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PROBATE 101 FOR THE NON-ESTATE PRACTITIONER

I. ESTATE – DEFINITION

- "The word 'estate' is a general term, and in modern construction may be said to embrace prima facie the whole estate of the testator, both real and personal, and his property of every description."[1]

- The "probate estate" consists of everything the decedent died seised and possessed of and passes by operation of law or the decedent's Last Will and Testament. Such items include everything owned in the sole name of the decedent, or held as tenants in common. "Non-probate" assets are discussed later in this outline.

II. PROBATE

A. WHAT IS PROBATE?

- In its most basic terms, "probate" is defined as the "the official proof made before the proper and appointed tribunal of the due execution of the will, ascertaining it to be the genuine and lawful express of the last wishes of the deceased in respect to his property."[2]

- It has also come to be known as the process of administration of a decedent's estate, whether with or without a will. [3]

B. PRE-PROBATE

1. Funeral arrangements and disposition of remains

a. Instructions may be given in two ways.

i. Individual can designate an agent, so long as the designation is in writing, signed and notarized by both the individual and the agent. [4]

ii. Written instructions in will or other writing - personal representative named in the will has authority to provide for burial before qualifying before Clerk. [5]

iii. Be aware of situations where the family does not agree as to the disposition of remains.[6]

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[1] *Neblett v. Smith*, 142 Va. 840, 852 (1925).
[2] *See* Harrison, Wills & Administration § 168.
[3] *See* Fielding L. Williams, Jr. and John H. Turner, III, "The Life of An Estate", at II-1 (Virginia CLE 2005).
[4] *See* VA. CODE ANN. § 54.1-2825 (Michie 2006).
[5] *See* VA. CODE ANN. § 64.1-136 and 136.1 (Michie 2006).

iv. The statutes regulating the funeral industry make it clear that there is no "right" answer:

> *Except as provided in §§ 32.1-288 and 32.1-301, funeral service establishments shall not accept a dead human body from any public officer except a medical examiner, or from any public or private facility or person having a professional relationship with the decedent without having first inquired about the desires of the next of kin and the persons liable for the funeral expenses of the decedent. The authority and directions of any next of kin shall govern the disposal of the body.*
>
> *. . . .*
>
> *E. This section shall not be construed to apply to the authority of any administrator, executor, trustee or other person having a fiduciary relationship with the decedent. VA. CODE ANN. § 54.1-2807(B) & (E) (Michie 2006).*
>
> *"Next of kin" means any of the following persons, regardless of the relationship to the decedent: any person designated to make arrangements for the disposition of the decedent's remains upon his death pursuant to § 54.1-2825, the legal spouse, child over 18 years of age, custodial parent, noncustodial parent, siblings over 18 years of age, guardian of minor child, guardian of minor siblings, maternal grandparents, paternal grandparents, maternal siblings over 18 years of age and paternal siblings over 18 years of age, or any other relative in the descending order of blood relationship. VA. CODE ANN. § 54.1-2800 (Michie 2006).*

v. ***PRACTICE POINTER***: Do not assume your client has authority since there can be liability with regard to wrongful cremation and the like. The best rule of thumb is to work out disputes about disposition prior to making any final decisions.

2. If no instructions are left, then it is up to the "next of kin". The Personal Representative can reimburse for funeral expenses paid for by next of kin, or persons authorized to make arrangements.[7]

3. Payment of funeral and associated expenses

a. Payment is normally required at the time the arrangements were made. Funeral expenses are allowed administrative expenses, and in the case of insolvency, $2,000 of those expenses are given priority.[8]

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[6] *See Goldman v. Mollen*, 168 Va. 345 (1937) (inferring that the surviving spouse's wishes may supersede others); *see also* VA. CODE ANN. § 54.1-2807(B) and (E) (Michie 2006), and VA. CODE ANN. § 54.1-2800 (Michie 2006).
[7] *See* VA. CODE ANN. § 64.1-136.1 (Michie 2006).
[8] *See* VA. CODE ANN. 64.1-158 (Michie 2006).

b. Personal Representative named in will has authority to pay these expenses before qualifying,[9] and may reimburse himself.[10] **BEWARE** if the Estate is insolvent as a Personal Representative becomes a creditor when he "lends" money to the Estate. [11]

c. Family or friend pays and is reimbursed by personal representative.

C. WHEN TO PROBATE?

- The decision of when to probate depends upon what the decedent died owning, and how such property was titled.

- Upon the death of the individual, if she died with a Will, the Will should be admitted to probate.

- Some people confuse Virginia's "Small Estate Act" to mean that the Will does not need to be admitted to probate. The Will can be admitted, but the personal representative, under certain circumstances, need not qualify. [12]

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D. WHERE TO PROBATE?

- Probate must be done in the county or city in which the decedent had a known place of residence or mansion house.[13]

- VA. CODE ANN. § 64.1-75 (Michie 2006) sets forth the following as to "Jurisdiction of probate of wills"

> *The circuit courts of the Commonwealth, and the clerks of such courts, and the duly qualified deputies of such clerks, and the clerks of all other courts having jurisdiction of the probate of wills, shall have such jurisdiction according to the following rules: In the county or city wherein the decedent has a mansion house or known place of residence; if he has no such house or known place of residence, then in a county or city wherein any real estate lies that is devised or owned by the decedent; and if there be no such real estate, then in the county or city wherein he dies or a county or city wherein he has estate; provided, however, that in the City of Richmond the circuit court of such city, and the clerk of such court and his duly qualified deputies shall have such jurisdiction which shall be exercised within its respective territorial jurisdiction as defined by law and in the manner heretofore provided by law.*

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[9] *See* VA. CODE ANN. § 64.1-136 (Michie 2006).
[10] *See* VA. CODE ANN. § 64.1-136.1 (Michie 2006).
[11] *See Virginia Trust Co. v. Evans*, 193 Va. 425, 435 (1952); *see also Thomasson v. Walker*, 168 Va. 247, 254-55 (1937) (quoting and adopting the West Virginia Supreme Court's decision in *Yokum v. Yokum*, 110 W. Va. 221, 226-27, 157 S.E. 579, 581-82 (1931)).
[12] *See, e.g.*, VA. CODE ANN. § 64.1-132.2(A) (Michie 2006).
[13] *See* VA. CODE ANN. § 64.1-75 (Michie 2006).

- Certified copy of will must be filed in any other jurisdiction in which decedent owned real estate.

E. WHAT IS NOT PART OF PROBATE?

1. Transfer on death accounts (TOD)

2. Accounts or property held as joint tenants with right of survivorship (JTWROS), or tenants by the entireties with right of survivorship

3. Beneficiary designated- life insurance, IRAs, retirement plans, and annuities

4. Real Estate goes directly to the heirs at law (intestacy) or according to the devises set forth in the Will.[14] **Exception:** if the Estate is insolvent or lacks sufficient liquidity to pay the debts and lawful demands. The real estate can be sold to pay such debts and demands, in the same manner as personalty.[15]

F. SMALL ESTATES

1. Definition – estates with assets of $50,000 or less

2. Probate the Will anyway, but there is no obligation to qualify, file accountings, inventories, etc.

III. QUALIFICATION – THE PERSONAL REPRESENTATIVE

A. GENERALLY. A Personal Representative is the person or entity that is appointed by either Will or statute, appears in person, and is sworn in by the Court or the Clerk or Deputy Clerk of the Circuit Court in the county or city in which the decedent had a known place of residence or mansion house so that he/she can administer the estate.[16]

B. EXECUTOR

1. **Definition** – fiduciary appointed pursuant to decedent's Will and/or Codicil who administers the estate per the directions contained in the decedent's Will and/or Codicil

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[14] *See Bruce v. Farrar*, 156 Va. 542, 545 (1931) (holding "a devisor having title to real estate may name the executor of his estate, and such personal representative is clothed with such legal powers as the will confers. If the will so provides, he has dominion over the real as well as the personal estate. The executor is purely the creature of the devisor. On the other hand, when any person having title to any real estate of inheritance dies intestate, such real estate descends and passes, under the statute of descent, directly to the heir, without the intervention of a personal representative, subject only to the debts of the ancestor. If it becomes necessary to administer the personal estate of the decedent in case of intestacy, such estate is administered by an administrator -- a personal representative created by law. The administrator has no control whatever over the real estate, and his duties relate only to the administration of the personal estate").

[15] *See* VA. CODE ANN. §§ 64.1-181, 64-1-183, 64.1-185 (Michie 2006).

[16] *See* VA. CODE ANN. § 64.1-75 (Michie 2006).

2. In order to qualify as a fiduciary for the Estate, the following is needed:

- Original Will
- Death Certificate with seal (Medical Examiner's Certificate, or letter from Medical Examiner confirming the death). May be obtained from funeral home, Virginia Department of Health – Vital Records (http://www.vdh.state.va.us/vitalrec/index.asp) & Department of Health in the jurisdiction where decedent was domiciled.
- Probate Forms. Download from Virginia State Courts website http://www.courts.state.va.us/forms/circuit/fiduciary.html.
- If Bond with surety is not waived in the Will, client may need to bring bondsman with him/her. In Fairfax County, there is no need to bring the bondsman.
- List of Heirs. The list of heirs is not necessarily those individuals devised property in the Will. They are also the individuals listed in VA. CODE ANN. § 64.1-1 through VA. CODE ANN. § 64.1-8.1
- Probate Information Form – Provides the Probate Clerk with the information necessary to open a file and probate the Will
- Probate tax return (if greater than $50,000)
- Checks (Clerk's fees & probate taxes)

C. ADMINISTRATOR - administers the estate when there is no Will

1. **Who May Qualify? Order of Priority** – VA. CODE ANN. § 64.1-118 details the appointment order:

§ 64.1-118. What clerk or court to appoint administrator of estate; who to be preferred

A. The court or the clerk who would have jurisdiction as to the probate of a will, if there were a will, shall have the jurisdiction to hear and determine the right of administration of the estate in the case of a person dying intestate. Administration shall be granted as follows:

1. During the first thirty days following the intestate's death, the clerk may grant administration (i) to a sole distributee or his designee or (ii) in the absence of a sole distributee, to any distributee or his designee who presents written waivers of right to qualify from all other competent distributees.

2. After thirty days have passed since the intestate's death, the clerk may grant administration to the first distributee, or his designee, who applies therefor, without either waiting for any further period of time, or requiring the consent or waiver of any other distributee; provided, however, that if, during the first thirty days following the intestate's death, more than one distributee notifies the clerk of an intent to qualify after the thirty-day period has elapsed, the clerk shall not appoint any distributee, or his designee, until the clerk has given all such distributees an opportunity to be heard.

3. After sixty days have passed since the intestate's death, the clerk may grant administration to one or more of the creditors or to any other person, provided such

creditor or other person certifies that he has made diligent search to find an address for any sole distributee and has given not less than thirty days notice by certified mail of his intention to apply for administration to the last known address or addresses of the distributee discovered or alternatively, that he has not been able to find any such address. Qualification of a creditor or person other than a distributee is not subject to challenge on account of a failure to have made the certification herein required.

4. The court may appoint administrators under the same conditions as herein provided for the clerk, and when the court determines that it is in the best interests of an intestate's estate, the court may depart therefrom at any time and appoint such person as the court, in the exercise of its discretion, deems most appropriate.

B. The court or clerk shall not grant administration to any person unless satisfied that he is suitable and competent to perform the duties of his office. A person under a disability as defined in § 8.01-2 is not eligible to qualify.

C. If any beneficiary of the estate objects, no husband, wife or parent who has been barred from all interest in the estate because of desertion or abandonment as provided under § 64.1-16.3 is suitable to serve as an administrator of the estate of the deceased spouse or child, as the case may be.

2. What is required when qualifying as Administrator?

- Death Certificate with seal (Medical Examiner's Certificate, or letter from Medical Examiner confirming the death). May be obtained from funeral home, Virginia Department of Health – Vital Records (http://www.vdh.state.va.us/vitalrec/index.asp) & Department of Health in the jurisdiction in which the decedent was domiciled.
- Probate Forms. Download from Virginia State Courts website http://www.courts.state.va.us/forms/circuit/fiduciary.html.
- Client may need to bring bondsman with him/her. In Fairfax County, there is no need to bring the bondsman.
- List of Heirs. The individuals listed in VA. CODE ANN. § 64.1-1 through VA. CODE ANN. § 64.1-8.1
- Probate Information Form –Gives the Probate Clerk information necessary to open a file.
- Probate tax return (if greater than $50,000)
- Checks (Clerk's fees and probate taxes)

D. CURATOR - administers the estate as a temporary fiduciary in the "absence of an executor or until administration of the estate can be granted." VA. CODE ANN. § 64.1-93 (Michie 2006).

