THE BASICS OF FILING INVENTORIES AND ACCOUNTS

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In all cases other than foreclosure accounts, fiduciaries must file an inventory of the assets in the estate with the commissioner's office within four months after qualification. Estate fiduciaries must file an account of the activities during the first twelve months of administration within sixteen months after qualification. Conservators and guardians must file an account of the first four months of administration within six months after qualification. Trustees of testamentary trusts must file an account of the first calendar year's activities on or before May 1 of the year following qualification. Trustees conducting sales under deeds of trust must file an account of the sale within six months after the sale date.

There are slightly different forms for inventories and accounts of estates, trusts, conservators and guardians. There are no approved forms for foreclosure accounts. Copies of each approved form of inventory and account, together with the instructions which accompany that form, are attached.

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.[1] 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."[2]

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."[3] 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.[4] 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

[1] VA. CODE ANN. § 26-12.
[2] Lamb, VIRGINIA PROBATE PRACTICE § 16 (1957).
[3] Circuit Court Form CC-1670.
[4] *See Manual for Commissioner of Accounts* § 5.801.

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 "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."[5] 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."[6] Basically, this limits the scope of part 2 to the decedent's interest in jointly-held bank accounts which pass to the joint owner by virtue of a right of

[5] *Id*. at §5.105.
[6] Circuit Court Form CC-1670.

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.[7] Fiduciaries should also note that divorce extinguishes rights of survivorship in multi-party accounts and renders them tenancies in common.[8] The decedent's interest in multi-party accounts that are subject to this 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 or a real-estate limited liability company are personal property, reportable in part 1 of the inventory. Interests in condominium property,[9] cooperatives,[10] or time-share interests[11] are real estate interests,[12] 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.[13] 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.

Account Adjustments

Estate fiduciaries are required to file their first accounts sixteen months after qualification covering the first year of administration.[14] Guardians and conservators must

[7] *See* VA. CODE ANN. § 6.1-125.8.
[8] VA. CODE ANN. § 6.1-125.4.
[9] VA. CODE ANN. § 55-79.41.
[10] VA. CODE ANN. § 55-428.A.
[11] VA. CODE ANN. § 55-363.
[12] *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.
[13] Manual for Commissioners of Account ¶ 5.202.
[14] VA. CODE ANN. § 26-17.5.

file their first accounts within six months of qualification for the first four months of administration.[15] 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.[16]

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.[17] 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.[18] 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

[15] VA. CODE ANN. § 26-17.4.
[16] VA. CODE ANN. § 26-17.6.
[17] VA. CODE ANN. § 26-17.10.
[18] 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.[19]

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. [20] 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 Code [21]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 for distribution to heirs or, if necessary, to pay off debt.[22] While appropriate testamentary

[19] VA. CODE ANN. § 26-17.9.B.
[20] VA. CODE ANN. § 26-17.9.E.
[21] There is no image of the item and the record is not evidence of payment, merely evidence of withdrawal.
[22] *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).

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.

§ 64.1-57 of the Virginia Code 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.[23] 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.

It is often the case that the fiduciary has no intention and no need to sell the real estate of the decedent, notwithstanding the power of sale granted in the will. In such cases, in Fairfax the commissioner will permit the removal of the real estate from the probate estate as an adjustment in the first account, provided that the fiduciary clearly declares his intent not to sell the property.

This is in accord with the general rule among Virginia commissioners. 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."

Notwithstanding this present intention not to exercise the power of sale, an unexpected claim against the estate could require the fiduciary to do so. It is the duty of the personal representative to sell such of the assets as the necessities of the estate may

[23] ESTATE AND TRUST ADMINISTRATION IN VIRGINIA § 3.202 (2nd ed. 2003).

require, even to the exclusion of named devisees.[24] Pursuant to § 64.1-57, the fiduciary remains empowered to sell the real estate if necessary to pay the debts of the decedent. Thus, the present intention not to exercise the power does not prevent the fiduciary from the actual exercise of the power at a later date if necessity requires him to act.

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 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.[25] This doctrine has created controversies in the Virginia courts previously.[26] 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.[27] 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.[28] 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

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[24] 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).
[25] *See French v. Vradenburg's Ex'rs*, 105 Va. 16, 52 S.E. 695 (1906).
[26] *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).
[27] VA. CODE ANN. § 64.1-157.1.
[28] VA. CODE ANN. §§ 58.1-22; 58.1-911.

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 while a claim is outstanding.

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 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.

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.[29] The fiduciary must still provide a tax certificate and receipts for specific bequests. A 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.

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

[29] VA. CODE ANN. § 26-20.1.

beyond the scope of parental duty of support.[30] The commissioner has concurrent jurisdiction with the court to approve annual expenditures of $3,000 or less.[31] § 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.

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.[32] 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.[33] 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,[34] 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.

As an example, the Uniform Trust Code permits a trustee to resign upon 30 days' written notice to all co-trustees and qualified beneficiaries.[35] The court appoints testamentary trustees and requires the trustee to qualify before serving.[36] 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.[37] The issue

[30] VA. CODE ANN. § 31-8.1.
[31] VA. CODE ANN. § 31-8.2.
[32] *See, e.g.,* VA. CODE ANN. § 32.1-1023.B
[33] VA. CODE ANN. § 31-14.1.B.
[34] VA. CODE ANN. §§ 55-541.01 *et seq.*
[35] VA. CODE ANN. § 55-547.05.A.1
[36] VA. CODE ANN. § 26-46.1.
[37] *See* VA. CODE ANN. § 26-46.

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.[38] 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.

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")[39] 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

[38] VA. CODE ANN. § 55-544.14.
[39] Va. Code Ann. § 31-37 *et seq.*)

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.