

COLLECTING AND MANAGING ASSETS OF THE ESTATE

A personal representative of a decedent's estate is required to perform a number of duties during the estate administration process. The specific duties that a personal representative must perform in any specific case depend on the circumstances of that case.

A personal representative's obligations may include duties relating to the collection and management of assets of the estate, the review of claims against the estate, managing the sale of assets of the estate, the payment of debts of the decedent and expenses of administration of the estate, the filing of the decedent's final income tax return and income tax returns of the estate and the distribution of assets to beneficiaries of the estate. Personal representatives in Virginia are also generally required to file an inventory that lists assets of the estate and annual accountings that show the estate's receipts, expenses and distributions to beneficiaries.

The duty to collect and manage assets of the estate is usually one of the most important duties of the personal representative. This report discusses the rules of Virginia law governing the duty of a personal representative to collect and manage estate assets.

A. The Obligation to Collect Assets

1. In General

A personal representative of an estate is under an obligation to collect the assets of the estate. *Isbell v. Flippen*, 185 Va. 977, 41 S.E. 2d 31 (1947); *Denny v. Searles*, 150 Va. 701, 143 S.E. 484 (1928). The personal representative's obligation includes the obligation to reduce choses in action to judgment. *Isbell v. Flippen*, supra.

2. Decedent's Personal Estate

The personal representative's duty to collect assets should extend generally to every asset of the decedent subject to the personal representative's control. See Va. Code Section 64.2-514 (obligation of personal representative to administer the whole personal estate of the decedent).

3. Compromise of Claims

A personal representative may compromise a liability due to the estate if the compromise is approved by a court and all parties in interest are properly before the court. Va. Code Section 8.01-425. In the absence of court approval, a personal representative is entitled to make a settlement or compromise with respect to a claim of the estate if he acts in good faith, with ordinary prudence and with due regard to the interest of the estate. If the personal representative's actions meet those conditions, the settlement or compromise will not subject the personal representative to liability to the beneficiaries. See *Kelly v. R.S. Jones & Assoc.*, 242 Va. 79, 406 S.E.2d 34 (1991).

4. Failure to Collect Assets

If a personal representative's failure to collect an asset causes a loss to the estate and the failure to collect is due to his negligence or improper conduct, the personal representative is liable for the amount of the loss. See Va. Code Section 64.2-1415.

B. Powers as to Collection of Assets

1. In General

The personal representative is vested with title to, and is the legal owner of, the personal estate as to which the decedent was seized and possessed. See *Lake v. Pattie*, 116 Va. 130, 81 S.E. 78 (1914). As the legal owner of the decedent's personal estate, the personal representative is entitled to take possession and assert title. See Smith, Harrison on Wills and Administration, Section 479 (3d ed. 1985).

2. Power to File Suit

The personal representative has the power to file suit for enforcement of any judgment entered in favor of the decedent or for enforcement of any contractual rights of the decedent. Va. Code Section 64.2-519. In addition, the personal representative may maintain an action for damages for taking of goods of the decedent or for destruction or damage to the decedent's estate. Va. Code Section 64.2-520.

C. Collection of Decedent's Interest in Survivorship Joint Bank Accounts

1. In General

The personal representative of a decedent's estate generally has no authority to claim an interest in a joint bank account that is a survivorship account.

2. Authority to Assert Claim When Estate is Insolvent

A personal representative is authorized, in certain circumstances, to assert a claim against a joint survivorship account and administer amounts recovered as part of the estate. See Va. Code Section 6.1-125.8. A personal representative has the authority to assert a claim to the amount that the decedent owned beneficially in the joint account, immediately before his death, if the 3 conditions described below are met.

- a. The other assets of the estate must be insufficient to pay debts, taxes and expenses of administration of the estate, including statutory allowances to the surviving spouse, minor children and dependent children.

b. The personal representative must receive a written demand by a surviving spouse, a creditor or one acting for a minor or dependent child.

c. The proceeding to assert the claim must be commenced within 2 years following the death of the decedent.

3. Obligation to Assert Claim When Estate is Insolvent

Although a personal representative has the authority to assert a claim to a survivorship joint account in the circumstances described above, the personal representative does not have the obligation to assert such a claim unless someone in interest requests him to do so within 6 months from the date of the initial qualification on the estate. Va. Code Section 64.2-515.

D. Identification of Assets

1. Necessity of Identifying Assets

As a practical matter, identifying and locating assets that constitute the decedent's estate is generally a necessary condition to collecting the assets.

2. Practical Actions

Actions that tend to assist in identifying assets including (i) interviewing the survivors of the decedent, (ii) reviewing the contents of the decedent's residence, (iii) mailing a change of address notice to the Post Office to direct forwarding of the decedent's mail to the personal representative, (iv) reviewing documents referencing the decedent's income or assets, including income tax returns and (v) reviewing the decedent's bank records.

E. Maintaining Assets

1. Duty

The personal representative has the duty to preserve against loss assets of the estate that are under his control. See Smith, Harrison on Wills and Administration, Section 482 (3d ed. 1985). In making decisions about what actions are appropriate in preserving assets, the personal representative should take into account all of the relevant considerations, including the nature and the type of assets in the estate. The rules governing management of tangible personal property differ from the rules governing management of real property.

2. Tangible Personal Property

a. In General

The personal representative should take appropriate action to prevent loss in regard to tangible personal property. Depending on the circumstances, such actions may include (i) storing valuable items in a safety deposit box, to the extent feasible and (ii) reviewing insurance policies to confirm that adequate insurance coverage is in place.

b. Sales

In some cases, a sale of some or all of the tangible personal property may provide economic benefits by reducing or eliminating costs of insurance premiums or maintenance expenses.

c. Authority to Sell

In general, a personal representative has the authority to sell tangible personal property if the will grants such authority. Absent authority to sell under the will, a personal representative has the statutory authority to sell tangible personal property if the sale is necessary to pay funeral expenses, charges of administration, debts and legacies. Va. Code Section 64.2-526. The statutory power is subject to the privilege of specific legacies and to statutory provisions governing exempt property. Va. Code Section 64.2-526.

d. Obligation to Sell

The personal representative is obligated to sell personal property that is likely to be impaired in value by his retention of the property. Va. Code Section 64.2-526.

3. Real Property

a. Power of Sale

In general, the personal representative has the power to sell real estate owned by the decedent only if the will grants such power expressly or by incorporating statutory powers set forth in Va. Code Section 64.2-105.

b. Title

Unless the will specifically devises real estate to the personal representative, a decedent's real estate passes to the devisee under the will, who acquires title to the real estate effective as of the date of the decedent's death. *Bruce v. Farrar*, 156 Va. 542, 158 S.E. 856 (1931). When the personal representative has a power of sale, title to the real estate passes to the devisee subject to divestment by the personal representative in the exercise of his power of sale. See *Yamada v. McLeod*, 243 Va. 426, 416 S.E.2d 222 (1992). As the holder of title, the devisee should be entitled to exclusive use and possession of the real property unless and until exercise of the power of sale.

c. Real Estate Subject to a Mortgage

A specific devise of real estate generally passes subject to any mortgage or other lien existing at the time of the testator's death without the right of exoneration unless the will clearly sets forth a contrary intent. Va. Code § 64.2-531.

d. Maintenance

The personal representative should take such action to prevent loss to real estate that is appropriate under the circumstances. What action is appropriate may vary depending on several factors including (i) whether the personal representative has a power of sale, (ii) whether the real estate is encumbered and (iii) the actions taken by the devisees under the will to protect the real estate.

