

## CHAPTER 5

### SPECIAL PROBLEMS IN ADMINISTRATION

This chapter highlights several issues in estate administration that have not been addressed completely in other chapters of this book. In almost every administration of an estate, some unusual issue arises that the personal representative must address.

#### 5.1 SUIT FOR AID AND GUIDANCE FROM COURT

**5.101 In General.** The personal representative, as a fiduciary, must rely on his or her own judgment and ability to handle problems that arise in the administration of the estate. Nevertheless, in some situations, such as an ambiguous provision in the will, uncertainty in the applicable law, or the distribution of a significant asset that is the object of competing claims of beneficiaries, the personal representative may occasionally be confronted with an important issue for which the proper resolution is unclear. In these instances, the personal representative should seek the aid, guidance, and protection of the circuit court.

**5.102 Reasons to Seek the Court's Guidance.** Among the many issues that might prompt the personal representative to seek the aid and guidance of the court are the following:

1. Clarifying an ambiguous provision in a will;
2. Determining whether a condition or contingency set forth in the will has occurred;
3. Determining whether the estate has an interest in a particular asset;
4. Resolving a dispute among beneficiaries over the effect of a provision of the will or the disposition of certain estate property;
5. Determining the testator's intent; and
6. Resolving an uncertainty in the applicable law.

Although a personal representative confronted with one of these problems is encouraged to obtain the court's guidance, he or she must not subject the estate to unnecessary expenses by seeking aid for questions that can be resolved without court involvement.<sup>1</sup>

In addition to securing the court's binding interpretation of the disputed issue, a personal representative who has obtained the court's guidance is protected against challenges by an adverse party. Conversely, failing to obtain the aid of the court in cases of uncertainty may expose the personal representative to liability to a party adversely affected by the personal representative's decision if that decision is ultimately overturned by the court.

In these uncertain cases, an alternative to a suit for aid and guidance from the court is for the personal representative to obtain written consent to the proposed action from all interested parties and beneficiaries. For a dispute between two beneficiaries of an estate, this might be a more sensible and efficient resolution than a suit for aid and guidance. In many cases, however, the agreement of all the parties in interest may not be readily attainable.

**5.103 Filing.** A suit for aid and guidance from the court is initiated by the personal representative filing a complaint in the circuit court in which he or she qualified.<sup>2</sup>

**5.104 Parties.** It is often difficult for the personal representative to be sure that all interested persons are made parties to the suit. Some persons who have an actual or potential interest in the matter may be unknown to the personal representative. In such circumstances, "Parties Unknown" should be made a party to the suit and proceeded against by order of publication. Guardians ad litem may also need to be appointed for parties who are minors or otherwise incapacitated.

The Supreme Court of Virginia has adopted a general rule that the interest of a contingent beneficiary can be represented by another contingent beneficiary under the doctrine of "virtual representation" where their interests are sufficiently similar to assure adequate representation. Furthermore, there

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<sup>1</sup> For additional information on suits seeking aid or guidance from the court, see Brockenbrough Lamb, *Virginia Probate Practice* § 133 (1957).

<sup>2</sup> See James P. Cox, III, *Harrison on Wills and Administration* § 28.03 (4th ed. 2007). For a copy of a complaint for aid and direction, see Appendix 5-1.

are instances in which the interests of contingent beneficiaries are too remote to require their joinder as necessary parties.<sup>3</sup>

**5.105 Role of Personal Representative.** Once the suit is filed and the parties convene, the circuit court holds a hearing on the issue and takes testimony. The role of the personal representative in the case may vary. The personal representative can simply stay on the sidelines, have the parties in interest make the arguments to the court, and wait for the court to rule on how the personal representative should carry out his or her duties. Of course, if the personal representative has information pertinent to the issue, he or she should provide that information to the court. Because the personal representative's duty is to carry out the wishes of the testator, he or she should not choose sides between or among beneficiaries but simply bring the issue before the court and provide information that may help the court reach its decision.<sup>4</sup>

