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J. Rodney Johnson

University of Richmond, rjohnson@richmond.edu

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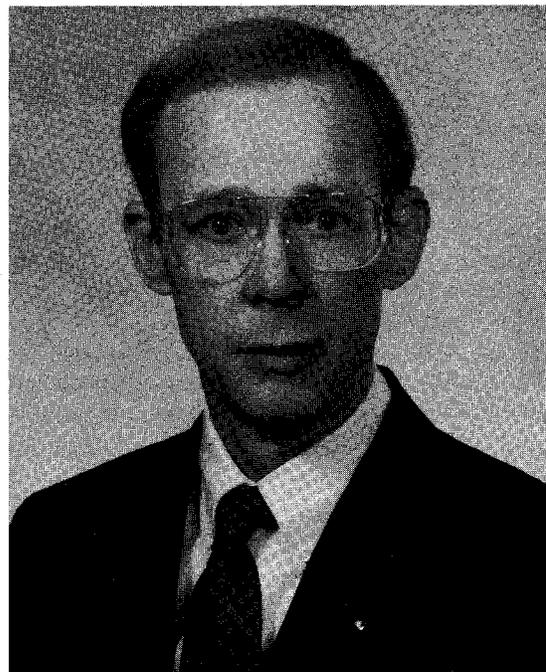
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The Absence of Due Process in Fiduciary Accounting *A Constitutional Concern*

Introduction. Once upon a time the content of a legal notice posted on the courthouse door was likely to become a matter of community knowledge within a reasonable period of time. Today, however, few persons would seriously suggest that courthouse posting satisfies minimum due process requirements for notice to parties of a proceeding affecting their property rights. Yet this is the only form of notice that Virginia law provides for beneficiaries when their fiduciaries make accountings before the commissioner of accounts. And, topping this, there is no provision for *any* form of notice to beneficiaries when the commissioner reports to the court on the fiduciaries' accountings. Accordingly, this article argues that Virginia's present fiduciary accounting notice provision, Code § 26-27, is patently unconstitutional and that it should be replaced in an orderly fashion before a judicial decision to that effect casts our fiduciary administration system into disarray. Legislative proposals are appended to this article that will largely, though not perfectly, resolve these problems without imposing a time, substance, or economic burden on any party. Although Code § 26-27 deals with the accounts of personal representatives, guardians, curators, committees, and trustees, this article will focus on only one of these groups — testamentary trustees — in order to facilitate a presentation of the issues.

Accountings by a testamentary trustee. Testamentary trustees are required to make annual settlements of their accounts before the commissioner of accounts.¹ These accountings typically contain a chronological recitation of all receipts, expenses and distributions during the accounting period, which may be broken down into different subcategories in some cases. During the settlement process a beneficiary has the right to appear before the commissioner and “insist upon or object to anything which could be insisted upon or objected to by him . . . if the commissioner were acting under an order of a court of chancery for the settlement thereof, made in a suit to which he . . . was a party.”² Unlike the highly formalized, court-oriented procedures in many other jurisdictions, Virginia's approach is intended to provide a more informal, “user-friendly” procedure before the commissioner. Indeed, the *Manual for Commissioners of Accounts* states that “(o)ne strength of the Commissioner system is informal resolution without the beneficiary being required to hire counsel.”³ Following the commissioner's settlement of the trustee's account, the commissioner is required to file a report thereon in the circuit court clerk's office, along with “any matters specially stated deemed pertinent by the



J. Rodney Johnson, J.D. (William and Mary), LL.M. (New York University), is a professor of law at the University of Richmond. Professor Johnson is a member of the American Law Institute, the American College of Trust and Estate Counsel, the National College of Probate Judges, The Virginia Bar Association, the Virginia State Bar, the American Bar Association (Chair, Committee on Planning and Administration of Small Estates and Trusts, 1993-95), the Richmond Estate Planning Council, the Trust Administrators Council of Richmond, the Christian Legal Society, and he serves as a Virginia Commissioner to the National Conference of Commissioners on Uniform State Laws, as a member of the Standing Committee on Commissioners of Accounts of the Judicial Council of Virginia, and as the Virginia Liaison for the Joint Editorial Board of the Uniform Probate Code. Professor Johnson is the author of *Basic Will Drafting in Virginia*, numerous articles in the fields of estate planning and fiduciary administration, and he is a frequent speaker at continuing legal education seminars.

