

Managing Prosperity: Estate and Retirement Planning for All Ages Probate and the Probate Process

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“Probate” is a court procedure for settlement of the estate of a deceased person. Probate is the process of proving a will in court or if the decedent does not have a will the process of administering the estate. In Virginia, for most estates, no judge or jury will be needed. A judge or jury becomes involved only if there is a dispute over the estate. The clerk of the circuit court for the county or city in which the person resided at the time of death handles most probate functions.

Often, the person appointed as executor of the estate under a will, or someone who qualifies as administrator of an estate if there is no will (the term “personal representative” includes both an executor or an administrator), approaches the probate process with fear and uncertainty. Certainly, the process presents an unknown to most people.

This publication strives to give some basic information on probate and the probate process. The authors hope that the knowledge contained in this publication will take some of the fear and uncertainty out of the probate process.

The Probate Estate

The “probate estate” consists of the value of property that passes by terms of the will or, if there is no will, under the law. Property that does not pass through probate includes property held in co-ownership with rights of survivorship, life estates, and life insurance proceeds which pass to named beneficiaries other than the estate. Holding property in these ways may decrease the cost of probate for the estate. However, the loss of flexibility in the conveyance of the estate may result in adverse tax consequences. In addition, the cost of probate is not significant in Virginia. An asset that is included in the probate estate will also be included in the taxable estate, but there may be assets in the taxable estate that are not included in the probate estate. For example, if the deceased owned a life insurance policy at the time of death, the death proceeds of the life insurance policy are included in the taxable estate, but not the probate estate.



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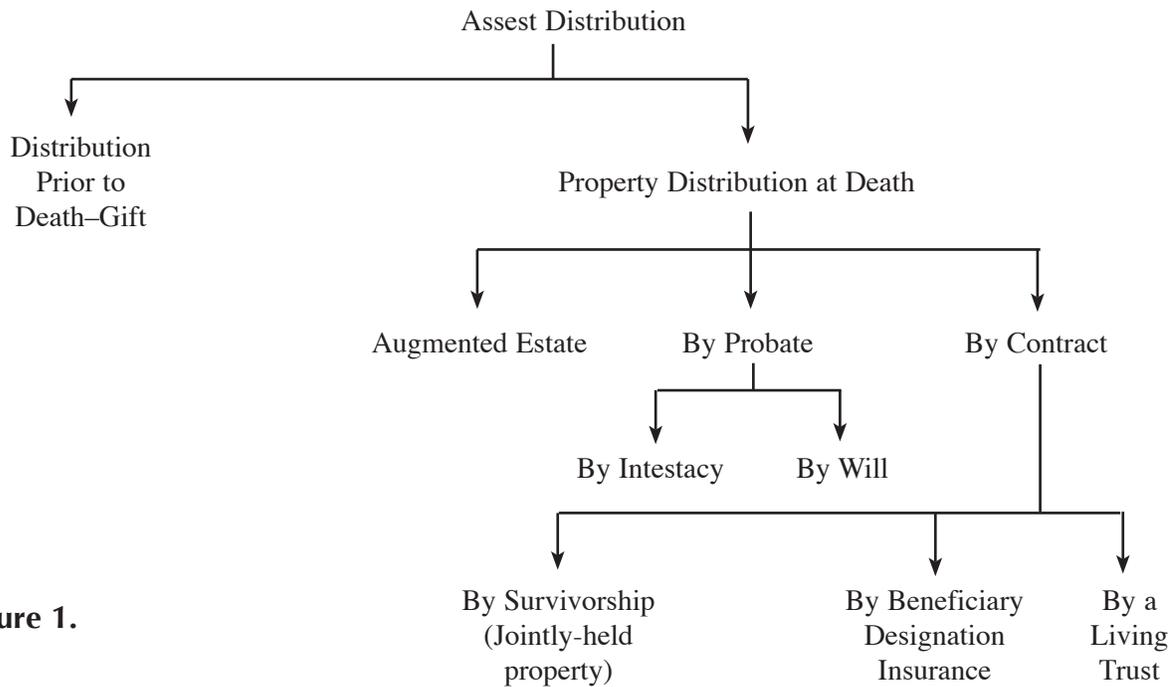


Figure 1.

First Steps If a Will Exists

First, the original will must be located. Often, the will is stored in the deceased's safe deposit box. The will may also be with family members, a lawyer or other advisor, or a bank.

All of us have seen movies that show a gathering of family and friends after a death for a dramatic will reading. No will reading is required under Virginia law and usually no will reading occurs. You may wish to hold a will reading or mail a copy of the will to family members so that questions about its contents are minimized.

