

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:

(circle one) Yes / No

Request Proceeding:

Yes / No

Notice of Hearing Published:

Yes / No

Hearing on Debts and Demands:

Yes / No

Commissioner Files Report with Court:

Yes / No

File Show Cause Motion with Circuit Court:

Yes / No

Set Date for Hearing on Show Cause Order:

Yes / No

Publish Show Cause Order in Newspaper:

Yes / No

Hearing on Show Cause Order:

Yes / No

Present Order of Distribution for Judge's Signature:

Yes / No

Prepay Final Expenses and Distribute Remaining Estate Assets:

File Final Accounting Showing No Assets:

Final Federal Fiduciary Income Tax Return:
