

CHAPTER 30.1-15

FORMAL TESTACY AND APPOINTMENT PROCEEDINGS

30.1-15-01. (3-401) Formal testacy proceedings - Nature - When commenced.

1. A formal testacy proceeding is litigation to determine whether a decedent left a valid will. A formal testacy proceeding may be commenced by an interested person filing a petition as described in subsection 1 of section 30.1-15-02 in which the interested person requests that the court, after notice and hearing, enter an order probating a will, or a petition to set aside an informal probate of a will or to prevent informal probate of a will which is the subject of a pending application, or a petition in accordance with subsection 2 of section 30.1-15-02 for an order that the decedent died intestate.
2. A petition may seek formal probate of a will without regard to whether the same or a conflicting will has been informally probated. A formal testacy proceeding may, but need not, involve a request for appointment of a personal representative.
3. During the pendency of a formal testacy proceeding, the court shall not act upon any application for informal probate of any will of the decedent or any application for informal appointment of a personal representative of the decedent.
4. Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously appointed personal representative, after receipt of notice of the commencement of a formal probate proceeding, must refrain from exercising the power to make any further distribution of the estate during the pendency of the formal proceeding. A petitioner who seeks the appointment of a different personal representative in a formal proceeding also may request an order restraining the acting personal representative from exercising any of the powers of that office and requesting the appointment of a special administrator. In the absence of a request, or if the request is denied, the commencement of a formal proceeding has no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution.

30.1-15-02. (3-402) Formal testacy or appointment proceedings - Petition - Contents.

1. Petitions for formal probate of a will, or for adjudication of intestacy with or without request for appointment of a personal representative, must be directed to the court, request a judicial order after notice and hearing, and contain further statements as indicated in this section. A petition for formal probate of a will:
 - a. Requests an order as to the testacy of the decedent in relation to a particular instrument which may or may not have been informally probated and determining the heirs.
 - b. Contains the statements required for informal applications as stated in paragraphs 1 through 6 of subdivision a of subsection 1 of section 30.1-14-01 and the statements required by paragraphs 2 and 3 of subdivision b of subsection 1 of section 30.1-14-01.
 - c. States whether the original of the last will of the decedent is in the possession of the court or accompanies the petition.

If the original will is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will, and indicate that it is lost, destroyed, or otherwise unavailable.

2. A petition for adjudication of intestacy and appointment of an administrator in intestacy must request a judicial finding and order that the decedent left no will and determining the heirs, contain the statements required by subdivisions a and d of subsection 1 of section 30.1-14-01, and indicate whether supervised administration is sought. A petition may request an order determining intestacy and heirs without requesting the appointment of an administrator, in which case the statements required by paragraph 2 of subdivision d of subsection 1 of section 30.1-14-01 may be omitted.

30.1-15-03. (3-403) Formal testacy proceeding - Notice of hearing on petition.

1. Upon commencement of a formal testacy proceeding, the court shall fix a time and place of hearing. Notice shall be given in the manner prescribed by section 30.1-03-01 by the petitioner to the persons herein enumerated and to any additional person who has filed a demand for notice under section 30.1-13-04. Notice shall be given to the following persons:
 - a. The surviving spouse, children, and other heirs of the decedent;
 - b. The devisees and executors named in any will that is being, or has been, probated, or offered for informal or formal probate in the county, or that is known by the petitioner to have been probated, or offered for informal or formal probate elsewhere; and
 - c. Any personal representative of the decedent whose appointment has not been terminated.

Notice may be given to other persons. In addition, the petitioner shall give notice by publication to all unknown persons and to all known persons whose addresses are unknown who have any interest in the matters being litigated.

2. If it appears by the petition or otherwise that the fact of the death of the alleged decedent may be in doubt, or on the written demand of any interested person, a copy of the notice of the hearing on said petition shall be sent by registered mail to the alleged decedent at the alleged decedent's last-known address. The court shall direct the petitioner to report the results of, or make and report back concerning, a reasonably diligent search for the alleged decedent in any manner that may seem advisable, including any or all of the following methods:
 - a. By inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent.
 - b. By notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the alleged decedent.
 - c. By engaging the services of an investigator.

