# A PRACTICAL OVERVIEW OF PROBATE AND ADMINISTRATION OF ESTATES IN VIRGINIA

## What is "Probate?"

In any discussion of Virginia's probate process, it is helpful to first review what is meant by the term "probate." "Probate" refers to the process by which a decedent's estate is administered and settled under the general supervision of the Court. While it typically includes recording the Will and having an executor appointed to carry out the Will's provisions, probate also includes the administration of an intestate estate, typically with the appointment of an administrator. In some cases, probate also includes recording the Will *without* appointment of a personal representative. In Virginia, this process of administering and distributing the assets of the estate is supervised through Commissioners of Accounts.

Although an executor is the fiduciary appointed when there is a Will, and an administrator is the fiduciary appointed when there is no Will, there are variations which are explained later in this outline. For purposes of this outline, the terms "personal representatives" or "fiduciaries" will refer to all types of personal representatives, as later defined.

## What property is subject to the probate process?

Not all estates are subject to the probate process, and even when an estate will be probated, not all assets will be subject to probate. The probate estate includes only the assets (real property and personal property) which were held in the decedent's name at death, assets which pass under the Will or by intestacy, and assets made payable to the estate or the personal representative (such as certain life insurance policies).

**1. Excluded Assets. Excluded** from probate are two general categories of assets: jointly-owned survivorship property, and assets payable pursuant to a contract. These excluded assets pass *outside* the Will, and outside the probate process.

**a. Jointly-owned survivorship property.** Real property a decedent owned with another person is typically owned either as "tenants in common" or as "joint with right of survivorship." If married, the property may have been owned as "tenants by the entirety," a specialized form of joint survivorship ownership. Tangible personal property can be held in these same ways. Any interest owned as tenants in common can be transferred by Will to a

designated beneficiary or beneficiaries. Joint with survivorship and tenants by the entirety property interests, on the other hand, pass directly to the survivor or survivors at the first death, by operation of law, outside the Will and generally outside of probate.

Real estate which was not owned as survivorship property passes directly to the beneficiaries named in the Will, and is not typically part of the probate estate in Virginia unless the Will authorizes the executor to sell it. (It is important to note that some of these items which are not part of the probate estate are counted as part of the taxable estate for Federal and state estate tax purposes.)

**b. Contractual Obligations.** Joint bank accounts, payable on death accounts, transfer on death accounts, joint certificates of deposit, and similar types of accounts or investments all pass outside of a Will and outside the probate process (unless the estate is named as the beneficiary). Rights with respect to these assets, including rights on death, are determined by the contract signed with the bank, the insurance company, or such other party. **This disposition cannot be changed by making an alternate disposition in the Will.** Retirement plan assets and property held in trust also escape probate, for the same reasons.

A life insurance policy is another type of contract. The proceeds of the contract are paid to the beneficiary who was designated as such by the owner of the policy. Generally, only if the beneficiary is the estate of the decedent will the proceeds be included in the probate estate. Also, if the decedent owned the policy on the life of another person, then the policy will sometimes be included in the estate, even when the policy death benefit is not payable to the estate.

**2. Included assets.** By elimination then, "probate assets" typically include assets that are:

a. Titled only in the decedent's name;

b. Titled jointly *without* a right of survivorship (tenants in common);

c. Titled jointly with a right of survivorship, but all other joint owners have predeceased the decedent;

d. Payable to a beneficiary who predeceased the decedent (and no contingent beneficiary was named or, if named, also predeceased the decedent);

e. Payable to the decedent's estate.

## A. Small Estate - What It Is and How to File

In some states, "Small Estate" provisions are sometimes referred to as "informal probate." In Virginia, however, they are a substitute for probate, since they do not involve qualification of a personal representative, and sometimes involve no filings with the Court. These provisions, found in Virginia Code §§ 64.2-600 *et seq,* (referred to in this outline as the "Small Estate Act" or the "Act") provide assurance to those who owed debts to a decedent and those in possession of certain estate property that they can deal directly with a successor to the decedent, even without qualification of a personal representative and formal probate. The greatest advantage of informal probate is lack of requirement for formal record-keeping and reporting, resulting in lower costs -- no filing of Inventories and Accountings with the Commissioner of Accounts, since there is no personal representative.

Often the first job of the estate attorney is to determine whether probate is necessary, and if so, what type. Consideration must also be given to whether a personal representative needs to be qualified on the estate.

**1. Advantages of Formal Probate.** There are various advantages to be gained from the appointment of a personal representative and formal administration of the estate, even when it is not specifically required in order to transfer the estate assets.

**a. Generally Good Practice.** Fraudulent concealment or destruction of a Will is a felony (Virginia Code § 18.2-504). Putting the Will on record, even when qualification of a personal representative is not necessary, avoids any allegation that the person in possession intended to conceal the Will.

**b. Claims.** The amount and validity of any claims against the decedent or the estate are considered, and such claims can either be paid, contested, compromised or otherwise disposed of, as appropriate. This is particularly important where the estate is insolvent, such as where there is considerable credit card debt. Probate procedures also limit the time frame in which certain claims can be brought. A public record is created that gives interested parties an opportunity to raise issues regarding debts and claims. Formal probate also provides protection to the fiduciary against claims that he or she acted improperly.

**c. Protection of Beneficiaries or Heirs.** Assets remaining in the estate after the payment of claims, taxes, and expenses are distributed in accordance with the Will, or the

provisions of intestacy. The personal representative is bound by fiduciary duty and must treat all beneficiaries fairly and impartially, thereby providing protection to the beneficiaries.

**d. Evidence of Title.** Recording a Will provides evidence of title with respect to any subsequently discovered property of the decedent.

**e. Time Bar.** The surviving spouse's right to claim an elective share (described later) does not expire until six months after the later of the date the Will is admitted to probate, or, in an intestate estate, the date of qualification of an administrator. Limitations periods with respect to other rights and claims are also triggered by these dates.

**f. Tax Returns.** Fiduciaries should be sure to file all final income tax returns for the decedent and any for the estate.

**2. Reasons To Avoid Formal Probate.** There are times when it is preferable to avoid formal probate when it is not otherwise required. For a relatively small estate which can be collected through the Small Estate provisions, the time and costs involved in formal administration of the estate may be completely disproportionate to the benefits gained. In some cases where the debts and liens exceed the value of the assets, or the estate is otherwise borderline insolvent, it may be preferable to abandon the assets, rather than incur probate costs in addition to the existing debts and liens. Qualification as a personal representative of an estate results in the imposition of various duties and responsibilities on the person serving as fiduciary. Again, these fiduciary responsibilities may outweigh the benefits.

