirty days following the intestate’s death, the Clerk may grant administration to the person who is entitled to inherit the estate, or if there is more than one person entitled to inherit, then to any one of them who obtains a waiver of the right to qualify from all the others entitled. After the first thirty days, the Clerk may appoint the first person who appears who is entitled to inherit a portion of the estate, unless others had also notified the Clerk of an intent to qualify. In that case, the Clerk will give all an opportunity to be heard. After sixty days, the Clerk may allow a creditor of the estate to qualify as personal representative. The Clerk may refuse to appoint any one who fails to satisfy the Clerk of his suitability and competence to serve.

CHAPTER X: ESTATES OF DECEDENTS WHO DIE WITHOUT A WILL

Q: How is the estate administered if there is no will?

A: The administration of the estate of an intestate follows closely along the lines of that of an estate under will, with all of the same requirements for filing the Inventory, Accounts, and tax returns. The personal representative collects the estate assets, pays its debts and expenses, and finally distributes the estate to the heirs.

One important difference, however, is that if there is no will, the decedent could not waive the legal requirement of a surety bond on the personal representative, which may cause the estate to incur the additional expense of a surety premium in order to have a personal representative appointed. Another difference is that personal representatives are usually granted certain powers under the will to transact estate business, such as selling real estate, which the personal representative of an intestate cannot do without making special application to the court.

Q: Is administration of an intestate's estate always necessary?

A: Many people who die without a will actually have little or no property that would be subject to the laws of intestate succession. This is because many assets pass at death by virtue of co-ownership titling (as, for example, joint tenants with right of survivorship), or by beneficiary designation (as in a life insurance policy or pension plan benefit). Care should be exercised to determine whether assets will pass by survivorship or beneficiary designation before assuming that formal administration of an estate is required. See Chapters VI and XI generally, for assets that pass without the need for administration.

Special Assets

Q: What does it mean when property is “jointly” owned, and what becomes of the property when one of the owners dies?

A: In Virginia, joint ownership can take three forms: **tenancy in common**, **joint tenancy with right of survivorship**, and **tenancy by the entirety**. There are significant differences among them.

A *tenancy in common* is a simple co-ownership in either real or personal property, between two or more persons. The shares may be equal or unequal. When one of the co-owners dies, the interest passes as part of his or her estate, either under will or by the laws of intestate succession.

A *joint tenancy with right of survivorship* can also exist between any number of persons, but it is usually seen with only two (or three at most). All co-owners’ interests must be equal, and when one of them dies, his or her interest passes to the surviving joint owner or owners equally, regardless of what the decedent’s will may say.

A *tenancy by the entirety* is very much like a joint tenancy with right of survivorship, except that there can be only two co-owners, and they must be legally married to each other. This is by far the most common way for married couples to own real estate in Virginia. In the event of divorce, the form of ownership automatically converts to a tenancy in common. When one of the tenants by the entirety dies, his or her interest passes to the surviving spouse, regardless of what the decedent’s will may say.

Q: How do you tell which form of co-ownership the decedent had?

A: For real estate, check the deed that transferred the property to the decedent. If the deed for property in Virginia says only “joint tenants” then

the ownership is a co-tenancy and there is no right of survivorship.

For a bank account, ask to see a copy of the signature card; the title on the bank statement does not usually provide enough information. The signature card may spell out precisely the form of co-ownership: it may be marked “with survivorship” or “without survivorship.” Unless there is clear and convincing evidence showing a different intention, the balance in a joint bank account belongs to the surviving party.

For securities held in certificate form, the form of co-ownership will be stated on the certificate. Be sure to look on the back of the certificate for an explanation of any abbreviations used on the front.

For securities held in a brokerage account, ask to see a copy of the paperwork that was completed when the account was opened.

Q: How is real estate handled in the estate of a decedent?

A: Much real estate in Virginia, especially family residences, is owned as tenants by the entirety or as joint tenants with right of survivorship, so when one of the owners dies, the surviving joint owner(s) automatically acquire the decedent's share. The decedent's estate does not control this property.

If a decedent owned real property in his or her sole name or as a tenant in common (or is the sole surviving owner of survivorship property), the real estate passes as part of the estate, but is usually accorded special handling. It is generally not supposed to be sold unless necessary to pay creditors or expenses of administration, or unless the decedent directed the sale in the will. It cannot

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be sold by the personal representative unless authority to sell was given under the will, or by the court.

Q: What about life insurance?

A: Life insurance benefits are payable at the death of an insured according to the terms of the contract that the owner of the policy had with the insurance company.

Most often, the insured was the owner of the policy, and had the right to select a beneficiary or beneficiaries of the policy proceeds. Usually, this is the widow or widower or the decedent's children, but it may be the estate, or a trust that the decedent set up during life.

If the beneficiary is an individual, the policy proceeds pass outside of the will or intestate estate, directly to the beneficiary. If the policy is payable to the insured's estate, it falls under the control of the personal representative and is distributed under the terms of the decedent's will or the laws of intestacy.

