

The Probate Process From Start to Finish for Paralegals



All rights reserved. These materials may not be reproduced without written permission from NBI, Inc. To order additional copies or for general information please contact our Customer Service Department at (800) 930-6182 or online at www.NBI-sems.com.

For information on how to become a faculty member for one of our seminars, contact the Planning Department at the address below, by calling **(800) 777-8707**, or emailing us at speakerinfo@nbi-sems.com.

This publication is designed to provide general information prepared by professionals in regard to subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. Although prepared by professionals, this publication should not be utilized as a substitute for professional service in specific situations. If legal advice or other expert assistance is required, the services of a professional should be sought.

Copyright 2014
NBI, Inc.
PO Box 3067
Eau Claire, WI 54702

67671

Are you **maximizing** the **visibility** of your company?

Let us help you.

Savvy businesses know they need to take every opportunity to get their company and products in front of the right audience. IPE *is* that opportunity.

By sponsoring break times at IPE seminars, you're taking advantage of yet another way to establish relationships with new customers – and solidify your contact with those you already have.

Why pass up this opportunity when reaching our shared audience is so easy? Call us today to find out more about how you can become a sponsor for an IPE seminar.

800.777.8707

Jim Lau | Laurie Johnston

Legal Product Specialists
jim.lau@nbi-sems.com
laurie.johnston@nbi-sems.com

IPE
INSTITUTE *for*
PARALEGAL EDUCATION™

www.ipe-sems.com

INSTITUTE FOR PARALEGAL EDUCATION —

Customize Your Continuing Educational Experience

For more than 15 years, the Institute for Paralegal Education (IPE) has provided legal education to paralegals, legal assistants, legal office staff, paralegal students, or those beginning work in a new area of practice. We offer dynamic, informative training on the topics you need to increase your qualifications in the legal profession. If you are searching for practical advice from experienced professionals working in the field, IPE is the training source for you.



Live Video Webcasts



Live Audio Webinars



Previously Recorded Programs OnDemand



Live (In-Person) Seminars



Video DVDs



Audio CDs



Course Books

IPE
INSTITUTE *for*
PARALEGAL EDUCATION™

Visit us online at www.ipe-sems.com
or call us at **1-800-793-5274**
for more information

The Probate Process From Start to Finish for Paralegals

Authors

Andrew L. Ellis
Dinsmore & Shohl LLP
Huntington Square
900 Lee Street, Suite 600
Charleston, WV

Melanie Hicks
Paralegal Solutions, LLC
159 Granby Circle
Beaver, WV

Mary Rennie Rowe
Dinsmore & Shohl LLP
Huntington Square
900 Lee Street, Suite 600
Charleston, WV

Presenters

ANDREW L. ELLIS is an attorney with Dinsmore & Shohl LLP. Mr. Ellis leverages a thorough understanding of estate and trust law with extensive experience handling taxation matters to help clients navigate the complex regulations of estate planning and administration. He represents both institutions and individuals in a variety of matters, including transfer of wealth and business succession plans, as well as personal and professional business planning and guidance. His comprehensive knowledge of state and federal income tax matters has enabled him to work with a number of non-profit organizations, advising them through their formation all the way through to procuring their tax exemption status, including the application process. Additionally, his experience working with businesses of all sizes, as well as his knowledge of evolving tax legislation, allow him to offer proactive counseling and planning advice to clients to help achieve their goals and objectives while mitigating their risk along the way. Mr. Ellis has extensive litigation experience in will contests and misappropriation of funds cases, utilizing his knowledge of estate and trust law to help clients reach successful resolutions. He also handles general litigation matters for clients, ranging from breach of contract matters to real estate disputes. Mr. Ellis has handled various types of litigation matters throughout the state of West Virginia. Mr. Ellis is a member of The West Virginia State Bar (Probate Committee) and the Charleston Estate Planning Council. He earned his B.A. degree from West Virginia Wesleyan College, his LL.M. degree from the University of Denver and his J.D. degree from the University of Denver College of Law.

MELANIE HICKS obtained an associate degree in Paralegal Studies in 1994 from the College of WV (nka University of Charleston, Beckley). She has worked for more than 20 years for sole practitioners in real estate, civil litigation, family law and criminal law areas of the legal field. Ms. Hicks incorporated Paralegal Solutions, LLC, in 2008, and now works as a freelance paralegal for numerous attorneys and firms performing real estate work, litigation support and contract review. She became a member of LAPSWV in 2008 and passed the NALA certifying examination in March 2010. Ms. Hicks was elected as LAPSWV's Secretary for 2011-2012, NALA Liaison for 2012-2013, first vice president for 2013-2014 and president for 2014-2015. She has been nominated as the NALA Affiliate Award winner for LAPSWV for 2012 and 2014. She is currently a member of NALA's Leadership Enhancement and Preparation (LEAP) Class of 2014.

MARY RENNIE ROWE is a member of the Corporate Department of Dinsmore & Shohl LLP, focusing her practice on tax and benefits matters. In addition, she is experienced representing clients in a variety of civil litigation throughout West Virginia. Ms. Rowe also previously served as an intern with the Richmond Commonwealth's Attorney's Office and as a summer clerk under the Hon. Robert B. King for the U.S. Court of Appeals for the Fourth Circuit. She received her B.A. degree from Vanderbilt University, cum laude, and her J.D. degree from the University of Richmond School of Law. She has previously lectured for National Business Institute on estate planning issues.

Table Of Contents

How To File An Estate In Probate Court

Submitted by Mary Rennie Rowe

HOW TO FILE AN ESTATE IN PROBATE COURT

Mary Rennie Rowe
Dinsmore & Shohl LLP
Charleston, WV
(304) 357-0919
mary.rowe@dinsmore.com

A. Introduction

W. Va. Code § 44-1-15 (2014) provides that it is the duty of a personal representative “to administer well and truly the whole personal estate of his decedent.” The function of this outline is to provide an overview of the steps necessary to properly administer an estate under West Virginia law. It is important to file all necessary documents in a timely fashion and handle the estate in a manner consistent with the intent of the decedent. According to West Virginia law, every estate must go through several steps, ranging from probating a decedent’s will to making a final distribution of assets to the appropriate beneficiaries.