Once the will is located, the executor appointed under the will should take it to the appropriate office of the clerk of the circuit court to be admitted to probate. The appropriate clerk's office is the office of the clerk of the circuit court for the city or county in which the deceased lived at his/her death. If the deceased resided in a nursing home at the time of death, questions arise as to where the deceased was living. If the deceased still owned the home in which he/she lived immediately prior to admission to the nursing home, the city or county where that home is located should be used as the place of residence. Otherwise, the location of the nursing home should be used to determine place of residence.

For example, Fran Fairfax lived in her home in Fairfax County prior to being admitted to a nursing home in 1998. Fran died in the nursing home in 2000, but still owned the Fairfax County home. The nursing home is located in Arlington County. Fran's executor should have the will probated in the Clerk's Office for the Circuit Court of Fairfax County.

When the will is brought to the clerk's office, the clerk reviews the will to insure that it is valid (See VCE Publication 448-080, *Wills*). If the will is valid, the clerk admits it to probate. The will may appoint one or more executors. The clerk keeps the original will (but can provide you a copy if you pay the copy charge). In addition to the original will, the executor must provide a death certificate or a newspaper obituary. Required fees include the clerk's fee and probate tax. You should make an appointment with the clerk's office to ensure that you will not wait for a long period of time.

After admitting the will to probate, the clerk can then "qualify" the personal representative. Qualification simply involves the personal representative swearing under oath to faithfully and responsibly carry out his/her duties. The personal representative will then sign a bond that commits himself/herself to be personally responsible for any losses to the estate due to his/her improper acts.

Most wills prepared by attorneys will eliminate the need for the personal representative to have a surety on their bond. The attorney includes a provision in the will stating that the requirement of surety is dispensed with, to the extent allowed by law. A bond is the promise of the personal representative that he/she will properly discharge his/her duties. A surety bond is a type of insurance policy and is backed by the financial assets of an insurance company. The insurance company promises to pay back any money that the personal representative inappropriately keeps or gives away. If the will does not eliminate the need for a surety, an insurance company representative should provide the surety at the clerk's office. The clerk's office representatives can assist in locating a surety company.

After qualification, the personal representative will be provided with one or more *certificates of qualification*. A certificate of qualification is a piece of paper that states that the person has qualified as personal representative, and is embossed with the clerk's seal.

First Steps If No Will Exists

If no will exists, then any *heir* (person entitled under state law to receive property if no will exists) may qualify as administrator (See VCE Publication 448-078, *Intestacy*). If more than one person asks to qualify, then a priority list applies, with husband or wife most preferred. If no heir asks to qualify within thirty days from the date of death, then a creditor may apply and be appointed or the clerk may appoint any person. In the case of persons with no family, friends, or creditors willing to apply, then the sheriff of the city or county usually qualifies. This process also applies if none of the executors named under the will comes forward within thirty days. Unlike the will situation, however, the clerk will normally only appoint one personal representative. A judge may appoint two or more personal representatives if a dispute arises over the appointment. The clerk may appoint two or more personal representatives if the appointees agree to that arrangement.

Duties of the Personal Representative

The duties of the personal representative may be summarized as follows:

1. To inventory and appraise the value of the estate;
2. To pay debts of the estate;
3. To pay estate taxes; and
4. To distribute the property according to the will or, if no will exists or the will does not cover some particular property, according to Virginia law.

When the personal representative qualifies, he/she will receive several forms from the clerk. Three forms will generally be filled out at the time of qualification. A *Memorandum of Facts* gives the name, address, place and date of death, and marital status of the deceased. The *Probate Tax Return* details the estimated value of the deceased's real property in Virginia and personal property. Approximate values can be listed on this form, and values can be changed later.

Property outside of Virginia boundaries generally does not have to be listed. However, property owned outside of Virginia must be probated in the other state. For example, if a Virginia resident owns a condominium in

Florida, the estate must be probated in Florida as to the condominium (See VCE Publication 448-069, *Business Organization*).

Finally, the *List of Heirs* identifies the deceased's family members who would be entitled to receive the estate if the deceased had no will (See VCE Publication 448-078, *Intestacy*). The names, addresses (at least city or county and state), ages (at least a designation of over 18 years or under 18 years), and relationship to the deceased of these persons must be provided.

The personal representative should immediately open a separate checking account for the estate. It is not proper to mix estate money with personal money. All money belonging to the estate must be deposited in the estate account and all expenses of the estate should be paid from the estate account. The estate account should bear interest.

