

A Guide to the Administration of Decedents' Estates in Virginia

A cooperative project
of The Wills, Trusts & Estates Section of The Virginia Bar Association

V.B.A.
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.

Some exceptions to the general rules and procedures described in this manual have been omitted, as well as some rules that may apply only in limited 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, 2014. 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 Circuit Court Clerk's Office handling probate will 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.

The Code of Virginia is updated annually, as is the Internal Revenue Code. It is the user's responsibility to determine whether there have been changes in the law not reflected herein.

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 these terms are explained in the text, but in case the reader reviews only certain chapters or skips about in the manual, a brief definition of some of the key words used in the manual is provided below:

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 that does not name an executor or all executors named decline to serve.

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

Bond: a written promise, recorded in the Clerk's Office, by the administrator to perform his or her obligations and duties.

Certificate of Qualification: the written document created by the Clerk, under seal, at the time the personal representative qualifies to administer the estate. Sometimes referred to as "letters testamentary."

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 that has jurisdiction to probate wills and to 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: the persons who would inherit the decedent's estate if the decedent died intestate, as determined by law at the time of the decedent's death.

Intestate: dying without a will.

Intestate Succession: the order in which family members are to inherit property from a decedent who dies intestate, as set forth at Virginia Code Sections 64.2-200 and 64.2-201.

Inventory: the list or schedule describing the decedent's assets over which the personal representative has authority. (Clerk will provide a printed form.)

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

Notice of Probate: the required notice of certain information given to beneficiaries and heirs. (Clerk will provide a printed form.)

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 used generally to refer 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.

Self-Proving Affidavit: an affidavit, given under oath, by the testator and witnesses, and notarized, that proves the Will was signed and witnessed in accordance with Virginia law.

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 Code Section 54.1-2825 provides that any person may designate, in a signed and notarized writing that has been accepted in writing by the person so designated, an individual to make arrangements for his or her funeral and the disposition of his or her remains upon death. The designated individual, if any, is responsible for making the arrangements.

If there is no designation made under Section 54.1-2825, and if the decedent's next of kin disagree on the funeral arrangement or disposition of remains, then any of the next of kin may petition the Court to determine who has authority to do so. Virginia Code Section 54.1-2807.01. If there is no next of kin, then Section 54.1-2807.02 sets forth the order in which certain persons are authorized to make such decisions.

Otherwise, 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 may provide for the burial and pay reasonable funeral expenses even before that person has qualified as executor. See Virginia Code Section 64.2-511.

As a practical matter, if there is no will and no other means of access to the decedent's accounts, a family member usually advances the necessary funds 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 from the estate will be limited to \$4,000.00 (or such other amount set forth in Virginia Code Section 64.2-528) 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 priority for payment of debts, set out in Virginia Code Section 64.2-528. Failure to follow the order of payment set by law can make the personal representative personally liable to creditors of the decedent. If the estate is insolvent but there are funds remaining after priority payments have been made, remaining funds may be shares on a pro rata basis by the general creditors, and among these could be the person who advanced funeral costs in excess of \$4,000.00.

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

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

If the decedent lived alone, the executor should remove perishable property from the residence, arrange for the care of pets and safeguard the premises until the remaining property can be removed. As soon as possible, the executor should 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.

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) and other similar agencies should be notified to discontinue any payments to the decedent. The decedent's heirs may be entitled to death benefits from the Social Security Administration or the Department of Veterans Affairs that will be processed only after notice is given.

Insurance companies with which the decedent maintained life insurance policies should be notified so that the company can contact the named beneficiaries and process the insurance claims. The personal representative should request from each life insurance company a completed IRS Form 712: Life Insurance Statement.

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

Contact the decedent's last employer to determine whether any death benefits are payable by the company, such as retiree life insurance benefits, or survivor pensions.

If the decedent executed any powers of attorney during lifetime the agent named in the power of attorney should be notified that the agent's rights and powers under 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, determine whether 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 and delivering it to the Court for probate.

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. It is possible that the decedent made more than one will, or modified the will by codicil, without destroying the older versions. If a will is found, inquiries should still be made with legal advisors and others to determine if the will that was found is in fact the latest will of the decedent, or if there might be a later codicil. Most wills contain provisions for the decedent to make a list for the disposition of items of tangible personal property. If the will so provides, try to locate this list.

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.

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 portrayed in movies. If a will is located, however, it may be helpful to provide a copy to family members or other beneficiaries or to read it to the heirs and beneficiaries who are available during the time the funeral is being planned. 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 the contents of the will and to eliminate suspicions that

something is being hidden. The legal requirements for notifying heirs and beneficiaries named in the will and making copies of the will available are discussed in Chapter IV.

CHAPTER III

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 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, that require interested parties to appear before a judge 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 always to probate the will. If a person intentionally destroys or conceals a will in order to prevent its probate, that person 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: To be valid under Virginia law, the will must be in writing, and signed by the testator, or some other person in the testator's presence and by his or her direction, in a manner to make it clear that the name is intended as a signature. A will wholly in the testator's handwriting is valid if the handwriting and signature of the testator are proved by at least two disinterested witnesses. A will not wholly in the testator's handwriting is valid if the signature of the testator is made, or the will is acknowledged by the testator, in the presence of at least two competent witnesses who are present at the same time and who sign the will in the presence of the testator.

Some wills are "self-proved." A will may be made self-proved by the testator's acknowledgment and the affidavits of the witnesses made before a notary public. 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.

