

# Frequently Asked Questions

## Administration of Estates

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**Q: What is probate?**

Probate is the official proving and recording of a will as the authentic and valid last will and testament of the deceased.

**Q. When is it necessary to probate and/or qualify on an estate?**

An estate must be probated when the decedent has solely-held assets that do not have a joint or co-owner with rights of survivorship, a beneficiary (not in the will but actually on the account or security), or a payable-on-death designee. Assets include real property and personal property. Personal property includes bank accounts, stocks and bonds, retirement accounts, life insurance policies and other types of securities, as well as personal belongings and vehicles.

A personal representative must qualify to file a wrongful death suit or to continue a pending suit when one of the parties dies before the conclusion of the suit.

**Q. Where should I go to qualify as the personal representative for an estate?**

To the clerk's office of the circuit court of the jurisdiction:

- where the decedent was last known to reside, (this includes assisted living facilities) if none, then;
- where the decedent owned real estate, if none; then
- where the decedent died or had any estate.

For persons residing in a nursing home/convalescent home, pursuant to §64.1-76 of the 1950 Code of Virginia, as amended, the place of legal residence of such person shall be presumed to be the same as it was **before** such person became a patient; however, that presumption may be rebutted in Court by competent evidence.

**Q. What does dying “testate” or “intestate” mean?**

A person dies testate if he/she left a valid will. A person dies intestate if he/she did not leave a valid will. If a person dies intestate, then the laws of the Commonwealth of Virginia, in effect at the time of death, determine who the heirs are and hence who receives the decedent's property.

**Q. What is the procedure to probate an estate with a will?**

The executor named in the will **must schedule an appointment** with the Probate Division to probate the will and qualify as executor. The named executor should be a Virginia resident, however, statutes will allow out-of-state residents to qualify.

When the named executor is not a resident of Virginia, a Virginia resident must accompany the executor to the Probate Office to either co-qualify or be appointed as a resident agent.

**Q. What if the named executor does not wish to serve?**

The named executor must prepare a **notarized** statement renouncing the appointment. Priority goes to any alternates named in the will. If no alternates are named, or if any alternate executor renounces the right to serve (following the same procedure as the first named executor), then an “administrator c.t.a.” will need to be appointed and qualify as such. (See §64.1-116 of the 1950 Code of Virginia, as amended. Also see the definition at end of this booklet.)

**Q. What if the named executor is deceased?**

The alternate executor or administrator c.t.a. must present a certified copy of the death certificate of the deceased executor at the probate appointment.

**Q. What if the named executor wishes to be removed as such after qualifying?**

Only the court may remove a qualified personal representative. It may be necessary to have another personal representative ready to be appointed at the time the original personal representative is removed. The executor, like any other qualified personal representative, must present a petition for removal, a praecipe/notice form to set the matter on the court's motions day docket and present a proposed court order for the judge's signature. A filing fee is required. You must file these documents, along with the filing fee. A new civil action case file will be opened. You should also reference the fiduciary case number on the documents, if applicable.

**Q. What if an in-state executor or any other personal representative residing in Virginia moves out-of-state after qualification and the estate is still open?**

The personal representative must then serve with a surety bond and have a resident agent appointed, or he/she may petition the court to have an in-state resident co-qualify. Please call the Probate Division to discuss this situation with a Probate Clerk.

**Q. Who inherits the property of a person who dies intestate (person dying without a will)?**

If a person dies without a will, Virginia law provides a course of descents as follows (after payment of funeral expenses, debts and cost of administration):

- All to the surviving spouse, unless there are children (or their descendants) of someone other than with the surviving spouse, in which case, one-third passes to the surviving spouse and the remaining two-thirds is divided among all children.
- If no surviving spouse, all assets pass to the children and their descendants.
- If none, then all assets pass to the deceased's father and mother, or the survivor.
- If none, then all passes to the deceased's brothers and sisters or their descendants.

There are further contingent beneficiaries set out in the Virginia statutes. (VA Code §64.1-1, as amended.)