**3. Definitions under Small Estate provisions.** The provisions of the Small Estate Act (Virginia Code §§ 64.2-600 *et seq*,) were revised effective July 1, 2010. While these provisions provide a method for *collection* of these assets, they do not specifically provide a method for *distribution* of the collected assets. Under the revised law, collection of assets is easier, and there is additional protection for the ultimate distributees of the estate. These provisions are available for collecting and distributing a decedent's property when the **total assets** of the decedent are valued at no more than $50,000 (not including real estate) as of the date of death. In addition, an even simpler procedure is available when each individual asset of a decedent is valued at less than $15,000.

It is important to understand the definitions used in this Act, in order to determine whether it applies to a given situation:

a. *"Small asset" means any indebtedness owed to or any asset belonging or presently distributable to the decedent, other than real property, having a value, on the date of the decedent's death, of no more than $50,000. A small asset includes any bank account, savings institution account, credit union account, brokerage account, security, deposit, tax refund, overpayment, item of tangible personal property, or an instrument evidencing a debt, obligation, stock, or chose in action.*

A Small Asset therefore does NOT include real property, but does include both assets owned by and due to a decedent, as well as debts owed to the decedent. It appears that a decedent could have several separate Small Assets, such as a car, a checking account, and a certificate of deposit.

b. *"Successor" means any person, other than a creditor, who is entitled under the decedent's will or the laws of intestacy to part or all of a small asset.*

c. "*Designated successor" means one or more successors who are designated pursuant to subdivision A 7 of § 64.2-601*.

The distinction between the Designated Successor and the Successor is important when utilizing the Small Estate Act, because it allows a *group* of beneficiaries or heirs to designate one or more of them to receive a Small Asset on behalf of the others.

d. *"Person" means any individual, corporation, business trust, fiduciary, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.*

**4. Application of Small Estate Act.** Notably, there is no definition of a "Small Estate," but the Small Estate provisions apply to two situations:

**a. Total assets (other than real estate) no more than $50,000.** § 64.2-601 provides a method for the collection of Small Assets by affidavit, if **all** of the following conditions are met:

i. The value of decedent's entire *personal* probate estate as of the date of decedent's death, wherever located, does not exceed $50,000;

ii. At least 60 days have elapsed since the decedent's death;

iii. No application for appointment of a personal representative is pending or has been granted in any jurisdiction;

iv. The decedent's Will, if any, was duly probated; and

v. The claiming successor is entitled to the Small Asset.

Successors who wish to utilize this provision do so by signing an Affidavit which complies with the following:

A. States that the five conditions listed above are met;

B. States the basis for the Successor's entitlement to the Small Asset (terms of the Will, intestate law, etc.);

C. States the names and addresses of ALL successors, to the extent known;

D. Designates which Successor or Successors are entitled to receive the Small Asset on behalf of the others (the "Designated Successor");

E. The Affidavit must state that the Designated Successor shall have the fiduciary duty to safeguard and promptly pay or deliver the Small Asset as required by the laws of the Commonwealth; and

F. The Affidavit must be signed by ALL known Successors. The Affidavit is then presented to the Person having possession of the Small Asset. Although the statute does not require that the Affidavit be recorded, some attorneys may choose to do so.

These revised provisions deleted the specific requirement under prior law that a List of Heirs must have been filed. However, in order for the Will to have been "duly probated," we presume that the List of Heirs must be filed. "Duly probated" does not mean that a personal representative qualified, but that the appropriate documents and the Will were provided for record, and the probate fees and taxes were paid. (For an intestate estate, it does not appear to be a requirement that a List of Heirs be filed, but is certainly advisable in most cases, even if no real estate is involved.)

***Note:*** Code § 64.2-601 also includes various ways in which a Designated Successor can make distribution to a Successor who is incapacitated or under any other legal disability, such as a minor.

**b. Individual assets *each* valued at less than $15,000.** Revised § 64.2-602 allows for the collection of a Small Asset under $15,000 *without affidavit* if all of the following conditions are met:

i. At least 60 days have elapsed since the decedent's death; and

ii. No application for appointment of a personal representative is pending or has been granted in any jurisdiction.

In such a case, ANY Successor may collect the Small Asset. It appears that this process could be used to collect several Small Assets in a single estate, even if the total value of those Small Assets exceeds $50,000. Nevertheless, in most cases where the estate exceeds $50,000, the formal probate process will usually be the best approach.

**5. Effect of using Small Estate Act.**

**a. Protection for Payor.** Under either Small Estate provision, the person in possession of the Small Asset who turns it over to a Successor or Designated Successor is "discharged and released to the same extent as if that person dealt with the personal representative of the estate. Such person is not required to see [sic] the application of the small asset or to inquire into the truth of any statement" made in the Affidavit. (Va. Code § 64.2-603)

**b. Fiduciary obligations.** Note that § 64.2-132.2 (B), which allows payment to ANY Successor without an Affidavit, imposes a fiduciary duty only on the Designated Successor, but unfortunately, this section does not provide for a Designated Successor (as does § 64.2-601). The only fiduciary duty imposed on Successors is found in § 64.2-603, which provides:

> *Any person to whom payment or delivery of a small asset has been made is answerable and accountable therefor to any personal representative of the decedent's estate or to any other successor having an equal or superior right.*

**c. Protection for Successor.** In addition to the cost savings and convenience of the Small Estate provisions, § 64.2-603 provides for an action against a Person who refuses to pay or deliver a Small Asset after presentation of the Affidavit, and specifically provides for recovery of damages. As stated above, this section also makes a Successor who has received a Small Asset answerable and accountable to any personal representative, and to all other Successors.

**6. Application of Small Asset to Funeral Bill.** The revised act also added a new § 64.2-604, which allows a Successor to request that a Person holding a Small Asset, when there has been no application for appointment of a personal representative pending or granted in any jurisdiction, pay or deliver the Small Asset to the undertaker or mortuary handling the decedent's funeral. This payment cannot be made until thirty days after death.

## B. Regular Probate

**1. Overview of the Formal Probate Process.** While the statutes referenced above provide for an informal probate process without the qualification of a personal representative, the more typical estate will require that someone be appointed by the Court ("qualified") to take control and "settle" the estate – a "formal probate." Formal probate refers to the process of recording a Will and having a personal representative appointed to take control of the decedent's assets; pay debts, taxes and claims of the estate; report to the Court (through the Commissioner of Accounts) of the actions taken; and distribute the remaining assets as the Will provides. It has also come to include the comparable process where there is no Will.

**2. Personal Representatives.** The powers of a personal representative and the derivation of the personal representative's authority are reflected by the title:

**a. Executor.** An executor must be designated in the Will, and has the powers as stated in the Will. If an attorney prepared the Will, these powers will typically include the statutory powers granted in Va. Code § 64.2-105.

**b. Administrator.** The personal representative of an intestate estate is an Administrator. Administrators have limited powers, and do not have the powers set forth in Va. Code § 64.2-105 unless such powers are granted by Court order, typically in a separate proceeding.

**c. Administrator c.t.a. and Administrator d.b.n.c.t.a.** When there is a Will but, for any reason, the executors designated in the Will cannot or do not serve, an administrator can be appointed to carry out the terms of the Will "cum testamento annexo" – with the will annexed. Where there has been a previous qualification of a personal representative who has ceased to serve due to death, resignation, removal or otherwise, the Court or Clerk may grant administration to a residual or substantial legatee or his designee; or, upon failure of such person

to apply within thirty days, to a person entitled to administration as if there had been no Will, provided the Court or Clerk feels the person is suitable and competent to perform the duties of office. (Va. Code § 64.2-500.) This person will be the Administrator d.b.n. ("de bonis non" – reflecting the property not yet administered). If an Administrator d.b.n. is appointed for a testate estate, he or she will be the Administrator d.b.n.c.t.a. The powers of an Administrator c.t.a. will be those provided in the Will.

**3. Planning for the Probate Appointment.** "Qualification" is the appointment by the Circuit Court of a personal representative to administer the estate. In Virginia, this is typically done by a probate Clerk, with no hearing or any other action involving a Judge.

**a. Ex parte.** Both the Virginia Circuit Courts (Va. Code § 64.2-446) and their Clerks (Va. Code § 64.2-444) are empowered to admit Wills to probate. This is usually through an *ex parte* proceeding, without summoning any party, and consists of the presentation of the Will to the Court or the Clerk and the proof of due execution, either by testimony or by the self-proving affidavit. The same applies to the appointment and qualification of personal representatives in testate and intestate estates. **An ex parte proceeding before the Clerk is the method of probate most frequently used.** If the Clerk is not comfortable, due to any given set of facts or circumstances, that he or she has authority to take the requested action, application to the Court may be required.

**b. Quasi inter partes probate.** Under Va. Code § 64.2-446, a person offering a Will for probate can have the Clerk summon interested parties to appear before the Court to show cause why the Will should not be admitted to probate. This is best used where there are particular persons who are, or may be, aggrieved by the Will, or when a dispute is anticipated.

**c. Inter partes probate.** In rare cases, all interested parties can be summoned to appear before a Circuit Court pursuant to Va. Code § 64.2-449. Guardians *ad litem* may be appointed for minors and incapacitated persons. Where necessary, process may be had by order of publication. When all interested parties are convened, the Court shall proceed to hear the motion for probate. The use of this proceeding results in a decree that will generally bar parties to the proceeding from later filing a Complaint to Impeach or Establish the Will. (See Va. Code § 64.2-448; Lamb, Virginia Probate Practice §§ 56 through 75.)

**4. Preparing for the Probate Appointment.** The process usually begins with a call to the probate Clerk of the Circuit Court, usually where the decedent last lived and owned real estate, in order to schedule the probate appointment. While those seeking to qualify do not need an attorney and can complete the necessary forms with the assistance of the Clerk, it is preferable that the required forms be prepared in advance, in order to obtain any missing information prior to the appointment. It is the practice of many attorneys to fax the Will and completed forms to the probate Clerk in advance of the appointment, in order that any problems can be identified and addressed in advance. In some jurisdictions, the Clerk will input the information into the Court's computers before the appointment, thereby minimizing waiting time, but others will wait until the proposed fiduciary is in the office before doing so.

At the probate appointment, several forms and documents must be presented. Most of the required forms can be found on the Virginia Courts website at http://www.courts.state.va.us/forms/circuit/fiduciary.html.

**a. Probate Information Form.** As the name states, this form recites information about the decedent and the proposed personal representative.

**b. Memorandum of Facts.** This form overlaps the content provided in the Probate Information Form, and includes additional information. (Many jurisdictions no longer require this form.)

**c. Probate Tax Return.** The value of the probate assets and real estate are to be shown on this Return, so that the probate taxes can be calculated.

**d. List of Heirs or List of Heirs/Real Estate Affidavit.** The List of Heirs shows the persons who would have inherited the decedent's assets had there been no Will, and can be filed for either a testate or intestate estate. The List of Heirs/Real Estate Affidavit can be used instead, but only for intestate estates. Both forms can serve to complete the "chain of title" to reflect the transfer of real estate upon the death.

Changes to the law effective July 1, 2010 clarify that the List of Heirs should reflect those heirs "in existence on the date of the decedent's death," with an additional list to be filed if there are subsequent changes. (Va. Code § 64.2-509.) In addition, Va. Code § 8.1-1717.1 provides that a $25 fee is charged to record the List of Heirs or List of Heirs/Real Estate Affidavit, unless a Will has been probated or a personal representative has qualified on the estate. In the case of an

intestate decedent, any heir at law may file a List of Heirs thirty days after the decedent's death, if there has been no qualification (Va. Code § 64.2-509.)

**e. Local Forms.** Some jurisdictions require additional forms, which are provided by those Clerk's offices.

**f. Waiver of Qualification.** If a person nominated as executor, or a person with a preference to serve as administrator, declines to serve, a letter to that effect from the person so nominated should be brought to the probate appointment. The renouncing party may also nominate a person so serve in his or her place, and this will usually be honored by the Clerk if no one else is applying or protesting. A form for this can be found on the Court website.

**g. Death Certificate.** An original death certificate will usually be required at probate. In some cases, a death notice or obituary (online or newspaper) can be used if a death certificate is not available.

**h. Original Will and Codicils**. The applicant must bring the original of the Will, if one exists, and any original Codicils. A written memorandum included with a Will, disposing of tangible personal property pursuant to Va. Code § 64.2-400, is typically not offered for probate, but the Will must be read to determine whether this applies. Most Wills today include a "self-proving affidavit," which means the signatures of the testator and witnesses have been properly notarized. If the Will is not self-proved, one or more of the witnesses will be required to appear and testify under oath as to the signature of the decedent. In some cases, a sworn affidavit can be used in place of a live appearance.

**i. Taxes and Fees.** The Clerk will require payment of the Clerk's fee and probate taxes (Va. Code §§ 58.1-1712 and 58.1-1718), and other local taxes and fees, at the time of qualification or admission of the Will. A check to pay for these costs should be brought to probate, drawn on the account of someone willing to advance the funds until the decedent's assets are available for reimbursement purposes.

