

**OP. NO. 04-025**

**WILLS AND DECEDENTS' ESTATES: DESCENT AND DISTRIBUTION.**

**TAXATION: VIRGINIA TAX ON WILLS AND ADMINISTRATIONS ACT.**

**Assets not part of probate estate are not subject to probate tax, even if assets are included in calculation of augmented estate.**

The Honorable Hayden H. Horney  
Clerk, Wythe County Circuit Court  
May 19, 2004

### **Issue Presented**

You ask whether benefits under a Virginia Retirement System retirement plan and insurance policy ("VRS benefits"), which are payable to a third party but are claimed by the surviving spouse when claiming an elective share of the augmented estate under § 64.1-16.1, are subject to probate tax.

### **Response**

The VRS benefits do not comprise any part of the amount of the probate estate itself, but are added to that amount for purposes of calculating the amount of the augmented estate. Therefore, it is my opinion that the VRS benefits are not part of the probate estate and are not subject to probate tax, even if the VRS benefits are included in the calculation of an augmented estate under § 64.1-16.1.

### **Background**

You relate that the VRS benefits were payable to a third party other than the decedent's estate or the surviving spouse. The surviving spouse exercised a personal right to claim an elective share of the augmented estate. If the surviving spouse's elective share must be satisfied from the VRS benefits, you inquire whether that portion of the benefits is subject to probate tax.

### **Applicable Law and Discussion**

Section 64.1-16 allows a surviving spouse to claim an elective share in the decedent's augmented estate.<sup>1</sup> The percentage of the elective share is one-third of the decedent's augmented estate if the decedent is survived by children or their descendants, and one-half of the decedent's augmented estate if there are no surviving children.<sup>2</sup> Section 64.1-16.1 defines "augmented estate" as "the estate passing by testate or intestate succession, real and personal, ... and to which is added the sum of" the value of certain properties,<sup>3</sup> and from which is deducted the values of certain other properties,<sup>4</sup> to arrive at the final amount of the augmented estate from which an elective share may be drawn.

By the very definition of "augmented estate," the base of the calculation is the probate estate,<sup>5</sup> or the estate that passes by will or intestate succession.<sup>6</sup> The purpose of § 64.1-16.1 is "to prevent one spouse from disinheriting the other by transferring property prior to the transferor's death and thereby diminishing the transferor's estate."<sup>7</sup> This purpose is achieved by imputing the value of certain transfers made by the decedent, during the marriage, to the decedent's probate estate<sup>8</sup> to arrive at the decedent's augmented estate.<sup>9</sup> Nevertheless, any funds transferred to a surviving spouse as part of an elective share do not pass by will in intestate succession.

The Virginia Tax on Wills and Administrations Act, §§ 58.1-1711 through 58.1-1718, governs the "probate tax."<sup>10</sup> Section 58.1-1712 imposes a tax "on the probate of every will or grant of administration not exempt by law." The probate tax is based on "the value of all property, real and personal, within the jurisdiction of the Commonwealth, which shall pass from the decedent to each beneficiary by will or intestacy."<sup>11</sup> The tax imposed on the probate of wills and the grants of administration is a tax on the privilege of qualifying as the personal representative of a decedent, the measure of which is the gross estate left by the decedent passing by his will or intestacy.<sup>12</sup> It is a tax which purports to be levied on probate, but is based on the value of property.<sup>13</sup> Fundamentally, however, the property which serves as the basis for valuation purposes must pass by will or intestacy.<sup>14</sup>

Previous opinions of the Office provide that other types of property that do not pass by will or intestacy are not subject to the probate tax. Such property may consist of: assets that pass under a trust agreement, when a special power of appointment created in the trust agreement is exercised in a will;<sup>15</sup> property that is jointly held, with the right of survivorship;<sup>16</sup> and property that passes, at death, under the terms of a trust agreement.<sup>17</sup>

Similarly, VRS benefits, which do not pass by will or intestacy, do not alter their status into elements of the probate estate by their inclusion in the decedent's augmented estate. Elements of the augmented estate that did not pass upon the decedent's death by will or intestacy are not part of the value of the property that is subject to the probate tax.

