Probate in Virginia

Administration of Estates

Prepared and issued by the
Virginia Court Clerks' Association.

ESTATES IN VIRGINIA

"What do I do with my husband's (wife's, mother's, father's, etc.) will after death?"

"Where do I take the will? Which court is responsible for probating wills and the administration of estates?"

"What do I do if the deceased had no will?"

"How much time do I have to start the probate process and how long does it take?"

"What do I need to take to the court?"

These are only a sampling of the questions one may have upon the loss of a loved one.

The Virginia Court Clerks' Association has developed this handout to provide answers to basic questions about probate and the administration of estates in Virginia.

The laws of Virginia, as in all states, can be complicated regarding probate and estates. This guide is issued to present an overall view of the probate procedure. Further details may be obtained from the Clerk of the Circuit Court, Commissioner of Accounts or your attorney.

I. WHAT IS PROBATE?

Probate is the official proving and recording of the will as the authentic and valid last will and testament of the deceased. The will should be probated where the decedent owned a home; or if none, where the decedent owned any real estate; or if none, where the decedent died or has any estate. If the decedent died in a nursing home or similar institution, then that person's residence is presumed to be where he or she resided prior to becoming a patient at such home.

II. WHERE SHOULD THE WILL BE PROBATED?

Virginia has no separate probate court. The will should be probated in the circuit court of the city or county where the deceased resided as discussed in paragraph I. Usually the Clerk of the Circuit Court or a deputy clerk handles the probate of wills and the circuit court judge is not involved. However, any person interested in the will may appeal to the judge within six months of the order of the clerk admitting a will to probate.

III. WHAT DOES DYING "TESTATE" OR "INTESTATE" MEAN?

A person dies testate if he left a will. One dies intestate if that person does not have a valid will at the time of death. If a person dies intestate, then the laws of the Commonwealth of Virginia, in effect at the time of death, determine who the heirs are and hence who receives the decedent's property.

IV. WHO INHERITS THE PROPERTY OF AN INTESTATE ?

If a person dies without a will, Virginia law provides a course of descents as follows (after payment of funeral expenses, debts and cost of administration):

- all to the surviving spouse, unless there are children (or their descendants) of someone other than the surviving spouse in which case, one-third goes to the surviving spouse and the remaining two-thirds is divided among all children.
- if no surviving spouse, all passes to the children and their descendants.
- if none, then all goes to the deceased's father and mother or the survivor.
- if none, then all passes to the deceased's brothers and sisters and their descendants.
- (there are further contingent beneficiaries set out in the Virginia statutes.)

V. IS THE APPOINTMENT OF AN EXECUTOR OR ADMINISTRATOR AND FORMAL ADMINISTRATION OF AN ESTATE ALWAYS REQUIRED?

The appointment of an executor or administrator is not always required. If such is the situation, no formal administration is necessary. This is usually true where the estate is a small asset estate, personal property having value on the date of death of no more than $50,000.00.

Additionally, qualification is not necessary to transfer a motor vehicle title. In these circumstances, the will is probated (proved and recorded in the Will Books of the Circuit Court) and nothing further is required. Other instances where formal qualification or administration may not be required are joint accounts with right of survivorship in banks, saving institutions, or credit unions.

In most cases, the payment of life insurance proceeds to a named beneficiary and the transfer of real estate to a surviving spouse or other person, where there were survivorship rights in the deed, occur outside the estate.

VI. WHEN SHOULD I PROBATE THE WILL OR IF THERE IS NO WILL SEEK TO BE APPOINTED ADMINISTRATOR?

There is no set time frame in which a will must be probated or estate administration must be started. The death of a loved one is a particularly emotional, stressful, and busy time. The probate of the will can usually wait until a week or so after the funeral. It is recommended that the initial steps in the estate process start within 30 days after death. If any questions exist, call your attorney or your local Circuit Court Clerk's Office.

