Questions and Answers – Probate

By Yahne Miorini, LL.M.

1. **When Do We Have Intestacy?**

The laws of intestacy may apply, when an individual dies intestate for at least a portion of his/her asset. This can happen in the following situations:

(1) There is no Will;
(2) The Will is incomplete, for instance there is no residuary clause;
(3) A trust is incomplete regarding its final distribution;
(4) Residuary beneficiaries are pre-deceased;
(5) The joint owner is predeceased;
(6) A beneficiary designation of a life insurance policy or of a retirement plan is missing or invalid;
(7) Beneficiaries have waived their rights.

Who Can Administer the Estate?

Individuals appointed by the court to administer an intestate estate are named administrators instead of executors. Virginia Code Section 64.1-188 sets the order of priority for the probate clerk to assess who can be appointed executor first. Administration is granted to the distributees who apply. There is sometimes a race for the appointment. There are different priority of whom may request appointment dependent of the time elapsed since the date of death.

During the first 30 days after the death, the clerk may grant administration to either the sole distribute or if there are several distributee to the one who has collected written waivers of the right to qualify from all other competent distributees.

When the first 30 day period has lapse, the clerk with grant administration to the first distributee who request the appointment. However, the clerk won't appoint any distributee if during the first 30 day period, several distributees have notified the clerk that they wanted to be appointed administrator of the estate. Either the distributees will reach an agreement to select one of them or to serve as co-administrator, or an hearing will be held by the judge to determine who shall serve.

When 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/her death. However, if during that 45-day period a distributee notifies the clerk of his/her intent to qualify, the clerk may hear the distributee before appointing the organization. In addition, the organization will have to provide (1) proof of diligent search to find an address for distributee, and (2) proof that distributee were given at least

30-day notice of the organization intent to qualify as administrator of the estate

Then creditors or any other person may request appointment after sixty days have passed since the intestate's death.

The Court may use its discretion to select the administrator who deemed to be the most appropriate to administer the estate.

Administrators have to be personally bonded. They have limited power in comparison the executor. For instance, heirs have immediately vested with real estate. Administrators cannot sell real estate. However, when there is not enough cash to pay debt of the decedent and administration expenses, administrators may petition the court to sell real estate. In comparison, executor may have the power of sell real estate from the Will.

2. Who are the Distributees?

The course of descendent is defined under Section 64.1-1 of the Virginia Code. This code section set the order of priority to distribute real estate in case of intestacy. Section 64.1-11, which directs the distribution of personal estate in case of intestacy, refers to Section 64.1-1 for the order of distribution.

In Virginia, real estate vests immediately to heirs-at-law. Estate administration relates to personal estate of the decedent. After payment of the funeral expenses, debts of the decedent and administration expenses, distribution to the heirs-at-law shall be the same of real estate.

The first in line is the surviving spouse. The surviving spouse will collect the entire estate when there is no children from a prior marriage. If there are children from a prior marriage, the share of the surviving spouse is reduced to one-third of the estate. The other two-third will be divided between the children of the decedent.

The second in line are the children of the decedent. When there is no surviving spouse, the whole estate is divided between the children and their descendants.

In absence of children or their descendents, the estate is distributed to the intestate's father and mother, or the survivor of them.

Questions and Answers – Probate

By Yahne Miorini, LL.M.

If there is none such, then the estate is distributed to the intestate's siblings and their descendants.

If there is none such, then the estate is divided in halves, one of the paternal side and one for the maternal side. To be distributed first of the grandparents or the survivor of them, then to the aunts and uncles and their descendants, then to the great-grandparents, then to the siblings of the grandparents and their descendants, and "so on, in other cases, without end, passing to the nearest lineal ancestors, and the descendants of such ancestors." *Add a spreadsheet on the family tree*

When there is no one from one side of the family, the other side collects the entire estate. When there is no one from both sides, then the pre-deceased spouse's family, will collect the estate.

As a last resort, the state will collect the estate, as provided under Section 64.1-12 of Virginia Code.

What is a Forfeited Beneficiary?

Section 64.1-16.3 of the Virginia Code provides that spouses who have willfully deserted or abandoned and that desertion was continued until the death of the intestate, shall be barred from collecting any interest of the intestate, as follows: the intestate succession, elective share, exempt property, family allowance, and homestead allowance.

The same disqualify exists for parents who willfully desert or abandoned their minor or incapacitated child.

What is a Family Allowance?

The surviving spouse and minor children are entitled to a reasonable allowance, called family allowance, to support them during the administration of the estate. The family allowance shall not exceed $18,000 and can be paid as a lump sum or by installments over a period of one year. The family allowance, set under Section 64.1-151.1 of the Virginia Code, is in addition to any benefit or share passing to the surviving spouse or minor children by the will of the decedent, by intestate succession, or by way of

elective share. This right has priority over all claims.

What is Exempt Property?

In addition to the family allowance, the spouse is entitled to exempt property not to exceed $15,000. If there is not surviving spouse, then the minor children are entitled to the exempt property.

Exempt property includes furniture, automobiles, furnishings, appliances and personal effects. If the total value of the exempt property is less than $15,000, the surviving spouse is entitled to other assets of the estate to the extent necessary to make up to $15,000.

This right set under Section 64.1-151.2 of Virginia Code is in addition to any benefit or share passing to the surviving spouse or minor children by the will of the decedent, by intestate succession, or by way of elective share. This right has priority over all claims but comes after the family allowance.

What is Homestead Allowance?

In addition to the family allowance and the exempt property, the surviving spouse is entitled to a homestead allowance of $15,000. If there is no surviving spouse, then the minor children may claim this interest.

The homestead allowance is in lieu of any share passing by will or by intestacy. Section 64.1-151.3. This right has priority over all claims but comes after the family allowance and the exempt property.

What is a small estate?

We need to make a distinction between a total of probate of asset below $50,000 and particular asset for an amount of less than $15,000.

60 days after the date of death, when a sum due is less than $15,000, the holder may deliver such sum may to the surviving spouse or to the distributee of the estate. Their receipts will be a full discharge and acquaintance. Sections 64.1-123, *et seq.* Of Virginia Code, set these authorization of payment. The holder may be the following:

i. The Commonwealth of Virginia
ii. The United State
iii. Employer when the amount paid is a pension
iv. Corporations and their agent when the payment is regarding securities

v. For transfer of vessel registered with the United State Bureau of Customs
vi. Assets from a trust or an estate payable to a distributee who has died and where no executor has been appointed
vii. Superintendent of a mental institution holder of a property owned by a decedent inmate for whom no guardian or conservator had been appointed
viii. Municipally operated health care facility
ix. Agency for payment of welfare funds

How to collect a small estate by an affidavit?

When the total of the probate asset is below $50,000, the appointment of an executor or administrator is unnecessary. Section 64.1-132.2 provides that any beneficiary may execute an affidavit in order to collect the assets.

60 days after the date of death, any beneficiary of the estate may execute an affidavit, which declares as follows:

1. The value of the entire personal probate estate, wherever located, does not exceed $50,000;

2. At least 60 days have elapsed since the death of the decedent;

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

4. The will, if any, was duly probated and the list of heirs required by § 64.1-134 of Virginia code was duly filed; and

5. The claiming successor is entitled to payment or delivery of the property, and the basis upon which such entitlement is claimed.

Any individual in possession of estate asset may deliver or make payment to the person presenting the affidavit.

What is the Hotpot Rule?

Although the administration of the estate is similar to an estate with a will, there is one important exception set under Section 64.1-17 of Virginia Code. The gift made to a descendant by the decedent prior to his death is considered an advancement. This gift shall be brought into hotchpot with the whole estate. Therefore the share of the gifted beneficiary will include the gift made to such beneficiary.

The hotchpot rule applies to intestacy or partial intestacy and only among children. The advancements to children are not brought into hotchpot for the benefit of the surviving spouse who is only entitled to share in the estate of the

Questions and Answers – Probate

By Yahne Miorini, LL.M.

intestate of which the decedent died possessed[1]. When a gift has been made during the life of the decedent to a child, the presumption is that the gift was made in advancement of the share that the child will receive upon death. The court will look at the circumstance around the gift and any statement made by the decedent at the time of the gift or during his/her life. This presumption is rebuttable. A substantial gift is by itself evidence that the gift was intended as an advancement.

Children, at the time of receiving the gift as their advancements, may have entered into covenants with their parents that they relinquished all interest in or claim to any portion of the estate then owned or which might be thereafter acquired by the parents, and as to which they might die intestate. However, Virginia does not recognize relinquishment, while other state may uphold such relinquishment.

The child who has elected not to bring an advancement of real estate into hotchpot is not debarred from participating in the division of the parent's estate where such advancement doesn't exceed the child's share of the real estate.

What can the executor of an estate do if there is a missing beneficiary?

The administrator shall petition the court for an order permitting the settlement of the estate account. The fund will be set aside for the missing beneficiary, usually in a certificate of deposit in the beneficiary's name. Another solution is offered by Section 64.1-105 *et seq.* The administrator can petition the court to distribute the share of the missing beneficiary to those beneficiaries who would collect the same of the missing beneficiary if the missing beneficiary was in fact dead. The distributee must give proper refunding bonds, with surety in such form as the court directs until the missing beneficiary is determined to be dead in accordance with Section 64.1-105.

How to transfer of Motor Vehicle?

Vehicles can be transferred pursuant to Virginia Code Section 46.2-634 if no personal representative has been qualified. This section authorizes the beneficiary to submit evidence of the owner's death and his or her claim to ownership of the vehicle to the Department of Motor Vehicles. Virginia Code Section 29.1-717.3 provides for a similar mechanism for titles to boats.

[1] *Rowe v. Rowe*, 144 Va. 816, 130 S.E. 771 (1925)

Questions and Answers – Probate

By Yahne Miorini, LL.M.

1) Community property states

Even though Virginia is not a community property state, the trustee or executor should ensure that assets of the decedent/grantor were not acquired as community property. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington are community property states. There is a rebuttable presumption[2] that any property acquired by a husband and wife while resident in a community property state is considered to be owned equally by each spouse. If they later move to Virginia, the property (or funds derived from the sale of such community property) continues to retain community property status. However, any property acquired in Virginia follows to rules of Virginia. Sections 64.1-197 through 64.1-206 of the Code of Virginia, known as the Uniform Disposition of Community Property Rights at Death Act, govern property with community property status held by a decedent at his death. In general, the decedent's half interest in any community property passes according to the terms of his Will or, in absence of a Will, by the laws of intestate succession. The personal representative is not required to discover whether the decedent's asset is a community property, or whether any property held by the surviving spouse is a community property. The surviving spouse can make a written demand to claim the community property interest.[3] If the community property is titled under the sole name of the surviving spouse, the personal representative or an heir or devisee of the decedent may institute an action to perfect title to the property.

1) Non U.S. citizen spouse status

The IRS used to require a proof of the contribution of each spouse to determine which portion of the joint property was to be reported in the gross estate. As of January 1, 1977, there is a presumption[4] that each spouse owns a 50 per cent interest of the property held jointly or as tenants by the entirety. This presumption applies only to US citizens. The marital deduction does not apply to a spouse who is not a US citizen.[5] In such cases, the normal tracing rule for joint property will apply. However, if prior to the filing of the federal estate tax return, the spouse become a US citizen, the presumption of 50 percent ownership will apply. If the citizenship is not obtained, the surviving spouse has the option to transfer the assets into a qualified domestic trust (QDOT). This trust will qualify for a marital deduction but actually result in a postponement of the decedent's estate tax.

[2] See Va. Code Section 64.1-198.

[3] See Va. Code Section 64.1-200.
[4] See I.R.C Section 4020(b).
[5] See I.R.C. Section 2523(i)(3).