commissioner, or which may be required by any person interested to be so stated.”⁴ The commissioner's report lies in the clerk's office for a period of 15 days during which a beneficiary

may file exceptions thereto in another simplified procedure.⁵ If no exceptions are filed within this 15-day period, the commissioner's report is automatically confirmed.⁶ Following this automatic confirmation the commissioner's report "shall be taken to be correct, except so far as it may, in a suit in proper time, be surcharged or falsified."⁷

Consequences of the settlement process. Judge Lamb sums up the net result of this settlement procedure as follows — "The effect of an account regularly stated, followed by [automatic] confirmation, is protection for the fiduciary from any assault except by the difficult suit to surcharge and falsify. Such accounts are *prima facie* correct."⁸ Harrison joins Lamb in this characterization of the suit to surcharge and falsify as being a "difficult" procedure,⁹ and the Virginia Supreme Court has "expressly held that the *ex parte* settlements of the commissioner of accounts are presumed to be correct until surcharged and falsified, and not only the duty of specifying errors, but also the *onus probandi* devolves on the party complaining."¹⁰ Moreover, the complaining party is unable to obtain a review of the entire account that has been settled *ex parte* because "the inquiry is limited to particular items alleged to have been improperly included or omitted, and in all other respects the account is left to stand as it is."¹¹

The problem presented. Although a beneficiary is given two opportunities to participate in a "user-friendly" account settlement process before being relegated to the "difficult" procedure of a suit to surcharge and falsify, there is no provision in Virginia law requiring anyone to give the beneficiary notice of either opportunity. The only provision for notice about the pending settlement of the trustee's account is found in Code § 26-27, which merely (i) requires the commissioner to post on the courthouse door a list of the fiduciaries whose accounts are before him for settlement, and (ii) prohibits the commissioner from completing an account until 10 days after such posting. In this regard, the *Manual for Commissioners of Accounts* recognizes that "(t)his posting procedure is clearly an anachronism from the 19th century when the Commissioner system was established. In rural 19th-century Virginia, citizens regularly visited the courthouse to transact business and may have paid some attention to the notices posted."¹² Such cannot be said today, and thus the *Manual* concludes that "(f)or the system to work, the Commissioners must notify those interested."¹³

However, there is no duty upon the commissioner to give any notice other than the courthouse posting required by § 26-27, and there is no duty upon the trustee of a testamentary trust to give beneficiaries any notice at all.¹⁴ Thus a known beneficiary of a testamentary trust, whose whereabouts are also known, (i) has no right to receive notice calculated to advise the beneficiary of the pending settlement of the trustee's account in the commissioner's office, and (ii) has no right to receive any notice of any kind, not even by posting, of the commissioner's report being filed with the court and the beginning of the 15-day period for filing objections before the commissioner's report is automatically confirmed.

The constitutional context. Although there are later cases, *Mullane v. Central Hanover Bank & Trust Co.*¹⁵ is the U.S. Supreme Court's landmark decision dealing with due process in fiduciary accountings. *Mullane* arose in the context of a bank, serving as trustee of a common trust fund, making a judicial settlement of its trust accounts based upon notice to beneficiaries by newspaper publication pursuant to New York law. In responding to the claim that this newspaper notice was constitutionally insufficient under the Fourteenth Amendment, the Court noted that

Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of . . . property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.¹⁶

The lack of notice to beneficiaries in Virginia fiduciary accounting effectively deprives them of the opportunity to participate in either (i) the "user-friendly" settlement procedure before the commissioner, or (ii) the relatively simple remedy of filing exceptions to the commissioner's report. The property interests of such a beneficiary are negatively impacted in several ways as a consequence of this lack of notice. First, the beneficiary's property interest in the trust is subjected to some diminution by the costs associated with the settlement procedure, in which lack of notice precluded participation.¹⁷ Second, the beneficiary has lost the opportunity to protect his property interests in the expedient and "user-friendly" settlement procedure before the commissioner (as well as the opportunity to file exceptions to the commissioner's report), and must now attempt to protect his property interests in the "difficult" suit to surcharge and falsify where the commissioner's report is *prima facie* correct and the beneficiary bears the burden of proof in establishing the contrary.¹⁸ Third, the beneficiary must now expend additional funds to retain counsel to prosecute the suit to surcharge and falsify in order to have any remedy, whereas a remedy without the necessity of counsel or expenses of a suit existed in the commissioner's office. And fourth, the complainant in a suit to surcharge and falsify is unable to obtain a review of the entire account that has been settled *ex parte* because "the inquiry is limited to particular items alleged to have been improperly included or omitted, and in all other respects the account is left to stand as it is."¹⁹ The foregoing, which is not meant to be exhaustive, should be sufficient to establish that a beneficiary does experience a deprivation or diminution of property in these cases.

