

**A PRIMER ON THE LAW OF WILLS, TRUSTS,
AND FIDUCIARIES IN VIRGINIA**

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PART 1: What Is a Trust, and What Body of Law Applies to the Administration of a Trust in Virginia?

I. What Is a Trust?

A. Key Concepts.

1. A *trust* is a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another.¹
2. A trust divides the title to property, vesting the legal title in the trustee and the equitable title or beneficial interest in the beneficiary
3. The *settlor* is a person, including a testator, who creates, or contributes property to, a trust.⁴
4. The *terms* of a trust are the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence.⁵
5. A *trust instrument* is an instrument, executed by the settler, that contains terms of the trust.⁶
6. A *trustee* is the person who manages the trust for the benefit of another.⁷ A trustee includes an original, additional, and successor trustee, as well as a co-trustee.⁸
7. An *express trust* is a trust that the settlor intended to create.⁹ Its creation is based on proof of the declared intention of the settlor.¹⁰ Intention can be established by parol evidence.¹¹ There must be explicit, clear and convincing evidence that the declaration of trust is unequivocal.¹²

B. Necessary Elements.

1. Trustee.

- a. A trust can exist without a trustee when the named trustee is either dead or unwilling to act as trustee.¹³ In such cases, a new trustee is simply appointed.¹⁴

2. Beneficiary.

¹ Bogert's Trusts and Trustees § 1. Terminology and classification.

² 1-12 Michie's VA Jurisprudence on Estates § 2.

³ 1-12 Michie's VA Jurisprudence on Estates § 2.

⁴ Va. Code § 55-541.03.

⁵ Va. Code § 55-541.03.

⁶ Va. Code § 55-541.03.

⁷ 1-12 Michie's VA Jurisprudence on Estates § 2.

⁸ Va. Code § 55-541.03.

⁹ Peal v. Luther, 199 Va. 35, 37, 97 S.E.2d 668 (1957).

¹⁰ Peal, 199 Va. at 37, 97 S.E.2d at 669-70.

¹¹ Peal, 199 Va. at 37, 97 S.E.2d at 669-70.

¹² Ingles v. Greear, 181 Va. 838, 840, 27 S.E.2d 222, 223 (1943).

¹³ REST 2d TRUSTS § 2 Definition Of Trust.

¹⁴ REST 2d TRUSTS § 2 Definition Of Trust.

- a. A trust can exist without a beneficiary as long as a beneficiary is definitely ascertainable within the period of the rule against perpetuities.¹⁵
- b. A trust is without a beneficiary when the trust is created for a child who is not born or conceived at the time of the creation of the trust, or when a trust is created for a definite class of persons although the individuals within that class have not yet been identified.¹⁶
- c. If there is no definite or definitely ascertainable beneficiary designated, there is no trust.¹⁷ The exception to that rule is a charitable trust, which can be created without a definite beneficiary.¹⁸

3. **Trust Property.**

- a. A trust cannot exist without trust property.¹⁹
- b. Without property that exists and is ascertainable at the time a trust is created, there is no trust.²⁰ At most, there is an agreement to create a trust.²¹
- c. If a trust is created and all of the property later ceases to exist, the trustee no longer holds anything in trust.²² The trustee, however, is personally liable to the beneficiary if the trustee committed a breach of trust in causing or allowing the trust property to cease to exist, or if the trustee sold the trust property to himself or herself, or lent trust funds to himself or herself, being permitted to do so by the terms of the trust.²³

4. **Expressed Intention.**

- a. In order to create an express trust, there must be either (1) explicit language to that effect or (2) circumstances which show with reasonable certainty that a trust was intended to be created.²⁴ The declaration must be reasonably certain in its material terms. If an element is uncertain, the trust must fail.²⁵
- b. At common law, no particular form of creation or declaration of a trust or use was required; rather it could be by deed, will, writing not under seal, or word of mouth.²⁶

¹⁵ REST 2d TRUSTS § 2 Definition Of Trust.

¹⁶ REST 2d TRUSTS § 2 Definition Of Trust.

¹⁷ REST 2d TRUSTS § 2 Definition Of Trust.

¹⁸ REST 2d TRUSTS § 2 Definition Of Trust.

¹⁹ REST 2d TRUSTS § 2 Definition Of Trust.

²⁰ REST 2d TRUSTS § 2 Definition Of Trust.

²¹ REST 2d TRUSTS § 2 Definition Of Trust.

²² REST 2d TRUSTS § 2 Definition Of Trust.

²³ REST 2d TRUSTS § 7 The Necessity of Trust Property.

²⁴ Woods v. Stull, 182 Va. 888, 902, 30 S.E.2d 675, 681-82 (1944).

²⁵ Woods, 182 Va. at 902, 30 S.E.2d at 681-82.

²⁶ 1-12 Michie's VA Jurisprudence on Estates § 5.

- c. Trusts can be created without the use of technical words.²⁷ Words are sufficient to create a trust if they “unequivocally show an intention that the legal estate was vested in one person, to be held in some manner or for some purpose on behalf of another, if certain as to all other requisites.”²⁸ The nonuse of technical words will be given weight, though it is not controlling.²⁹
- d. Because Virginia did not enact the seventh and eighth sections of the English statute of frauds, which require a writing for the proof of an express trust in lands, the matter of parol trusts rests as it did at common law.³⁰
- e. The statute of frauds is not violated when parol evidence is used to prove an agreement which is the basis of an express trust or a resulting trust.³¹

II. What Body of Law Applies to the Administration of a Trust in Virginia?

A. Key Concepts.

- 1. Virginia’s Uniform Trust Code, Va. Code §§ 55-541.01 *et seq.*, deal with the creation of trusts, as well as administrative matters such as amendments and termination.
- 2. In Virginia, trusts are governed by statute, as well as by common law and principles of equity, except to the extent that they are modified by statute.³²
- 3. Virginia is one of a minority of American jurisdictions that will enforce an express trust in real estate created by a parol agreement.³³

B. Virginia Uniform Trust Code.

- 1. Applies to
 - a. express inter vivos trusts, charitable or noncharitable;³⁴
 - b. trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust;³⁵ and
 - c. testamentary trusts,³⁶
 - i. except to the extent that a specific provision is made for them in Title 26 or elsewhere in the Code of Virginia, or to the extent it is clearly inapplicable to them.³⁷
- 2. Does not apply to
 - a. trusts that are primarily used for business, investment, or commercial transactions;³⁸

²⁷ Broaddus v. Gresham, 181 Va. 725, 731, 26 S.E.2d 33, 35 (1943).

²⁸ Broaddus, 181 Va. at 731, 26 S.E.2d at 35.

²⁹ Executive Committee of Christian Education, etc. v. Shaver, 146 Va. 73, 79, 135 S.E.2d 714, 715 (1926).

³⁰ 1-12 Michie’s VA Jurisprudence on Estates § 5.

³¹ Gibbens v. Hardin, 239 Va. 425, 431, 389 S.E.2d 478, 481 (1990).

³² Va. Code § 55-541.06.

³³ Sterling v. Blackwelder, 383 F.2d 282, 284 (4th Cir. 1967).

³⁴ Va. Code § 55-541.02.

³⁵ Va. Code § 55-541.02.

³⁶ Va. Code § 55-541.02.

³⁷ Va. Code § 55-541.02.

- b. constructive trusts and resulting trusts;³⁹
 - c. land trusts (Va. Code § 55-17.1);⁴⁰
 - d. deeds of trusts (Va. Code § 55-58 et seq.);⁴¹
 - e. employment trusts;⁴² and
 - f. special purpose trusts governed by Title 57, such as church and cemetery trusts.⁴³
3. Impact of the Uniform Trust Code (UTC).
- a. Code § 55-541.06 provides that the common law of trusts and the principles of equity supplement the UTC except when modified by statute. Code § 55-541.05(b) provides that the express terms of a trust prevail over many provisions of the UTC, including the power to divide a trust under Code § 55-544.17. For the protection of charitable trusts, the Attorney General is given the rights of a "qualified beneficiary" by Code § 55-541.10(d).⁴⁴
 - b. The UTC has not altered the fundamental principles that in construing, enforcing, and administering wills and trusts, the testator's or settlor's intent prevails over the desires of the beneficiaries.⁴⁵ Intent is to be ascertained by the language the testator or settlor used in creating the will or trust.⁴⁶

³⁸ Va. Code § 55-541.02.