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

A: The Clerk requires certain information about the will, and the testator, as described in the forms below. 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: <http://www.courts.state.va.us/forms/circuit/fiduciary.html>. These generally are:

1. *Probate Information or Memorandum of Facts.* Information about the decedent is requested, including the decedent's 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.* The Clerk will assess a tax, the "probate tax" (different from the "estate tax" discussed in Chapter VIII) on the value of the decedent's real estate in Virginia and the decedent's personal property, such as furniture, vehicles, machinery, cash, bank accounts, stock, bonds, etc. but excluding property owned with survivorship (explained in Chapter XI) and certain assets such as life insurance, IRAs and retirement plan benefits that pass to a named beneficiary other than the decedent's estate. The probate tax return reports what the personal representative estimates to be the value of the assets subject to this tax. The probate tax must be paid at the time of probate. At present, the rate of tax is 10 cents for every \$100 of value, or fraction of \$100, and there is no tax if the value is \$15,000 or less, as provided in Virginia Code Section 58.1-1712. If the value does not exceed \$15,000, Virginia Code Section 58.1-1714 makes it unnecessary to file a probate tax return. Virginia Code Section 58.1-1718 authorizes the county or city in which the probate occurs also to assess a tax equal to one third of the amount of the state probate tax.

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 64.2-200.

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 all children be listed along with the surviving spouse.

Q: What witnesses are needed at probate?

A: If there is a self-proving affidavit attached to the will, the witnesses do not need to 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 them. 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 give their testimony (whether in person or in a sworn statement) may differ 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;
2. Unless the will waives surety on the bond of the personal representative, arrange to have a representative of an insurance company appear at the time of the probate appointment 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. In some jurisdictions, the Clerk will require this letter to be notarized; and
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 is usually necessary in order to administer the estate passing under the will or by intestacy. 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 covered by the Virginia Small Estate Act*, found at Virginia Code Sections 64.2-600 through 64.2-604. These include:
 - a. Assets of an estate when the total value of the entire personal probate estate as of the decedent's death does not exceed, under current law, \$50,000, if certain requirements are met, including an affidavit stating certain facts.
 - b. An asset, other than real property, owed, belonging or distributable to the decedent and valued at, under current law, \$25,000 or less, without an affidavit, if certain requirements are met.
 - c. Funeral expenses not exceeding \$4,000, as explained in Chapter VII, if transferred to the undertaker or mortuary and certain requirements are met.
4. *Motor vehicles and boats*, if certain Department of Motor Vehicles or U.S. Coast Guard forms are completed.
5. *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: To qualify as either executor or administrator, individuals:

1. must be *18 years of age* or older, although surety may be waived in the discretion of the Circuit Court or Clerk if the probate estate does not exceed the amount set by Virginia Code Section 64.2-1411, currently \$25,000;
2. must be *able to obtain surety*, if required;

3. may be a *resident or nonresident 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 and the value of the estate does not exceed the amount set by Virginia Code Section 64.2-1411, currently \$25,000; 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.

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:

1. in which *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 or her 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 also the value of the real estate if the will authorizes the personal representative to sell the real estate, and in most cases, the bond 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 the amount set by Virginia Code Section 64.2-1411, currently \$25,000. 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 Court or Clerk waives surety and the value of the estate does not exceed the amount set by Virginia Code Section 64.2-1411, currently \$25,000.

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

A: The certificate of qualification, sometimes referred to as “letters testamentary,” is the certificate 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 reporting 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.)

CHAPTER IV

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 of entitlement to copies of wills, 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 is 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 the amount set by Virginia Code Section 64.2-508, currently \$5,000. Some persons are not required to receive notice, such as a personal representative who is also a beneficiary, trust beneficiaries (if the trustee is notified), and persons who receive bequests that do not exceed the amount set by Virginia Code Section 64.2-508, currently \$5,000, and who are not the decedent's heirs at law. 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 are entitled to receive notice of probate:

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 decedent's name and date of death;*
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 statements:*

“This notice does not mean that you will receive any money or property;” and

“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 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 therefor 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”; and

5. *the mailing address of the Commissioner of Accounts* with whom the inventory of the personal representative must be filed, if the inventory is required.

The Clerk will provide a special form containing 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.

CHAPTER V

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: Yes. A Virginia decedent cannot completely exclude his or her surviving spouse from a share of the estate, without the spouse's consent. The rights of a surviving spouse to an "elective share" of the decedent's estate are described in Virginia Code Sections 64.2-300 through 64.2-308, as in effect on the date of the decedent's death. Under these statutes, the surviving spouse of a Virginia decedent has the right to 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.

Whether or not claiming the elective share is in the surviving spouse's best interest requires careful analysis of the assets included in the calculation, and their value. A surviving spouse who has any questions about the elective share should immediately seek legal advice before the election is made. There are time limits on making the election.

In addition to claiming an elective share, the surviving spouse may claim certain exemptions and allowances that are discussed later in this Chapter.

Q: When does the surviving spouse make the election to claim a share?

A: 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 period in which the surviving spouse makes the election may be extended in certain circumstances. The 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.

Q: What is the "elective share" and how is it calculated?

A: If the surviving spouse claims the elective share within the permitted time frame, the surviving spouse is entitled to an amount equal to one third (1/3) of the decedent's "augmented estate" (described below) if the decedent left surviving children or their descendants. The share is an amount equal to one half (1/2) of the decedent's "augmented estate" if the decedent left no children or their descendants.