B. Distinctions Between Modest and Larger Estates

West Virginia, unlike other states such as Ohio, provides little distinction in the probate process based upon the value of an estate. Therefore, the phrases “small estate,” “large estate,” and “regular estate” are not applicable. However, the value of assets in an estate may affect the amount of the bond required by the personal representative, whether the estate is subject to federal estate tax, and whether the estate will be referred to a fiduciary commissioner. Those estates valued at One Hundred Thousand Dollars (\$100,000.00) or less (exclusive of real estate specifically devised and nonprobate assets) or which have only one beneficiary generally will not be referred to a fiduciary commissioner pursuant to W. Va. Code §§ 44-2-1 and 44-3A-5 (2014).

While there is little distinction between a “small estate” and a “large estate,” the administration of some estates may be simple and the administration of other estates with

multiple beneficiaries, creditors, disputes, and tax liabilities may be quite complex. Although many personal representatives attempt to navigate the probate process without an attorney's assistance, the retention of a competent legal advisor with probate experience is wise.

C. The Estate Timetable and What Needs to Be Done

1. *Initiating the Process*

The first step in administering a decedent's estate is to present the decedent's will for probate and qualify the executor of the estate. W. Va. Code § 41-5-4 (2014) provides that the county commission having jurisdiction over the probate a will is the county commission (1) in the county where the testator, at the time of his or her death, had a place of residence; (2) if the testator had no place of residence, where he or she owned real estate; (3) if he or she had no real estate, in the county where he or she died or had any property at the time of his or her death; or (4) if the testator died out of state, his or her will may be admitted to probate in the county where he or she had property.

Pursuant to W. Va. Code § 41-5-1 (2014), a person having custody of a will must deliver the will to the clerk of the county commission or the executor named in the will within thirty (30) days of the decedent's death. The personal representative must then offer the will for probate within a reasonable time.

A person who fails to deliver a will to the clerk or the executor named in the will within thirty (30) days of the decedent's death is guilty of a misdemeanor and is civilly liable to the beneficiaries for any damages caused by such neglect. W. Va. Code § 41-5-1 (2014).

2. *Probate in Solemn Form*

Formal probate, as outlined in W. Va. Code § 41-5-5 (2014), is known as solemn form. To begin the procedure, an interested person files with the county commission having

jurisdiction a duly verified petition which outlines: (1) when and where the testator died; (2) his or her last place of residence; (3) the nature of his or her estate; and (4) the relationship to the decedent and the residence of all heirs at law, beneficiaries under the will, and the surviving spouse. The county clerk then serves upon all the interested parties a notice requiring them to appear at a scheduled hearing and to show cause why the will should not be admitted to probate. A guardian ad litem must be appointed for any parties under disability, such as minors. Before the entry of a probate order, any interested party may file a notice of contest, and the county clerk then issues further process. At the final hearing, the county commission enters an order admitting the will to probate or refusing it.

3. *Ex Parte Probate*

The simpler and more common procedure for probate is the ex parte procedure, which is outlined in West Virginia Code § 41-5-10 (2014). Any person may move the county commission for probate of a will without notice to any other party. The motion for ex parte probate is made orally, and no formal written motion is required.

The original, signed will must be presented to the county clerk. Some county clerks schedule appointments for the probate of wills and others do not. Ordinarily, one witness needs to appear before the county clerk to swear that the will is valid and was signed before him or her by the testator and the other witnesses. However, it is possible to avoid bringing a witness if a self-proving affidavit is affixed to the original will. Finally, if the will or West Virginia law requires that a bond be posted by the personal representative, a representative of the bonding company should be present at the time of probate.

4. *Bond Requirements*

If the will or West Virginia law requires a bond, the personal representative is required to make a determination, based on his or her estimate at the time, of the value of the probate estate. The probate estate includes property that is owned solely by the decedent at the time of his or her death that passes by will or by intestacy. All other property is considered nonprobate property, which includes assets held as joint tenants with the right of survivorship, such as real estate, bank accounts, individual retirement accounts, life insurance policies payable to named beneficiaries other than the estate, payable on death accounts, and annuities payable to a named beneficiary other than the estate. Once the probate estate is determined, the personal representative must post a bond equal to or greater than the value of the probate property. Generally, the value of the real property included in the probate estate is not included in the bond calculation. W. Va. Code § 44-1-7 (2014).

Fortunately, it is possible to avoid the bond requirement. W. Va. Code § 44-1-8 (2014) states that if the will provides that the personal representative shall not give bond, the personal representative shall not be required to give a bond unless at the time the will is admitted to probate (or at any time thereafter), on application of any person interested, or from the knowledge of the county commission or the clerk admitting the will to probate, the county commission deems it proper that bond should be given.

5. *Qualification of the Personal Representative*

Pursuant to W. Va. Code § 44-1-13 (2014), at the time the will is admitted to probate in an ex parte proceeding, the personal representative shall provide to the county clerk a death certificate of the decedent and an affidavit listing the names and addresses of the beneficiaries or heirs of the decedent. The county commission then issues a certificate of appointment to the

personal representative. It is advisable to obtain multiple copies of the certificate of appointment.

When a person dies intestate, the clerk customarily grants administration to the distributees who apply to be appointed. If a will is located following the appointment of an administrator, the county commission will ordinarily revoke the appointment of the administrator and appoint an executor in accordance with the terms of the will.

W. Va. Code § 44-1-4 (2014) provides that a surviving spouse is to be given preference when the clerk determines the proper party to be appointed as administrator of an intestate estate. The clerk is then given the authority to determine which distributee should be appointed to administer the estate in the absence of a surviving spouse. If no one applies to be appointed within thirty (30) days of the decedent's death, the clerk may grant administration to creditors of the estate.

6. *Fiduciary Commissioner System*

West Virginia utilizes two forms of probate administration and each county commission chooses which system to utilize. The most common system is the fiduciary commissioner system provided by W. Va. Code § 44-3-1, *et seq.* (2014). Any county commission may, however, utilize the fiduciary supervisor system provided by W. Va. Code § 44-3A-1, *et seq.* (2014), which is discussed below.