**Q. How is qualification as an administrator determined if there is no will?**

A. Administration shall be granted as follows:

1. During the first thirty days following the intestate's death, the clerk may grant administration (i) to a sole distributee or his designee or (ii) in the absence of a sole distributee, to any distributee or his designee who presents written waivers of right to qualify from all other competent distributees.
2. After thirty days have passed since the intestate's death, the clerk may grant administration to the first distributee, or his designee, who applies therefore, without either waiting for any further period of time, or requiring the consent or waiver of any other distributee; provided, however, that if, during the first thirty days following the intestate's death, more than one distributee notifies the clerk of an intent to qualify after the thirty-day period has elapsed, the clerk shall not appoint any distributee, or his designee, until the clerk has given all such distributees an opportunity to be heard.
3. After 45 days have passed since the intestate's death, the clerk may grant administration to any nonprofit charitable organization that operated as a conservator or guardian for the decedent at the time of his death; however, (i) if, during the first 45 days following the intestate's death, any distributee notifies the clerk of an intent to qualify after the 45-day period has elapsed, the clerk shall not appoint any such organization administrator until the clerk has given all such distributees an opportunity to be heard, and (ii) such organization certifies that it has made a diligent search to find an address for any sole distributee and has given not less than 30 days notice by certified mail of its intention to apply for administration to the last known address or addresses of the distributee discovered or, alternatively, that it has not been able to find any

such address. Qualification of such organization is not subject to challenge on account of a failure to have made the certification herein required.

4. After sixty days have passed since the intestate's death, the clerk may grant administration to one or more of the creditors or to any other person, provided such creditor or other person certifies that he has made diligent search to find an address for any sole distributee and has given not less than thirty days notice by certified mail of his intention to apply for administration to the last known address or addresses of the distributee discovered or alternatively, that he has not been able to find any such address. Qualification of a creditor or person other than a distributee is not subject to challenge on account of a failure to have made the certification herein required.
5. The court may appoint administrators under the same conditions as herein provided for the clerk, and when the court determines that it is in the best interests of an intestate's estate, the court may depart there from at any time and appoint such person as the court, in the exercise of its discretion, deems most appropriate.

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

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

Qualifying as an administrator does not automatically make one a beneficiary to the decedent's estate. The beneficiaries in an intestate estate are the legal heirs at law. Heirs at law are set forth by statute. (See §64.1-1 of the 1950 Code of Virginia, as amended.)

#### **Q. What steps are involved in the qualification process with the Clerk?**

- a) Sign the appropriate forms provide by the Clerk.
- b) Take an Oath of Office.
- c) Sign a Bond.
- d) Pay the required qualification fees.
- e) At the end of the Executor/Administrator qualification process, you will receive all or some of the following (depending on type of qualification):
  - Certificates of Qualification
  - Notice Regarding Estate of
  - Affidavit of Notice Regarding Estate of
  - Letter from the Commissioner of Accounts
  - Inventory Form
  - How to Complete the Inventory
  - Instructions and Duties of an Executor/Administrator
  - Important Deadlines to Remember
- f) After your qualification appointment, the Clerk will record the following public documents:
  - The Will (if the decedent died with a Will)
  - The Probate Clerk's Order
  - The List of the Heirs
  - Probate Information form
  - The Bond
  - The Affidavit of Notice Regarding Estate

**Q. What are the basic duties of an Executor/Administrator?**

1. To preserve the estate
2. To administer the estate as required first by the Code of Virginia and second by the terms of the Will, if the decedent had a Will.
3. Giving notice of probate to interested parties and filing an affidavit of notice.
4. Filing income, inheritance, or estate taxes with the federal or state government.
5. Filing an Inventory and Accounting or Statement in Lieu of Accounting with the Commissioner of Accounts Office.
6. Paying all Probate fees and taxes due to the Clerk of the Circuit Court.
7. Payment of debts in the order set forth by law (**Virginia Code §64.1-157** as amended)
8. Disbursement of remaining assets according to the Will or according to intestate law.

**Q. How can I obtain a Tax ID Number?**

If you apply to open an account for an estate or trust, you will be asked for the taxpayer identification number of the estate or trust. The Clerk's Office cannot issue a taxpayer id number for an estate, trust or other entity. You will need to apply with the IRS using the form SS-4, which is located on the IRS website. You may also call the IRS at 1-800-829-3676 to request a form.

After you have completed FORM SS-4, you may obtain the taxpayer identification number by telephone, by fax, or by mail. To obtain the taxpayer identification number by telephone, call 1-866-816-2065. You must have the completed FORM SS-4 in front of you when you call. To obtain the taxpayer identification number by fax, fax the completed FORM SS-4 to 1-859-699-5760. You also may obtain the taxpayer identification number by mail by sending the completed FORM SS-4 to the following address:

Internal Revenue Service  
EIN Operation  
Holtsville, NY 00501

This office cannot provide assistance in obtaining or completing the FORM SS-4, or in submitting it to the Internal Revenue Service. If you have any questions, please contact the Internal Revenue Service.

**Q. What are the fees associated with probate?**

The Code of Virginia mandates fees for probate. State Tax is \$1.00 per \$1,000. Currently, Dinwiddie County does not charge a local probate tax. Additional fees will vary depending on the type of estate but it will usually range from \$20 to \$100. The statutes may change annually; therefore, check with the Probate Division for updates.

**Q. Are bonds required?**

All personal representatives must be bonded. A bond is a guarantee that you will perform your Executor/Administrator duties as required by law. State statutes govern whether the bond is with or without corporate surety. The Probate Clerk will set the appropriate bond with or without surety at the time the personal representative qualifies.

**Q. What does bond with surety mean?**

A surety bond is a guarantee by a third party (usually an insurance or bonding company) that an Executor/Administrator will properly account for all money and property in the estate and that the Executor/Administrator will discharge his/her Executor/Administrator duties as required by law.

**Q. How long does it take after qualification to complete the probate process?**

Finalization of an estate varies in time depending upon various circumstances. A personal representative must file an inventory within four months from the qualification date. A first accounting or statement in lieu of accounting must be filed within sixteen months from the qualification date. Personal representatives file these documents with the Commissioner of Accounts office.

**Q. What if the only asset solely held by the decedent was real estate?**

**If there is a will, then**

The named executor will make an appointment in the jurisdiction of probate (where the decedent resided at the time of death) to record the will without qualification (unless the will specifically directs the executor to sell the real estate). When there is no specific directive to sell, the statutes in the Commonwealth of Virginia do not require an executor to qualify. Once the will has been recorded, the real estate passes automatically, by operation of law, to the beneficiary of the real estate under the will.

When real estate is in Virginia, but outside the county having jurisdiction of probate, the will is still recorded in the county having jurisdiction. Recording fees and probate tax are collected. A certified copy of the will, list of heirs and probate order are prepared for the person presenting the will to record in the county where the real estate is located. Also included is a certificate reflecting probate tax has been collected on real estate by the clerk's office having the original jurisdiction of probate.

If the probate jurisdiction is outside Virginia and real estate is solely held by the deceased in Virginia, exemplified (or triple sealed copies) of the probate documents are prepared by the jurisdiction of probate to record in the county in Virginia where the real estate is deeded. Recording fees and probate tax must be collected and a new list of heirs for Virginia must be recorded. Ancillary administration is not required in Virginia, unless it is a directive under the will to have the real estate sold by the executor. When this directive is absent, upon recording the will, the real estate passes automatically, by operation of law, to the beneficiary of the real estate in the will. The real estate may then be sold by the beneficiary, as a beneficiary (not as an executor).

**If there is no will, then**

The heirs would record a "List of Heirs/Real Estate Affidavit" (obtained from the Probate Office), and pay the proper recording fee. You would need to bring a certified copy of the death certificate, a list of the names, addresses and ages of the heirs at law, and the legal description of the real property to the appointment.

**Q. Suppose the only asset was a motor vehicle?**

Probate may not be necessary in this case. Please contact the Division of Motor Vehicles for further instructions.

**Q. Is probate necessary in a small estate?**

If an estate consists of personal assets not totaling more than \$50,000.00, sixty days have passed since the date of death and no personal representative has qualified in any jurisdiction, a small estate affidavit may be issued to the heirs at law when there is no will, or to the beneficiaries of a will once the will and heirs at law have been recorded. An appointment with the Probate Division is necessary for this procedure. A certified copy of the death certificate is also required.

**Q. What should the prospective executor/administrator bring to the probate appointment?**

**A.**

1. Virginia resident to accompany a nonresident prospective executor or administrator.
2. The original will and codicil(s) if any, (for testate estates).
3. A certified copy of the death certificate.
4. Approximate dollar value (as of the date of death) of any solely held personal assets (i.e. bank accounts, stocks and bonds, retirement accounts, life insurance policies and other types of securities, as well as personal belongings and vehicles.)

5. Approximate fair market value (as of the date of death) of real estate in Virginia deeded solely to the deceased or the value of the percentage owned by the deceased when the real estate is deeded as tenants-in-common.
6. Names, ages and addresses of heirs at law. These are individuals who are legally entitled to receive an estate when there is no will, pursuant to §64.1-1 of the 1950 Code of Virginia, as amended. This list is still required if the person died with a will (testate).
7. A check or cash to pay fees calculated during the probate appointment. The check must include your name, address, phone number, and Virginia Bar number if you are an attorney. The clerk's office does not accept out-of-state checks or starter checks.

**Q. Can a will be filed with the clerk's office prior to death?**

The Clerk's Office does not accept wills for safekeeping. Wills were kept for safe keeping in the Clerk's Office prior to 2008. Please call the office to see if the Clerk's Office has the will. The testator should ensure that all named executors know the location of the will. Photo identification is required for the testator to remove the will from the clerk's office. The testator may give written, notarized consent for a designee to retrieve the will. The designee is required to show valid photo identification.

**Q. Should a will be kept in a safe deposit box at a bank?**

There is a Virginia statute that authorizes banks to allow a spouse, next of kin, or other person having an interest in locating a will access to a deceased person's safe-deposit box. This statute is **not** mandatory. As a result, many banks are reluctant to allow access due to fiduciary and privacy concerns (See §6.1-332.1 of the 1950 Code of Virginia, as amended.)

**Q. Is an executor or administrator compensated?**

The administration of an estate generally requires a fair amount of time and energy. Compensation is allowed. The Commissioner of Accounts must approve the compensation and generally this amount is limited to 5% of the assets handled.

**Q. May the clerk's office help someone write a will?**

**No.** Court personnel are **prohibited** by state law from giving you legal advice or assistance. You may consult an attorney.

## DEFINITIONS

**Administrator:** The person appointed by and qualified before the Clerk to administer the decedent's estate when there is no will.

**Administrator C.T.A.:** *Cum testamento annexo*, or, *with the will annexed*. An administrator of the estate other than named executor in a will. Serves when all named executors do not serve due to death, incapacity or renunciation of their right to serve.

**Beneficiary:** A person or organization entitled to receive a portion of the estate.

**Bond:** A written document in which the obligor formally recognizes an obligation to pay money in the event the obligor does not properly perform his or her duties.

**Certificate of Qualification:** The Certificate of Qualification, sometimes referred to as "Letters Testamentary", is the paper that the personal representative receives from the Clerk at the time of qualification which states that a person has qualified as executor or administrator and has authority to act on behalf of the estate.

**Certified Copy:** A copy of a document or record, signed and certified as a true copy by the officer to whose custody the original is in trusted.

**Codicil:** A supplement or an addition to a will; it may explain, modify, add to, subtract from, qualify, alter, restrain or revoke provisions in an existing will.

**Commissioner of Accounts:** A person(s) appointed by the Court to monitor the reports and activities of personal representatives.

**Creditor:** A person or organization owed money by the decedent.

**Decedent:** A deceased person.

**Estate:** The decedent's property, including real estate, tangible and intangible personal property and all other assets owned or controlled by the decedent at the time of his/her death.

**Executor:** The person named in the decedent's will to administer the estate. To validate the appointment the executor must qualify before the clerk.

**Fiduciary:** A person in a position of trust with respect to another's property; a general term used to refer to executor, administrator or trustee.

**Heirs at Law:** A person(s) who would inherit the decedent's estate if the decedent died without a will.

**Holographic Will:** A will written entirely by the testator with his own hand and not witnessed (attested).

**Intestate Estate:** An estate to be administered without a will.

**Inventory:** A detailed list of articles; a list or schedule of property, containing designation or description of such specific article.

**Personal Representative:** A term used to mean either the executor or the administrator of the decedent's estate. This term only applies to the person administering a testate or intestate estate and does not apply to any other type of fiduciary.

**Probate:** The procedure whereby a will is admitted to record in the Clerk's Office. Also, used to include the process of qualifying a person as an executor or administrator of an estate. It sometimes is referred to as the entire process of administering an estate.

**Qualification:** The procedure whereby a person is appointed by the clerk to serve as executor or administrator of a decedent's estate.

**Self-Proved Will:** A will that includes a notarized affidavit of the testator and attesting witnesses. See §64.1-87.1 and §64.1-87.2, of the 1950 Code of Virginia, as amended, for specific language.

**Testator:** One who dies leaving a will.

**Testate Estate:** An estate to be administered pursuant to a will.

**Will:** A written document that gives instructions on how a person wants his/her property distributed after death.