

FBA "CLE At Sea"

Navigating the Commissioner of Accounts Office

John H. Rust, Jr., Commissioner of Accounts

19th Judicial Circuit

The Commissioner of Accounts System

The circuit court appoints the commissioner, who must be an attorney. The court may appoint as many commissioners as may be required to carry out the duties of the office. The commissioner serves at the pleasure of the circuit court. The commissioner of accounts “shall have a general supervision of all fiduciaries admitted to qualify in such court or before the clerk thereof and make all ex parte settlements of their accounts.” VA. CODE ANN. § 26-8.

Virginia is the only jurisdiction in the United States with a system comparable to the commissioner of accounts system.¹ The system began with the revision of the Virginia Code in 1849. Prior to that revision, Virginia allowed the executor to appoint a commissioner, usually his friend or neighbor with no knowledge of or experience in estate law, to approve the executor’s account. That system led to much litigation. Those proposing the new system in 1849 thought

“it must be a great improvement to have such accounts settled by commissioners holding their offices under appointment of the circuit courts; commissioners appointed such because of their acquaintance with the principles on which the accounts should be stated, and from whom, therefore a settlement on proper principles may generally be expected. We think too benefit will result from having the reports of such settlements returned in all cases to the circuit courts, which may be expected better to examine into, and more correctly to decide upon the matters arising on such accounts, than could be done in the county and corporation courts.”²

Over the years, the commissioner system has held up well in comparison to other systems. It is generally viewed as “effective and economical.”³ The commissioner

¹ Commission on Virginia’s Courts in the 21st Century: To Benefit All; To Exclude None, Appendix at 48.

² *Report of the Revisors of the Code of Virginia* at Title XXXIX, Chapter CXXXII, 1st (January 1849).

³ Commission on Virginia’s Courts in the 21st Century: To Benefit All; To Exclude None, Appendix at 45.

system operates without public funds, yet Virginia continues to rank among those states with the lowest probate administration costs.⁴

Today, the Standing Committee Regarding Commissioners of Accounts of the Judicial Council of Virginia, first appointed by Chief Justice Carrico in 1993, has oversight over the commissioner system. This committee created the Manual for Commissioners of Account, promulgated the suggested Uniform Fiduciary Fee Schedule and the Uniform Fee Schedule for Commissioners of Account, and developed a procedure for receiving complaints against commissioners, all of which the Judicial Council has approved. The Fairfax Circuit Court has adopted the Uniform Fiduciary Fee Schedule, but, at the request of the Fairfax Commissioner, has adopted its own fee schedule for its commissioner. The Judicial Council currently has under consideration a Uniform Fee Schedule for Commissioners of Account substantially similar to that now in effect in Fairfax.

The Scope of the Commissioner's Duties

The Circuit Court appoints the commissioner of accounts to provide general supervision of fiduciaries within the Court's jurisdiction. VA. CODE ANN. § 26-8. The Court does not delegate its judicial authority to the commissioner. The commissioner's recommendations are not binding upon the Court and the Court may review the evidence, take new evidence, and make its own determination of the propriety of the commissioner's report.⁵ The Court has plenary authority to direct the matter or any portion thereof to the Commissioner as it deems necessary for the convenient dispatch of the business of the Court.⁶ Absent statutory authority inherent in the appointment as commissioner or a referral from the circuit court, the commissioner has no basis upon which to render an opinion as to the propriety of a fiduciary's actions.

⁴ In 1990, AARP estimated that probate costs were between 2%-10% of the gross estate. *Probate: Consumer Perspectives and Concerns*. The National Association of Financial and Estate Planning estimates that average probate costs were between 4% and 10% of the value of the estate. NAFEP, *Estate Planning Basics*. Charles Schwab estimates the average probate costs in Virginia to be 3%. Charles Schwab Probate Cost Calculator. In 1975, the Virginia General Assembly noted that "Virginia ranks near the bottom on the American Bar Association scale comparing administration costs among the states." S. Doc. 15 (1975). Today, *Money Magazine* states: "In general, say estate lawyers, the probate process is particularly costly in California, New York and Pennsylvania, where total fees could top \$35,000 on a \$600,000 estate. For an estate of the same size in comparatively bargain states like North Carolina, Texas and Virginia, probate would run less than \$16,000." Smith, *When to Trust Living Trusts*, August 1, 1990. The Virginia State Bar notes: "The overall costs of probate in Virginia are not nearly as great as in many other states, and accordingly, there are often sound reasons probate should not be avoided." Virginia State Bar, *Planning for the Future*. Similarly, the Virginia Cooperative Extension Services states: "the cost of probate is not significant in Virginia." Virginia Cooperative Extension, *Managing Prosperity: Estate and Retirement Planning for All Ages Probate and the Probate Process*.

⁵ *Morris v. United Virginia Bank*, 237 Va. 331, 377 S.E.2d 611 (1989). Cf. *Morrill v. Morrill*, 45 Va. App. 709, 613 S.E.2d 821 (2005)(review of recommendations of commissioner in chancery).

⁶ See, e.g., VA. CODE ANN. § 32.1-1023.B. Cf. VA. CODE ANN. §§ 8.01-607 and 609 (referral to commissioner in chancery).

By the same token, a commissioner, as a quasi-judicial officer charged with responsibility for fiduciary matters, has a duty to render a complete opinion on the matters that are before him. When a party brings an action to settle an account, the court has a duty “to try all the issues, administer full relief to the parties, and to either render an order for the amount found to be due, or to issue an order showing that there is nothing due. The court enjoys broad discretionary power in account matters to make any order or decree as justice requires.”⁷ The commissioner of accounts has a similar duty. The Circuit Court for the City of Norfolk had occasion to consider the limitations upon the inquiries of the commissioner of accounts in the matter of *Trustee’s Sale of the Property of Willie Brown*.⁸ The Court stated

To perform his duties on behalf of the court, a Commissioner’s authority must extend to every aspect of law or fact related to a fiduciary’s duties, qualifications, and actions that may affect the rights of a beneficiary of an estate or a fund before him. No question of law, equity, or disputed fact concerning an account should be insulated from a Commissioner’s inquiry. Were a Commissioner of Accounts to be prohibited from considering such matters, how could he accurately and effectively assist the court?

Thus, within the scope of the commissioner’s statutory duties, the commissioner has broad authority to address all the issues affecting those duties.

The commissioner has responsibility to review, audit and approve inventories and accounts of fiduciaries representing estates, trusts, guardianships, and conservatorships, as well as trustee’s accounts of foreclosures. As a part of those responsibilities, the commissioner also conducts debts & demands hearings and hearings pursuant to § 26-29 of the Virginia Code.

Judge Lamb described the commissioner of accounts eloquently, stating

If the probate courts are “the courts of widows and orphans”, as they are sometimes called, the Commissioner of Accounts is the executive arm of the court, supporting the shield by which protection is afforded to those inadequately armed to protect themselves.⁹

⁷ 1 AM. JUR. 2d *Accounts and Accountings* § 67 (2006).

⁸ 67 Va. Cir. 204 (2005).

⁹ Lamb, VIRGINIA PROBATE PRACTICE § 107 (1957).

The Commissioner's Office, Public Records and Freedom of Information

Under Virginia's Freedom of Information Act (FOIA) law, all official records of the executive, judicial and legislative branches of government are presumed to be open to the public and available for copying and inspection, except as otherwise specifically provided.¹⁰ While the judicial system is not generally subject to the Freedom of Information Act, its records are public documents and generally available to the public for inspection and copying.¹¹ When a commissioner approves inventories and accounts and files those documents in the clerk's office, these become public records and are available to the public. It is also generally assumed that the commissioner, as an appointed arm of the court, is a public official and the commissioner's office is a repository of public records, although there is no express statutory requirement for such assumptions.¹² However, there are questions whether all the records of the commissioner, including the vouchers, bank statements, investment account statements, tax returns, and other back-up information are subject to public inspection.

The court system is exempt from the provisions of the Government Data Collection and Dissemination Practice Act.¹³ Nevertheless, in Fairfax, the commissioner attempts to comply with its restrictions upon disclosure of identifying information. Virginia Code § 2.2-3808.1 prohibits a state agency from disclosing "the social security number or other identification numbers appearing on driver's licenses or information on credit cards, debit cards, bank accounts, or other electronic billing and payment systems that was supplied to an agency." The commissioner receives many such records in connection with the audit of inventories and accounts that contain personal identification and financial information generally prohibited from disclosure.¹⁴ The Standing Committee Regarding Commissioners of Account recommends that such information be made available only to interested parties.¹⁵ In Fairfax, access to vouchers, financial statements and other confidential information which the commissioner holds pending approval of the inventory or accounts of a fiduciary is limited to persons with a direct interest in the matter, such as fiduciaries, heirs, claimants, and their attorneys and accountants. Documents approved and filed with the clerk's office are redacted to delete identifying numbers and other confidential information.

¹⁰ Atty. Gen. Op. to Moody, 9/7/76, 1976-77 p. 310; VA. CODE ANN. § 2.2-3704.

¹¹ VA. CODE ANN. § 17.1-208.

¹² See, e.g., MANUAL FOR COMMISSIONERS OF ACCOUNT at § 3.102. See also *Commission on Virginia's Courts in the 21st Century: To Benefit All; To Exclude None, Appendix* at 41, stating "The Commissioner of Accounts does not have the power to seal records, and thus, although there is some debate in specific instances, in general the public has access to the records of the Commissioner of Accounts."

¹³ VA. CODE ANN. § 2.2-3802

¹⁴ VA. CODE ANN. § 2.2-3808.1.

¹⁵ MANUAL FOR COMMISSIONERS OF ACCOUNTS at § 3.03.

