

DISTRICT OF COLUMBIA BAR
Continuing Legal Education

**SURVIVAL GUIDE TO ADMINISTERING THE INSOLVENT
DECEDENT'S ESTATE**

October 4, 2007
6:00PM to 9:15PM

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I. WHERE TO FIND THE LAW

A. District of Columbia

1. Title 18 – Wills
2. Title 19 – Descent and Distribution
3. Title 20 – Probate and Administration of Decedents’ Estates
 - a. Chapter 7 – Administration of the Estate
 - i. § 20-701, et seq: Duties of personal representative, notice of appointment to heirs, legatees and creditors
 - ii. §§ 20-751 – 753: Claims by personal representatives and attorneys
 - b. Chapter 9 – Claims
 - i. § 20-901: Claims not paid in normal course of administration
 - ii. § 20-902: Effect of statute of limitations
 - iii. § 20-903: Limitation on presentation of claims against the estate
 - iv. § 20-904: Exempt assets
 - v. § 20-905: Manner of presentation of claims
 - vi. § 20-906: Order of payment
 - vii. § 20-912: Secured claims

B. Maryland

1. Estates and Trusts Article
 - a. Title 7 – Administration of the Estate
 - b. Title 8 – Claims of Creditors
 - i. § 8-105: Order of payment
 - ii. § 8-107: Allowance of claim
 - iii. § 8-108: Payment of claim
 - c. Title 9 – Special Provisions Relating to Distribution

C. Virginia

1. Title 64.1 – Wills and Decedents’ Estates
 - a. Chapter 1 – Chapter 10
 - b. Chapter 6 – Personal Representatives and Administration of the Estate
 - i. Article 5.1: Exempt Property and Allowances
 - ii. Article 6: Assets and Debts
 - (a) § 64.1-157: Order in which debts of decedents to be paid
 - (b) § 64.1-158: Creditors to be paid in order of their classification; class paid ratably; when representative not liable for paying debt of inferior dignity

II. WHAT IS AN INSOLVENT ESTATE?

A. Definitions of Insolvency

1. Accounting: Total liabilities exceed total assets.¹
2. Bankruptcy Code: Financial condition such that the sum of such entity's debts is greater than all of such entity's property, at fair valuation, exclusive of property that is either exempt or has been fraudulently transferred.²
3. Fraudulent Conveyance Act: Where the sum of the debtor's debts is greater than all of the debtor's assets at a fair evaluation.³
4. UCC: A person is insolvent who has either ceased to pay his debts as they become due or is insolvent within the meaning of the Bankruptcy Code.⁴

B. Insolvent Estate for Tax Purposes

1. Federal: Internal Revenue Code defines "insolvency" as excess of liabilities over fair market value of assets.⁵
2. District of Columbia: Defined for Corporations, ("unable to pay debts as they become due in the regular course of affairs"), UCC ("ceased or unable to pay debts as they become due or insolvent within meaning of the federal Bankruptcy Code") and Insurance (D.C. Code Ann. § 31-1301(12)) purposes
3. Maryland: Defined for UCC (same as D.C.) and Insurance (Md. Code Ann., Insurance § 9-201 "impaired insurer") purposes.
4. Virginia: Defined for UCC (same as D.C.) and Insurance ("liabilities in excess of assets or inability to pay obligations as they become due in the regular course of business") purposes.

III. BASIC COSTS TO START PROBATE

A. Court Costs

District of Columbia

Rule 425

Court costs are assessed on the basis of the value of the probate estate, excluding real estate. No court costs are assessed if the value of the probate

¹ "Accounting Terminology Guide", The Web Site of the New York State Society of CPAs. http://www.nysscpa.org/prof_library/guide.htm (August 16, 2006).

² 11 U.S.C. § 101(32).

³ D.C. Code Ann. § 28-3102(a)

⁴ U.C.C. 1-201(23)

⁵ See e.g. 26 U.S.C. § 58(c)(1)(B).

estate is less than \$500. At the other end of the scale, probate estate assets over \$5.0 million are assessed court costs of \$2,300, plus 0.02% of the excess over \$5.0 million.

Real Estate: An additional flat fee of \$25 is assessed for real property or properties in D.C., of whatever value, carried as probate assets. If the proceeds of the sale of real property are included in the estate, or if real estate is sold during the estate administration after filing a waiver of inventories and accounts under Rule 415, or subsequent to the filing of the petition for probate in unsupervised estates, the real estate value is included in the court cost assessment.

Comment. Note that there are different fee schedules depending on the decedent's date of date.

<u>Date of death</u>	<u>Rule</u>
before January 1, 1981	Rule 24 (called "fees")
after January 1, 1981	Rule 125 (called "court costs")
on or after July 1, 1995	Rule 425

Court Cost Computation

The value of the probate estate includes:

- Gross principal value of the assets of the probate assets;
- Gross value of any increase in the principal value of any probate asset realized upon disposition; and
- Gross value of any income reported by the personal representative in periodic accounts, but excluding the value of real property except when sold during administration.

Time of payment

In a supervised administration, any unpaid costs shall be paid at the time of filing the first account. In an unsupervised administration, court costs must be paid at the time of filing the petition for probate.

Trust Liability for Court Costs

As per D.C. Code §19-1305.05(a)(3), the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children under 19-101.02, 19-101.03, and 19-101.04, to the extent the settlor's residuary probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.

Maryland

Md. Code Ann. Estates & Trusts §2-206

The Maryland probate fee is based on the total gross estate. Md. Code Ann. Estates & Trusts §2-206 sets out the fee schedule. For example, estates valued at less than \$10,000 are charged a \$50 probate fee. Estates of \$5 million or more are charged a probate fee of \$2,500, plus .02% over \$5 million.

Computation

For purposes of calculating probate fees, the value of the probate estate includes the sum of:

- (1) The value of all inventories filed in the proceedings;
- (2) All principal and income receipts; and
- (3) All increases realized on a disposition, other than a distribution to beneficiaries, of any probate asset; less
- (4) All decreases realized on a disposition, other than a distribution to beneficiaries

If the estate is proceeding under modified administration, for the purpose of determining the appropriate fee, the value of the estate is the gross value of the probate assets as reported on the final report under modified administration.

Time of payment

The probate fee is assessed and collected when the first administration account is filed. For regular estates, the account is due nine months after the appointment of the personal representative. For small estates (value of \$30,000 or less, or \$50,000 or less if the spouse is the sole legatee or heir) the probate fee is due when the petition for the administration of a small estate is filed. If the estate is under modified administration, the fee is assessed and collected when the personal representative files the final report under modified administration.

Virginia

Va. Code §58.1-1712

A tax is imposed on the probate of every will or grant of administration not exempt by law. The probate tax is based on the date of death value (or alternative value, if chosen) of the estate, including both personalty and realty. For every \$100 of value, or fraction of \$100, a tax of 10 cents is imposed. The tax does not apply to decedents' estates of \$15,000 or less in value. Payment of the probate tax is prerequisite to qualification as personal representative. Va. Code § 58.1-1715.

City or county probate tax: In addition to the state tax imposed by §58.1-1712, the governing body of any county and the council of any city may impose a county or city tax on the probate of every will or grant of administration as provided in §58.1-3805. The city or county probate tax is one-third of the amount of the state tax on such probate of a will or grant of administration.

B. Bond

District of Columbia

D.C. Code §20-502

Unless excused from giving bond by the will or by waiver of all interested persons, each personal representative must give bond. Any person having an interest in the estate worth in excess of \$1,000, or any creditor having a claim in excess of \$1,000, may make a written demand that a personal representative give bond in an amount not exceeding the value of the person's or creditor's interest in the estate. Upon a request for bond, the Court may set a hearing to determine if bond is required. Bond premiums are chargeable against the estate assets.

Maryland

Md. Est. & Trusts Art. §§ 6-101, 102

Even if the terms of the will exempts the personal representative from giving bond, the personal representative must give a nominal bond for debts and inheritance taxes on the probate estate. The bond is set by the Register of Wills based on the size of the personal estate. When the inventory is filed, the Register of Wills may direct that the bond be increased if the original estimate was too low.

Virginia

Va. Code Ann. §§ 64.1-119, 121

All fiduciaries are required to be bonded in Virginia. Va. Code § 64.1-119. The bond penalty must equal, at the least, the full value of the personalty. Va. Code § 64.1-120. If the will authorizes the executor or administrator to sell real estate or receive rents, the bond must equal, at the least, the full value of both the personal estate and of such real estate, or rents and profits, as the case may be. The fiduciary may request that the bond amount be re-determined in light of any reduction in the current market value of the estate property. Va. Code § 64.1-120.

Security (surety) is generally required on a bond in Virginia. There are, however, exceptions to the security requirement. Under Va. Code §64.1-121, no security is required if:

- (1) the personal representative(s) are the sole distributees or beneficiaries of the estate;
- (2) the personal representatives are entitled to file a statement in lieu of an account under Va. Code Ann. §26-20.1, then security is required only on the portion of bond covering the property passing to beneficiaries who are not personal representatives; or
- (3) the Will waives security.

Under Va. Code §26-4, courts and clerks have the discretion to allow a personal representative to qualify by giving bond without a surety (i.e., no security) if the amount of the estate coming into the hands of the personal representative does not exceed \$15,000.