In counties with the fiduciary commissioner system, the fiduciary commissioner is the primary officer charged with overseeing the personal representative's administration of the estate. In counties which have adopted the fiduciary supervisor system of administration, the fiduciary supervisor is the primary officer charged with overseeing the personal representative's administration of the estate. With both systems, the county commission oversees the actions of

the personal representative and can exercise powers to dismiss, replace, or discipline the personal representative.

a. Appraisement and Nonprobate Inventory – Under the fiduciary commissioner system, the Appraisement (West Virginia Form 6.01, Appraisement of the Estate For Decedents Dying On or After July 13, 2001) and two copies and the Nonprobate Inventory (West Virginia Form 6.02, Nonprobate Inventory of the Estate For Decedents Dying On or After July 13, 2001) shall be filed within ninety (90) days of the date of qualification of the personal representative. W. Va. Code § 44-1-14 (2014). On the Appraisement and Nonprobate Inventory, the personal representative shall list the fair market value of all property in which the decedent had an interest at the time of his or her death. These forms serve as the basis for the preparation of the West Virginia and federal estate tax returns and the accountings of the estate. Once the Appraisement is filed, the county clerk will refer the estate to a fiduciary commissioner, if necessary, so that the fiduciary commissioner may make a determination of debts, claims, shares of legatees and distributees, and any other matter necessary for the settlement of the estate. W. Va. Code § 44-2-1 (2014).

If the assets of the estate are valued at One Hundred Thousand Dollars (\$100,000.00) or less (exclusive of any real estate specifically devised and nonprobate assets), the county clerk will not refer the estate to a fiduciary commissioner unless a claim is filed against the estate.

b. Publication of Notice – Within thirty (30) days of the filing of the Appraisement, the county clerk shall publish a legal notice in a newspaper of general publication once a week for two (2) successive weeks regarding the death of the decedent and the administration of the estate. W. Va. Code § 44-1-14a (2014) requires the personal representative to serve a copy of the legal notice upon the surviving spouse of the decedent, the beneficiaries or

heirs of the decedent, the trustee of any trust established by the decedent, and the creditors of the decedent.

Creditors shall have ninety (90) days to file a claim against the estate. W. Va. Code § 44-2-2 (2014). The personal representative is required to file with the fiduciary commissioner a list of the names and addresses of all known creditors, distributees, and legatees of the estate and the fiduciary commissioner is required to mail a copy of the ninety (90) day notice to them. W. Va. Code § 44-2-4 (2014).

In the event a dispute arises concerning the validity of a claim against the decedent's estate, the personal representative must file a counter affidavit objecting to the validity of the claim in accordance with W. Va. Code § 44-2-6 (2014).

c. General Responsibilities - Generally, it is the responsibility of the personal representative to collect all assets of the decedent, pay all debts of the decedent and all taxes, costs, and administrative expenses incurred in the administration of the estate, and to distribute any remaining assets to the beneficiaries under the will or to the decedent's heirs and distributees under the laws of intestacy. Costs and administrative expenses include funeral expenses, accountant fees, attorneys' fees, executors' commissions, utilities, medical expenses, home health care, and income tax liability. An itemized list of the administrative expenses should be found on Schedule J of the Form 706 (discussed below). Significantly, all of the debts and administrative expenses of the estate are deductible under IRC § 2053.

d. Annual Accountings and Final Settlement – W. Va. Code § 44-4-2 (2014) requires the personal representative to file with the county commission annual accountings two (2) months following the end of the first year of the administration of the estate and annually thereafter until the estate is closed, at which time the personal representative shall file a final

settlement which lists the assets described on the Appraisal (with any adjustments), receipts received during the administration of the estate, and all disbursements and distributions. The personal representative shall file the final settlement with the fiduciary commissioner within five (5) years from the date of appointment unless the county commission grants an extension. W. Va. Code § 44-4-14 (2014).

W. Va. Code § 44-4-7 (2014) provides that a personal representative who fails to file an annual accounting is not entitled to compensation for fiduciary services during such year.

e. Waiver of Final Settlement – It is possible for the personal representative to avoid the cost and expense of the preparation of annual accountings and the final settlement by filing a waiver of final settlement pursuant to W. Va. Code § 44-2-29 (2014). The waiver must be signed by each beneficiary (other than those who receive only a bequest of tangible personal property or cash) and must contain an affidavit of the personal representative stating that the time for filing of claims has lapsed, there are no unpaid claims of the estate, and all beneficiaries have been advised of their respective shares of the estate.

f. Decedent's Income Tax Returns – The decedent's final income tax returns, IRS Form 1040 and West Virginia Form IT-140, are due by April 15 of the year following the year of the decedent's death, unless the personal representative is granted an extension.

g. Fiduciary Income Tax Returns – If the taxable income of the decedent's estate is Six Hundred Dollars (\$600.00) or more in any tax year, the personal representative must file a Form 1041 (U.S. Income Tax Return for Estates and Trusts) and Form IT-141 (West Virginia Fiduciary Income Tax Return) on or before the 15th of the fourth (4th) month following the close of the calendar year or fiscal year elected by the personal representative.

h. Federal Estate Tax Return – IRS Form 706, the United States Estate (and Generation-Skipping Transfer) Tax Return, is due nine (9) months after the decedent’s death if the gross estate of the decedent exceeds the applicable exclusion amount in effect during the year of the decedent’s death. For the year 2014, the applicable exclusion amount is Five Million Three Hundred Forty Thousand Dollars (\$5,340,000.00). The federal estate tax is imposed upon all property in which the decedent had an interest at the time of his or her death less applicable deductions and credits. All property shall be valued at the fair market value as of the date of the decedent’s death unless the personal representative elects the alternate valuation date or dates set forth in IRC § 2032. This provision states, in part, that the personal representative may elect to have property included within the decedent’s estate valued on the date six (6) months after the decedent’s death; provided, however, if any property owned by the decedent is distributed, sold, exchanged, or otherwise disposed of within such six (6) months, then such property is valued as of the date of distribution, sale, exchange, or other disposition. A personal representative may only elect to value property pursuant to IRC § 2032 if such election decreases the value of the decedent’s gross estate and reduces estate taxes otherwise payable.

