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Handling Decedents' Estates

Who takes care of the funeral?

You may say, in a signed and notarized writing, who takes care of your funeral. This person makes the arrangements. You also may say in your Will, or in a separate letter to the Executor of your Will, who takes care of your funeral. If you give no written instructions, your surviving spouse or next of kin takes care of your funeral.

Who pays for the funeral?

Often the funeral takes place before your Will is found or admitted to probate. If there is a Will, the Executor usually pays reasonable funeral expenses. Later, the Executor gets paid back from your Estate. If there is no Will, a family member usually pays reasonable funeral expenses. Later, the family member gets paid back from the person who becomes Administrator of your Estate.

Who should be told about the fact of death?

All of the heirs and beneficiaries of the decedent (deceased person) should be told. The Social Security Administration (SSA), the Department of Veterans Affairs (VA), and other agencies sending monthly checks also should be told. There may be death benefits that SSA or VA will pay only after notice has been given. Any life insurance company with a policy in effect should be told. This way, the company can start the claims process.

Letters should be sent to creditors telling them of a possible delay in payment. Letters to creditors also should ask for proof of the nature and amount of any debt or bill. If there was a Power of Attorney, the person holding it should be told. This is because the Power of Attorney ends at death.

Where is the Will likely to be found?

Wills often are held in safe deposit boxes at banks. Virginia law allows a bank to permit certain people to look in a safe deposit box for the sole purpose of finding the Will. If the decedent had no safe deposit box, family, friends, local banks, and financial and legal advisors should be contacted. They might know where a Will could have been kept.

What happens if the Will can't be found?

If the original Will can't be found, but it was signed and never revoked, a copy of a lost Will can be admitted to probate. There also is a way to deal with a Will found after the Estate has been administered under the incorrect belief there was no Will.

Does the Will have to be read to the family?

It may be helpful to read the Will to the family around the time of the funeral. However, the law does not require this. Reading the Will should be considered to reduce questions about the Will.

What is probate?

Probate is giving the Will to the Clerk of the proper Circuit Court and proving the Will is valid (real and genuine). Probate also is becoming a personal representative of the decedent. A personal representative is an Executor named in a will or an Administrator if there is no will. Probate also is taking care of an Estate.

How is a Will probated?

Anyone can present a Will for probate. Usually the person who wants to become the Executor does this. This is done by taking the Will to the Clerk of the proper Circuit Court. This is the court in the county or city where the decedent lived at the time of death. The Clerk or a Deputy Clerk looks at the Will. If the Will has a self-proving affidavit, or if witnesses testify the decedent properly signed the Will, it is admitted to probate.

Is probate required?

Probate is not always required. For example, there may be no property that passes by Will. However, it is better to probate a Will.

What is needed to probate a Will?

To be valid, a Will must be in writing. It must be signed by the decedent or at his or her direction. A Will also must be either wholly in the decedent's handwriting, or witnessed by at least two competent witnesses who are present at the same time. Some Wills have a self-proving affidavit. This is an affidavit attached to the Will. In the affidavit, a Notary Public says the Will was properly signed by the decedent and two witnesses, all present at the same time, and notarized.

What other information does the Clerk need to probate a Will?

The Clerk needs information on three forms. The first form is the Memorandum of Facts. This is about the decedent, and asks for full name, address, place and date of death, and marital

status. The second form is the Probate Tax Return. This lists property that passes under the Will. It includes both real property (house and land), and personal property, such as vehicles, furniture, cash, bank accounts, stocks and bonds. If the Estate is worth more than \$15,000, there is a probate tax based on the value of the Estate. This probate tax is different from the estate tax. The third form is the List of Heirs. This lists the family who would inherit if there were no Will.

What witnesses are needed at probate?

If the Will has a self-proving affidavit, no witnesses are needed. If the Will doesn't have a self-proving affidavit, the Clerk tells you whether one or two witnesses are needed. The Clerk also says whether the testimony must be given in person or in a sworn statement. If the Will is wholly in the decedent's handwriting, two witnesses with no interest in the Estate, who can identify the handwriting, must appear.

What else is needed at the time of probate?

- The original of the Will.
- Unless the Will says no bond is needed, an insurance company needs to provide a bond.
- A check to pay the Clerk's fee and any probate tax.
- If the person named as Executor doesn't want to serve, a letter from the person saying that.
- A death certificate or death notice from the newspaper.

What is qualification?

Qualification is becoming the personal representative of the Estate. Usually it takes place at the same time as probate of the Will. The personal representative is sworn in by the Clerk. After qualification, the personal representative has the right and the duty to take care of the Estate, and will be reviewed by the Commissioner of Accounts.

When is qualification required?

Qualification is not always required. However, it may be needed to take care of the Estate. For example, the personal representative may need to sign to transfer assets or to pay claims against the Estate. Some assets can be transferred without qualification.