VII. WHAT SHOULD I TAKE WITH ME TO PROBATE A WILL OR QUALIFY ON AN ESTATE?

First, the will (original) must be taken to the Clerk's Office of the Circuit Court in your

local jurisdiction. It is recommended that an appointment be made with the Clerk or a deputy clerk. You might be given some forms to fill out prior to the appointment. Second, the person offering the will for probate or seeking to qualify should know all the assets owned by the deceased and, as accurately as possible, the value of those assets. A copy of the death certificate should be taken to the court. This document contains much of the information that will be needed by the Clerk or deputy clerk assisting you.

VIII. WHO WILL BE APPOINTED BY THE COURT AS EXECUTOR OR ADMINISTRATOR?

If there is a will, the person or persons named in the will normally will be appointed. If no one is named or the person named refuses to serve or ceases to act after being appointed, administration may be granted to one who was an alternate in the will or who is a beneficiary of the will. Of course, anyone appointed must be competent and suitable in the opinion of the court making the appointment.

If there is no will, within 30 days of death the clerk may grant administration (i) to a sole distributee or his designee, or, if more than one heir to the one(s) designated by all distributees.

The person appointed must take an oath that he or she will faithfully perform the duties required and further must give bond in an amount at least equal to the value of the estate to be handled. Surety generally must be given on the bond unless the will waives surety (which most wills do) or the person(s) appointed is (are) the only beneficiary(ies) or the appointment is of a bank or trust company. If the appointee is not a resident of Virginia, or in the case of co-fiduciaries, if none are residents of Virginia, surety will be required. When a nonresident attempts to qualify as co-fiduciary with a Virginia resident, if the Virginia resident cannot qualify for bond without surety, neither can the nonresident.

IX. WHAT ARE THE BASIC DUTIES OF AN EXECUTOR OR ADMINISTRATOR?

Probably the most important duty is to ascertain and take possession of the deceased person's property over which the executor or administrator has responsibility or control. Further, the fiduciary (executor or administrator) must determine the liabilities (debts) of the estate and determine the value of the estate over which the fiduciary does not have control (for tax-accounting reasons). Further, the fiduciary must see to the payment of debts of the deceased and the estate (including taxes) and the sale or distribution of property of the estate in accordance with the dictates of the will and the law of Virginia. Generally, the fiduciary must file a complete inventory of the estate within four months of qualification with the Commissioner of Accounts. The Commissioner of Accounts is a local person (generally an attorney) appointed by the circuit court to oversee and ensure that estates are properly handled. The fiduciary must also give written notice of qualification or probate to the heirs and beneficiaries of the estate or those who would have been the heirs, within thirty days after qualification or probate.

Finally, the fiduciary must make an accounting (generally a list of all assets of the estate, all distributions and all assets on hand) on a yearly basis until a final accounting can be made. Often, a first and final accounting can be made at the conclusion of the first year following qualification. The fiduciary must immediately report any change of address or telephone

number to the Commissioner of Accounts.

X. WHAT TAXES ARE THERE TO BE PAID?

- At the time of filing the will the probate tax must be paid. (Generally $1.00 state probate tax and .33¢ local tax, if applicable, per $1,000.00 value of the estate.)
- State taxes.
- The final income tax return of the deceased must be filed.
- The final personal property tax return of the deceased must be filed.
- An income tax return for the estate (income coming to the estate after death) must be filed if there is sufficient income.
- A Virginia estate tax return must be filed if required (generally only required if a federal estate tax return is necessary).
- Federal taxes.

Just as for the state, the decedent's final federal income tax return, estate income tax return, and estate tax return must be filed if required. Generally estate taxes (both federal and state) are due only if the gross estate (includes life insurance and survivorship property not handled by fiduciary) exceeds the threshold established by federal and state statutes.

XI. IS AN EXECUTOR OR ADMINISTRATOR COMPENSATED?

The administration of an estate generally requires a fair amount of time and energy. Compensation is allowed. The Commissioner of Accounts must approve the compensation and generally this amount is limited to five percent of the assets handled.

XII. WHERE CAN ONE GO FOR MORE INFORMATION OR ANSWERS TO SPECIFIC QUESTIONS?

- Talk to the Clerk of the Circuit Court or one of the deputy clerks. They will give you specific instructions (usually written) at the time of probate.
- Talk to your Commissioner of Accounts or an assistant. You will have to deal with them so it is good to make their acquaintance early.
- Talk to your attorney.