The Fairfax Commissioner's Office

In Fairfax County, the commissioner's office receives between 3,000 and 3,600 filings each year. Of these, approximately 1,800 filings are new matters. With the recent spike in foreclosures, the office should be at the high end of that range for 2007. In 2006, the Fairfax commissioner's office received 137 foreclosure accounts, 77 of those in the fourth quarter. As of the end of July, the Fairfax office had received 546 foreclosures for 2007. The previous high in Fairfax was 600 foreclosure accounts. The office will clearly exceed 600 filings during 2007.

At present, the Fairfax commissioner's office has a staff of nineteen people, including the commissioner, the deputy commissioner, the executive director, five full-time account auditors, two part-time account auditors, one foreclosure account auditor, two inventory account auditors, a customer service representative, an intake clerk, an approvals clerk, a delinquency clerk, an executive assistant to the commissioner, and a part-time file clerk. The office is located in the City of Fairfax, Virginia, in the Fairfax Building at 10555 Main Street, Suite 500. The location abuts the main parking structure for the courthouse complex and has limited pedestrian access between the building and the parking structure.

The circuit court sets the fees which the commissioner's office charges. The court periodically reviews both the fee structure and the receipts and expenditures of the office to assure that the fees charged to the public are reasonable and commensurate with the services required. These "user" fees fully fund the operations of the commissioner and alleviate any requirement for tax support for Virginia probate operations. The fees of the commissioner's office in Fairfax are not the same as the Uniform Fee Schedule that the Standing Committee Regarding Commissioners of Accounts has promulgated; however, the Judicial Council currently has under consideration a Uniform Fee Schedule for Commissioners of Account substantially similar to that now in effect in Fairfax. A copy of the current fiduciary fee schedules now in effect in Fairfax is attached.

The matters that the commissioner reviews vary in complexity and in size. In order to spread the load equitably among the filers, the commissioner's fees are based upon the assets which each fiduciary has within his control rather than upon the complexity of the account. While this allocates the burden differently than a fee based upon complexity, it generally assures that the fee is not prohibitive for the size of the estate. In addition, fees are determined at different rates for estates, trusts, conservatorships and guardianships.

Inventory Issues.

In all cases except foreclosure, a fiduciary's relationship with the commissioner begins with the filing of an inventory, generally due four months after qualification with the circuit court.¹⁶ As all future actions are based upon this inventory, it is "of vital importance. It is the starting point and the basis upon which the accounting rests."¹⁷

The inventory form states that "[t]he Commissioner of Accounts has not independently verified the value of the items on the inventory or the fact that they are the only assets of the estate."¹⁸ From the perspective of the commissioner, the inventory is presumed to be correct. There is controversy among the commissioners of account whether a commissioner has authority to conduct a hearing to determine objections to an inventory.¹⁹ The office of the Fairfax commissioner has consistently taken the position that objections to an inventory are proper matters to be heard pursuant to § 26-29 of the Virginia Code, which provides that anyone "interested in any ... account, may, before the commissioner, insist upon or object to anything which could be insisted upon or objected to by him, or for such other, if the commissioner were acting under an order of a circuit court for the settlement thereof, made in a suit to which he or such other was a party." As the Code section refers specifically to an account, it is generally the practice of the Fairfax commissioner to at least require the filing of an account before convening a hearing pursuant to § 26-29 concerning objections to an inventory. This gives the fiduciary an opportunity to make adjustments to the assets stated in the inventory in the account prior to the hearing.

Under § 26-12 of the Virginia Code, in the case of after-discovered or received assets, a fiduciary has the option of filing an amended inventory or, with the permission of the commissioner, showing the after-discovered asset on the next regular account. In Fairfax, the commissioner routinely gives permission to show after-discovered assets on the next regular account, obviating the need for most amended inventories.

Virginia Code § 64.1-122.2 requires that a fiduciary give notice of the estate to all interested parties within thirty days of qualification and to file an affidavit of such notice within four months of qualification. The notice advises interested parties of the filing schedule for the estate and notifies them of their right to obtain copies of the filings by requesting the same from the fiduciary. The commissioner is prohibited from approving

¹⁶ VA. CODE ANN. § 26-12.

¹⁷ Lamb, VIRGINIA PROBATE PRACTICE § 16 (1957).

¹⁸ Circuit Court Form CC-1670.

¹⁹ See *Manual for Commissioner of Accounts* § 5.801.

“any settlement” until the fiduciary files the required affidavit. The commissioner has responsibility to enforce the filing of the affidavit.

As the statute specifically refers to settlement of an account, the Manual for Commissioners of Account states that “the Commissioner should approve the inventory regardless of whether the affidavit has been filed.”²⁰ In Fairfax, the commissioner has declined to follow this interpretation of the Virginia Code. In the opinion of the Fairfax commissioner, the required notice is the primary legal basis for an heir or other party to become aware of a pending estate in which that person might have an interest. If the notice is not timely and properly given, its efficacy may be vitiated by the disbursement of the assets of the estate prior to the filing of the first account. Therefore, in Fairfax, the commissioner requires the filing of a proper affidavit of notice as a part of the approval of the initial inventory.

The reporting on the inventory form of assets which the decedent owned jointly with another is far from uniform. The only assets to be reported in part 2 of the inventory are the interests of the decedent in “multiple party accounts and certificates of deposit in banks and credit unions.”²¹ Basically, this limits the scope of part 2 to the decedent’s interest jointly-held bank accounts which pass to the joint owner by virtue of a right of survivorship. The inventory does not include jointly-held brokerage accounts, mutual funds, or real estate.

Secondly, that portion of such accounts includible in the inventory is only the decedent’s interest in the accounts. Generally the valuation should be limited to the proportionate share of the decedent in any such accounts at financial institutions. These amounts are reported in the inventory as such joint accounts may be subject to claims of the decedent’s creditors.²² Fiduciaries should also note that divorce extinguishes rights of survivorship in multi-party accounts and renders them tenancies in common.²³ The decedent’s interest in multi-party accounts that are subject to the statute should be reported in part 1 as assets of the decedent.

Fiduciaries also frequently make erroneous reports of a decedent’s real estate holdings. The inventory includes real estate which the decedent owned, or in which he had a partial interest; however, it does not include in any form the decedent’s jointly-held real estate which passes pursuant to a retained right of survivorship. Fiduciaries should take care to report real-estate related assets correctly. Interests in a real-estate partnership

²⁰ *Id.* at §5.105.

²¹ Circuit Court Form CC-1670.

²² *See* VA. CODE ANN. § 6.1-125.8.

²³ VA. CODE ANN. § 6.1-125.4.

or a real-estate limited liability company are personal property, reportable in part 1 of the inventory. Interests in condominium property,²⁴ cooperatives,²⁵ or time-share interests²⁶ are real estate interests,²⁷ reportable in parts 3, 4 and 5 of the inventory.

If the fiduciary has the power of sale to sell real estate, the fair market value of the decedent's real estate is included in part 3. Even real estate that has been specifically devised must be included if the fiduciary has a general power of sale.²⁸ The power to sell real estate may be express in the will or may be incorporated by reference. Virginia Code § 64.1-57, the general powers provision routinely incorporated in most wills, includes the power to sell real estate. If the fiduciary has the power to sell real estate, this increases the probate estate and the amount of the requisite bond.

In Fairfax, the commissioner has a few additional pointers for those filling in the inventory form:

- i. Math should not be a lost art or an arcane discipline. Correct addition and subtraction of the columns in the inventory will accelerate its review and approval.
- ii. Inventories are public documents and care should be taken in this electronic age not to invite identity theft. Redact inventories to limit bank account numbers and other sensitive identifying information to the last four digits of the account code. *See* VA. CODE ANN. § 2.2-3808.1.
- iii. Assets should be valued at fair market value as of the date of death. While assessed values may be used for real estate, fiduciaries should be mindful of the stepped-up basis rules under the Federal tax code. I.R.C. § 1014. Generally, it is prudent that inventory values agree with the stepped-up basis of assets for tax purposes.

B. Account Adjustments

Estate fiduciaries are required to file their first accounts sixteen months after qualification covering the first year of administration.²⁹ Guardians and conservators must file their first accounts within six months of qualification for the first four months of

²⁴ VA. CODE ANN. § 55-79.41.

²⁵ VA. CODE ANN. § 55-428.A.

²⁶ VA. CODE ANN. § 55-363.

²⁷ *See generally* Manual for Commissioners of Account ¶ 5.202. Commissioners around Virginia generally subscribe to the tenet that if an interest is transferred by deed, it is real estate.

²⁸ Manual for Commissioners of Account ¶ 5.202.

²⁹ VA. CODE ANN. § 26-17.5.

administration.³⁰ Thereafter, all such accounts are due annually. Trustees of testamentary trusts are required to file accounts on or before May 1 for the preceding calendar year.³¹

Settlement of a fiduciary's account is a continuous narrative. The beginning balance of the first account must be the reported value of the probate estate on the inventory. Similarly, the value of the ending assets in each account must then appear as the value of the beginning assets in the next account. As in the case of inventories, math should not be a lost art or an arcane discipline. Correct addition and subtraction of the columns in the account will accelerate its review and approval. If an interested party has requested copies of estate filings, the fiduciary must show that such copies were provided or the commissioner will not approve the account.

A commissioner's view of the assets of an estate is static. If the IBM stock which the decedent owned at his death was worth \$10.00 per share on the day he died, that stock will be worth \$10.00 per share when it is distributed from the estate four years after the decedent's death. Unrealized gain or loss remains unreported. Market fluctuations, while relevant for computing fiduciary fees and filing fees, are irrelevant to account reporting. There is, in effect, an estate basis similar to a tax basis, which is the foundation of estate accounting.