- Assets owned jointly with rights of survivorship.
- Real property given to a beneficiary in the Will.
- Assets of certain Estates worth not more than \$15,000.
- Small sums in banks, savings & loans, and credit unions if the amount is under \$15,000.
- Motor vehicles, if certain Department of Motor Vehicles (DMV) forms are completed.
- Life insurance, IRA, and retirement plan benefits payable to a named beneficiary.

Who may qualify as a personal representative?

To qualify as an Executor or Administrator, you must be 18 or older, and able to get a bond if needed. You also must live in Virginia, unless you are the decedent's spouse, parent, sibling, child or other descendant, spouse of a child, nephew or niece. You also must be suitable and competent to do the duties of a personal representative.

Where do probate and qualification take place?

Probate takes place in the county or city where the decedent had a house or residence. If there is none, then where the decedent owned real property. If there is none, then where the decedent died or had other property. If the decedent died in a nursing home, residency is the location of decedent's home before admission to the nursing home. If the decedent died in a home for adults, or adult care facility (ACF), residency is the location of the ACF.

What is the bond of the personal representative?

Usually the personal representative has to put up a bond. This is a promise to pay to the Estate any loss due to the personal representative's improper acts. The amount of the bond is at least the value of the Estate, and usually double the value. A Will can say no bond is needed. Bond is not needed if all beneficiaries of an Estate also are personal representatives. Bond is not needed if the Estate is worth less than \$15,000.

What does the Commissioner of Accounts do?

The Commissioner of Accounts is a person appointed by the Circuit Court to review the work of personal representatives. The Commissioner reviews the inventory that lists the assets of the Estate. The personal representative must prove to the Commissioner that all property in the Estate is properly handled.

What is a Notice of Probate?

This is a notice that tells people who may be inheriting that a Will has been probated and/or that a person has qualified to take care of the Estate. The Circuit Court Clerk gives forms to use to give notice. This notice is needed only if the Estate is larger than \$5,000. After notice is given, the person who sent the notice files an affidavit with the Clerk that notice was sent.

Who gets Notice of Probate?

- The surviving spouse, if any.
- All heirs at law of the decedent (deceased person).
- All people who may inherit under the Will, or any other Will previously probated.

What is in the Notice of Probate?

- The name and date of death of the decedent.
- The name, address, and phone number of the personal representative of the decedent. (A personal representative is an Executor named in a Will, or an Administrator if there is no Will.)
- The mailing address of the Circuit Court Clerk where the Will was probated.
- A statement that says: “This notice does not mean that you will receive any money or property.”

Does the surviving spouse have any special rights to the Estate?

Yes. A surviving spouse may claim an “elective share” of the Estate. This can be done without giving up whatever else the surviving spouse may get from the Estate. This must be done within six months of the date of probate, or the date someone qualifies to take care of the Estate, whichever is later. This must be done in person before the Circuit Court Clerk, or in a writing filed with the Clerk.

How much is the elective share?

If the decedent had any children or other descendants, the elective share is $\frac{1}{3}$ of the “augmented estate.” Otherwise, the elective share is $\frac{1}{2}$ of the “augmented estate.”

What is the augmented estate?

This is the Estate controlled by the personal representative, plus other property not under the personal representative’s control, minus other property that is excluded. This can be very complex. Individual legal advice is needed.

What happens if a surviving spouse is not in the Will?

A surviving spouse not in the Will gets the same share as a surviving spouse of a person who dies without a Will if two things are true. First, the Will was signed before the marriage. Second, no other writing says anything different.

What happens to the marital home?

Often the marital home is titled so it automatically goes to the surviving spouse, no matter what the Will says. If the Deed to the marital home is “joint tenancy with right of survivorship,” the surviving spouse becomes the sole owner. This also happens if the Deed to the marital home is “tenancy by the entirety.” If the spouse’s right to live in the marital home can’t be determined right away, the spouse can live there for a reasonable time, at no charge. This continues until the spouse’s rights can be determined. The surviving spouse also has this right if the decedent died intestate (without a Will), or if the surviving spouse claims an elective share.

Do the surviving spouse and/or children have more rights to the Estate than others?

Yes. The surviving spouse and minor children may claim three allowances. These are the Family Allowance, the Exempt Property Allowance, and the Homestead Allowance.

What is the Family Allowance?

The Family Allowance is paid from the Estate to support the surviving spouse and minor children. It is paid for no longer than one year if the Estate can't pay the other allowed claims. It is paid to the spouse, if living, and if not, to the person who has custody of the minor children. The amount normally is \$18,000 for one year. This may vary on a case-by-case basis. The Family Allowance is paid in addition to anything else given to the spouse or minor children. It has priority over all other claims against the Estate.

What is the Exempt Property Allowance?