The state probate tax rate in Virginia is $1.00 per $1,000 of value of probate property. Localities can charge an additional 1/3 of that amount, increasing the rate to $1.33 per $1,000. The Clerk collects this tax, which is imposed on the value of all real and tangible property located in Virginia, as well as all intangible property wherever located. It is recommended that the attorney confirm the current fees with the probate Clerk before the meeting. *[Note: Some*

*jurisdictions do not accept credit cards for payment. The form of payment should be confirmed with the client and the Clerk's Office prior to the appointment. Note also that Va. Code § 17.1-275 allows a charge of an additional "convenience fee" for credit card payments, not to exceed 4% of the amount paid.]*

Examples of property *not* included in the valuation of the estate for probate tax purposes:

a. Property held jointly with right of survivorship.

b. Insurance proceeds, unless payable to the estate.

c. Property held by a trust (other than one created under the decedent's Will).

d. Property passing through the exercise of a power of appointment.

e. Bonds payable on death to a named beneficiary.

If the valuation reported at probate is later determined to be incorrect, then refunds or additional billing may apply. The Clerk collects any underpayment, but the personal representative must apply to the Department of Taxation and the local treasurer for any refund. (Va. Code § 58.1-1717)

No probate tax (Va. Code § 58.1-1712) is charged on probate estates valued at $15,000 or less, and no Clerk's fee (Va. Code § 17.1-275(3)) is charged on probate estates valued at $5,000 or less.

**j. Bonds and Surety.** A bond will be required in an amount not less than the value of the personal estate or, if the Will authorizes sale or rental of real estate, at least equal to the value of personal and real estate. (Va. Code § 64.2-505.) *See also* Lamb, §§6 and 31. In addition, the personal representative will usually be required to purchase a commercial surety bond to secure his or her obligation to properly execute the terms of the Will, unless any of the following exceptions applies:

i. The Will waives surety or security on the bond (Va. Code §64.2-505);

ii. All beneficiaries or all distributees are also personal representatives of the estate (even if additional persons are personal representatives as well) (Va. Code §64.2-505);

iii. The fiduciary is a bank or trust company qualified to do business in Virginia and having a specified amount of capital stock is to serve (Va. Code §6.2-1003);

iv. If the value of assets involved does not exceed $15,000 (Va. Code §64.2-1411);

Upon request of the personal representative, the Clerk must redetermine the amount of the bond (other than one set by the Court) to reflect a reduction in the current market value of the estate, whether due to disbursements, distributions, or valuation of assets, if the reduced value is reflected on a confirmed accounting or a recorded inventory, which has been approved by the Commissioner of Accounts. (Va. Code § 64.-504.)

Despite the foregoing, in certain cases a party with a pecuniary interest, or the Court or Clerk, may nevertheless require security on the bond. (Va. Code § 64.2-505.)

Even if surety is waived, if no executor or co-executor is a Virginia resident, the non-resident(s) must either purchase the surety bond or appoint a Virginia resident to serve with them. Surety will almost always be required for a non-resident personal representative who is serving alone.

When surety is needed, the estate attorney should contact the bonding company's agent in advance, and provide the name, address, and social security number of the proposed personal representative, in order to confirm that the proposed person is bondable. The agent will then be expected to appear at the probate qualification meeting, to sign the Court's papers and get the information needed from the personal representative.

**5. Testamentary Trusts.** While a complete explanation of the Uniform Trust Code is outside the scope of this outline, attorneys working in this field should educate themselves about the provisions which apply to testamentary trusts. When the Will provides for the establishment of a trust or trusts, it will be necessary at some point for the Trustee to qualify before the Clerk and post bond (with or without surety). Surety on the bond is required unless waived by the Will, or if the trustee is a bank or trust company. Notices to beneficiaries must be sent in compliance with Virginia's Uniform Trust Code (§ 64.2-700 *et seq).* At the time the Will is probated, any trust provisions contained in the Will should be evaluated to determine whether qualification of the Trustee should be requested at the same meeting, especially if the nominee for executor and trustee is the same person.

**6. Order of Probate and Qualification.**

a. Once the fees are paid, the Clerk will admit the Will to record, qualify the person as the personal representative, and assign a Commissioner of Accounts for reporting purposes. Upon the completion of this process, an order will be entered by the Clerk, showing

whether the Will was admitted to probate and whether a personal representative qualified. (Note also that Va. Code § 64.2-455 requires that a certified copy of the Will be recorded in any other county where the decedent owned real estate, so this is also a good time to obtain additional copies if needed.)

b. A writing which is presented as a Will or codicil but is defective or has been revoked will be marked "Refused" or "Rejected," and will be held by the Clerk in the event of an appeal.

c. The Clerk must provide an Inventory form and a list of instructions to the personal representative. These basic forms were developed by the Office of the Executive Secretary of the Supreme Court and are distributed by all Clerks. Additional instructions may be provided by some jurisdictions, and can often be downloaded from that Court's website.

**7. Recording a Will with No Qualification.** Many attorneys advise their clients to record a Will, even if there will be no need to qualify an Executor, citing any of the following reasons:

a. Establishes relevant date to measure limitations period for various claims and actions.

b. Putting a Will into the public record provides a reference for the administration and the interest of parties in the event additional assets are later discovered.

c. The Will is essential if it passes any interest in real property.

d. Recording a copy of the Will in each jurisdiction where the decedent owned real property may avoid future problems (insurable interest, real estate tax billing, title work, etc.).

e. § 18.2-504 charges parties who fraudulently conceal or destroy a will with a felony.

## C. The Estate Timetable - What You Need to Do

**1. Initial Conference with the Client.** The administration of an estate typically begins with a phone call from the executor named in the Will, or from the surviving spouse or another family member, seeking guidance as to the first steps to take. Often, the death has just occurred, in which case it may be beneficial to encourage the client to wait a few days before worrying about the formalities of estate administration. Once the client is ready to move forward, the first issue is always to determine whether or not an original Will can be located. The next matter is typically to determine the assets owned by and due to the decedent, in order to determine to what extent administration of the estate will be necessary or desirable, and whether it will be necessary to qualify a personal representative.

Most attorneys include the paralegal as early in the administration process as possible, beginning with the first meeting, or have the paralegal handle the initial telephone intake. It is often more efficient, as well as more economical for the client, to have the paralegal involved at these early stages. Due to the many issues that may be addressed in the preliminary meetings with the client, the use of a questionnaire or checklist is also highly recommended. The first meeting is also the time to obtain a retainer agreement. Every firm uses different forms and software to manage this process, but systems should be developed to facilitate the process. The Appendix to Article I of this Outline contains some sample forms which illustrate many of the considerations, and outline critical dates and forms to assign responsibility for managing them. Samples of other types of documents are also included to help you design forms that fit the needs of your firm.