Note: Va. Code §64.1-121 provides that if at any time person with an interest in the estate files a written motion with the court that surety upon the bond should be required, the court may require the fiduciary to furnish surety and, in addition, award the movant reasonable attorney's fees and costs which shall be paid out of the estate.

C. Publication Costs

D.C. and Maryland

In the District of Columbia and in Maryland, the Notice of Appointment of the Personal Representative must be published in a newspaper of general circulation in the county of appointment, once a week for three successive weeks. After the third printing of the Notice, the personal representative must file with the Register of Wills certification that the Notice has been published.

Virginia

In Virginia, the personal representative must give notice to statutorily designated persons within 30 days of qualifying but need not publish. Notice is not required when the known assets passing under the Will or by intestacy do not exceed \$5,000. Va. Code §64.1-122.2.

Va. Code § 64.1-171 addresses the proceeding for receiving proof of debts. The commissioner of accounts appoints a time and place for receiving proof of debts and demands against the decedent or his estate. The commissioner publishes notice, in a newspaper of general circulation in the county or city where the fiduciary qualified, at least ten days before the hearing date. The

fiduciary is required to give written notice to any known claimant of a disputed claim at the claimant's last address.

IV. LIENS

A. Tax Liens

- The general rule is that a federal tax claim or lien must be paid before all other claims.

- Generally, for federal tax liens, **first in time is first in right.**⁶

1. Method of Perfection

a. **Federal:** After the lien is assessed, a Notice and Demand for Payment is sent to the taxpayer. If 10 days pass without payment, the IRS may file a Notice of Federal Tax Lien in the land or chattle records. Such filing publicly notifies creditors and the public of the lien, which attaches to all property and all rights in property.⁷

b. **District of Columbia:** A lien is created on all property by assessment and demand. However, the lien imposed by D.C. Code Ann. § 47-4421 by assessment is not valid against a bona fide purchaser for value, a holder of a security interest, a mechanic's lienor, or a judgment lien creditor until the lien has been filed with the Recorder of Deeds.⁸

c. **Maryland:** Tax collector must record a notice of tax lien with the Clerk of the circuit court for the county where property subject to the lien is located.⁹ The lien then has the force and effect of a judgment lien.¹⁰

d. **Virginia:** Memorandum of lien must be recorded with the Clerk's office of the county or city where the decedent resided, and the Clerk's office of the county or city where real estate subject to the lien is located.¹¹ The lien is enforceable for up to ten years following decedent's death.

B. Medicaid Liens

There are two kinds of Medicaid liens—pre-death or Tax Equity and Financial Responsibility Act (TEFRA) liens, and post-death or estate recovery liens.¹²

⁶ US v. White Bear Brewing Co., 350 U.S. 1010 (1956). See also Pearlstein v. U.S. Small Business Admin., 719 F.2d 1169, 1177 (1983).

⁷ <http://www.irs.gov/businesses/small/article/0,,id=108339,00.html#Notice>

⁸ D.C. Code Ann. § 47-4423.

⁹ Md. Code, Tax-General § 13-807.

¹⁰ Md. Code, Tax-General § 13-808.

¹¹ Va. Code Ann. §§ 58.1-908 58.1-632, and 58.1-1805.

¹² <http://aspe.hhs.gov/daltcp/Reports/liens.htm>

While estate recovery does not begin until the Medicaid recipient dies, a TEFRA lien may be placed against the real property of a recipient of any age who is an inpatient of a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, if it has been determined that he or she cannot reasonably be expected to return home. States must afford the individual an **opportunity for a hearing** on that finding and are required to dissolve a TEFRA lien if the Medicaid recipient returns home.¹³

Federal guidelines direct states to pursue recovery of assets conveyed through probate.¹⁴

1. Method of Perfection

a. **District of Columbia:** D.C. Code Ann. § 4-607 provides for a Medicaid lien perfected by filing with the Recorder of Deeds **and** serving of notice on the party against whom the lien is asserted.

b. **Maryland:** Md. Code, Health-General § 15-121 allows a Medicaid claim to be asserted against the estate but this may be modified if there is a hardship. Maryland will also place a TEFRA lien on a person's home provided that they have no reasonable expectation that the person will return to live there. If they do return, then the lien is lifted.

c. **Virginia:** Virginia does not impose TEFRA liens against a recipient's home.¹⁵ However, Virginia will pursue recovery if the Medicaid recipient (or their estate) exerts a claim against a third party tortfeasor who caused the personal injury being treated. In the event of a wrongful death judgment or settlement, Virginia will pursue a claim in the amount of the outstanding Medicaid bills paid under the Virginia Medical Assistance Program.¹⁶ The amount of this lien is subject to negotiation and even waiver by the attorney general's office¹⁷, and is subject to reduction by the trial court to ensure "a just recovery for the injured party and reasonable compensation for her counsel."¹⁸

2. Exceptions

a. **Federal:** Under 42 U.S.C. §1396p, a lien may NOT be attached to a home if the Medicaid enrollee's spouse, minor child, blind or disabled child, or sibling with an equity interest in the house resides there and has done so for a year or more.¹⁹

¹³ 42 U.S.C.S. § 1396p.

¹⁴ Ibid.

¹⁵ <http://www.pearlstein-law.com/medicaid%20exemptions%20table.pdf>

¹⁶ Va. Code Ann. § 8.01-66.9.

¹⁷ *Commonwealth v. Huynh*, 262 Va. 165; 546 S.E.2d 677 (2001).

¹⁸ *Terry v. Harris*, 56 Va. Cir. 326, 327 (2001).

¹⁹ Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices

b. **District of Columbia:** D.C. Code § 3-504(b) manifests the requirement that liens for recovery not impose any “undue hardship” on the family of the Medicaid recipient. D.C. courts have interpreted this section strictly, however, and appear to favor full repayment of expenses even when recipients have little income.²⁰ Despite this strict interpretation, D.C. Code § 3-504(b) provides the mayor with the power to waive enforcement of any claim or lien for Medicaid expenses.

c. **Maryland:** MD Health code § 15-121(b) provides that if imposition of a lien would cause “substantial hardship” on the surviving dependants of the deceased. In addition, Maryland may release or reduce its subrogation claims under 15-120(c)(3) if that claim causes “substantial hardship” to the recipient or their surviving dependants.

d. **Virginia:** Under Va. Code Ann. § 8.01-66.9, courts may impose a reduction in the amount of the lien in order to preserve equity and ensure fairness.

C. On Specific Property

1. **Real Estate** (deeds of trust and mortgages)

a. Method of perfection

i. **District of Columbia:** Liens are perfected by filing with the Recorder of Deeds.²¹

ii. **Maryland:** Mortgages are perfected by filing on the land records with the county recorder.²²

iii. **Virginia:** Liens against real property are perfected by being filed on the land records with the clerk of the circuit court where the property is located.²³

2. **Personal Property**

a. Method of perfection

i. **UCC Article 9:** Personal property liens are perfected by filing a financing statement with the secretary of state. *See* D.C. Code Ann. §§ 28:9-301, *et seq.*; Md. Code, Commercial Law §§ 9-301, *et seq.*; and Va. Code Ann. §§ 8.9A-301, *et seq.*

²⁰See. *Walker v. District of Columbia*, 682 A.2d 639 (1996).

²¹D.C. Code Ann. §§ 42-401, -801.

²²<http://www.bankruptcymaryland.com/>

²³Va. Code § 55-58.1.

D. Mechanics' Liens

1. **District of Columbia**²⁴

a. The Notice of Mechanics' Lien must be filed with the Recorder of Deeds **within 90 days** after completion of the building or improvement.²⁵

b. A D.C. lien is inchoate. The lien relates back to the day work commenced on the project.²⁶ The lien survives bankruptcy or a sale of the property unless challenged. Based on the case law from other states, the automatic stay of the Bankruptcy Code should not stay the perfection of the mechanic's lien.

c. Generally, a D.C. mechanic's lien has priority over all liens and mortgages that attach to the property after work was commenced. A DC mechanic's lien has priority over construction loan advances made after the claimant filed its Notice of Mechanic's Lien.²⁷ The mechanic's lien priority is only to post-notice advances, regardless of when the construction loan was recorded.

d. Subcontractors have priority over general contractors with subcontractors of the same class taking pro rata.²⁸ If a subcontractor gave notice to the owner before the owner paid the general contractor, however, that subcontractor has priority to the extent of those payments.²⁹

2. **Maryland**³⁰

a. A Maryland contractor must file a **Petition to Establish a Lien** and then attend a show cause hearing so that the court can establish an "Interlocutory Lien."³¹

b. A Maryland mechanic's lien has essentially the same priority as a judgment lien. Most types of liens filed before the issuance of an interlocutory lien will have priority over the mechanic's lien, as well as construction loans recorded prior to a mechanic's lien court proceeding.

c. A construction lender may lose its priority only if it advances additional money with knowledge that a mechanic's lien claim is in progress.³²

d. If there are multiple mechanics' liens on one property, they will take pro rata, regardless of which lien petition is filed first.³³ Failure to

²⁴ See <http://www.fullertonlaw.com/chapt4.htm>, updated in 2005.