The Exempt Property Allowance lets the spouse, if living, and if not, the minor children, to choose up to \$15,000 in personal property from the Estate. This can be furniture, vehicles, furnishings, appliances, and other personal items. The Exempt Property Allowance is in addition to the Family Allowance. It also is in addition to anything else given to the spouse or minor children. It has priority over all other claims against the Estate, except the Family Allowance.

What is the Homestead Allowance? How is it claimed?

The Homestead Allowance lets the spouse, if living, and if not, the minor children, to choose up to \$15,000 in any type of property from the Estate. The Homestead Allowance is in addition to the Family Allowance and the Exempt Property Allowance. The Homestead Allowance replaces anything else given to the spouse or minor children, unless that share is less than \$15,000. If the surviving spouse claims the elective share, the surviving spouse can't also claim the Homestead Allowance. The Homestead Allowance has priority over all other claims against the Estate, except the Family Allowance and the Exempt Property Allowance.

How are these allowances claimed?

They must be claimed within one year of the decedent's death. This must be done in person before the Circuit Court Clerk or in a notarized writing filed with the Clerk.

May every surviving spouse claim the elective share and these allowances?

Every spouse may claim the elective share and these allowances, unless the spouse gave up these rights during the lifetime of the decedent in a signed writing. The writing must follow exact legal requirements.

What happens if a child is not in the Will?

If the deceased parent signed a Will before any children were born to the parent, then a child may claim the same share the child would have gotten if the parent had died without a Will. If the deceased parent signed a Will when the parent had at least one living child, then a child born afterwards, not in the Will, may claim the smaller of two shares.

- The share of a child provided for in the Will.
- The share the child would have gotten if the parent had died without a Will.

If the deceased parent signed a Will after the birth of all children, then a child who is not in the Will has no claim in the Estate.

What is the Virginia Small Estate Act?

This applies to Estates of not more than \$15,000. This allows property in the Estate to be transferred without a personal representative. To do this, the person who wants transfer of the property gives an affidavit to the person who has the property. The affidavit must say these things.

- The value of the Estate is not more than \$15,000.
- At least 60 days have passed since the death of the decedent.
- No one has qualified, or applied to be, personal representative.
- The Will, if any, has been probated.
- The List of Heirs has been filed.
- The person who wants the transfer is entitled to the property, and why.

What about motor vehicles?

The Virginia Department of Motor Vehicles (DMV) will allow title to a vehicle to be re-registered in the name of the surviving spouse, or other persons entitled to it. DMV needs a certificate that no one has qualified to be personal representative. DMV has the forms to make the transfer. DMV also needs the title to the vehicle.

What is the order for paying claims against the Estate?

When there is enough property in the Estate to pay all claims, the order to claims makes no difference, since all will be paid. When there is not enough property in the Estate to pay all claims, then claims must be paid in this order.

- Costs and expenses of administration.
- Family allowances, exempt property allowances, and homestead allowances.
- Funeral expenses up to \$2,000.
- Debts and taxes with preferences under federal law.

- Medical and hospital expenses of the last illness of the decedent. This includes people attending the decedent. Payment is up to \$400 for each hospital and nursing home, and up to \$150 for each person furnishing services or goods.
- Debts and taxes due Virginia.
- Debts due where the decedent was acting in trust for someone else.
- All other claims.

Is the personal representative personally liable for claims against the Estate?

The personal representative is not personally liable for the decedent's debts or claims against the decedent's Estate. Liability could arise only if the personal representative did not act in good faith, broke a court order, or didn't pay claims in the proper order.

What is a personal representative?

A personal representative is the person who takes care of the Estate of the decedent (deceased person). This can be an Executor named in a Will. This also can be an Administrator appointed by the Court if there is no will.

What does the personal representative do after qualification?

The personal representative has to send Notice of Probate. This is a notice that tells people who may be inheriting that a Will has been probated and/or that a person has qualified to take care of the Estate. After notice is given, an affidavit is filed with the Clerk that notice was sent. If there is a Will, the personal representative has to determine these things.

- Who will be inheriting.
- What property is in the Estate.
- What powers are granted by the Will.
- Whether there are any limits in the Will about giving property to the heirs.

The personal representative should open a separate checking account for the Estate. If the Estate is large, a separate savings or money market account also should be opened. To open the accounts, the bank will need a death certificate. The bank also will need a certificate of qualification.

All assets of the Estate should be put in the separate checking account. All expenses paid for the Estate should be paid from the separate checking account. All receipts, statements, invoices and bills that are paid should be saved. The bank records should contain all information needed to report to the Commissioner of Accounts. This includes the amount and source of each deposit. This also includes the payee, amount and purpose of each check written.

Who collects and values the Estate?

The personal representative also must determine and establish the value of the property in the Estate. An Inventory listing the property and its value must be filed with the Commissioner of Accounts. An appraiser may be used to value assets when the worth is unknown or uncertain.