It is important that the value of the assets enumerated on the Appraisal and the Nonprobate Inventory be consistent with the values listed on the Form 706. In many instances, this is accomplished by filing an amended Appraisal and Nonprobate Inventory at the time the Form 706 is filed.

i. Discharge of the Personal Representative – Unless the personal representative has filed a waiver of final settlement, the fiduciary commissioner shall prepare a report of the final settlement and give notice of such report to all interested parties. W. Va. Code § 44-4-15 (2014). The fiduciary commissioner shall hold the report for inspection by interested

parties for ten (10) days. Interested parties may file exceptions to the report. After this time period, the fiduciary commissioner files the report with the county commission. W. Va. Code § 44-4-16 (2014). After the county commission holds the report for at least ten (10) days for examination and correction of any errors, the county commission enters an order discharging the personal representative.

For those estates valued at One Hundred Thousand Dollars (\$100,000.00) or less or those estates with only one beneficiary, the county commission will discharge the personal representative when the personal representative files the waiver of final settlement or files with the clerk a report of receipts, disbursements, and distributions and an affidavit stating that all claims against the estate have been paid.

Under West Virginia law, a personal representative is not required to distribute the assets of the decedent's estate until the filing of a final settlement of accounts and entry of an order discharging the personal representative. Upon arrival of a final settlement and entry of an order discharging the personal representative, it is appropriate to make a final distribution to the residuary beneficiaries of the estate. Nevertheless, many personal representatives make partial distributions from estates during the pendency of the estate administration. These are at-risk distributions which may be subject to the claims of creditors.

j. Compensation of the Personal Representative – W. Va. Code § 44-4-12 (2014) provides that a personal representative is entitled to reasonable compensation in the form of a commission on the assets subject to administration. Until 2007, the general standard in West Virginia with regard to the amount of the personal representative's compensation was five percent (5%) of the estate's receipts. *See, e.g., In re: Estate of Lapinsky v. Sparacino*, 148 W. Va. 38, 132 S.E.2d 765 (1963). In 2007, the West Virginia Legislature adopted a statutory

fee schedule which is set forth in W. Va. Code § 44-4-12a (2014). Significantly, however, it may not be advisable for a personal representative to receive such a fee if he or she is the sole beneficiary of the estate because of the income tax consequences of receiving such a fee.

7. *Fiduciary Supervisor System*

Counties that utilize the fiduciary supervisor system include Marion, Summers, Putnam, Greenbrier, Kanawha, Braxton, Jackson, and Berkeley.

Under the fiduciary supervisor system, the process for filing the Appraisement and Nonprobate Inventory and the process of publication of notice of the death of the decedent is the same as with a fiduciary commission system. Additionally, the personal representative has the same general responsibilities as one does with the fiduciary commissioner system. The areas in which the fiduciary supervisor system is different from the fiduciary commissioner system are outlined below.

a. Short Form Settlement – After ninety (90) days have lapsed since the publication of the legal advisement regarding the death of the decedent, the personal representative is permitted to close the estate by filing with the fiduciary supervisor a short form settlement and a waiver executed by each beneficiary. W. Va. Code § 44-3A-4a (2014). The settlement must contain an affidavit of the personal representative which states that the time for filing claims has expired, no known or unpaid claims exist, and the allocation of property has been agreed upon by each beneficiary.

b. Summary Settlement – At any time after the time period for creditors to submit claims has expired, the fiduciary supervisor may require that the personal representative (or the personal representative may on his or her own motion) file a proposed settlement. W. Va. Code § 44-3A-19 (2014). The fiduciary supervisor has the authority to approve the settlement or

return it to the personal representative for modification. The fiduciary supervisor shall give notice of the proposed settlement to the tax commissioner, all creditors whose claims have not been satisfied, and all beneficiaries. The fiduciary supervisor must also publish the notice as a Class I-10 legal advertisement. If no one disputes the proposed settlement, the fiduciary supervisor directs the personal representative to conclude administration of the estate. When evidence is submitted that all claims and taxes have been paid, the fiduciary supervisor submits his or her report of the settlement to the county commission for approval.

c. Formal Settlement – In the event a dispute arises among beneficiaries, there are contested claims, or the estate is insolvent, the fiduciary supervisor will refer the estate to a fiduciary commissioner for hearings and resolution of matters which usually require a thorough accounting by the fiduciary commissioner.

D. Steps for Proving the Will

Chapter 41, Article 1 of the West Virginia Code sets forth the formal requirements for a valid will, which are: (1) the testator must be at least eighteen years of age and of sound mind; (2) he or she must have testamentary intent (the testator must intend for the instrument to be a will or to dispose of his or her property upon his or her death); (3) the will must be in writing; (4) the testator must sign the will; and (5) two witnesses must sign the will in the presence of the testator and in the presence of each other. W. Va. Code §§ 44-1-1 to 44-1-4 (2014). In the case of a holographic will, a will may stand as a valid will only if it is wholly in the handwriting of the testator and is signed by him or her. W. Va. Code § 41-1-3 (2014).

E. Steps for Challenging the Will

1. *Overview*

When a dispute arises over a decedent's will, it is generally fought over one or more of the following four theories:

- a) the will fails to meet the technical requirements of a valid testamentary instrument;
- b) the testator lacked testamentary capacity to make the will;
- c) the will was procured through undue influence, fraud, or mistake; and
- d) a person has tortiously interfered with another's expectancy to inherit under the estate.

Interested persons who were not parties to an ex parte or solemn form probate proceeding may seek to impeach a will under the provisions of W. Va. Code § 44-5-11 (2014). Jurisdiction lies with the circuit court. The complaint must be filed with the clerk of the circuit court within six (6) months after the will has been admitted to or denied probate by the county commission. If the will was admitted to or denied probate upon appeal to the circuit court, the statute of limitations is six (6) months from the entry of the circuit court order. Venue is proper in the county where the will was admitted or denied probate.