If life insurance is payable to a trust (discussed later in this Chapter), the proceeds go directly to the trust without passing through the estate. The trustee then manages and distributes the proceeds as part of the trust assets according to the terms of the trust agreement.

Life insurance benefits are not usually subject to income taxes, but may be subject to estate taxes. (See Chapter VIII.)

Q: What happens to United States Savings Bonds?

A: United States savings bonds are commonly found in estates. Information on the procedure for redeeming or cashing in the bonds can be obtained by calling the closest Federal Reserve Bank. There is also a very helpful website with forms and instructions for transferring ownership or redeeming bonds: www.savingsbonds.gov.

Local banks may also be able to assist in determining the value of the bonds and the requirements for redemption.

Savings bonds are often held in survivorship form, or with a pay on death (P.O.D.) designation. In these cases, their ownership passes directly to the successor owner rather than under the will or by intestacy.

Care should be taken to determine the proper income tax treatment of savings bonds. The tax treatment varies with the type of bond held. Remember that the decedent may have deferred recognizing the interest on the bonds for income tax purposes. The deferred interest may generate a substantial amount of income tax.

Q: Are pension plan accounts part of the estate?

A: Because they are paid to a beneficiary directly, pension plan benefits are not usually subject to the personal representative's administration.

If there is a survivor benefit under a pension plan (including profit-sharing and thrift plans), the benefits are almost always paid to a named beneficiary. The amount and rate are determined by the plan, often under a formula. They may be paid in a lump sum, or over several years, or as an annuity. The beneficiary may have some choice over how the benefits are paid.

When benefits are due from a qualified retirement plan (meaning that the plan qualified for certain favorable tax treatment for itself and the sponsoring employer), they must be payable to the surviving spouse, if there is one, unless the surviving spouse consented to have them paid to someone else. Pension plan benefits are generally taxable income as they are received by the beneficiary. If the beneficiary is the surviving spouse, however, he or she may withdraw a lump sum and deposit it in an individual retirement account, to defer the income taxes until a later date.

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Q: Are individual retirement accounts (IRAs) treated like pension plans?

A: Individual retirement plans are treated like pension plans in some ways, while in others, they are quite different. While IRAs are commonly payable directly to a spouse or child, it is not unusual to see an IRA pass through an estate rather than by beneficiary designation.

Unlike a qualified pension plan, there is no legal requirement for an IRA to go to the surviving spouse, but if the surviving spouse does receive the account, he or she may roll it over into another IRA and continue the benefits of income tax deferral.

Q: What about Social Security survivor benefits?

A: Social Security survivor benefits are not subject to estate administration nor to estate tax.

Q: What if the decedent established a “living trust”?

A: It is increasingly popular for people to establish a trust during lifetime, transfer all or most of their assets to it, but retain the benefit and control of the assets for the rest of their life. This is commonly referred to as a *living trust*.

When the creator of the trust dies, the assets in the trust, including any assets that are designated to pass to the trust at the creator’s death, are distributed or held in continued trust by a successor trustee, according to the terms of the trust agreement. The provisions in such a trust cannot be changed after the creator of the trust dies.

The trust assets do not usually come under the control of the estate’s personal representative and are not affected by the terms of the decedent’s will or the laws of intestate succession. Property passing from the trust at death does not go through probate. It is this feature of probate avoidance that has helped most to boost the popularity of living trusts. However, it is

important to remember that assets in living trusts are still fully subject to estate taxes just as if no trust existed. The named trustee under the living trust will have responsibilities similar to those of an executor in preserving the trust assets and distributing them as provided in the trust.

Q: What about a trust set up in the will?

A: The decedent’s will may direct that a trust be established for the management of some or all of the assets of the estate. This is referred to as a testamentary trust, and is often used to manage assets for children after the death of their parents. In this case, the trust is an entity separate from the estate, and comes into existence when the personal representative distributes assets to the testamentary trustee to fund the trust. The person named as trustee under a will has responsibilities similar to those of the personal representative, but the trustee’s authority is limited to the assets that become a part of the trust, whereas the authority of the personal representative extends to all assets passing by the will, until distributed. The testamentary trustee has to appear before the Clerk and receive a certificate of qualification in order to act.

CHAPTER XII

Compensation and Reimbursement of the Personal Representative

Q: Is the executor or administrator entitled to a fee?

A: Yes. The Virginia statute governing compensation of fiduciaries provides that a fiduciary is to be paid for reasonable expenses incurred by him or her and also, unless fixed by agreement or otherwise, reasonable compensation for the work that is done. If the will makes no provision for compensation, or if there is no will, then the compensation must be reasonable. If the will provides a specific method for calculating fees, or a specific amount or percentage, then the fee will be set based on that provision in the will.