³⁹ Va. Prac. Probate Handbook § 14:32 (2010 ed.).

⁴⁰ Va. Code § 55-541.02.

⁴¹ Va. Code § 55-541.02.

⁴² Va. Code § 55-541.02.

⁴³ Va. Prac. Probate Handbook § 14:32.

⁴⁴ Ladysmith Rescue Squad, Inc. v. Newlin, 280 Va. 195, 201-02, 694 S.E.2d 604, 607-08 (2010).

⁴⁵ Ladysmith Rescue Squad, Inc., 280 Va. at 201-02, 694 S.E.2d at 607-08.

⁴⁶ Ladysmith Rescue Squad, Inc., 280 Va. at 201-02, 694 S.E.2d at 607-08.

PART 2: What Are the Formalities of a Valid Will vs. a Valid Inter Vivos Trust?

I. Virginia Statutes.

A. Wills.

1. Under Virginia statute, a will must be in writing and signed by the testator.⁴⁷ If the testator cannot sign, it may be signed by another at the testator's direction in such a manner that indicates that the name is intended as a signature.⁴⁸ Additionally, unless the will is entirely in the handwriting of the testator, it must be signed or acknowledged by the testator in the presence of two competent witnesses who must also sign.⁴⁹ If the will is entirely in the handwriting of the testator, that fact must be ascertained by at least two disinterested parties.⁵⁰
2. If a document does not meet the requirements of a will, it may still be treated as if it met the requirements of a will if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (1) the decedent's will, (2) a partial or complete revocation of the will, (3) an addition to or an alteration of the will, or (4) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.⁵¹
3. It is not possible to excuse compliance with any requirement for a testator's signature, except in circumstances where two people mistakenly sign each other's will, or a person signs the self-proving certificate to a will instead of signing the will itself.⁵²
4. The remedy to treat a document as a valid will despite its failure to meet the stated requirements is available only in proceedings brought in a circuit court under the appropriate provisions of this title, filed within one year from the decedent's date of death and in which all interested persons are made parties.⁵³

B. Trusts.

1. A trust is created if:
 - a. The settlor has capacity to create a trust, or the settlor's agent creates the trust under a power of attorney, which expressly authorizes the agent to create a trust on the settlor's behalf;
 - b. The settlor or his agent indicates an intention to create the trust; and
 - c. The trust has a definite beneficiary.⁵⁴
2. A trust may be created by:
 - a. The transfer of property to another person as trustee during the settlor's lifetime by the settlor or the settlor's agent, under a power of attorney, which expressly authorizes the agent to create a trust on settlor's behalf;

⁴⁷ Va. Code § 64.1-49.

⁴⁸ Va. Code § 64.1-49.

⁴⁹ Va. Code § 64.1-49.

⁵⁰ Va. Code § 64.1-49.

⁵¹ Va. Code § 64.1-49.1.

⁵² Va. Code § 64.1-49.1.

⁵³ Va. Code § 64.1-49.1.

⁵⁴ Va. Code § 55-544.02.

- b. A will or other disposition taking effect upon the settlor's death;
- c. A declaration by the owner of property that the owner holds identifiable property as trustee; or
- d. An exercise of a power of appointment in favor of a trustee.⁵⁵

⁵⁵ Va. Code § 55-544.01.

PART 3: Who Oversees the Administration of Estates and Testamentary Trusts in Virginia?

I. The Commissioner of Accounts oversees the administration of estates and testamentary trusts in Virginia.

- A. The commissioner of accounts does *not* oversee the administration of revocable trusts.

II. Establishment and Purpose of the Office of Commissioner of Accounts.

- A. In Virginia, the office of commissioner of accounts is a creature of statute.⁵⁶
- B. The purpose of the office is to assist the circuit court in overseeing the administration of decedents' estates, thus creating a less expensive yet equally efficient method of overseeing estate administration.⁵⁷

III. Appointment.

A. Commissioner of Accounts.

1. "The judges of each circuit court shall appoint as many commissioners of accounts as may be requisite to carry out the duties of that office."⁵⁸
2. The commissioners of accounts must be "discreet and competent attorney-at-law" and are "removable at [the] pleasure" of the circuit courts.⁵⁹

B. Assistant Commissioner of Accounts.

1. Each court "having jurisdiction of the probate of wills and granting administration on estates of decedents" may also appoint assistant commissioners of accounts as needed.⁶⁰
2. The assistant commissioner of accounts can perform all of the duties and exercise all of the powers of the commissioner of accounts, but may act only in cases that the commissioner of accounts delegates to the assistant commissioner of accounts.⁶¹
3. The assistant commissioner of accounts must also be a "discreet and competent attorney-at-law."⁶²
4. Most jurisdictions have designated individuals to serve as assistant commissioners of accounts.

C. Deputy Commissioner of Accounts.

1. "In any city or county having a population in excess of 200,000," the commissioner of accounts may appoint a deputy commissioner of accounts, who can perform any of the commissioner of accounts' official duties while that commissioner of accounts is in office.⁶³

⁵⁶ See generally Va. Code Ann. §§ 26-8 to 26-37 (1950 & 2009 Supp.).

⁵⁷ Nicholas v. Nicholas, 169 Va. 399, 402, 193 S.E.689, 690 (1938).

⁵⁸ Va. Code Ann. § 26-8(A).

⁵⁹ Va. Code Ann. § 26-8(A).

⁶⁰ Va. Code Ann. § 26-10.

⁶¹ Va. Code Ann. § 26-10.

⁶² Va. Code Ann. § 26-10.

⁶³ Va. Code Ann. § 26-10.1.

2. The judge of the court having jurisdiction of the probate of wills and granting administrations of decedent's estates must approve the commissioner of accounts' appointment.⁶⁴
3. The deputy commissioner of accounts must also be a discreet and competent attorney-at-law and is removable at the pleasure of the court.⁶⁵

IV. Duties.

A. General.

1. The commissioner of accounts supervises all fiduciaries and the administration of decedents' estates within his or her jurisdiction, and makes all ex parte settlements of their accounts.⁶⁶
 - a. "Fiduciaries" include personal representatives, conservators, guardians of minor's estates, committees, receivers, and testamentary trustees.
2. If a court appoints more than one commissioner, each commissioner maintains his or her "own office and keep[s] his [or her] own books, records, and accounts."⁶⁷

B. "Record of Fiduciaries."

1. At the end of each month, the clerk of court provides the commissioner of accounts with a "list of fiduciaries authorized to act as such under orders entered during that month" and whether the fiduciary has given the required bond, if any.⁶⁸
2. The commissioner of accounts uses this information to maintain the "Record of Fiduciaries," in which he or she makes the following entries:
 - a. the name of every fiduciary;
 - b. the name of the decedent whose estate the fiduciary represents or the name of the living person for whom he is acting in fiduciary capacity;
 - c. the penalty of his or her bond;
 - d. the names of his or her sureties;
 - e. the date of the order conferring his authority;
 - f. the date of any order revoking his authority (the clerk must certify the revocation to the commissioner within 10 days);
 - g. the date of the return of every inventory of the estate; and
 - h. the date of each settlement of the accounts of the fiduciary.⁶⁹
3. The commissioner of accounts indexes the Record of Fiduciaries in the name of the decedent or person represented by the fiduciary.⁷⁰
4. The commissioner of accounts forfeits \$20 for failure to make an entry.

C. Inventories.

1. Duties of Commissioner of Accounts.

⁶⁴ Va. Code Ann. § 26-10.1.

⁶⁵ Va. Code Ann. § 26-10.1.

⁶⁶ Va. Code Ann. § 26-8(A).

⁶⁷ Va. Code Ann. § 26-8(B).

⁶⁸ Va. Code Ann. § 26-9.

⁶⁹ Va. Code Ann. § 26-9.