**5.106 Estate Liable for Costs of Suit.** The doctrine of judicial instructions provides that if the involvement of the court is required to interpret an ambiguous will or trust, all expenses of that litigation, including attorney fees of the parties to the action, are to be paid by the estate. The Virginia Supreme Court has stated that Virginia has not explicitly recognized the doctrine of judicial instructions, but "even if the doctrine exists in Virginia law, an ambiguity in the provisions of the instrument necessitating litigation is a condition precedent for its application."<sup>5</sup>

## 5.2 OTHER COURT ACTIONS<sup>6</sup>

**5.201 Distribution of Funds for Missing Beneficiary.** Sometimes a personal representative cannot make a complete distribution of property because a beneficiary cannot be located or fails to respond to communication from the personal representative. In this situation, the personal representative cannot close the administration and be relieved of his or her fiduciary duties without providing for a distribution of the property to or for the benefit of the missing beneficiary.

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<sup>3</sup> *NationsBank of Va., N.A. v. Estate of Grandy*, 248 Va. 557, 450 S.E.2d 140 (1994). The entire process of a suit for aid and direction is fully set forth in Lamb, *supra* note 1, § 133 and Cox, *supra* note 2, §§ 28.03-28.06.

<sup>4</sup> In *Caine v. Freier*, 264 Va. 251, 564 S.E.2d 122 (2002), the Virginia Supreme Court ruled that a personal representative had no right to pursue, at the estate's expense, an appeal of a case for which it requested the aid and guidance of the circuit court.

<sup>5</sup> *Feeney v. Feeney*, 295 Va. 312, 321, 811 S.E.2d 830, 835 (2018).

<sup>6</sup> A thorough discussion of other administration suits is set forth in Lamb, *supra* note 1, §§ 129-139 and Cox, *supra* note 2, ch. 28.

Although there is no specific statutory authority for relief in these situations, “common sense demands that a fiduciary who has done all that is humanly possible to meet the duties imposed upon him should not be deprived indefinitely of the privilege of making a final settlement of his accounts.”<sup>7</sup>

The personal representative can petition the court for an order permitting the settlement of his or her final account. The court, in its order, ordinarily authorizes the personal representative to invest the funds set aside for the beneficiary in a certificate of deposit in the beneficiary’s name. The personal representative then sends notice of the certificate of deposit to the beneficiary at the beneficiary’s best known or last known address. Once the funds are placed in the certificate of deposit, the personal representative can finalize the accounts and evidence the fulfillment of his or her duties to the missing beneficiary by providing the commissioner of accounts with a copy of the certificate of deposit. If the missing beneficiary does not make a claim for the funds to which he or she is entitled, eventually a presumption of death may be made under section 64.2-2300 *et seq.* of the Virginia Code, which will permit distribution to other beneficiaries or residuary legatees. At that time, recipients of the property or funds must post a refunding bond, without surety, upon the condition that they deliver the property or funds, without interest, to the intended beneficiary upon demand if it is subsequently determined that he or she was alive when the bond was given.<sup>8</sup>

#### **5.202 Distribution of Funds Pursuant to Section 64.2-2301.**

Occasionally, even if a beneficiary cannot be shown by the exercise of reasonable diligence to be alive at the applicable time, the legal presumption of death cannot be satisfied under section 64.2-2300 *et seq.* Section 64.2-2301 provides a procedure for the personal representative to settle the estate in those circumstances. The personal representative can seek a decree from the court permitting the distribution of the estate to those beneficiaries who would be entitled to the funds if it were shown that the missing person was in fact dead. The persons to whom the funds would be distributed must give proper refunding bonds, with surety in such form as the court directs, until the missing person is determined to be dead in accordance with section 64.2-2300. The bond must be conditioned to account for the estate or fund to any person establishing title to it. Notice of the motion made pursuant to section 64.2-2301 must be given to all persons upon whom service may be had.

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<sup>7</sup> Lamb, *supra* note 1, § 128. The settling or winding up of an estate is covered in detail in Chapter 8 of this book.

<sup>8</sup> Va. Code § 64.2-2306.

