

PROBATING AN ESTATE
IN A VIRGINIA CIRCUIT COURT
CLERK'S OFFICE

(3 FREE CLE CREDITS)

April 12, 2018

1:00pm – 4:00pm

Fredericksburg Circuit Court

701 Princess Anne St.

Faculty

Honorable Jeff Small

Jeff graduated from George Mason University with a BS in Biology. After college he worked on Capitol Hill for Representative Don Young from Alaska. Jeff went to law school in 1995 at Nova Southeastern University and graduated in 1998. He became a member of the Virginia bar after graduation. From the years 1998 to present Jeff has been a small business owner with operations in Fredericksburg, Chesterfield and Virginia Beach. In 2012, Jeff was elected Clerk of the Circuit Court in Fredericksburg where he still serves. In the Clerk's office Jeff closely oversees the probate section of the office.

George Snead, Esq., Assistant Commissioner of Accounts for the City of Fredericksburg.

AGENDA

1:00 P.M. TO 2:30 P.M.

ISSUES AND PROCEDURES OF PROBATING TESTATE ESTATES IN
THE CIRCUIT COURT CLERK'S OFFICE

2:30 P.M. TO 2:45

Break

2:45 P.M. TO 3:30

ISSUES AND PROCEDURES OF PROBATING INTESTATE ESTATES
IN THE CIRCUIT COURT CLERK'S OFFICE

3:30 P.M. TO 4:00 P.M.

QUESTIONS AND ANSWERS

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Testate

Introduction:

This CLE is designed to give the attorney a feel for what the Clerk's office looks for when an estate is filed for probate in our offices. We aren't probate attorneys or estate planning professionals. We are taught a "probate procedure" to put an estate to record. This CLE goes over the considerations we use, the statutes we rely on and definitions for probate terms and statutes.

1. Jurisdiction 64.2-443.

A. The jurisdiction to probate a will lies only in the county or city where the decedent resided at the time of his death.

Exceptions- If for suit purposes may also file in the jurisdiction where the suit will be brought. If in a nursing home it is presumed that the place of residence be the same as it was before they became a patient.

2. Proof of death

A. The Clerk must be presented with the death certificate, obituary or other evidence of death.

B. In Fredericksburg we require a death certificate. We don't allow obituaries. Anyone can pay the newspaper for an obituary. We do allow medical examiner's reports.

3. Only original wills. No copies allowed. If only a copy is available then the Circuit Court Judge must sign an order allowing the clerk to put the will copy to probate.

The code states the will must contain the original signature of the decedent. This rules out the ability to probate a copy of the will.

4. They died with a will. 64.2-401 and 64.2-403 states that any individual may make a will to dispose of part of or all of their estate at death unless they are of unsound mind or are an unemancipated minor.

The will must be in writing, signed by the testator, or by some other person in the testator's presence and by his direction. It can be signed by someone other than the testator if at the testator's direction.

If handwritten wholly (holographic) also requires that two **disinterested** witnesses come forth to prove that it is the handwriting of the testator.

A will not wholly in the testator's handwriting (typed) requires that the signature of the testator is made, or the will is acknowledged by the testator, in the presence of at least

two competent witnesses who are present at the same time and who subscribe the will in the presence of the testator.

64.2-452 allows the will to be self-proved at the time of its execution. If there is no self-proving clause and the will is typewritten one witness needs to appear at probate or complete a deposition. If the will is holographic two **disinterested** witnesses need to appear at probate or complete a deposition.

5. Personal Representative- Virginia calls them executors. They must be named in the will.

A. If one or all of the personal representatives are Virginia residents then surety may be waived.

B. If the personal representative is not a Virginia resident then surety on the bond is required even if the will waives it.

i. Exception, the non-resident has a resident qualifies with him or the estate doesn't exceed \$25,000.

6. Assets

A. Property; personal and real- if owned solely by the decedent then it is an asset of the estate and must be reported.

i. Exceptions, pay on death accounts, beneficiaries of life insurance accounts, etc.

ii. Exception, real estate owned by joint tenants by entirety with rights of survivorship

B. If the only asset is a car DMV has a form that allows the transfer of title. See DMV website.

7. Is there a need for qualification?

A. If the assets are owned jointly or payable on death, or to transfer real estate only then no need to qualify. Probate the will only (no requirement of bond, inventory or accounting).

B. Assets are in the decedent's name only = qualification may be necessary.

8. Bonding. **BONDING IS REQUIRED IN ALL QUALIFICATIONS!** The question to ask is if surety on the bond is required or can be waived. 64.2-504 says every bond shall be at least equal to the amount of the full value of the estate.

A. Large latitude to the Clerk to set bond.

i. If surety waived. The Clerk will usually add the value of the personal property and real estate and double.

ii. If surety not waived the Clerk will add the value of the personal property and real estate but not double.

iii. If no power to sell real estate then the real estate is not factored in.

iv. In small estates; double the amount but no higher than \$25,000.