The Account Audit

The account audit focuses upon reasonable proof of receipts, disbursements, and distributions. Generally, this proof consists of appropriate vouchers upon which the commissioner can rely. In the case of receipts, bank or brokerage account statements will generally suffice, although the commissioner may require exhibition of 1099s or K-1s as appropriate. Fiduciaries who are receiving social security or SSI benefits as the designated representative of the ward are not required to account for such receipts.³² Transactions involving personalty or closely-held securities will usually require a bill of sale or other acceptable documentation to demonstrate value. The commissioner requires a copy of the HUD-1 for all real estate transactions.

Corporate fiduciaries are permitted to file an affidavit of payment to account for debts, taxes and expenses without providing vouchers.³³ This provision does not relieve corporate fiduciaries of the responsibility to provide receipts or vouchers for distributions to beneficiaries, although automated electronic distributions to beneficiaries do not

³⁰ VA. CODE ANN. § 26-17.4.

³¹ VA. CODE ANN. § 26-17.6.

³² VA. CODE ANN. § 26-17.10.

³³ VA. CODE ANN. § 26-17.9.D.

require vouchers beyond the bank statement of account if the beneficiary has previously consented in writing to such distributions.³⁴

For disbursements, commissioners traditionally required exhibition of original cancelled checks. As modern check imaging has replaced physical return of actual checks, the General Assembly has accommodated this technology by permitting copies of bank statements and one side of cancelled checks to suffice.³⁵ Where the commissioner remains unsatisfied, he may still require a proper voucher, but he may not require the actual cancelled check. Receipts from payees, such as funeral homes, also suffice as vouchers. Funeral expenses continue to have special significance to most commissioners in light of prior statutory requirements to exhibit a paid receipt for the funeral. Therefore, most commissioners will require evidence of payment in full of this cost.

Increasingly, fiduciaries are using money market accounts at brokerage houses as estate checking accounts. These accounts usually do not return checks and do not provide images of payments that are made. The only record of payment is a notation upon the account statement, noting the amount and, in most cases, the payee of the check. The reliability of these payment records is difficult to ascertain. Unlike bank accounts, withdrawal from the account is generally not based upon negotiation of the check and it is not generally indicative of receipt of the payment by the named payee. Electronic banking payments have the same characteristics. These payments are not fully in accord with the provisions of §26-17.9.E of the Virginia Code³⁶ and the acceptance thereof as “proper vouchers” is in the discretion of the commissioner.

In Fairfax, the commissioner will generally accept evidence of payment of routine expenses, such as utility bills, mortgage payments, or other regular disbursements, shown on brokerage account statements or as electronic banking withdrawals. The commissioner will usually require additional evidence of payments of unusual or large expenses, such as funeral bills, legal fees, or taxes. The commissioner will always require additional evidence of receipt of distributions to beneficiaries.

Accounting for Real Estate Assets

Under Virginia law, real and personal property are subject to different rules of administration. Title to real property vests in the devisee or heir immediately upon the death of the decedent; title to personal property vests in the personal representative to be

³⁴ VA. CODE ANN. § 26-17.9.B.

³⁵ VA. CODE ANN. § 26-17.9.E.

³⁶ There is no image of the item and the record is not evidence of payment, merely evidence of withdrawal.

distributed or, if necessary, to pay off debt.³⁷ While appropriate testamentary language may subject the real property belonging to the decedent to the payment of the debts of the decedent, such testamentary power of sale does not vest title to the real property in the fiduciary or empower the fiduciary to distribute the real property.

In many wills, the executor is granted the powers of fiduciaries under § 64.1-57 of the Virginia Code. This code section expressly empowers a fiduciary,

To sell, assign, exchange, transfer and convey or otherwise dispose of, any or all of the investments and property, either real, personal or mixed, which may be included in, or may at any time become part of the trust or estate upon such terms and conditions as the fiduciary, in his absolute discretion, may deem advisable, at either public or private sale, either for cash or deferred payments or other consideration, as such fiduciary may determine

A fiduciary who qualifies before the court accepts the powers and duties set forth in the will.³⁸ While the fiduciary may elect not to use the power to sell real estate, absent an order of the court, the fiduciary may not divest himself of that power. Therefore, the question arises how a fiduciary should report in his accounts real estate over which he has the power of sale, but which has passed by operation of law to the heirs or devisees.

Generally, Virginia commissioners will permit a fiduciary to show distribution of this real estate in his first account if it is his intention not to exercise the power of sale, even though an unexpected claim against the estate could require the fiduciary to do so.³⁹ As one commissioner put it to his peers: “[I]n most cases the fiduciary has no real connection with the real estate, and it never comes under his authority, supervision, or control, and it is never ‘distributed’ by him. And where it is never under his control to administer or distribute, I do not require him to account for it, and I do not allow him commission on it (subject to special circumstances), and I do not charge a COA fee on it.”

Note that this capacity to divest the account of the real estate asset has not affected the general ability of fiduciaries to pay real estate related debts and expenses

³⁷ *Broaddus v. Broaddus*, 144 Va. 727, 130 S.E. 794 (1925). See also *Estate of Hackler v. Hackler*, 44 Va. App. 51, 602 S.E.2d 426 (2004); *In re Estate of Trent*, 58 Va. Cir. 83 (2001).

³⁸ ESTATE AND TRUST ADMINISTRATION IN VIRGINIA § 3.202 (2nd ed. 2003).

³⁹ See VA. CODE ANN. § 64.1-181. See *Yamada v. McLeod*, 243 Va. 426, 416 S.E.2d 222 (1992); Harrison, WILLS AND ADMINISTRATION FOR VIRGINIA AND WEST VIRGINIA § 484 (3rd ed. 1986).

from the personal property of the estate, often shifting the beneficial interests in the estate from legatees of personal property to legatees of real property.⁴⁰ This doctrine has created controversies in the Virginia courts previously.⁴¹ The General Assembly has recently enacted a partial solution to the problem, prohibiting the exoneration of real estate debt upon parcels subject to a specific devise.⁴² It is likely that the legislative activity will spur additional litigation to define further the nature and extent of permitted expenditures upon real estate assets not otherwise a part of the probate estate.

Distributions to Beneficiaries

The commissioner's responsibility to protect those least able to protect themselves is most apparent in the supervision of distributions to the beneficiaries of the various estates. For this reason, in Fairfax there is a particular scrutiny on vouchers evidencing a distribution from the estate. Receipts are preferred to cancelled checks (although these are accepted as appropriate vouchers) and receipts are required where the voucher presented does not adequately demonstrate receipt of the distribution, such as in the case of brokerage account checks. Where there are inconsistencies in proportionate distribution, or unusual fees or costs, a statement of satisfaction from each beneficiary can assuage the commissioner's concerns.

Payment of Taxes

A commissioner also has responsibility to protect the Commonwealth and its tax receipts.⁴³ In Fairfax, the fiduciary is required to provide a tax certificate evidencing the fiduciaries due diligence in paying taxes due from the estate, including Federal and state estate taxes. A copy of the current Tax Certificate form is attached hereto as an exhibit. Where the estate is clearly subject to Federal estate taxes, the commissioner will also require evidence of the filing of Federal and Virginia estate tax returns, usually in the form of copies of the first three pages of the Federal return and a copy of the Virginia return.

Protection of Creditors

Finally, the commissioner has responsibility to protect creditors of the estate as well. The commissioner cannot approve a final account unless all claims against the estate have been resolved. Similarly, no fiduciary can file a statement in lieu of account

⁴⁰ See *French v. Vradenburg's Ex'rs*, 105 Va. 16, 52 S.E. 695 (1906).

⁴¹ See, e.g., *May v. May*, 210 Va. 584, 172 S.E.2d 717 (1970)(charging real estate with expenses); *In re Estate of George F. Griffith*, 1993 WL 946049 (Va. Cir. Ct. 1993)(criticizing estate administration where real estate expenses paid).

⁴² VA. CODE ANN. § 64.1-157.1.

⁴³ VA. CODE ANN. §§ 58.1-22; 58.1-911.

while a claim is outstanding. If the estate contests a claim, it is not sufficient to state that the estate does not agree with the claim. In order to contest the claim, the fiduciary must request a debts and demands hearing before the commissioner to give the claimant an opportunity to present his claim.⁴⁴ Either the fiduciary or the claimant can request a hearing before the commissioner.⁴⁵ The hearings before the Commissioner are generally conducted in an informal manner without rigid application of the rules of evidence or procedure. If a matter is complex or would benefit from a strict application of the rules, the Commissioner has the authority under Virginia Code § 64.1-171 to “direct the fiduciary or the claimant or either of them to institute a proceeding at law or in equity to establish the validity or invalidity of any claim or demand, which he deems not otherwise sufficiently proved.” After notice, including advertisement, and an opportunity to be heard, the commissioner shall determine the claim and file his report with the court. Such reports are to be filed within 60 days of the hearing.⁴⁶

Insolvent Estates and Statutory Allowances

If the estate is insolvent, the commissioner cannot approve disbursements to creditors which are not in compliance with the statutory priorities established in § 64.1-157 of the Virginia Code. Note that the statutory priorities make specific allowances for family, exempt property and homestead allowances, which have priority over all claims other than administrative expenses.⁴⁷ Statutory allowances entitled to priority in the disbursement of an estate are expenses of administration rather than debts of the decedent, and therefore, the allowances are entitled to priority over a federal tax lien.⁴⁸

The Virginia Code permits a family allowance up to the amount of \$18,000. Under § 64.1-151.4 of the Virginia Code, the personal representative has the obligation to establish a reasonable family allowance out of the money in the estate, not to exceed the statutory maximum of \$18,000. If a person is aggrieved by that determination, the sole recourse is to petition the circuit court for appropriate relief. Second, the exempt property allowance entitles the surviving spouse to value not exceeding \$15,000, in excess of any security interest therein, in the tangible personal property of the estate. If there is not sufficient personalty to make up the \$15,000, the claimant may receive other assets of the estate up to the maximum allowance amount. Finally, the surviving spouse is entitled to a homestead allowance of \$15,000; however, § 64.1-151.3 of the Virginia Code, which establishes the homestead allowance, states that “[t]he homestead allowance is in lieu of any share passing to the surviving spouse or minor children by the will of the decedent or

⁴⁴ See VA. CODE ANN. § 64.1-171.