2. *Will Contests*

The simplest way to void a will results from the testator's failure to follow the requirements outlined in W. Va. Code § 41-1-3 (2014) (as outlined in Section D). For example, both witnesses were not present when the testator signed the document, the signature of the testator was a forgery, or one of the witnesses was not mentally competent.

- a. Lack of Testamentary Capacity – If the will has been duly executed and not subsequently revoked, a common ground for challenging a will is that the testator lacked testamentary capacity. A person of “unsound mind” is incapable of making a will. The test of

testamentary capacity requires that the testator be capable of understanding (1) the nature and consequences of his or her act, (2) the property to be disposed, and (3) the objects of his or her bounty. In addition, the testator must hold such knowledge in his or her mind a sufficient length of time to be able to form some rational judgment in relation to them. In West Virginia, the law requires less mental capacity to make a will than to make a deed or contract. Mental capacity is determined at the time the will is executed. Old age and eccentricity alone are insufficient to establish a lack of testamentary capacity to make a will. Mere infirmity of body and mind, due to illness, is not, standing alone, enough to establish “incapacity of a testator to make a will.” *Ritz v. Kingdon*, 139 W.Va. 189, 79 S.E.2d 123 (1953) (reversed on other grounds); *State v. Brage*, 140 W.Va. 585, 87 S.E.2d 689 (1955).

b. Fraud and Mistake – Fraud and mistake affect testamentary intent, whereas undue influence affects testamentary capacity. Fraud occurs when a testator is misled into executing a will which he or she does not know to be a will or which does not say what he or she thinks it says. If fraud is proven, the court may set aside the will.

A court may set aside a will on the grounds of mistake, but only if it is a mistake as to what the instrument contains, or as to the paper itself. These situations are typically limited to descriptions of property and designations of beneficiaries. A mistake of fact or law upon which a testator relies in making his or her will cannot be corrected by the court.

c. Undue Influence – Undue influence is concerned not with the testator's intentions, but with his or her very capacity to execute the will. Undue influence sufficient to invalidate a will must be such influence as destroys the free agency of the testator and, in legal effect, amounts to force or coercion; but such force and coercion need not be physical or applied at any particular time. The burden of proving undue influence is upon the party who alleges it.

d. Tortious Interference with a Testamentary Bequest – West Virginia recognizes the tort of tortious interference with a testamentary bequest or with expectation of inheritance. In West Virginia, the tort is independent of the right to contest a will and is not within the probate jurisdiction of the county commission. A suit for tortious interference with a testamentary bequest is a common law action in tort, seeking a recovery against a wrongdoer defendant who is alleged to have wrongfully acted, usually in a form of fraud, to deprive the plaintiff of what he or she would have received from the decedent's estate, but for the fraud. The statute of limitations is two (2) years from the time when the injured party should have become aware of the wrongful conduct. *Barone v. Barone*, 170 W.Va. 407, 294 S.E.2d 260 (1982).

e. Declaratory Judgments – Under the Uniform Declaratory Judgments Act, W. Va. Code §§ 55-13-1, *et seq.* (2014), a party can seek declaratory relief. Under W. Va. Code §55-13-2 (2014), “any party interested under a...will...” may have any question of construction or validity “determined,” and obtain “a declaration of rights, status or other legal relations thereunder.” This is an extremely helpful tool to deal with ambiguous bequests, devises, or even instructions in a will. In the case of “contest,” the use of a declaratory judgment action is literally and specifically allowed in order to address a question about “... validity arising under the instrument.”

W. Va. Code § 55-13-2 (2014) uses the terms “any party interested.” That may connote that one still has to have a legal interest under the will, i.e., for example, to be an heir or devisee. Nevertheless, cases and interpretation of the Uniform Declaratory Judgments Act are well known for the liberal treatment of standing. For example, in *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979), the court noted that “for standing under the Declaratory Judgments Act, it is not essential that a party have a personal legal right or interest.” Therefore, even if stymied by a

possible lack of standing to make an attack on the will in any of the other approaches discussed, the declaratory judgment action offers yet another avenue.

7225174v1

Working With Executors And Administrators

Submitted by Mary Rennie Rowe

WORKING WITH EXECUTORS AND ADMINISTRATORS

Mary Rennie Rowe
Dinsmore & Shohl LLP
Charleston, WV
(304) 357-0919
mary.rowe@dinsmore.com

A. Duties of Executors and Administrators During the Probate Process

The personal representative of a decedent's estate, whether an executor or administrator, is a fiduciary to the estate and its beneficiaries. Because of this, the personal representative must comply with the various duties imposed on a fiduciary. In order to ensure that the personal representative fulfills these obligations, the personal representative is supervised by the County Commission. In counties with the Fiduciary Commissioner system of administration, the Fiduciary Commissioner is the primary officer charged with overseeing the personal representative's administration of the estate. In counties which have adopted the Fiduciary Supervisor system of administration, the Fiduciary Supervisor is the primary officer charged with overseeing the personal representative's administration of the estate. In both the Fiduciary Commissioner and Fiduciary Supervisor systems, the County Commission oversees the actions of the personal representative and can exercise powers to dismiss, replace, or discipline the personal representative if need be.

1. *Submitting the Will for Probate and Qualifying as Personal Representative*

The first step in administering a decedent's estate is to present the decedent's will for probate and qualify as the personal representative of the estate. W. Va. Code § 41-5-1 (2014) provides that any person having custody of a decedent's will must deliver the will to the Clerk of the County Commission having jurisdiction over the decedent's estate or deliver it to the executor named in the will. Any person who fails to deliver a decedent's will in accordance with

W. Va. Code § 41-5-1 (2014) is guilty of a misdemeanor. In addition, the executor or administrator must qualify as the personal representative of a decedent's estate by taking an oath in accordance with W. Va. Code § 44-1-3 (2014) before the Clerk of the County Commission that he or she will faithfully perform the duties of the office to the best of his or her skill and judgment. An executor has no power before qualifying "except that he may provide for the burial of the testator, pay reasonable funeral expenses and preserve the estate from waste." W. Va. Code § 44-1-1 (2014).