1. When to use a curator? Virginia Code Ann. § 64.1-93 sets forth the circumstances under which a curator can be appointed:

§ 64.1-93. Appointment of curator; when made; his duties

Such court or clerk as is mentioned in § 64.1-75, or any duly qualified deputy of such clerk, may appoint a curator of the estate of a decedent during a contest about his will, or during the infancy or in the absence of an executor, or until administration of the estate be granted, taking from him bond in a reasonable penalty. The curator shall take care that the estate is not wasted before the qualification of an executor or administrator, or before such estate shall lawfully come into possession of such executor or administrator. He may demand, sue for, recover and receive all debts due to the decedent, and all his other personal estate, and likewise may lease or receive the rents and profits of any real estate whereof the decedent or testator may have died seized or possessed. He shall pay debts, so far as such payment may not affect the priority in the order of payment prescribed by law, and may be sued in like manner as an executor or administrator; and upon the qualification of an executor or administrator shall account with him for and pay and deliver to him such estate as he has in his hands or may be liable for.

- Basically in situations or suits to establish a Will
- There is no named Executor or the named Executor declines to serve or cannot qualify
- No administration established
- Will contest with no qualified Executor

2. How long does the administration of a Curator last? Until administration is granted by the Court.[17]

IV. WHAT MAKES A VALID WILL?

A. ELEMENTS

- Testamentary capacity
- Testamentary intent
- Compliance with formalities as set forth in VA. CODE ANN. § 64.1-49, to wit:

> *No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly in the handwriting of the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. If the will be wholly in the handwriting of the testator that fact shall be proved by at least two disinterested witnesses.*

- Basically, in order to be self-proving, the Will must be executed in the presence of at least two competent witnesses, who are all present at the same time to the execution of the Will.

- If a holographic will (i.e., a will entirely in the handwriting of the testator), then it must proved by at least two disinterested witnesses.

[17] *See* VA. CODE ANN. § 64.1-93 (Michie 2006).

B. WRITTEN STATEMENT

- A "written statement" is a writing referenced in the Will dealing specifically with tangible personal property.

- There are no specific requirements except that it needs to be referred to in the Will and the statement needs to be signed by the testator.

- Virginia Code Ann. § 64.1-45.1 (Michie 2006) governs both the content of the statement, as well as the potential liability for the personal representative.

- A copy of the statement must be filed with the Commissioner of Accounts when distributions are made pursuant to the written statement.

- Personal representatives are not liable for making distributions without knowledge of the existence of a written statement.

- Virginia Code Ann. § 64.1-45.1 (Michie 2006) provides the following:

> *If a will refers to a written statement or list to dispose of items of tangible personal property not otherwise specifically bequeathed, the statement or list shall be given effect to the extent that it describes items of tangible personal property and their intended recipients with reasonable certainty and is signed by the testator although it does not satisfy the requirements for a will. Bequests of a general or residuary nature, whether referring only to personal property or to the entire estate, are not specific bequests for the purpose of this section.*
>
> *The written statement or list may be referred to as one which is in existence at the time of the testator's death, may be prepared before or after the execution of the will, may be altered by the testator at any time and may be a writing that has no significance apart from its effect on the dispositions made by the will. When distribution is made pursuant to such a written statement or list, a copy thereof shall be furnished to the commissioner of accounts along with the legatee's receipt.*
>
> *A personal representative shall not be liable for any distribution of tangible personal property to the apparent legatee under the testator's will made without actual knowledge of the existence of a written statement or list, nor shall he have any duty to recover property so distributed. However, a person named to receive certain tangible personal property in a written statement or list which is effective under this section, may recover that property, or its value if the property cannot be recovered, from an apparent legatee to whom it has been distributed in an action brought for that purpose within one year after the probate of the testator's will.*
>
> *This section shall not apply to a writing admitted to probate as a will and, except as provided herein, shall not otherwise affect the law of incorporation by reference.*

C. "SELF-PROVING WILL" vs. NON-SELF PROVING WILLS

1. What is a "self-proving Will"?

A "self-proving" will is one that contains an "acknowledgement by the testator and affidavits of the attesting witnesses, each made before an officer authorized to administer oaths under the laws of this Commonwealth" or agent under the laws of the state where the acknowledgement occurred, or before another recognized agent, as listed in VA. CODE ANN. § 64.1-87.1 (Michie 2006).

2. What should a "self-proving Will" contain?

- VA. CODE ANN. § 64.1-87.1 (Michie 2006) provides a sample acknowledgement and attestation that should be employed. The basic way is for the acknowledgement to be signed by both the testator and the two witnesses
- ***PRACTICE POINTER*** – if you draft Wills, this language should be included.

STATE OF VIRGINIA
COUNTY/CITY OF..........

Before me, the undersigned authority, on this day personally appeared ___________________, _______________________, and ___________________, known to me to be the testator and the witnesses, and, all of these persons being by me first duly sworn, ..., the testator, declared to me and to the witnesses in my presence that said instrument is his last will and testament and that he had willingly signed or directed another to sign the same for him, and executed it in the presence of said witnesses as his free and voluntary act for the purposes therein expressed; that said witnesses stated before me that the foregoing will was executed and acknowledged by the testator as his last will and testament in the presence of said witnesses who, in his presence and at his request, and in the presence of each other, did subscribe their names thereto as attesting witnesses on the day of the date of said will, and that the testator, respectively, whose names are signed to the attached or foregoing instrument at the time of the execution of said will, was over the age of eighteen years and of sound and disposing mind and memory. *......................*
Testator

....
Witness

....
Witness

Subscribed, sworn and acknowledged before me by ...., the testator, and subscribed and sworn before me by .... and ...., witnesses, this ... day of ...., A.D., ...

SIGNED ....
..

(OFFICIAL CAPACITY OF OFFICER)

3. Alternative Method for "self-proving" Will

- Same acknowledgment as above, except the witnesses and testator have not signed the acknowledgment.
- This is an alternate method, but the above method is preferred.
- Below is sample language to be with the alternate method, which language is found in VA. CODE ANN. § 64.1-87.2 (Michie 2006):

STATE OF VIRGINIA
CITY/COUNTY OF ....
Before me, the undersigned authority, on this day personally appeared ...., ..., and ...., known to me to be the testator and the witnesses, respectively whose names are signed to the attached or foregoing instrument and, all of these persons being by me first duly sworn, ..., the testator, declared to me and to the witnesses in my presence that said instrument is his last will and testament and that he had willingly signed or directed another to sign the same for him, and executed it in the presence of said witnesses as his free and voluntary act for the purposes therein expressed, that said witnesses stated before me that the foregoing will was executed and acknowledged by the testator as his last will and testament in the presence of said witnesses who in his presence and at his request and in the presence of each other did subscribe their names thereto as attesting witnesses on the day of the date of said will and that the testator, at the time of the execution of said will, was over the age of eighteen years and of sound and disposing mind and memory.

Sworn and acknowledged before me by ...., the testator, and .... and ...., witnesses, this ... day of .... A.D., ...

SIGNED ....
...

(OFFICIAL CAPACITY OF OFFICER)

4. If the Will is not "self-proving," what do you do?

- The personal representative must locate at least one witness.[18]
- There are two ways for a witness to "acknowledge" the will – (i) witness deposition form or (2) appearance in the Clerk's office.
- A witness deposition form can be found at http://www.courts.state.va.us/forms/circuit/fiduciary.html
- Virginia Code Ann. § 64.1-87 (Michie 2006) provides the legal requirements for witness depositions:

> *When any will, or authenticated copy thereof, is offered for probate, and a witness attesting the same, or in event the will be wholly in the handwriting of the testator, a witness to prove such handwriting, resides out of this Commonwealth, or though in this Commonwealth is confined in another county or corporation under legal process, or is unable from sickness, age or any other cause to attend before the court or clerk where the same is offered, the same may be proved by the deposition of the witness or witnesses, which shall be taken and certified as depositions are taken in other cases, except that no notice need be given of the time and place of taking the same, unless it be in a case in which the probate is opposed by some person who has made himself a party; and the proof so given shall have the same effect as if it had been given before such court or clerk. For the purpose of making such proof the party offering such will or copy shall be permitted to withdraw temporarily the original thereof upon leaving an attested copy with such court or clerk, or, in the discretion of the clerk, the party may be given a certified copy of the original. Such deposition may be taken prior to the time that the will is offered for probate, and the deposition filed at the same time the will is offered, provided, that if probate is opposed by some person who has made himself a party, such person shall have the right to examine such witness.*

- ***PRACTICE POINTER*:** Consider filing will without qualification to administer estate. The deceased may be an heir to another estate, and it will be on the record. The will establishes muniment of title to unknown or after-discovered property.

D. INTERNATIONAL WILLS

1. Definition: "International will" means a will executed in conformity with §§ 64.1-96.3 through 64.1-96.6. VA. CODE ANN. § 64.1-96.2

2. Requirements

- The Code establishes the requirements for admitting an international will to probate. Basically, the international will must comply with the requirements for domestic wills.[19]

[18] *See* VA. CODE ANN. § 64.1-87 (Michie 2006).

§ 64.1-96.3. International will; validity

(a) A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile, or residence of the testator, if it is made in the form of an international will complying with the requirements of this article.

(b) The invalidity of the will as an international will shall not affect its formal validity as a will of another kind.

(c) This article shall not apply to the form of testamentary dispositions made by two or more persons in one instrument.

§ 64.1-96.4. Requirements
(a) The will shall be made in writing. It need not be written by the testator himself. It may be written in any language, by hand or by any other means.

(b) The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof. The testator need not inform the witnesses, or the authorized person, of the contents of the will.

(c) In the presence of the witnesses, and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.

(d) When the testator is unable to sign, the absence of his signature does not affect the validity of the international will if the testator indicates the reason for his inability to sign and the authorized person makes note thereof on the will. In these cases, it is permissible for any other person present, including the authorized person or one of the witnesses, at the direction of the testator to sign the testator's name for him, if the authorized person makes note of this also on the will, but it is not required that any person sign the testator's name for him.

(e) The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

§ 64.1-96.5. Other points of form

(a) The signatures shall be placed at the end of the will. If the will consists of several sheets, each sheet will be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

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[19] *See* Sec. IV-C, *supra.*

(b) The date of the will shall be the date of its signature by the authorized person. That date shall be noted at the end of the will by the authorized person.

(c) The authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to have his will kept shall be mentioned in the certificate provided for in § 64.1-96.6.

(d) A will executed in compliance with § 64.1-96.4 shall not be invalid merely because it does not comply with this section.

- In addition to the other formalities, a certificate is required to be attached to the Will in order to admit it probate.

§ 64.1-96.6. Certificate

The authorized person shall attach to the will a certificate to be signed by him establishing that the requirements of this Act for valid execution of an international will have been complied with. The authorized person shall keep a copy of the certificate and deliver another to the testator. The certificate shall be substantially in the following form:

CERTIFICATE

(Convention of October 26, 1973)

1. I, ... (name, address and capacity), a person authorized to act in connection with international wills
2. Certify that on .... (date) .... (place)
3. (testator) .... (name, address, date and place of birth) in my presence and that of the witnesses
4. (a) .... (name, address, date and place of birth)
(b) .... (name, address, date and place of birth) has declared that the attached document is his will and that he knows the contents thereof.
5. I furthermore certify that:
6. (a) in my presence and in that of the witnesses
(1) the testator has signed the will or has acknowledged his signature previously affixed.
**(2) following a declaration of the testator stating that he was unable to sign his will for the following reason*
.... I have mentioned this declaration on the will
**and the signature has been affixed by (name and address)*
7. (b) the witnesses and I have signed the will;
*8. *(c) each page of the will has been signed by..........................*
.... and numbered;
9. (d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;

10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;
11. (f) the testator has requested me to include the following statement concerning the safekeeping of his will:
12. PLACE OF EXECUTION
13. DATE
14. SIGNATURE and, if necessary, SEAL.

** to be completed if appropriate*

E. MILITARY MEMBERS

- Testamentary paper executed by a person in the military service of the US which on its face purports to be executed in accordance with VA. CODE ANN. § 64.1-49 (Michie 2006), upon proof of signature by two disinterested witnesses, shall be admitted to probate.

- The provisions of VA. CODE ANN. § 64.1-54 (Michie 2006) set forth the following requirements:

> *A testamentary paper executed before or after October 1, 1940 by a person in the military service of the United States as defined by the Soldiers' and Sailors' Relief Act of 1940, while in such service, purporting on its face to be witnessed as required by § 64.1-49, upon proof of the signature of the testator by any two disinterested witnesses, shall be presumed, in the absence of evidence to the contrary, to have been executed in accordance with the requirements of that section and shall be admitted to probate in like manner and with like effect as if the formalities of execution were duly and regularly proved.*

F. FRAUDULENT CONCEALMENT OR DESTRUCTION OF WILLS

- Fraudulent concealment or destruction of a Will is a Class 6 felony.[20]

- ***PRACTICE POINTER*:** If you file the Will, no one can accuse you of concealing it.