⁷⁰ Va. Code Ann. § 26-9.

- a. The commissioner of accounts must (1) inspect all inventories returned to him by fiduciaries, (2) see that they are in proper form, and (3) within 10 days after they are received and approved by the him or her, deliver them to the clerk of court to be recorded.⁷¹
- b. No commissioner will approve a personal representative's inventory until (1) 21 days have elapsed from the receipt of that inventory and (2) unless the inventory (a) contains a statement that any copies requested have been mailed, (b) shows the names and addresses of the persons to whom they were mailed, and (c) shows the date of mailing.⁷²

2. Responsibilities of the Fiduciaries.

a. Personal Representatives, Curators, Guardians of Estates, Conservators, Committees.

- i. Each of these fiduciaries must return an inventory to the commissioner of accounts within four months after the date of the order conferring that fiduciary's authority.⁷³
 - a) Every personal representative filing an inventory or any document making changes to an inventory with the commissioner of accounts must send a copy to persons to whom notice was given pursuant to § 64.1-122.2(A)-(B) and who have requested copies.⁷⁴
 - b) See § 26-12(A)-(B) for details of what each fiduciary's inventory must contain.

b. Testamentary Trustees.

- i. Every testamentary trustee who qualifies in the clerk's office must return an inventory to the commissioner of accounts within four months after the first date that any assets are received.⁷⁵
 - a) See § 26-12(C) for details of what each fiduciary's inventory must contain.

c. Further Inventories.

- i. In addition to filing the initial inventory, every fiduciary must also return to the commissioner of accounts a further inventory of any assets discovered or received after filing an inventory.⁷⁶
- ii. Within four months after the discovery or receipt of the assets, the fiduciary must either: (1) file an "amended inventory showing all assets of the estate or trust;" (2) file an "additional inventory showing only the after-discovered assets;" or (3) obtain the permission of the commissioner of accounts to show

⁷¹ Va. Code Ann. § 26-14.

⁷² Va. Code Ann. § 26-14(B).

⁷³ Va. Code Ann. § 26-12(A)-(B).

⁷⁴ Va. Code Ann. § 26-12.4(A).

⁷⁵ Va. Code Ann. § 26-12(C).

⁷⁶ Va. Code Ann. § 26-12(E).

the after-discovered assets on the estate's or trust's next regular accounting.⁷⁷

3. See section (V)(C), "Enforcement of Inventories," below.

D. Settlements of Accounts.

1. Duties of Commissioner of Accounts.

- a. The commissioner of accounts' reviews and approves fiduciaries' filed settlements of accounts. The commissioner of accounts also states, settles, and reports to the court an account of the transactions of each fiduciary.⁷⁸
- b. The commissioner of accounts must report every account stated, and will file the report in the office of the court that appointed him or her as soon as practicable after its completion.⁷⁹
 - i. In addition, on or before the date of filing a report on a personal representative's account, the commissioner of accounts must send a copy of the report and any attachments to every person who was entitled to request a copy of the account under § 26-12.4 and who submits a written request to the commissioner of accounts.⁸⁰
 - ii. This copy will also include a statement advising the recipient that the report will stand confirmed by law 15 days after the report is filed with the court unless there are objections to the filing.⁸¹
- c. No commissioner will approve a personal representative's account until (1) 21 days have elapsed from the receipt of that account and (2) unless the account (a) contains a statement that any copies requested have been mailed, (b) shows the names and addresses of the persons to whom they were mailed, and (c) shows the date of mailing.⁸²
- d. Note that if an assistant commissioner of accounts makes a settlement of a fiduciary account, then he or she must report the fact and date of each settlement to the commissioner of accounts within 30 days. The commissioner of accounts then makes the entry in his or her record books.
- e. On the first day of the term of any circuit court in the commissioner of accounts' county or city, or during the first week of every month, the commissioner of accounts posts on the front door of that circuit courthouse a list of the fiduciaries whose accounts are before him or her for settlement. The commissioner of accounts will not complete

⁷⁷ Va. Code Ann. § 26-12(E).

⁷⁸ Va. Code Ann. § 26-17.10(A).

⁷⁹ Va. Code Ann. § 26-31, 32.

⁸⁰ Va. Code Ann. § 26-31, 32.

⁸¹ Va. Code Ann. § 26-31, 32.

⁸² Va. Code Ann. § 26-12.4(B).

any fiduciary's account until 10 days after the list containing the fiduciary's name has been posted.⁸³

2. Responsibilities of the Fiduciaries.

a. Every fiduciary discussed below must file an account with the commissioner of accounts of the jurisdiction in which he or she qualified. Every account must be signed by all fiduciaries.⁸⁴

b. Conservators, Guardians of Minors' Estates, Committees, Trustees under § 37.2-1016, Receivers.

i. First Account. Within six months from the date of qualification, these fiduciaries must exhibit before the commissioner of accounts a statement of all money and other property which the fiduciary has received, become chargeable with, or has disbursed within four months from the date of qualification.⁸⁵

ii. Subsequent Accounts. After the first account has been filed and settled, the fiduciary must file second and subsequent accounts for each succeeding 12-month period within four months from the last day of that 12-month period.⁸⁶

iii. The commissioner of accounts may extend the period for filing for reasonable cause.⁸⁷

c. Personal Representatives.

i. First Account. Within sixteen months from the date of qualification, personal representatives must exhibit before the commissioner of accounts a statement of all money and other property which the personal representative has received, become chargeable with, or has disbursed within 12 months from the date of qualification.⁸⁸

ii. Subsequent Accounts. After the first account has been filed and settled, the personal representative must file second and subsequent accounts for each succeeding 12-month period within four months from the last day of that 12-month period.⁸⁹

iii. The commissioner of accounts may extend the period for filing for reasonable cause.⁹⁰

iv. The personal representative may file a first or subsequent account at an earlier date, and the commissioner of accounts or the court may require the personal representative to do so upon reasonable cause shown.⁹¹

⁸³ Va. Code Ann. § 26-27.

⁸⁴ Va. Code Ann. § 26-17.3.

⁸⁵ Va. Code Ann. § 26-17.4(A).

⁸⁶ Va. Code Ann. § 26-17.4(B).

⁸⁷ Va. Code Ann. § 26-17.4(B).

⁸⁸ Va. Code Ann. § 26-17.5(A).

⁸⁹ Va. Code Ann. § 26-17.5(B).

⁹⁰ Va. Code Ann. § 26-17.5(B).

⁹¹ Va. Code Ann. § 26-17.5(C).

- v. Every personal representative filing an account or any document making changes to an account with the commissioner of accounts must send a copy to persons to whom notice was given pursuant to § 64.1-122.2(A)-(B) and who have requested copies.⁹²

d. Testamentary Trustees.

- i. Every testamentary trustee must exhibit a statement of accounts for each calendar year to the commissioner of accounts of the court where the order conferring his authority was entered.⁹³
- ii. **First Account.** The first account must be filed on or before May 1 of the calendar year following the initial funding of the trust.⁹⁴
- iii. **Subsequent Accounts.** Accounts for each subsequent calendar year must be filed on or before May 1 of the following year.⁹⁵
 - a) Note: all testamentary trustees who qualify prior to July 1, 1993, and elect to file accounts on a fiscal year basis may continue to file such accounts on an annual basis within four months after the end of the fiscal year selected.⁹⁶

e. Accounts of Sales Made under Deeds of Trust, Mortgage, or Assignment for the Benefit of Creditors.

- i. Within six months after the date of sale made under any recorded deed of trust, mortgage, or assignment for the benefit of creditors, other than under a decree, the trustee must return an account of sale to the commissioner of accounts of the court in which the instrument was first recorded.⁹⁷
- ii. After recording any trustee's deed, the trustee must promptly deliver a copy of the deed to the commissioner of accounts.⁹⁸
- iii. The commissioner of accounts then settles and reports to the court an account of the trustee's transactions and records the account like other fiduciary reports.⁹⁹
- iv. If a trustee fails to comply with these requirements, he or she forfeits his or her commission on the sale unless allowed by the court.¹⁰⁰

3. Settlement Includes Unsettled Portion of Preceding Year.

⁹² Va. Code Ann. § 26-12.4(A).