²⁵ D.C. Code Ann. § 40-301.02.

²⁶ D.C. Code Ann. § 40-301.01.

²⁷ D.C. Code Ann. § 40-303.07.

²⁸ D.C. Code Ann. § 40-303.10.

²⁹ D.C. Code Ann. § 40-303.03.

³⁰ See <http://www.fullertonlaw.com/mdtable.htm>, updated in 2005.

³¹ Md. Code, Real Property § 9-105.

³² See <http://www.fullertonlaw.com/chapt2.htm#VII.%20PRIORITY>.

³³ Md. Code, Real Property § 9-108.

apportion the claim, however, may give other mechanic's liens a higher priority.³⁴

3. **Virginia**³⁵

a. All contractors must file a Memorandum of Mechanic's Liens in land records **within 90 days** of last supply of labor or materials.³⁶

b. A Virginia mechanic's lien may have the highest priority of any in the United States. The mechanic's lien claimant will have priority over the construction loan bank.³⁷ The Virginia mechanic's lien will also survive a foreclosure or any other sale of the property.³⁸

c. Although a mechanic's lien for new construction will have priority over the construction loan, the bank will have first priority for money advanced to buy the land.³⁹ In other words, the bank has the first lien on the land and the mechanics' lien claimant has the first priority in the building. A mortgage or other lien recorded prior to the commencement of work has complete priority over a mechanic's lien for rehabilitation, remodeling or home improvement.

d. Because the lien is inchoate, the "automatic stay" of the Bankruptcy Code does not stay the perfection of the mechanics' lien.⁴⁰

E. **Hospital Liens**

1. **District of Columbia:** Liens are perfected upon notice given to the party against whom the lien is asserted and recordation with the Recorder of Deeds.⁴¹

2. **Maryland:** Lien must be filed with the Clerk of the circuit court in which the medical services were provided.⁴² Hospital's liens are only subordinate to an attorney's lien for professional services for collecting or obtaining damages.⁴³

3. **Virginia:** Written notice must be given to the injured party.⁴⁴ The hospital lien is inferior to the lien of an attorney or personal representative for professional services in a claim or suit for damages.⁴⁵

³⁴ See <http://www.fullertonlaw.com/chapt2.htm#VII.%20PRIORITY>.

³⁵ See <http://www.fullertonlaw.com/chapt1.htm>, updated in 2005.

³⁶ Va. Code Ann. § 43-4.

³⁷ Va. Code Ann. § 43-21.

³⁸ See *Hadrup v. Sale*, 201 Va. 421, 424-425 (1959).

³⁹ Va. Code Ann. § 43-21.

⁴⁰ See <http://www.fullertonlaw.com/chapt1.htm>, updated in 2005.

⁴¹ D.C. Code Ann. §§ 40-201, -202.

⁴² Md. Code, Health-General § 16-602(a).

⁴³ Md. Code, Commercial Law § 16-601(c).

⁴⁴ Va. Code Ann. §§ 8.01-66.5, -66.9.

⁴⁵ Va. Code Ann. §§ 8.01-66.3.

- a. In any civil action brought for wrongful death of or injuries to a prisoner, Virginia will have a lien against such action for the amount of medical services rendered to that prisoner.⁴⁶ Such a claim is inferior to reasonable attorney's fees.⁴⁷
- b. As with Medicaid liens, hospital liens exerted by state hospitals are subject to "sound judicial discretion" and can be reduced by the courts in cases where the equities so require.⁴⁸

V. CLAIMS

A. Statute of Limitations

1. District of Columbia

- a. D.C. Code Ann. § 20-903(a)(1) provides that all claims against a decedent's estate, whether founded on contract or other legal basis, shall be barred against the estate unless presented **within six months** after the date of the first publication of notice of the appointment of a personal representative.⁴⁹

2. Maryland

- a. Md. Code Ann., Est. & Trusts § 8-103(a) states that **all** claims against an estate of a decedent are forever barred against the estate, the personal representative, and the heirs and legatees, unless presented within the earlier of: (i) **six months** after the date of the decedent's death; or (ii) **two months** after the personal representative mails or otherwise delivers to the creditor a copy of a § 7-103 notice or other written notice, notifying the creditor that he has two months to present his claim.⁵⁰
- b. Upon appointment, the personal representative must deliver a copy of the Notice of Appointment to all creditors then known, and thereafter to any subsequently discovered creditor. However, creditors are still bound to the six-month limitation, regardless of **whether or not they receive actual notice**.⁵¹
- c. Even if an action is commenced beyond this six-month limitations period, however, a personal representative may be **estopped** to assert the statute of limitations as a defense if the delay in commencing an action is induced by the personal representative.⁵²

⁴⁶ Va. Code Ann. § 8.01-66.9:1.

⁴⁷ Id.

⁴⁸ Quivers v. Suffee, 58 Va. Cir. 94,95 (2001).

⁴⁹ See In re Estate of Sato v. Castro, 878 A.2d 1247 (D.C. 2005) (PR could not make payment to himself for claim against estate without filing timely notice with the Register of Wills).

⁵⁰ See Collier v. Connolley, 285 Md. 123 (1979).

⁵¹ Lampton v. LaHood, 94 Md. App. 461 (1993).

⁵² Grimberg v. Marth, 338 Md. 546 (1995).

3. Virginia

- a. Va. Code Ann. § 64.1-179 provides that **after six months** from the qualification of the personal representative, the court may, upon motion of the personal representative or a legatee or distributee, make an order for the creditors and all interested persons to show cause against the payment of the estate to legatees or distributees. A copy of the order must be published once a week for two successive weeks, in one or more newspapers, as the court directs. On or after the day named in the order, the court may order the payment to the legatees or distributees.
- b. However, every legatee or distributee to whom any such payment is made may, in a suit brought against him **within five years afterward**, be adjudged to refund a due proportion of any claims enforceable against the decedent or his estate which have been finally allowed by the Commissioner of Accounts or the court, or which were not presented, including recovery costs.
- c. In the event any claim becomes known to the personal representative after the notice for debts and demands but prior to the entry of an order of distribution, the claimant, if the claim is disputed, shall be given notice and the order of distribution shall not be entered until **ten days after notice**.
- d. Legatees have a **one year limitations period** in which to bring claims for tangible personal property.

B. Due Process Concerns

- In Tulsa Prof'l Collection Servs. v. Pope, 485 U.S. 478, 99 L. Ed. 2d 565, 108 S. Ct. 1340 (1988), the Supreme Court held that “due process requires the personal representative of an estate to provide **actual notice** of probate proceedings by mail or equally reliable means to all creditors whose identities are **‘known or reasonably ascertainable.’**”

1. District of Columbia

- a. A personal representative is under a duty to make a reasonably diligent search for creditors. “Impracticable and extended searches” are not required.⁵³
- b. Publication notice is sufficient for creditors who are not reasonably ascertainable or whose claims are merely “conjectural.” In re Estate of Bryant v. Bryant, 793 A.2d 487 (D.C. 2002).
- c. D.C. Code Ann. § 20-704 mandates publication of a Notice of Appointment to Interested Persons, Creditors and Unknown Heirs **within**

⁵³ Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 317-18 (1950)).

twenty days after appointment of the personal representative, in any newspaper of general circulation for three successive weeks. Those concerned are left in no uncertainty because the statute provides that any claim not filed within the prescribed period is unenforceable. Evans v. Washington Hospital Ctr., Inc., 298 A.2d 44 (D.C. 1972).

2. Maryland

a. Md. Code, Est. and Trusts § 7-103 requires the personal representative to publish a Notice of Appointment in a newspaper of general circulation for three successive weeks notifying creditors to present their claims.

b. Md. Code, Est. and Trusts § 7-103.1(a) also provides, “**Promptly after appointment**, the personal representative of a decedent’s estate shall: (1) Make a reasonably diligent effort to ascertain the names and addresses of the decedent’s creditors; and (2) Mail or otherwise deliver a notice to those creditors whose names and addresses he has ascertained of the time within which their claims may be presented under Md. Code § 8-103(a).”⁵⁴

c. What constitutes a “reasonably diligent effort” has not yet been decided by Maryland appellate courts. Warfel v. Brady, 95 Md. App. 1 (1993).

d. A self-executing statute of limitations, like Md. Code Ann., Est. & Trusts § 8-103(a), does not violate a creditor’s due process rights. Lampton v. LaHood, 94 Md. App. 461 (1993).

3. Virginia

a. “The right to notice as a requirement of due process is limited to interested parties, so that they may be apprised of an action and be given an opportunity to be heard on matters pending before a court that may affect their interests.” In re Phillips, 265 Va. 81 (2003) (applying Tulsa).