**2. Locating the Will.** Locating the original Will may be a problem for some families. Until the Will is found, the family may not know whether one exists. Often a copy can be found, but not the original (as is usually required for probate). If the original Will cannot be found, and a copy is to be admitted, the Clerk will typically require that an action be filed in Court to establish the copy for probate.

Some of the common places an original Will is found include:

**a. Where other important papers were kept in the home.** May include portable safe, file drawers, shoe box in closet.

**b. Lawyer's or accountant's office.** May be identified from a copy of the Will or other documents (such as Power of Attorney or Advance Medical Directive), which contain information about the drafting attorney.

**c. With a family member, close friend or bank officer.** If a person has possession of an original Will but will not produce that Will for probate, the Court may order that it be produced to the Court.

**d. Wills can be lodged with the Clerk's office** in some jurisdictions (Va. Code § 64.2-409).

**e. Safe deposit box.** In cases where joint access to a safe deposit box is authorized under the account, a surviving owner may freely access the box of a decedent (§ 6.2-2301). But on the death of a sole lessee of a safe deposit box, the bank will allow an interested person to enter the box, with the supervision of an officer or employee, only to look for a Will (§ 6.2-2302). This section and the related sections can be very helpful when a box is believed to contain the Will. Many attorneys will have a paralegal or another member of the attorney's staff present when the contents of a box are opened, to prepare a listing of all items found, especially if the beneficiaries are not harmonious. If no key can be located, a fee may be charged to drill the box, typically under $50.

If little information is known regarding the decedent's safe deposit box, it may be wise to contact every local financial institution where the decedent maintained accounts to see if decedent had a box. Sometimes such information can be determined from a review of charges on prior financial statements, prior year check statements, or keys found at the home of the decedent. *(Planning Note: When a client executes a Will, note in the file where the original will be kept.)*

**3. Identifying the Decedent's Assets.** As soon as possible, identify all real property, personal property, and intangible property of the estate and determine how the property was held (solely, jointly, payable on death, etc.). Reviewing income tax returns may assist in this process. The value of all property, taking into account the factors identified above, must be reported at the time of probate, in order to prepare the probate tax return and determine the probate tax.

**4. Duties of Personal Representative in Formal Probate.** With formal administration, the first duty of the personal representative after qualification is to ascertain and take control of

the deceased person's property, or at least that property over which the executor or administrator has responsibility. The personal representative must also determine the assets (and values) of the estate over which the fiduciary does *not* have control (for tax reporting and other reasons), as well as determine the debts and liabilities of the estate. Ultimately, the fiduciary must see to the payment of the debts, taxes and other obligations of the deceased and the estate, and the ultimate distribution of the property of the estate in accordance with the provisions of the Will and Virginia law.

The fiduciary must also comply with various reporting requirements, as provided in Virginia Code Title 64.2, which are explained in further detail in the balance of this Outline.

Initial duties will typically address the following considerations:

**a. Banking.** Once qualified, the personal representative will need to open an estate checking account, and transfer to it accounts of the decedent which are to become probate assets. It is not necessary that all intangible assets be liquidated, or that all proceeds be deposited into one account, but at least one checking account will be needed in order to pay bills. When two or more fiduciaries qualify on an estate, both must typically open the bank account together, so it is often desirable that this step be taken immediately after qualification, especially if either or both fiduciaries are not residents of the area. Because an Employer Identification Number ("EIN") will be needed to open the estate checking account, many attorneys prepare the IRS Form SS-4 for the fiduciary to sign at qualification, and obtain the EIN immediately after, so that the checking account can be opened promptly. Remind the personal representative that original cancelled checks, or bank copies of the checks, must be provided with accountings, and the new bank account will need to provide them with the monthly statements.

**b. Notice.** Within 30 days after (i) qualification of the personal representative or (ii) admission of the Will to probate without qualification, the fiduciary must send a Notice of Qualification to the decedent's spouse, beneficiaries under Will, and heirs at law. (Note that Notice must be sent to all heirs at law, *even if* they are not included in the Will.) Many attorneys prepare these Notices (also found on the Court website) in advance, and have the fiduciary sign them at the probate appointment. The fiduciary or the attorney then mails them to the appropriate persons.

No Notice need be sent when the known assets passing under the Will or by intestacy do not exceed $5,000, or to the following persons:

i. A personal representative or proponent of the Will;

ii. Any person who has signed a waiver of right to receive notice;

iii. Any person to whom a summons has been issued as a party interested in the probate (pursuant to § 64.2-446);

iv. Any person who is the subject of a conservatorship, guardianship, or committeeship, if notice is provided to such conservator, guardian, or committee;

v. Any beneficiary of a trust, other than a trust created by the decedent's Will, if notice is provided to the trustee of the trust;

vi. Any heir or beneficiary who survived the decedent but is deceased at the time of qualification or probate, or to such person's successors in interest, if notice is provided to such person's personal representative;

vii. Any minor for whom no guardian has been appointed, if notice is provided to his parent or another person in loco parentis;

viii. Any beneficiary of a pecuniary bequest or of a bequest of tangible personal property which is not in excess of $5,000, provided the beneficiary is not an heir at law; and

ix. Any unborn or unascertained persons.

**c. Affidavit of Notice.** Within four months after qualification (or admission of the Will to probate without qualification), the personal representative must file an Affidavit of Notice (also found on the Court website) in the Clerk's Office, which identifies the persons to whom and dates that Notice was sent. This form, too, is often provided by the estate attorney at qualification, to ensure prompt compliance with the obligation.

**d. Inventory.** Within four months after qualification, the personal representative must file an Inventory for the estate with the Commissioner of Accounts. The Commissioner of Accounts is a local person (generally an attorney), who has been appointed by the Circuit Court to oversee and ensure that estates are properly managed and administered. The Inventory is a detailed list of the assets of the estate, and their values as of the date of decedent's death.

**e. Accounting.** Within 16 months after qualification, the personal representative must file an accounting with the Commissioner of Accounts, covering the period ending 12 months after qualification. The accounting is a detailed list of all assets of the estate, all receipts and all disbursements, and the assets remaining on hand at the end of that accounting period. Additional accountings are due annually until a Final Accounting can be made. Often, a first and final accounting can be made at the conclusion of the first year of administration. An accounting Cover Sheet, found on the Court's website, must be completed, and original supporting documentation must be provided along with a detailed itemization of all transactions during the reporting period. Proof of payment (or payment arrangements) for the funeral expense must be provided to the Commissioner before the estate can be closed.

