

WILLS AND DECEDENTS' ESTATES: ADMINISTRATION OF ESTATES - VIRGINIA SMALL ESTATE ACT — DESCENT AND DISTRIBUTION.

COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS.

PROPERTY AND CONVEYANCES: RECORDATION OF DOCUMENTS.

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST THE ADMINISTRATION OF JUSTICE - PERJURY.

Duty of clerk to record list of heirs without inquiry into its legal sufficiency. Duty to record amended list of heirs, regardless of whether clerk believes original list was correct or erroneous. Duty of court at subsequent proceeding to determine accuracy of list. Clerk should inform person who intentionally furnishes under oath or by affidavit false list of heirs that he could be subject to prosecution for perjury.

The Honorable Michael D. Wolfe

Clerk, Circuit Court of Alleghany County

May 18, 1999

You ask several questions regarding the duty of a circuit court clerk to record a list of heirs provided under §§ 64.1-134 and 64.1-135 of the *Code of Virginia*.

Section 64.1-134 requires the personal representative of a decedent, and the proponent of a will where there is no qualification of a personal representative, to furnish the court or clerk "a list of heirs under oath in accordance with a form provided to each clerk of court by the Office of the Executive Secretary of the Supreme Court or a computer-generated facsimile thereof."¹ If no personal representative qualifies within thirty days following the death, "any heir at law of a decedent who died intestate" may file the form.² Section 64.1-134 provides: "The clerk shall record such list in the will book and index in the name of the decedent and the heirs. Such list so made and recorded shall be prima facie evidence of the facts therein stated."³

Section 64.1-135 applies only "[u]pon the death intestate of a person owning real estate." The section permits any person having an interest in the real estate, including a personal representative, to execute an affidavit setting forth the real estate owned by the decedent within the county or city, the intestacy, and the names and addresses of the heirs at law. As in § 64.1-134, the form is to be provided by the Office of the Executive Secretary of the Supreme Court.⁴ The clerk of the court in which deeds are admitted to record in the locality in which the real estate is located is to record and index the form of affidavit the same as wills are recorded and indexed.⁵

You ask first whether a clerk has a duty to record a list of heirs provided under § 64.1-134 or § 64.1-135 when the clerk knows that the list is incorrect.⁶ You ask also whether a clerk has a duty to record an amended list of heirs which removes the name of an illegitimate child whose name was reported on the original list.⁷

Section 17-59 requires a clerk to record "[e]very writing authorized by law to be recorded." Section 55-106 further requires a clerk to record any such writing that is properly acknowledged or proved as provided by law. Prior opinions of the Attorney General conclude that, if a document is authorized by law to be recorded and is properly signed and acknowledged, it is not the duty of a clerk to assess the legal sufficiency of the document and that a clerk may not refuse to record the document.⁸

It is clear that the lists of heirs you describe are "authorized" by §§ 64.1-134 and 64.1-135 to be recorded. The clerk has no duty to question whether a particular list of heirs is complete or accurate under Virginia's descent and distribution statutes.⁹ Rather, if the writings are properly signed and acknowledged on the forms provided by the Office of the Executive Secretary of the Supreme Court, the clerk has a mandatory duty to record the documents. It is further my opinion that the clerk has a duty to record an amended list of heirs, regardless of whether the clerk believes that the original list was correct or erroneous. It is the duty of the court at a subsequent proceeding to determine which of the lists is accurate under the law and facts.

Although the clerk is to record the list(s) of heirs without inquiry into the legal sufficiency of the list(s), a person who intentionally furnishes the clerk under oath or by affidavit a list of heirs knowing that the list is false could be subject to prosecution for perjury.¹⁰ It would be appropriate for the clerk to so inform the person tendering the documents.¹¹

¹The list is to be furnished the court or clerk where the personal representative qualifies and the clerk of the circuit court of the locality where real estate of the decedent's estate is located. Section 64.1-134.

²Section 64.1-134.

³As prima facie evidence, a recorded list of heirs suffices as proof of the identity of the heirs until the list is contradicted and overcome by other evidence. See *Hyson v. Dodge*, 198 Va. 792, 795, 96 S.E.2d 792, 794 (1957). Recording the list of heirs does not, however, operate to establish the truth of the document or overcome the rights of legitimate heirs not included in the list. See, e.g., § 51.1-164 (Virginia Retirement System may make payment to successor of decedent when list of heirs required by § 64.1-134 was duly filed with clerk and with Board of Trustees of Retirement System; while Board is not required to inquire into truth of list, person to whom payment is made remains answerable and accountable to any person having superior right to decedent's estate).

⁴Section 64.1-135.

⁵*Id.*

⁶You inquire specifically about a situation in which the person submitting the document admits under oath that one of the heirs of the decedent is omitted from the list.

⁷You indicate that the amended list of heirs states its purpose as removal of the illegitimate heir, without notice to the child or guardian. Section 64.1-5.1(4) provides that no claim of succession based on the relationship of a parent and a child born out of wedlock will be recognized in a settlement of a decedent's estate unless the child or someone acting for the child files an affidavit alleging parenthood within one year of the parent's death. The affidavit is to be filed in the circuit court in the locality where property of the decedent is located. *Id.* An action seeking adjudication of parenthood also is to be filed in the court within the one-year period. *Id.* Subject to certain exceptions, the one-year period applies notwithstanding the minority of the child. *Id.* No language in the statute suggests that the filing of a list of heirs under § 64.1-134 or § 64.1-135 establishes parenthood under § 64.1-5.1(4).

⁸See Op. Va. Att'y Gen.: 1986-1987 at 159, 160 (clerk must record document that meets basic statutory requirement without inquiry into legal sufficiency of writing); 1984-1985 at 380, 381 (clerk's authority to refuse to record document is very limited; must record document properly signed and acknowledged); *id.* at 166, 166 & n.1 (clerk has duty to record writing that is properly

signed and acknowledged; legal consequences of writing can be determined only by court); 1971-1972 at 65, 65 (it is not within power of clerk to determine whether instrument presented for filing meets requirements of any particular provision of law).

⁹Sections 64.1-01 to 64.1-17.

¹⁰See § 18.2-434 (person to whom oath is lawfully administered on any occasion who willfully swears falsely touching any material matter or thing shall be guilty of perjury); *Wisniewski v. Johnson*, 223 Va. 141, 143, 286 S.E.2d 223, 224 (1982) (by swearing to document, person vouches that contents are true; person who swears falsely may be guilty of felony under § 18.2-434).

¹¹See 1971-1972 Op. Va. Att'y Gen., *supra* note 8, at 65 (clerk to call to attention of person tendering deed for recordation that conveyance may not be in compliance with county subdivision ordinance).