After discussing the general unreliability of newspaper publication to give notice, but recognizing that in some instances newspaper publication was the only method realistically available, the Court in *Mullane* went on to hold that it did not meet minimum due process requirements in that case, and further stated that

(w)here the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency. The trustee has on its books the names and addresses of the income benefi-

ciaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses.²⁰

The *Mullane* case can be factually distinguished from the case under consideration in insignificant ways, but the two cases are the same in substance. In the context of the present case, the applicability of the *Mullane* logic and reasoning cannot be denied vis-a-vis the diminution of the beneficiary's property interest, the ease with which the trustee and the commissioner may give notice to those whose addresses are known, and the consequent right of the beneficiary to receive notice by a method no less certain than ordinary mail.²¹

Responses to the problem in Virginia. The issue of notice in fiduciary accounting has come before three groups in Virginia during the past decade. The responses made by these groups are reported in the following paragraphs.

Following the U.S. Supreme Court's 1988 decision in *Tulsa Professional Collection Serv., Inc. v. Pope*,²² which was based upon the *Mullane* rationale, The Virginia Bar Association's Section on Wills, Trusts, and Estates became concerned about the impact of these two cases upon the probate process and fiduciary notice in Virginia. This concern led to numerous discussions by the Section that culminated in a document identifying a number of constitutional deficiencies in Virginia estates and trusts law, two of which are the subject-matter of this article — fiduciary accountings to the commissioner of accounts and the commissioner's report to the court.²³

Another group whose members' professional lives cause them to be constantly examining issues such as those raised herein are the faculty members at Virginia's six law schools who teach in the estates and trusts field. In August 1996, the following inquiry was sent to a faculty member teaching in the field of estates and trusts at each of Virginia's six law schools:

In regard to the constitutional sufficiency of Virginia Code § 26-27's provision for notice to beneficiaries in accounting proceedings, I (do) (do not) [please circle your choice] believe that this section satisfies the due process requirements of the Fourteenth Amendment when applied to known beneficiaries whose whereabouts are also known.

All of the addressees responded to this inquiry, and each one circled "do not."²⁴

The Judicial Council of Virginia established a Standing Committee on Commissioners of Accounts in January 1993, and gave the Committee six charges, one of which was to make a continuous review of the statutes relating to fiduciaries. The issue of notice in fiduciary accountings came before the Standing Committee in the fall of 1996, while it was considering the legislative proposals it would seek to have introduced in the 1997 Session. Following a lengthy discussion of the issue, a motion was made to determine whether or not the Standing Committee was in favor of giving any notice, without regard to how that notice might be satisfied. The members present were equally divided on this issue and thus the motion failed on a tie vote. Putting the constitutional issues aside, this vote is

particularly difficult to understand in the light of the Standing Committee's statement in its own *Manual* that "(f)or the system to work, the Commissioners must notify those interested."²⁵

Conclusion. In regard to the need for remedial legislation to resolve the within-described problems, it is submitted that the affirmative opinions (i) contained in the Report of The Virginia Bar Association's Section on Wills, Trusts, and Estates, (ii) of all of the surveyed law professors who teach in the field of estates and trusts in Virginia, and (iii) of a significant number of the Standing Committee on Commissioners of Accounts, corroborate the arguments made in this article, and collectively all of the foregoing mandate a legislative response.

As noted at the outset, this article's discussion focuses on the rights of a beneficiary of a testamentary trust for purposes of convenience. However, it requires little imagination to see that the foregoing arguments also apply to accountings of personal representatives, guardians, curators, committees and, effective January 1, 1998, conservators for incapacitated persons. Thus the proposed statute that is appended to the article deals with all of these fiduciaries.