**f. Tax Returns.** The personal representative is responsible for determining whether Federal or state income tax returns for the decedent, and fiduciary income tax returns for the estate, are required, and for having any such returns filed and taxes paid (or refunds requested). Federal estate tax liability must also be considered.

## D. Proving The Will

### 1. Jurisdiction and Venue.

a. Jurisdiction of the probate of Wills (Va. Code § 64.2-443) and of qualification of an administrator if there is no Will (Va. Code § 64.2-502) is with the Circuit Courts and their Clerks. Venue is proper in the county or city in which:

i. The decedent had a home or known place of residence, if any;

ii. If none, then where there is real estate that was devised or owned by the decedent;

iii. if none, then where the decedent died or has personal estate.

b. Persons who are patients in a nursing home, assisted living facilities, and similar facilities, because of age or impaired health are presumed to reside in the locality of their legal residence immediately before entering the home, although the presumption may be rebutted (Va. Code § 64.2-443).

**2. Who may qualify.**

**a. Institutions.** A professional corporation, as an entity, may qualify in any fiduciary capacity (Va. Code § 13.1-546.1). Other corporations, such as banks and trust companies, may also serve if they are authorized to do business in Virginia. (Va. Code § 64.2-1426.) Note also that Va. Code § 64.2-1001 specifies the types of corporations which can engage in the trust business in Virginia.

**b. Individuals.** An individual may serve as a personal representative if he or she meets these requirements:

i. 18 years of age or older;

ii. Is a Virginia resident, or files with the Court a written consent that service of process or notice may be by service on the Clerk, or on a resident agent designated in the writing.

iii. If surety on the bond is required, the individual must be able to obtain that surety. (Nonresidents are typically required to post surety unless a nonresident is also serving.)

iv. Va. Code § 64.2-502 provides that when there is no Will, a person under a disability (as defined in Va. Code § 8.01-2) is not eligible for appointment. This includes confined felons, minors, and incapacitated persons. Note that while this exception contained is in the statute dealing only with intestate qualifications, it appears that it would apply equally to testate qualifications as well.

**c. Additional Intestate Rules.** When there is no Will, the preferred order of selection in choosing an administrator is set forth in Va. Code § 64.2-502, as follows:

**i. During the first thirty days** after the intestate's death, the sole distributee (or his or her designee), or any distribute (or designee) who presents written waivers from all other competent distributees.

**ii. Thirty days after the intestate's death,** if no distributee has applied for appointment, the Clerk may grant administration to the first distributee (or designee) who applies. However, if the Clerk has been notified within the first thirty days that another distributee intends to apply, then the Clerk must give all of such applicants an opportunity to be heard.

**iii. Forty-five days after the intestate's death,** a charitable non-profit organization which served as conservator or guardian for the decedent at his or her death can be appointed, provided no distributee has already indicated an intent to qualify, and the organization certifies it has made a diligent search to find an address for a sole distributee, and has sent written notice of its intent to apply for administration to the last known address of any known distributee, or that no such address has been found.

**iv. Sixty days after the intestate's death,** a creditor or any other person may be appointed if it certifies it has made a diligent search to find an address for a sole distributee, and has sent written notice of its intent to apply for administration to the last known address of any known distributee, or that no such address has been found.

**v. Subsequent application after appointment.** If a distributee applies after a creditor or other person has been appointed, the distributee may be appointed after reasonable notice to the creditor or other person, and the grant of administration to the creditor or other person shall cease. (Va. Code §64.2-502).

**d. Absence of Appointment.** For a testate or an intestate estate, if two months have elapsed without an executor or administrator (except during a will contest or the infancy or absence of the executor), the Court or Clerk may, on the motion of any person, order any person of the county or city to administer the estate.

**e. Attorneys as personal representatives.** All attorneys who wish to serve as fiduciaries should familiarize themselves with Legal Ethics Opinion 1515, which sets out ethical guidelines regarding the attorney serving as the fiduciary, including drafting a Will which names the attorney as a fiduciary.

**3. Requirements and Methods for Proving a Will.**

**a. Validity of Will.** Va. Code § 64.2-403 provides that, to be valid, a Will must be in writing and signed by the testator (or by some other person in the presence and at the direction of the testator), in such a manner as to make it manifest that the name is intended as a signature. Unless it is wholly in the handwriting of the testator, the signature shall be made or the Will acknowledged in the presence of at least two competent witnesses, present at the same time, who must sign in the presence of the testator.

**b. Savings Provision.** Virginia Code §64.2-404 (enacted in 2007 as §64.1-49.1) provides a "savings provision" for certain writings not in compliance with this provision. This statute provides for an action to be brought in Circuit Court, within one year from the decedent's death. The proponent of the writing must establish, by clear and convincing evidence, that the decedent intended the document or writing to constitute a Will, a partial or complete revocation of a Will, an addition to or alteration of the Will, or a partial or complete revival of a formerly revoked Will (or portion of a Will). All interested persons must be made parties, and the action results in the document or writing being treated as if it had been executed in compliance with §64.2-403.

The remedy granted by this section cannot be used to excuse compliance with any requirement for a testator's signature, except in circumstances where two persons (such as husband and wife) mistakenly sign each other's Wills, or a person signs the self-proving certificate instead of signing the Will.

**c. Witnesses and Self-proving Wills.** A properly executed Will which is self-proved either at the time of execution or subsequently by a statutory self-proving affidavit will be admitted to probate without further proof. (Va. Code § 64.2-452 and §64.2-453.) A Will which is not self-proving may be proved by a witness (or sometimes two, as determined by the Clerk), who must state under oath that the requirements were met.

If a witness attesting the Will (or, in the case of a holographic will, proving the handwriting) resides out of state, is confined in another county or city under legal process, or is unable to attend probate due to sickness, age, or other cause, a deposition may be provided (similar to an Affidavit) instead of a personal appearance. No notice of the time of "taking" of the deposition need be given unless probate is being opposed by another party. (Va. Code § 64.2-447.) *(Note: This can be a very valuable way to establish a Will which was signed out of state or by persons who do not want to appear in person. A form to be completed by the witness is available on the Court website.)*

A witness deposition may be taken any time before the Will is offered for probate, and is filed when the Will is offered. Someone opposing the probate is entitled to examine the deposed witness. If all witnesses are dead or cannot be located, the signatures of the testator and the subscribing witnesses may be proven by the testimony of two disinterested witnesses, or other

actual witnesses to the execution, if any, may give evidence and may testify as to the genuineness of the witness' signature to the attestation clause. *See* Lamb, §44 and §45.