- ***PRACTICE POINTER*:** All wills and codicils should be presented.

- The Will, and any codicils, are authenticated since they have been admitted to probate.[21]

- Compelling production of will of person having custody of will is to be done pursuant to VA. CODE ANN. § 64.1-86.

- Get a Curator qualified and then the Curator makes motion

[20] *See* VA. CODE ANN. § 18.2-504 (Michie 2006).
[21] *See* VA. CODE ANN. § 8.01-389 (Michie 2006).

G. LATER DISCOVERED WILL

- There is no statute of limitations on probating later will. Admitted to probate in same manner as first probated will.

- The probating of the later will does not attack validity of first will.

- Good faith purchaser for value and without notice from a personal representative, devisee, or in case of intestacy, heirs at law, is protected from claims arising from later discovered will unless later discovered will admitted within 1 year of death.[22]

  § 64.1-95. Bona fide purchaser of real estate without notice of devise protected

  The title of a bona fide purchaser without notice for valuable consideration from the heir at law of a person who has died heretofore, or who may die hereafter, having title to any real estate of inheritance in this Commonwealth, shall not be affected by a devise of such real estate made by the decedent, unless within one year after the testator's death the will devising the same or, if such will has been probated without this Commonwealth, an authenticated copy thereof and the certificate of probate shall be filed for probate before the court or clerk having jurisdiction for that purpose and shall afterwards be admitted to probate and recorded in the proper court or clerk's office as a will of real estate.

  § 64.1-96. Same; later will

  The title of a bona fide purchaser without notice for valuable consideration from the devisee, or from the personal representative with power to sell, encumber, lease or exchange, under the will of a person who has died heretofore, or may die hereafter, having title to any real estate of inheritance in this Commonwealth, shall not be affected by any other devise of such real estate made by the testator in another will, unless within one year after the testator's death such other will or, if such other will has been probated without this Commonwealth, an authenticated copy thereof and the certificate of probate shall be filed for probate before the court or clerk having jurisdiction for that purpose and shall afterwards be admitted to probate and recorded in the proper court or clerk's office as a will of real estate.

- There is no saving statute for personal property.

[22] *See* VA. CODE ANN. §§ 64.1-95 & 96 (Michie 2006).

V. METHODS OF PROBATE

A. EX PARTE QUALIFICATION & PROBATE

1. Both Circuit Courts[23] and clerks of the circuit courts[24] can probate the Will, *ex parte*.

- "Any court having jurisdiction of the probate of wills under § 64.1-75 may, however, without summoning any party, proceed to probate and admit the will to record or reject the same." VA. CODE ANN. § 64.1-85 (Michie 2006).
- VA. CODE ANN. § 64.1-77 sets forth how clerks can probate wills:

> *The clerk of any court, having jurisdiction of the probate of wills, within their respective territorial jurisdictions as defined by law, or any duly qualified deputy of any such clerks, may appoint appraisers of estates of decedents, admit wills to probate, appoint and qualify executors, administrators and curators of decedents, and require and take from them the necessary bonds in the same manner and with like effect as the court could do if in session. Such powers and duties may be exercised and discharged as well during the sessions of the court as at other times.*
>
> *Such clerk shall keep an order book, in which shall be entered all orders made by him, or his deputy, respecting the subjects aforesaid, except probate orders which are recorded in the will book need not be entered in the clerk's order book.*
>
> *All wills heretofore admitted to probate by any duly qualified deputy clerk of any court of competent jurisdiction shall be deemed to have been properly admitted to probate to the same extent as if the clerk had acted in the proceeding.*

2. When the probate is by the clerk, any interested party may appeal to the circuit court as a matter of right for *de novo* review of the probate order.[25]

3. *Ex parte* is presentation of will to the circuit court or clerk and proof of due execution either by testimony (e.g.,witness) or self-proving affidavit.[26]

B. QUASI INTER PARTIES PROBATE

1. Clerk may summon parties to show cause why the will should not be admitted to probate.

2. ***PRACTICE POINTER*:** Where there are persons who are or potentially are aggrieved by clerk's order. This is an offensive move.

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[23] *See* VA. CODE ANN. § 64.1-85 (Michie 2006).
[24] *See* VA. CODE ANN. § 64.1-77 (Michie 2006).
[25] *See* VA. CODE ANN. 64.1-88 (Michie 2006).
[26] *See* VA. CODE ANN. § 64.1-77 (Michie 2006).

3. Virginia Code Ann. § 64.1-79 (Michie 2006) provides the following.

> *A person offering, or intending to offer, to a court having jurisdiction of the probate of wills or to the clerk of a circuit court having such jurisdiction, a will for probate, may obtain from the clerk of such court process directed to the proper officer of any county or corporation, requiring him to summon any person interested in such probate to appear at the next term of such court, on a day named in the summons, to show cause why the will should not be admitted to probate*.

C. INTER PARTIES PROBATE

1. All interested persons are summoned before a circuit court. A guardian *ad litem* may be appointed for minors and persons under disability. Service required, and if necessary, order of publication is allowed.

2. When all interested parties are convened, court shall proceed to hear motion to admit the will to probate.[27]

3. This action generally bars parties to the proceeding from filing suits to impeach or establish will.

4. The pertinent Code sections provide the following:

> *A circuit court to which a will is offered for probate, or into which the question of probate is removed by appeal or otherwise, may cause all persons interested in the probate to be summoned to appear on a certain day. VA. CODE ANN. § 64.1-80*

> *When all the persons interested in such probate shall be properly convened by such summons or order of publication, or assignment of guardian, or shall otherwise appear as parties, the court shall proceed to hear the motion for such probate. VA. CODE ANN. § 64.1-82 (Michie 2006).*

D. BILL TO ESTABLISH OR IMPEACH A WILL

1. This is a suit that may be filed pursuant to VA. CODE ANN. § 64.1-88 (Michie 2006) by any interested person who was not a party to probate by clerk or by court.

> *After a decree or order under § 64.1-85 or under § 64.1-77, a person interested, who was not a party to the proceeding, may proceed by bill in equity to impeach or establish the will, on which bill a trial by jury shall be ordered to ascertain whether any, and if any how much, of what was so offered for probate be the will of the decedent. The court may also, if it deem proper, require all testamentary papers of the same decedent to be produced and direct the jury to ascertain whether any, or if there be more than one which,*

[27] *See* VA. CODE ANN. § 64.1-82 (Michie 2006).

of the papers produced, or how much of what was so produced, be the will of the decedent. VA. CODE ANN. § 64.1-88

2. Who is named in such a suit?

a. Those with a legally ascertainable interest are to be named. The Supreme Court of Virginia has defined such persons to be the following:

> To impeach or establish a will pursuant to Code § 64.1-90, a party must, inter alia, be a "person interested." Title 64.1 pertaining to wills and decedents' estates does not define the term "person interested" although it is used in several sections of that title. See e.g., Code §§ 64.1-80, -81, -82, -83, -88, and -90. However, we believe that the term means that an individual must have a legally ascertainable, pecuniary interest, which will be impaired by probating a will or benefited by setting aside the will, and not a mere expectancy. See Ames v. Reeves, 553 So. 2d 570, 572 (Ala. 1989) ("To maintain a will contest, it is essential that the contestant have a real, beneficial interest, not simply an expectancy or an inchoate right."); Estate of Keener, 167 Ill. App. 3d 270, 521 N.E.2d 232, 234, 118 Ill. Dec. 164 (Ill. App. 1988) ("An interested person[] needs to have a direct, pecuniary, existing interest which would be detrimentally affected by the probate of the proferred will."); Bloor v. Platt, 78 Ohio St. 46, 84 N.E. 604, 605 (Ohio 1908) ("Any person who has such a direct, immediate, and legally ascertained pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will, or be benefited by setting aside the will, is 'a person interested.'"); Washington & Lee Univ. v. Dist. Court of Okla. County, 492 P.2d 320, 324 (Okla. 1971), cert. dismissed, 406 U.S. 951, 32 L. Ed. 2d 351, 92 S.Ct. 2061 (1972) ("The term 'any person interested' . . . means any person having such a direct pecuniary interest in the devolution of a testator's estate that his interest would be impaired or defeated if the will were admitted to probate, or his interest would be benefitted if the will were denied admission to probate."); see also Fitzgibbon v. Barry, 78 Va. 755, 760 (1884) ("In no case . . . is it necessary to make those persons parties who are entitled 'only to future and very uncertain and contingent interests.'"). *Martone v. Martone*, 257 Va. 199, 205-206 (1999).

b. All individuals named in the Will, as well as next-of-kin (as set forth in VA. CODE ANN. § 64.1-1), and if there is any possibility of "unknown parties", those individuals should be joined as well. The purpose – to afford complete relief to all parties and to bar further suits filed later.

3. The procedure to be employed is as follows:

a. After decree admitting or rejecting will by Clerk, the Complaint is filed and the necessary parties are joined.

b. Commence to trial, and the trial may be by jury.

c. There is a one year statute of limitations period. If the complaint is not filed within one year in court where will was admitted or rejected, the suit is forever barred. See VA. CODE ANN. § 64.1-89 (Michie 2006) set forth in full below:

> *If the decree or order be made by the court in the exercise either of its original jurisdiction or an appeal from the clerk, such bill shall be filed within one year from the date of such order made by the court. If no appeal be taken from a decree or order made by the clerk under § 64.1-77, the bill shall be filed within one year from the date of such order or decree by the clerk. If no such bill be filed within that time, the decree or order shall be forever binding. The venue for filing a bill under § 64.1-88 shall be as specified in subdivision 7 of § 8.01-261. VA. CODE ANN. § 64.1-89*

d. There is a saving provision for infants and persons of unsound mind. These individuals shall have one year after the infant turns 18 or one year after the person of unsound mind is restored to sanity to file suit unless these individuals were otherwise brought before the court (by GAL).

e. If a person has been proceeded against by order of publication, and unless he actually appeared as a party or was personally summoned, he can file a Complaint to Impeach or Establish a Will within two years after such decree or order.

> *Sections 64.1-84, 64.1-88 and 64.1-89 are subject to these provisos: that any person interested who has not otherwise been before the court and who, at the time of the decree or order, is under the age of eighteen years or of unsound mind may file a bill in equity to impeach or establish the will within one year after he becomes of age or is restored to capacity, as the case may be, and that any person interested who has been proceeded against by order of publication may, unless he actually appeared as a party or was personally summoned, file such bill within two years after such decree or order. VA. CODE ANN. § 64.1-90 (Michie 2006).*

E. APPEAL OF CLERK'S ORDER

1. Another means of establishing or impeaching a Will is to appeal of clerk's order.

2. The appeal can be made without bond, and must be filed within 6 months of clerk's order. See VA. CODE ANN. § 64.1-78 (Michie 2006), which states the following:

> *Any person interested may, within six months after the entering of such an order, appeal therefrom as a matter of right, without giving any bond, to the court whose clerk, or deputy, has made the order. Upon application being made for such appeal, the clerk or deputy shall enter forthwith in his order book an order allowing such appeal, and docket the same as a preferred cause for trial at the next term of the court. The court at any term shall hear and determine the matter as though it had been presented to the court in the first instance, and shall cause a copy of the order on the order book of the court embracing its final action to be copied by the clerk, or deputy, into his order book. At any time after such appeal is allowed the court, or the judge thereof in vacation, may make any such order for the protection of the parties interested or for the protection or*

preservation of any property involved as might have been made had the matter been originally presented to the court, or as may seem needful. VA. CODE ANN. § 64.1-78

F. PROBATE OF LOST OR DESTROYED WILL

1. How do you probate a lost or destroyed will? You must file a suit to establish and probate the Will.[28]

2. The proponent of the Will must prove by clear and convincing evidence, that the Will was lost or destroyed, but not revoked by testator.[29]

3. If the person last in possession of the document purporting to be the Will is the testator, the presumption is that the Will was revoked by the testator. If the person last in possession was not the testator, and the document was not accessible by the testator, the presumption is that the will was lost.[30]

VI. QUALIFICATION

A. BOND WITH OR WITHOUT SURETY

1. Once the Will is probated or the intestate administration is opened and the personal representative is qualifying, the Clerk determines whether bond with or without surety is necessary.

2. How to Determine Value of Bond – bond is required to be equal to at least the value of the personal property estate and can be double the value, or if allowed, equal to value of Real Estate and personal property . VA. CODE ANN. § 64.1-120 (Michie 2006) provides the following:

A. Except as provided in subsection B, every bond of an executor or administrator shall be in a penalty equal, at the least, to the full value of the personal estate of the deceased to be administered; and when there is a will which authorizes the executor or administrator to sell real estate, or receive the rents and profits thereof, the bond shall be in a penalty equal, at the least, to the full value both of the personal estate and of such real estate, or rents and profits, as the case may be.