⁹³ Va. Code Ann. § 26-17.6(A).

⁹⁴ Va. Code Ann. § 26-17.6(A).

⁹⁵ Va. Code Ann. § 26-17.6(A).

⁹⁶ Va. Code Ann. § 26-17.6(B).

⁹⁷ Va. Code Ann. § 26-15.

⁹⁸ Va. Code Ann. § 26-15.

⁹⁹ Va. Code Ann. § 26-15.

¹⁰⁰ Va. Code Ann. § 26-15.

a. When a commissioner of accounts is settling an account for a given year, he or she will include any time prior to that year for which the fiduciary has not settled.¹⁰¹

4. See section (V)(D), “Enforcement of Settlement of Accounts,” below.

E. Exceptions and Waivers to Inventories and Accounts.

1. Waiver of Accounts and Inventory for Testamentary Trustees.

a. The trustee will not be required to file accounts with the commissioner of accounts if (1) the decedent’s will probated on or after July 1, 1993 contains a waiver of the testamentary trustee’s obligations to account, or (2) if the sole beneficiary of the trust also is a trustee.¹⁰²

i. Note: for this section only, a “sole beneficiary” means a person who is (1) the only income beneficiary who is entitled to the principal, or the remaining principal goes to the trustee’s estate or (2) the only income beneficiary and has either a general power of appointment over the principal or has a special power of appointment that is not limited to a particular class of persons.¹⁰³

b. When the waiver is in the decedent’s will, the trustee must give written notice to all trust beneficiaries who are adults, whose addresses are known to the trustee, and to whom income or principal could be currently distributed. In addition, the trustee must (1) provide each with a copy of the applicable provisions of the will and a copy of § 26-17.7; (2) advise each of his or her right to require an annual accounting; and (3) give each an annual accounting upon request.¹⁰⁴

c. The trustee must either send to the commissioner of accounts a copy of the notice to each beneficiary or file with the commissioner a writing stating that the requirements of § 26-17.7 have been met.¹⁰⁵

d. Notwithstanding a waiver in the decedent’s will or any prior consent of a beneficiary, any adult beneficiary may, at any time during the administration of the trust, demand in a writing delivered to the trustee and to the commissioner of accounts that the trustee settle annually with the commissioner of accounts.¹⁰⁶

i. This demand may also be made by the following: the personal representative of a deceased beneficiary whose estate is a beneficiary; an attorney in fact for a beneficiary; a guardian of an incapacitated beneficiary; a committee of a convict or insane beneficiary; the duly qualified guardian of a minor, or if

¹⁰¹ Va. Code Ann. § 26-28.

¹⁰² Va. Code Ann. § 26-17.7(A).

¹⁰³ Va. Code Ann. § 26-17.7(A).

¹⁰⁴ Va. Code Ann. § 26-17.7(A).

¹⁰⁵ Va. Code Ann. § 26-17.7(A).

¹⁰⁶ Va. Code Ann. § 26-17.7(C).

none exists, the custodial parent of a minor or by any minor who has reached 14 years of age.¹⁰⁷

- e. However, any trustee under a will containing the requisite waiver will be relieved of duty to file an inventory or annual accounts with the commissioner of accounts if the trustee (1) obtains written consent from all adult beneficiaries, to whom income or principal of the trust could be distributed, after providing them with requisite documents; and (2) files those consents with the commissioner of accounts on or before the date on which the inventory or next required accounting would be due.¹⁰⁸
- f. New provision: any trustee under a will probated on or after July 1, 2010, will be relieved of duty to file an inventory or annual accounts with the commissioner of accounts if the will does not direct the filing of such inventory or accounts and the trustee (1) obtains the written consent from all adult beneficiaries and representatives of incapacitated beneficiaries, to whom income or principal of the trust could be distributed, after providing them with requisite documents; and (2) files those consents with the commissioner of accounts on or before the date on which the inventory or next required accounting would be due.¹⁰⁹
- g. If the testamentary trustee is not required to account due to a waiver under § 26-17.7, then the trustee is exempted from the duty to file an inventory for as long as there is no duty to file annual accounts.¹¹⁰

2. Wrongful Death Actions.

- a. An inventory is not required when the personal representative has qualified solely for the purpose of bringing a wrongful death action under § 8.01-50 unless (1) there are no surviving relatives designated as beneficiaries under § 8.01-53 and (2) the court directs any recovery to be paid to the personal representative for distribution according to law.¹¹¹

3. Estate Less Than \$15,000.

- a. When decedent's personal estate passing by testate or intestate succession does not exceed \$15,000 in value and an heir, beneficiary, or creditor whose claim exceeds that value seeks qualification, the clerk shall waive inventory and settlement of accounts. However, this does not apply if the decedent died owning any real estate over which the person seeking qualification would have the power of sale.¹¹²
- b. If the principal sum of a fiduciary does not exceed \$15,000, then that fiduciary must still exhibit his or her first account in the appropriate

¹⁰⁷ Va. Code Ann. § 26-17.7(C).

¹⁰⁸ Va. Code Ann. § 26-17.7(D).

¹⁰⁹ Va. Code Ann. § 26-17.7(E).

¹¹⁰ Va. Code Ann. § 26-12(C).

¹¹¹ Va. Code Ann. § 26-12.2.

¹¹² Va. Code Ann. § 26-12.3.

time period, but the commissioner of accounts may permit subsequent accounts every three years (rather than every year). The commissioner of accounts may also grant this permission to fiduciaries whose estates have been reduced to \$15,000. The commissioner of accounts can revoke this permission upon his or her own motion or upon request of an interested party.¹¹³

4. Statement in lieu of Settlement of Accounts.

- a. If all distributees of a decedent's estate or all residuary beneficiaries under a decedent's will are personal representatives of that decedent's estate, the personal representative may file with the commissioner of accounts a statement under oath (1) that all known charges against the estate have been paid, (2) that six months have elapsed since the personal representative qualified in the clerk's office, and (3) that the residue of the estate has been delivered to the distributees or beneficiaries.¹¹⁴

F. Commissioners of Accounts' Fees.

1. The court that appointed the commissioner of accounts sets the fee that the commissioner of accounts receives from the decedent's estate for the various services he or she performs.¹¹⁵
2. The majority of courts have adopted the Uniform Fee Schedule, which lists fee charges for each of the commissioner's services. The Standing Committee on Commissioners of Accounts of the Judicial Council of Virginia produced the Uniform Fee Schedule to provide uniformity and fairness in commissioner fee charges throughout the Commonwealth.
 - a. For the Uniform Fee Schedule, see the *Manual for Commissioners of Accounts* ¶ 18.3 (Virginia CLE 4th ed. 2009).
3. Note that each commissioner has the authority, "for any given service he [or she] performs, either to establish a lesser fee than that prescribed by the court, or to waive one or more fees."¹¹⁶

V. Powers.

A. Duration of Supervision.

1. Each commissioner "retain[s] the power of supervision over every account, matter, or thing referred to him until his [or her] final account is approved, unless the commissioner resigns, retires, or is removed from office, in which case his [or her] successor shall continue such duties."¹¹⁷

B. Subpoena Power, but No Contempt Power.

¹¹³ Va. Code Ann. § 26-20.

¹¹⁴ Va. Code Ann. § 26-20.1(A).

¹¹⁵ Va. Code Ann. § 26-24.

¹¹⁶ Va. Code Ann. § 26-8(C).

¹¹⁷ Va. Code Ann. § 26-8(B).

