

PROBATE IN VIRGINIA

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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 as such home.

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. 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 6 months of the order of the clerk admitting a will to probate.

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.

WHO INHERITS THE PROPERTY OF AN INTESTATE (Person Dying Without a Will)?

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

- a) all to the surviving spouse, unless there are children (or surviving descendants) of someone other than the surviving spouse in which case, 1/3 goes to the surviving spouse and the remaining 2/3 is divided among all children.
- b) if no surviving spouse, all passes to the children and descendants.
- c) if none, then all goes to the deceased's father and mother or the survivor

- d) if none, then all passes to the deceased's brothers and sisters and their descendants
- e) (there are further contingent beneficiaries set out in the Virginia statutes)

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

Qualification of an executor or administrator is not always necessary. This is true when the estate is less than \$50,000 and a small estate affidavit is accepted by the financial institution to take control of the asset. If the small estate affidavit is not accepted, qualification is usually needed.

A small estate is considered to be \$50,000 without a qualification and \$15,000 with a qualification.

NOTE: Small estate affidavit forms are available in the Clerk's Office or at the Financial Institution.

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.

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 the death. If any questions exist, call your attorney or the Probate Division of the Norfolk Circuit Court Clerk's Office at 664-4397 or 4398.

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. It is recommended that an appointment be made with a deputy clerk. You will 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 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 deputy clerk assisting you.

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 persons 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 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 will do) or the person(s) appointed is (are) the only beneficiary(ies) or the appointment 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 along with a resident agent for Non-Virginia resident fiduciaries.

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 4 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 30 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.

WHAT TAXES ARE THERE TO BE PAID?

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

Just as for 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 certain thresholds. Consult the IRS or Virginia Department of Taxation

IS AN EXECUTOR OR ADMINSTRATOR 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 5% of the assets handled.

WHERE CAN I GO FOR MORE INFORMATION OR ANSWERS TO SPECIFIC QUESTIONS?

Talk with your attorney.

PLEASE NOTE: LAWS CHANGE. MAKE SURE TO CONSULT WITH YOUR ATTORNEY FOR THE MOST UP-TO-DATE INFORMATION.