C. Actual Notice of Personal Representative

1. District of Columbia

a. In administering an estate, a personal representative is obliged to consider all valid claims about which he has actual knowledge, even if creditors fail to comply with the enumerated filing formalities of D.C. Code Ann. § 20-905.

b. A personal representative cannot hide behind a procedural defect in the notice in order to avoid paying a legitimate debt of which the personal representative has actual, timely notice, and a trial court abuses its discretion under D.C. Code Ann. § 20-905 if it disallows such a claim

⁵⁴ See Ohio Casualty Ins. Co. v. Hallowell, 94 Md. App. 444 (1993).

purely for defect of formal notice to the personal representative. In re Estate of Sato v. Castro, 878 A.2d 1247 (D.C. 2005). *See also* In re Estate of Monge, 841 A.2d 769 (D.C. 2004).⁵⁵

2. Maryland

a. It appears from the statutory language that a personal representative has a duty to conduct a **reasonably diligent search** for creditors, and an express duty to notify those creditors of his appointment. Creditors who are so notified have two months to present their claims, as opposed to the normal six month limitations period. The personal representative can be sued by parties injured by breaches of his fiduciary duty under Md. Code, Est. and Trusts § 7-403.

b. Mere notice to a representative of an estate regarding a possible demand or claim against an estate does not constitute presenting or filing a claim under Md. Code Ann., Est. & Trusts § 8-104. Lampton v. LaHood, 94 Md. App. 461 (1993).

3. Virginia

a. Generally, at the time that the personal representative initiates a **debts and demands hearing**, the Commissioner of Accounts will ask the personal representative to advise him of any known outstanding claims.⁵⁶ The personal representative is also required to give 10 days notice of the debts and demands hearing to any creditor known to him.⁵⁷

b. It is believed that claims that are not forwarded and approved by the Commissioner of Accounts are denied and excluded from distribution of estate assets. However, the statute is unclear and there appear to be no cases on the question.

D. Method of Filing Claims

1. District of Columbia

a. Pursuant to D.C. Code § 20-905, any creditor may, **within 6 months** from the date of the first publication of notice, file a written statement of claim with the Register of Wills and deliver or mail a copy of the statement to the personal representative. A claim shall be deemed presented under § 20-903 if inadvertently it is only sent either to the personal representative or to the Register.⁵⁸

⁵⁵ In re Estate of Phillips, 532 A.2d 654 (D.C. 1987) (Claim filed against estate within six-month period for presenting claims was not barred even though it did not perfectly conform to the requirements of D.C. Code § 20-905. Trial court had discretion under D.C. Code § 20-905(c) to allow claims, the merits of the claim were not in dispute, and at least one personal representative had actual notice of the claim during the six-month statutory period for making estate claims.)

⁵⁶ The Virginia Lawyer: A Deskbook for Practitioners, Vol. II, § 8.2201(A), Virginia CLE Publications (2004).

⁵⁷ Va. Code Ann. § 64.1-171.

⁵⁸ D.C. v. Gantt, 558 A.2d 1120 (D.C. 1989).

b. Unless a release of a validly recorded claim has been recorded or the claim has finally been determined in favor of the personal representative, such claim shall constitute a lien against all real property owned by the decedent in the District of Columbia at death for a period of 12 years from date of death, unless the personal representative is empowered to sell the property, in which case, such claim shall constitute a lien against the net proceeds from the sale. In re Estate of Monge, 841 A.2d 769 (D.C. 2004).

2. **Maryland**

a. Under Md. Code Ann., Est. & Trusts § 8-104(a), in order for a creditor to make claims against an estate of a decedent within the appropriate statutory time period, he or she must: (1) **deliver a verified, written statement** of the claim to the personal representative pursuant to § 8-104(b); (2) **file the claim with the Register of Wills** in the correct county, pursuant to § 8-104(c); or (3) if a cause of action survives death, **commence an action** on any person to whom property has been distributed, pursuant to § 8-104(d).⁵⁹

b. The use of the word “may” throughout § 8-104 indicates the legislature’s intent that the forms of presentment be permissive and not mandatory in nature. Moreover, § 8-104(b) expressly provides that failure to comply with the provisions of this section may be a basis for disallowance of a claim in the discretion of the court. Lowery v. Hairston, 73 Md. App. 189 (1987).

3. **Virginia**

a. Any person having any debt or demand and desiring to prove the same must **file his claim or a written statement thereof before the Commissioner of Accounts**, who shall endorse thereon the date of the filing and sign the endorsement in his official character.⁶⁰

E. Method of Challenging Claims

1. **District of Columbia**

a. For claims presented properly, the personal representative shall mail a notice to each claimant stating that the claim has been disallowed in whole or in part and advising the claimant of the procedures and time limitations for contesting the disallowance. In re Estate of Monge, 841 A.2d 769 (D.C. 2004).

b. If the claim is disallowed in whole or in part, the claim is forever barred to the extent of the disallowance unless the claimant files a

⁵⁹ Lampton v. LaHood, 94 Md. App. 461 (1993). See also Chamberlin v. Carter, 835 F. Supp. 869 (D. Md. 1993) (explaining the filing requirements of § 8-104(b)).

⁶⁰ Va. Code Ann. § 64.1-173.

verified complaint in the Court, not later than 60 days after the mailing of the notice disallowing the claim. *Id.*

c. In allowing a claim, the personal representative may deduct any counterclaim that the estate has against the claimant.⁶¹

2. **Maryland**

a. For claims presented properly, the personal representative shall mail notice to each claimant stating, 1) that the claim has been disallowed in whole or in a stated amount; or 2) that the personal representative will petition the court to determine whether the claim should be allowed; and 3) warning the claimant of time limitations for challenging the disallowance.⁶²

b. The claimant is forever barred to the extent of the disallowance unless 1) he **files a petition for allowance** in the court or 2) **commences an action** against the personal representative or against one or more of the persons to whom property has been distributed **within 60 days** after the mailing of notice by the personal representative.⁶³

3. **Virginia:** All challenges to claims are dealt with at the **debts and demands hearing** before the Commissioner of Accounts.⁶⁴ After all claims are presented, the personal representative, and any interested party, has 15 days to present an exception to the claims presented.⁶⁵

VI. PRIORITY OF CLAIMS

A. **Priority of Federal Claims**

Under 31 U.S.C. §3713 (a)(1)(B), the federal government is entitled to have its claims paid first if the estate of the deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

Exceptions: The federal “priority rule” is subject to two classes of expenses administrative expenses and homestead/family allowances. For purposes of the exception the federal priority rule, administrative expenses include court costs, reasonable fiduciary and attorney compensation, and expenses incurred to collect and preserve asset. Administrative expenses are not subject to section 3713(a) priority because they are not debts of the debtor,

⁶¹ D.C. Code Ann. § 20-910.

⁶² Md. Code Ann., Est. & Trusts § 8-107(a).

⁶³ Md. Code Ann., Est. & Trusts § 8-107(b). *See also* Campbell v. Welsh, 54 Md. App. 614 (1983).

⁶⁴ The Virginia Lawyer: A Deskbook for Practitioners, Vol. II, § 8.2201(A), Virginia CLE Publications (2004).

⁶⁵ *Ibid.*

but are instead charges against the estate. Rev. Rul. 80-112, 1980-1 C.B. 306.

Funeral expenses: Administrative expenses include funeral expenses, but not the expense of the decedent's last illness. Rev. Rul. 80-112.

Allowances: The homestead and family allowances are provided for by state law. Like administrative expenses, these allowances are treated as charges against the estate rather than debts of the decedent and are not subject to section 3713(a) priority so long as the allowances are in reasonable amounts. Rev. Rul. 80-112.

B. Order of Payment – State Statutes

State law determines the order in which creditors will be paid if the assets of the estate are insufficient to pay all claims in full.

1. District of Columbia

D.C. Code §20-906

If the probate assets are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

- (1) Court costs, publication costs, and bond premiums;
- (2) Funeral expenses, not exceeding \$1,500;
- (3) Fiduciary and attorney's fees, not exceeding \$1,000;
- (4) Homestead allowance pursuant to section 19-101.02 and the family allowance pursuant to section 19-101.04;
- (5) Exempt property pursuant to section 19-101.03
- (6) Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending the decedent;
- (7) Claims for rent in arrears for which an attachment might be levied by law;
- (8) Judgment and decrees of courts in the District of Columbia; and
- (9) All other just claims.

As per D.C. Code §20-906(b), no preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to preference over claims not due.

2. Maryland

Md. Code Ann., Est. & Trusts §8-105

When the assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

- (1) Fees due to the register;
- (2) Costs and expenses of administration;

- (3) Funeral expenses, not to exceed \$5,000 if the estate is administered as a small estate or \$10,000 if the estate is administered as a regular estate;
- (4) Compensation of the personal representative, for legal services, and commissions of licensed real estate brokers.
- (5) Family allowance as provided in Md. Code Ann. §3-201.
- (6) Taxes due by the decedent;
- (7) Reasonable medical, hospital, and nursing expenses of the last illness of the decedent;
- (8) Rent payable by the decedent is not more than three months in arrears;
- (9) Wages, salaries, or commission for services performed for the decedent within three months prior to the death of the decedent;
- (10) Old age assistance claims under Article 88A, §77 of the Code; and
- (11) All other claims.

As per Md. Code Ann., Est. & Trusts §8-105(b), no preference shall be given in the payment of a claim over another claim of the same class. A claim due and payable is not entitled to a preference over claims not yet due.