2. *Locating Heirs and Beneficiaries*

Once appointed, the personal representative has an obligation to use reasonable diligence to locate the heirs or beneficiaries of the decedent's estate. W. Va. Code § 44-1-13 (2014) requires the personal representative to file an affidavit showing the names and, as far as possible, the addresses of the persons who would take any part of the estate of the decedent as heirs or beneficiaries.

3. *Handling Assets of the Estate*

Once a personal representative has probated the will and been appointed as the personal representative by the County Commission, the personal representative must locate, collect, and preserve all assets belonging to the decedent. This duty often includes maintaining insurance on items such as the decedent's personal residence.

4. *Filing an Appraisement of the Estate*

W. Va. Code § 44-1-14 (2014) requires the personal representative to file an Appraisement of the estate listing and appraising the assets of the decedent at their real and actual value. W. Va. Code § 11-11-7 (2014) requires the personal representative to file a Nonprobate Inventory of the estate. The Appraisement and Nonprobate Inventory serve as the

base information for the preparation of federal and state tax returns and the accountings of the estate. In order to file the Appraisal and Nonprobate Inventory, it is necessary to gather information concerning the decedent's real estate, tangible personal property, government bonds and securities, shares of corporate stock, and money. A personal representative is required to file the Appraisal and Nonprobate Inventory within ninety (90) days of the date of qualification of the personal representative.

5. *Taking Charge of Personal Property*

The personal representative has a duty to take custody of the probate assets of the estate and to administer the estate in order to preserve and protect the property for distribution to the proper persons. This may present a problem if the decedent had another person acting on his or her behalf in a fiduciary capacity, such as a conservator or attorney-in-fact under a durable power of attorney for business.

6. *Collecting Debts Due the Decedent*

One of the primary duties of the personal representative is to pay the debts and administrative expenses of a decedent's estate. These include utilities, insurance, medical bills, taxes, funeral expenses, accountant fees, attorneys' fees, executor's commissions, and miscellaneous administrative expenses.

7. *Defending Actions Against the Estate*

The personal representative has a duty to defend all actions against a decedent's estate. In West Virginia, this may involve a complaint filed against a decedent's estate in Circuit Court or a proof of claim filed against a decedent's estate before the County Commission.

8. *Prosecuting Claims of the Estate*

The personal representative has a duty to prosecute all valid claims on behalf of a decedent's estate. Under West Virginia law, the personal representative is the individual charged with bringing a wrongful death action. In addition, a personal representative may be forced to file a civil action in order to collect a debt due to the decedent.

9. *Fulfilling the Decedent's Contractual Obligations*

When a decedent has entered into a contract which has not been performed, the personal representative may be compelled to fulfill the obligations of the decedent with respect to the contract. Significantly, however, the personal representative of a decedent's estate may not be compelled to carry out a contract which is personal in nature and in which personal performance by the decedent is of the essence to the contract.

10. *Filing Estate and Income Tax Returns*

The personal representative must file all tax returns on behalf of decedent's estate and, where applicable, pay any taxes due. These tax returns include: (1) the decedent's final federal income tax return, (2) the decedent's final state income tax return, (3) the federal estate tax return, (4) the federal fiduciary income tax return, and (5) the state fiduciary income tax return.

11. *Filing Annual Accountings*

In the event the beneficiaries of an estate are not willing to sign a waiver of final settlement in accordance with the provisions of W. Va. Code § 44-2-29 (2014) or a short form settlement in accordance with the provisions of W. Va. Code § 44-3A-4a (2014), it is necessary for the personal representative to file annual accounting in accordance with the provisions of W. Va. Code § 44-4-2 (2014).

12. *Final Settlement*

West Virginia Code § 44-2-29 (2014) provides that in all estates subject to administration where a West Virginia Estate Tax release has been filed with the Clerk and more than ninety (90) days has elapsed since the filing of the notice required by W. Va. Code § 44-2-1 (2014), a final settlement may be waived. An affidavit must be made and filed by the personal representative to the effect that the time for filing of claims has expired, that no known and unpaid claims exist against the estate, and that all heirs and distributees have been advised to the shares to which each is entitled from the estate. The waiver signed by the sole beneficiary in a sole beneficiary estate or, in the case of multiple beneficiaries, by every beneficiary, is then recorded in lieu of a final settlement.

With respect to estates administered under the Fiduciary Supervisor alternative procedure, W. Va. Code §44-3A-4a (2014) provides a similar provision, except that the short form settlement is filed with the Fiduciary Supervisor.

13. *Distributing the Assets of the Estate*

Upon conclusion of the estate administration, the personal representative has a duty to guard against error in the final distribution of the assets of the estate. This requires the personal representative to exercise care to see that the intent of the decedent is carried out with respect to distributions to the beneficiaries of the estate. Under West Virginia law, a personal representative is not required to distribute the assets of a decedent's estate until the filing of a final settlement of accounts and entry of an order discharging the personal representative.

14. *Fiduciary Duties of the Personal Representative and Misconduct of the Personal Representative*

The fiduciary duties of a personal representative include the duty of loyalty and the duty of care. In addition to the duties discussed above, a personal representative has a duty "to administer well and truly the whole personal estate of his decedent." W. Va. Code § 44-1-15

(2014). The personal representative must exercise his or her fiduciary functions with the interests of the estate and its beneficiaries in mind. The personal representative should not engage in transactions with the estate without proper disclosure and court approval. This prohibition extends to commingling funds. In this regard, the personal representative should not mix the assets of the estate with his or her personal funds. Similarly, the personal representative should not deal with the estate assets for his or her own benefit.

The personal representative must act as a person would in the care of his or her own assets. Accordingly, a personal representative may be removed for cause if he or she acts in violation of his or her fiduciary duties to the estate. *Syl. Pt. 5, McClure v. McClure*, 184 W. Va. 649, 403 S.E. 2d 197 (1991).

W. Va. Code § 44-5-5 (2014) provides that the County Commission having jurisdiction over the decedent's estate may order a personal representative to post additional bond. In addition, the County Commission may revoke the powers of a personal representative for failure to comply with an order or for misconduct. W. Va. Code § 44-5-5 (2014).

Finally, W. Va. Code § 44-1-23 (2014) provide that “a civil action may be maintained by or against a personal representative for the taking or carrying away of any goods, or for the waste or destruction of, or damage to, any estate of or by his decedent.”