What is “reasonable” has been the subject of many Virginia court cases. A customary rule previously followed in many jurisdictions is 5% of the value of the receipts, but this is subject to increase or decrease based on the circumstances at hand. The personal representative should have receipts for all expenses for which reimbursement

is requested and should keep track of the time expended and the tasks performed. If an attorney assists with the administration of the estate, the attorney's fees to the estate may reduce the personal representative's fee, because the attorney may be fulfilling some of the personal representative's work and responsibilities. Generally, legal fees paid for preparation of tax returns, handling any litigation related to the estate, preparation of motions and orders, and advice and counsel to the fiduciary in how to carry out responsibilities do not reduce the fiduciary's commission. The fee is subject to approval by the Commissioner of Accounts and it is advisable to discuss the fee with the Commissioner prior to taking it and spending it. The Commissioner of Accounts may make available information designed to guide the personal representative in calculating a reasonable fee for services. The fee is taxable income to the personal representative.

Advisors

Q: Where can the executor or administrator obtain help in administering an estate?

A: The personal representative of an estate is entitled to seek assistance from attorneys, accountants, banks or trust companies, investment advisors, brokers, and any other advisors who can help with the administration of the estate, the investment, management and sale of the assets, the preparation and filing of tax returns, and the preparation and filing of the Inventory and Accountings required to be filed with the Commissioner of Accounts. In addition, the Clerk in charge of probate usually distributes written instructions at the time of qualification, The Commissioner of Accounts assigned to oversee administration of the estate may be available to answer certain questions, but neither the Clerk nor the Commissioner will provide individual legal or tax advice.

The responsibility of proper administration rests with the personal representative who may avoid costly errors by seeking the guidance and help of a lawyer or other advisor early in the probate process.

Q: What other information is needed to administer an estate in Virginia?

A: There are more than 200 sections in the Virginia Code which deal with the administration of estates, the interpretation of wills, the responsibilities of the personal representative and other issues affecting estates. Please seek further advice if you have specific questions.

CHAPTER XIV

Conflicts of Interest

Q: Is the executor or administrator permitted to buy assets from the estate or borrow from the estate?

A: The executor or administrator acts in a position of trust and responsibility with respect to estate property in which other persons may have an interest. The personal representative should not benefit personally from his or her role as executor or administrator and should not distribute any assets in any fashion that gives the personal representative a financial advantage over the other beneficiaries or the persons who

have claims against the estate. Unless the personal representative is also the only beneficiary of the estate and there are no unpaid debts against the estate, he or she should not lend estate monies to himself or herself or to any business in which he or she has an interest. A personal representative who wishes to purchase assets from the estate should first determine whether all other beneficiaries will consent, obtain an independent appraisal of the assets to be purchased, and then consult with a lawyer before going any further. Such transactions are risky and may be overturned by a court.

An Estate Administration Checklist

Q: How can the personal representative keep track of all the filing deadlines?

A: Use the following checklist to assist in keeping track of various filing dates for reports to the Commissioner of Accounts and to the taxing authorities.

An Estate Administration Checklist

Name of Decedent: _____ Date of Death: _____

Decedent's Social Security No.: _____

Name of Personal Representative: _____

Date of Probate: _____

Date of Qualification: _____

Tax Year for Estate Ends: _____

Estate Federal ID Number Applied for:
(Use Form SS-4) _____

Notice of Probate:
(30 days from qualification or probate) _____

Notice Affidavit to Clerk's Office:
(4 months from qualification or probate) _____

Spouse's Elective Share Deadline:
(6 months from date of probate
or qualification of administrator, unless extended) _____

Inventory Due:
(4 months from qualification) _____

Decedent's Final Federal Income Tax Return Due:
(April 15 - IRS Form 1040) _____

(over)

An Estate Administration Checklist

Decedent's Final State Income Tax Return Due:
(May 1 - Va. Form 760) _____

Decedent's Final Gift Tax Return Due:
(April 15) _____

Estate Tax Returns Due:
(9 months from date of death) _____

First Federal Fiduciary Income Tax Return Due:
(15th day of 4th month after tax year
of estate ends - IRS Form 1041) _____

Subsequent Federal Fiduciary Income Tax
Returns Due (Month/Day):
(15th day of 4th month after tax year ends) _____

First Virginia Fiduciary Income Tax Return Due: _____

Subsequent State Fiduciary Income Tax
Returns Due (Month/Day):
(Va Form 770) _____

First Annual Accounting Due:
(16 months from date of qualification
to cover first 12 months) _____

Subsequent Annual Accountings Due (Month/Day):
(4 months after end of accounting year) _____

Final Federal Fiduciary Income Tax Return Filed: _____

Debts and Demands Proceedings (circle one) Yes/No

Request Proceeding: _____

Notice of Hearing Published: _____

Hearing on Debts and Demands: _____

Commissioner Files Debts and
Demands Report with Court: _____

Prepare Show Cause Motion and Order
and Send to Circuit Court: _____

Date of hearing to Enter Show Cause Order: _____

Publish Order in Newspaper: _____

Prepare and Present Order of Distribution
for Judge's Signature: _____

Distribute remaining property in estate: _____