3. Virginia

D.C. Code §64.1-157

When the assets of the decedent in the hands of the personal representative are insufficient to satisfy all demands against them, the assets shall be applied in the following priority:

- (1) Costs and expenses of administration;
- (2) The family allowance, exempt property allowance, and the homestead allowance;
- (3) Funeral expenses not to exceed \$2,000;
- (4) Debts and taxes with preference under federal law;
- (5) Medical and hospital expenses of the last illness of the decedent, including compensation of persons attending the decedent, but not to exceed \$400 for each hospital and nursing home, and \$150 for each person furnishing goods and services;
- (6) Debts and taxes due the Commonwealth of Virginia;
- (7) Debts due as trustee for persons under disabilities, as receiver or commissioner under decree of court of Virginia, as personal representative, guardian or committee when the qualification was in Virginia, and for moneys collected by anyone to the credit of another and not paid over;
- (8) All other claims.

As per Va. Code §64.1-158, creditors are to be paid ratably in order of their classification. No payment shall be made to creditors in a lower class until creditors in superior classes have been paid; no preference shall be given in the payment of any claim over another claim of the same class; and no claim not due and payable shall be given preference over a claim which is due and payable.

C. Rights of surviving spouse and children

Rights to homestead allowance, exempt property, and family allowance are governed by the law of the decedent's domicile at death.

1. District of Columbia

a. Homestead Allowance

D. C. Code §19-101.02

The surviving spouse or domestic partner is entitled to a \$15,000 homestead allowance. If there is no surviving spouse or domestic partner, each surviving minor child (or dependent adult child) of the decedent is entitled to the \$15,000 homestead allowance divided by the number of minor or dependent children.

- The homestead allowance is exempt from and has priority over all claims against the estate.
- The homestead allowance is in addition to any share passing by the decedent's will, unless otherwise provided by intestate succession or by elective share.

b. Exempt property

D.C. Code §19-101.03

In addition to the homestead allowance, the surviving spouse or surviving domestic partner is entitled to up to \$10,000 in excess of any security interest therein, in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse or surviving domestic partner, the decedent's surviving children are jointly entitled to the same amount of exempt property.

- If there is not \$10,000 worth of exempt property in the estate, then other personality (but real estate) is subject to the exempt property claim.
- Exempt property rights have priority over all claims against the estate, except the homestead allowance and the family allowance.
- The exempt property allowance is in addition to any share passing by the decedent's will, unless otherwise provided by intestate succession or by elective share.
- *Comment:* Unlike the family allowance (see D.C. §19-101.04), the death of any person entitled to exempt property does not terminate the right to exempt property not yet paid.

c. Family allowance

D.C. Code §19-101.04 and 101.05

In addition to the homestead allowance and exempt property, the surviving spouse or surviving domestic partner, and minor children whom the decedent was obligated to support and children who were in fact being supported by the decedent are entitled to a reasonable allowance in money, not exceeding \$15,000 in cash or personalty, out of the estate for their maintenance during the period of administration.

The family allowance is not chargeable against any benefit or share passing to the surviving spouse, domestic partner, or children by the will of the decedent, unless otherwise provided by intestate succession or by way of elective share. The death of any person entitled to family allowance terminates the right to allowances not yet paid.

d. Allowance and Exemption Payment Source D.C. Code §19-101.05

- If the estate is sufficient, property specifically devised may not be used to satisfy rights to homestead allowance or exempt property.
- Regarding the family allowance, the surviving spouse or surviving domestic partner may elect to take up \$15,000 either in cash or in personalty at its fair market value.

e. Elective share

D.C. Code §19-113(e)

The legal share of the surviving spouse or surviving domestic partner is the share he or she would have taken if the deceased spouse had died intestate, but not to exceed one-half of the net estate bequeathed and devised by the will.

2. Maryland

Md. Code Ann., Est. and Trusts §3-201

a. Family allowance

The surviving spouse is entitled to receive an allowance of \$5,000 for personal use. The family allowance is in addition to the elective share. Each unmarried minor child is entitled to an allowance of \$2,500.

b. Elective share

Md. Code Ann., Est. and Trusts §3-203

The surviving spouse may elect to take a one-third share of the net estate if there is surviving issue of the deceased, or a one-half share of the net estate if there are no surviving issue. “Net estate” is defined as the decedent’s property passing by testate succession, without a deduction for State or federal estate or inheritance taxes, and reduced by:

- (1) funeral and administration expenses;
- (2) family allowances; and
- (3) enforceable claims and debts against the estate.

3. Virginia

a. Homestead allowance

Va. Code § 64.1-151.3

The homestead allowance is \$15,000. If a spouse or minor children are bequeathed a sum less than \$15,000 under a will or are entitled to less than \$15,000 by intestate succession, the homestead allowance elected is in an amount which, when added to the amount passing by will or intestate succession, results in a total of \$15,000 being paid to the surviving spouse and children.

- If the surviving spouse claims and receives an elective share of the decedent's estate, the surviving spouse is not entitled to the benefit of any homestead allowance.

b. Exempt property

Va. Code § 64.1-151.2

In addition to the family allowance, the surviving spouse (or children if there is no surviving spouse) is entitled to \$15,000 in household furniture, automobiles, furnishings, appliances, and personal effects. Exempt property is in addition to elective share.

c. Family allowance

Va. Code § 64.1-151.1 and 1-151.4

The surviving spouse and minor children whom the decedent was obligated to support are entitled to a reasonable allowance in money out of the estate, not to exceed \$18,000. Family allowance is in addition to elective share.

- In an insolvent estate, the surviving spouse or minor children who elect the family allowance, exempt property allowance and homestead allowance receive the first \$48,000 ahead of creditors under Virginia law.
- A surviving spouse who deserted or abandoned a decedent is barred of all interest in the decedent's estate by intestate succession, elective share, exempt property, family allowance and homestead allowance.
- The surviving spouse may waive the family allowance, exempt property, and homestead allowance by marital or premarital contract or by express waiver after the decedent's death. Va. Code §64.1-151.6.
- The assets received by the surviving spouse may continue to be obligated on the same debts as the decedent if the surviving spouse and decedent were joint debtors.

d. Elective share

Va. Code §64.1-16

The surviving spouse's elective share is one-third of the decedent's augmented estate, or if no children or their descendants survive, the percentage is one-half of the decedent's augmented estate. The augmented estate means real and personal property after the payment of allowances and exemptions under Va. Code §64.1-151.1 et seq., funeral expenses, charges of administration (not including federal or state transfer taxes) and debts, to which is added the sum of certain types of property outlined in Va. Code §64.1-16.1.

D. Special Creditors:

1. Internal Revenue Service

Federal tax claim: The IRS asserts its tax claim against the estate by filing a proof of claim in the probate court. If the proof of claim is not filed, the IRS may give notice of the tax liability to the personal representative to ensure that the personal representative is subject to the federal priority rule under 31 U.S.C. §3713(b).

Tax lien: A lien that arose against property of the taxpayer prior to death continues on the property after the taxpayer's death.

Transferee liability: As per I.R.C. § 2053, the taxable estate is determined by deducting from the gross estate amounts for funeral expenses, administration expenses, claims against the estate, and unpaid mortgages or indebtedness.

2. Local Tax Authorities

Both Maryland and Virginia's order of claims statutes give mid-level priority to the payment of state tax. The District's order of payment statute does not specifically address taxes.

3. Medical

Under federal law and regulations, including those under Title XIX of the Social Security amendments of 1965, states may make a claim against the estate of an indigent or medically indigent person for the amount of any medical assistance payments made on his behalf by the state. The state may waive its claim if it determines that enforcement of the claim would result in substantial hardship to the heirs or dependents of the individual against whose estate the claim exists. See Md. Ann. Code, HG §15-121; Va. Code §32.1-327.

4. Secured Creditors

Priority statutes apply to debts that are unsecured. Secured creditors are entitled to debt satisfaction from the secured property.

5. Judgment Creditors

Priority of a judgment or decree depends upon the jurisdiction. In the District of Columbia, judgment creditors are ranked just above “other just claims”. In Maryland and Virginia, judgment creditors are lumped in the “other claims” category.

VII. BANKRUPTCY⁶⁶

A. Decedent’s Estate Cannot Be a Debtor

Estate is not a person under 11 U.S.C. § 109(a).

B. When a Bankrupt Debtor Dies During His/Her Bankruptcy Case⁶⁷

1. Bankruptcy Rule 1016

a. Death or incompetency of the debtor shall not abate a liquidation case under chapter 7. The estate shall be administered and the case concluded in the same manner, so far as possible, **as though the death or incompetency had not occurred**. The rule does not mandate that the Chapter 7 case must proceed after the death or incompetency of the debtor. The case is still subject to dismissal under 11 U.S.C. § 707. If a reorganization, family farmer’s debt adjustment, or individual’s debt adjustment case is pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded as far as possible as though the death or incompetency had not occurred.

b. It is possible that the estate of an individual who files for bankruptcy and subsequently dies could be administered in a Chapter 7 or 11 case, depending on the circumstances. A decedent’s estate, however, **may not file bankruptcy or convert to a different chapter** under the Bankruptcy Code.⁶⁸

c. A corollary to the power to continue the posthumous administration of any bankruptcy case is the power to **exercise all of the avoiding powers** authorized by the Code. This would include claims dealing with violations of the automatic stay. The ability to pursue such

⁶⁶ See BANKRUPTCY AND PROBATE. Pearlstein-law.com/bankruptcy&probate-rev1

⁶⁷ See 9 COLLIER ON BANKRUPTCY 2D, P 1016.01 (15th Ed. 1996).