B. Upon the request of an executor or administrator, the clerk shall redetermine the penalty of the bond in light of any reduction in the current market value of the estate in the executor's or administrator's possession or subject to his power, whether such reduction is due to disbursements, distributions or valuation of assets, if such reduction is reflected in an accounting that has been confirmed by the court or an inventory that has been approved by the commissioner of accounts and recorded in the clerk's office. This provision shall not apply to any bond set by the court.

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[28] *See Hawkins v. Tampa*, 197 Va. 22 (1955).
[29] *See Mumaw v. Mumaw*, 214 Va. 573 (1974).
[30] *See Johnson v. Cauley*, 262 Va. 40, 44 (2001).

3. **When Bond with Surety is needed.**

a. Surety may be needed to back bond of the personal representative if none of the following situations exist (note: this list is not exhaustive):

- If surety is waived in the Will[31] and person qualifying is a Virginia resident; or If the person qualifying as executor is a non-resident (and surety is waived in the will), is serving with a resident co-fiduciary.
- If the fiduciary is a bank or trust company qualified to do business in Virginia, having trust powers and having specified amount of capital stock.[32]
- If all the beneficiaries are also the personal representatives[33].
- If the value of estate does not exceed $50,000[34]
- If the Personal Representative serving jointly with bank, trust company (exempted second item above), with no power of sale over real estate, or court directs otherwise.

b. The following Code sections are applicable and should be consulted:

If all distributees of a decedent's estate or all beneficiaries under the decedent's will are personal representatives of that decedent's estate, whether serving alone or with others who are not distributees or beneficiaries, the court or clerk shall not require security; if all personal representatives of a testate decedent are entitled to file a statement in lieu of an accounting under § 26-20.1, the security shall be required only upon the portion of their bond given in connection with the property passing to beneficiaries who are not personal representatives; and no security shall be required of an executor when the will waives security of an executor nominated therein. However, in any case, upon the application of any person who has a pecuniary interest or upon motion of the court or clerk, such fiduciary may be required to provide security in an amount deemed sufficient. If at any time any person with an interest, or a legatee, devisee or distributee of an estate files with the court a motion in writing suggesting that surety upon the bond should be required of a fiduciary for the protection of the estate, a copy of such motion shall be served upon the fiduciary. The court shall hear the matter and may require the fiduciary to furnish surety upon his bond in the amount it deems necessary and, in addition, award to the movant reasonable attorney's fees and costs which shall be paid out of the estate.

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[31] *See* VA. CODE ANN. § 64.1-121 (Michie 2006).
[32] *See* VA. CODE ANN. § 64.1-118 (Michie 2006).
[33] *See* VA. CODE ANN. § 64.1-121 (Michie 2006).
[34] *See* VA. CODE ANN. § 26-4 (Michie 2006).

This section shall be deemed to permit qualification without security in situations where the personal representative or personal representatives are the only distributees or only beneficiaries by virtue of one or more instruments of disclaimer filed prior to, or at the time of, such personal representative's qualification. VA. CODE ANN. § 64.1-121 (Michie 2006).

And – the other applicable Code section:

The several courts in this Commonwealth and the clerks thereof, having jurisdiction to appoint personal representatives, guardians, conservators and committees may, in their discretion, when the amount coming into the hands or possession of the personal representative, guardian of a minor, conservator or committee does not exceed $ 15,000, allow any such personal representative, guardian, conservator or committee to qualify by giving bond without surety. Any personal representative or trustee serving jointly with a bank or trust company exempted from giving surety on its bond as such under § 6.1-18 shall, unless the court shall otherwise direct, be likewise exempt. VA. CODE ANN. § 26-4 (Michie 2006).

c. A statement in lieu of accounting is allowed if residuary beneficiary is the personal representative. If there is complete identity between Personal Representative and all residuary beneficiaries, then security may be reduced to cover only portion of estate going to other beneficiaries.[35]

B. CERTIFICATE OF QUALIFICATION

1. Upon the completion of probate and/or qualification, an Order identified as a Certificate of Qualification will be entered. The Certificate of Qualification is evidence of the Personal Representative's authority to act on behalf of the estate.

2. Clerks can issue the probate order and the Certificate of Qualification.

3. There are actually two forms of the Certificate of Qualification – the long form and the short form.

4. As a matter of practice, copies of short form are provided. However, you can request copies of long form.

5. Virginia Code Ann. § 64.1-122 (Michie 2006) sets forth how and when such certificates are required.

C. OTHER ITEMS TO CONSIDER AT TIME OF QUALIFICATION.

[35] *See* VA. CODE ANN. § 64.1-121 (Michie 2006).

1. The Clerk shall provide information and forms from Commissioner of Accounts regarding the required filings (usually in the form of a packet).[36]

2. The Ancillary Estate.

a. Generally. The primary estate administration takes place where decedent was domiciled (i.e., died a resident).

b. Probate in Virginia, real estate located outside of Virginia. An ancillary administration most commonly occurs when real estate is located outside of Virginia. Check with the jurisdiction in which the real estate is located in order to ascertain what is necessary.

c. Probate in Virginia, real estate located in Virginia, but not in jurisdiction where probate opened. A certified copy of the Will must be filed in each jurisdiction in Virginia in which real estate is owned, along with a List of Heirs/Real Estate Affidavit.[37] The personal representative need not qualify in all Virginia jurisdictions where real estate is owned, but the two documents listed above are required. Virginia Code Ann. § 64.1-135 states the following:

> *Upon the death intestate of a person owning real estate, any person having an interest therein, including a personal representative who has qualified, may execute an affidavit, on a form provided to each clerk of the court by the Office of the Executive Secretary of the Supreme Court or a computer-generated facsimile thereof, setting forth briefly (i) the real estate owned by the decedent at the time of his death situated within the city or county where such affidavit is to be recorded; (ii) the intestacy; and (iii) the names and last known addresses of the heirs at law. The clerk of the court of the county or city in which deeds are admitted to record and in which such real estate or any part thereof is located, shall, upon the payment of the fees provided by law, record and index the same as wills are recorded and indexed.*
>
> *The clerk of the court of the county or city where such affidavit is recorded shall transmit an abstract of said affidavit to the commissioner of the revenue of said county or city as in the case of deeds conveying real estate. Upon receipt thereof by said commissioner, such real estate may be transferred upon the land books and assessed in accordance therewith. VA. CODE ANN. § 64.1-135*

d. Probate outside of Virginia, real estate located in Virginia.

- The ancillary personal representative has a duty to pay all Virginia taxes owed and claims of Virginia creditors. It is advisable to obtain order of distribution.
- If ancillary administration is required, qualification process is the same. The ancillary personal representative must account to Commissioner of Accounts as is required of primary personal representative.

[36] *See* VA. CODE ANN. § 26-1.2 (Michie 2006).
[37] *See* VA. CODE ANN. § 64.1-135 (Michie 2006).

VII. PROBATE &/OR QUALIFICATION ARE COMPLETE – NOW WHAT?

A. REQUIRED FILINGS

1. As stated above, the Clerk's office will provide the forms necessary to be filed upon qualification of the Personal Representative or probate of the Will.

2. **Notice of Probate.** Personal Representative or person offering the Will must:

a. Send Notice of Probate to the heirs within 30 days of date of qualification or admission of will to probate.[38]

b. The Personal Representative or person offering the Will must file an affidavit stating that such Notice was sent within 4 months of the date of qualification or probate.[39]

c. Who are the "heirs"?

- Surviving spouse and all heirs at law, as well as living and ascertained beneficiaries of the Will (testamentary trust beneficiaries included); and with pour over wills, the trustee of the revocable inter vivos trust (but not beneficiaries of the trust); and
- Personal Representative of beneficiary or heir who has survived decedent but is deceased at time of qualification or probate.

d. Exceptions to Notice Requirement:

- The Personal Representative or proponent of the Will;
- Any person who has signed and filed waiver of right to receive notice;
- Any person to whom a summons has been issued pursuant to 64.1-79 or 80; or
- When known assets passing under will or by intestacy do not exceed $5,000.

e. Special Circumstances.

- Persons who are subject to conservatorship or guardianship, if notice is provided to conservator, guardian or committee;
- Beneficiaries of revocable inter vivos trust, so long as trust is a named beneficiary under will;

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[38] *See* VA. CODE ANN. § 64.1-122.2 (Michie 2006).
[39] *See id*.

- Any minor for whom no guardian is appointed if notice provided to parent or *loco parentis*.

f. How is Notice delivered? By hand or first class mail.[40]

g. What happens if you don't file? The Commissioner of Accounts will not approve settlement of accounts until affidavit has been recorded. If the Affidavit is not filed within 4 months, the Commissioner of Accounts shall issue a summons to the fiduciary requiring compliance and if not, Commissioner of Accounts shall enforce filing as set forth in VA. CODE ANN. § 26-23. If Personal Representative does not comply, Commissioner of Accounts may report to court, and the report could be grounds for removal of the Personal Representative.

3. Inventory. A Personal Representative must set forth all assets held by decedent at death, along with an approximate value in an Inventory. This filing is required to be filed with the Commissioner of Accounts within four months of qualification. This is discussed in the Section labeled "Commissioner of Accounts" in Section VI of this outline, *infra*.

4. Annual Accountings. A Personal Representative must file annual accountings with the Commissioner of Accounts. The first accounting is due within sixteen months of qualification, and every year following until final distribution is made. This is discussed in the Section labeled "Commissioner of Accounts" in Section VIII of this outline, *infra*.

B. DUTIES OF THE PERSONAL REPRESENTATIVE

1. Basic Duties – to marshal assets of the estate, satisfy the debts of the decedent, pay all expenses of administration, make all required filings before the Court and Commissioner of Accounts, and make final distribution to the heirs or legatees.

2. The Initial Steps.

a. As the decedent's Social Security number can no longer be used, the estate must obtain a taxpayer identification number which is done by the filing of a Form SS-4. http://www.irs.gov/pub/irs-pdf/fss4.pdf. A Form 56 notice of fiduciary should be filed for the decedent and the estate. http://www.irs.gov/pub/irs-pdf/f56.pdf. A useful resource is IRS Publication 559. http://www.irs.gov/pub/irs-pdf/p559.pdf

b. Once you have obtained a taxpayer identification number for the estate, a checking account should be opened. The only signatory on the account is the person named in the Certificate of Qualification.

c. The decedent's mail should be forwarded to the Personal Representative. You can accomplish this online. https://moversguide.usps.com/?referral=USPS

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[40] *See* VA. CODE ANN. § 64.1-122.2(D) (Michie 2006).

d. A bank account should be opened in the name of the Personal Representative and the Estate, using the Estate's taxpayer identification number.

3. When more than one person has qualified as Personal Representative, unless the will provides otherwise, the general powers are joint and several. Thus, the co-fiduciaries are jointly and severally liable to beneficiaries, or other interested parties for failure to perform duties. Generally, they must concur on action to be taken.

4. Marshaling the Assets

a. The Personal Representative must collect all assets of the Estate. Keep in mind that those assets may also include those items set forth in VA. CODE ANN.§ 64.1-144 (Michie 2006), which states the following: "A personal representative may sue or be sued upon any judgment for or against or any contract of or with his decedent, including, but not limited to, suits for personal injury or wrongful death."

b. Other assets of the Estate include:

- Tangible personal property
- Cash
- Stocks and bonds
- Motor vehicles (unless titled jointly with right of survivorship). DMV forms and requirements http://www.dmv.state.va.us/webdoc/citizen/guide/index.asp
- Closely held corporate stock
- Unincorporated business interests
- Partnership interest
- Life insurance death benefit proceeds payable to the Estate
- Anything with the designation of the decedent's Estate (beneficiary designation)
- Real Estate that has been directed by the Will to be sold

c. When and what goods can Personal Representative sell? Virginia Code Ann. § 64.1-154 (Michie 2006) contains the answer, to wit: "Of the goods not mentioned in § 64.1-153, the personal representative shall, subject to the provisions of Article 5.1 (§ 64.1-151.1 et seq.) of this chapter, sell, as soon as convenient, at public auction or private sale, such as are likely to be impaired in value by keeping, giving a reasonable credit except for small sums, and taking bond with good security."

d. What about Real Estate? As stated earlier, real estate can be sold to satisfy claims of creditors.[41] Real estate includes condominiums, time shares and cooperative apartments.

i. Generally, the personal representative has no control over real estate.[42]

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[41] *See* sec. II-E 5, *supra.*
[42] *See Bane v. Adair*, 156 Va. 542, 544, 158 SE 26 856 (1951); *but see* n. 8, supra.

ii. Direction in the Will to sell grants only a power of sale, but confers no interest in land. Title to the property devolves to heirs.[43]

iii. Limitations on sale of real estate. If sold within one year of the decedent's death, a creditor may file claim against decedent's real estate. Title companies commonly require the Personal Representative as seller to hold the sale proceeds in escrow until the end of the one year period, or purchase a special bond. But, sales pursuant to court orders within the one year period are valid against the estate's creditors if taken in compliance with 64.1-184. The net proceeds from such sales are subject to such claims. The applicable Code section states the following:

§ 64.1-184. When sale within year valid against creditors; proceeds paid to special commissioner; bond to obtain proceeds.

