

A BRIEF OVERVIEW OF ACCOUNTING PROCESS THROUGH THE COMMISSIONER OF ACCOUNTS OFFICE, INCLUDING WILLS, TRUSTS, CONSERVATORSHIPS, GUARDIANSHIPS AND FORECLOSURES

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

The Fairfax Commissioner's Office

In Fairfax County, the commissioner's office receives between 3,000 and 3,600 account filings each year. Of these, approximately 1,800 filings are new matters. In the recent past, most of those filings were estates and trusts. Foreclosure sales in the first part of this decade generated between 100 – 200 account filings annually. Over the past two years there has been a substantial increase in foreclosure sales. In 2006, the Fairfax commissioner's office received 137 foreclosure accounts, 77 of those in the fourth quarter. In 2007, the commissioner's office received 1,357 foreclosure accounts. As of the end of March, the Fairfax office had received 829 foreclosures for 2008. One day in April the office received 48 foreclosure accounts. It is likely that this office will have foreclosure account filings in 2008 equal to or in excess of all other account filings.

At present, the Fairfax commissioner's office has a staff of twenty-five people, including the commissioner, the deputy commissioner, the executive director, seven full-time account auditors, one part-time account auditor, three foreclosure account auditors, two inventory account auditors, a customer service representative, an intake clerk, an approvals clerk, a foreclosure clerk, a delinquency clerk, an executive assistant to the commissioner, a receptionist and two part-time file clerks. 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 some limited pedestrian access between the building and the Court's parking structure.

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

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

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

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

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.

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*.

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.

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

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).

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

⁸ 67 Va. Cir. 204 (2005).

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

Administration of the Commissioner System

Today, the Standing Committee on 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 sets the fees which the commissioner’s office charges. The 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 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 Judicial Council currently has under consideration a Uniform Fee Schedule for Commissioners of Account substantially similar to that now in effect in Fairfax. Copies of the fee schedules payable to the commissioner for the various types of estates now in effect in Fairfax are 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.

Protection of Creditors

The commissioner has responsibility to protect creditors of the estate as well its beneficiaries. 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. 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

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

fiduciary must request a debts and demands hearing before the commissioner to give the claimant an opportunity to present his claim.¹⁰

Insolvent Estates and Statutory Allowances

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.”¹¹

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.¹² 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.¹³ However, when an estate is insolvent, no interest is allowed on the claims.¹⁴ This is consistent with the adoption of the chancery rule in Virginia disallowing interest on any insolvent estate.¹⁵

The statutory priorities established in § 64.1-157 of the Virginia Code make specific allowances for family, exempt property and homestead allowances, which have priority over all claims other than administrative expenses.¹⁶ 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.¹⁷

¹⁰ See VA. CODE ANN. § 64.1-171.

¹¹ Harrison, WILLS AND ADMINISTRATION § 505 (3d ed. 1989); VA. CODE ANN. § 64.1-158.

¹² 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.

¹³ *But see* VA. CODE ANN. § 64.1-157.1 (denying exoneration if the property is the subject of a specific devise).

¹⁴ *Virginia Surety Co. v. Hilton*, 181 Va. 952, 27 S.E.2d 62 (1943)(interpreting the predecessor to § 64.1-170).

¹⁵ *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).

¹⁶ Va. Code Ann. §§ 64.1-151.1; 64.1-151.2 and 64.1-151.3.

¹⁷ *Estate of Igoe v. U.S.*, 717 S.W.2d 524 (Mo. 1986). See IRM 5.17.13.3(6).

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 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.¹⁸

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.

Hearings upon debts and demands are set out in the Virginia Code and well-established.¹⁹ 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.

Either the fiduciary or the claimant can request a debts and demands hearing before the commissioner.²⁰ 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

¹⁸ See *Johnston v. Rosenthal*, 31 Va. Cir. 368 (1993).

¹⁹ See VA. CODE ANN. § 64.1-171.

²⁰ VA. CODE ANN. § 64.1-173.

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.²¹

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.²² 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.²³

²¹ VA. CODE ANN. § 64.1-172.

²²VA. CODE ANN. § 64.1-172.

²³ *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).