⁶⁸ In re Estate of Roberts, 2005 Bankr. LEXIS 2280 (D.Md. 2005).

claims in an adversary proceeding is necessary to effectively administer the case.⁶⁹

d. If the debtor dies during the case, only property exempted from property of the bankruptcy estate or acquired by the debtor after the commencement of the case and not included as property of the bankruptcy estate will be available to the debtor's personal representative. The bankruptcy proceeding will continue in rem with respect to any property of the bankruptcy estate, and the discharge will apply in personam to relieve the debtor, and thus his personal representative, of liability from discharge debts.⁷⁰

e. In In re Cleland, 150 B.R. 63 (D.Kan. 1992), a decedent Chapter 7 debtor's case was dismissed under 11 U.S.C. § 707(a) where the debtor had no dependents and only one creditor, the value of the debtor's assets was more than sufficient to satisfy claim of her creditor, and those assets were presently being administered in the debtor's probate estate where sole creditor had filed. The court held that allowing the bankruptcy to proceed provided no benefit to the debtor or to any dependent of the debtor and hampered the sole creditor's collection efforts in state court.

3. Who administers what?

a. If a bankruptcy is pending when a person dies, the only assets that go into the probate estate are the property claimed as exempt in the debtor's bankruptcy case (assuming no objections to those exemption claims are sustained) and any property acquired by the debtor after the commencement of the bankruptcy case. Conversely, the only debts for which the probate estate is liable are those incurred by the decedent after the filing of the bankruptcy petition.⁷¹ Based on this rationale, there is no violation of the automatic stay as a result of the opening of a probate estate.⁷²

b. The result is that the deceased debtor's pre-bankruptcy debts are discharged in the bankruptcy, and the deceased debtor's exempt assets are passed to the probate estate free of that debt.⁷³ The probate estate has no authority to supervene the bankruptcy trustee's exclusive control over property of the bankruptcy estate.⁷⁴ Neither can the probate estate entertain collateral attacks on the claims allowance process.

⁶⁹ Wills v. Heritage Bank (In re Wills), 226 B.R. 369 (E.D. Va. 1998).

⁷⁰ In re Gridley, 131 B.R. 447 (D.S.D. 1991).

⁷¹ In re Lucio, 251 B.R. 705 (W.D. Tex. 2000). See also In re Gridley, 131 B.R. 447, 451 (D.S.D. 1991).

⁷² Id.

⁷³ See In re Combs, 166 B.R. 417, 420 (N.D. Cal. 1994).

⁷⁴ 28 U.S.C.S. § 1334(d).

- c. Courts may appoint a guardian at litem for incompetent debtors in order to adequately protect the rights of the debtor, facilitate the expeditious administration of the bankruptcy estate, and preserve the integrity of the bankruptcy court and bankruptcy process.⁷⁵
- d. The personal representative is the proper party to attend the first meeting of creditors.⁷⁶

C. Use of Bankruptcy and the Automatic Stay by a Personal Representative or Beneficiary of the Estate

- 1. Does a beneficiary of an estate hold a bankruptcy interest sufficient to warrant the automatic stay protection of the bankruptcy court regarding a pending foreclosure of the decedent's property or other creditor threats?
 - a. MAYBE! In the Maryland case of Bunch v. Hopkins Savs. Bank (In re Bunch), 249 B.R. 667 (D.Md. 2000), Debtor was the personal representative and sole heir of his mother's estate. Defendant bank held a mortgage on the mother's house. Debtor filed a Chapter 13 on his own behalf after his mother died. The Bankruptcy Court held that the automatic stay prevented the bank from conducting a foreclosure sale on the house because debtor held an equitable interest in the house as the sole heir of the estate. In dicta, the Court noted that the bank knew that debtor was the sole heir, and indicated that notice is a prerequisite. The question of an equitable interest in bankruptcy estate property was not considered.
 - b. AND, in the District of Columbia, the Bankruptcy Court has held that an estate personal representative does have sufficient interest in property of the estate (Sect. 341) to utilize the automatic stay protection of the Bankruptcy Code. Trustees have argued that a putative beneficiary also has a sufficient inchoate equitable interest in estate property to impose a stay but we know of no decision as of this time.
 - c. BUT, in In re Marra, 179 B.R. 782 (M.D. Pa. 1995), the Bankruptcy Court held that an heir does not have a "claim" against the decedent's property as that term is defined in the Bankruptcy Code, i.e., a "right to payment." 11 U.S.C.S. § 101(5)(A). On the contrary, heirs merely succeed to the debtor/decedent's probate estate. Legatees succeed to the estate of the testator as beneficiaries and objects of his bounty, and have no rights or equities as against creditors.
 - d. AND, in In re Bremer, 6 F. Supp. 1022 (S.D. Ill. 1934), the Bankruptcy Court held that:

⁷⁵ In re Moss, 239 B.R. 537 (W.D. Mo. 1999).

⁷⁶ In re Hamilton, 274 B.R. 266 (W.D. Tex. 2001).

- i. a position as creditor or party of interest to a bankrupts estate did not pass to the heirs through a probate estate. **OR**
 - ii. heirs to a probate estate which was a creditor of a bankrupt's estate, did not make the heirs creditors or parties of interest.
- e. In the District of Columbia, our Bankruptcy judge will impose the automatic stay for a beneficiary's interest subject to court review at a **relief from stay hearing**.

D. The Federal Probate Exception

A "probate exception" to federal jurisdiction was created by case law. However, this probate exception did not bar a judgment from a Texas bankruptcy court regarding the litigation of an estate claim.

On May 1, 2006 the U.S. Supreme Court considered this issue and ruled in the infamous Anna Nicole Smith case, Marshall v. Marshall, 126 S.Ct. 1735 (2006). The court opined that the federal jurisdiction (i.e., bankruptcy in this case) prevailed and the bankruptcy court's judgment was superior to the state claimed "probate exception" because the claim did not "interfere" with the probate proceeding.

VIII. ASSETS OF THE DECEDENT

For the purpose of probate administration, the decedent's estate consists of all property, real and personal, in which the decedent had an interest and which does not pass by operation of law or by contract to another party upon the decedent's death.

Assets which are not considered part of a decedent's probate estate are real estate owned as joint tenants with right of survivorship (or by tenants by the entirety), bank accounts or securities which pass to a survivor under the terms of the contract by which they are established, life insurance policies with a named beneficiary other than the decedent's estate, and the decedent's interests in pension and profit-sharing plans which either by statute or under the terms of the plans vest in a named party or parties upon the decedent's death.

- A. Trust Assets
- B. Life Insurance Proceeds
- C. IRA Distributions
- D. Property held jointly with rights of survivorship
- E. Tenancy in common
- F. Totten, POD or TOD accounts

- G. Causes of action held by estate
- H. Inheritances

IX. ADMINISTRATION OF THE INSOLVENT ESTATE

A. Negotiations with Creditors

1. **District of Columbia:** A personal representative may convene a meeting of all creditors whose claims have been duly presented pursuant to D.C. Code Ann. § 20-905. The Court shall deny or approve any claim in whole or in part at the meeting.⁷⁷
2. **Maryland:** A personal representative may appoint a meeting of creditors whose claims have been properly filed.⁷⁸ Written notice of the time, date, place, and purpose of the meeting shall be given at least ten days before the date.⁷⁹
3. **Virginia:** To initiate a **debts and demands hearing**, the personal representative may request the Commissioner of Accounts to appoint a time and place for receiving proof of debts and demands against the decedent or the estate.⁸⁰

B. Challenges and Denial of Claims (See section VI. E, *supra*)

C. Negotiations with the Tax Authorities

1. Offers and compromise
 - a. **District of Columbia**
 - i. A personal representative may compromise or settle claims against the estate. Upon review, the trial court will consider the validity of the claim, the PR's investigation of the claim, the defenses available, and the reasonableness of the settlement.⁸¹
 - ii. Compromises and settlement agreements are analyzed using standard contract principles. Unless a claim is unreasonable or the compromise is imprudently consummated, public policy encourages recognition of settlements.⁸²
 - b. **Maryland:** Md. Code, Est. & Trusts § 7-401(h) authorizes personal representatives to pay or compromise any valid claims against the estate.

⁷⁷ D.C. Code Ann. § 20-910.

⁷⁸ Md. Code, Est. and Trusts § 8-109(h).

⁷⁹ Ibid.

⁸⁰ Va. Code Ann. § 64.1-171.

⁸¹ *In re Estate of Dickson*, 559 A.2d 331 (D.C. 1989). See also D.C. Code Ann. § 20-741(18).

⁸² *Bullard v. Curry-Cloonan*, 367 A.2d 127 (D.C. 1976).

c. **Virginia:** A fiduciary has the right to compromise claims of and against the estate without court approval. However, without court approval, the fiduciary may be liable “*in devastatit*” if he did not act in good faith, with ordinary prudence, and with due regard for the estate’s interests.⁸³

d. **Federal:** IRC 7122 provides for an offer and a compromise available to tax debtors. The procedure must be strictly followed with a threshold initial offer formula before it will even be considered.