A separate taxpayer identification number for the estate should be obtained from the Internal Revenue Service as soon as possible. When opening the bank account, notify the bank that the number has been applied for. The deceased's social security number is not sufficient, but may be utilized temporarily. The estate is a separate entity for tax purposes and is taxed differently than a living person.

The personal representative must then notify (within 30 days of qualification and in writing) all beneficiaries and heirs that a will has been probated and/or that a person has qualified to administer the estate. The clerk will provide the forms for this notice, as well as the form that you must file with the clerk's office stating, under oath, that the proper notices were sent.

The personal representative must locate, gather, and protect the assets of the estate, pay proper debts of the estate, distribute the remainder to the proper persons, and account for what has been done. Within four months of the date of qualification, the personal representative must file an *inventory* with the *commissioner of accounts*. An inventory lists all assets owned by the deceased at the date of death, along with values at the date of death. The commissioner of accounts is a local attorney appointed by the court to oversee the reports and activities of the personal representative. Most contact with the court after qualification will be through the commissioner of accounts. The commissioner of accounts charges a variable fee for all filings.

After filing the inventory, the personal representative must next file one or more *accountings* with the commissioner of accounts office. An accounting details

money and assets entering and leaving the estate during the preceding 12-month period. Canceled checks and bank statements must be attached to the accounting. The first accounting is due 16 months after the date of qualification. This accounting covers the first 12 months after qualification. Subsequent accountings must be filed within four months of the end of the accounting period. When all estate assets have been distributed, a *final accounting* must be filed with the commissioner of accounts.

In addition, the personal representative is responsible for ensuring that the final tax return for the deceased is filed in a timely manner. Income tax returns must also be filed for the estate itself, if the estate has over \$600 income for a particular tax year. A certified public accountant or otherwise qualified tax preparer should be consulted on these issues because the estate is a separate taxpayer. (See VCE Publications 448-095, *General Tax Considerations*, and 448-096, *Advanced Tax Considerations*)

Probate and Settlement Costs

Probate and estate settlement costs include the following:

1. Court costs and probate tax;
2. Personal representative's fee (approved by the commissioner of accounts);
3. Attorney's fee (subject to the approval of the commissioner of accounts); and
4. Personal representative's surety bond cost, if required.

Court costs include filing fees and miscellaneous clerk's fees. These fees vary, but are usually about \$20. The probate tax in Virginia is 10 cents per \$100 of value of the probate estate, or 1/10 of 1%. The locality may add another 3 1/3 cents per \$100 of value as a local tax.

The personal representative is entitled to a fee of 3-6% of the value of the probate estate, plus 3-6% of the estate income. A 5% fee is the norm in Virginia. Personal representatives may choose to lower the fee or to take no fee. Attorney's fees may be zero for simple estates or may be hundreds of thousands of dollars for complicated estates. If the deceased undertook good estate planning, post death attorneys' fees for probate should not be significant, except in complex circumstances. If the commissioner of accounts feels that the personal representative is paying an attorney to do what the personal representative should be doing, then the commissioner may reduce the personal representative's fee by the amount of unnecessary attorneys' fees.

Finally, if a surety bond is required, the cost of that bond is based, in part, on the value of the probate estate. Surety bonds will start at around \$250 for small estates. Total estate settlement costs usually range from 3-6% of the fair market value of the probate estate. Typically, the percentage paid is at the lower end of the range for large estates.

Should the Personal Representative Hire a Lawyer to Help?

Inexperienced personal representatives often wonder whether the assistance of an attorney is necessary. In most simple estate cases, the answer is "probably not." Personnel at the clerk's offices are normally very experienced and proficient in the probating of estates. These public servants are a valuable source of information and assistance. They may not, however, give legal advice. If the personal representative feels more comfortable with an attorney, then an attorney should be hired. The attorney should charge an hourly rate.

On the other hand, if the estate involves some complications, an attorney should definitely be retained. Estate attorneys are familiar with probate procedures and pitfalls. Several hundred or several thousand dollars spent in attorneys' fees in a complex or contested case may save the estate a great deal of money.

Conclusion

The uninitiated may view the estate probate process as impossibly complex. Indeed, many complicated issues may arise. However, the typical estate does not involve unmanageable problems. Thankfully, personnel at the local clerk's offices are very helpful. In addition, the Virginia Bar Association has published *A Guide to the Administration of Decedent's Estates in Virginia* (1998). This publication addresses the probate issues discussed here in more detail and details additional probate matters. Most circuit court clerk's offices in Virginia have copies of this booklet to distribute, free of charge, to the public. The authors highly recommend this resource.

Personal representatives should not approach the probate process with feelings of dread. Instead, feel privileged to be able to provide one last service to the deceased.

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