In the absence of a legislative resolution of the issues raised herein, it is only a question of time before a case raising them comes before the courts. One such case did go to the Virginia Supreme Court in 1995, but the Court was able to decide it without reaching the constitutional questions.²⁶ These issues may be reached in the next case, however, with the potential of throwing Virginia's fiduciary accounting system into turmoil. Therefore, until such time as appropriate legislation issues from the General Assembly, the prudent fiduciary (and commissioner?) may wish to consider voluntarily giving the notices suggested herein. An interested party cannot claim to have been denied procedural due process by § 26-27 if that party was given actual knowledge of the proceeding in question.

A postscript concerning inventories. It is further submitted that a parallel provision should be added to the Code requiring fiduciaries to give mailed notice to beneficiaries when they file inventories of their estates with the commissioner of accounts. Although none of the foregoing constitutional arguments are applicable to inventory filing, many good reasons for giving this notice do exist, such as fiduciary disclosure, "sunshine," and protection of the common good. The person filing the inventory stands in a fiduciary relationship to those who own the estate and elementary principles of fiduciary disclosure suggest that the owners ought to be advised of the content of their estate and the value placed thereon by their fiduciary. From a "sunshine" standpoint, there are obvious incentives to a fiduciary's full disclosure of all of the assets in an estate, and their more accurate valuation, if the fiduciary must send a copy of the inventory to parties who are likely to have knowledge about this property. From the standpoint of protecting the common good, those who receive a copy of an inventory that is defective in content or valuation are in a position to bring the problem to the attention of the commissioner who otherwise would normally approve the defective inventory without a realization of its deficiencies.

PROPOSED LEGISLATION

NEW § 26-27.1. Written notice of filing inventories and accountings to be provided to certain parties. — Every fiduciary filing an inventory or accounting with the commissioner of accounts shall give notice thereof by first class mail

(A) in connection with a decedent's estate, to those persons who were entitled to notice from the fiduciary pursuant to § 64.1-122.2, except that notice to heirs shall not be required in a testate matter;

(B) in connection with a testamentary trust, to all beneficiaries who are or, in the exercise of the trustee's discretion, may be entitled to any present distribution of income or principal;

(C) in connection with a minor's estate, to those individuals who would be the minor's heirs if the minor were to die on the date that notice is given; and

(D) in connection with an adult incapacitated person's estate, to any known agent under a durable power of attorney or, in there is no such agent or if the fiduciary is also such agent, to those individuals who would be the incapacitated person's heirs if the person were to die on the date that notice is given.

(E) Notwithstanding the provisions of clauses (B), (C) and (D), notice need not be given to (i) an incapacitated person if notice is given to his fiduciary, (ii) any minor for whom no guardian has been appointed, if notice is provided to his parent or person standing in loco parentis, (iii) any unborn or unascertained persons, and (iv) any person who has waived the right to notice hereunder.

(F) Forms for the notice required by this section, which shall contain appropriate instructions concerning their use, shall be prepared by the Office of the Executive Secretary of the Supreme Court and shall provide for the attachment of a copy of the inventory or accounting (not including any supporting documents) thereto. Such forms shall be furnished to each clerk of court, who shall provide copies thereof to every fiduciary who qualifies in the clerk's office.

(G) No commissioner of accounts shall approve any inventory or accounting

(1) until twenty-one days have elapsed from the receipt thereof, and

(2) unless the inventory or accounting contains a statement that the notice required by this section (i) has been given, and shows the names and addresses of those to whom it was given, (ii) has been waived, or (iii) cannot be given due to the inability of the fiduciary, after the exercise of reasonable diligence, to determine the name and address of any person to whom notice is required.

§ 26-32. Where filed; notice to interested parties. — The commissioner shall file the report in the office of the court by which he is appointed, as soon as practicable after its completion. *On or before the date of such filing, the commissioner shall mail or deliver a copy of the report to every person who was given notice of the accounting pursuant to § 26-27.1.*

§ 26-14. Commissioners to inspect and file inventories with clerks; notice to interested parties. — The commissioner shall inspect all inventories returned to him by fiduciaries, see that they are in proper form, and, within ten days after they are respectively received and approved by him, deliver them to the clerk of the court, to be recorded as required by law. *On or before the date of such delivery, the commissioner shall mail or deliver a copy of the inventory to every person who was given notice of its filing pursuant to § 26-27.1.*

§ 26-27. Commissioners to post list of fiduciaries whose accounts are before them for settlement. — Repealed.