⁴⁵ VA. CODE ANN. § 64.1-173.

⁴⁶ VA. CODE ANN. § 64.1-172.

⁴⁷ Va. Code Ann. §§ 64.1-151.1; 64.1-151.2 and 64.1-151.3.

⁴⁸ *Estate of Igoe v. U.S.*, 717 S.W.2d 524 (Mo. 1986). See IRM 5.17.13.3(6).

by intestate succession.” In other words, by taking the homestead allowance the spouse will no longer be permitted to share in the estate as an heir and the remaining balance in the estate will pass to the decedent’s creditors and remaining heirs at law.⁴⁹

Interest on claims is treated differently in solvent and insolvent estates. The general rule in the United States, including Virginia, is that interest continues to accrue on a decedent's debt after his death and it is a legitimate claim against the estate.⁵⁰ Thus, it is appropriate for a personal representative to continue to pay mortgage payments after the decedent's death, regardless of whether the real estate is a part of the estate.⁵¹ However, when an estate is insolvent, no interest is allowed on the claims.⁵² This is consistent with the adoption of the chancery rule in Virginia disallowing interest on any insolvent estate.⁵³

If the commissioner office receives claims filed against an estate which, in the aggregate, exceed the total value of the estate as reported in the inventory, the commissioner will give notice to the fiduciary that the commissioner cannot approve a final accounting for the estate unless distributions to the creditors are in accordance with a proper determination of the validity and priority of the claims against the estate. In such cases, the commissioner recommends that the fiduciary file an interim accounting as soon as practical and that he request a hearing on debts and demands to determine the validity and priority of the claims against the estate in accordance with Virginia Code § 64.1-157. Determination of priorities among competing claims is complex and “[a] personal representative who pays . . . creditors out of the order of preference fixed by statute is liable . . . no matter how honestly he may have acted, and no matter how solvent the estate may have appeared.”⁵⁴

The Final Account

The final account of a fiduciary is subject to special scrutiny. First, the fiduciary must distribute all of the remaining assets of the estate. The account must show a zero balance on hand. Second, the distributions to the beneficiaries must conform to the requirements of the will or the laws of descent and distribution, whichever are applicable. Thus, the fiduciary must address any disproportionate distributions made in prior accounts and the fiduciary must satisfy all specific bequests. Often events outside the probate record affect distributions. If corporate beneficiaries go out of existence or if individual beneficiaries pass away prior to probate of the

⁴⁹ See *Johnston v. Rosenthal*, 31 Va. Cir. 368 (1993).

⁵⁰ See, eg, *In re Reber's Estate*, 143 Pa. 308, 22 A 880 (1891); *Kentucky Title v. English*, 50 S.W. 2d 968 (Ky. 1899); 31 AM.JUR.2d *Executors and Administrators* §§ 652 and 673; UNIFORM PROBATE CODE § 3-805.

⁵¹ But see VA. CODE ANN. § 64.1-157.1 (denying exoneration if the property is the subject of a specific devise).

⁵² *Virginia Surety Co. v. Hilton*, 181 Va. 952, 27 S.E.2d 62 (1943)(interpreting the predecessor to § 64.1-170).

⁵³ *Greenbrier Joint Stock Land Bank v. Opie*, 165 Va. 334, 182 S.E. 255 (1935); See, e.g. *Swiss Re Life Co. v. Gross*, 253 Va. 139, 479 S.E.2d 857 (1997)(insolvent insurance company); *Metompin Bank v. Bronson*, 172 Va. 494, 2 S.E.2d 323 (1939)(insolvent banking institution).

⁵⁴ Harrison, WILLS AND ADMINISTRATION § 505 (3d ed. 1989); VA. CODE ANN. § 64.1-158.

will, these facts may not be apparent on the face of the probate record. A simple statement of facts attached to the final account can greatly assist in the review and approval of that account.

Fiduciary Compensation

Similarly, the commissioner has a duty to review fiduciary compensation. A copy of the current approved Fiduciary Fee Schedule is attached as an exhibit. In many cases, this compensation is cumulative over the life of the estate. A statement showing the total compensation of the fiduciary over the various accounts and the calculation of the allowable fiduciary fee is very helpful to the commissioner's office. Where a fiduciary believes the extraordinary nature of his task justifies greater compensation than the guidelines permit, it is always advisable to request approval of that compensation in advance of disbursement to avoid unnecessary embarrassment. Finally, note that under the fiduciary fee guidelines, attorney or accountant compensation for routine fiduciary duties is generally deducted from allowable fiduciary compensation. Professional fees for matters that a fiduciary cannot reasonably be expected to handle independently, such as court proceedings or tax preparation, will be allowed in addition to the fiduciary fee. If the total professional and fiduciary fees exceed the allowable fiduciary compensation, it is advisable to address these costs in advance with the commissioner to determine a fiduciary fee which the commissioner will approve.

Hearings Before the Commissioner

The commissioner of accounts conducts hearings in his office in Fairfax. Principally, these hearings relate to debts and demands, hearings pursuant to § 26-29 of the Virginia Code, or direct referrals from the circuit court. In addition, brief hearings are held to deal with expenditures of minors. The hearings before the Commissioner are generally conducted in an informal manner without rigid application of the rules of evidence or procedure. While the hearings are informal, the commissioner will require advocates to present testimony and exhibits in support of their positions and routinely will request briefs from counsel on complex issues of law.

As an example of the informality, one need not be a member of the Virginia Bar to participate in a hearing before the commissioner. One may find guidance in the provisions of § 26-29, concerning general objections to accounts, which states that an interested party or any person who "appears as next friend for another interested in any such account" may present matters to the Commissioner.⁵⁵ Thus, the statutory scheme contemplates non-legal representatives of interested parties addressing matters before the Commissioner. While the concept of next friend generally refers to those unable to

⁵⁵ See Harrison, *WILLS AND ADMINISTRATION IN VIRGINIA AND WEST VIRGINIA* § 530(4) (3rd ed. 1989).

present matters on their own behalf,⁵⁶ it clearly contemplates non-legal representatives acting on behalf of interested parties before the Commissioner.

Hearings upon debts and demands are set out in the Virginia Code and well-established.⁵⁷ Hearings pursuant to an order of reference from the circuit court are limited to the issues referred to the commissioner and are usually limited to certain explicit questions which the court wishes answered. Hearings pursuant to § 26-29 of the Virginia Code are less well-defined and more open-ended.

Generally, a hearing pursuant to § 26-29 may encompass “anything which could be insisted upon or objected to by [an interested party] if the commissioner were acting under an order of a circuit court.” As the language implies, the principal constraint upon a hearing pursuant to § 26-29 is that the matter not be the subject of a suit pending in which the Court could refer the matter to the Commissioner. If the Commissioner were to hold a hearing on matters properly before the Court without such a referral, it would require substantial effort on behalf of all the litigants, only to be subject to the independent, identical and authoritative review of the Court when it conducts its own evidentiary hearing. Such a result is contrary to the principles of judicial economy.

The commissioner prepares his report after the hearing and receipt of any subsequent briefs. The commissioner’s fee for the preparation of the report is based upon the time required and the complexity of the issues presented. As noted above, the Virginia Code requires that a debts and demands report be prepared within sixty days of the hearing.⁵⁸ While the other proceedings are not subject to the same statutory requirements, the commissioner makes an effort to issue his reports within that sixty day time period.

Pursuant to § 26-32 of the Virginia Code, a commissioner’s report will stand confirmed by law fifteen days after the report has been filed with the court in the absence of any objections being filed thereto. If the parties file exceptions to the report, the circuit court hears those exceptions and has plenary authority to accept or reject the findings and conclusions of the commissioner.⁵⁹

⁵⁶ Jackson v. Counts, 106 Va. 7, 54 S.E. 870 (1906).

⁵⁷ See VA. CODE ANN. § 64.1-171.

⁵⁸ VA. CODE ANN. § 64.1-172.

⁵⁹ *Morris v. United Virginia Bank*, 237 Va. 331, 377 S.E.2d 611 (1989). *Cf. Morrill v. Morrill*, 45 Va. App. 709, 613 S.E.2d 821 (2005)(review of recommendations of commissioner in chancery).

Short Takes.

Statement in Lieu of Settlement of Account

In some cases the personal representative is permitted to file a short form account known as the Statement in Lieu of Settlement of Accounts. Generally, (1) if all the residual beneficiaries under the will or all intestate distributees also qualify as personal representatives of the estate, whether or not others may also qualify as personal representative in addition to such beneficiaries, and (2) if there are assets in excess of all debts and taxes which may be due, the personal representative is eligible to file a Statement in Lieu.⁶⁰ The fiduciary must still provide a tax certificate and receipts for specific bequests. fiduciary is not eligible to file a Statement in Lieu if there is an outstanding claim against the estate or if the residuary beneficiary is a trust rather than the fiduciary, notwithstanding that the fiduciary may also be the sole beneficiary of the trust.

Note that the Statement in Lieu of Settlement of Account form requires those signing to state under oath that they are the only distributees or residuary beneficiaries of the decedent's estate. Unrelated fiduciaries who have qualified with the heirs have expressed some concern about those statements as the unrelated fiduciary is not an heir. Nevertheless, the Code requires that all fiduciaries sign the Statement in Lieu of Settlement of Account.⁶¹ In Fairfax, the commissioner will accept a separate statement under oath from the unrelated fiduciary otherwise conforming to the Statement in Lieu form but omitting the representation that the unrelated fiduciary is an heir.