Who invests and manages the Estate?

The personal representative must manage and take care of the assets of the Estate. This must be done with the same degree of care as someone managing and taking care of his or her own property.

May assets in the Estate be sold?

If the Will says that certain assets not be sold, or gives certain property to heirs, these should not be sold unless needed to pay funeral expenses, charges to administer the Estate, or debts of the Estate. Other assets should be sold if likely to go down in value. Real estate (house and land) may not be sold unless the Will says so.

What reports must be filed?

Three reports must be filed to administer an Estate. First, after the Notice of Probate has been sent, an affidavit saying that notice was sent must be filed with the Clerk of the Circuit Court. This must be done within 30 days after probate and qualification.

Second, the Inventory that lists the property and its value must be filed with the Commissioner of Accounts. This must be done within four months after qualification.

Third, an account of what has occurred in the Estate during the year must be filed with the Commissioner of Accounts annually. The first account is due 16 months after qualification. It should cover the first 12 months. After the first account, each account must be filed annually. Each account is due four months after the end of the year covered by the account.

When do the assets in the Estate have to be given out?

The personal representative does not have to give out any assets of the Estate until six months after qualification. No assets subject to federal Estate tax have to be given out until the tax has been paid.

What is an Order of Distribution?

The personal representative is not personally liable for claims against the decedent's Estate. Liability can arise only if the personal representative did not act in good faith or didn't pay claims in the proper order. An Order of Distribution protects against this.

What is a Debts and Demands proceeding?

The personal representative asks the Commissioner of Accounts to set a Debts and Demands hearing. This sets a time and place for creditors, and those having claims against the Estate, to appear and file their claims. A notice of hearing must be published in the local newspaper. A notice of hearing also must be posted at the courthouse. The personal representative also must notify known creditors. Claims are presented to the Commissioner of Accounts. After the hearing, the Commissioner makes a report of the debts and demands that have been proven.

What is a Show Cause motion and order?

This allows the personal representative to ask the court to issue an order for creditors, and those having claims against the Estate, to show cause why payment should not be made. Before this can be done, three other things must happen.

- Six months have passed since qualification.
- The Inventory has been filed with the Commissioner of Accounts.
- The report of the Debts and Demands hearing has been filed in the Clerk's office.

A Show Cause Order is published in the local newspaper. This sets a time and place for creditors, and those having claims against the Estate, to appear and state their objections. If there are no objections, the court will enter an Order of Distribution. A personal representative who relies on this order is fully protected against anyone claiming against the Estate.

Must there be an Order of Distribution?

No. There is no requirement to get an Order of Distribution before the Estate is settled. However, this offers the most protection to the personal representative.

What happens when a person dies without a Will?

A person who dies without a valid Will is said to be intestate. When there is no Will, the decedent's property goes to family members under a plan set out by law in each state. The law depends on 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.

In Virginia, if a person dies intestate but survived by a spouse, the widow or widower gets everything, unless the decedent had children who were not also the children (by birth or adoption) of the surviving spouse. In this case, the surviving spouse gets one-third. All the decedent's children share the other two-thirds.

If there is no surviving spouse, the children or other descendants generally inherit the entire Estate. If there is no spouse or descendent surviving, there is a chain of relatives in line to

inherit. These are parents, brothers and sisters, nephews and nieces, then grandparents and their descendents.

Who administers the Estate if there is no Will?

Usually a family member applies to the court to become personal representative. The surviving spouse is the preferred person. If there is no surviving spouse, or the surviving spouse does not wish to serve, other persons who would inherit the Estate may ask to be appointed. In the case of persons equally entitled to inherit, such as two siblings, the one who applies first usually is appointed.

How is the Estate administered if there is no Will?

If there is no Will, the Estate is administered in much the same way as an Estate under a Will. The Notice of Probate, Inventory, and accounts all must be filed. The personal representative collects the assets, pays debts and expenses, and distributes the Estate to the heirs.

Can the personal representative get a fee?

Yes. If the Will has a method for determining a fee, then the fee will be based on that. If the Will does not have a method, or if there is no Will, then the fee charged must be reasonable. The general rule is that the fee is 5% of the value of the receipts. The fee is subject to approval by the Commissioner of Accounts. It is advisable to discuss the fee with the Commissioner before taking and spending it.

Where can the personal representative get help in administering an Estate?

The personal representative may get help from attorneys, accountants, bank, and other advisors. The Clerk of the Circuit Court usually gives written instructions at the time of qualification. The Commissioner of Accounts also may be available to answer questions. However, neither the Clerk nor the Commissioner will provide individual legal advice.

More than 200 sections of the Code of Virginia deal with administering estates. The duty of proper administration rests with the personal representative. Due to this, a personal representative should get help from an attorney if there are any questions.