B. Paralegal Contact With Executors and Administrators

Paralegals assist attorneys in the delivery of legal services, including assistance with estate administration. Paralegals can be extremely helpful to attorneys in performing estate administration tasks such as locating heirs and beneficiaries, categorizing and managing assets of the estate, drafting the Appraisal and Nonprobate Inventory of the estate, drafting estate and income tax returns, annual accountings, and final settlements, organizing estate files, handling

day-to-day contact with the personal representative and beneficiaries, conducting legal research, drafting legal documents and correspondence, and initiating contact with the County Commission, Fiduciary Supervisor, and/or Fiduciary Commissioner. Paralegals must remember that they cannot give legal advice to personal representatives or beneficiaries. Legal advice is telling or advising a client what he or she should or should not do in a certain situation and giving a client information that would lead that client to make a legal decision for his or her case or estate. Paralegals must also be careful not to give confidential information to those who do not have the authority or reason to have such information.

C. Compensation

W. Va. Code § 44-4-12 (2014) allows for reimbursement from the estate to the personal representative for reasonable expenses incurred by the personal representative in the administration of the estate. In addition, the personal representative is entitled to reasonable compensation for administering the decedent's estate. W. Va. Code § 44-4-12 (2014).

1. *Statutory Compensation*

Prior to 2007, five percent (5%) of actual receipts was the usual standard for determining reasonable compensation of a personal representative. *See* Syl. Pt. 1, *In re: Estate of Lapinsky v. Sparacino*, 148 W. Va. 38, 132 S.E. 2d 765 (1963).

In 2007, the West Virginia Legislature enacted W. Va. Code § 44-4-12a (2014), which sets forth the compensation schedule and expenses of personal representatives. Personal representatives, as defined in West Virginia Code § 42-1-1 (2014), are allowed reasonable expenses and commissions on the amount of the personal estate subject to administration and on the proceeds of real estate that is sold as follows: 1) 5% for the first \$100,000.00; 2) 4% all above \$100,000.00 up to \$400,000.00; 3) 3% all above \$400,000.00 up to \$800,000.00; and 4)

2% all above \$800,000.00. The personal representative is allowed a commission of 1% for real estate that is not sold. In addition, personal representatives are allowed a commission of 1% on all property not subject to administration and includible in the decedent's estate for purposes of computing the federal estate tax, excluding joint and survivorship property. A testator may deviate from the commissions allowed under this statute by express language in the testator's will.

2. *Fees for Personal Representative Who Is An Attorney*

Where a personal representative of an estate is an attorney who renders professional services, compensation for such professional services in addition to a commission shall not be allowed pursuant to W. Va. Code § 44-4-12a(e) (2014).

D. Special Administration

There are special situations in which the administration of a decedent's estate is modified from the general statutory format.

1. *Estates Under \$100,000.00 and Sole Beneficiary Estates*

W. Va. Code § 44-2-1 (2014) provides that where the value of the assets of the estate are \$100,000.00 or less, exclusive of real estate specifically devised and nonprobate assets, or there is only one beneficiary of the probate estate, the Clerk shall record the Appraisal of the estate without reference to a Fiduciary Commissioner. With respect to estates administered in Fiduciary Supervisor counties, see W. Va. Code § 44-3A-5 (2014).

2. *Ancillary Administration*

The ancillary administration of an estate occurs when the decedent is a nonresident of West Virginia but owns real estate in West Virginia at the time of his or her death. W. Va. Code § 44-5-3 (2014) provides for the appointment of a nonresident individual as the ancillary

administrator of a nonresident decedent's assets situate in West Virginia where such individual is the duly appointed personal representative in the decedent's state of domicile. Authenticated copies of the probate documents (will, order of appointment, etc.) must be submitted in the county where ancillary administration is sought. If the personal representative is not required to post bond under the terms of the decedent's will, he or she will not be required to post bond in order to qualify as ancillary administrator.

E. Duties of the Attorney for the Executor – Who is the Client?

Generally speaking, the attorney for an estate represents the personal representative, who handles matters on behalf of the estate. The personal representative is the proper party to litigate on behalf of the estate, as outlined in W. Va. Code § 44-1-22 (2014), which provides that a personal representative may sue or be sued upon any judgment for or against, or any contract with the decedent. Typically, the attorney for an estate does not represent the beneficiaries of the estate. However, in will contests, the question sometimes arises as to whom the attorney is permitted to represent.

Rule 1.7 of the American Bar Association (“ABA”) Model Rules of Professional Conduct states that an attorney shall not represent a client if the representation involves a concurrent conflict of interest.¹ In October of 1993, the American College of Trust and Estate Counsel (“ACTEC”) adopted Commentaries to the ABA’s Model Rules of Professional Conduct. With regard to Rule 1.7, the ACTEC Reporter’s Notes state in part:

Lawyer for Fiduciary. Under the majority view, a lawyer who represents a fiduciary . . . stands in a lawyer-client relationship

¹ Rule 1.7 of the West Virginia Rules of Professional Conduct and Rule 1.7 of the ABA Model Rules of Professional Conduct are functionally the same. So, while an analysis of Rule 1.7 of the ABA’s Model Rules of Professional Conduct is not controlling, commentary and examples are useful in understanding the West Virginia Rule. Additionally, the West Virginia Supreme Court of Appeals has previously cited the ABA rules in its decisions. *See, e.g., State ex rel. Morgan Stanley & Co. v. MacQueen*, 187 W. Va. 97, 101, 416 S.E.2d 55, 59 (1992).

with the fiduciary and not with respect to the fiduciary estate or the beneficiaries.

Duties to Beneficiaries. The lawyer who represents a fiduciary generally is not usually considered also to represent the beneficiaries. . . . [A] lawyer who represents a fiduciary individually regarding a fiduciary estate may owe few, if any, duties to the beneficiaries apart from the duties that the lawyer owes to other nonclients.

In addition, the ABA issued an opinion, Formal Opinion 94-380, which adopted the majority view that an attorney who represents a fiduciary does not also represent the beneficiaries.