Incapacitated Adults

In most cases, the court conditions orders appointing conservators "so as to permit the incapacitated person to care for himself and manage property to the extent he is capable."⁶² Thus, the commissioner must have some flexibility in approving the use of the ward's funds. Generally, in Fairfax the commissioner will permit the conservator to provide a reasonable sum to the ward for cash expenditures for which vouchers and receipts will not be strictly required; however, the conservator should be guided by the factors relating to gifts from the estate, to the extent relevant, in determining the amount of such an allowance. These factors are set forth in § 37.2-1024.A of the Virginia Code as follows:

- (i) the size and composition of the estate; (ii) the nature and probable duration of the incapacity; (iii) the effect of the gifts or disclaimers on the estate's financial ability to meet the incapacitated person's foreseeable health, medical care, and

⁶⁰ VA. CODE ANN. § 26-20.1.

⁶¹ VA. CODE ANN. § 26-17.3.

⁶² VA. CODE ANN. § 37.2-1009.

maintenance needs; (iv) the incapacitated person's estate plan; (v) prior patterns of assistance or gifts to the proposed donees; (vi) the tax effect of the proposed gifts or disclaimers; (vii) the effect of any transfer of assets or disclaimer on the establishment or retention of eligibility for medical assistance services; and (viii) other factors that the court may deem relevant.

In any event, the total amount of these expenditures should not exceed the aggregate annual gift restriction of \$500 contained in § 37.2-1024.B. The commissioner prefers, but will not strictly require upon a showing of good cause, that receipts be provided for individual expenditures of more than \$25.00.⁶³ Of course, reasonable expenditures which are supported by receipts or vouchers would not fall within these limitations.

Sale of Real Estate

The commissioner is often called upon to review and approve the proposed sale of real estate by a minor's guardian or by a conservator. The scope of that review is generally set forth in the order appointing the guardian or conservator.⁶⁴ In those cases in which the clerk of the court appoints a guardian of a minor who owns real estate, the commissioner is required to set forth the conditions under which the sale of that real estate would be approved.⁶⁵ As the requirements that the court imposes and those which the commissioner has established are generally similar, attached as an exhibit is a copy of the Notice to Guardians of Minors Who Own Real Estate currently in effect in Fairfax. Generally, the commissioner is seeking evidence of the necessity of the sale, the value of the property, and the terms of the proposed sale. Where, as in the current environment, real estate values are unstable and diminishing, additional evidence is generally required to explain sales prices which are significantly lower than prior sales or assessed value. In light of the time constraints on most real estate transactions, the commissioner's office makes every effort to reply promptly to requests for approval of a real estate sale.

Testamentary Trusts and the Uniform Trust Code

Although Virginia has adopted the Uniform Trust Code,⁶⁶ its application to testamentary trusts is expressly limited. § 55-541.02 of the Uniform Trust Code states "This chapter also applies to testamentary trusts, except to the extent that specific provision is made for them in Title 26 or elsewhere in the Code of Virginia, or to the extent it is clearly inapplicable to them." Thus, whether specific provisions of the Uniform Trust Code are applicable to testamentary trusts is a matter of interpretation.

⁶³ Cf. Va. Code Ann. § 26-17.9.

⁶⁴ See, e.g., VA. CODE ANN. § 32.1-1023.B

⁶⁵ VA. CODE ANN. § 31-14.1.B.

⁶⁶ VA. CODE ANN. §§ 55-541.01 *et seq.*

As an example, the Uniform Trust Code permits a trustee to resign upon 30 days' written notice to all co-trustees and qualified beneficiaries.⁶⁷ The court appoints testamentary trustees and requires the trustee to qualify before serving.⁶⁸ It has been the established practice from many years in Virginia probate proceedings that a fiduciary, including a testamentary trustee, may not resign without leave of court.⁶⁹ The issue presented is whether the enactment of the Uniform Trust Code changed the long-standing requirement that testamentary trustees must seek leave of court to resign. In Fairfax, it is the opinion of the commissioner that the alternate procedure for resignation of a trustee upon written notice is not applicable to testamentary trustees as there is a specific provision made for such resignation in Title 26 at § 26-46. Even if the Uniform Trust Code were deemed to permit testamentary trustees to resign by written notice, § 55-547.05 of the Virginia Code provides that “[a]ny liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.”

On the other hand, the Uniform Trust Code provides that the trustee may terminate an uneconomic trust if the assets are less than \$100,000.⁷⁰ Prior to enactment of the Uniform Trust Code, under § 8.01-606 of the Code of Virginia, if a person was due funds in the amount of \$15,000 or less, the commissioner routinely exercised the authority to direct the payment of those funds to the persons entitled to those amounts without the intervention of a fiduciary. Similarly, under § 31-42 of the Virginia Code, a fiduciary may make a distribution for a minor directly to an UMTA account even in the absence of authority in the will or trust. This statutory provision is limited to a distribution of \$10,000 absent Court approval. Under § 31-41 of the Virginia Code, a fiduciary may make a distribution for a minor directly to an UMTA account in any amount if expressly authorized in the will or trust. Under § 64.1-57(p), a fiduciary is authorized to transfer funds in any amount to an UMTA account for a beneficiary who is a minor or under a disability. Under § 64.1-180.1, a commissioner is authorized to approve such distributions without regard to amount or value. Thus, the provisions of the Uniform Trust Code concerning termination of small trusts appear consistent with prior statutory authority, notwithstanding the substantial increase in amount and limited oversight. Thus, in Fairfax, the commissioner will approve the termination of a testamentary trust of \$100,000 or less pursuant to § 55-544.14 of the Virginia Code. This is not the general rule in other circuits in Virginia.

⁶⁷ VA. CODE ANN. § 55-547.05.A.1

⁶⁸ VA. CODE ANN. § 26-46.1.

⁶⁹ See VA. CODE ANN. § 26-46.

⁷⁰ VA. CODE ANN. § 55-544.14.

Trust Termination and Distributions to Minors

In many cases, executors required to fund testamentary trusts and trustees of those trusts seek ways to provide alternate administration of these trust funds. In addition, where the will calls for direct distribution to minor children, executors also seek alternatives to the appointment of guardians for the minors. The commissioner's office can assist in several ways. Under § 31-41 of the Virginia Code, a fiduciary may make a distribution for a minor directly to an account established pursuant to the Virginia Uniform Transfers to Minors Act ("VUTMA")⁷¹ in any amount if expressly authorized in the will or trust. Similarly under § 64.1-57(p) of the Virginia Code, a fiduciary is authorized to transfer funds in any amount to a VUTMA account for a beneficiary who is a minor or under a disability. Under § 64.1-180.1, a commissioner is authorized to approve such distributions without regard to amount or value.

In the absence of authority in the will or trust, if the trust is for the benefit of minor children or the distribution is direct to the minor, under § 31-42 of the Virginia Code, a fiduciary may make a distribution for a minor to a VUTMA account. However, the statutory provision is limited to a distribution of \$10,000 absent Court approval. A commissioner of accounts has authority to approve such a transfer in an amount up to \$15,000 under the provisions of § 8.01-606 of the Virginia Code. In Fairfax, the commissioner will permit the direct disbursement to a VUMTA account where a testamentary trust is created solely for beneficiaries who are minor, either under § 8.01-606 or using § 64.1-57(p) where both the executor and the trustee concur.

Conduit Transactions

If the will of a widow or widower establishes a testamentary trust for the benefit of the deceased spouse and payable to the children upon the death of the spouse, a distribution to that testamentary trust serves only as a conduit for further disbursement of funds. In such circumstances, it is not the policy of the commissioner's office to require needless acts which provide no substantive benefit to the estate or the heirs. If the executor and the trustee concur that the trust would be terminated immediately if funded, the commissioner will not require the qualification of the trustee and the funding of the trust solely for purposes of form. Upon the written requests of the executor and the trustee, the commissioner will waive the funding of the trust and the qualification of the trustee.

Parental Guardians and Expenditures of a Minor's Funds

The legal guardian of a minor's estate is not to make any distributions of income or principal to or for a minor ward who has a living parent, unless the court finds that the parent is unable to completely fulfill his or her duty of support, or finds the distribution is

⁷¹ Va. Code Ann. § 31-37 *et seq.*)

beyond the scope of parental duty of support.⁷² The commissioner has concurrent jurisdiction with the court to approve annual expenditures of \$3,000 or less.⁷³ § 31-8.2 of the Virginia Code requires that the commissioner give five days' written notice of a scheduled hearing date to any minor who is fourteen years of age or older.

Foreclosure Accounts

Foreclosure accounts are required to be filed within six months of the actual sale.⁷⁴ With the current volume of foreclosures, most trustees handling a number of foreclosures are filing their accounts at the last possible moment. This has led to many questions concerning the payment of interest to the foreclosing lender and subordinate creditors after the date of sale. Generally the effect of a foreclosure sale is to terminate the rights of the lender in the mortgaged property. Subsequent to that sale, any interest that the lender may claim is limited to the proceeds of sale and not to the property. Similarly, the foreclosure sale ends the lien upon the property sold and the lender's right to recover further value therefrom. Subsequent to the sale, the mortgagee may not look to the property for the payment of any portion of the mortgage debt.

In Virginia, interest is generally allowed to the date of sale, not to the date of closing.⁷⁵ The adjustment of interest as of the date of sale is based upon the rule that the foreclosure sale is effective when the auction occurs, not at the subsequent closing upon that sale. In the leading case of *In re Rolen*,⁷⁶ the Bankruptcy Court had occasion to examine Virginia law to determine the effective date of a foreclosure sale. The court stated, "Virginia law appears conclusive on this point. In a sale by a trustee under a Deed of Trust, the sale is complete when the trustee knocks the land down to the bidder, makes a memorandum of the sale and its terms, and signs the same."⁷⁷ Based upon the effective date of the foreclosure sale, the accrual of interest payable from the foreclosure proceeds should end upon the date of sale.