The elective share is calculated by first determining the value of the decedent's "augmented estate" and then applying the appropriate fraction (1/3 or 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, property given to the spouse in the will, certain property given to the surviving spouse during the decedent's lifetime,

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” means, initially, the decedent's entire estate passing by will or intestate succession, after payment of all allowances, exemptions, funeral expenses, charges of administration (other than federal or state estate taxes) and debts. To this initial determination, certain other property that the decedent transferred to the spouse or others at death by any means other than by will or intestate succession or by gift during life is added. There are exceptions to the classes of property that must be taken into account.

There are very specific rules to determine the property that is to be included and excluded from the augmented estate. The calculation of the augmented estate can be very complex. The calculation is required only if the surviving spouse claims the “elective share” discussed above.

When the surviving spouse exercises this right, it can affect the shares other beneficiaries will receive. 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: What are the inheritance rights of an “omitted spouse”?

A: An omitted spouse is one who is not given any share of property at death by will but the deceased spouse died with a will that was executed before the marriage (Virginia Code Section 64.2-422). In this case, the omitted spouse receives the same share of the estate that the spouse would have received if the decedent left no will, unless it appears from the will or from the provisions of a valid premarital or marital agreement that the omission was intentional. The share of a surviving spouse of a decedent who dies without a will is explained in Chapter X. In some cases, the omitted spouse share may be different from the elective share discussed above.

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

A: Often the marital residence is titled so that it will pass automatically to the surviving spouse, regardless of what the Will provides. If title to the marital residence, as expressed in the deed, is “joint with right of survivorship” with the surviving spouse, or is “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 marital residence is titled only in the name of the decedent, there may be a period of time where the survivor's rights in the residence are uncertain. In this case, if (i) the principal residence passes by intestate succession and the decedent is survived by children or their descendants, one or more of whom are not children or their descendants of the surviving spouse, or (ii) the surviving spouse claims an elective share in the decedent's augmented estate, Virginia Code Section 64.2-307 gives the surviving spouse the right to reside in the marital

residence, without any charge for rent, repairs, taxes or insurance, until the spouse's rights in the residence can be determined.

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: Yes. The surviving spouse and minor children of a decedent are entitled to claim a "Family Allowance" for their continued maintenance. In addition, the surviving spouse is also entitled to claim an "Exempt Property" allowance. If there is no surviving spouse, this right vests in the minor children of the decedent. Third, the surviving spouse is entitled to a "Homestead Allowance." If there is no surviving spouse, this right vests in the minor children of the decedent.

The Family Allowance has priority over all claims against the estate. The right to Exempt Property has priority over all claims against the estate except the Family Allowance. The Homestead Allowance has priority over all claims against the estate, except the Family allowance and the right to Exempt Property. The Homestead Allowance is in lieu of any share passing to the surviving spouse or minor children by the decedent's will or by intestate succession. The Homestead Allowance is not available if the surviving spouse claims and receives an "elective share" of the decedent's estate, discussed above.

These allowances and exemptions are often claimed 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. These allowances are explained further 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 a period of time no longer than 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 is not to exceed \$24,000, payable in a lump sum or in periodic installments. This amount is subject to change by action of the General Assembly. Refer to Virginia Code Section 64.2-309 for updates to the amount. An election to take a Family Allowance must be made within one year from the decedent's death. The election is made either in person before the Court having jurisdiction over the estate, or by a signed writing, acknowledged before a notary public, that is admitted to record within the one year time frame.

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 \$20,000 worth of household furniture, automobiles, furnishings, appliances, and personal effects from the estate. Refer to Va. Code Section 64.2-310 for updates to the amount. 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 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 \$20,000 from the estate. Refer to Va. Code Section 64.2-311 for updates to the amount. 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 \$20,000. It is claimed in the same manner and in the same time frame as the Family Allowance and Exempt Property. The Homestead Allowance cannot be claimed if the elective share is claimed.

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 waiver is effective only if it complies with certain requirements described in Virginia Code Section 64.2-314.

Q: When 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 when he or she had no children*, then a child later born or adopted who is not provided for or mentioned in the will, or such child's descendants, is entitled to claim the same share the child would have received had the parent died without a will. Virginia Code Section 64.2-419. This means that if a parent dies without a will, then a child is entitled to a share only if either (i) there is no surviving spouse or (ii) the decedent left children who are not also the children of the surviving spouse. Otherwise, a child omitted from the will has no claim to a share of the deceased parent's estate.

If the deceased parent made a will when he or she had at least one living child who was provided for in the will, then any child subsequently born who is neither provided for or expressly excluded in the will is entitled to the smaller of (i) the same share as the child who is provided for in the will or (ii) the share the child would have received had the parent died without a will. Virginia Code Section 64.2-420.

If the deceased parent made a will after all of his or her children were born and omitted one or more of them from the will, the omitted child or children will 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 “Small Estate Act,” that permit transfer of certain assets in a decedent’s estate without the appointment of an executor or administrator. Some of these statutes are discussed below. The transfer of jointly held assets and other types of nontestamentary transfers is discussed in Chapter XI.

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

A: The Virginia Small Estate Act (Virginia Code Sections 64.2-600 through 64.2-604) permits any person (including government agencies, corporations, other estates, trusts, corporations, partnerships, and other similar legal or commercial entities) having possession of a “small asset” belonging to a decedent to pay it to a successor who is entitled to the asset under the decedent’s will or by intestate succession.

A “small asset” means any indebtedness owed to, or any asset belonging to the decedent, other than real property, having a value, on the date of the decedent’s death, of no more than \$50,000 (or such other amount set forth in Virginia Code Section 64.2-600). A small asset includes any bank or similar account, brokerage account, security, tax refund, item of tangible personal property, or a note.