**d. Holographic Wills.** A will entirely in the testator's handwriting and signed by the testator in such manner as to make it manifest that the name is intended as a signature may be admitted to probate. If it is not witnessed, at least two disinterested witnesses must testify at probate that it is entirely in the testator's own handwriting. (Va. Code § 64.2-403.) See also Thomas v. Copenhaver, 235 Va. 124, 365 S.E.2d 760 (1988). A "disinterested" witness may be someone who is not in the immediate family or an in law, and has no interest in the estate. See Lamb, supra, §33.

**e. Military Wills.** A Will executed by a person in the U.S. military service while in the service and which, on its face and in the absence of contrary evidence, purports to have been properly witnessed, shall be presumed to be valid and shall be admitted to probate upon proof of the testator's signature by two disinterested witnesses. (Va. Code § 64.2-403.)

**f. International Wills.** Va. Code § 64.2-435 sets out specific requirements for an International Will.

**4. Other Probate and Qualification Proceedings.**

**a. Probate of Lost or Destroyed Will.** If it appears that there was a Will but the original cannot be located, a copy may sometimes be admitted to record by bringing a suit in equity for the purpose of establishing the lost or destroyed Will. There must be evidence that the Will is not missing because of the decedent's intent to revoke it. (See Va. Code § 8.01-374; Brown v. Hardin, 225 Va 624 S.E. 2d 2941 (1983); Hawkins v. Tampa, 197 Va. 22, 87 S.E.2d 636 (1955).) The proponent of the copy must prove by clear and convincing evidence that the Will existed in legal form, the contents of the Will (a copy of the Will is admissible), and that it has been lost or destroyed (but not revoked by destruction by the testator). See Mumaw v. Mumaw, 214 Va. 573, 203 S.E.2d 136 (1974); Lamb, §§77, 78.

**b. Probate of a Later Will.** A later Will is admitted to probate in the same manner as a prior Will, and does not attack the validity of the execution of the prior Will. There is no statute of limitations for probating a later Will in Virginia. Bliss v. Spencer, 125 Va. 36, 99 S.E. 593 (1919). A good faith purchaser for value of real estate (for value and without notice) from a personal representative, devisee, or, in the case of intestacy, the heirs at law, is protected

from adverse claims arising from the probate of a later Will unless the later Will is admitted to probate within one year of the testator's death. (Va. Code § 64.2-456, § 64.2-457.) Note that there is no similar saving statute in the case of personal property. Although the personal representative may be protected, the claims against the legatees, or distributees in the case of intestacy, survive. See also Lamb, §79 and § 80.

**c. Probate of a Foreign Will.** Where a Will has been admitted to probate outside Virginia, an authenticated copy of the Will and the certificate of probate from the foreign jurisdiction may be offered for probate to the Virginia Court or Clerk. (Va. Code § 64.2-450.) Having been proved in the foreign jurisdiction, it will be admitted to probate in Virginia as a Will of personalty. In addition, if under Virginia law the Will would be a valid Will, it will also be admitted in Virginia as a Will of real estate.

**d. Ancillary Administration.** The primary administration of an estate usually takes place in the state in which the decedent was domiciled. Administration may be required in some additional jurisdiction because of the need to deal with assets there and the fact that the domiciliary personal representative lacks the power to do so ("ancillary administration"). Ancillary administration in Virginia may also be necessary if Virginia real property is to be sold by the executor. (Va. Code § 64.2-524; see also Lamb, supra, §102.)

**E. Attacking a Will.**

**1. Will Challenges.** There are two statutory methods for attacking an order of probate for a testamentary writing: an appeal from the Clerk's order, and a complaint to impeach or establish a Will.

**a. Appeal from Clerk's Order.** Where the Clerk enters the probate order, any interested party aggrieved by the Clerk's decision may appeal to the Circuit Court, as a matter of right, for a de novo review. (Va. Code § 64.2-445.) Such an appeal must be filed within six months after entry of the order of probate. It is filed in the Clerk's office of the Circuit Court which first made the order.

**b. Complaint to Impeach or Establish a Will** (devisavit vel non). A Complaint to Establish or Impeach a Will may be filed by any interested party who was not a party to the probate (§ 64.2-448). This type of action questions the validity of the Will itself.

**i. Time to file.** A suit of this type must be filed within one year of the date the Will is admitted to probate or refused, in the jurisdiction where admitted or refused, or it is forever barred. If an appeal of the Clerk's order is made under §64.2-445, the Complaint to Impeach may be brought within one year of the Court's order admitting the writing to probate. If, at the time of the decree admitting the Will to probate, an interested party is under the age of eighteen years or of unsound mind, and has otherwise not been before the Court, such person may file a Complaint to Impeach within one year of restoration of capacity. (Va. Code § 64.2-448.) A person who resides outside of Virginia, or who was proceeded against by order of publication, may, unless he or she actually appeared as a party or was personally summoned, file a Complaint to Impeach within two years of the entry of the decree admitting the Will to probate.

This statute of limitation only bars an attack on a Will previously admitted to probate, but does not prevent a later Will from being admitted to probate. See Lamb, supra, §§56, 75.

**ii. Parties to the suit.** A Complaint to Impeach may only be brought by a person interested in the Will, who was not a party to the original probate proceeding. An appeal from a Clerk's order of probate, however, is available to persons even though they were parties to the initial probate proceeding. The term "parties" would seem to encompass those persons actually named in the Will, as well as the decedent's heirs at law. See Guilfoil v. Hayes, 169 Va. 548, 194 S.E. 804 (1938). The personal representative is a necessary party.

**iii. Status of administration during pendency of suit.** During the pendency of a Complaint to Impeach, the executor has the primary duty to preserve the estate and prevent waste, and to pay legitimate expenses of the estate and debts of the decedent. The Court may appoint a curator to preserve the assets and pay debts in place of the executor while the action is pending. A curator is similar to a receiver in that he holds and preserves property for others. Under Va. Code § 64.2-451, a curator is empowered the same as an executor or administrator, with the important distinction that the curator cannot pay legacies or make distributions to heirs or beneficiaries of the decedent. Curatorship terminates on the appointment of an executor or administrator and the delivery of the decedent's property to the executor or administrator, along with an accounting of the curator's actions, or by other court order.

**iv. Payment of the expenses of suit.** Expenses incurred by the personal representative in the defense of such an action are deemed to be for the benefit of the estate, and are therefore expenses of administration properly paid by the estate. As such, these expenses have priority over other claims against the estate, including the Family, Exempt Property, and Homestead Allowances. (Va. Code § 64.2-531.)