In the category of traps for the unwary, trustees selling property in Fairfax County were faced with real challenges in placing advertisements for foreclosure sales. In October, 2006, the Circuit Court of Fairfax determined that a newspaper without paid circulation is not a newspaper of general circulation, notwithstanding what its actual circulation may be.⁷⁸ Under this analysis, the *Washington Examiner* was expressly

⁷² VA. CODE ANN. § 31-8.1.

⁷³ VA. CODE ANN. § 31-8.2.

⁷⁴ Va. Code Ann. § 26-15.

⁷⁵ See, e.g., MANUAL FOR COMMISSIONERS OF ACCOUNT at § 16.406.

⁷⁶ 39 B.R. 260 (W.D. Va. 1983).

⁷⁷ 39 B.R. at 264.

⁷⁸ *In re Washington Newspaper Pub. Co., Inc.*, 72 Va. Cir. 186 (October 24, 2006), *rehearing denied* 2006 WL 3157657 (October 26, 2006).

prohibited from publishing legal notices in Fairfax County effective December 15, 2006. In response, the *Washington Examiner* made arrangements for concurrent publication of its notices in the *Falls Church News Press*, which has a small paid circulation that meets the strict legal requirements for advertisement in a newspaper of general circulation in the county under §§ 8.01-323, 8.01-324, and 55-59.2 of the Virginia Code. As the *Washington Examiner* has a substantially greater circulation in Fairfax County, it was the opinion of the commissioner that advertisement in both publications provided greater assurance of a fair sale. Therefore, the commissioner requested that the *Washington Examiner* provide certification of advertisement to the trustee in both the *Examiner* and the *Falls Church News Press*. The *Washington Examiner* went to the legislature and had § 8.01-324 amended to eliminate the requirement of a list of paid subscribers. On July 31, 2007, the Circuit Court entered an order reinstating the *Washington Examiner* effective July 2, 2007.

Enforcement Proceedings

If a fiduciary fails to comply with his statutory duties, the commissioner is charged with responsibility to enforce the performance of those duties.⁷⁹ In most cases, the commissioner will provide a final written notice to the fiduciary that enforcement proceedings will commence absent compliance with his statutory duties. In egregious situations or well-established instances of non-compliance, the commissioner may omit the written notice.

To enforce compliance, the commissioner first issues a summons requiring the fiduciary to act within 30 days. The summons is formally served upon the fiduciary. If the fiduciary still does not comply, the summons is reported to the court and if the fiduciary summoned is a licensed Virginia attorney, the commissioner must also mail a copy of the report to the Virginia State Bar.⁸⁰ The commissioner then applies to the court for issuance of a rule to show cause against the fiduciary. Again, this motion is served upon the fiduciary. If the court issues the rule to show cause, a return date is established and the rule to show cause is served upon the fiduciary. Generally the court prefers personal service of the rule. At the return of the rule, the court has the full authority of its contempt power to enforce compliance. Although rare, the judges of the Circuit Court of Fairfax have been known to incarcerate recalcitrant fiduciaries if the fiduciary does not show a sincere intent to meet his statutory duties. If the fiduciary fails to appear on the return date for the rule to show cause and personal service has been made upon the fiduciary, the court will generally issue a *capias* for the arrest of the fiduciary, to be held until the court can hear the matter. The *capias* will usually set a

⁷⁹ See VA. CODE ANN. § 26-13. See also VA. CODE ANN. §§ 26-15, 26-18, and 64.1-122.2

⁸⁰ VA. CODE ANN. § 26-13.

bond amount for the fiduciary to be released from custody pending the hearing. In the experience of this commissioner, these measures are more than sufficient to enforce the probate system in Virginia.

The Short Arm of the Commissioner of Accounts

The commissioner has no authority to require any fiduciary to qualify with the court; the commissioner has “a general supervision of all fiduciaries *admitted to qualify in such court* or before the clerk thereof and make all ex parte settlements of their accounts.”⁸¹ Thus, absent qualification before his court, the commissioner has no role in the administration of a trust or estate.

The Fairfax commissioner was presented with a true test of this doctrine in 2006, when a large corporate trustee sought an opinion whether it was required to qualify before the circuit court and to file accounts with the commissioner. The commissioner responded, but noted that his opinion was advisory only and that should the trustee desire a definitive opinion on the issue, it would be necessary to petition the circuit court.

The trust had been established in a will probated in another state in 1947. In 1996, the probate court in that state changed the *situs* of the trust to Fairfax County, Virginia. A trust which has its principal place of administration in or moves its principal place of administration to Virginia is subject to the jurisdiction of the Virginia courts regarding any matter involving the trust.⁸² In the absence of a controlling designation in the trust, the trust is subject to and governed by Virginia law.⁸³

The Uniform Trust Code states that no trust is subject to continuing judicial supervision except as provided in Title 26 of the Virginia Code.⁸⁴ Thus, the determination whether the trustee must qualify with the court is governed by the provisions of Title 26 of the Virginia Code. Section 26-1.1 of the Virginia Code requires a trustee appointed under a deed or other writing to qualify with the court if the deed or other writing requires such qualification. That section also permits a trustee to qualify voluntarily if the trustee chooses to do so. By its terms, that section does not apply to testamentary trusts such as the trust in question.

Section 26-46.1 of the Virginia Code permits the court or its clerk to qualify any trustee named in a will, deed or other instrument. Section 26-46.2 of the Virginia Code provides

⁸¹ VA. CODE ANN. § 26-8.

⁸² VA. CODE ANN. § 55-542.02.

⁸³ VA. CODE ANN. § 55-542.07.

⁸⁴ VA. CODE ANN. § 55-542.01.

Every trustee named in a will probated after July 1, 1968, before proceeding to act thereunder, shall qualify and give bond before the proper court or clerk thereof.

Thus, Virginia generally requires that trustees named in a will probated in Virginia qualify before the court.⁸⁵ That section also provides that “if the will is the will of a non-resident, and has not been admitted to probate, then the trustee or trustees thereunder shall be permitted to qualify in any jurisdiction in which the will could be probated” It appears under Virginia law that the trustees named in a will probated outside Virginia are permitted to qualify before Virginia courts but are not required to do so.

Under former § 26-64 of the Virginia Code, which was repealed upon enactment of the Uniform Trust Code, Virginia permitted transfer of trust assets to nonresident trustees “appointed by some court of record in the state in which the beneficiaries reside or to a nonresident individual named in the instrument creating such trust who has qualified before some court of record in the state in which such named trustee resides.” Former § 26-65 of the Virginia Code, also repealed upon enactment of the Uniform Trust Code, required that the nonresident trustee to whom such transfer was to be made give bond with surety as a condition of the transfer. Thus, under the former Virginia provisions governing transfer of trust assets, Virginia directed the qualification of nonresident trustees as a condition of the transfer. Under present § 55-541.08 of the Virginia Code, the court may transfer “the principal place of administration of a testamentary trust to another state . . . upon such conditions, if any, as it may deem appropriate.” Thus, under Virginia law, the determination whether a trustee must qualify in a state outside Virginia is within the discretion of the Virginia court.

The Court of Appeals of Texas was asked to approve a transfer of a testamentary trust from Virginia to Texas. The court declined to act, holding that “the Virginia courts have exclusive jurisdiction to determine the qualification of this Virginia testamentary trust.”⁸⁶ This determination is consistent with provisions of the Uniform Trust Code, now Virginia law, that grant discretion to the courts in which the trust has its principal place of administration to condition the transfer of trust as the court deems appropriate.

⁸⁵ In the context of this section, it is my judgment that “probated” means “admitted to probate in this Commonwealth” as stated in the beginning of the section. If read otherwise, the provisions of the section do not make sense. For instance, trustees under a nonresident’s will that “has not been admitted to probate” would include trustees under the will of a still-living testator if probate is read to include all jurisdictions. This section was first enacted in 1964. The amendment in 1968 related to the requirements for surety on the bond of the trustees. *See In re Johnson*, 1982 WL 215254. The will was first probated in another state in 1947. Had that probate occurred in Virginia, the trustee may not have been required to qualify under Virginia law in effect in 1947; however, the transfer of the situs of the trust to Virginia and the first administration of the trust in Virginia both occurred in 1996. It is my opinion that the trust became subject to the laws of Virginia in effect in 1996 and that qualification must be determined as of the date of such transfer rather than the date of the original probate in a different jurisdiction.

⁸⁶ *Rosenberg v. Bank of America*, 2003 WL 182467.

In the instant case, the will was admitted to probate in another state. The trustee of the Residuary Trust qualified in that state. The courts of that state appointed and qualified substitute trustees over the years as appropriate. The trustees submitted their accounts to that state for approval and audit in accordance with that state's law. When that state's court changed the situs of the trust to Fairfax County, Virginia and appointed a new corporate co-trustee resident in Virginia, the court had the opportunity to require that the trustees qualify in Virginia as a condition of such transfer of *situs*. The court did not do so. It is my opinion that absent a statute to the contrary, the courts of the state in which a will is probated have the exclusive jurisdiction to determine the qualification of testamentary trustees appointed in that will. As that state court did not require the trustees of the Residuary Trust to qualify in Virginia upon transfer of the *situs* of the trust, it is my opinion that Virginia does not have the requisite jurisdiction to require such qualification as a result of the transfer independent of the courts of the state in which the will is probated.