There are three different methods by which payment or delivery of a small asset can be made under the Virginia Small Estate Act, as follows:

1. *By Affidavit.* Any person who possesses a small asset **must pay** it to the **designated successor** upon being presented an affidavit made by all the known successors. A “successor” is any person, other than a creditor, who is entitled, under the decedent’s will or by the laws of intestate succession, to all or part of the small asset. A “designated successor” is one of the successors who is designated in the affidavit to receive the small asset on behalf of all the successors. The affidavit must be signed by all known successors and must state:

- a. That the value of the decedent’s entire personal probate estate, as of the date of date, wherever located, does not exceed \$50,000;
- b. That at least 60 days have elapsed since the decedent’s death;
- c. That no application for the appointment of a personal representative is pending or has been granted in any jurisdiction;
- d. That the decedent’s will, if any, was duly probated;

e. That the designated successor is entitled to payment or delivery of the small asset, and the basis upon which the successor claims entitlement;

f. The names and addresses of all known successors, to the extent known;

g. The name of each successor designated to receive payment or delivery of the small asset, on behalf of all successors; and

h. That the designated successor has a fiduciary duty to safeguard and promptly pay or deliver the small asset as required by the laws of Virginia.

2. *Without Affidavit.* Any person who possesses a small asset valued at \$25,000 or less, may choose (but is not required) to pay it to any successor if:

a. At least 60 days have elapsed since the decedent's death; and

b. No application for the appointment of a personal representative is pending or has been granted in any jurisdiction.

The designated successor has a fiduciary duty to safeguard and promptly pay or deliver the small asset to the other successors, if any, as required by the laws of Virginia.

Any person to whom payment or delivery of a small asset has been made is answerable to and accountable to any personal representative of the decedent's estate or to any other successor having an equal or superior right.

3. *In Payment of Funeral Expenses.* Any person who possesses a small asset may (but is not required to) pay to the undertaker or mortuary handling the decedent's funeral an amount not to exceed the amount in effect at the time under Virginia Code Section 64.2-528 (currently, \$4,000) at the request of a successor if:

a. At least 30 days have elapsed since the decedent's death; and

b. No application for the appointment of a personal representative is pending or has been granted in any jurisdiction.

Refer to the applicable statutes described above for any changes to the amounts made by the General Assembly.

Q: What if the successors cannot agree on a designated successor and the person who is holding the asset refuses to turn it over without a signed Small Estate Affidavit?

A: If the total value of the probate estate is \$25,000 or less and does not include any real estate subject to the personal representative's power of sale, the personal representative may qualify without surety (see Chapter III) and without any duty to file an inventory or annual accountings (discussed in Chapter IX). However, each qualification certificate provided by the Clerk to the personal representative will specify that it may be used only once and then only to obtain possession of an asset worth no more than \$25,000.

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 record the fact of the decedent's passing and that title to the decedent's real property passed to the new owner. It is not necessary for someone to qualify as personal representative 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.

A form of affidavit for this purpose can be found at www.courts.state.va.us/forms/circuit/cc1612.

Q: How is a boat or car transferred from the decedent's name to the new owner?

A: *Motor Vehicles.* If no personal representative has qualified, then the Department of Motor Vehicles will issue a new certificate of title at the request of the legatee or distributee, who must submit proof of the owner's death and such other information as the Department of Motor Vehicles may require. The Department maintains a website (<http://www.dmv.state.va.us/webdoc/pdf/vsa24.pdf>) that contains its current requirements, including forms.

Boats. Similarly, if no personal representative has qualified, then upon the owner's death, the U.S. Coast Guard will transfer ownership of a vessel registered with the Coast Guard at the request of the legatee or distributee, who must submit proof of the owner's death and such other information as the Coast Guard may require. See <http://www.dgif.virginia.gov/boating/registration>.

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 personal representative 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.

However, insolvent estates, i.e., estate in which debts, expenses, and claims will exceed the value of the assets of the decedent under the personal representative's control, 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);
3. *Funeral expenses* not to exceed the amount set out in Virginia Code Section 64.2-528 (currently, \$4,000);
4. *Debts and taxes given priority under federal law*;
5. *Medical and hospital expenses of the decedent's last illness*, including compensation of persons attending the decedent, not to exceed the amounts set out in Virginia Code Section 64.2-528 for each hospital and nursing home (currently, \$2,150) and for each doctor or other person furnishing services or goods (currently, \$425);
6. *Debts and taxes due Virginia*;
7. *Debts due where the decedent was acting in a fiduciary capacity for another*;
8. *Debts and taxes owed to localities and municipal corporations in Virginia*; and
9. *All other claims*.

Q: Is the personal representative 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, did not follow the order of priority for payment of debts and claims.

CHAPTER VIII

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 cents 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 \$15,000 or less.

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

A: No. A federal return must be filed when the total of the gross estate plus all lifetime taxable gifts (other than “annual exclusion” gifts) exceeds the amount specified in federal law to be the “applicable exclusion amount” for the year of the decedent’s death. For those dying in 2015, this amount is \$5,430,000. The amount is adjusted annually for inflation. Therefore, it is important to check the law for the year of the decedent’s death. There is currently no Virginia estate tax, but if the decedent owned real property in another state, an estate tax return may need to be filed in that other state. Again, it is important to check the law in effect in the year of the decedent’s death.

Q: What is the gross estate?