The costs of any search so directed shall be paid by the petitioner if there is no administration or by the estate of the decedent in case there is administration.

30.1-15-04. (3-404) Formal testacy proceedings - Written objections to probate - Demand for jury trial. Any party to a formal proceeding who opposes the probate of a will for any reason shall state in that party's pleadings the objections to probate of the will. In a contested formal testacy proceeding, any party is entitled to a jury trial of all issues of fact by serving upon all appropriate parties and filing with the court a written demand for jury trial. The written demand must be affixed to the pleading of the party which raises any issues of fact and may not be served and filed later than seven days before the time set for hearing.

30.1-15-05. (3-405) Formal testacy proceedings - Uncontested cases - Hearings and proof. If a petition in a testacy proceeding is unopposed, the court may order probate or intestacy on the strength of the pleadings if satisfied that the conditions of section 30.1-15-09 have been met, or conduct a hearing in open court and require proof of the matters necessary to support the order sought. If evidence concerning execution of the will is necessary, the affidavit or testimony of one of any attesting witnesses to the instrument is sufficient. If the affidavit or testimony of an attesting witness is not available, execution of the will may be proved by other evidence or affidavit.

30.1-15-06. (3-406) Formal testacy proceedings - Contested cases. In a contested case in which the proper execution of a will is at issue, the following rules apply:

1. If the will is self-proved pursuant to section 30.1-08-04, the will complies with the requirements for execution without the testimony of any attesting witness, upon filing the will and the acknowledgment and affidavits annexed or attached to it, unless there is evidence of fraud or forgery affecting the acknowledgment or affidavit.
2. If the will is notarized pursuant to paragraph 2 of subdivision c of subsection 1 of section 30.1-08-02, but not self-proved, there is a rebuttable presumption that the will complies with the requirements for execution upon filing the will.
3. If the will is witnessed pursuant to paragraph 1 of subdivision c of subsection 1 of section 30.1-08-02, but not notarized or self-proved, the testimony of at least one of the attesting witnesses is required to establish proper execution if the witness is within this state, competent, and able to testify. Proper execution may be established by other evidence, including an affidavit of an attesting witness. An attestation clause that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause occurred.

30.1-15-07. (3-407) Formal testacy proceedings - Burdens in contested cases. In contested cases, petitioners who seek to establish intestacy have the burden of establishing prima facie proof of death, venue, and heirship. Proponents of a will have the burden of establishing prima facie proof of due execution in all cases, and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, revocation, or other cause affecting its validity. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. If a will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to probate, and if a will is opposed by a petition for a declaration of intestacy, it shall be determined first whether the will is entitled to probate.

30.1-15-08. (3-408) Formal testacy proceedings - Will construction - Effect of final order in another jurisdiction. A final order of a court of another state determining testacy, the validity or construction of a will, made in a proceeding involving notice to and an opportunity for contest by all interested persons must be accepted as determinative by the courts of this state if it includes, or is based upon, a finding that the decedent was domiciled at the time of death in the state where the order was made.

30.1-15-09. (3-409) Formal testacy proceedings - Order - Foreign will. After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, if the court finds that the testator is dead, venue is proper, and that the proceeding was commenced within the limitation prescribed in section 30.1-12-08, it shall determine the decedent's domicile at death, the decedent's heirs, and the decedent's state of testacy. Any will found to be valid and unrevoked shall be formally probated. Termination of any previous informal appointment of a personal representative, which may be appropriate in view of the relief requested and findings, is governed by section 30.1-17-12. The petition shall be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead. A will from a place which does not provide for probate of a will after death may be proved for

probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become effective under the law of the other place.