TAX CERTIFICATE TO ACCOMPANY FIDUCIARY ACCOUNTS

To: Commissioner of Accounts
Circuit Court of Fairfax County, Virginia
10555 Main Street, Suite 500
Fairfax, Virginia 22030

Re: Estate of _____ Fiduciary No. _____

The undersigned fiduciary/fiduciaries of the above-referenced estate ("Estate") does/do hereby certify, under penalty of perjury, that the foregoing is true and correct to the best of the knowledge of the undersigned:

1. The undersigned has read and reviewed the sections of the Code of Virginia on the reverse side of this Tax Certificate to Accompany Fiduciary Accounts.
2.
 - (a) All taxes pertaining to the Estate have been paid; or,
 - (b) All taxes pertaining to the Estate have been paid to the extent ascertainable after personal inquiry of the Virginia Department of Taxation and the Director of Tax Administration, Fairfax County, Virginia, or the Commissioner of Revenue of the City of Fairfax, Virginia, as may be appropriate based upon the residence of the decedent; or,
 - (c) There remains in the possession of the undersigned a sufficient sum, over and above the charges of administration, to pay all taxes charged against the undersigned in the undersigned's fiduciary capacity; or,
 - (d) The Estate is insolvent and the debts of the decedent were paid in accordance with existing statutes made and provided for such instances.
3. Under the laws of the United States and the Commonwealth of Virginia, all required federal and Virginia estate tax returns have been filed. All federal and Virginia estate taxes imposed upon the property of the Estate have been paid in full or no such tax is due.

Fiduciary Name and Title: _____
(Please Print)

Date: _____
(Signature)

Fiduciary Name and Title: _____
(Please Print)

Date: _____
(Signature)

Excerpts from the 1950 Code of Virginia, as amended, relating to the duties of the Commissioner and the fiduciary with regard to the payment of taxes:

§ 58.1-22. Accounts not to be settled until taxes paid or provided for.

No commissioner of accounts shall, under § 26-32, file any report of an account of the transactions of any fiduciary not governed by § 58.1-911 until the commissioner finds that all taxes, whether state, county or city, assessed and chargeable upon property in the hands of the person for whom such account is settled have been paid or unless such account shall show that there remains in the hands of such person a sufficient sum, over and above the charges of administration, to pay all taxes charged against such person in his capacity as fiduciary.

§ 58.1-23. Inquiries required of fiduciaries.

Every personal representative, before settling the estate in his hands, shall make inquiry of the treasurer of the county or city wherein the decedent last resided and of the Department with respect to any unpaid taxes and levies assessed against his decedent.

§ 58.1-911. Final account.

No final account of a personal representative shall be approved by a commissioner of accounts unless the commissioner finds that all state, county or city taxes assessed and chargeable upon property in the hands of a personal representative have been paid. No final account of a personal representative who is required to file a federal estate tax return shall be approved by the commissioner of accounts unless the commissioner finds that the tax imposed on the property by this chapter, including applicable interest, has been paid in full or that no such tax is due.

Tax inquiries may be made to:

<p>Commonwealth of Virginia:</p> <p>Virginia Department of Taxation Office of Customer Services Post Office Box 1115 Richmond, VA 23218-1115 804-367-8031 www.tax.virginia.gov</p>	<p>Internal Revenue Service:</p> <p>1-800-829-1040 (Local Office) 5205 Leesburg Pike Baileys Crossroads, VA 22041 (703) 756-6663 www.irs.gov</p>
<p>County of Fairfax:</p> <p>Department of Tax Administration Fairfax County Government Center, Suite 223 12000 Government Center Parkway Fairfax, Virginia 22035 703-222-8234 www.fairfaxcounty.gov/dta/</p>	<p>City of Fairfax:</p> <p>Commissioner of the Revenue 10455 Armstrong Street City Hall - Room 210 Fairfax, VA 22030-3649 703-385-7880 www.fairfaxva.gov/Taxes/Taxes.asp</p>



John H. Rust, Jr.
Commissioner of Accounts

COMMONWEALTH OF VIRGINIA
CIRCUIT COURT OF FAIRFAX COUNTY
Office of the Commissioner of Accounts
THE FAIRFAX BUILDING
10555 Main Street, Suite 500
Fairfax, Virginia 22030
703-667-4900



Joseph A. Barsanti
Deputy Commissioner

**FIDUCIARY COMPENSATION SCHEDULE
FOR EXECUTORS AND ADMINISTRATORS**

Virginia Code Section 26-30 allows a “reasonable compensation” to an Executor or Administrator for services rendered in the administration of an estate. There is no specific definition of “reasonable compensation”, but the Commissioner, in the absence of unusual circumstances, will allow a fee based upon the following:

1. Income – 5% of income receipts (not including capital gains) realized during each accounting period.

2. Principal – A fee based upon the inventory value, including amended inventories, of the decedent’s probate assets in accordance with the following schedule:

First \$400,000.00	5%
Next \$300,000.00	4%
Next \$300,000.00	3%
Balance over \$1,000,000.00	2%
Balance over \$10,000,000.00	By agreement with the Commissioner (prior consultation is required)

3. Special Rules

a. Where the will clearly sets out compensation in a specific dollar amount or a specific percentage that the Executor is to receive, the will controls, and the Executor is entitled to the amount set out.

b. Where the will states that the Executor shall receive for services the compensation set out in a referenced published fee schedule in effect at the time such services are rendered, fees as set out in the fee schedule shall be presumed to be reasonable, as that term is used in §26-30. The burden of persuading the Commissioner that fiduciary compensation taken according to such a fee schedule is not reasonable would be on an objecting party. The ultimate responsibility of determining the reasonableness of the compensation rests with the Commissioner.

c. Where the will is silent as to the Executor’s compensation, if the Executor (corporate or otherwise) uses a published fee schedule to determine compensation, the other guidelines set out herein apply. There is, however, no presumption that such a published fee schedule is not reasonable.

d. Where all parties affected by the amount of compensation are (i) competent to contract (ii) understand the issues involved (ie., can give “informed consent”) and (iii) agree in writing as to the amount of the compensation to be paid, then the agreement should be honored by the Commissioner.

e. The value of real estate will be included as property in the decedent’s probate estate for compensation purposes only if the Executor is given the power to sell real estate and (i) is instructed to sell real estate in the will, or (ii) is requested to sell real estate by all affected beneficiaries or devisees, or (iii) is required to sell real estate to pay taxes and other charges against the estate, or (iv) the Commissioner determines that such sale is clearly in the best interest of the devisees or beneficiaries as a whole.

f. Where the Executor or Administrator hires an attorney or accountant to perform the routine duties of the Executor or Administrator, those fees shall be deducted from the compensation due the Executor or Administrator. This does not apply to fees paid to attorneys or accountants for professional services necessary for

the orderly administration of the estate. The reasonable expense of such services will be allowed in addition to the fiduciary fee.

g. If the Executor employs an investment advisor, the advisor's fees, if reasonable, should generally not be deducted from the Executor's compensation.

h. As a general rule, an Executor or Administrator is not allowed compensation based on the value of non-probate assets. The Commissioner may allow such compensation in circumstances where it is necessary for the Executor or Administrator to assume some responsibility for the asset. The Executor or Administrator is advised to make separate compensation arrangements with the beneficial owners of non-probate assets.

i. Where there are co-fiduciaries, generally, one fee will be divided equally among them. The co-fiduciaries may agree among themselves on a different division. In case of a dispute concerning the division of the fee, the Commissioner may hold a hearing to resolve the dispute.

j. Where there are successor fiduciaries, compensations shall be based on the guidelines, but the Commissioner shall determine the amount to be allowed based on all factors concerning the estate. More than one full compensation fee may be allowed, if the Commissioner determines this to be appropriate.

k. The Commissioner may reduce the compensation allowable by these guidelines in exceptional circumstances, e.g. a very large estate requiring relatively little work.

l. The Commissioner may increase the allowable compensation in exceptional circumstances upon the request of the Executor or Administrator. Factors to be considered would be the nature of the assets, the character of the work, the difficulties encountered, the time and expertise required, and the results obtained.

4. Endnotes

a. Executors or Administrators do not have to wait to take their compensation until the estate is closed; however, the time of taking should bear some relationship to the expected life of the estate, the work already done, and the work remaining to be done.

b. Nothing in these guidelines is intended to alter any statute concerning fiduciary compensation. For instance, fiduciary compensation may be forfeited if a proper account is not timely filed.

John H. Rust, Jr.
Commissioner of Accounts

Joseph A. Barsanti
Deputy Commissioner of Accounts



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Deputy Commissioner

FIDUCIARY COMPENSATION SCHEDULE
FOR TRUSTEES

Virginia Code Section 26-30 allows a “reasonable compensation” to a Trustee for services rendered in the administration of a trust. There is no specific definition of “reasonable compensation”, but the Commissioner, in the absence of unusual circumstances, will allow a fee based upon the following:

1. **Total Assets at Beginning of Accounting Period** – An annual compensation based upon the market value of the trust assets brought forward from the Inventory or prior account in accordance with the following schedule:

First \$500,000.00	1% (.01)
Next \$500,000.00	¾ of 1% (.0075)
Balance over \$1,000,000.00	½ of 1% (.005)
Balance over \$10,000,000.00	By agreement with the Commissioner (prior consultation is required)

2. **Special Rules**

- a. Where the required accounting is for a period of less than one year, the compensation should be pro-rated.
- b. Where the will clearly sets out compensation in a specific dollar amount or a specific percentage that the Trustee is to receive, the will controls, and the Trustee is entitled to the amount set out.
- c. Where the will states that the Trustee shall receive for services the compensation set out in a referenced published fee schedule in effect at the time such services are rendered, fees as set out in the fee schedule shall be presumed to be reasonable, as that term is used in §26-30. The burden of persuading the Commissioner that fiduciary compensation taken according to such a fee schedule is not reasonable would be on an objecting party. The ultimate responsibility of determining the reasonableness of the compensation rests with the Commissioner.
- d. Where the will is silent as to the Trustee’s compensation, if the Trustee (corporate or otherwise) uses a published fee schedule to determine compensation, the other guidelines set out herein apply. There is, however, no presumption that such a published fee schedule is not reasonable.
- e. Where all parties affected by the amount of compensation are (i) competent to contract (ii) understand the issues involved (ie., can give “informed consent”) and (iii) agree in writing as to the amount of the compensation to be paid, then the agreement should be honored by the Commissioner.

f. Where the Trustee hires an attorney or accountant to perform the routine duties of the Trustee, those fees shall be deducted from the compensation due the Trustee. This does not apply to fees paid to attorneys or accountants for professional services necessary for the orderly administration of the trust. The reasonable expense of such services will be allowed in addition to the fiduciary fee.

g. If the Trustee employs an investment advisor, the advisor's fees, if reasonable, should generally not be deducted from the Trustee's compensation.

h. Where there are co-fiduciaries, generally, one fee will be divided equally among them. The co-fiduciaries may agree among themselves on a different division. In case of a dispute concerning the division of the fee, the Commissioner may hold a hearing to resolve the dispute.

i. Where there are successor fiduciaries, the annual compensations shall be pro-rated.

j. The Commissioner may reduce the compensation allowable by these guidelines in exceptional circumstances, e.g. a very large trust requiring relatively little work.

k. The Commissioner may increase the allowable compensation in exceptional circumstances upon the request of the Trustee. Factors to be considered would be the nature of the assets, the character of the work, the difficulties encountered, the time and expertise required, and the results obtained.