D. Statute of Limitations

1. Waivers

a. **District of Columbia:** A personal representative may waive the statute of limitations for a fixed period of time, provided that it is prudent and in the best interests of the estate.⁸⁴

b. **Maryland**

i. Under certain conditions, the six-month period under this section can be interrupted or waived.⁸⁵ In Ohio Cas. Ins. Co. v. Hollowell, 94 Md. App. 444 (1993), the period was waived where the parties entered into an express agreement extending the limitation period.

ii. The personal representative may also unintentionally waive, or be estopped to assert, limitations under the particular circumstances of a case. *See e.g.* Kann v. Kann, 344 Md. 689 (1997).

iii. The personal representative may also be estopped from asserting the limitations period if the delay was induced by the personal representative.⁸⁶

c. **Virginia**

i. It is the duty of the personal representative to plead the statute of limitations as to all claims against the estate which were barred at the time the action was brought. However, where the personal representative believes that a just debt exists, and it is about to be barred by the limitations period, the personal representative may make a **written** promise to pay the debt, thereby preventing the operation of the statute.⁸⁷

ii. **No oral acknowledgment** of, or promise to pay, or part payment on a debt of a decedent made by his personal representative,

⁸³ Kelly v. R.S. Jones & Assocs., Inc., 242 Va. 79 (1991).

⁸⁴ Hunter-Boykin v. George Wash. Univ., 328 U.S. App. D.C. 22 (1998) (applying DC law).

⁸⁵ Cunninghame v. Cunninghame, 364 Md. 266 (2001). Burket v. Aldridge, 241 Md. 423 (1966).

⁸⁶ *See* Cornett v. Sandbower, 235 Md. 339 (1964) (limitations period was not a bar to action against administrator because delay was caused by administrator’s fraudulent misrepresentations).

⁸⁷ Gwinn v. Farrier, 159 Va. 183 (1932).

either before or after the debt is barred, shall operate to take it out of the statute of limitations.⁸⁸

2. Tolling statutes

- a. **District of Columbia:** In an action against the estate of a deceased person, the interval between the death of the deceased and 6 months after the date of the first publication of notice of the appointment of a personal representative (not to exceed 2 years) shall not be computed as a part of the period within which the action must be brought.⁸⁹ Failure of a personal representative to respond to a presented claim shall in no way suspend the operation of any statute of limitation.
- b. **Maryland**
 - i. Subject to § 8-103(a), a period of limitations which would terminate, except for the death of the decedent, during the period from the death of the decedent until 6 months after the date of the decedent's death, is automatically extended until 6 months after the date of the decedent's death.⁹⁰
 - ii. In Bertonazzi v. Hillman, 241 Md. 361 (1966), the period of limitations of six calendar months was tolled by a suit brought in a county in which neither the decedent nor his administratrix resided.
- c. **Virginia:** A person shall file his claim or a written statement thereof before the Commissioner, who shall endorse thereon the date of the filing and sign the endorsement in his official character. The time that elapses between such filing and the termination of the proceedings shall not be computed as a part of the time within which, under any statute or rule of law, it may be necessary, in order to prevent a bar of the claim, to bring any action or institute any proceeding recommended in writing by the Commissioner of Accounts for the recovery or enforcement of such claim.⁹¹

E. Law Suits

1. Defenses

District of Columbia: D.C. Code Ann. § 20-741(18) authorizes personal representatives to prosecute or defend or submit to arbitration actions, claims, or proceedings in any appropriate jurisdiction for the benefit of the estate, including the commencement of any personal action that the decedent might have commenced, or to compromise, arbitrate, settle, or

⁸⁸ St. Joseph's Soc. v. Virginia Trust Co., 175 Va. 503 (1940).

⁸⁹ D.C. Code Ann. § 20-902.

⁹⁰ Md. Code, Est. and Trusts § 8-102(b).

⁹¹ Va. Code Ann. § 64.1-173.

otherwise adjust any claims, charges, debts, or demands against or in favor of the estate.

a. **Maryland:** Md. Code, Est. & Trusts § 7-401(y) provides that a personal representative may prosecute, defend or submit to arbitration any action, claim or proceeding for the protection or benefit of the estate.

b. **Virginia:** Va. Code Ann. § 64.1-144 makes the personal representative the proper party to prosecute or defend any action for or against or on any contract with the decedent or the estate.

F. Disclaimers

1. **All three jurisdictions have adopted the Uniform Disclaimer of Property Interests Act**, codified as § 19-1501 through § 19-1518 of the D.C. Code, Estates & Trusts Article of the Md. Code §§ 9-201 *et seq.* and Chapter 8.1 of Title 64.1 of the Va. Code.
 - a. The disclaimer must be in writing, describing the property disclaimed and the intent of the disclaimer and signed.⁹²
 - b. The disclaimer must be delivered to the personal representative **within 9 months** from actual notice of the bequest or indefeasible vesting of the interest in the disclaimer and filed with the IRS to avoid inclusion in the federal estate tax. IRC §2518.
 - c. A new Uniform Disclaimer Act has been enacted by the Council for the District of Columbia. This act eliminates any time limitation for State purposes but NOT for the IRS estate tax rules.⁹³
2. Asset protection. The disclaimer has been used to attempt to avoid the creditors of the estate and the creditors of the beneficiaries. The few cases are interesting but an aggressive and alert creditor can probably undo the effort.

District of Columbia: No cases have yet had an opportunity to address the recent adoption of the Uniform Disclaimer of Property Interests Act in the District.

Maryland: Maryland disapproves of disclaimers that hide assets from state programs. If a Medicaid recipient disclaims assets to remain on Medicaid, and subsequently dies, the state may pursue a claim against the residual beneficiary of the disclaimed assets to recoup Medicaid costs, even if the disclaimer was valid under § 9-205.⁹⁴

Virginia: In determining the disposition of disclaimed assets, Virginia cases have assumed that disclaiming beneficiaries' disclaimer "relates-

⁹² D.C. Code Ann. § 19-1505, MD. Code, Estates & Trusts § 9-202(c), and Va. Code Ann. § 64.1-196.4(D).

⁹³ Revised Uniform Disclaimer of Property Interests Act, D.C. Law 16-205, 53 DCR 9063 (2006).

⁹⁴ Troy v. Hart, 1997 Md. App. LEXIS 77 (1997).

back” to the time of the decedent’s death⁹⁵. This fiction allows seamless passage of disclaimed assets to the next beneficiary in line. Virginia has allowed beneficiaries of a life insurance policies to disclaim death benefits and avoid creditors, provided the creditors cause of action against the beneficiary originated *after* the date of the life insurance policy.⁹⁶

G. Income From Cancellation of Debt, BEWARE!

1. Because of the broad definition of income, IRC 61(a)(13) may apply income tax on the cancellation of debt because of the economic benefit to the debtor.
2. 26 U.S.C. §108 (IRC §108) Provides for exclusions from gross income to include insolvency and bankruptcy. If there is no exclusion, the cancellation of debt is treated as gross income for tax purposes.
3. If a good negotiator turns an insolvent estate into a solvent estate, there may be an income tax event. The tax may be charged to the estate or possibly to the heirs and beneficiaries of the estate that receive the economic benefit.

X. ASSET AND CREDITOR PROTECTION

A. Debtors and Estates

1. Pre Mortem

Each state has its own exemption laws for its residents.⁹⁷ Those exemption rules seem to terminate at death and will not protect a decedent’s estate. It is always wise to consider asset protection when making estate plans. Trusts, gifts and transfers may be wise to dispose of as many assets in an orderly manner. Such transfers may be challenged by creditors as avoidable fraudulent transfers but not if there are sound reasons for making the transfers in addition to asset protection. Though not intended as legal advice, the risk is usually slight because of the expense and complexity of the fraudulent action but the analogy of the pig and the hog is a factor.

2. Post Mortem

It may also be possible to argue that the exemption statutes can apply to a probate estate. Apparently, no clear case law exists to the contrary.

District of Columbia: While D.C. courts are thus far silent on the survival of the exemptions in §15-501, courts have looked to Federal exemptions for guidance in construing the generous homestead exemption offered by D.C. Code

⁹⁵ Kevin White, *A Clash of Expectations: Debtors' Disclaimers of Property in Advance of Bankruptcy*, 60 Wash & Lee L. Rev. 1049. (2003).

⁹⁶ *Abbott v. Willey*, 253 Va. 88; 479 S.E. 2d 528 (1997).

⁹⁷ DC Code Ann. §15-501; Md, Code Ann. § 11-504 and Va. Code Ann. §34:1-34.

Ann. § 15-501(a)(3).⁹⁸ Under Federal bankruptcy law, it is well settled that properly claimed exemptions survive the death of the debtor.⁹⁹ The few cases that explore a decedent-debtor's exemptions under § 15-501, confine themselves to life insurance proceeds which ARE exempt under D.C. Code Ann. § 31-4716.¹⁰⁰

Maryland: Maryland exemption law exempts from execution life-insurance payments to the spouse, child, or dependent relative of the decedent-debtor and allows decedent's beneficiaries to realize the benefits of this insurance even as the residual estate assets are seized by creditors.¹⁰¹ However, the courts have not yet addressed whether other exemptions listed in Md. Courts & Judicial Proceedings Code Ann. § 11-504 pass to the decedent-debtor's estate or dissipate upon death of the debtor.