A: “Gross estate” is a tax term. Generally, it means all property (or interests in property) owned by the decedent at death, including both probate and non-probate assets. It includes, for example, such items as life insurance even though payable to a beneficiary other than the decedent’s estate, jointly-owned property that, by virtue of the way title is held, passes automatically to a survivor, and certain annuities and retirement benefits. If the gross estate, less any allowable deductions, exceeds the applicable exclusion amount, i.e., the amount exempt from estate tax in the year of the decedent’s death, estate taxes may be due. The gross estate is often larger than the estate reported for probate purposes. The personal representative must be mindful of the difference between the “probate estate” and the “gross estate” in order 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 decedent’s final income tax return covers only the 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 decedent’s final federal income tax return is due on April 15 of the year following the decedent’s death, and his or her 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 and reports its income on a fiscal year basis. The personal representative must file an annual “fiduciary income tax” return to report all income earned by the estate from the date of the decedent’s death, if the estate’s income is \$600 or more for the taxable year. Generally, any income taxes due are payable from the estate’s assets unless distributed to a beneficiary. Because the fiduciary income tax return can be difficult to prepare, the personal representative is encouraged to obtain professional assistance. The estate’s assets may be used to pay the cost of an accountant or other professional for this purpose.

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

A: Not necessarily. If the decedent made gifts in any year before his death that exceeded the gift tax annual exclusion for that year, a gift tax return is required. The gift tax annual exclusion is the amount the IRS permits each individual to give to another free of gift tax and reporting requirements. In 2015, the gift tax exclusion amount is \$14,000 per recipient per year, but this amount is subject to change based on an inflation adjustment formula under federal tax law. The decedent’s personal representative is responsible for filing the decedent’s final gift tax return, if required, as well as any delinquent gift tax returns.

CHAPTER IX

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 decedent's assets, settle the decedent's debts, and then distribute the 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. Safeguarding the assets is discussed in Chapter I. The requirement to notify beneficiaries and heirs is discussed in Chapter IV.

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 minor 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 that 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 so as to earn interest on any excess cash. The personal representative will need to present a death certificate and a certificate of qualification to the bank when opening the account. A tax identification number ("TIN") must be obtained for the estate from the Internal Revenue Service if the estate's assets will generate income. As a practical matter most banks will require a TIN to open an estate bank account regardless of whether income is being generated for the estate. The TIN is obtained by filing IRS Form SS-4 or applying online at: [http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Apply-for-an-Employer-Identification-Number-\(EIN\)-Online](http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Apply-for-an-Employer-Identification-Number-(EIN)-Online). Consideration should also be given to filing of IRS Form 56, Notice Concerning Fiduciary Relationship, to notify the IRS that the personal representative's fiduciary relationship has been created or terminated.

The personal representative should transfer the balance in the decedent's personal bank accounts into the estate's account, reimburse any estate expenses that were advanced by others before qualification, and maintain detailed records for each transaction in the bank account that will permit preparation of the estate's

tax returns and accountings, including the amount and source of each deposit and the payee, amount, and purpose of each check written. All original receipts, statements, and invoices and bills should be saved as supporting documentation.

Q: Who collects and values the estate's assets?

A: This responsibility falls upon the personal representative. As described below, the personal representative must file with the Commissioner of Accounts an inventory listing all of the decedent's personal estate under the personal representative's supervision and control, any Virginia real estate over which the personal representative has the power of sale, and any other Virginia real estate owned by 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 sufficiently large to require the filing of a federal estate tax return, formal appraisals 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, in the absence of an estate tax return, 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 basis (the date-of-death value) is used to determine whether there is a taxable gain or loss at the time of sale.

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

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 also 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 the personal representative sell estate assets?

A: If the decedent's will directs that certain assets not be sold (for example, where a specific asset is bequeathed to a specific beneficiary), 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. Generally speaking, the personal representative has no authority to sell or otherwise deal with the decedent's real estate unless the authority is expressly granted by the 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 a notice to the decedent's 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 (\$25,000 as of July 1, 2015), a beneficiary or heir seeks qualification and the personal representative does not have the power of sale over the decedent's real estate, the requirement to file an inventory and an accounting is waived. In many such instances, it may not even be necessary to qualify a personal representative at all, but the will should still be probated.

Inventory. The personal representative must file the inventory with the Commissioner of Accounts within four (4) months after the qualification date. The inventory lists all probate assets at their date-of-death value.

Accountings. Unless an exception applies, the personal representative must file a report, or accounting, with the Commissioner of Accounts each year to detail what has occurred in the estate since the last report. The first account uses the inventory values as a starting point, and is due 16 months after the personal representative's qualification. It covers the estate's activity during the first 12 months following qualification. After the personal representative files the first account, second and subsequent accounts must be filed annually, each due within four months after the end of the particular accounting period involved. The Clerk will provide the personal representative with the necessary forms and instructions for the inventory and accountings at the qualification meeting.

Estate Tax Return. If the total value of the decedent's probate and non-probate property exceeds the amount not subject to federal estate tax (discussed in Chapter VIII), the personal representative must file a federal estate tax return and pay any estate tax due within nine (9) months after the date of death. There is currently no Virginia estate tax. Because of the estate tax return's complexity and important legal and financial significance, the personal representative is encouraged to seek assistance from a qualified accountant or attorney in its preparation. The fees for such professionals are payable from the estate assets.

Income Tax Returns. The estate is a separate taxpayer for income tax purposes and must file both federal and Virginia income tax returns annually. In addition, the decedent's individual federal and state income tax returns may need to be filed for the year in which the decedent died, as well as for any prior year(s) for which a return was due but not filed. The tax filing requirements are discussed in more detail in Chapter VIII.