Although a fiduciary's inventory becomes a public record after the commissioner approves it and lodges it with the clerk of court, and an interested party can obtain a copy upon becoming aware of the filing, the question to be answered is "What purpose is being accomplished, or public policy served, by making the interested parties wait until this time before they are entitled to any notice; particularly when the later one discovers an error the more difficult it is to rectify that error in many cases?" It certainly cannot be said that notice is unnecessary because the commissioner is protecting the interests of the parties, because the commissioner's approval is "of the form of the inventory only."²⁷

The proposed legislation. The first of the above three statutes, new § 26-27.1, deals with notice to interested parties of the filing of inventories and accountings before the commissioner.²⁸ Paragraph (A) of new § 26-27.1 focuses on notice by personal representatives, and parallels the provisions presently found in § 64.1-122.2, that establishes the notice of probate that they must give. Simplicity is obtained by providing that

the persons who are entitled to receive notice of inventory and accounting are the same persons to whom the personal representative has already sent notice of probate — persons whose names and addresses are already in the fiduciary's files. The only burden placed upon the personal representative will be photocopying and mailing a copy of the accounting to these same persons.

The remainder of new § 26-27.1 deals with the other fiduciaries who are required to account. For purposes of clarity, the rule for each kind of fiduciary is set forth in a separate paragraph. Again, in each of these cases, the identity of the persons entitled to notice will normally be known and the only burden placed upon the fiduciary will be photocopying and mailing.

The remaining proposals are simply amendments to § 26-32, which requires the commissioner to file account reports with the clerk of court, and § 26-14, which requires the commissioner to deliver approved inventories to the clerk of court. The notice requirement created by the amendments to these sections simply requires the commissioner to give mailed no-

tice to persons whose names and addresses have already been provided by the fiduciary.²⁹ This will not impose any substantive burden upon the commissioner of accounts, but it will satisfy the beneficiaries' rights to due process.

ENDNOTES

1. *Va. Code* § 26-17.6.
2. *Va. Code* § 26-29.
3. MANUAL FOR COMMISSIONERS OF ACCOUNTS, ¶ 6.1, p. 32 (12/95). The Judicial Council of Virginia established a Standing Committee on Commissioners of Accounts in 1993. The *Manual* was prepared by this Committee and published by the Virginia Law Foundation in 1995.
4. *Va. Code* §§ 26-31 and 26-32.
5. "No particular form or formality is required when stating and filing exceptions. All that is needed is a paper, signed by the exceptant or his counsel, filed in the clerk's office within the time allowed, stating in simple language the fact that exception is noted and specifying briefly the point made." 3 HARRISON ON WILLS, § 531(2), p. 118 (3rd ed 1989).
6. *Va. Code* § 26-33.
7. *Va. Code* § 26-34.
8. Lamb, VIRGINIA PROBATE PRACTICE, § 107, p. 211 (1957) (internal citation omitted).
9. 3 HARRISON ON WILLS, § 549, p. 215 (3rd ed 1989).
10. Powers v. Powers, 174 Va. 164, 169 (1939).
11. Lister v. Virginia National Bank, 209 Va. 739, 742 (1969), quoting from 34 C.J.S., EXECUTORS AND ADMINISTRATORS, § 921, p. 1131.
12. *Manual*, ¶ 6.1, pp. 31-32 (12/95).
13. *Ibid.*, at p. 32.
14. *Va. Code* § 64.1-122.2 is the only other provision for any kind of notice to the beneficiary of a testamentary trust. This section merely requires an executor to give beneficiaries an after-the-fact notice of probating the decedent's will and qualification thereunder. There is no provision for notice to the beneficiaries when the trustee qualifies in the clerk's office or makes an accounting to the commissioner. It has been suggested that the executor's notice of probate to beneficiaries suffices to put them on notice that a trustee's accounting will be filed at some time in the future and it is thereafter their duty to be on the watch for it. However, even when this argument is applied to the executor's own account it leads to the *reductio ad absurdum* that, from a due process standpoint, a plaintiff in filing a civil action need not give the defendant any notice after serving the initial pleading, it being the defendant's duty to check the court file thereafter to discover whatever other papers or motions the plaintiff might file in the civil action. As the argument is not sustainable in regard to the accounting of the executor who has earlier given some form of notice, *a fortiori* it is not sustainable in regard to the trustee who has given no notice.
15. 339 U.S. 306 (1950).
16. *Mullane*, at 313.
17. The Supreme Court found two deprivations of property in *Mullane*. One was that the beneficiaries' "interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one [In Virginia replace "one" with "the commissioner of accounts."] who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest [In Virginia replace "contest" with "accounting.]" *Mullane*, at 313.
18. Also arising in this connection is the issue of the trustee's compensation, the claim for which may be excessive from the beneficiary's standpoint. This is of particular importance because, as the Court noted in *Mullane*, "it is their [the beneficiaries] caretaker [the trustee] who in the accounting becomes their adversary." *Ibid.*, at 316. If a beneficiary objects to the trustee's claimed compensation before the commissioner, the burden will be upon the trustee to prove the reasonableness of the claim. But if the objection can only be made in a suit to surcharge and