1. Commissioners, assistant commissioners, and deputy commissioners have the power to issue subpoenas to require (1) “any person to appear before them” and (2) “the production of any documents or papers before them.”¹¹⁸
2. Commissioners, assistant commissioners, and deputy commissioners do not have the power to punish any person for failure to appear or to produce documents or papers; however, they “may certify the fact of such nonappearance or failure to produce to the circuit court, which may impose penalties for civil contempt as if the court had issued the subpoena.”¹¹⁹
3. Commissioners, assistant commissioners, and deputy commissioners may also certify to the circuit court that a fiduciary failed to inform the clerk or commissioners of his or her nonresident status and new address pursuant to § 26-1.2, which may result in the court imposing a \$50 penalty on the fiduciary.¹²⁰

C. Enforcement of Inventories.

1. If any fiduciary fails to make the return of the required inventory, the commissioner of accounts “shall issue, through the sheriff or other proper officer, a summons to such fiduciary, requiring him [or her] to make such return.”¹²¹
2. If the fiduciary does not make the return within 30 days after the date of service of the summons, the commissioner of accounts must (1) report the fact to the court, which will immediately order a summons to the fiduciary, requiring him or her to appear, and (2) mail a copy of this report to the Virginia State Bar. Unless the court excuses the fiduciary for sufficient reason, the court will fine the fiduciary up to \$500 upon appearing in court.¹²²
3. If the fiduciary still fails to make the return within the court-ordered time, he or she “shall be deemed guilty of contempt of court, and be dealt with accordingly.”¹²³

D. Enforcement of Settlements of Accounts.

1. “If any fiduciary required to account fails to make a complete and proper account within the time allowed,” the commissioner of accounts either
 - a. proceeds against such fiduciary by summons and reports to the court and the Virginia State Bar (the same enforcement process as the enforcement of inventories under § 26-13, described above), or
 - b. file with the court and clerk at least twice a year (at times ordered by the court) a list of all fiduciaries who have failed to make a complete and proper account within the time allowed, except those whom the commissioner of accounts has granted extra time. The clerk then issues a summons against each fiduciary on that list and the court will

¹¹⁸ Va. Code Ann. § 26-8.1.

¹¹⁹ Va. Code Ann. § 26-8.1.

¹²⁰ Va. Code Ann. § 26-8.1.

¹²¹ Va. Code Ann. § 26-13.

¹²² Va. Code Ann. § 26-13.

¹²³ Va. Code Ann. § 26-13.

take action against the fiduciary in the same manner as it does under § 26-13 for failure to file inventories.¹²⁴

2. The commissioner of accounts also files with the court and clerk at least quarterly a list of all fiduciaries whose accounts have been before the commissioner of accounts for more than five months, noting which fiduciaries are delinquent.¹²⁵
3. **Forfeiture of Commission.** In addition, if any fiduciary wholly fails to provide the commissioner of accounts with a statement of accounts that fully complies with § 26-17.3 and all other statements and items required for that year, or omits money or property from a statement of accounts, then the fiduciary may receive no compensation for his or her services and no commission on money or property during that year. The commissioner of accounts, in his or her discretion, may allow compensation for good cause shown.¹²⁶
 - a. This is not an absolute forfeiture, but depends on the circumstances of each case.¹²⁷
 - b. The commissioner of account's actions are subject to review by the court if interested persons file exceptions.
 - c. See also section (G), "Fiduciaries' Fees" below.

E. Enforcement of Accounts of Sales under Deeds of Trust, Mortgage, or Assignment for the Benefit of Creditors.

1. If the trustee fails to file an account, the commissioner of accounts and the court will proceed against the trustee in the same manner and impose the same penalties as against fiduciaries who fail to file inventories under § 26-13 (see section (D)(3), "Enforcement of Inventories," above).¹²⁸
2. The trustee may be excused for sufficient reason.¹²⁹

F. Fiduciaries Personally Liable for Costs.

1. The fiduciaries who fail, without good cause, to make the returns and exhibits required shall personally pay the costs of all proceedings against them, and they will receive no allowance for the costs in the settlement of their accounts.¹³⁰

G. Fiduciaries' Fees.

1. In stating and settling an account, the commissioner of accounts has initial approval power over the amount of a fiduciary's fees, and will allow (1) any reasonable expenses incurred by the fiduciary and (2) a reasonable compensation, in the form of a commission on receipts or otherwise.¹³¹

¹²⁴ Va. Code Ann. § 26-18.

¹²⁵ Va. Code Ann. § 26-18.

¹²⁶ Va. Code Ann. § 26-19.

¹²⁷ See, e.g., *Perrow v. Payne*, 203 Va. 17, 121 S.E.2d 900 (1961); *Dearing v. Walter*, 179 Va. 620, 20 S.E.2d 483 (1942).

¹²⁸ Va. Code Ann. § 26-15.

¹²⁹ Va. Code Ann. § 26-15.

¹³⁰ Va. Code Ann. § 26-23.

¹³¹ Va. Code Ann. § 26-30.

2. If a committee or other fiduciary renders services with regard to real estate owned by the ward or beneficiary, the commissioner of accounts may also allow compensation for the services rendered with regard to the real estate and the income from or value of the real estate.¹³²
3. However, where the compensation of an institutional fiduciary is specified under the terms of the trust or will by reference to a standard publishing fee, the commissioner of accounts shall not reduce the compensation below the amount specified unless there is sufficient proof that (1) the settler or testator was not competent when the trust instrument or will was executed or (2) such compensation is excessive in light of the compensation institutional fiduciaries generally receive in similar situations.¹³³
4. Under § 26-19, the commissioner may require a fiduciary to forfeit compensation if accounts are not timely filed (see (V)(D)(3) above).

VI. Exceptions, Examination, Correction, and Confirmation of the Commissioner's Reports.

- A. Any exceptions filed to the commissioner of accounts' report must specify with reasonable certainty the particular grounds of objections relied upon.¹³⁴
- B. After 15 days from the time the commissioner of accounts' report is filed, the court must examine any exceptions that have been filed and will correct any errors. The court may give the report to the same or another commissioner of accounts; it may empanel a jury to decide any matter; or it may confirm the report in whole or in part.¹³⁵
- C. If no exceptions are filed, the report stands confirmed on the day after the 15th day after filing.¹³⁶
- D. Note that where it is apparent from the face of the commissioner of accounts' report, the pleadings, and the exhibits that the commissioner's report was based on a fundamental error of law, no exception to the report is required.¹³⁷
- E. Once the report is confirmed, it will be taken as correct except as it may be surcharged or falsified in a suit. No person who was party to exceptions filed to report may bring a suit to surcharge or falsify the report.¹³⁸

VII. Disposition of Papers Relating to Estates

- A. After the clerk records the confirmed the account, all inventories and reports and supporting documents filed with the clerk and not required for further inquiry may be returned to the commissioner of accounts or the filing fiduciary upon request and/or the discretion of the commissioner of accounts.¹³⁹

¹³² Va. Code Ann. § 26-30.

¹³³ Va. Code Ann. § 26-30.

¹³⁴ Perrow v. Payne, 203 Va. 17, 121 S.E.2d 900 (1961).

¹³⁵ Va. Code Ann. § 26-33.

¹³⁶ Va. Code Ann. § 26-33.

¹³⁷ Carle v. Cochran, 127 Va. 223, 103 S.E. 699 (1920).

¹³⁸ Va. Code Ann. § 26-34.

¹³⁹ Va. Code Ann. § 26-35, 37.

- B.** The clerk may destroy these papers or any other papers relating to estates when the matter has been closed with final settlement for more than three years and appropriate recordings have been made. The commissioner of accounts may also destroy any of these papers when the matter has been closed with a confirmed final accounting for more than one year.¹⁴⁰

¹⁴⁰ Va. Code Ann. § 26-37.

PART 4: When Does a Will Speak and Why Is That Important in the Context of Drafting Estate Planning Documents? What About a Trust?