F. Management of Investments

1. Prudent Investor Rule

A personal representative is generally required to invest and manage the estate's investment assets in accordance with the prudent investor rule. That prudent investor rule may be expanded, restricted, eliminated or otherwise changed by provisions of the will. Va. Code Section 64.2-781.

a. Standard

To comply with the prudent investor rule, the personal representative must invest and manage assets as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the will and the assets of the estate. Va. Code Section 64.2-782(A).

b. Level of Care, Skill and Caution

In making decisions and taking actions required under the standard, the personal representative must exercise reasonable care, skill and caution. Va. Code Section 64.2-782(A).

c. Special Skills and Expertise

A personal representative with special skills and expertise is required to use those skills and expertise. Va. Code Section 64.2-782(F).

d. Time for Compliance

Within a reasonable time after accepting office or receiving assets, the personal representative is required to make and implement decisions in regard to retention and disposition of assets and bring the portfolio into compliance with the prudent investor act. Va. Code Section 64.2-784.

e. Duty to Consider Specific Circumstances

The prudent investor act imposes on a personal representative the duty to consider a number of circumstances in investing and managing assets, where relevant, including the following: (i) general economic conditions, (ii) the effect of inflation or deflation, (iii) expected tax consequences, (iv) the role played by each investment within the overall portfolio, (v) the expected total return from income and capital appreciation, (vi) other resources of the beneficiaries, (vii) needs for liquidity, regularity of income and preservation or appreciation of capital and (viii) an asset's special relationship to the purposes of the will or beneficiaries. Va. Code Section 64.2-782(C).

f. Duty to Diversify

The personal representative is required to diversify the investments of the estate unless he reasonably decides that, due to special circumstances, the purposes of the estate are better served without diversifying. Va. Code Section 64.2-783.

g. Evaluation of Performance

In determining whether a personal representative complies with the prudent investor rule, any investment decision of the personal representative is evaluated in the context of the portfolio as a whole and as part of an overall

investment strategy having risk and return objectives reasonably suited to the estate. Va. Code Section 64.2-782(B). In addition, compliance with the prudent investor rule must be determined based on facts and circumstances existing at the time of the personal representative's decisions or action, not by hindsight. Va. Code Section 64.2-787.

h. Delegation

A personal representative may delegate investment and management functions that a prudent personal representative having comparable skills could properly delegate under the circumstances. Va. Code Section 64.2-788(A). In delegating functions, the personal representative must exercise reasonable care, skill and caution in (i) selecting an agent, (ii) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust, and (iii) periodically reviewing the agent's actions to monitor the agent's performance and compliance with the terms of the delegation. Va. Code Section 64.2-788(A). A personal representative who meets the above statutory requirements applicable to delegation shall not be liable to beneficiaries or to the estate for decisions or actions of the agent to whom the function was delegated.

2. Specified Lawful Investments

a. Conclusion Presumption

A personal representative is not required to comply with the duties imposed under the prudent investor rule to the extent that he invest funds in specified categories of securities prescribed by statute. A personal representative is conclusively presumed to have been prudent in investing funds in such securities. Va. Code Section 64.2-1502.

b. Investment Categories

The categories of securities that fall within the statutory protection include (i) specified obligations of Virginia, its agencies and political subdivisions, (ii) specified obligations of the United States and (iii) accounts, time deposits and certificates of deposits in banks and other financial institutions authorized to do business in Virginia, to the extent that such accounts, time deposits and certificates of deposit are fully insured by the FDIC or the National Credit Union Share Insurance Fund. Va. Code Section 64.2-1502.

3. Waiver of Prudent Investor Rule

A personal representative is not subject to the prudent investor rule to the extent that the provisions of the will waive the application of the rule. A will shall be considered to waive the prudent investor rule only if the applicable provisions expressly manifest an intent that the prudent investor rule is to be waived. To be effective, such a waiver must (i) specifically refer to the prudent investor rule, (ii) refer to a power to make speculative investments, (iii) expressly authorize acquisition or retention of a specific asset or type of assets or (iv) employ language synonymous to one of the foregoing. Va. Code Section 64.2-781.