B. Surety can be waived by statute.

i. 64.2-1411 waives surety if the estate does not exceed \$25,000

ii. 64.2-505 waives surety if all the beneficiaries qualify as personal representatives.

iii. 6.2-1003 waives surety if the personal representative is a bank.

iv. 64.2-1426 waives surety if a Virginia resident qualifies with the out of state resident personal representative.

C. **The will can waive surety but it cannot waive bonding.** Surety cannot be will waived if the personal resident is not a Virginia resident unless a statute for waiving surety is used.

9. Heirs. 64.2-509 says a List of Heirs must be filed. 64.2-200 lays out the Course of descents. Clerks can stick to the minimum or expand.

A. Surviving Spouse (and children from previous relationships).

B. Children

C. Parents

D. Etc, etc.

10. Affidavit of Notice. 64.2-508. Personal representative must send notice of the probate. An affidavit of that notice must be filed with the Clerk within 4 months. Not required if personal representative is the proponent is the sole heir and beneficiary or estate is less than \$5000.

11. Inventory and Settlement of Accounting. Not required if estate doesn't exceed \$25,000.

FILED WITH COMMISSIONER OF ACCOUNTS; NOT THE CLERK.

A. Inventory. Within four months. 64.2-1300. If more assets found later an amended or second inventory may be required and additional taxes be paid.

B. Accounting. Within 16 months. 64.2-1304

- i. Statement in Lieu of Accounting. 64.2-1314. All beneficiaries are personal representatives.

12. Small Estate Considerations.

A. Qualify under 64.2-1411. \$25,000 or less

B. Small Estate Affidavit. 64.2-600 & 601. Estate \$50,000 or less. 60 days passed and all heirs signed.

13. Real Estate Affidavit. 64.2-510. If the only asset is real estate and there is no probate then this affidavit may be filed to allow the real estate to pass to the heirs. \$17 fee.

Intestate- No Will

1. Jurisdiction 64.2-443.

A. The jurisdiction to probate a will lies only in the county or city where the decedent resided at the time of his death.

Exceptions- If for suit purposes may also file in the jurisdiction where the suit will be brought. If in a nursing home it is presumed that the place of residence be the same as it was before they became a patient.

2. Proof of death

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B. In Fredericksburg we require a death certificate. We don't allow obituaries. Anyone can pay the newspaper for an obituary. We do allow medical examiner's reports.

3. Date of Death. When can the administrator qualify. 64.2-505

A. Sole Distributee. No delay

B. More than one distributee

i. **After 30 days** any one of the distributees. Whomever comes first. More than one may qualify together but the Clerk can only qualify one time. If more than one distributees applies within the first 30 days the Clerk should not appoint until all distributees have an opportunity to be heard.

ii. **After 45 days** clerk may appoint non profit charitable organization if the organization served as guardian or conservator.

iii. **After 60 days** the Clerk can appoint one or more creditor or an any other person who has attempted to provide notice to the sole distributee.

4. Oath of Administrator- 64.2-501. The Administrator shall take an oath stating that he will perform the duties to the best of his judgment. *

Same as executor. But an additional oath for administrators is required stating that he has not been convicted under certain criminal statutes. I am not under a disability as defined under Code of Virginia § 8.01-2, and regardless of whether my civil rights have been restored, I have not been convicted of a felony offense of (i) fraud or misrepresentation or (ii) robbery, extortion, burglary, larceny, embezzlement, fraudulent conversion, perjury, bribery, treason, or racketeering.

5. If the personal representative is not a Virginia resident then the bond must be secured. Unless, it can be waived by statute. We will talk about when surety can be waived when we get to bonding.
6. Is there a need for qualification?
 - A. If the assets are owned jointly or payable on death, or to transfer real estate only then no need to qualify.
 - B. Assets are in the decedent's name only = qualification may be necessary.
7. Bonding. **BONDING IS REQUIRED IN ALL QUALIFICATIONS!** The question to ask is if surety on the bond is required or can be waived. 64.2-504 says every bond shall be at least equal to the amount of the full value of the estate.
 - A. Large latitude to the Clerk to set bond.
 - i. If surety waived. The Clerk will usually add the value of the personal property.
 - ii. If surety not waived the Clerk will add the value of the personal but not double.
 - iii. An Administrator cannot sell real estate without permission from the Judge.
 - iv. In small estates; double the amount but no higher than \$25,000.
 - B. Surety can be waived by statute.
 - i. 64.2-1411 waives surety if the estate does not exceed \$25,000
 - ii. 64.2-505 waives surety if all the beneficiaries qualify as personal representatives.
 - iii. 6.2-1003 waives surety if the personal representative is a bank.
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