I. Intent.

- A. When construing wills, courts are primarily concerned with enforcing the testator's intent at the time of execution.¹⁴¹
- B. In ascertaining intention, the court
 - 1. tries to see things as testator saw them when will was written;¹⁴²
 - 2. looks to the will's words in light of entire will and the circumstances surrounding the testator when the will was executed; and¹⁴³
 - 3. therefore, the court cannot change the terms of the will to account for circumstances unforeseen by the testator.¹⁴⁴

II. § 64.1-62: Will To Be Construed as If Made Just Before Testator's Death.

- A. The statute states, .
 - 1. "*A will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator...*"
 - a. For example in *Carper v. Reynolds* (1971), The testator owned an undivided one-half interest in a farm when he made his will. At death, the testator owned the entire interest in the farm. The will devised all his right, title, and interest in the farm. Therefore, the court held it was the testator's intent to devise his entire interest at his death notwithstanding parenthetical words, "being a one-half undivided interest," as will spoke as of testator's death rather than when it was made.¹⁴⁵
 - 2. "... *unless a contrary intention shall appear by the will.*"¹⁴⁶
 - a. When the testator intended for the will to speak at the time of execution, courts will award the proceeds accordingly.¹⁴⁷
 - b. For example in *Warner v. Baylor*, the testator bequeathed a specific number of stock shares. After the will was executed, the corporation issued a stock split. The court held that the will's language showed intention to give legatees proportionate interest in corporations that the testator had at the time of execution, which showed intent to have will speak at date of execution.¹⁴⁸ As a result, the devisees received the additional shares resulting from the split rather than the exact quantity bequeathed in the will.

¹⁴¹ Yancey v. Scales, 244 Va. 300, 421 S.E.2d 195 (1992).

¹⁴² Whitehurst v. White, 160 Va. 859, 169 S.E. 724 (1933).

¹⁴³ Warner v. Baylor, 204 Va. 867, 134 S.E.2d 263 (1964).

¹⁴⁴ Hurt v. Hurt, 121 Va. 413, 93 S.E. 672 (1917).

¹⁴⁵ Carper v. Reynolds, 211 Va. 567, 179 S.E.2d 482 (1971).

¹⁴⁶ Va. Code § 64.1-62.

¹⁴⁷ Warner, 204 Va. 867, 134 S.E.2d 263 (1964).

¹⁴⁸ Warner, 204 Va. 867, 134 S.E.2d 263 (1964).

III. Lapsed or Void Legacy or Devise.

- A. At common law, when a devisee predeceases the testator, the devise lapses and passes through a residuary clause or by intestacy. Virginia has passed an anti-lapse statute providing that the issue of the predeceased devisee will take, so long as the predeceased devisee and the testator share the same grandparents.¹⁴⁹
- B. For example, in *Wildberger v. Cheek's Ex'rs*, the testator bequeathed money to a sister who had died before execution of the will, leaving issue who survived testator. The court held that the legacy did not lapse, but passed to such issue.¹⁵⁰
- C. However, the anti-lapse statute applies unless a contrary intention appears in the will.¹⁵¹
- D. For example, if a testator writes, "I devise my entire estate to my wife if she survives me," but his wife predeceases him, then it is clear that the testator intended for the devise to lapse and the statute would not apply.

IV. Ademption by Extinction.

- A. Ademption by extinction happens when "the identical thing bequeathed is not in existence, or has been disposed of, so that it does not form a part of the testator's estate, at the time of his death, the legacy is extinguished, and the legatee's rights are gone."¹⁵²
- B. For example, in *Seal v. Godley*, The will at issue created a trust, but the trust was adeemed because the decedent conveyed away the land that was to be the corpus of one of the trusts.¹⁵³

V. Apportionment.

- A. "When an estate owes estate taxes, Code § 64.1-161 requires that such taxes be apportioned,"¹⁵⁴ and the apportionment is "prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues."¹⁵⁵
- B. This statute is "based on the principle that estate taxes should be equitably apportioned among the taxable legatees."¹⁵⁶ However, an individual may avoid apportionment by making directions in a will "for the payment of such estate taxes and ... designat [ing] the fund or funds or property out of which such payment shall be made."¹⁵⁷
- C. For example, in *Lynchburg College v. Central Fidelity Bank*, The decedent intended that the estate taxes, debts, and administration expenses be treated as a charge against

¹⁴⁹ Va. Code Ann. § 64.1-64.1

¹⁵⁰ *Wildberger v. Cheek's Ex'rs*, 94 Va. 517, 27 S.E. 441 (1897).

¹⁵¹ *Thomas v. Copenhaver*, 235 Va. 124, 365 S.E.2d 760 (citing *Sutherland v. Sydnor*, 84 Va. 880, 881-82, 6 S.E. 480, 481 (1888)).

¹⁵² *Hood v. Haden*, 82 Va. 588 (1886).

¹⁵³ *In re Estate of Brockenbrough*, 68 Va. Cir. 95 (Nelson Co. 2005) (citing *Seal v. Godley* # CH00-781).

¹⁵⁴ *Stickley v. Stickley*, 255 Va. 405, 408, 497 S.E.2d 862, 863 (1998).

¹⁵⁵ Va. Code Ann. § 64.1-161(A)

¹⁵⁶ *Stickley*, 255 at 408, 497 S.E.2d at 863 (quoting *Lynchburg College v. Central Fidelity Bank*, 242 Va. 292, 296, 410 S.E.2d 617, 619 (1991)).

¹⁵⁷ *Stickley*, 255 Va. at 408, 497 S.E.2d at 863 (quoting Code § 64.1-165).

- the estate, thus avoiding apportionment of the estate taxes.¹⁵⁸ Although the decedent did not designate the fund out of which the taxes were to be paid, the court reached this conclusion because it was clear that the testator intended that the taxes be paid from the fund bearing the burden of the other debts and administration expenses.
- D.** However, if it was not clear that the testator intended for payment of his estate taxes to come from a specific fund, the taxes would be apportioned among the devisees. Therefore, in estate planning, it is important to also plan for estate taxes. Omitting this discussion could create results that a client would not want had they been informed of Code § 64.1-161.

VI. Pour-Over Wills and Revocable Trusts.

- A.** A testator can create a revocable trust during his lifetime that he can revoke at any time. He can also devise property in his will to the revocable trust. However, once the testator dies, he no longer has the power to revoke the trust.
- B.** Therefore, failing to coordinate the provisions in a trust to account for the trustor's death can undermine the best intentions in preparing a well-crafted will.

VII. Closing Remarks and Takeaways.

- A.** When drafting a will the most important thing to remember is that things change: families have more kids, and today's assets may change (the farm interest in *Carper v. Reynolds*) or cease to exist (where testator conveyed the corpus of the trust in *Seal v. Godley*) in the future. The laws may change too (estate tax). Looking at a client's will or trust as distributing today's snapshot of assets without recognizing the possibility of change in the future can be extremely short-sighted. It's also impossible to know how long a client will live.
- B.** The estate planning attorney must balance these uncertainties with the goal of having the client's estates disposed according to her wishes.

¹⁵⁸ Lynchburg College v. Central Fidelity Bank, 242 Va. 292, 296, 410 S.E.2d 617, 619 (1991).

PART 5: What Must the Estate Planning Attorney Know About *In Terrorem* Clauses in Virginia?

I. What is a No-Contest Clause?

- A. A *no-contest clause* (or an *in terrorem* clause) may be written into testamentary documents to discourage beneficiaries from challenging the documents' validity. This clause provides that a beneficiary- contestant to the will or trust shall take nothing, or a token amount, instead of the amount provided for in the documents.¹⁵⁹
- B. Example:
 - 1. “Any person that objects to or contests any provision of this Trust in whole or in part, shall forfeit his or her entire distribution otherwise payable under this Trust and receive only \$1.00 under this Trust and will receive no other distribution from my Trust nor from my estate.”¹⁶⁰

II. Background: What Is a Will Contest?

- A. Beneficiaries may typically bring six types of contests to challenge or set aside executed documents:
 - 1. Lack of testamentary capacity [capacity, insane delusion].
 - a. Note: It “is well settled [in Virginia] that all men are presumed to be of sound mind, the burden being upon him who alleges the contrary to establish such allegation.”¹⁶¹ A will contestant “who would impeach a will on the ground that the decedent has become incompetent, must clearly prove that incompetency to exist.”¹⁶² Where subsequent revocation by a later will is at issue, the proponent of that will bears the burden of proving the existence of testamentary capacity at that time, by a preponderance of the evidence.¹⁶³
 - 2. Undue influence.
 - 3. Fraud.
 - 4. Improper execution.
 - 5. Forgery.
 - 6. Subsequent revocation by a later will.