Any alienation of such estate made within one year after the death of the testator or intestate shall be valid against creditors of such testator or intestate, if such estate is sold and conveyed under and pursuant to decrees of a court of competent jurisdiction in a proper suit for partition, sale of lands of persons under disability, or other judicial sale, and the net proceeds of sale are paid to a special commissioner appointed by the court for the purpose.

The net proceeds of sale shall be the purchase price for such estate including money, deferred purchase money obligations, and other securities, remaining after the payment of the expenses of sale ordinarily paid by the vendor in sales of such estates and the discharge of such indebtedness and encumbrances for which, by law, such estate is primarily liable.

The net proceeds so paid shall be held by the special commissioner appointed by the court for the purpose, in lieu and in place of such estate subject to the claims of creditors of the testator or intestate in the same manner and to like extent in every respect as such estate would have been if not sold, for a period ending no sooner than one year after the death of the testator or intestate. Upon expiration of the one-year period, or at any time within the one-year period upon the posting of a bond with such surety as may be prescribed by the court to secure any claims against the property or proceeds, if no claim has been made or asserted against the net proceeds, they shall be distributed by the special commissioner to those entitled thereto in proportion to the interest of each in such estate. A purchaser of any land so sold in conformity with the provisions of this section shall not be required to see to the application of the purchase money.

The special commissioner who receives and holds such net proceeds or refunding bond shall give such bond as may be required by the court appointing him.

[43] *See Coles v. Jamerson*, 112 Va. 311 (1911).

5. Investing.

a. Scope of Duty. The Personal Representative's scope of duty regarding investment of the decedent's property is defined in the Will, powers granted under § 64.1-57 and/or by statue in Title 26, Chapter 3 of the 1950 Code of Virginia. This means that investing the property is not always permitted, so it is important for you to understand the scope of the Personal Representative's duties.

b. Specific Circumstances. Virginia Code Ann. § 26-39 sets forth the requirements if a fiduciary is required to invest funds:

> *Whenever a guardian of an estate, conservator or other fiduciary charged with the investment of funds collects any principal he shall have a reasonable time not exceeding four months to invest or loan the same, and shall not be charged with interest thereon until the expiration of such time. A guardian of an estate, conservator or any other fiduciary shall only be required to invest in accordance with the provisions of §§ 26-40.01, 26-40.1, 26-40.2, 26-44, and 26-44.1 and Article 2 (§ 26-45.3 et seq.) and if he so invests shall be accountable only for such interest and profits as are earned. If any funds are otherwise invested without the previous consent of the court having jurisdiction of such trust funds, the burden shall be on the guardian of an estate, conservator or other fiduciary before his settlement is approved by the commissioner of accounts to show to the satisfaction of the commissioner that after exercising reasonable diligence he was unable to so invest the funds and that the investment made was reasonable and proper under all of the circumstances and fair to the beneficiary of the funds.*
>
> *This section shall not be construed as altering the provisions of any will, deed or other instrument giving to the fiduciary discretion as to the rate of interest, character of security, nature or investment under the trust, or time within which the trust funds are to be loaned or invested.*

c. ***PRACTICE POINTER:*** If the Personal Representative is to invest funds, he shall follow the prudent investor rule, which is set forth in Title 26, Chapter 3 of the 1950 Code of Virginia.

6. Other Duties.

a. Prepare and file decedent's final individual income tax returns (IRS Form 1040 and Virginia Form 760)

b. If Estate Tax Returns are required (IRS Form 706 and Virginia Est-80) must be filed within 9 months of date of death

c. Prepare and file fiduciary income tax returns (IRS Form 1041 and Virginia Form 770)

d. ***PRACTICE POINTER*****:** consult with a tax attorney or an accountant who has experience with the taxation of estates, it is different than taxation of individuals.

VIII. COMMISSIONER OF ACCOUNTS

A. WHO IS THE COMMISSIONER AND WHAT IS HIS ROLE?:

1. The Commissioner of Accounts is an attorney appointed by the circuit court who has general supervision of all fiduciaries admitted to qualify by the court and to make all ex parte settlement of their accounts. An Assistant Commissioner of Accounts is also appointed by the court for situations in which the Commissioner of Accounts has a conflict of interest.

2. The current provisions of the Code of Virginia are essentially unchanged in concept from those early statutes. Virginia Code §26-8 directs "[t]he judges of each circuit court" to appoint as many commissioners of accounts[44] "as may be requisite to carry out the duties of that office." The duty of each Commissioner is to oversee the inventories and accountings of all fiduciaries subject to that court's judicial supervision of their accounts, namely: personal representatives of decedents' estates; guardians of the estates of minors and conservators of incapacitated adults; trustees of testamentary trusts and of some *inter vivos* trusts; and trustees under deeds of trust in foreclosure proceedings.

3. In 1993, the Judicial Council of Virginia[45] established the Standing Committee on Commissioners of Accounts (the "Standing Committee"), a quasi supervisory authority for providing suggestions for the operation of the office of a commissioner of accounts and for review and investigation of complaints concerning the performance of a commissioner of accounts. Pursuant to these charges, the Standing Committee prepared and the Virginia Law Foundation published an advisory and educational volume entitled, *Manual for Commissioners of Accounts*, (3d Ed.) The Standing Committee also developed an advisory uniform fee schedule for services by a commissioner which was approved by the Judicial Council for recommendation to circuit courts for adoption.

B. FILING AND REVIEW OF INVENTORY

1. **Requirements.** Personal Representative is required to file Inventory with Commissioner of Accounts within 4 months of qualification. Filing is waived when estate's value is less than $50,000.

a. Personal Representative should examine all of decedent's assets, including ownership instruments, such as deeds, titles, and certificates to determine the precise nature, if any, of the decedent's ownership. All assets in decedent's name should be transferred into estate's name.

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[44] *See* Va. Code §26-10 (2005) which authorizes appointment of assistant commissioners to handle cases the Commissioner determiners not to deal with personally. Va. Code §26-10.1 (2005) permits appointment of deputy commissioners to assist the Commissioner.

[45] The Judicial Council is established by Va. Code §17-700, *et. seq*., to provide for the continuous study of the organization, rules and methods of procedure and practice of Virginia's judicial system.

b. Appraisals. All property of the decedent passing through the probate estate should be valued. Although assessed value for real estate tax purposes may be used to value real estate, the better practice is to have the real estate appraised by a licensed real estate appraiser.

c. Forms. The Inventory form is provided by the Office of Secretary of Supreme Court.[46] Go to http://www.courts.state.va.us/forms/circuit/fiduciary.html

> *Forms and instructions for the inventories required by § 26-12 shall be provided to each clerk of court by the Office of the Executive Secretary of the Supreme Court. Every inventory filed pursuant to § 26-12 shall be filed on the appropriate form, which shall be provided to the fiduciary by the clerk of the court granting administration or on a computer-generated facsimile of the appropriate form. VA. CODE ANN. § 26-12.1*

d. Instructions. Instructions provide inventory must include "all of the decedent's personal estate under your supervision and control; (ii) interest in any multiple party account (which is); (iii) real estate over which you have power sale; (iv) other assets in decedent's estate (whether in Virginia or not). These assets are to be valued as of the date of the decedent's death. See the instructions. http://www.courts.state.va.us/forms/circuit/cc1670inst-0702.pdf

e. Filing Fees. Filing fee made payable to "Commissioner of Accounts". Not all counties are the same, and you should request a fee sheet from the Commissioner of Accounts in the jurisdiction in which you are filing. Please see Appendix A, which sets forth the fee schedule for Fairfax County.

2. Review of Inventory By Commissioner. There is no statutory requirement for when the Commissioner of Accounts must approve an Inventory. Once approved by the Commissioner, the Inventory is recorded by the Clerk in the will book.[47]

3. Inventory Not Timely Filed. If an Inventory not timely filed, Commissioner of Accounts shall issue a summons to the fiduciary required to make the filing. If the filing is not made within 30 days of the service of the summons, the Commissioner of Accounts shall report the failure to file to the court.[48] If an attorney is the fiduciary, the Commissioner must also notify the Virginia State Bar of the failure to file.[49]

4. After Discovered Assets. These assets must be reported to the Commissioner of Accounts either by way of filing an Amended Inventory or on the Estate's next accounting (at the discretion of the Commissioner). Virginia Code Ann. § 26-24 (Michie 2006) sets forth the following:

> *After discovered assets are reported to the Commissioner of Accounts by filing of an amended inventory showing all assets of estate, by filing an additional inventory showing additional assets only, or by showing after-discovered assets on estate's next accounting*

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[46] *See* VA. CODE ANN. § 26-12.1 (Michie 2006).
[47] *See* VA. CODE ANN. § 26-16 (Michie 2006).
[48] *See* VA. CODE ANN. §§ 26-12 & 26-13 (Michie 2006).
[49] *See* VA. CODE ANN. § 26-13 (Michie 2006).

(at the discretion of the Commissioner). Filing of an amended Inventory or permission to extend from the Commissioner must be done within 4 months of discovery of assets.

5. Copies of Inventories and Accountings.

a. Personal Representative must provide copies of the Inventory and Accounts to those whom notice of probate was given **and** who made a written request to the Personal Representative. Virginia Code Ann. § 26-12.4 sets forth the specific requirements:

A. Every personal representative filing an inventory or account (including an affidavit of intent to file a statement in lieu of an account pursuant to § 26-20.1) or any document making changes to either with the commissioner of accounts shall, on or before the date of such filing, send a copy thereof, which need not include copies of any supporting vouchers, by first-class mail to such of those persons to whom notice was given pursuant to subsections A and B of § 64.1-122.2 as have requested the same from the personal representative in writing; provided, however, that copies need not be given to (i) persons who would take only as heirs at law in a case where all of the decedent's probate estate is disposed of by will, or (ii) beneficiaries whose gifts have been satisfied in full prior to such filing. A request for copies may be made to a personal representative at any time. It may relate to one specific filing or to all filings to be made by the personal representative but it is not effective for filings made prior to its receipt by a personal representative.

B. No commissioner of accounts shall approve any personal representative's inventory or account (i) until twenty-one days have elapsed from the receipt thereof and (ii) unless the inventory or account contains a statement that any copies requested pursuant to this section have been mailed, and shows the names and addresses of the persons to whom they were mailed and the date of such mailing.

b. Certificate of Mailing Requirement. By signing the certificate included in the Inventory form, the Personal Representative is representing that he has complied with the requirements of VA. CODE ANN. § 26-12.4 (Michie 2006).

C. FILING & REVIEW OF ACCOUNTINGS

1. Requirements.

a. The Account begins with the assets of the estate as reported on the Inventory and accounts for those assets until they are either expended or distributed.

b. The first Account is due within 16 months of qualification and covers a 12 month period. Subsequent accountings are due within four months of the end of the 12 month accounting period. An Account may be filed earlier than when required.[50]

[50] *See* VA. CODE ANN. § 26-17.5 (Michie 2006).

c. According to the Manual for Commissioners of Accounts, Third Edition, "The account shall be sufficiently clear for it to be understood by a person of average intelligence."[51]

d. Substance and form requirements.

i. For statutory requirements for substance fiduciary accounts see VA. CODE ANN. § 26-17.3 (Michie 2006), and for the form of fiduciary accounts including size of paper and margins see VA. CODE ANN. §§ 42.1-82 and 55-108 (Michie 2006).

ii. The Account form is also provided by the Office of Secretary of Supreme Court. See http://www.courts.state.va.us/forms/circuit/fiduciary.html See the instructions provided on the website for the requirements for the form as well as the attachments. http://www.courts.state.va.us/forms/circuit/cc_1680_inst_0705.pdf

iii. Generally all transactions require provide supporting documentation or vouchers, except disbursements of $25 or less.[52]

iv. Virginia Code Ann. § 26-17.9 provides the following:

A. Vouchers for disbursements and a statement of cash on hand or in a bank and all investments held at the terminal date of the account shall also be exhibited with each account. A voucher shall not be required when a disbursement, not exceeding the value of $ 25, is made to a legatee under the authority of a will and such legatee refuses to take the possession or fails to present the disbursement check to a bank for payment. In such case the fiduciary shall file an affidavit stating that he has made a good faith effort to comply with the terms of the will and the provisions of this section.

B. A fiduciary may make payment to a beneficiary by transfer to the beneficiary's bank account with the fiduciary or by payment to an account with another bank through an automated clearinghouse, wire transfer or similar mechanism, if the beneficiary has consented in writing to such method of payment. In either case, a record or statement of the bank making such payment shall be a sufficient voucher.