### **Conclusion**

The VRS benefits do not comprise any part of the amount of the probate estate itself, but are added to that amount for purposes of calculating the amount of the augmented estate. Accordingly, it is my opinion that the VRS benefits are not part of the probate estate and are not subject to probate tax, even if the VRS benefits are included in the calculation of an augmented estate under § 64.1-16.1.

<sup>1</sup>Section 64.1-13(A) authorizes a surviving husband or wife, for whom no provision is made in the spouse's will or whose resident spouse has died intestate, to "claim an elective share in the spouse's augmented estate" within the time period specified in the statute.

<sup>2</sup>Va. Code Ann. § 64.1-16 (LexisNexis Repl. Vol. 2002).

<sup>3</sup>See § 64.1-16.1(A)(1)-(3) (LexisNexis Repl. Vol. 2002).

<sup>4</sup>See § 64.1-16.1(B).

<sup>5</sup>See *Chappell v. Perkins*, 266 Va. 413, 418, 587 S.E.2d 584, 586 (2003).

<sup>6</sup>Assets pass by will when such is admitted to probate, and assets pass by intestacy when no will exists or none is admitted to probate.

<sup>7</sup>*Chappell*, 266 Va. at 421, 587 S.E.2d at 588.

<sup>8</sup>The value of the augmented estate is decreased by payments made for allowances and exemptions elected under Article 5.1, Chapter 6 of Title 64.1; funeral expenses; administrative charges, exclusive of federal or state transfer taxes; and debts. Section 64.1-16.1(A).

<sup>9</sup>See § 64.1-16.1(A)(3); *Chappell*, 266 Va. at 421, 587 S.E.2d at 588.

<sup>10</sup>The tax imposed on the probate of wills generally is known as the "probate tax," because the term "probate estate" is the general term for the property that passes from the decedent by will or intestacy. See Va. Code Ann. § 51.1-164 (LexisNexis Repl. Vol. 2002) (providing for payment of VRS benefits to decedent's successor upon presentation of affidavit certifying that will was duly probated and that probate estate did not exceed \$10,000 in value); Va. Code Ann. § 58.1-3(A)(5) (LexisNexis Supp. 2003) (providing that information contained in estate's probate tax return may be disclosed, when such information is requested by beneficiary or decedent's lawful heir); § 64.1-132.2(A)(1) (LexisNexis Repl. Vol. 2002) (providing for collection by decedent's successor of indebtedness due estate, upon presentation of affidavit stating that value of personal probate estate does not exceed \$15,000); Probate Tax Return, Va. Cir. Ct. Form CC-1651, *available at* <http://www.courts.state.va.us/forms/circuit/cc1651-0798.pdf> (providing instructions on payment of probate tax imposed on probate estate).

<sup>11</sup>Section 58.1-1713(A) (Michie Repl. Vol. 2000).

<sup>12</sup>Op. Va. Att'y Gen.: 1997 at 189, 190; 1972-1973 at 415.

<sup>13</sup>Op. Va. Att'y Gen.: 1997, *supra* note 12, at 190; 1969-1970 at 277, 277.

<sup>14</sup>1997 Op. Va. Att'y Gen., *supra* note 12, at 190; *cf.* 1984-1985 Op. Va. Att'y Gen. 319, 320 (concluding that, although property jointly held with right of survivorship may be listed as part of inventory filed by commissioner of accounts, probate tax is not applicable to such property because it passes by survivorship and not by will or intestacy).

<sup>15</sup>1997 Op. Va. Att'y Gen., *supra* note 12, at 189.

<sup>16</sup>1984-1985 Op. Va. Att'y Gen., *supra* note 14, at 319.

<sup>17</sup>1969-1970 Op. Va. Att'y Gen. 289, 289.

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