**5.203 Standing of Personal Representative.** A duly qualified personal representative is the proper party to initiate a suit on behalf of a decedent's estate.<sup>9</sup> Before filing any suit (especially a claim on which a statute of limitations may run), the attorney representing the personal representative must confirm that the personal representative has been validly appointed by the appropriate court. The Virginia Supreme Court has ruled that if a decedent already has a personal representative serving, an order that appoints another administrator is void. To replace an executor or administrator or add another personal representative, the prior appointment must be revoked before an order is entered appointing a new personal representative or reappointing the existing administrator with another as joint administrator.<sup>10</sup>

**5.204 Malpractice Claims Against Attorneys.** Before 2016, a malpractice action against an attorney who drafted estate planning documents was typically barred because the breach of contract occurred during the testator's lifetime, even though the damages, which are an essential element of a legal malpractice claim, did not arise until after the testator's death.<sup>11</sup> In *Thorsen v. Richmond Society for the Prevention of Cruelty to Animals*,<sup>12</sup> a closely divided court found that a disappointed intended beneficiary of a will could maintain, as a third-party beneficiary, a claim for breach of contract against the drafting attorney. The court also found that the intended beneficiary was not barred by the three-year statute of limitations for an oral contract claim because the statute of limitations cannot begin to run as to the testamentary beneficiary until a cause of action accrues, which does not occur until after the death of the testator.

In response to the *Thorsen* decision, the General Assembly enacted section 64.2-520.1 to clarify the law governing an action for damages from legal malpractice in estate planning. The statute provides that, regardless of when the applicable estate planning documents are executed, a cause of action for damages to an individual or an individual's estate accrues upon completion of the representation during which the malpractice occurred and not at the individual's death. The cause of action applies to preparation of documents and the provision of legal advice and includes future tax liability arising from the

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<sup>9</sup> Va. Code § 64.2-519; see Cox, *supra* note 2, § 25.27; see also *Platt v. Griffith*, 299 Va. 690, 858 S.E.2d 413 (2021).

<sup>10</sup> *Bolling v. D'Amato*, 259 Va. 299, 526 S.E.2d 257 (2000).

<sup>11</sup> See *Rutter v. Jones, Blechman, Woltz & Kelly, P.C.*, 264 Va. 310, 568 S.E.2d 693 (2002).

<sup>12</sup> 292 Va. 257, 786 S.E.2d 453 (2016).

malpractice. An action for damages based on a written contract for legal services between the attorney and the client must be brought within five years after the cause of action accrues; an action for damages in which an unwritten contract for legal services existed must be brought within three years after accrual. To limit the reach of the *Thorsen* third-party beneficiary claims, the statute provides that, unless a written agreement between the client and attorney expressly grants standing to a person who is not a party to the representation by specific reference to section 64.2-520.1, the action for legal malpractice may be maintained only by the client or by that individual's personal representative.

**5.205 Reformation of Will.** Section 64.2-404.1 provides a procedure for the reformation of will to correct mistakes or achieve the decedent's tax objectives. A court may reform the terms of a decedent's will, even if unambiguous, to conform the terms to the decedent's intention if it is proved by clear and convincing evidence that both the decedent's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement. The evidence required to justify a reformation of the will must be clear and convincing evidence. The court may modify the terms of a decedent's will to achieve the decedent's tax objectives in a manner that is not contrary to the decedent's probable intention. A proceeding for reformation of a will must be brought in a circuit court within one year from the decedent's date of death and in which all interested persons are made parties. The remedy of reformation applies to all wills and codicils regardless of the date of their execution.

### 5.3 REMOVAL OF FIDUCIARY

**5.301 In General.** While this chapter has discussed suits instituted by the personal representative to obtain direction from the court on matters relating to the estate, there are instances in which the personal representative and his or her actions themselves become the focus of a legal action.

**5.302 Removal of Personal Representative.** The court may remove a personal representative for failure to fully perform his or her duties or obey the orders of the court. Upon a petition filed by a person who has an interest in the estate, the court may remove the personal representative for good cause. Good cause can be established by a showing of fraud, breach of trust, or gross neglect by the personal representative.<sup>13</sup> A trial court is afforded

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<sup>13</sup> For a more detailed listing of the causes for removal of a personal representative and the liability of the personal representative for *devastavit*, see Cox, *supra* note 2, § 25.32.