C. In the case of payments to the Internal Revenue Service for income tax estimates or any other payments required or permitted to be made by wire transfer or similar mechanism, the fiduciary shall not be required to exhibit a receipt for such payment. A record or statement of the bank making such payment shall be a sufficient voucher.

D. In the case of payments of debts, taxes and expenses, a corporate fiduciary's affidavit signed by an officer familiar with the facts that describes each payment by date, payee, purpose and amount shall be a sufficient voucher for the purpose of subsection A. However, the commissioner of accounts may require that the corporate fiduciary exhibit a voucher for a specific payment.

[51] *See* Manual for Commissioner of Accounts (3d Ed.) at 43, ¶7.201, B.11.

[52] *See id*. at 53 (having the suggested form for "Affidavit for Payment of Debts, Taxes, and Expenses Pursuant to Va. Code § 26-17.9(D)").

E. In the event a fiduciary seeks to use a check as a voucher or receipt hereunder, (i) a copy of both sides of the check shall be sufficient or (ii) a copy of the front side of the check, and the periodic statement, from the financial institution showing the check number and amount that coincides with the copy shall be sufficient, provided such copy was made in the regular course of business in accordance with the admissibility requirements of § 8.01-391, and provided further, that the commissioner of accounts may require a fiduciary to exhibit a proper voucher for a specific payment or for distributions to beneficiaries or distributees. However, the commissioner of accounts shall not require a fiduciary to exhibit an original check as a voucher hereunder.

v. The Personal Representative must provide file Tax Certificate stating that all taxes are paid with Account.[53]

2. The Final Accounting. Must have zero balance in order for Account to be considered a final accounting.

3. Distributions/Legacies/Bequests.

a. If bequest not paid within one year of death, interest shall be paid the legatee of 6% per annum from one year anniversary forward.[54]

b. Personal Representative may not be compelled to pay any legacy under will or make distribution until six months after qualification.[55] Virginia Code Ann. § 64.1-177 (Michie 2006) sets forth the following with regard to this particular rule:

A personal representative shall not be compelled to pay any legacy given by the will or make distribution of the estate of his decedent until after six months from the date of the order conferring authority on the first executor or administrator of such decedent and, except when it is otherwise specifically provided, he shall not then be compelled to make such payment or distribution until the legatee or distributee shall give him a bond, executed by himself or some other person, with sufficient surety, with condition to refund a due proportion of any debts or demands which may afterwards appear against the decedent and of the costs attending their recovery. Such bond shall be filed and recorded in the clerk's office of the court which may have decreed such payment or distribution or in which the accounts of such representative may be recorded.

c. Following six months, Personal Representative is not required to distribute the Estate unless a refunding bond with sufficient surety is given by the legatee.

4. Filing and Review of Account. According to the Manual for Commissioners of Accounts, "review of an account will commence within 90 days of receipt by the Commissioner."[56]

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[53] *See id.* at 48.
[54] *See* VA. CODE ANN. §§ 64.1-68, 6.1-330.53 (Michie 2006).
[55] *See* VA. CODE ANN. § 64.1-177 (Michie 2006).
[56] *See* Manual for Commissioner of Accounts (3d Ed.) at 43, ¶7.202.

5. **Account Not Timely Filed.**

a. The Commissioner is required to report to the clerk and the court at least every quarter those fiduciaries whose accounts have been before the Commissioner for more than five months and note the fiduciaries who are deemed delinquent.[57]

b. As with the failure to file an Inventory, if an attorney is the fiduciary and fails to settle an account within thirty days after the date of service of a summons, the Commissioner must notify the court and the Virginia State Bar.[58]

6. **When Is an Account Not Required (i.e., What is a Statement in Lieu of Accounts)?**

a. When the all distributees of an estate or all residuary beneficiaries under the will are Personal Representatives of that Estate, the Personal Representatives may file a Statement In Lieu of Settlement of Account instead of the account required by Va. Code Ann § 26-17.5 (Michie 2006).

b. A Statement in Lieu is basically a statement to the Commissioner stating that all debts have been paid and distributions to legatees were made (with receipts attached).

c. The Statement In Lieu form is also provided by the Office of Secretary of Supreme Court at http://www.courts.state.va.us/forms/circuit/cc_1681_0702_rev.pdf and the instructions can be found at http://www.courts.state.va.us/forms/circuit/cc_1681_0702_inst.pdf

7. **Written Statement.** If the testator left a written statement or list identifying recipients of tangible personal property, a copy of the writing shall be furnished to the Commissioner of Accounts along with the legatee's receipt. VA. CODE ANN. § 64.1-45.1

D. COMPENSATION OF FIDUCIARY

1. **Reasonable Compensation.**

a. A fiduciary is allowed "reasonable compensation" for his services.[59]

b. The term "reasonable compensation" is not defined by statute (at least as to individual fiduciaries, as opposed to institutional fiduciaries).[60]

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[57] *See* VA. CODE ANN. § 26-18 (Michie 2006).
[58] *See id*.
[59] See VA. CODE ANN. § 26-30 (Michie 2006).
[60] *See, e.g., Clare v. Grasty*, 213 Va. 165 (1972); *Perrow v. Payne*, 203 Va. 17 (1961); *Bickers v. Shenandoah Valley Nat'l Bank*, 201 Va. 257 (1959); *Virginia Trust Co. v. Evans*, 193 Va. 425 (1952); *Swank v. Reherd*, 181 Va. 943 (1943); *Mapp v. Hickman*, 164 Va. 386 (1935); *Jones v. Virginia Trust Co*., 142 Va. 229 (1925); *Lake v. Hope*, 116 Va. 687(1914); *Lovett v. Thomas*, 81 Va. 245 (1885); *Boyd's Sureties v. Oglesby*, 64 Va. (23 Gratt.) 674 (1873).

c. Fairfax County.

i. The Commissioner of Accounts for Fairfax County has published compensation guidelines. See Appendix B for Schedule.

ii. The Commissioner has the discretion to exceed the published guidelines.

PRACTICE POINTER: A fiduciary who seeks to exceed the fee guideline should obtain the informed written consent of all beneficiaries.

d. Virginia Code Ann. § 26-30 (Michie 2006) has been amended. Please see the following showing the current statute in effect until July 1, 2006, and the amended version, which is to be in effect as of July 1, 2006:

*§ 26-30. (**Effective <u>until</u> July 1, 2006**) Expenses and commissions allowed fiduciaries*

The commissioner, in stating and settling the account, shall allow the fiduciary any reasonable expenses incurred by him as such; and also, except in cases in which it is otherwise provided, a reasonable compensation, in the form of a commission on receipts, or otherwise. Unless otherwise provided by the court, any guardian appointed pursuant to Chapter 10 (§ 37.2-1000 et seq.) of Title 37.2 shall also be allowed reasonable compensation for his services. If a committee or other fiduciary renders services with regard to real estate owned by the ward or beneficiary, compensation may also be allowed for the services rendered with regard to the real estate and the income therefrom or the value thereof.

*§ 26-30. (**Effective July 1, 2006**) Expenses and commissions allowed fiduciaries*

The commissioner, in stating and settling the account, shall allow the fiduciary any reasonable expenses incurred by him as such; and also, except in cases in which it is otherwise provided, a reasonable compensation, in the form of a commission on receipts, or otherwise. Unless otherwise provided by the court, any guardian appointed pursuant to Chapter 10 (§ 37.2-1000 et seq.) of Title 37.2 shall also be allowed reasonable compensation for his services. If a committee or other fiduciary renders services with regard to real estate owned by the ward or beneficiary, compensation may also be allowed for the services rendered with regard to the real estate and the income therefrom or the value thereof. Notwithstanding the foregoing provisions or any provision under Chapter 31 (§ 55-541.01 et seq.) of Title 55, where the compensation of an institutional fiduciary is specified under the terms of the trust or will by reference to a standard published fee schedule, the commissioner shall not reduce the compensation below the amount specified, unless there is sufficient proof that i) the settler or testator was not competent when the trust instrument or will was executed or ii) such compensation is excessive in light of the compensation institutional fiduciaries generally receive in similar situations.

2. When is a Fiduciary Precluded from Receiving Compensation? A fiduciary who fails to file an Account can be precluded from receiving a fee. Please see VA. CODE ANN. § 26-19 (Michie 2006) which provides the following:

> *If any such fiduciary wholly fail to lay before such commissioner a statement of all matters required in § 26-17.3 together with all other statements and items therein required for any year, within four months after its expiration, and, though a statement be laid before the commissioner, yet if the fiduciary be found chargeable for that year with any money or other property, not embraced in the statement, he shall have no compensation for his services during such year, nor commission on such money or other property unless allowed by the commissioner for good cause shown; the commissioner's action in such case shall be subject to review by the court on exceptions by any interested person. This section shall not apply to a case in which a fiduciary has laid a statement of his accounts within such year before a commissioner in chancery who in a pending suit has been ordered to settle his account.*

E. DEBTS OF AND CLAIMS AGAINST ESTATE

1. Generally. The decedent's debts and liabilities of the decedent must be addressed before any distributions can be made. In practice, most fiduciaries acknowledge and pay such debts.

2. Procedure for Creditors.

a. A creditor may file a claim with the Commissioner of Accounts who then endorses the date of filing and signs endorsement.[61]

b. This process stops the running of any statue of limitation against the claim until a debts and demands hearing is held before the Commissioner.

c. Virginia Code Ann. § 64.1-173 (Michie 2006) sets forth this procedure:

> *Any person having any such debt or demand and desiring to prove the same shall file his claim or a written statement thereof before the commissioner, who shall endorse thereon the date of the filing and sign the endorsement in his official character. The time that elapses between such filing and the termination of the proceedings commenced under § 64.1-171 shall not be computed as a part of the time within which, under any statute or rule of law, it may be necessary, in order to prevent a bar of the claim, to bring any action or institute any proceeding recommended in writing by the commissioner for the recovery or enforcement of such claim.*

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[61] *See* VA. CODE ANN. § 64.1-173 (Michie 2006).

2. Debts & Demands Hearing.

a. When fiduciary disputes creditor's claim, the fiduciary should request a hearing on debts and demands before the Commissioner of Accounts.[62]

b. A creditor or beneficiary can also request a debts and demands hearing.

c. Fiduciary's Duties in Requesting Debts & Demands Hearing. This is set fully set forth in VA. CODE ANN. § 64.1-171 (Michie 2006):

> *Any commissioner of accounts who has for settlement the accounts of a personal representative of a decedent shall when requested to so do by a personal representative or any creditor, legatee or distributee of a decedent, or may at any other time determined by the commissioner, even though no accounting is pending, appoint a time and place for receiving proof of debts and demands against the decedent or his estate. The commissioner shall publish notice thereof once in some newspaper of general circulation in the county or city wherein the fiduciary qualified at least ten days before the date set for the hearing. At least ten days before the date fixed for the hearing the commissioner shall also post a notice of the time and place at the front door of the courthouse of the court of the county or city wherein the fiduciary qualified.*
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> *The fiduciary, shall give notice, in writing, to any claimant of a disputed claim known to the fiduciary at the last address of the claimant known to the fiduciary. The notice may be by regular, certified or registered mail, or by personal service at least ten days prior to the date set for hearing. The notice shall inform the claimant of his right to attend and present his case, of his right to obtain another date if the commissioner of accounts finds the initial date inappropriate, and of the fact that he will be bound by any adverse ruling. The fiduciary shall also inform the claimant of his right to file exceptions with the judge in the event of an adverse ruling.*
>
> *Evidence of any mailing of notice by the fiduciary shall be filed with the commissioner. The commissioner may in a case deemed appropriate to him 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.*

d. Ten days prior to a debts and demands hearing, the Commissioner of Accounts publishes notice and the Personal Representative gives notice to any known creditor of disputed claim.[63]

e. Within 60 days after hearing Commissioner shall make a debts and demands report.[64]

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[62] *See* VA. CODE ANN. § 64.1-171 (Michie 2006).
[63] *See* VA. CODE ANN. § 64.1-171 (Michie 2006).
[64] *See* VA. CODE ANN. § 64.1-172 (Michie 2006).

f. ***PRACTICE POINTER*:** Many Commissioners require the preparation of an interim account as they will not schedule a debts and demands hearing without the filing of an account. Some will not allow interim account, and hearing must wait until after first account is filed. Check with the appropriate Commissioner's office.