**2. Interpretation of Will Provisions.**

**a. Duty of the Personal Representative.** It is the duty of the personal representative to administer the estate of the decedent and to distribute the assets according to the express terms of the testamentary instrument, without resort to extrinsic evidence of the decedent's intent. Many times the expressions in a Will pose problems of interpretation, whether about the identification of proper beneficiaries, the determination of the testator's intent, or the creation of potentially conflicting claims that make administration of the estate a minefield of personal liability for the fiduciary and adversity among the beneficiaries. The use of the Petition to Construe a Will or Petition for Aid and Direction of the Court in interpreting Will provisions or ruling on conflicting claims protects the fiduciary from personal liability. Without the Court's guidance, the fiduciary's actions would be subject to attack by any party to or beneficiary of the Will, or of a trust established under the Will.

**b. Petition for Aid and Direction.**

**i.** There must exist a real and present difficulty of administration in order to invoke the assistance of the Court through an action for aid and direction.

**ii. Parties to the suit.** The personal representative is a necessary party to a Petition for Aid and Direction, since an estate "acts" through such representative. The personal representative, not the estate, will be bound by any decree in an action to which he or she is a party. Each beneficiary whose interests will be affected by the decision will also be necessary parties, but it is typically desirable to include all potential and contingent beneficiaries. If a possible effect of interpretation is to cause the testator's property or any portion thereof to pass by intestate succession, then the decedent's heirs at law will also be indispensable parties to the suit.

**iii. Declaratory Judgment**. In some cases where an actual justiciable controversy exists, an action for Declaratory Judgment can sometimes have the same effect as a suit for aid and direction, often at lower cost.

**iv. Expenses as costs of administration.** Where the Will is so ambiguous that it is necessary to seek judicial aid and direction, the Court will typically direct that reasonable attorneys' fees be paid out of estate assets, regardless of who prevails, as the action has benefitted the estate by providing direction to the executor. However, the decision to award attorneys' fees always lies within the sole discretion of the Court. See Robinson v. Lee, 205 Va. 363, 136 S.E.2d 860 (1964); Aldridge v. Rodgers, 183 Va. 866, 33 S.E.2d 654 (1945). Under the doctrine of judicial instructions, all costs of litigation regarding the construction of an ambiguous will or trust are paid by the estate, regardless of whether the ambiguity is construed in favor of or against the estate. See Landrith v. First Virginia Bank, 40 Va. Cir. 59, 40 Va. Cir. 59; 1995 Va Cir. LEXIS 1365 (1995), where the doctrine was applied; Allison v. Allison, 101 Va. 588 (1903), where the doctrine was not affirmatively recognized, nor explicitly rejected by the Supreme Court of Virginia.

**3. Grounds for impeaching a will.**

**a. Capacity.**

**i. Who may make a will?** Va. Code § 64.2-401 limits this only by providing that no one of unsound mind or an unemancipated minor shall be capable of making a Will. Testamentary capacity is required only at the time the Will is signed. Eyber v. Dominion National Bank, 249 F. Supp. 531 (W.D. Va. 1966); Gibbs v. Gibbs, 239 Va. 197, 387 S.E.2d 499 (1990). The generally recognized standard for testamentary capacity in Virginia requires the testator, at the time of execution, to know: the objects of his or her bounty (heirs, etc.); the nature and character of the property owned; how he or she wishes to dispose of the property, and that a Will is being made. See Thomason v. Carlton, 221 Va. 845, 276 S.E.2d 171 (1981).

What constitutes "unsound mind"? Old age, in and of itself, does not prove incapacity to make a Will. Capacity may exist even if a guardianship action is pending, or the testator is found to be incapacitated before or shortly after the Will is signed. The fact that a person has already been determined to be incapacitated and a guardian and/or conservator has been appointed does not, per se, relieve the incapacitated person from executing a Will.

CAUTION, however, that the legal capacity of any person who is the subject of an order appointing a guardian, conservator, and/or committee may be questioned, and the Order should be carefully considered to determine whether *legal* capacity has been terminated.

**ii. Burden of proof.** Burden of proof of capacity is on the person offering a Will for probate. Clear and convincing evidence is required. Ticker v. Sandbridge, 85 Va. 546, 8 S.E. 650 (1888).

**iii. Presumptions.** Proof of compliance with the statutory requirements for the execution of a Will, set out in § 64.2-403, such as the self-proving affidavit, creates a presumption that capacity existed. Once the presumption is established, the contestant bears the burden of going forward with evidence to rebut the presumption. See Gibbs, s upra.

**iv. Intent.** Testamentary intent is also a requisite for a valid Will, but does not go to the issue of capacity.

**v. Competency of witnesses.** Competency is also required of witnesses to the execution of the Will. Like the test for the testator, competency for witnesses must exist at the time of attestation. See Bruce v. Shuler, 108 Va. 670, 62 S.E. 973 (1908). A competent witness is one who would be qualified to testify in Court to the facts to which he or she attests. Ferguson v. Ferguson, 187 Va. 581, 47 S.E.2d 346 (1948). A person named as beneficiary or executor in a Will, or a notary public, is not incompetent to witness the Will. (Va. Code § 64.2-405.)

**b. Undue Influence.**

**i. Definition.** In order to constitute undue influence in Virginia, the act or acts must destroy the volition and free agency of the testator and, in legal effect, amount to force and coercion. A presumption of undue influence arises and the burden of going forward with the evidence shifts when weakness of mind and grossly inadequate consideration or suspicious circumstances are shown or when a confidential relationship is established. See Friendly Ice Cream Corp. v. Beckner, 268 Va. 23, 597 S.E.2d 34 (2004).

**ii. Burden of proof.** Undue influence requires proof by clear and convincing evidence by the party alleging the acts. See, Martin v. Phillips, 235 Va. 523, 529 (1988). Undue influence may be proved by circumstantial evidence, but facts alleged must be

inconsistent with any theory other than undue influence. See Harrison on Wills and Administration, §8.11 (4th ed. 2009).

**iii. Unsoundness of mind as a factor.** Unsoundness of mind is not required in Virginia for a showing of undue influence. But mental weakness, when considered with other facts, may show that volition of another was substituted for that of the testator.

**iv. Question of fact.** No formula or standard can be set out to establish or determine what acts may constitute undue influence. The question is one of fact based on the unique circumstances of each case.

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***This outline was prepared in January, 2013 and does not include information regarding Transfer on Death provisions for real estate or motor vehicles, or other laws enacted after that time.***