Other. There are other important dates that are applicable only in certain estates, such as the 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 of its scope.

Chapter XV contains an estate administration checklist to help track many of the items discussed in this manual. Sample forms, instructions and PDFs of many of the forms described above are available on the following website: <http://www.courts.state.va.us/forms/circuit/fiduciary.html>.

Q: Is there any particular timeframe within which distributions (including the funding of trusts) must be made?

A: A personal representative cannot be compelled to pay or distribute any property from the estate until at least six months have passed since her or she qualified. The personal representative may require a beneficiary to sign a refunding bond. The refunding bond obligates the beneficiary to refund a pro rata portion of the distribution if needed later by the personal representative to satisfy any debts or claims that are

subsequently presented or brought 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. Note, though, that a personal representative generally may not require a release or indemnification from the beneficiaries as a condition to making final distributions.

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, statutory interest will begin to accrue on any legacy remaining unpaid one year following the decedent's 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 when paying debts and claims against the estate. If there are not enough estate assets available to fully satisfy all debts and claims, the personal representative may seek contribution from those who received certain property from the decedent outside of probate. See, for example, Virginia Code Sections 6.2-611 (joint and payable-on-death accounts) and 64.2-747 (revocable trust). If the estate is insolvent, all debts and claims must be paid in the order of priority set out in Chapter VII. Failure to do so could cause the personal representative to be personally liable to a creditor who might otherwise have been paid.

Even if the estate is solvent, the personal representative could still face personal liability if a debt or claim becomes known after all assets have been distributed. This potential threat is eliminated if the personal representative obtains an Order of Distribution from the Court before making the final distributions from the estate. The process for obtaining an Order of Distribution includes a so-called "debts and demands" hearing and a Show Cause motion and order, both of which are described below.

Q: What is a debts and demands hearing?

A: The first step in protecting the personal representative from personal liability following the final distribution of the estate assets is a debts and demands hearing. The procedure for a debts and demands hearing is as follows:

1. 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.
2. 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.
3. At least 10 days before the hearing, the personal representative must give notice of the hearing to any creditors having debts known to the personal representative that are contested, and the personal representative must file proof of mailing of the notice with the Commissioner.
4. 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 (i) six months have passed since the personal representative's qualification, (ii) the personal representative has filed an accounting, and (iii) the Commissioner of Accounts has filed a report of the debts and demands hearing in the Clerk's Office, the personal representative may file a motion with the Court, asking it to issue an order requiring all creditors or those having claims against the estate to show why final payment and delivery of the estate to the estate's beneficiaries should not be made. The Show Cause order, a form of which may be found in Virginia Code Section 64.2-557, is published for two weeks in the local newspaper. The Show Cause order requires creditors to appear in court on the specified day if they wish to object to the final distribution of the estate assets.

Q: What is the Order of Distribution?

A: If no objections are presented at the Show Cause hearing, the Court will enter an Order of Distribution directing the personal representative to proceed with the final distribution of estate assets to the beneficiaries. Personal representatives who make distributions in reliance upon this order are fully protected from all creditors and those to whom distribution is made in accordance with the order. In some jurisdictions, 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: The personal representative may settle the estate without an Order of Distribution. However, as previously mentioned, the debts and demands procedure provides the personal representative the greatest degree of protection in the distribution of an estate. The personal representative should weigh its cost against his or her degree of comfort that all creditors have been identified and all beneficiaries are satisfied with the plan of distribution.

CHAPTER X

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 was living at the time of death.)

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 such children (usually from a prior marriage), the surviving spouse and all of 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 or other descendants, the children or their descendants generally inherit the entire estate. If there is no spouse or descendant surviving, the decedent’s surviving parents (or parent) inherit the property. If neither of the decedent’s parents is living, Virginia Code Section 64.2-200 sets out the order in which more remote relatives (i.e., brothers and sisters, then nieces and nephews, then grandparents, then their descendants, etc.) will inherit the estate. If all lines of descent are exhausted, the Commonwealth becomes entitled to the estate (“escheat”).

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 Court 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 written waiver of the right to qualify from all the others entitled. After the first 30 days, the Clerk may appoint the first person who appears who is entitled to inherit a portion of the estate,

unless one or more others previously notified the Clerk that they wished to qualify. In that case, the Clerk will give all those interested in qualifying an opportunity to be heard. If no one has asked to qualify within 45 days after the decedent's death, the Clerk may grant administration to any nonprofit charitable organization that served as the decedent's guardian or conservator, if the organization certifies that it has made a diligent search for any distributee and meets certain other notice requirements. After 60 days, the Clerk may grant administration to one or more creditors or to any other person.

The Clerk may refuse to appoint anyone who fails to satisfy the Clerk of his suitability and competence to serve. Administration will not be granted to any person under a disability as defined in Virginia Code Section 8.01-2 or has been convicted of certain criminal offenses.

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

A: The administration of an intestate estate is very similar to that of a testate estate, with all of the same requirements for filing the inventory, accountings, and tax returns discussed in previous Chapters. 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 for surety on the personal representative's bond, which will often 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.

CHAPTER XI

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 five forms: tenancy in common, joint tenancy without right of survivorship, joint tenancy with right of survivorship, tenancy by the entirety and community property. There are significant differences among them.

1. A *tenancy in common* is a simple form of co-ownership 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.

2. A *joint tenancy without right of survivorship* is effectively the same as a tenancy in common, except that the joint tenants’ interests are equal. With the exception of joint bank accounts (which are always presumed to belong to the surviving party), an asset held as “joint tenants” without any reference to survivorship is deemed to be a joint tenancy without right of survivorship and the decedent’s share passes as part of his or her estate. Virginia Code Section 55-20.1.