3. Order of Payment of Debts – Insolvency.

a. If the debts and claims of an estate exceed its assets, there is a statutory order of payment for debts and claims. As a Personal Representative can be held personally liable for his or her actions, it is important that the payment of debts and claims be made according to the order of priority VA. CODE ANN. § 64.1-157 (Michie 2006), which is set forth below:

> *When the assets of the decedent in the hands of his personal representative are not sufficient for the satisfaction of all demands against him, they shall be applied in the following order to the payment of:*
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> *1. Costs and expenses of administration;*
>
> *2. The allowances provided in Article 5.1 (§ 64.1-151.1 et seq.) of this chapter;*
>
> *3. Funeral expenses not to exceed $ 2,000;*
> *4. Debts and taxes with preference under federal law;*
>
> *5. Medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him not to exceed $ 400 for each hospital and nursing home and $ 150 for each person furnishing services or goods;*
>
> *6. Debts and taxes due this Commonwealth;*
>
> *7. Debts due as trustee for persons under disabilities, as receiver or commissioner under decree of court of this Commonwealth, as personal representative, guardian, conservator or committee, when the qualification was in this Commonwealth and for moneys collected by anyone to the credit of another and not paid over, regardless of whether or not a bond has been executed for the faithful performance of the duties of the party so collecting such funds;*
>
> *8. All other claims.*

b. No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over a claim not due. Please see VA. CODE ANN. § 64.1-158 (Michie 2006), which set forth fully below:

> *No payment shall be made to creditors of any one class until all those of the preceding class or classes shall be fully paid; and when the assets are not sufficient to pay all the creditors of any one class, the creditors of such class shall be paid ratably; but a personal representative who, after twelve months from his qualification, pays a debt of his decedent, shall not thereby be personally liable for any debt or demand against the*

decedent of equal or superior dignity, whether it be of record or not, unless before such payment he shall have notice of such debt or demand.

F. SPOUSAL CLAIMS

1. Generally. These claims may be made against a testate or intestate estate. The Estate cannot close and the Commissioner will not approve a final accounting until these claims are resolved.

2. Elective Share

a. Claim must be made within 6 months of the later of:

i. Date of probate of will, or

ii. Qualification of administrator of estate if intestate[65]

iii. The time period can be extended under some circumstances[66]

b. The Procedure.[67]

i. The election by the spouse is made by either appearing in person before court with jurisdiction over estate, or

ii. Writing filed with Clerk of Court or recorded in the court having jurisdiction over estate.

c. When Are Rights Barred?

i. Right to make elective share claim can be waived by an agreement signed during the decedent's lifetime.[68]

ii. A surviving spouse who willfully deserted or abandoned his or her spouse is barred from claiming of all interest in the estate by intestate succession, elective share, exempt property, family allowance, and homestead allowance.[69]

d. What is the "Elective Share"?

i. One-third (1/3) of decedent's "augmented estate" if decedent had any children or descendants surviving, or

ii. One-half (1/2) of decedent's "augmented estate" if decedent did not have any surviving children or descendants

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[65] *See* VA. CODE ANN. § 64.1-13 (Michie 2006).

[66] *See id*.

[67] *See id*.

[68] *See, e.g., Dowling v. Rowan*, 270 Va. 510 (2005).

[69] *See* VA. CODE ANN. § 64.1-16.3 (Michie 2006).

e. Calculation of Elective Share

i. The value of the decedent's "augmented estate" is determined and the spouse's elective share is either one-third (1/3) or one-half (1/2) of the "augmented estate".

ii. The Augmented Estate.

- The calculation of the augmented estate is only needed when a spouse makes an elective share claim.
- The augmented estate is based on the public policy that a surviving spouse should provide for and a decedent will not permitted to disinherit a spouse.
- Broadly described as including decedent's probate estate and increased by assets that the Personal Representative would not otherwise control.[70]

***PRACTICE POINTER*:** Until the period in which a spouse's right to make an elective share has ended, the Personal Representative should be careful about making distributions.

iii. Spouse is entitled to interest at the annual rate of six percent (specified in § 6.1-330.53) from the date of the decedent's death until payment of the elective share.[71]

3. Rights in Family Residence.

a. The spouse is allowed to reside in principal residence without charge until spouse's rights fully determined and satisfied, provided:

i. the decedent was intestate and is survived by one or more children or descendants of a prior marriage, or

ii. Spouse claims an elective share.[72]

b. If spouse is deprived of access to residence, enforce right through unlawful entry or detainer, and recover possession and damages for time spouse was deprived.[73]

4. Allowance Elections.

a. Family Allowance[74]

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[70] *See* VA. CODE ANN. §§ 64.1-16.1 and 64.1-16.2 (Michie 2006).
[71] *See* VA. CODE ANN. § 64.1-16 (Michie 2006).
[72] *See* VA. CODE ANN. § 64.1-16.4 (Michie 2006).
[73] *See id*.
[74] *See* VA. CODE ANN. § 64.1-151.1 (Michie 2006).

i. Support for spouse and minor children paid for one year.

ii. If spouse does not survive, it is payable to person caring for minor children.

iii. Reasonable amount, generally not to exceed $18,000. It is in addition to augmented elective share and amounts passing to spouse by will or intestacy.

iv. Claim must be made within one year of death by appearing in person before court with jurisdiction over estate, or notarized writing filed with Clerk of Court or court having jurisdiction over estate.

v. It is in addition to any share given to spouse or minor children by will, intestate succession, or elective share.

vi. It has priority over all other claims per VA. CODE ANN. § 64.1-157.

vii. The death of any person entitled to family allowance terminates person's right to any allowance not yet paid.

viii. The right to allowance can be waived by marital or pre-marital agreement.[75]

***PRACTICE POINTER*:** Consider requesting entire amount as death of spouse or minor children terminates right to payments not yet made.

b. Exempt Property[76]

i. This can be claimed by surviving spouse, if living, or minor children of decedent if spouse not living.

ii. Select from estate up to $15,000 of exempt property - household furniture, automobiles, furnishings, appliances and personal effects.

iii. If exempt property is not sufficient, may use other assets to satisfy deficiency

iv. The claim must be made within one year of death, by appearing in person before court with jurisdiction over estate, or notarized writing filed with Clerk of Court or court having jurisdiction over estate.

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[75] *See* VA. CODE ANN. § 64.1-151.6 (Michie 2006).
[76] *See* VA. CODE ANN. § 64.1-151.2 (Michie 2006).

v. This is in addition to family allowance and any share given to spouse or minor children by will, intestate succession, or elective share.

vi. It has priority over all other claims, except family allowance.

vii. Right to Exempt Property can be waived by marital or pre-marital agreement.[77]

c. Homestead Allowance[78]

i. This can be claimed by surviving spouse, if domiciled in Virginia, or minor children of decedent.

ii. Claim must be made within one year of death, by appearing in person before court with jurisdiction over estate, or notarized writing filed with Clerk of Court or court having jurisdiction over estate.

iii. This is in lieu of amounts passing by will or intestate succession, unless the amount is less than $15,000.

iv. If spouse claims elective share, he/she cannot claim homestead allowance.

v. This claim has priority over all other claims, except family allowance and exempt property

vi. The right to this allowance can be waived by marital or pre-marital agreement, or separate written waiver executed by surviving spouse.[79]

G. TRUSTS

The Virginia Uniform Trust Code becomes effective on July 1, 2006. Please see materials from January 2006 CLE sponsored by the Fairfax Bar Association's Wills, Trusts. and Estates Section.

IX. LAWSUITS BY AND AGAINST FIDUCIARIES – WHEN, WHY & HOW

A. ENFORCEMENT OF CLAIMS

1. Virginia Code Ann. § 64.1-144 (Michie 2006) permits claims due the Estate to be enforced by the Personal Representative against third parties.

[77] *See* VA. CODE ANN. § 64.1-151.6 (Michie 2006).
[78] *See* VA. CODE ANN. § 64.1-151.3 (Michie 2006).
[79] *See* VA. CODE ANN. § 64.1-151.6 (Michie 2006).

2. Suits can be filed by Personal Representatives, however, it must be pleaded in the Complaint that the suit is being brought in the Personal Representative's fiduciary capacity on behalf of the estate. If not, the complaint can be assailed by defensive pleadings,[80] (e.g., demurrer, motion to dismiss, plea in bar, etc.). Also, the Personal Representative is not able to bring the suit until qualified.[81]

B. AID & DIRECTION

1. **Types of Situations Applicable**. Aid and Direction is asking the court for assistance.

a. These suits are used in situations in which the personal representative requires assistance in interpreting the Will; or

b. If the administration of the estate is complicated, or involves claims by beneficiaries to make court intervention necessary. [82]

2. **Duties Owed by the Personal Representative.** A Personal Representative owes a fiduciary duty to the decedent. If there exists a will, the executor has a duty to defend the intentions expressed by the testator in his will.[83] He may not substitute his own interpretation of the testator's intentions,[84] nor advocate a position advancing his own self-interest contradictory to the very instrument under which he qualified.[85]

3. **Objectives of Aid & Direction Suit.** Counsel should ask what it is that the fiduciary is trying to accomplish, because it is the result sought that will be of most use in determining the propriety of the Personal Representative's actions, especially if the Personal Representative is also a beneficiary of the Estate.[86]

a. Good Faith is Required. As with most issues related to this subject, good faith in bringing the suit shall control.[87] But this is not the only test.

b. Scope of Powers & Ordinary Prudence. Central to all inquiries regarding the propriety of a fiduciary's behavior are two other tests besides good faith, to wit: "whether or not the

[80] *See e.g., Clinchfield Coal Corp. v. Webber*, 165 Va. 49, 53 (1935).
[81] *See id.*
[82] *See Williams v. Bond*, 120 Va. 678, 686 (1917) (stating "[t]he subject of the suit was in the nature of a final accounting and settlement upon a trust fund, involving disputed claims, and the complainant followed a recognized and approved practice in seeking the aid and advice of a court of equity").
[83] *See Butt v. Murden, 154 Va. 10, 152 S.E. 330 (1930).*
[84] *See id*. *See also Clare v. Grasty*, 213 Va. 165, 169 (1972); *Gaymon v. Gaymon*, 63 Va. Cir. 264, 281 (Vieregg, J., Fairfax Co. Cir. Ct., Oct. 14, 2003).
[85] *See Clare*, 213 Va. at 169 (holding "'But as an executor entrusted by his testator with only the Virginia assets of the estate, Grasty's primary and pervading duty was to the testator and the legal directions in his will.' Whether Grasty had law which might support his position is not material, since it is the executor's duty to make every effort to carry out the testator's intention").
[86] *See, e.g.*, *Gaymon v. Gaymon*, 63 Va. Cir. 264, 290-91 (Vieregg, J., Fairfax Co. Cir. Ct., Oct. 14, 2003); *In re Estate of Wicker*, 58 Va. Cir. 331, 333-37 (Hammond, J., Henrico Co. Cir. Ct., Mar. 11, 2002).
[87] *See Shepherd v. Darling*, 120 Va. 586, 591 (1917).

fiduciary's conduct fell within the scope of his powers and duties; and whether or not the fiduciary exercised ordinary prudence in pursuing the ends sought."[88] *The questions involving good faith and prudence are the most critical*.

c. Estate vs. Individual Interests.

i. Typically, lawsuits involving the estate and beneficiaries are ones in which the beneficiaries are left to "fight it out."[89] There are, of course, exceptions to this rule.[90] Good faith requires that the suit be commenced in the execution of a fiduciary's duties.[91] It should be remembered that:

> *a fiduciary is not required to act at his peril; he need not eat the doubtful vegetable in order to ascertain if it is a wholesome mushroom or a poisonous toadstool, . . . In such cases of doubt or difficulty the expense incident to instituting and conducting such a suit, including an allowance by the court of proper compensation to the fiduciary's counsel, is to be borne by the estate, not by the personal representative out of his own pocket or out of his compensation or commissions.*[92]

ii. Cases brought seeking interpretation of a will, or questioning how to distribute an estate appear to be within this standard. In fact, any case advancing the *estate's* interests fall within the ambit of above-quoted rule.[93]

iii. There are, actually, several cases that clarify the difference between the estate's interests and the fiduciary's self-interests. A personal representative may not litigate the interests of one class of beneficiaries over another,[94] and if he does, he certainly cannot charge the estate with the attorney's fees expended on the ground that he was "defending the Will."[95]

iv. Counsel should beware of the "will" or "estate contest" disguised as an "aid and direction" suit.[96] A clue – if the Personal Representative is advancing his interests versus the decedent's, it is not a proper Aid and Direction suit.[97]

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[88] *Gaymon*, 63 Va. Cir. at 281(citing *Commercial & Savings Bank v. Burton,* 183 Va. 133, 149 (1944)).
[89] *See Butt v. Murden*, 154 Va. 10, 15 (1930).
[90] *In re Estate of Wicker*, 58 Va. Cir. 331, 333-334 (Va. Cir. Ct., 2002) (stating "The distinction is drawn between services that benefit the Estate, through legal representation of the administrator or executor, and services performed personally for a potential beneficiary of the Estate").
[91] *See Clare v. Grasty*, 213 Va. 165, 170 (1972); s*ee also Leavell v. Smith's Exec'r*, 99 Va. 374, 379 (1901).
[92] *Gaymon*, 63 Va. Cir. at 282 (quoting Harrison, *Wills and Administration,* § 560, at 231).
[93] *See, e.g., O'Brien v. O'Brien, 259 Va. 552 (2000)*, and *Colley v. Cox, 209 Va. 811 (1969), discussed in Gaymon,* 63 Va. Cir. at 287-88.
[94] *Shocket v. Silberman*, 209 Va. 490, 493 (1969) (quoting *Ferrell v. Basnight*, 127 S.E.2d 219, 221-22 (N.C. 1962) (holding that "[a]n executor cannot litigate the claims of one set of legatees against the others at the expense of the estate").
[95] *See McCormick v. Elsea*, 107 Va. 472, 474-75 (1907) (holding that although a fiduciary, the victorious executrix could not charge the estate with attorney's fees for a purpose from which she stood to gain).
[96] *See generally Gaymon v. Gaymon*, 63 Va. Cir. 264 (Vieregg, J., Fairfax Co. Cir. Ct., Oct. 14, 2003).