III. Winning and Losing: Key Points.

- A. A no-contest clause discourages will contests by giving prospective contestants the choice of taking the certain, but smaller, will provisions or challenging the will for the chance at more.¹⁶⁴
- B. If the will contest is lost, the contestant forfeits her share according to the terms of the no-contest clause in the will.¹⁶⁵

¹⁵⁹ Dukeminier et al., *Wills Trusts & Estates* 198 (8th ed. 2009).

¹⁶⁰ *Keener v. Keener*, 278 Va. 435, 682 S.E.2d 545 (2009).

¹⁶¹ *Howard v. Howard*, 112 Va. 566, 72 S.E. 133 (1911).

¹⁶² *Woody v. Taylor*, 114 Va. 737, 77 S.E. 498 (1913).

¹⁶³ *Gibbs v. Gibbs*, 239 Va. 197, 387 S.E.2d 499 (1990).

¹⁶⁴ Dukeminier et al., *Wills, Trusts, & Estates* 199.

¹⁶⁵ See generally *Keener v. Keener*, 278 Va. 435, 682 S.E.2d 545 (2009), *Virginia Found. of Indep. Colls. v. Goodrich*, 246 Va. 435, 436 S.E.2d 418 (1993), *Womble v. Gunter*, 198 Va. 522, 95 S.E.2d 213 (1957).

- C. If the contest is won, the will may be invalidated or set aside, creating either a distribution under state intestacy laws or an alternate distribution under some other testamentary document.¹⁶⁶

IV. A Mixed Approach to No Contest Clause Enforcement.

A. Restatement of Property, Wills and Other Donative Transfers, Section 8.5.

1. This section states: “A provision in a donative document purporting to rescind a donative transfer to, or a fiduciary appointment of, any person who institutes a proceeding challenging the validity of all or part of the donative document is enforceable unless probable cause existed for instituting the proceeding..”
2. Note: The “probable cause” standard reduces the risk of forfeiture, so long as the contestant has a colorable claim.¹⁶⁷ This approach is in furtherance of the ancient maxim that *equity abhors forfeiture* and appears to promote beneficiaries' right to seek truth and justice where foul play is at work.

B. Uniform Probate Code, Section 2-517.

1. This section states, “A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.”

C. Numerous States Have Adopted the Probable Cause Standard for Enforcing No-Contest Clauses.

1. These states include Alaska, Colorado, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota, and Utah.
2. For example, Michigan’s statute states: “A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.”¹⁶⁸

D. Some States Do Not Enforce No-Contest Clauses.

1. These states include Louisiana, Indiana, and Florida.
2. For example, Florida law states: “A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable.”¹⁶⁹

E. Virginia's Neighboring Jurisdictions.

1. The Classic Approach to enforcing no-contest clauses is explained in an old, influential South Carolina case, *Mallet v. Smith*:
 - a. “It is the interest of the State, that every legal owner should enjoy his estate, and that no citizen should be obstructed by the risk of forfeiture from ascertaining his rights by the law of the land. It may be politic to encourage parties in the adjustment of doubtful rights by arbitration or

¹⁶⁶ See Donna R. Bashaw, *Are In Terrorem Clauses No Longer Terrifying? If So, Can You Avoid Post-Death Litigation With Pre-Death Procedures?*, 2 NAELA J. 349 (2006).

¹⁶⁷ See Comment c.

¹⁶⁸ MCL 700.2518.

¹⁶⁹ Florida Statutes Annotated § 732.517.

by private settlement; but it is against the fundamental principles of justice and policy to inhibit a party from ascertaining his rights by appeal to the tribunals established by the State to settle and determine conflicting claims. If there be any such thing as public policy, it must embrace the right of a citizen to have his claims determined by law.”¹⁷⁰

2. A similar approach is used in North Carolina and West Virginia.¹⁷¹
3. In the District of Columbia, probable cause is a defense to no contest clause enforcement only when the will is contested upon the grounds of fraud or revocation by codicil or a new will.¹⁷²

F. Strict but Narrow Enforcement.

1. In states where no-contest clauses are enforceable and a probable cause approach is not employed, courts narrowly construe these clauses to avoid forfeiture,
2. For example, in *Harrison v. Morrow*, the Court held that where the clause prohibited challenges to the procedures for distribution of specific bequests, a contest to the will in its entirety was outside the clause’s purview.¹⁷³ Thus, the Court applied a *narrow* construction to the clause, finding it inapplicable even as a contest to the will amounts to a contest of the distribution procedures and percentages allocated.

V. Recognizing the Split in Virginia: *Womble v. Gunter*.¹⁷⁴

A. Background.

1. When executors of a will applied to the courts for construction of the testamentary document, certain beneficiaries challenged the resulting degree before the state Supreme Court. The Court affirmed the Circuit Court's construction and also considered whether the no-contest clause in the will, apart from causing forfeiture of the beneficiary's share, also cause the forfeiture of their infant beneficiaries by representation on a “next friends” theory.

B. Discussion Favoring Probable Cause.

1. The Court’s Role to Administer Equity and Justice.

- a. “ A sound public policy demands that the truth of a disputable claim should be ascertained as the law provides, and that since courts are created to administer justice there should be no penalties inflicted upon those who seek their performance of that function.”¹⁷⁵

2. Incentivizing Meritorious Lawsuits to the Detriment of Wrongdoers.

¹⁷⁰ 27 SC Eq. (6 Rich.Eq.) 12 (1853).

¹⁷¹ See *Ryan v. Wachovia Bank & Trust Co.*, 235 N.C. 585, 70 S.E.2d 853 (1952); *Dutterer v. Logan*, 103 W.Va. 216, 137 S.E. 1 (1927).

¹⁷² *Wilkes v. Freer*, 271 F.Supp. 602 (D.D.C Jul 12, 1967) (NO. CIV. 2422-65), *Barry v. American Security & Trust Co.*, 77 U.S. App. D.C. 351, 135 F.2d 470 (1943).

¹⁷³ 977 So. 2d 457 (Ala. 2007).

¹⁷⁴ *Womble v. Gunter*, 198 Va. 522, 95 S.E.2d 213 (1957).

¹⁷⁵ 198 Va. at 525, 95 S.E.2d at 216.

- a. “[I]f a will is actually invalid, a strict and literal application of such ‘no-contest’ clause would tend to prevent the establishment of this fact, and thus thwart the course of justice. The persons, who may have been instrumental in the creation of the invalid document and who were to profit most by its admission to probate, would be provided a helpful cover for their wrongful acts.”¹⁷⁶

3. The Public’s Interest Is in Removing Barriers to the Moral/Legal Duty to Report.

- a. “The public has an interest in having all the documents properly presented to the court; a person knowing of such instrument has the moral if not the legal duty of presenting the instrument for consideration; it would be against public policy to deter such person from presenting the same if he knew that he would risk the loss of all benefits under the will if he took any action on it. The conclusion of these authorities is that if such person's action in instituting the contest is based on good faith and probable cause he should not be deprived of his benefits by the ‘no-contest’ provision.”¹⁷⁷

4. The Public Interest is in Seeking Truth and Justice.

- a. The public is “interested in the discovery of the commission of the crime of forgery, and such forgery or subsequent revocation by a later will is usually based upon evidence more definite in character than that tending to establish the shadowy lines of demarcation involved in mental capacity, undue influence or fraud.”¹⁷⁸

C. Discussion Favoring Strict Enforcement.

1. Discouraging Family Quarrels.

- a. “A will contest not infrequently engenders animosities and arouses hostilities among the kinsfolk of the testator, which may never be put to rest and which contribute to general unhappiness.”¹⁷⁹

2. Protecting the Settlor’s Reputation.

- a. “Moreover, suspicions or beliefs in personal insanity, mental weakness, eccentricities, pernicious habits, or other odd characteristics centering in or radiating from the testator, may bring his family into evil repute and adversely affect the standing in the community of its members.”¹⁸⁰

3. Increasing the Costs of Frivolous Lawsuits.

- a. A probable cause rule encourages litigation and shifts the balance unduly in favor of contestants.

4. Lack of Judicial Capacity to Deem a Testator’s Capacity or State of Mind as Compromised.

¹⁷⁶ 198 Va. at 525, 95 S.E.2d at 216.