3. 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.

4. 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. 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. In the event of divorce, this form of ownership automatically converts to a tenancy in common.

5. *Community property* is a special form of ownership that applies only to property acquired by a married couple while living in one of the community property states. The primary difference between community property and joint property is that title to community property may be held in either spouse’s sole name. Regardless of title, however, each spouse has the right to dispose of his or her one half of the community property at death unless it is held “with survivorship.” Virginia is not a community property state, but it does recognize the community property character of assets brought into this state by couples who acquired it while living in a community property state, provided the property or its proceeds continue to be held as “community property.” Because it is relatively rare to encounter community property in Virginia, this manual does not address it. If a decedent owns community property, the personal representative should consider seeking legal advice.

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

A: For real estate, check the deed by which the decedent and the other co-owner(s) took title. For deeds to Virginia property, there is no right of survivorship unless the words “joint tenants with right of survivorship,” “tenants by the entirety” or similar express language is used.

For bank and brokerage accounts, the account statement may provide a clue as to how the account is titled. For example, if the statement is addressed to “John and Mary Doe JTWROS” or “John and Mary Doe TBE,” it is likely to be jointly owned with survivorship rights. However, to be certain, the personal representative should ask to see a copy of the signature card or paperwork completed when the account was opened, which will usually spell out the precise form of co-ownership, if any.

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.

Q: How is the decedent’s real estate handled?

A: Virginia real estate is often titled in multiple owners’ names as tenants by the entirety or as joint tenants with right of survivorship so that when one owner dies, the other(s) automatically acquire the decedent’s share. This type of property is not included in the decedent’s probate estate.

However, if the 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. Any real estate included in the estate 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 be sold by the personal representative unless authority to sell was given under the will or by the Court.

Virginia also permits owners to record a “transfer on death” deed to name the person or persons who will take title to the property at the owner’s death. If such a deed has been recorded in the local land records during the owner’s lifetime, the named beneficiary becomes the new owner automatically upon the decedent’s death and the property is not part of the probate estate. Anyone who has recorded a transfer on death deed during his or her lifetime may also revoke it by filing a revocation in the land records. Therefore, the personal representative may wish to check the land records to determine whether such a deed or revocation has been previously filed.

Q: What about life insurance?

A: Life insurance benefits are payable at the insured’s death according to the terms of the contract between the owner of the policy and the insurance company. The owner has the right to name a beneficiary or beneficiaries to receive the policy proceeds at the insured’s death. Usually, the insured is also the owner of the policy, and the decedent’s surviving spouse or children (or a trust created for their benefit) is the beneficiary. If the insurance contract does not name a beneficiary, or if the named beneficiary does not survive the insured, the proceeds will be payable to the estate unless the insurance contract provides for a different default beneficiary.

If the beneficiary is an individual or a living trust (discussed below), the policy proceeds pass outside of the will or intestate estate, directly to the beneficiary. In the case of proceeds payable to a trust, the trustee will manage and distribute the funds as part of the trust assets according to the terms of the trust agreement. If the policy is payable to the insured’s estate or to a trust under the will (discussed below), the proceeds become

part of the decedent's probate estate and are distributed pursuant to the terms of the decedent's will or the laws of intestacy.

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

Q: What happens to United States Savings Bonds?

A: Many estates include United States savings bonds. Information on the procedure for transferring, redeeming or cashing in the bonds can be obtained from Treasury Direct, found on the web at www.savingsbonds.gov. 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: What happens to retirement plan benefits upon the death of a plan participant?

A: Because retirement plan benefits pass by beneficiary designation, they are usually not subject to estate administration. However, the personal representative still may have responsibilities related to the decedent's retirement benefits, including accounting for the decedent's minimum required distribution in the year of death, completing roll-overs, collecting and paying any estate taxes apportioned to the retirement plan benefits, and making other decisions that affect the decedent's final income tax return.

If benefits are payable to the estate of the decedent, then they do become part of the probate estate and the personal representative will have additional responsibilities. The IRS has complicated rules that make some forms of death payouts much less desirable than others, and the personal representative will need to seek professional advice to preserve some of the opportunities to avoid disadvantageous post-death pay out options.

Q: What about Social Security survivor benefits?

A: Social Security survivor benefits are not subject to estate administration or to estate tax. The Social Security Administration will contact the decedent's widow or widower or surviving minor or disabled children directly about the availability of such benefits.

Q: Is a "living trust" subject to estate administration?

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 additional assets payable to the trust at the creator's death, are distributed or held by the trustee as directed in the trust agreement. Under most circumstances, the provisions in such a trust cannot be changed after the creator of the trust dies.

If the will directs that assets pass to the trust, then the personal representative will be responsible for distributing the assets to the trust. The personal representative will need to confirm the continued validity of the trust and the trustee's authority before coordinating with the trustee to transfer the assets and pay any estate or income taxes payable on the assets passing from the estate to the trust. The assets used to fund the trust prior to the decedent's death do not usually come under the control of the estate's personal representative except to the extent permitted by the terms of the trust.

Any assets that were transferred to the trust prior to the decedent's death are not treated as probate assets. 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 the federal estate tax applies to assets in living trusts, and that interest, dividends and other income the trust assets generate are subject to income taxation. The named trustee under the living trust will have responsibilities similar to those of a personal representative in preserving and managing the trust assets and distributing them as provided in the trust agreement.