Virginia: In Virginia the debtor's spouse retains the homestead exemption after the debtor's death.¹⁰² In addition, Virginia courts generally construe the protections offered by the legislature liberally, suggesting that courts may be favorable to the idea of providing relief to decedent-debtor's families.¹⁰³

Disputing claims and negotiating with creditors are common techniques which are often successful. The event of the death of a debtor will often soften the heart of the most avaricious creditor and allow a discount or a waiver.

B. Creditors

Creditors should attempt to track the age and health of their debtors since death alters the playing field.

While a debtor is alive, a creditor should use all of the collection techniques available to it: 1) recording a judgment on the land records, 2) discovery to find assets, 3) garnishment of wages and bank accounts, 4) repossession of secured assets, 5) replevin, 6) foreclosure, and jawboning with the debtor on a regular basis. Don't let an account get mislaid or too stale.

After death, be certain to contact the Personal Representative(s) and make them aware of your claim. File a claim with the court and the PR if the claim is not paid within 30 days of the appointment. Defend aggressively against challenges to your claim. Review the assets of the decedent and look for unusual pre mortem gifting and transfers into trusts that can be attacked as fraudulent transfers. Many time the mere inquiry or threat will result in the payment once the resistant debtor is gone and a more objective PR is calling the shots. Be prepared to negotiate.

⁹⁸ In re McDonald, 279 B.R. 382 (Bankr. DC 2002).

⁹⁹ In re Irwin, 338 B.R. 839 (E.D.Ca. 2006).

¹⁰⁰ In re Davis, 275 B.R. 134 (Bankr. DC 2002).

¹⁰¹ In re Kleinman, 272 B.R. 339 (Bankr. D. Md. 2001).

¹⁰² In re Hayes, 119 Bankr. 86 (Bankr. E.D. Va. 1990).

¹⁰³ Dickens v. Snellings, 10 Bankr. 949 (Bankr. W. D. Va. 1981).

XI. SOME ETHICAL ISSUES

A. Disputing Claims

1. **District of Columbia:** The D.C. Rules of Professional Conduct give some guidance in how to proceed in Rule 3.1. This rule warns practitioners that aggressive claim disputation must not extend to overly aggressive and excessive contentions. The standard of Rule 3.1 is a “good-faith” expectation that the claim has merit. Also important is D.C. SCR-Civil Rule 11 (2007), which is identical to Fed. R. Civ. P. Rule 11. Rule 11 should serve as a reminder that overly broad or aggressive claim disputes may lead to sanctions.
2. **Maryland:** Rule 3.1 of the Maryland Rules of Professional Conduct supplies the same basic test as the District. In making or defending claims against the estate, a lawyer must have a “good-faith” belief in the merit of his contention. Md. Rule of Civ. P. Rule 1-311(b) imposes on lawyers a similar duty to avoid frivolous filings and to ensure that claims and disputes are not groundless, and contain “good ground to support” the dispute.
3. **Virginia:** As in the District and Maryland, Virginia Rule 3.1 requires the same good-faith belief in the claim or assertion. However, comment [2] to Rule 3.1 indicates that an action or dispute is not frivolous simply because it is unlikely to fail. The hallmark of a frivolous dispute under the Va. Rules of Professional conduct, therefore, is whether the dispute is exerted primarily as a mechanism to harass or injure another party.

B. Treatment of Disputed Funds

1. **District of Columbia:** Under Model Rule 1.15, a lawyer must deliver to the client/estate all funds that the client/estate is entitled. However, when a lawyer receives funds (such as a personal injury settlement) upon which the District has perfected a lien, the lawyer must withhold that portion of the funds from the client/estate until resolution of that dispute.¹⁰⁴
2. **Maryland:** Maryland Rule of Professional Conduct Rule 1.15(e) requires that all funds that are disputed be kept isolated (preferably in a trust account) and not released until resolution of the dispute. Also, MD Code § 15-120(c) provides that lawyers holding funds owing to the state for payment of claims will be personally liable for those funds if they are improperly distributed.
3. **Virginia:** Va. Rules of Prof. Conduct Rule 1.15 lays out in detail the requirements of a lawyer who safeguards a client’s property. 1.15(b) requires disputed funds be segregated from other accounts until resolution of the dispute.

¹⁰⁴ See D.C. Bar Opinion 251 (1994).

C. Duties to Third Parties

1. **Generally:** The model rules in Virginia, Maryland and the District of Columbia all give general guidance to fiduciaries in their dealings with third parties. Being aware of who your client is can help avoid conflicts of interest and misunderstandings.

- a. Rule 1.1: Attorneys owe their clients and the beneficiaries a general duty of competence.
- b. Rule 1.2: Attorneys would be well-advised to make the extent of their representation clear to beneficiaries of the estate.
- c. Rule 3.3: Attorneys owe a duty of candor to the tribunal and court.
- d. Rule 4.1: Attorneys owe a duty of truthfulness to clients, the courts, and to beneficiaries.

2. **District of Columbia:** Personal representatives, as fiduciaries, are under a duty to discharge the estate's assets in accordance with the best interests of the estate and all "persons interested in the estate,"¹⁰⁵ including creditors and beneficiaries of the estate.

3. **Maryland:** In Maryland, a fiduciary, trustee, or special administrator owes a duty of careful and due diligence of a prudent person to the beneficiaries of the estate.¹⁰⁶ However, Maryland courts have held that the attorneys retained by the personal representative are NOT in privity with beneficiaries, indicating that while attorneys owe a general duty of care, they do not develop a complete fiduciary relationship with estate beneficiaries¹⁰⁷.

4. **Virginia:** A fiduciary, when acting as trustee or administrator of an estate owes that estate a duty of reasonable prudence and diligence.¹⁰⁸ Virginia Code Ann. § 11-9.1(C) provides that court-appointed fiduciaries "[stand] in a fiduciary relationship to the principal by whom he was appointed and may be held liable for a breach of any fiduciary duty to the principal." When acting as executor, attorneys should make decisions based upon the rights of BOTH the decedent AND any beneficiaries.¹⁰⁹

¹⁰⁵ D.C. Code § 20-701(a) (2007)

¹⁰⁶ Bourne v. Lloyd, 100 Md. App. 575 (1994).

¹⁰⁷ Ferguson v. Cramer, 349 Md. 760 (1998) (dismissing a malpractice action against counsel to the personal representative and rejecting the contention that beneficiaries are in privity based on a third-party beneficiary exception).

¹⁰⁸ Buckle v. Marshall, 176 Va. 139, 10 S.E.2d 506 (1940).

¹⁰⁹ Harrison v. Miller, 124 W. Va. 550, 21 S.E.2d 674 (1942).

D. Delay and Incompetence

1. **Generally:** When attorneys neglect their duties in insolvent estates, they can find themselves subject to censure, suspension, fines, or even disbarment.¹¹⁰
2. **District of Columbia:**
 - a. **Delay:** In extreme cases, attorneys have been suspended for years after failing to complete probate of an estate.¹¹¹ As demonstrated by In re Bingham, not even extreme health problems will serve as an excuse for unreasonable delay in completing probate. Nor does it matter how small the payment or estate. Attorneys who take on insolvent estates should be sure they do not neglect filings as it may lead to censure or suspension.¹¹²
 - b. **Incompetence:** Attorneys should be aware that a failure to properly defend a claim, or act to prohibit a client from removing funds from the estate can lead to censure.¹¹³
3. **Maryland:**
 - a. **Delay:** Undue delay seems an especially common source of disciplinary action, and Maryland courts have suspended attorneys who failed to timely deliver insurance payments to the estate beneficiaries.¹¹⁴
 - b. **Incompetence:** Attorneys in Maryland have been suspended for several reasons including undue delay in filing timely petitions for probate, improperly advising the personal representative on matters related to estate administration, and charging an improper fee.¹¹⁵
4. **Virginia:**
 - a. **Delay:** Virginia Courts do not tolerate unnecessary delay, whether in general civil cases or in estate administration, and have traditionally imposed sanctions on attorneys who violate norms of professional conduct.¹¹⁶
 - b. **Incompetence:** Generally, Va. Rule of Professional Conduct Rule 1.1, discussed in the previous section, requires attorney's provide competent representation to their clients. Attorneys who undertake

¹¹⁰ Negligence, inattention, or professional incompetence of attorney in handling client's affairs in estate or probate matters as ground for disciplinary action -- modern cases, 66 A.L.R.4th 342.

¹¹¹ In re Bingham, 881 A.2d 619 (D.C. 2005).

¹¹² Id.

¹¹³ See. In re Douglass, 745 A.2d 307 (D.C. 2000); In re Hopkins, 687 A.2d 938 (D.C. 1996).

¹¹⁴ Attorney Grievance Com. v. Marano, 299 Md. 633 (1984).

¹¹⁵ Attorney Grievance Com. v. Abb., 306 Md. 636 (1986).

¹¹⁶ Attorney's delay in handling decedent's estate as ground for disciplinary action, 21 A.L.R.4th 75

insolvent estates must be competent in the area of estate planning and be, at the very least, physically able to perform their duties.

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§ 20-701(a)

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