30.1-15-10. (3-410) Formal testacy proceedings - Probate of more than one instrument. If two or more instruments are offered for probate before a final order is entered in a formal testacy proceeding, more than one instrument may be probated if neither expressly revokes the other or contains provisions which work a total revocation by implication. If more than one instrument is probated, the order shall indicate what provisions control in respect to the nomination of an executor, if any. The order may, but need not, indicate how any provisions of a particular instrument are affected by the other instrument. After a final order in a testacy proceeding has been entered, no petition for probate of any other instrument of the decedent may be entertained, except incident to a petition to vacate or modify a previous probate order and subject to the time limits of section 30.1-15-12.

30.1-15-11. (3-411) Formal testacy proceedings - Partial intestacy. If it becomes evident in the course of a formal testacy proceeding that, though one or more instruments are entitled to be probated, the decedent's estate is or may be partially intestate, the court shall enter an order to that effect.

30.1-15-12. (3-412) Formal testacy proceedings - Effect of order - Vacation. Subject to appeal and subject to vacation as provided herein and in section 30.1-15-13, a formal testacy order under sections 30.1-15-09 through 30.1-15-11, including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:

1. The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will:
 - a. Were unaware of its existence at the time of the earlier proceeding; or
 - b. Were unaware of the earlier proceeding and were given no notice thereof, except by publication.
2. If intestacy of all or part of the estate has been ordered, the determination of heirs of the decedent may be reconsidered if it is shown that one or more persons were omitted from the determination and it is also shown that the persons:
 - a. Were unaware of their relationship to the decedent;
 - b. Were unaware of the decedent's death; or
 - c. Were given no notice of any proceeding concerning the decedent's estate, except by publication.
3. A petition for vacation under either subsection 1 or 2 must be filed prior to the earlier of the following time limits:
 - a. If a personal representative has been appointed for the estate, the time of entry of any order approving final distribution of the estate, or, if the estate is closed by statement, six months after the filing of the closing statement.
 - b. Whether or not a personal representative has been appointed for the estate of the decedent, the time prescribed by section 30.1-12-08 when it is no longer possible to initiate an original proceeding to probate a will of the decedent.
 - c. Twelve months after the entry of the order sought to be vacated.

4. The order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs.
5. The finding of the fact of death is conclusive as to the alleged decedent only if notice of the hearing on the petition in the formal testacy proceeding was sent by registered or certified mail addressed to the alleged decedent at the alleged decedent's last-known address and the court finds that a search under subsection 2 of section 30.1-15-03 was made.

If the alleged decedent is not dead, even if notice was sent and search was made, the alleged decedent may recover estate assets in the hands of the personal representative. In addition to any remedies available to the alleged decedent by reason of any fraud or intentional wrongdoing, the alleged decedent may recover any of the estate or its proceeds from distributees which is in their hands, or the value of distributions received by them, to the extent that any recovery from distributees is equitable in view of all of the circumstances.

30.1-15-13. (3-413) Formal testacy proceedings - Vacation of order for other cause.

For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal.

30.1-15-14. (3-414) Formal proceedings concerning appointment of personal representative.

1. A formal proceeding for adjudication regarding the priority or qualification of one who is an applicant for appointment as personal representative, or of one who previously has been appointed personal representative in informal proceedings, if an issue concerning the testacy of the decedent is or may be involved, is governed by section 30.1-15-02, as well as by this section. In other cases, the petition shall contain or adopt the statements required by subsection 1 of section 30.1-14-01 and describe the question relating to priority or qualification of the personal representative which is to be resolved. If the proceeding precedes any appointment of a personal representative, it shall stay any pending informal appointment proceedings as well as any commenced thereafter. If the proceeding is commenced after appointment, the previously appointed personal representative, after receipt of notice thereof, shall refrain from exercising any power of administration except as necessary to preserve the estate or unless the court orders otherwise.
2. After notice to interested persons, including all persons interested in the administration of the estate as successors under the applicable assumption concerning testacy, any previously appointed personal representative, and any person having or claiming priority for appointment as personal representative, the court shall determine who is entitled to appointment under section 30.1-13-03, make a proper appointment and, if appropriate, terminate any prior appointment found to have been improper as provided in cases of removal under section 30.1-17-11.