falsify, because lack of notice precluded an earlier objection before the commissioner, the amount allowed the trustee by the commissioner is presumptively correct and the burden of proving to the contrary is placed upon the beneficiary.

19. Lister v. Virginia National Bank, 209 Va. 739, 742 (1969), quoting from 34 C.J.S., EXECUTORS AND ADMINISTRATORS, § 921, p. 1131.

20. *Mullane*, at 319.

21. This article refrains from an extended discussion of *Mullane* and its progeny in the belief that the clarity of the matter at hand does not require it. *The Legal Index to Periodicals* will lead one to numerous *Mullane* articles.

22. 485 U.S. 478 (1988), focusing on notice to creditors in the estate settlement process, within a context that does not exist in Virginia.

23. A PROPOSAL FOR REQUIRING NOTICE IN VIRGINIA PROBATE, A report of the Wills, Trusts, and Estates Section of The Virginia Bar Association, 22 pp. (December 1988), drafted by the then Chairman of the Section, C.L. "Tim" Dimos, Esquire, which reads in part as follows:

"III. Deficiencies in the Virginia Code

The Virginia Code falls short of the due process notice requirements in the following areas of probate and administration: . . .

4. Accountings may be filed with the Commissioner of Accounts without notice to beneficiaries. The Commissioner in turn may 'state, settle and report' those accounts after posting at the courthouse door but without further notice to beneficiaries. *Va. Code* § 26-17 [§ 26-27]. Once the Commissioner makes his report to the circuit court it will stand confirmed unless exceptions are filed within fifteen days. *Va. Code* § 26-33."

24. The original signed responses are on file with the author.

25. *Manual*, ¶ 6.1, at 32.

26. Law v. Law, Virginia Supreme Court Record No. 941673, decided in an unpublished opinion on June 23, 1995. In this case the commissioner's report on accounts from a decedent's estate was filed with the clerk on May 16, 1994; it was automatically confirmed on June 2, 1994; and the complaining party filed "Objection to Approval of Annual Account Reports" on June 28, 1994. The complaining party, a Michigan resident acting as the legal representative of two minor heirs, maintained that the "limited notice afforded by posting as provided in Code § 26-27 denied Clayton Law's heirs the opportunity to contest the report of the commissioner of accounts in violation of the due process clause." *Opinion*, p. 2. However, the Supreme Court responded that "(t)he order appealed from shows that appellant was not denied an opportunity to present her exceptions to the commissioner's report in violation of her due process rights. Even though the order recited that appellant's pleading was untimely because it was filed more than 15 days after the commissioner's report was filed, the order shows that the trial court nevertheless considered appellant's objections and rejected them." *Ibid.*

27. *Manual*, ¶ 5.1, p. 19, (12/95). The *Manual* further notes that "(s)ome commissioners attach a disclaimer to the inventory in order to insure that interested persons will understand that the commissioner's approval of the inventory is only as to its form. Language used by one commissioner is 'The Commissioner of Accounts has not independently verified the value of the items on this inventory or the fact that they are the only assets of the estate.'" *Ibid.*, footnote 1.

28. This statute was drafted in the Legislative Subcommittee of the Standing Committee on Commissioners of Accounts as a part of a proposed 1997 legislative package. The Standing Committee took no action on this proposal due to its decision to not go forward with any form of notice provision. The author serves as Chair of the Legislative Subcommittee.

29. A further amendment not proposed herein, but which may be desirable, is a lengthening of the period the commissioner's report lies in the clerk's office before automatic confirmation from the present 15 days to a more traditional, and perhaps more reasonable, 21 days.