4. **Appeals.** Personal Representatives lack standing to bring appeals regarding decisions rendered in Aid and Direction suits.[98] They have received their relief by obtaining a decision.[99]

C. SETTLEMENT/COMPROMISE OF CLAIMS

1. Fiduciaries can settle claims pursuant to common law.[100] However, such settlements are voidable.[101]

2. Fiduciaries can also obtain court approval of such settlements.[102]

3. How are these two methods reconciled? The Supreme Court of Virginia has made the following reconciliation:

> *We have long recognized that under the common law fiduciary has the right to compromise claims of and against the estate without court approval. If, however, the administrator did not seek court approval, he could be liable for devastavit if he did not act in good faith, with ordinary prudence, and with due regard for the estate's interests. When these cases were decided, the predecessor to § 8.01-425 was already part of the Code of Virginia in virtually the same terms. Although not explicitly stated in the cited cases, their implicit holding would permit the fiduciary to compromise a claim without court approval. If the compromise should be approved by the court, subsequent challenge would be precluded in accordance with § 8.01-425.*
>
> *We decline to adopt Kelly's interpretation that § 8.01-425 requires that, to be valid, compromises made by a fiduciary must be approved by a court. Rather, we hold that the provisions of § 8.01-425 are permissive. Subsequent litigation of a compromise executed by a fiduciary without court approval may void the compromise as to some or all of the affected parties in interest; however, the compromise is not void at its inception, merely voidable under appropriate circumstances. This holding is in*

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[97] *See id.*

[98] *See Caine v. Freier*, 264 Va. 251, 257 (2002) (stating "We reject the Bank's contention that it has some 'institutional' interest in administration of decedents' estates, thereby causing it to be adversely affected by the chancellor's rulings. The Freier children are the persons adversely affected. The personal representative 'has no right, at the expense of the estate, to seek [rulings] favorable to these legatees'"); *see also Shocket v. Silberman*, 209 Va. 490, 492 (1969) (holding "[i]n his bill he merely asked for the aid and guidance of the lower court in the interpretation of the will and the decree complained of gave him this relief. The interpretation in no way adversely affected the estate represented by the executor").

[99] *See id.*

[100] *See Kelly v. R.S. Jones & Assocs., Inc.*, 242 Va. 79, 84 (1991); *see also Lake v. Pattie*, 116 Va. 130, 134-35 (1914); *Turpin v. Chesterfield C. & I.M. Co.*, 82 Va. 74, 77-78 (1886).

[101] *See Kelly v. R.S. Jones & Assocs., Inc.*, 242 Va. 79, 84 (1991).

[102] *See* VA. CODE ANN. § 8.01-425 (Michie 2006).

concert with decisions in other jurisdictions which have considered the question. Kelly v. R.S. Jones & Assocs., Inc., 242 Va. 79, 84-85 (1991) (citations omitted).

D. SURCHARGE & FALSIFICATION SUITS

1. **What is a "Surcharge & Falsification" Suit?** It is a suit to review certain expenditures made by a fiduciary. If the expenditures were contrary to law or authority, the fiduciary will be personally liable for the repayment of those expenditures. This is a procedure that has been around for many, many years, but is not utilized very often.[103] It is, however, an extraordinary remedy, and should only be used in situations in which the fiduciary makes improper and excessive expenditures.

2. **Exceptions vs. Surcharge.**

a. The beneficiaries can file exceptions to the findings of the Commissioner of Accounts within fifteen days of the accounting being approved.[104]

b. While that mode is economically feasible, if the Commissioner rules against the beneficiaries, the beneficiaries appeal the Commissioner's findings to the circuit court, and absent pure questions of law, the commissioner's findings are left intact unless found to be unsupported by the evidence.[105]

c. Notwithstanding, the beneficiaries can opt to forego filing exceptions and file a suit to surcharge and falsify the account.[106]

3. **Burden of Proof.**

a. A settlement of accounts (hereinafter "accounting") is presumed to be *prima facie* correct until it is duly surcharged and falsified.[107] "*Prima facie* evidence is evidence which on its first appearance is sufficient to raise a presumption of fact or establish the fact unless rebutted. It imports that the evidence produces for the time being a certain result, but that the result may be repelled."[108]

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[103] *See* Harrison, Wills and Administration, §549 at 216 (stating that "suits to surcharge and falsify are seldom used in Virginia").
[104] *See* VA. CODE ANN. § 26-33 (Michie 2004).
[105] *See* VA. CODE ANN. § 26-33 (Michie 2004); *see also Morris v. United Virginia Bank*, 237 Va. 331, 337 (Va., 1989) (holding "While the report of a commissioner in chancery does not carry the weight of a jury's verdict, Code § 8.01-610, it should be sustained unless the trial court concludes that the commissioner's findings are not supported by the evidence.
[106] *See* VA. CODE ANN. § 26-34 (Michie 2004).
[107] *See Young v. Bowen*, 131 Va. 401, 404 (1921). *See also* VA. CODE ANN. § 26-34 (Michie 2004); *Butt v. Murden*, 154 Va. 10 (1930); *Butt v. Murden*, 149 Va. 518 (1927); *Scott v. Porter*, 99 Va. 553 (1901); *Leavell v. Smith's Ex'r*, 99 Va. 374 (1901); *Robinett's Adm'r v. Robinett's Heirs*, 92 Va. 124 (1895); *Hurt v. West's Adm'r*, 87 Va. 78 (1890); and *Radford v. Fowlkes*, 85 Va. 820 (1889).
[108] *Babbitt v. Miller*, 192 Va. 372, 379-80 (1951).

b. History.

i. Historically, the accounts of a fiduciary were examined and settled in front of a Commissioner, which is why they bear a presumption in favor of being correct.[109] It is because of the examination by a Commissioner of the Accounts that the burden of proof in a surcharge and falsify would devolve upon the party complaining.[110]

ii. Today, a Commissioner of Accounts reviews the vouchers and statements produced by the fiduciary.[111] The presumption that an approved accounting is correct is still the law in the Commonwealth. A complainant in a surcharge and falsify action has the duty to specify the errors contested in the accounting.[112] Further, the burden of proof, or *onus probandi*, in a surcharge and falsify action is typically upon the party contesting the accounting.[113]

c. Burden-shifting.

i. There are occasions for which this burden of proof shifts to the fiduciary. The *ex parte* settlement (or accounting, as it is commonly known) is prima facie evidence to show the situation of the personal estate of the decedent.[114] However, "such accounts are not evidence at all . . . that the claims stated in them were debts justly due by the deceased."[115]

ii. The propriety of the expenditure is an important distinction. For instance, when the question of payment of attorney's fees in conjunction with lawsuits instituted against or involving the beneficiaries, the question is typically not whether the payment was made, or that the amount paid was incorrect.[116] The question is whether it was *proper*

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[109] *See Atwell's Adm'r v. Milton*, 14 Va. (4 Hen. & M.) 253, 256 (1809).
[110] *See id*. (stating "can there be a doubt that a copy of the account so exhibited, examined, allowed, and admitted to record by the proper tribunal, would prima facie be so far conclusive evidence, in favour of the executor, in an action brought upon his official bond, as to shift the burden of proof, as to any thing which might surcharge or falsify such account, from the executor to the plaintiff.")
[111] *See McIntyre's Adm'r v. Wright's Adm'r*, 113 Va. 299, 301 (1912).
[112] *See Powers v. Powers*, 174 Va. 164, 169 (1939).
[113] *See Commercial & Savings Bank v. Burton*, 183 Va. 133, 139 (1944) (quoting *Powers v. Powers*, 174 Va. 164, 169 (1939)).
[114] *See Leavell v. Smith's Exec'r*, 99 Va. 374, 378 (1901).
[115] *Id.*
[116] In those situations, the burden of proof would be upon the beneficiary. *McIntyre's Adm'r v. Wright's Adm'r*, 113 Va. 299, 301-302 (1912). In *McIntyre's Adm'r*, the complainant pointed to disbursements with merely oral testimony as to the personal nature of debts paid as proof of surcharge and asked that the amount be surcharged. The court refused to do so ruling that the evidence failed to overcome the presumption of correctness, stating specifically the following:

> It is not permissible for us to assume that a commissioner of accounts would treat such checks as "proper and satisfactory vouchers," showing that "all funds coming into his (the administrator's) hands had been properly accounted for," or that an intelligent court would have confirmed a report based upon such vouchers. The admissible evidence is not sufficient to surcharge and falsify the account, and it must be taken as correct. *McIntyre's Adm'r v. Wright's Adm'r*, 113 Va. 299, 301-302 (1912).

for the personal representative to pay the associated attorney's fees. It is the disagreement as to the propriety of payment of those fees that an approved accounting does not establish, *prima facie* or otherwise.[117]

iii. When a fiduciary holds an interest adverse to the estate he represents, which does not grow out of its due administration, the personal representative stands in the position of proving his demand as if the accounting had never been made.[118]

4. Advice of Counsel May Not Be a Defense in Certain Circumstances. It should also be noted that although there is no case decided by the Virginia Supreme Court speaking to the defense of advice of counsel, attorneys and fiduciaries alike should be careful about the use of such a defense, as it could lead to an argument that the personal representative has abdicated his role as fiduciary.[119]

E. REMOVAL

1. Virginia Code Ann. § 26-3 (Michie 2006) provides in pertinent part: "If the order of the court or clerk is not complied with, or whenever from any cause it appears proper, the court may revoke and annul the powers of any such fiduciary."

2. Further, executors and administrators, may only be removed for cause.[120]

3. Friction between the personal representative and the beneficiary is not sufficient for removal.[121]

4. This excerpt from Virginia Supreme Court's ruling in *Nickel's Adm'r v. Horsley* sets forth some situations for which removal is appropriate:

> *One may be considered unsuitable for the appointment who holds already some other trust whose interests decidedly conflict with those of the estate in question. . . . Or who is hostile to another of the next of kin. Or who is otherwise so adversely interested to heirs, creditors, or other kindred, as to prejudice the due settlement of the estate, if it be placed under his charge. For the administrator should be interested in settling the estate, not unfaithfully or partially, but faithfully, for the welfare of all concerned.*

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[117] *Leavell*, 99 Va. at 378.

[118] *See Scott v. Porter*, 99 Va. 553, 556 (1901).

[119] *See, e.g., Bliss v. Spencer*, 125 Va. 36, 53 (1919) (holding that "Such abdication . . . constituted a plain dereliction of the very duty which the office of guardian is created to perform). Currently, there are no cases decided by the Virginia Supreme Court with regard to abdication by a fiduciary in a decedent's estate. However, it should be well-taken that any abdication of his role as fiduciary can have serious consequences.

[120] *See Clark v. Grasty,* 210 Va. 33, 37 (1969); *Beavers v. Beavers*, 185 Va. 418, 423 (1946) (upholding the construction that §§ 2637 and 2639 (i.e., §§ 64.1-116 and 118 in 2001 Code), when read together, dictates that an administrator may only be removed for cause).

[121] *See Clark*, 210 Va. at 38 (adopting the reasoning used in removal of a trustee).

. . .

> Where there are antagonistic interests, and the probability that the administrator will be called on to conduct litigation between himself individually and himself as administrator of the decedent, it is clear that he should not be appointed; and, if these antagonisms develop after appointment, he should be removed. *Nickel's Adm'r v. Horsley*, 126 Va. 54, 57 (1919).

5. Engaging in a course of conduct financially detrimental to the estate for which the fiduciary is responsible is grounds for removal.[122]

6. Just remember that since the court qualified the fiduciary, the court can remove the fiduciary. Do your best in counseling the fiduciary to stay above the fray, and act in accordance with the scope of his authority.

F. MISCELLANEOUS

New rules were adopted for lawsuits and motions being brought by fiduciaries. Please see Appendix C for a memo prepared by the Fairfax County Circuit Court Probate Division, as well as Appendices D and E which set forth the filing fees and instructions for cases filed in Fairfax County.

[122] *See Willson v. Whitehead*, 181 Va. 960, 966-68 (1943) (analyzing various theories allowing for removal).