3. **Endnote**

Nothing in these guidelines is intended to alter any statute concerning fiduciary compensation. For instance, fiduciary compensation may be forfeited if a proper account is not timely filed.

John H. Rust, Jr.
Commissioner of Accounts

Joseph A. Barsanti
Deputy Commissioner of Accounts



John H. Rust, Jr.
Commissioner of Accounts

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Fairfax, Virginia 22030
703-667-4900



Joseph A. Barsanti
Deputy Commissioner

FIDUCIARY COMPENSATION SCHEDULE FOR CONSERVATORS FOR INCAPACITATED ADULT

Virginia Code Section 26-30 allows a “reasonable compensation” to a Conservator for services rendered in the administration of a conservatorship. There is no specific definition of “reasonable compensation”, but the Commissioner, in the absence of unusual circumstances, will allow a fee based upon the following:

1. Total Assets at Beginning of Accounting Period – An annual compensation based upon the market value of the conservatorship assets brought forward from the Inventory or prior account in accordance with the following schedule:

First	\$500,000.00	1% (.01)
Next	\$500,000.00	¾ of 1% (.0075)
Balance over	\$1,000,000.00	½ of 1% (.005)
Balance over	\$10,000,000.00	By agreement with the Commissioner (prior consultation is required)

2. Income – An additional fee of 5% shall be allowed on non-investment income received during the account period.

3. Special Rules

a. Where the required accounting is for a period of less than one year, the compensation should be prorated.

b. Where the will clearly sets out compensation in a specific dollar amount or a specific percentage that the Conservator is to receive, the will controls, and the Conservator is entitled to the amount set out.

c. Where the will states that the Conservator shall receive for services the compensation set out in a referenced published fee schedule in effect at the time such services are rendered, fees as set out in the fee schedule shall be presumed to be reasonable, as that term is used in §26-30. The burden of persuading the Commissioner that fiduciary compensation taken according to such a fee schedule is not reasonable would be on an objecting party. The ultimate responsibility of determining the reasonableness of the compensation rests with the Commissioner.

d. Where the will is silent as to the Conservator’s compensation, if the Conservator (corporate or otherwise) uses a published fee schedule to determine compensation, the other guidelines set out herein apply. There is, however, no presumption that such a published fee schedule is not reasonable.

e. Where all parties affected by the amount of compensation are (i) competent to contract (ii) understand the issues involved (ie., can give “informed consent”) and (iii) agree in writing as to the amount of the compensation to be paid, then the agreement should be honored by the Commissioner.

f. Where the Conservator hires an attorney or accountant to perform the routine duties of the Conservator, those fees shall be deducted from the compensation due the Conservator. This does not apply to fees paid to attorneys or accountants for professional services necessary for the orderly administration of the conservator. The reasonable expense of such services will be allowed in addition to the fiduciary fee.

g. If the Conservator employs an investment advisor, the advisor's fees, if reasonable, should generally not be deducted from the Conservator's compensation.

h. Where there are co-fiduciaries, generally, one fee will be divided equally among them. The co-fiduciaries may agree among themselves on a different division. In case of a dispute concerning the division of the fee, the Commissioner may hold a hearing to resolve the dispute.

i. Where there are successor fiduciaries, the annual compensations shall be pro-rated.

j. The Commissioner may reduce the compensation allowable by these guidelines in exceptional circumstances, e.g. a very large trust requiring relatively little work.

k. The Commissioner may increase the allowable compensation in exceptional circumstances upon the request of the Conservator. Factors to be considered would be the nature of the assets, the character of the work, the difficulties encountered, the time and expertise required, and the results obtained.

4. Endnote

Nothing in these guidelines is intended to alter any statute concerning fiduciary compensation. For instance, fiduciary compensation may be forfeited if a proper account is not timely filed.

John H. Rust, Jr.
Commissioner of Accounts

Joseph A. Barsanti
Deputy Commissioner of Accounts

Compensation Schedule/Conservatorships/July 2007



John H. Rust, Jr.
Commissioner of Accounts

COMMONWEALTH OF VIRGINIA
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THE FAIRFAX BUILDING
10555 Main Street, Suite 500
Fairfax, Virginia 22030
703-667-4900



Joseph A. Barsanti
Deputy Commissioner

**FIDUCIARY COMPENSATION SCHEDULE
FOR GUARDIANS FOR MINORS**

Virginia Code Section 26-30 allows a “reasonable compensation” to a Guardian for services rendered in the administration of a guardianship. There is no specific definition of “reasonable compensation”, but the Commissioner, in the absence of unusual circumstances, will allow a fee based upon the following:

1. Total Assets at Beginning of Accounting Period – An annual compensation based upon the market value of the conservatorship assets brought forward from the Inventory or prior account in accordance with the following schedule:

First \$500,000.00	1% (.01)
Next \$500,000.00	¾ of 1% (.0075)
Balance over \$1,000,000.00	½ of 1% (.005)
Balance over \$10,000,000.00	By agreement with the Commissioner (prior consultation is required)

2. Income – An additional fee of 5% shall be allowed on non-investment income received during the account period.

3. Special Rules

a. Where the required accounting is for a period of less than one year, the compensation should be pro-rated.

b. Where the will clearly sets out compensation in a specific dollar amount or a specific percentage that the Guardian is to receive, the will controls, and the Guardian is entitled to the amount set out.

c. Where the will states that the Guardian shall receive for services the compensation set out in a referenced published fee schedule in effect at the time such services are rendered, fees as set out in the fee schedule shall be presumed to be reasonable, as that term is used in §26-30. The burden of persuading the Commissioner that fiduciary compensation taken according to such a fee schedule is not reasonable would be on an objecting party. The ultimate responsibility of determining the reasonableness of the compensation rests with the Commissioner.

d. Where the will is silent as to the Guardian’s compensation, if the Guardian (corporate or otherwise) uses a published fee schedule to determine compensation, the other guidelines set out herein apply. There is, however, no presumption that such a published fee schedule is not reasonable.

e. Where all parties affected by the amount of compensation are (i) competent to contract (ii) understand the issues involved (ie., can give “informed consent”) and (iii) agree in writing as to the amount of the compensation to be paid, then the agreement should be honored by the Commissioner.

f. Where the Guardian hires an attorney or accountant to perform the routine duties of the Guardian, those fees shall be deducted from the compensation due the Guardian. This does not apply to fees paid to attorneys or accountants for professional services necessary for the orderly administration of the conservator. The reasonable expense of such services will be allowed in addition to the fiduciary fee.

g. If the Guardian employs an investment advisor, the advisor's fees, if reasonable, should generally not be deducted from the Guardian's compensation.

h. Where there are co-fiduciaries, generally, one fee will be divided equally among them. The co-fiduciaries may agree among themselves on a different division. In case of a dispute concerning the division of the fee, the Commissioner may hold a hearing to resolve the dispute.

i. Where there are successor fiduciaries, the annual compensations shall be pro-rated.

j. The Commissioner may reduce the compensation allowable by these guidelines in exceptional circumstances, e.g. a very large trust requiring relatively little work.

k. The Commissioner may increase the allowable compensation in exceptional circumstances upon the request of the Guardian. Factors to be considered would be the nature of the assets, the character of the work, the difficulties encountered, the time and expertise required, and the results obtained.

4. Endnote

Nothing in these guidelines is intended to alter any statute concerning fiduciary compensation. For instance, fiduciary compensation may be forfeited if a proper account is not timely filed.

John H. Rust, Jr.
Commissioner of Accounts

Joseph A. Barsanti
Deputy Commissioner of Accounts



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Joseph A. Barsanti
Deputy Commissioner

Notice to Guardians of Minors Who Own Real Estate

The Clerk of the Circuit Court of Fairfax County, Virginia has appointed you as Guardian of the estate of a minor. If the minor owns real estate and you seek to sell any interest in that real estate, you must first meet the conditions set forth below. Pursuant to the provisions of § 31-14.1.B. of the Code of Virginia, prior to the conveyance of any interest in real estate that the minor owns, you must

- a. Provide to the Commissioner of Accounts (i) a statement concerning the necessity of the proposed sale stating how the sale is in the best interest of the minor; (ii) an appraisal of the real estate, (iii) the most current real estate tax assessment of the property, and (iv) a copy of the fully executed contract of sale, which must be subject to the approval of the Court or the Commissioner.
- b. Consult with the Commissioner of Accounts concerning the propriety of the proposed sale.
- c. Give notice of the proposed sale to such interested parties as the Commissioner may require.

Upon compliance with such conditions, the Commissioner shall issue a report approving or denying the sale. The Commissioner will condition any approval of the sale upon the requirement that you cause your surety bond to be increased by the amount of money to be received as a result of the sale.

John H. Rust, Jr.
Commissioner of Accounts
19th Judicial Circuit