Q: What about a trust that is created in the will itself?

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 postpone outright distribution of property to children after the death of their parents. In this case, the trust is an entity separate from the estate and is created when the personal representative distributes assets to the testamentary trustee to fund the trust. The person named as testamentary trustee under a will has responsibilities similar to those of the personal representative, including the duty to file accountings (unless the duty is properly waived by the will or the trust beneficiaries as required by law), 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 must 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. Virginia Code Section 64.2-1208 requires the Commissioner of Accounts to allow the personal representative to be reimbursed for reasonable expenses incurred and, unless the will, a separate agreement or the Court provides otherwise, reasonable compensation for services. If the will provides a specific method for calculating fees, or a specific amount or percentage, then the commission for services will be allowed based on that provision in the will, unless it is excessive in relation to the services provided.

What is “reasonable” has been the subject of many Virginia court cases. Generally, it is based on the services the personal representative has provided on behalf of the decedent’s estate. Many older cases, beginning in 1793, established a general rule followed in many jurisdictions that 5% of the value of the assets subject to administration is reasonable, but this figure may be increased or decreased based on the circumstances at hand. The personal representative should keep original receipts for all expenses for which reimbursement is requested and should keep a contemporaneous record of all time expended and the tasks performed for the estate. Under Virginia Code Section 64.2-1217, a personal representative will forfeit any right to compensation if he or she fails to file certain required statements with the Commissioner of Accounts.

If an attorney, accountant or other third party assists with the administration of the estate, their fees charged to the estate will reduce the personal representative’s commission only to the extent they perform tasks that the personal representative is reasonably expected to handle personally. For example, legal fees paid for preparation of tax returns, handling any litigation related to the estate, preparation of motions and orders, and legal advice and counsel to the fiduciary in how to carry out responsibilities do not reduce the personal representative’s commission, but fees paid to a third party to prepare the probate papers or assist with the transfer of assets will.

The personal representative’s commission is subject to approval by the Commissioner of Accounts. It is best to discuss the intended amount with the Commissioner prior to taking it and spending it. It is reportable as taxable income to the personal representative.

In determining reasonable compensation, Commissioners of Accounts typically apply the “Guidelines for Fiduciary Compensation” developed by the Standing Committee on Commissioners of Accounts, approved by the Virginia Judicial Council, and approved by substantially all Circuit Courts in Virginia. A copy of the Guidelines can be requested from the local Commissioner of Accounts office, and can also be found in the Manual for Commissioners of Accounts, a Virginia CLE publication prepared by the members of the Judicial Council’s Standing Committee on Commissioners of Accounts. The Guidelines can also be found online at:

http://www.henricocommissionerofaccounts.com/pdf/Fiduciary_Compensation_Guidelines.pdf and several other websites maintained by Commissioners of Accounts.

CHAPTER XIII

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 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 500 sections in the Virginia Code that 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, borrow from the estate or hire relatives to assist with the administration?

A: The executor or administrator acts in a position of absolute trust and responsibility with respect to estate property in which other persons may have an interest. The personal representative should not benefit personally, directly or indirectly, 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 creditors of the estate. Unless the personal representative is the only beneficiary of the estate and there are no unpaid estate debts, he or she should not lend estate funds to himself or herself, a close family member or any business in which he or she or a close family member has an interest.

A personal representative who wishes to purchase assets from the estate or hire a family member to assist with the estate's administration should first obtain all other beneficiaries' written consent. In the case of a purchase of assets, the personal representative should also obtain and provide the beneficiaries with an independent appraisal of the property and consult with a lawyer before going any further. Such transactions are risky and may be overturned by a court.

CHAPTER XV

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 the filing dates for reports to the Commissioner of Accounts and to the taxing authorities:

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: (IRS Form SS-4): _____

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

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

Spouse's Election for Share of Augmented Estate: _____
(due 6 months from date of qualification or probate,
unless extended)

Inventory: _____
(due 4 months from qualification)

(over)

Decedent's Final Federal Income Tax Return:

(due April 15 – IRS Form 1040)

Decedent's Final State Income Tax Return:

(due May 1 - Va. Form 760)

Decedent's Final Gift Tax Return (if required):

(due April 15 – IRS Form 709)

Estate Tax Return:

(due 9 months from date of death – IRS Form 706)

First Federal Fiduciary Income Tax Return:

(due 15th day of 4th month after estate's fiscal tax year ends - IRS Form 1041)

Subsequent Federal Fiduciary Income Tax Returns:

(15th day of 4th month after tax year ends)

First Virginia Fiduciary Income Tax Return:

(due date same as federal – Va. Form 770)

Subsequent State Fiduciary Income Tax Returns:

(due same as federal)

First Annual Accounting:

(due 16 months from date of qualification; covers first 12 months of administration)

Subsequent Annual Accountings:

(4 months after end of accounting year)

Debts and Demands Proceedings:

Request Proceeding:

Notice of Hearing Published:

Hearing on Debts and Demands:

Commissioner Files Report with Court:

File Show Cause Motion with Circuit Court:

Set Date for Hearing on Show Cause Order:

Publish Show Cause Order in Newspaper:

Hearing on Show Cause Order:

Present Order of Distribution for Judge's Signature:

(circle one) Yes / No

Yes / No

Yes / No

Yes / No

Yes / No

Yes / No

Yes / No

Yes / No

Yes / No

Yes / No

Prepay Final Expenses and Distribute Remaining Estate Assets:

File Final Accounting Showing No Assets:

Final Federal Fiduciary Income Tax Return:
