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Wills: Virginia

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A Q&A guide to the law of wills in Virginia. This Q&A addresses state laws and customs that impact wills, including the key statutes and rules related to wills, the rules of intestacy, the requirements for creating a valid will, common will provisions, information concerning fiduciaries, and information regarding making changes to wills after execution, special circumstances regarding gifts made under a will or gift recipients, and lost wills. Answers to questions can be compared across a number of jurisdictions (see Wills: State Q&A Tool).

Key Statutes and Rules

1. What are the key statutes and rules that govern wills in your state?

The rules and laws pertaining to wills and probate proceedings in Virginia are found in Title 64.2 of the Virginia Code, which sets out:

- The laws applicable to wills (Va. Code Ann. §§ 64.2-400 to 64.2-458).
- The substantive laws of intestacy, which determine which parties inherit in the absence of a will (Va. Code Ann. §§ 64.2-200 to 64.2-206).
- The laws applicable to trusts, including testamentary trusts (Va. Code Ann. §§ 64.2-700 to 64.2-1108).
- The laws applicable to probate administration (Va. Code Ann. §§ 64.2-443 to 64.2-558).

Who Can Create a Will

2. Is there a minimum age requirement to create a will?

To create a will in Virginia, a person must be either:

- At least 18 years old.
- An emancipated minor.

(Va. Code Ann. § 64.2-401(B).)

3. What is the standard of mental capacity required to create a will?

A person must be of sound mind to create a valid will in Virginia (Va. Code Ann. § 64.2-401(B)). A person with sound mind understands the following when the person (testator) executes the will:

- The testator's property.
- The natural objects of the testator's bounty (those who would naturally inherit from the testator) and their claims on the testator.
- How the testator wants to distribute the testator's property.
- That the testator is making a will.

(*Fields v. Fields*, 499 S.E.2d 826, 828 (Va. 1998).)

The testator must be of sound mind when the will is executed. If the testator has mental capacity when the testator executes the will, it is generally not material what the testator's mental condition was before or after that time. (*D'Ambrosio v. Wolf*, 809 S.E.2d 625, 630 (Va. 2018); *Forehand v. Sawyer*, 136 S.E. 683, 688 (Va. 1927).)

4. Can an agent under a power of attorney create a will on behalf of a testator?

Virginia does not permit a person serving as an agent under a power of attorney to create or revoke a will or codicil for a testator. For more information on:

- Executing a will or codicil, see Question 6.
- Revoking a will or codicil, see Question 13: Revocation of a Will or a Codicil.

Permissible Form of Will

5. What form must the will take? In particular, please specify whether:

- Handwritten (holographic) wills are permitted.
- Oral (nuncupative) wills are permitted.
- Contractual wills are permitted.
- Statutory wills are permitted.
- Electronic wills are permitted.
- Out-of-state wills are binding.

Handwritten (Holographic) Wills

Virginia accepts holographic wills. A holographic will is a will entirely in the testator's handwriting and signed by the testator. (Va. Code Ann. § 64.2-403(B).)

Virginia does not require holographic wills to be witnessed. If the holographic will is not witnessed, two disinterested witnesses are required to prove the testator's handwriting and signature to probate the will (Va. Code Ann. § 64.2-403(B)).

Oral (Nuncupative) Wills

A nuncupative will is generally considered to be an oral will. Oral wills are not valid in Virginia (Va. Code Ann. § 64.2-403(A)).

Contractual Wills

Contracts to make a will are enforceable in Virginia. For a contract to be enforceable:

- The terms of the agreement must be certain and definite.
- The evidence for the existence of the contract must be clear and convincing.

(*Everton v. Askew*, 102 S.E.2d 156, 158 (Va. 1958).) Proof of the contract to make a will may be provided by competent witnesses or as an implication from the circumstances, parties, and instrument. Direct evidence is not necessary. (*Black v. Edwards*, 445 S.E.2d 107, 109 (Va. 1994).)

If the contract involves land, the contract must be in writing (*Reed's Heirs v. Vannorsdale*, 1831 WL 1912, *2 (Va. 1831)).

Execution of mutual wills, in and of themselves, is insufficient to show a contract to make or not to revoke a will (*Keith v. Lulofs*, 724 S.E.2d 695, 697-98 (2012)).

Statutory Wills

Virginia does not provide a statutory will.

Electronic Wills

Virginia does not permit electronic wills.

Out-of-State Wills

Virginia recognizes as valid a will of a nonresident regarding the nonresident's:

- Personal property located in Virginia if the will was validly executed under the law of the state or country where the person was domiciled (Va. Code Ann. § 64.2-407).
- Real property in Virginia only if the will generally was validly executed under Virginia law. However, if the nonresident's will was self-proved under the laws of another state, an authenticated copy may be admitted to probate for both Virginia real and personal property, when offered with its authenticated certificate of probate (Va. Code Ann. § 64.2-450).

For more information on probating the will of an out-of-state decedent, see Practice Note, Ancillary Probate in Virginia.

Will Execution Requirements

6. What are the execution requirements for a valid will? In particular, please specify:

- Requirements for the testator's signature.
- Any requirements for witnesses to a will.
- Any requirements for the will to be notarized.
- An example of an attestation clause.
- The requirements for a self-proving affidavit.
- If electronic wills are permitted, any different execution requirements.

Testator's Signature

In Virginia, a will must be signed in a way showing the name is intended as a signature, either by:

- The testator.
- Another person in the testator's presence and by the testator's direction.

(Va. Code Ann. § 64.2-403(A).)

Witness Requirements

If a testator creates a holographic will, witnesses to the execution are not required. However, the testator's handwriting and signature on an unwitnessed holographic will must be proved by two disinterested witnesses to probate the will (Va. Code Ann. § 64.2-403(B); see Question 5: Handwritten (Holographic) Wills).

When a testator creates a non-holographic will, the testator must either:

- Sign the will in the presence of the two competent witnesses.
- Acknowledge the will in the presence of two competent witnesses.

(Va. Code Ann. § 64.2-403(C).)

A competent witness is a person who, at attestation, is qualified to testify in court to the facts about which the witness attested by subscribing the witness' name to the will (*Ferguson v. Ferguson*, 47 S.E.2d 346, 351 (1948)).

The witnesses must both:

- Sign the will in the testator's presence.
- Be in the presence of each other when signing the will.

(Va. Code Ann. § 64.2-403(C).)

A person is not disqualified from serving as a witness solely because that person is named in the will, either as beneficiary or as a fiduciary (Va. Code Ann. 64.2-405; see *Ferguson*, 47 S.E.2d at 351). Virginia law does not require forfeiture of either a bequest made to a witness or an appointment of a witness as fiduciary because the individual is a named personal representative or beneficiary under the will. However, it is common practice for Virginia counsel to use disinterested witnesses.

Notary Requirements

A will is not required to be notarized. A self-proving affidavit included with the will must be notarized (Va. Code Ann. § 64.2-452; see Self-Proving Affidavit).

Sample Attestation Clause

Virginia law does not require an attestation clause (*Ferguson*, 47 S.E.2d at 351). However, most wills commonly include attestation clauses. When used, the attestation clause states that:

- The testator signed or acknowledged the will in the presence of the two competent witnesses.
- The testator declared to each of the witnesses that the document was the testator's will.
- In the presence of the testator and each other and at the testator's request, the witnesses signed their names to the will.

The attestation clause typically takes the following form:

"We, the undersigned, do hereby certify that the Testator has signed, sealed, acknowledged, and declared the foregoing paper as and for [his/her/their] Last Will and Testament in the presence of us, two (2) competent witnesses, who, in the Testator's presence, at the Testator's request, and in the presence of each other, all present together at the same time, have hereunto subscribed our names as attesting witnesses, on [DATE]."

The witnesses sign the will and typically provide their places of residence (the Virginia city or county of residence) in the space directly below the attestation clause. The witnesses do not have to include their addresses. However, including the addresses of the witnesses may assist with locating them if necessary when the will is probated.

Self-Proving Affidavit

A self-proving affidavit is not required. Counsel should still include a self-proving affidavit in all wills because it generally eliminates the need for a witness to attest in court to the will's proper execution when the will is offered for probate (Va. Code Ann. § 64.2-452).

In the self-proving affidavit, the testator and witnesses swear that:

- The testator declared to the notary and the witnesses in the notary's presence that:
  - the instrument was the testator's will;
  - the testator willingly signed the will or directed another to sign the will; and
  - the testator executed and acknowledged the will as the testator's free and voluntary act for the purposes expressed in the will, in the witnesses' presence.

- The witnesses stated before the notary that:
  - the testator executed and acknowledged the will as testator's will in the witnesses' presence; and
  - the witnesses signed the will in the testator and each other's presence, and at the testator's request, on the date of the will.
- The testator was over the age of 18 and of sound and disposing mind and memory when the testator executed the will.

The notary then acknowledges the testator's and witnesses' statements and identities. (Va. Code Ann. § 64.2-452.)

For more information on self-proving affidavits, see Standard Clause, Signature Pages for Will and Self-Proving Affidavit (VA).

Electronic Will Execution Requirements

Virginia does not authorize electronic wills.

Limitations on Gifts to Fiduciaries and Attorney Draftsperson

7. Are there any limitations on beneficiaries a testator can name in a will? In particular, please specify if a will can provide for gifts to:

- Executors.
- Gifts to trustees named in the will.
- Gifts to guardians.
- The lawyer who drafted the will.

Gifts to Personal Representatives

In Virginia, a will generally can provide for gifts to personal representatives.

Gifts to Trustees Named in the Will

A will generally can provide for gifts to trustees named in the will.

Gifts to Guardians

A will generally can provide for gifts to guardians.

Gifts to Lawyer Draftsperson

Gifts to lawyer draftspersons are generally not recommended. In Virginia, the Rules of Professional Conduct prohibit certain conduct relating to soliciting, accepting, or preparing instruments giving the lawyer or a lawyer's relative substantial gifts, unless the client is a relative of the donee (Virginia Rules of Professional Conduct, Rule 1.8(c)).

This rule is imputed to the lawyer's entire firm (Virginia Rules of Professional Conduct, Rule 1.10(a); see Va. State Bar Legal Ethics Op. 1100).

Rights of Family Members to Inherit

8. Are a testator's will bequests affected by community property laws, elective share laws, or other local laws that prohibit a testator from excluding a beneficiary from taking a share in the estate? In particular, please specify if a will can disinherit:

- The testator's spouse.
- A child of the testator.

Disinheriting a Testator's Spouse

In Virginia, surviving spouses are generally entitled to:

- The elective share (Va. Code Ann. § 64.2-308.3; see Elective Share).
- The homestead allowance (Va. Code Ann. § 64.2-311; see Homestead Allowance).
- Exempt property (Va. Code Ann. § 64.2-310; see Exempt Property).
- The family allowance (Va. Code Ann. § 64.2-309; see Family Allowance).

If the spouse and the testator married after the testator executed the will, the spouse may be entitled to a pretermitted spouse's share instead of the elective share (see Question 14: Effect of Marriage). A testator cannot eliminate these entitlements of the surviving spouse in the testator's will. However, the surviving spouse can waive these entitlements by a written agreement or waiver (Va. Code Ann. § 64.2-308.14(A)).

The surviving spouse is also barred from these entitlements if both:

- The surviving spouse willfully deserts or abandons the testator spouse.
- The desertion or abandonment continues until the other spouse's death.

(Va. Code Ann. § 64.2-308.14(E).)

Elective Share

A decedent's surviving spouse can elect to take a statutory elective share rather than under the testator's will. The elective share is half of the marital-property portion of the augmented estate. (Va. Code Ann. § 64.2-308.3(A).) The augmented estate includes:

- The testator's net probate estate.
- The testator's non-probate transfers to others, which generally include:
  - assets in a revocable trust on or before the testator's death; and
  - other non-probate transfers that were owned by the decedent at death.
- All the surviving spouse's property and non-probate transfers to others.

(Va. Code Ann. §§ 64.2-308.4(A).)

The value of the marital-property portion of the augmented estate is the value of the augmented estate multiplied by a percentage determined by how long the spouses were married. If the decedent and spouse were married to each other:

- Less than 1 year, the percentage is 3%.
- 1 year but less than 2 years, the percentage is 6%.
- 2 years but less than 3 years, the percentage is 12%.
- 3 years but less than 4 years, the percentage is 18%.
- 4 years but less than 5 years, the percentage is 24%.
- 5 years but less than 6 years, the percentage is 30%.
- 6 years but less than 7 years, the percentage is 36%.
- 7 years but less than 8 years, the percentage is 42%.
- 8 years but less than 9 years, the percentage is 48%.
- 9 years but less than 10 years, the percentage is 54%.
- 10 years but less than 11 years, the percentage is 60%.
- 11 years but less than 12 years, the percentage is 68%.
- 12 years but less than 13 years, the percentage is 76%.
- 13 years but less than 14 years, the percentage is 84%.
- 14 years but less than 15 years, the percentage is 92%.
- 15 years or more, the percentage is 100%.

(Va. Code Ann. § 64.2-308.4(B).)

Family Allowance

In addition to any other spousal right or allowance, the surviving spouse is entitled to a reasonable allowance of money from the estate during estate administration. This sum is for the use of the surviving spouse and minor children, if any. If there is no surviving spouse, the sum is payable to the person with custody of the minor children. (Va. Code Ann. § 64.2-309(A).)

The family allowance may be paid as a lump sum not to exceed $24,000 or in periodic installments not to exceed $2,000 per month for one year (Va. Code Ann. § 64.2-309(A)). The family allowance:

- Has priority over all claims against the estate (Va. Code Ann. § 64.2-309(B)).
- Is in addition to any intestate, will, or elective share (Va. Code Ann. § 64.2-309(C)).

The death of a person entitled to the family allowance terminates that person's right to any allowance not yet paid (Va. Code Ann. § 64.2-309(D)).

Exempt Property

In addition to any other spousal right or allowance, the surviving spouse, or minor children if there is no surviving spouse, is entitled to value up to $20,000 (in excess of any security interests) of personal effects, household furniture, furnishings, appliances, and cars. (Va. Code Ann. § 64.2-310(A).)

The exempt property allowance has priority over all claims against the estate except for the family allowance. The exempt property allowance is in addition to any intestate, will, or elective share. (Va. Code Ann. § 64.2-310(B), (C).)

If the value of exempt property is less than $20,000, the spouse is entitled to an additional amount so that the value of property passing to the spouse is $20,000. However, in all circumstances, the spouse is entitled to the full family allowance amount. (Va. Code Ann. § 64.2-310(A).)

Homestead Allowance

The surviving spouse is entitled to a homestead allowance of $20,000 in addition to the family allowance and exempt property spousal rights. If there is no surviving spouse, each minor child is entitled to an equal share of

$20,000. The homestead allowance has priority over all claims against the estate except for:

- The family allowance.
- The right to exempt property.

(Va. Code Ann. § 64.2-311(A), (B).)

The homestead allowance is instead of any intestate or will share. If the intestate or will share to the spouse is less than $20,000, the spouse is entitled to an additional amount so that the property passing to the spouse is $20,000. (Va. Code Ann. § 64.2-311(C).)

Disinheriting a Child of the Testator

Subject to a few exceptions (family allowance, exempt property, and homestead allowance, and as an omitted child), a child has no right to inherit from a parent under Virginia law.

Statutory Allowances

If the child is a minor at the decedent parent's death, the minor child may be entitled to:

- The family allowance (Va. Code Ann. § 64.2-309; see Family Allowance).
- Exempt property (Va. Code Ann. § 64.2-310; see Exempt Property).
- The homestead allowance (Va. Code Ann. § 64.2-311; see Homestead Allowance).

Omitted Child

If a child is born or adopted after a will is signed and is not provided for in the will, that child may also be entitled to a share of the testator's estate if certain criteria are met (see Question 14: After-Born Child).

Common Will Provisions

9. Discuss specific provisions commonly found in a will and the rules that apply to these provisions in your state. In particular, please discuss the following provisions and their effect:

- Incorporation by reference.
- Disposition of remains or for funeral wishes.
- No-contest clause.
- Rule against perpetuities.

Incorporation by Reference

Incorporation by reference is a general doctrine that sometimes allows a testator to refer to outside documents and incorporate their provisions into a will. Virginia law specifically authorizes incorporation by reference (Va. Code Ann. §§ 64.2-104, 64.2-105, and 64.2-400). Incorporation by reference is most often used in Virginia in the context of:

- A separate writing identifying recipients of tangible personal property (Va. Code Ann. § 64.2-400; see Disposition of Tangible Personal Property).
- Fiduciary powers (Va. Code Ann. § 64.2-105; see Fiduciary Powers).

Disposition of Tangible Personal Property

A testator may reference in the will a separate writing that directs the disposition of tangible personal property not otherwise specifically bequeathed in the testator's will (Va. Code Ann. § 64.2-400(A)). The written statement or list must:

- Describe with reasonable certainty the items of tangible personal property and the recipients of that tangible personal property
- Be signed by the testator.

(Va. Code Ann. § 64.2-400(A).)

The written statement or list may be:

- Referred to as one that is in existence at the testator's death.
- Prepared before or after the execution of the will.
- Altered by the testator at any time.
- A writing that has no significance apart from its effect on the dispositions made by the will.

(Va. Code Ann. § 64.2-400(B).)

A married testator may choose to prepare a written statement or list that provides for the disposition of tangible personal property if:

- The testator's spouse survives the testator.
- The testator is the second spouse to die.

A written statement disposing of tangible personal property is commonly prepared in separate paragraphs, identifying the proper disposition of tangible personal property depending on whether the testator has a surviving spouse.

Fiduciary Powers

In addition to the fiduciary powers listed in the will, Virginia allows the incorporation of additional statutory powers if the will specifically references the relevant Virginia Code statute (Va. Code Ann. § 64.2-105).

It is common for a will to incorporate additional statutory powers by reference. This incorporating language typically reads as follows:

"In addition to the powers granted by law, I grant my Executor the powers set forth in Va. Code Ann. § 64.2-105, whether dealing with assets subject to administration in Virginia or elsewhere, which powers are incorporated by reference and made a part of this will. I intend to give my Executor full management and control of all estate assets, without restriction to the incorporated powers."

Though less common, a Virginia will also may incorporate by reference an original letter or memorandum to the fiduciary as to the interpretation of discretionary powers of distribution where the will grants the fiduciary the power to make distributions to beneficiaries in the fiduciary's discretion. No provision of the letter or memorandum is enforceable if it contradicts or is inconsistent with a provision of the incorporating will. The testator:

- Must sign the letter or memorandum and have the document notarized.
- May prepare the document before or after the execution of the will.

(Va. Code Ann. § 64.2-104.)

Pour-Over Will

Though it is not strictly an incorporation by reference doctrine, a will may make a bequest to the trustee of the testator's revocable trust if:

- The trust is identified in the testator's will.
- The trust is in a writing, other than the will, executed before, concurrently with, or after the execution of the testator's will.

(Va. Code Ann. § 64.2-427(A).) The bequest is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or the testator's death (Va. Code Ann. § 64.2-427(A)).

The testator should generally execute a pour-over will if the testator uses a revocable trust.

Counsel may choose to also add a will provision incorporating by reference the trust terms into the will in case the bequest to the trustee of the testator's revocable trust is ineffective (for example, the trust is not in existence at the testator's death), such as:

"If the gift to the [TRUST NAME] is ineffective for any reason, I give all my remaining estate to the trustee upon the same terms and conditions set forth in that trust as of this date. I incorporate those terms by reference, but only for the purpose of this contingent gift."

However, if the testator amends the trust after executing the pour over will, the testator must also amend or republish for the will to incorporate the terms of any subsequent trust amendment.

Counsel commonly also include language, if the pour-over bequest to the trust fails, providing that any young or incapacitated beneficiaries should not receive assets of value outright under the will, such as:

"If a beneficiary who is under age 25 or incapacitated becomes entitled to receive any estate assets and no other provision for the retention of such assets applies, my Executor may (1) distribute such assets to an agent for the beneficiary under a durable power of attorney; or (2) distribute or administer such assets as authorized in Va. Code Ann. § 64.2-105(B)(17), as if such section applies to all beneficiaries who are under 25 or incapacitated. This authority shall be construed as conferring a power only and shall not postpone or prevent the absolute ownership and vesting of such assets in the beneficiary. If any person entitled to receive tangible personal property is a minor, I authorize my Executor to deliver his or her tangible personal property to the adult with whom he or she may be residing without bond, and the receipt of such adult shall be a complete discharge of all obligations of my Executor with respect to such tangible personal property."

Disposition of Remains or Funeral Wishes

The will can authorize the executor to make funeral arrangements for the testator and direct the disposition of the declarant's remains. If this language is included in the will, the will must be notarized. (Va. Code Ann. § 54.1-2825(A).)

The executor named in the will may provide for the testator's burial and pay reasonable funeral expenses, even if the named executor has not yet qualified by taking an oath and giving bond in the court or before the clerk where the will or an authenticated copy of the will is admitted to probate (Va. Code Ann. § 64.2-511; see Question 10: Qualification as Personal Representative).

Though a will can include language related to anatomical gifts, it is common in Virginia for a testator's advance medical directive to include this language, rather than the testator's will (see Standard Document, Advance Directive (VA): Drafting Note: Appointment of an Agent to Make an Anatomical Gift or Organ, Tissue, or Eye Donation). An anatomical gift made by will is effective on the testator's death whether or not the will is admitted to probate. Invalidation of the will after the testator's death does not invalidate the anatomical gift. (Va. Code Ann. §§ 32.1-291.4, 32.1-291.5(A), 32.1-291.9(A).)

Counsel must ensure that directions for the disposition of the testator's remains made in different documents do not conflict.

No-Contest Clause

No-contest clauses (also known as *in terrorem* clauses) are designed to discourage a beneficiary from contesting the dispositive provisions of a testator's will or joining in an action to impeach the will (in any role other than that of a will proponent). They typically provide that a contesting beneficiary, and often the contesting beneficiary's children and more remote descendants, are excluded as beneficiaries under the will if the beneficiary contests the will.

No-contest clauses in a will may also reference the testator's revocable trust and exclude beneficiaries from taking under the revocable trust as well. When such language is included in a will, it is also typically modified for the corresponding revocable trust. (See State Q&A, Revocable Trusts: Virginia: No-Contest Clause.)

No-contest clauses are enforceable in Virginia, but are strictly construed because:

- The testator, or a skilled draftsman acting at the testator's direction, can select the language that most precisely expresses the testator's intent.
- Virginia law does not generally favor provisions that work a forfeiture and enforces those provisions only according to their clear terms.

(*Keener v. Keener*, 682 S.E.2d 545, 548-49 (Va. 2009).)

Therefore, the drafting attorney should tailor the no-contest clause to the testator's circumstances and concerns. A broad no-contest clause is more likely to be invalidated than one that is more limited in its application.

Rule Against Perpetuities

Under the Virginia Uniform Statutory Rule Against Perpetuities, a nonvested property interest is invalid unless either:

- When the interest is created, it must vest or terminate no later than 21 years after the death of an individual then alive.
- The interest either vests or terminates within 90 years after its creation.

(Va. Code Ann. § 55.1-124(A).) Powers of appointment also are subject to this rule against perpetuities (Va. Code Ann. § 55.1-124(B), (C)).

A sample rule against perpetuities clause might read:

"Notwithstanding any contrary provisions of this Will, the share for each beneficiary shall vest (in the beneficiary or the beneficiary's estate) immediately prior to the expiration of the later of 21 years after the death of the last of my descendants who are living at my death or 90 years after the creation of this Will."

When the will includes trust provisions, the testator may waive the rule against perpetuities regarding personal property if the will provides that Va. Code Ann. § 55.1-124 does not apply (Va. Code Ann. § 55.1-127(A)(8)). The waiver does not apply to real property held in trust. Real property does not include any interest in a business entity, even if the entity holds real property. (Va. Code Ann. § 55.1-127(B).)

In a will with trust provisions for a young beneficiary, instead of waiving the rule against perpetuities, counsel can include a provision providing that the assets vested in the beneficiary, such as:

"Equitable title to the assets held in trust under this Will shall be vested in the beneficiary and alienable. No election shall be made to violate any applicable rule against perpetuities or the rule against restraint on alienation. The foregoing provisions of this article shall not be construed to postpone the vesting of any assets in the beneficiary for whom the assets are set apart but shall have only the effect of postponing the beneficiary's uncontrolled enjoyment of the assets until the assets are to be paid over and delivered to the beneficiary as prescribed under this article."

Executors

10. What are the rules regarding executor appointments in your state? In particular, please discuss:

- The terminology that is used to identify the person who is in charge of the estate (referred to here as the executor).
- Criteria for qualifying as an executor, including limitations on who a testator can name as executor.
- Rules regarding compensation of executors.
- Whether the drafting attorney can serve as executor.
- Priority rules for appointment of executor if the named executor fails to qualify.
- Who has authority to act when there are multiple executors.

Terminology Used to Identify Person in Charge of Estate

In Virginia, the person overseeing the estate is called the personal representative. Personal representatives include:

- An executor of a will.
- An administrator of an intestate estate.
- An administrator with the will annexed or *cum testamento annexo*.
- Any person who by court order is to take possession of the decedent's estate for administration.
- A curator of an estate.

(Va. Code Ann. § 64.2-100.)

Qualification as Personal Representative

For a person to qualify as a personal representative:

- The person must take an oath and give bond and surety, if surety is required (see State Q&A, Probate: Virginia: Question 8).
- The court must be satisfied that the person is suitable and competent to perform the duties of the personal representative's office.
- The person must not be under a disability.

(Va. Code Ann. §§ 64.2-500(B) and 64.2-505.) Virginia considers a person under a disability to be:

- A convicted felon during confinement.
- A person under age 18.
- An incapacitated person as defined under Va. Code Ann. § 64.2-2000.
- An incapacitated ex-service person under Va. Code Ann. § 64.2-2016.
- Any other person who, on motion to the court by any party to an action or suit or by any person in interest, is determined to be either:
  - incapable of taking proper care of themselves;
  - incapable of properly handling and managing their estate; or
  - otherwise unable to defend the person's property or legal rights either because of age or temporary or permanent impairment, whether physical, mental, or both. This impairment may also include substance abuse as defined under Va. Code Ann. § 37.2-700.

(Va. Code Ann. §§ 1-207 and 8.01-2(6).)

The following entities may act as personal representative of an estate:

- A professional corporation engaged in the practice of law (Va. Code Ann. § 13.1-546.1).
- Corporations chartered and conducting trust business in Virginia.
- Banks incorporated in Virginia that are authorized to engage in the trust business through a separate trust department (Va. Code Ann. §§ 6.2-819 to 6.2-821).
- Corporations authorized to engage in the trust business in Virginia under national banking laws, including any national bank or federal savings bank (Va. Code Ann. §§ 6.2-1067 to 6.2-1073).
- Trust companies authorized to establish and operate one or more trust offices or engage in trust business in Virginia (Va. Code Ann. §§ 6.2-1013 to 6.2-1046).
- Trust subsidiaries authorized to engage in trust business (Va. Code Ann. §§ 6.2-1047 to 6.2-1064).
- Multistate trust institutions authorized to engage in trust business (Va. Code Ann. §§ 6.2-1065 to 6.2-1073).
- Private trust companies authorized to engage in trust business (Va. Code Ann. §§ 6.2-1074 to 6.2-1080).
- Savings institutions authorized to engage in trust business (Va. Code Ann. §§ 6.2-1081 to 6.2-1099).

(Va. Code Ann. § 6.2-1001(A).)

Engaging in trust business means acting as a fiduciary (including a personal representative) in Virginia (Va. Code Ann. § 6.2-1000).

Compensation of Personal Representatives

Unless otherwise provided in the will, personal representatives are entitled to reasonable compensation for administering the estate based on receipts or otherwise (Va. Code Ann. § 64.2-1208(A)). The personal representative is compensated for the work the personal representative performed to administer the probate estate. This does not include compensation for other services, for example, if the personal representative also served as a trustee of a testamentary trust or the personal representative's management of any non-probate assets.

Although reasonable compensation is not defined in the statutes, the commissioner of accounts supervising the probate administration generally provides guidelines to the personal representative by publishing a fiduciary compensation schedule. The commissioner of accounts for each jurisdiction in Virginia, appointed by the judges of such circuit court, has general supervision of all fiduciaries admitted to qualify in the court or before the clerk. The commissioner of accounts, a discreet and competent attorney-at-law, makes all *ex parte* settlements of fiduciaries' accounts. The commissioner of accounts retains the power to supervise every account, matter, or thing referred to the commissioner until the final accounting is approved. (Va. Code Ann. § 64.2-1200.)

The guidelines are not a substitute for the commissioner's analysis on a case-by-case basis. The guidelines provide that:

- If the will states a specific dollar amount or percentage of compensation, the personal representative receives that set out amount or percentage.
- If all parties affected by the amount of compensation agree in writing, the agreement should be honored.
- If the will does not state a specific dollar amount, percentage, or fee schedule for compensation, the compensation should be computed as follows based on the value reported on the estate inventory:
  - 5% of the first $400,000;
  - 4% of the next $300,000;
  - 3% of the next $300,000;
  - 2% over $1,000,000;
  - over $10,000,000 by agreement with the commissioner of accounts with prior consultation; and
  - the personal representative may receive 5% of income receipts, which does not include capital gains.
- The value of real estate is included for fee purposes only if the personal representative is given the power to sell real estate and:
  - is instructed to sell real estate in the will;
  - is requested to sell real estate by all affected beneficiaries or devisees;
  - is required to sell real estate to pay taxes or other charges against the estate; or
  - the commissioner determines that a sale is clearly in the best interest of the estate and the beneficiaries or devisees as a whole.
- If the personal representative retains an accountant or attorney to perform duties that should be performed by the personal representative, those fees should be deducted from the personal representative's compensation.
- If there is more than one personal representative serving, compensation is divided among the co-personal representatives. The co-personal representatives agree how to divide the compensation among themselves.

(2004 Judicial Council of Va. Report to the Gen. Assembly and Sup. Ct. of Va., Chapter 6, Guidelines for Fiduciary Compensation.)

Institutional representatives are allowed compensation as specified in the will by reference to a standard published fee schedule unless:

- The testator was not competent when the testator executed the will.
- The specified compensation is excessive compared with compensation institutional fiduciaries generally receive in similar situations.

(Va. Code Ann. § 64.2-1208(B).)

Personal representatives are also entitled to reimbursement for their reasonable expenses in administering the estate (Va. Code Ann. § 64.2-1208(A)).

Drafting Attorney as Personal Representative

Drafting attorneys may serve as personal representative of a client's will. However, attorneys who are either drafting

wills or are named as personal representatives under wills must follow certain ethical guidelines, including that:

- The client must be fully informed before naming the attorney as personal representative.
- The appointment must be fully voluntary.
- The attorney should consider the client's sophistication and mental and physical state before suggesting that the attorney serve as personal representative.
- The attorney must disclose to the client in writing, and the client should sign, an estimate of the fees the attorney will charge for serving as personal representative.
- The attorney must advise the client to investigate potential fees of others who provide these services.
- If the attorney will be retaining the attorney's law firm to assist the attorney while serving as personal representative, the client must waive the conflict of interest in writing.
- The attorney should discuss the advisability of obtaining surety on the personal representative's bond if the attorney is appointed as personal representative.
- The attorney should only serve as personal representative if the attorney is competent to serve in that capacity.

(Va. Legal Ethics Op. No. 1515.)

Failure of Named Personal Representative to Qualify

If the will does not name a personal representative or no named representative is willing or able to serve, the court may appoint as personal representative a person who is a beneficiary of the residue or a substantial gift under the will or that person's designee. If none of these beneficiaries applies for administration within 30 days, the court may appoint a person who would be entitled to serve as personal representative if the decedent died intestate. (Va. Code Ann. § 64.2-500(A).)

The qualification process for appointing a personal representative of an intestate estate is as follows:

- For 30 days following the decedent's death, a sole distributee or the distributee's designee may be appointed as personal representative. If there is more than one distributee, any distributee or the distributee's designee may be appointed if written waivers are presented from all other distributees.
- After 30 days have passed from the decedent's death, the first distributee or the distributee's designee who applies may be appointed if, during the first 30 days since the decedent's death, no other distributee notified the court of the distributee's intent to qualify after the first 30-day period ended. If one or more distributees notified the court of intent to qualify after the first 30-day period ended, the court must give all distributees the opportunity to be heard before appointing a personal representative.
- After 45 days following the decedent's death, a nonprofit charitable organization may be appointed to serve as personal representative if it meets the requirements of Va. Code Ann. § 64.2-502(A)(3).
- After 60 days following the decedent's death, a creditor of the decedent or any other person may be appointed to serve as personal representative if the creditor or other person meets the requirements of Va. Code Ann. § 64.2-502(A)(4).

(Va. Code Ann. § 64.2-502(A).)

Multiple Personal Representatives

Unless the will provides otherwise, if there are:

- Two personal representatives, the personal representatives act jointly.
- Three or more personal representatives, the personal representatives act by a majority. However:
  - a personal representative not joining in exercising a power is not liable to the beneficiaries or to others for the consequences of the exercise; and
  - a dissenting personal representative is not liable for the consequences of an act in which the representative joins at the direction of the majority of the representatives if the dissenting representative dissented in writing to any co-personal representative, if the act is not a patent breach of trust.

(Va. Code Ann. § 64.2-1416(B).)

The testator can include language in the testator's will allowing a personal representative to delegate fiduciary powers, duties, and discretions to a co-personal representative by written notice to and written acceptance by the co-personal representative. The delegating personal representative is not liable for the exercise or non-exercise of such powers, duties, and discretions while the delegation remains in effect. The delegating personal representative may revoke the delegation at any time by written notice to the co-personal representative.

Given the need for personal representatives to act together or the potential for confusion or miscommunication, counsel generally discourages a client from naming three or more personal representatives to serve at one time.

Trustees

11. What are the rules regarding appointment of trustees for testamentary trusts in your state? In particular, please discuss:

- Criteria for qualifying as a trustee.
- Rules regarding compensation of trustee.
- Priority rules for appointment of trustee if the named trustees fail to qualify.
- Who has authority to act when there are multiple trustees.

Qualification as Trustee

Subject to the notice provisions of Va. Code Ann. § 64.2-1406, the clerk of any circuit court or any duly qualified deputy of such clerk may qualify any trustee named in a will and require and take from the trustee the necessary bonds in the same manner, as the court would (Va. Code § 64.2-1400(A)).

Subject to certain rules for non-resident fiduciaries, the clerk of the circuit court or qualified deputy:

- Subject to certain statutory notice provisions under Va. Code Ann. § 64.2-1406, may appoint and qualify as trustee an individual or a corporation authorized under Va. Code Ann. § 6.2-803.
- Subject to certain rules for non-resident fiduciaries under Va. Code Ann. § 64.2-1426, makes the appointment as trustee in the same manner and subject to the provisions of Va. Code Ann. § 64.2-500 for qualification of personal representatives (see Question 10).

(Va. Code Ann. § 64.2-1400(B).)

The clerk cannot require security from a trustee if the will expressly waives that requirement unless, based on any interested party's application or on the clerk's own knowledge, the clerk determines that security should be required (Va. Code Ann. § 64.2-1400(C)).

Qualification of the trustee may be *ex parte*, and no previous notice to the beneficiaries is required. If fewer than all trustees named in the will:

- Want to qualify, the trustee may only be qualified after reasonable notice is given to the other named trustees.
- Actually qualify, the trust powers conferred by the will are exercisable only by the qualifying trustees.

(Va. Code Ann. § 64.2-1400(D), (E)).

Compensation of Trustee

Testamentary trustees generally are compensated similar to personal representatives, either:

- Under express compensation provisions of the will or testamentary trust.
- If there are no applicable compensation provisions, as determined by the commissioner of accounts guidelines for fiduciary compensation. Compensation is taken annually, based on the fair market value of the trust assets at the beginning of the accounting period, with undistributed income and principal of the testamentary trust alike in determining the fair market value of the trust assets at that time (no compensation calculated on income received or distributed during the year). The fee schedule is:
  - one percent of the first $500,000;
  - three-quarters of one percent of the next $500,000;
  - one-half of one percent of amounts over $1,000,000; and
  - by prior consultation and agreement with the Commissioner for amounts of $10,000,000 or more.

(See Question 10: Compensation of Personal Representatives; 2004 Judicial Council of Va. Report to the Gen. Assembly and Sup. Ct. of Va., Chapter 6, Guidelines for Fiduciary Compensation.)

Failure of Named Trustee

The circuit court in which a will was admitted to probate, in the county where the trustee resides, or, if the trustee is a corporation, in the county in which the trustee's principal office in Virginia is located may appoint, on motion of any interested party and on satisfactory evidence of certain circumstances, substitute a testamentary trustee in place of the trustee named in the will. These circumstances include if the trustee:

- Dies.
- Becomes incapable of executing the trust because of physical or mental disability or confinement in prison.

- If residency is statutorily required, is no longer a resident of Virginia,
- Declines to accept the trust.
- Resigns the trust after having accepted it.
- For a corporate trustee, is adjudicated bankrupt or loses its charter.
- For any other reason ceases to be eligible to continue serving as trustee.
- For any other good cause shown.

(Va. Code Ann. § 64.2-1405(A).) Reasonable notice of a motion for the appointment of a substitute trustee must be provided to certain persons under statute (Va. Code Ann. § 64.2-1406(A)).

The circuit court may appoint a substitute corporate trustee whenever a corporate trustee removes its trust management function from Virginia to a jurisdiction outside Virginia if the court finds that the trust management after the removal results in good cause for the substitution of the trustee. A corporate trustee that maintains a place of business in Virginia where one or more trust officers are available on a regular basis for personal contact with trust customers or beneficiaries is not deemed to have removed the trust management function. (Va. Code Ann. § 64.2-1405(B).)

Until the court with jurisdiction appoints a successor trustee under Va. Code Ann. § 64.2-1405:

- The personal representative of a deceased trustee, or the remaining trustee or trustees if a co-trustee became ineligible to continue to serve as trustee, must execute the then unexecuted portions of the trust unless the will creating the trust directs otherwise.
- A corporate trustee being removed continues to execute the trust.

(Va. Code Ann. § 64.2-1407.)

Multiple Trustees

Unless the will provides otherwise, if there are:

- Two trustees, the trustees act jointly.
- Three or more trustees, the trustees act by a majority. However, a co-trustee not joining in exercising a power is not liable to the beneficiaries or to other co-trustees for the consequences of the exercise. A dissenting trustee is not liable for the consequences of an act in which the trustee joins at the direction of the majority of the trustees if the dissenting trustee dissented in writing to any co-trustee, if the act is not a patent breach of trust.

(Va. Code Ann. § 64.2-1416(B).)

A trustee is liable for only the trustee's own acts, receipts, neglects, or defaults, but not for:

- Those of any co-trustee.
- Those of any banker, broker, or other person with whom trust money or securities may be lawfully deposited
- For any loss that does not result from the trustee's own default or negligence.

(Va. Code Ann. § 64.2-1416(C).) However, a co-trustee may not be excused from liability for failing to:

- Participate in the administration of the trust.
- Attempt to prevent a breach of trust.
- Seek advice and guidance from the circuit court in an apparently recurring situation unless otherwise expressly provided by the will under which the co-trustee is acting.

(Va. Code Ann. § 64.2-1416(E).)

Guardians

12. What are the rules regarding appointment of guardians for minor children by will in your state? In particular, please discuss:

- Criteria for qualifying as a guardian.
- Whether a guardianship nomination in the will is binding or persuasive.
- At what age the guardianship terminates.

Qualification as Guardian

Natural Guardians

In Virginia, the law creates a presumption that the parents of an unmarried minor child are the joint natural guardians of the child's person if the parents are:

- Living together.
- Each competent to transact their own business.
- Not otherwise unsuitable.

(Va. Code Ann. § 64.2-1700.)

If one parent dies, the surviving parent is the natural guardian of the person of the child. If either parent abandoned the family, the other parent is the natural guardian of the person of the child. (Va. Code Ann. § 64.2-1700.)

Testamentary Guardians

A testator may appoint a guardian of:

- The person of the testator's minor child.
- The estate of the testator's minor child for property the parent gifted to the minor before the minor reaches age 18.

(Va. Code Ann. § 64.2-1701(A).) A guardian of a minor's estate has custody and control of the estate committed to the guardian's care. A guardian of the person of a minor other than a parent is not entitled to custody of the person of the minor if either of the minor's parents is living and the living parent is a fit and proper person to have custody of the minor. (Va. Code Ann. § 64.2-1701(A).)

The court has jurisdiction to determine the custody arrangement for the minor child. Therefore, court intervention may be sought if objections are raised over the guardian appointed under a testator's will. In this case, the court gives primary consideration to the child's best interests. (Va. Code Ann. § 20-124.2.)

If a person is appointed as a guardian under a will, that appointment is void if the appointed person either:

- Renounces the guardianship.
- Fails to qualify as guardian within six months after the will is probated.

(Va. Code Ann. § 64.2-1701(B); see Qualifying as Guardian.)

Appointment by Court

If the testator did not nominate a guardian for the testator's minor child in the testator's will, the court may appoint a guardian for the estate and for the person of the minor (Va. Code Ann. § 64.2-1702).

A minor who is at least 14 years old may nominate a guardian of their person or estate in either:

- The presence of the court or clerk.
- A writing acknowledged before any officer qualified to take acknowledgements.

(Va. Code Ann. § 64.2-1703(A).) In no case may the court appoint as guardian any person who is not related to the minor until:

- 30 days elapsed since the death or disqualification of any natural or testamentary guardians.
- The minor's next of kin had an opportunity to petition the court for appointment.
- The court or clerk is satisfied that the nonrelated person is competent to perform the guardian's duties.

(Va. Code Ann. § 64.2-1703(B).)

Qualifying as Guardian

Before the court appoints any person the guardian for the estate of a minor, the person, in the circuit court or before the circuit court clerk, must:

- Take an oath that the person will faithfully perform the duties of the office of guardianship to the best of the person's judgment.
- Give bond in an amount at least equal to the value of the minor's personal estate under the guardian's control.

(Va. Code Ann. § 64.2-1704(A).)

Every guardian for the estate of a minor must provide surety on the bond unless it is waived by will or under statute. However, on the motion of the court, clerk, or another interested person, the court or clerk may at any time require surety on a guardian's bond. (Va. Code Ann. § 64.2-1704(B)).

If the same guardian qualifies on the estate or two or more minors of the same family, the guardian is only required to give one guardianship bond (Va. Code Ann. § 64.2-1704(C)).

Termination of Guardianship

Termination of Guardianship of the Person

If there is a guardian of the person, the guardianship ends when the child turns 18 (Va. Code Ann. §§ 1-207, 64.2-1701, and 64.2-1702).

Termination of Guardian of the Estate

The testamentary guardian of the estate serves until the earliest of:

- The guardian's death, removal, or resignation.
- The minor turning 18.
- The termination of the period in the testator's will, if any. The testator may limit, in the terms of the will, the length of time a person may serve as guardian .

For example, a testator may direct that the minor's grandparent serves as guardian until the minor reaches age ten. At that time, the grandparent's guardianship terminates and the successor testamentary guardian serves until the minor attains age 18.

(Va. Code Ann. §§ 1-207, 64.2-1701, and 64.2-1803.)

The non-testamentary guardian of the estate appointed by the court serves until the earlier of:

- The guardian's death, removal, or resignation.
- The minor turning 18.

(Va. Code Ann. §§§ 1-207, 64.2-1702, and 64.2-1803.)

Changes to Will After Execution

13. What are the rules regarding changes to a will after it is executed? In particular, please specify:

- How a will can be modified after it is executed.
- How a will can be revoked after it is executed.
- Whether a previously revoked will can be reinstated, and if so, how.

Modification of a Will

In Virginia, wills are revocable until the testator dies or lacks testamentary capacity (see Question 3). There are generally only two options for modifying an existing will during the testator's life:

- Modification by codicil.
- Creating a new will.

A codicil amends an existing will. A testator may add, alter, substitute, or delete any part of a will by executing a codicil. A testator may add, alter, substitute, or delete any part of a codicil by executing a later codicil. Codicils are construed with the will to determine the testator's intent. (*Senger v. Senger's Ex'rs*, 27 S.E.2d 195, 197 (Va. 1943).)

The statutory definition of a will includes codicils, so codicils must be executed with the same formalities as wills (Va. Code Ann. §§ 64.2-100 and 64.2-403; see Question 6). If a testator executes one or more codicils, Virginia probates the codicils with the will and all of those testamentary documents become public record.

If the testator wants to make a minor change to the will, the preparation and execution of a codicil may be sufficient. If the testator wants to make significant changes to the will, there are numerous existing codicils, or the testator does not want any of the current will to be probated at the testator's death and become public record, counsel should draft a new will to incorporate all the testator's changes and revoke the previous will (and related codicils) once executed.

If a testator reduces a beneficiary's share by codicil, the beneficiary is likely to have access, as part of the routine probate process, to the original will and the codicil that reduces the beneficiary's share. If the testator instead executes an entirely new will that either reduces a beneficiary's share or omits the beneficiary entirely, that beneficiary:

- Does not have access to the prior will as part of the routine probate process.
- May not necessarily be aware of the reduction or elimination of the beneficiary's interest.

In practice, it is often preferable to prepare a new will, rather than a codicil, particularly if there is any reason to believe that any of the changes that the testator is making may cause later disputes or challenges.

Revocation of a Will or a Codicil

The testator may revoke a will or codicil, making it void and of no effect, by:

- Intentionally cutting, tearing, burning, obliterating, cancelling, or destroying, or having another person do so at the testator's direction and in the testator's presence:
  - A will or codicil.
  - A signature on the will or codicil.
  - A provision of the will or codicil.

  (Va. Code Ann. § 64.2-410(A).)
- Executing:
  - A properly executed later will or codicil expressly revoking the earlier will or codicil; or
  - a writing in the way a will must be executed under statute, expressly revoking the earlier will or codicil.

  (Va. Code Ann. § 64.2-410(B).)

A will or codicil is revoked by a validly executed later will or codicil only to the extent of an express revocation or inconsistency if the will or codicil:

- Revokes some but not all the former will or codicil.

- Contains provisions that conflict with the former will or codicil, but no revocation of the former will or codicil.

(Va. Code Ann. § 64.2-410(C).)

Generally, divorce or annulment, but not separation, revokes provisions to the former spouse unless the will provides otherwise (see Question 14: Effect of Divorce).

Reinstatement of a Will

A testator can republish a will by either:

- Re-executing the will or codicil with the required formalities, to the extent the testator's intent to revive the will or codicil is shown (Va. Code Ann. § 64.2-411).
- Executing a codicil which refers to the previously revoked will demonstrating the testator's consideration of the previously revoked will as the testator's will (*Gooch v. Gooch*, 113 S.E. 873, 877-78 (Va. 1922)).

Provisions revoked solely because of divorce or annulment are reinstated on remarriage to the former spouse in certain circumstances (see Question 14: Effect of Divorce).

Special Circumstances Regarding Gifts or Recipients

14. Please describe what happens if:

- A beneficiary does not survive the testator.
- A gift is not owned by the testator at the testator's death.
- There are not enough assets passing through the will to satisfy all the gifts.
- The gifted property is encumbered.
- The testator and a beneficiary or fiduciary to which the testator was married when the will was executed are no longer married when the testator dies.
- The testator gets married after the will is executed.
- A child is born after the will is executed.
- A beneficiary causes the testator's death.
- The testator and a beneficiary die at the same time.

Beneficiary Does Not Survive (Lapse)

In Virginia, if the will provides for what happens if a beneficiary predeceases the testator, the will provision controls. If the will does not provide for what happens if a beneficiary predeceases the testator and:

- The beneficiary is a grandparent or a descendant of a grandparent of the testator, the gift does not lapse. Rather, the gift passes to the beneficiary's surviving descendants.
- The beneficiary is not a grandparent or descendant of a grandparent of the testator, the gift lapses, unless the will provides an alternative disposition (in which case it passes according to the alternative disposition).

(Va. Code Ann. § 64.2-418.)

Gift Not Owned by Testator at Death (Ademption)

If a testator makes a disposition of a specific item of property in the testator's will but disposes of that item before death, the bequest is generally extinguished (adeems). However, there are exceptions to this general rule. For example, unless the testator provides otherwise in the testator's will, if a beneficiary is entitled to:

- A gift of specific securities, the beneficiary is also entitled to:
  - dividends generated from the securities; and
  - any additional securities the decedent acquired by merger, consolidation, reorganization, or other similar action started by the entity.

  (Va. Code Ann. § 64.2-415(B)(1).)
- Specific property, the beneficiary is also entitled to:
  - the amount of any condemnation award for the taking of the property that remains unpaid at death; and
  - any fire and casualty insurance proceeds on the property that remain unpaid at the decedent's death.

  (Va. Code Ann. § 64.2-415(B)(2).)
- Specific property, and all or part of that specific property was sold during the decedent's life by the decedent's conservator, guardian, committee, or agent under a durable power of attorney while the decedent was under a disability, the beneficiary is instead entitled to what remains of the property and an amount equal to the net sales price or insurance proceeds (Va. Code Ann. §§ 64.2-415(B)(3), (C)). The amount is determined by the net sales price or insurance proceeds and sentimental value is not considered.

Not Enough Assets (Abatement)

If an estate has insufficient assets to pay its obligations and all dispositions under the will, the gifts made to

beneficiaries abate, in other words, are reduced or eliminated, in the following order:

- General legacies on a *pro rata* basis.
- Specific legacies.

(*Chavis v. Myrick*, 58 S.E.2d 881, 883 (Va. 1950).)

Gifted Property Encumbered

Unless contrary intent is clearly set out in the will, a beneficiary receiving a specific gift of real property or personal property takes the property subject to any encumbrance existing at the testator's death, without the right of exoneration. A general directive in the will to pay all debts from the residuary estate is not considered a contrary intent that the specific gift of real property or personal property pass free and clear of the encumbrance. (Va. Code Ann. § 64.2-531(A).)

Effect of Divorce

If a married testator makes a will and afterwards the marriage terminates by divorce or annulment, the termination of the marriage revokes:

- Any disposition of property to the former spouse.
- Unless the will provides otherwise:
  - any power of appointment given to the former spouse; and
  - any nomination of the former spouse as executor, trustee, conservator, or guardian.

(Va. Code Ann. § 64.2-412(B).)

The former spouse is treated as having predeceased the testator regarding these will provisions (Va. Code Ann. § 64.2-412(C)).

If the will provisions are revoked solely because of divorce or annulment and there is no later or inconsistent will or codicil, the revoked provisions are revived on the testator's remarriage to the former spouse (Va. Code Ann. § 64.2-412(E)).

Effect of Marriage

If the testator was not married when the testator signed the will, the will does not provide for a future spouse, and the testator is married at death, the surviving spouse (known as a pretermitted or omitted spouse) is entitled to the same share of the testator's estate as if the testator died without a will (an intestate share) (Va. Code Ann. § 64.2-422; see Rules of Intestacy).

The surviving spouse does not receive this share if the omission of the surviving spouse as a beneficiary appears intentional from either:

- The testator's will.
- A validly executed premarital agreement or marital agreement between the testator and the surviving spouse.

(Va. Code Ann. § 64.2-422.)

After-Born Child

No Child Living When Will Was Made

If a testator has no children when the testator signed the will and the will does not provide for or mention future children, a child born or adopted after the testator executed the testator's will, known as a pretermitted or omitted child, or any descendant of that child is entitled to the same share of the testator's estate as if the testator died intestate (Va. Code Ann. § 64.2-419(A); see Rules of Intestacy).

If the testator leaves a surviving spouse and descendants, all of whom are descendants of both the decedent and the surviving spouse, all the testator's property goes to the surviving spouse under the intestacy statutes, even if a child is pretermitted (Va. Code Ann. § 64.2-200(A)(1); see Rules of Intestacy).

Another Child is Living When Will Was Made

If a testator executes a will that makes provisions for the testator's living children, but the will does not provide for or expressly exclude the future children, a child born or adopted by the testator after the will is executed is entitled to the lesser of:

- The omitted child's share of the testator's estate as if the testator had died without a will.
- An amount equal to any bequests and devises made to a child named in the will. If there are bequests and devises to more than one child under the will, then the omitted child is entitled to the largest aggregate bequest or devise to any child.

(Va. Code Ann. § 64.2-420(A).)

Beneficiary Causes Testator's Death

A person who participated in the willful and unlawful killing of another, such as a slayer, cannot profit from that wrong (Va. Code Ann. § 64.2-2511(A)).

A slayer is any person who either:

- Is convicted of the murder or voluntary manslaughter of the decedent.
- In the absence of this conviction, is determined, whether before or after death, by a court of appropriate jurisdiction by a preponderance of the evidence to have committed murder or voluntary manslaughter resulting in the decedent's death.

(Va. Code Ann. § 64.2-2500.)

A slayer cannot acquire any property or receive any benefits from the decedent's death (Va. Code Ann. § 64.2-2501). The slayer is deemed to have predeceased the decedent regarding property:

- Passing to the slayer by the decedent's will or intestacy (Va. Code Ann. § 64.2-2502).
- Acquired by the slayer by statute as the decedent's surviving spouse (Va. Code Ann. § 64.2-2502(A)).
- Owned by the decedent and the slayer as tenants by the entirety or any other form of ownership with right of survivorship (Va. Code Ann. § 64.2-2503(A)).
- In which the slayer holds a reversion or vested remainder (Va. Code Ann. § 64.2-2504).
- Vesting in the slayer or increasing the slayer's share on the decedent's death (Va. Code Ann. § 64.2-2506(A)).
- Subject to a power of appointment exercised in the decedent's will in favor of the slayer (Va. Code Ann. § 64.2-2507).
- As insurance proceeds payable to the slayer as the beneficiary or assignee of any policy or certificate of insurance or bond or other contractual agreement on the decedent's life or as the survivor of a joint life policy. These proceeds are paid to the designated alternative beneficiary or, if none, to the decedent's estate. (Va. Code Ann. § 64.2-2508).

Simultaneous Death

If the will does not contain a survivorship provision and an individual does not survive the testator or a stated event by 120 hours, as established by clear and convincing evidence, that individual is deemed to have predeceased the testator or the event (Va. Code Ann. §§ 64.2-2202 and 64.2-2205).

Lost Wills

15. Please describe what happens if the original will is lost.

In Virginia, a copy of a will can only be probated by filing a civil action with the circuit court. To establish a lost or destroyed will, the proponent must prove, by clear and convincing evidence, the will's:

- Previous existence in legal form.
- Contents.
- Loss or destruction.

(*Mumaw v. Mumaw*, 203 S.E.2d 136, 138 (Va. 1974).)

There is a presumption that the testator destroyed the will with an intention to revoke it if the will both:

- Was known to be in the testator's possession.
- Cannot be found at the testator's death.

(*Edmonds v. Edmonds*, 772 S.E.2d 898, 902-03 (Va. 2015).)

To prove the existence of the will, the proponent must show by clear and convincing evidence that the will was lost and not revoked (*Edmonds*, 772 S.E.2d at 902).

If it is shown that the will was not in the testator's custody and the testator did not have access to the will, there is a rebuttable presumption that the will was lost, unless it can be shown by clear and convincing evidence that the testator revoked the will (*Johnson v. Cauley*, 546 S.E.2d 681, 683 (Va. 2001)).

Rules of Intestacy

16. Please describe how property passes if there is no will or if the terms of the will distribute assets according to the laws of intestacy in your state (who are the testator's heirs).

If there is no will or if the terms of a will distribute assets according to the laws of intestate succession, the Virginia intestacy statutes govern the distribution of estate (Va. Code Ann. § 64.2-200).

Under the Virginia intestacy statutes, if a decedent dies leaving:

- A surviving spouse and either no descendants or descendants, all of whom are descendants of both the decedent and the surviving spouse, all the intestate property goes to the surviving spouse.
- A surviving spouse and descendants, one or more of whom are descendants of the decedent only, the intestate property goes:

  - one-third to the surviving spouse; and
  - two-thirds to the testator's descendants.
- Surviving descendants and no spouse, all the intestate property goes to the surviving descendants.
- No spouse or any descendants, the next in line under the intestacy statutes are, in order of priority:
  - the decedent's parents, or to the surviving parent; and
  - the decedent's siblings, and their descendants.
- If there is no living parent or living descendant of a parent, then one-half of the estate passes to the kindred of one of the decedent's parents and one-half of the estate passes to the kindred of the other of the decedent's parents as follows:
  - to the decedent's grandparents or to the surviving grandparent;
  - if none, to the decedent's uncles and aunts and their descendants;
  - if none, to the decedent's great-grandparents;
  - if none, to the siblings of the decedent's great-grandparents and their descendants; and
  - if none, to the nearest lineal ancestors and the descendants of those ancestors.
- If there are no surviving kindred of one of the decedent's parents, the entire estate passes to the kindred of the other of the decedent's parents.
- If there are no surviving kindred of either parent, the entire estate passes to the kindred of the decedent's most recent spouse, if any, if the decedent and spouse were married at that spouse's death and as if that spouse died intestate and entitled to the decedent's estate.
- If the list has been exhausted and there is no heir, the entire estate is subject to escheat to Virginia.

(Va. Code Ann. § 64.2-200.)