¹⁷⁷ 198 Va. at 526, 95 S.E.2d at 217.

¹⁷⁸ 198 Va. at 526, 95 S.E.2d at 217.

¹⁷⁹ 198 Va. at 527, 95 S.E.2d at 217.

¹⁸⁰ 198 Va. at 527, 95 S.E.2d at 217.

- a. It is unfair to aging testators for their will to be overturned by an assertion that their age implies diminished capacity to will their property. “The ease with which plausible contentions as to mental unsoundness may be supported by some evidence is also a factor which well may be in the mind of a testator in determining to insert such a clause in his will. Nothing in the law or in public policy, as we understand it, requires the denial of solace of that nature to one making a will.”¹⁸¹

5. The Court Is Concerned with Effectuating the Testator's Intent, not the Fairness of the Results.

- a. “The court is not concerned with whether an heir or a devisee receives the property of a decedent. The normal freedom of the owner to dispose of his property as he sees fit should not be curtailed unless the disposition violates some rule of law or is against public policy. Where the language is clear and unambiguous, it is the duty of the court to give force and effect to the intention expressed by the testator and carry out the objects desired by him in disposing of his property.”¹⁸²

VI. The Womble Court's Conclusion: Strict Enforcement Against Parents and Infants.

- A. The no-contest clause had to be enforced against adults and infants, otherwise the Court would make a new will for the testator, contrary to his clear intention to restrain public challenges to his private affairs. * 532.
- B. Both on principle and weight of authority, these clauses protect the reputation of the dead and promote peace and harmony among the living. * 527.
- C. Public policy does not compel invalidating no-contest clauses, “even if the contestant had good grounds for opposing the allowance of the will”. * 527.
- D. In 1967, the Court heard *Gasque v. Sitterding*, pronouncing an interpretive rule for no-contest clauses, that if there is no ambiguity in the language of the clause, no further evidence is needed to determine the meaning of the clause nor to construe the intent of the testator.¹⁸³

VII. Strict Enforcement in 2010? A New Twist from *Keener v. Keener*.¹⁸⁴

A. Background.

- 1. In *Keener v. Keener*, executors filed a “pour-over will” for probate. This will “pours over” any property the decedent owned at the time of his death, into a trust set up during the decedent's life. Thus, the will existed only to transfer property to the trust, and the trust documents contained their own terms of disposition and distribution, and a no contest clause. One of the decedent's daughters was not included in the trust documents. She filed for intestate administration of her father's estate, effecting a challenge to the pour-over

¹⁸¹ 198 Va. at 527-28, 95 S.E.2d at 218.

¹⁸² 198 Va. at 532, 95 S.E.2d at 220.

¹⁸³ *Gasque v. Sitterding*, 208 Va. 206, 210, 156, S.E.2d 576, 580 (1967).

¹⁸⁴ *Keener v. Keener*, 278 Va. 435, 682 S.E.2d 545 (2009).

will. The Virginia Supreme Court had to determine whether her challenge to the existence of the will was within the purview of the trust documents' no-contest clause.

B. The Clause.

1. “Any person that objects to or contests any provision of this Trust, in whole or in part, shall forfeit his or her entire distribution otherwise payable under this Trust and receive only \$1.00 under this Trust and will receive no other distribution from my Trust nor from my estate.”¹⁸⁵

C. The Testator's Intent?

1. When the testator wrote that a contestant shall receive “no other distribution from my Trust nor from my estate,” it appears that his estate meant any part of it. A challenge to a pour-over will would thwart the testator's intent to fund the trust through the will.
2. But the Court focused on the language preceding this, which stated that the clause applied to those who contested “any provision of this Trust” and that any broader purpose was not conveyed by an actual provision of the trust.
3. While the testator's intent is the Court's focus, the Court's reading was narrow. The Court recited public policy disfavoring forfeiture, citing *Trailsend Land Co. v. Virginia Holding Corp.*, 228 Va. 319, 321 S.E.2d 667 (1984), and also noted that the testator or a “skilled draftsman acting at his direction, has the opportunity to select the language that will most precisely express the testator's intent.”¹⁸⁶

D. The Court's Conclusion: The Words of the Clause Speak of a Contest Only to the Trust.

1. The Court concluded that the “testator could, if he so desired, have included, either in his will or in the trust, language broad enough to include the acts complained of by the petitioners, but did not choose to do so.” Thus, the contestant to the will had not challenged any provision of the trust that could trigger a no-contest clause. The Court did note, that the contestant requested the lower court to remove the current trustees, but that this issue was not presented on appeal.

E. Contributions of Keener.

1. Strict Enforceability of No-Contest Clauses in Trusts.

- a. The *Keener* Court extended the *Womble* Court's rationale for strict enforcement of no-contest clauses in wills: the Court held as a matter of first impression that when decedents rely on trusts to dispose their property, no-contest clauses therein are to be fully enforced.

2. Reaffirms Strict Enforcement Against Infants.

- a. The Court settled that the *Womble* result of strict enforcement, without any good faith exceptions, was proper as to contestants and their infants under the terms of a no-contest clause.

3. A New Layer of Detail in Testamentary Documents.

¹⁸⁵ 278 Va. at 439, 682 S.E.2d at 546.

¹⁸⁶ 278 Va. at 443, 682 S.E.2d at 548-49.

- a. The *Keener* result presents a new challenge to testators who utilize multiple testamentary vehicles to bequeath their property. The language of no-contest clauses should be sufficiently detailed to cover the possibility that contesting beneficiaries inherit through intestacy or receive distributions from portions of the estate not expressly referenced in governing documents that contain the no-contest clause.

4. The Status of Independent Actions, Still Unknown.

- a. The Virginia Supreme Court has yet to determine whether independent actions for breach of contract might constitute a “contest” to the will.

VIII. Goodrich: Avoiding the Keener Result?

A. Is there a Contest?

1. In order for a no-contest clause to apply, the *Keener* Court noted that there must be a proper contest in the first place, as determined by “the facts and circumstances of each particular case.”¹⁸⁷ Thus, actions that seek to interpret a will, rather than contest it, may receive safe harbor from no-contest clauses.

B. Declaratory Judgment Actions Not Always a Contest.

1. In *Virginia Foundation of Independent Colleges v. Goodrich*, the Court held that a declaratory judgment action seeking interpretation of a will provision was not a contest to the will itself.¹⁸⁸
2. The Court noted that the no-contest clause had two purposes: to prevent attempts to “contest the will, its validity, its due and proper execution, or any of its provisions,” and to prohibit “conduct which in any way questions acts undertaken in making the will or any of its provisions.”¹⁸⁹
3. The Court found that the punctuation of the clause indicated that the clause proscribed acts surrounding the “making” of the will. Since the contestant had questioned the *meaning* of the will, it was not an action proscribed by the no-contest clause.
4. *See also What Constitutes Contest or Attempt to Defeat Will Within Provision Thereof Forfeiting Share of Contesting Beneficiary*, 3 A.L.R.5th 590 §§ 2a, 15a (1992).

C. A Fine Line: Womble and Keener vs. Goodrich.

1. In *In re Rohrbaugh*, a Virginia Circuit Court observed that *Womble's* reading of no-contest clauses could proscribe *any action* that thwarts the purpose of a will.¹⁹⁰ The Court stated, “In *Womble*, the Supreme Court of Virginia noted that a will is “usually” contested on one or more of these six grounds, but did not expressly or impliedly limit the scope of what constitutes a will contest solely to these specific grounds.” This view cautions those who might read *Goodrich* to state that declaratory judgment actions protect beneficiaries from no-contest clauses.

¹⁸⁷ 278 Va. at 441-42, 682 S.E.2d at 548.

¹⁸⁸ *Virginia Found. of Indep. Colls. v. Goodrich*, 246 Va. 435, 436 S.E.2d 418 (1993).

¹⁸⁹ 246 Va. at 439, 436 S.E.2d at 420.

¹⁹⁰ Nos. FI 2002-68397, CL 2009-16701, 2010 WL 1805359, at *8 n. 10 (Va.Cir. Mar.31, 2010).