However, in certain situations, an attorney may represent both a fiduciary and individual beneficiaries. The ACTEC Commentaries for Rule 1.7 state in part:

It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter. . . . In some instances the clients may actually be better served by such a representation[.] . . . Multiple representation is also generally appropriate because the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests.

Based upon the ACTEC Commentaries and Reporter's Notes and the ABA's Formal Opinion, the Kentucky Bar Association issued an opinion in September of 1997, Ethics Opinion KBA E-401, which stated in part:

1. In representing a fiduciary the lawyer's client relationship is with the fiduciary and not with the trust or estate, nor with the beneficiaries of a trust or estate.
2. The fact that a fiduciary has obligations to the beneficiaries of a trust or estate does not in itself either expand or limit the lawyer's obligations to the fiduciary . . . nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward third parties.

...

5. A lawyer may represent the fiduciary of a decedent's estate or a trust and the beneficiaries of an estate or trust if the lawyer obtains the consent of the multiple clients, and explains the limitations on the lawyer's actions in the event a conflict arises, and the consequences to the clients if a conflict occurs.

See also Ky. Bar Ass'n v. Fernandez, 397 S.W.3d 383, 392, 2013 Ky. LEXIS 106, * 22 (2013). The West Virginia Supreme Court of Appeals and the West Virginia Bar Association have not issued opinions specifically on this issue. Therefore, the ABA, ACTEC, and Kentucky Bar Association commentaries and opinions are helpful when a question arises regarding appropriate representation.

Ethical Perils In The Probate Process

Submitted by Mary Rennie Rowe

ETHICAL PERILS IN THE PROBATE PROCESS

Mary Rennie Rowe
Dinsmore & Shohl LLP
Charleston, WV
(304) 357-0919
mary.rowe@dinsmore.com

A. Distinguishing Between Privileged and Non-Privileged Communications

The term “privilege” usually denotes an evidentiary rule that prevents a witness (the attorney) from testifying in court if the holder of the privilege (the client) objects. A client may also have a broader right, derived from an ethical duty of loyalty, to have his, her, or its confidences and secrets preserved from voluntary disclosure by his, her, or its attorney.

If an estate planning attorney represents both a husband and wife in an engagement, the attorney-client privilege is waived if a lawsuit develops between the husband and wife or a spouse and a decedent’s estate. An attorney can be called as a witness about the engagement if a client brings a malpractice lawsuit. An attorney who prepared the estate plan can be called as a witness in a will contest or will construction case, the privilege being waived because of the special need for the attorney's knowledge of the testator's intent. *See* Annotation, *Privilege as to Communications to Attorney in Connection with Drawing of Will*, 66 A.L.R. 2d 1302.

The “work-product doctrine” protects the mental impressions of an attorney preparing for trial from being adduced in pretrial discovery. Under Rule 26(b)(3) of the West Virginia Rules of Civil Procedure, work product developed “in anticipation of litigation or for trial” may be discovered “only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Even though all estate planning eventually culminates in a lawsuit known as a probate proceeding, the attorney's client file is

discoverable and is not considered “work product developed in anticipation of litigation.” See Note, *Work Product Discovery: A Multifactor Approach to the Anticipation of Litigation Requirement in Federal Rule of Civil Procedure 26(b)(3)*, 66 Iowa L. Rev. 1277, 1295 (1981) (“In order for materials to be considered prepared in anticipation of litigation courts have sometimes required the presence of specific claims prior to the preparation of the documents.”).

B. When a Client Asks for Legal Advice – Knowing How to Say “No”

Pursuant to the West Virginia Supreme Court of Appeals’ constitutional and inherent power, and legislative authorization under W. Va. Code § 51-1-4 (2014), the West Virginia Supreme Court of Appeals has the exclusive authority to define, regulate, and control the practice of law in West Virginia. See W. Va. Constitution, Article VIII, § 3, see also *W. Va. State Bar v. Earley*, 144 W. Va. 504, 529, 109 S.E.2d 420, 436 (1959); *Brammer v. Taylor*, 175 W. Va. 728, 733, 338 S.E.2d 207, 212 (1985). The West Virginia State Bar has held that, “[i]t is essential to the administration of justice and the proper protection of society that only qualified persons duly licensed be permitted to engage in the practice of law. It is harmful to the public interest to permit anyone to represent falsely that he is qualified to perform legal services.” See W. Va. State Bar Informal Opinion 2001-01. Additionally, “[t]he relation of attorney and client is direct and personal. . . . The gravity and consequences to society resulting from abuses of this relation demands that those assuming to advise or to represent others in matters connected with the law shall be properly trained and educated, and be subject to a peculiar discipline.” *Id.*

As outlined in Section B of *Working With Executors and Administrators*, paralegals must remember that they cannot give legal advice to personal representatives or beneficiaries. Legal advice is telling or advising a client what he or she should or should not do in a certain situation and giving a client information that would lead that client to make a legal decision for his or her

case or estate. It does not matter if a client or non-client is not paying you for your advice. If a client asks for legal advice, inform the client that you are not permitted to give such advice, but will contact the attorney you work with to provide such advice to the client. Sometimes, clients and non-clients contact paralegals for free or reduced-fee advice in an effort to save money. When in doubt, defer to the attorneys whom you work with.

Here are some tips to avoid providing legal advice:

- Make certain that those clients you communicate with understand that you are a paralegal and that paralegals cannot give legal advice.
- When conveying information which may be construed as legal advice, clearly identify the source of the advice as the attorney, e.g., “I asked Attorney Dinsmore about the question you posed and she stated that . . .”
- Make certain that all legal documents or correspondence which may include information which may be construed as legal advice are reviewed, approved, and signed by an attorney.
- Make certain that you communicate effectively with the attorneys with whom you work and keep them advised as to your activities. Make certain that all of your work is reviewed and approved by an attorney.

C. Protecting Your Firm From Malpractice Actions – Tools You Can Use to Meet Deadlines

Rule 1.4 of the West Virginia Rules of Professional Conduct provides that “(a) a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information,” and “(b) a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Most probate attorneys adhere to this rule by providing the client a written

narrative of the procedures that will be followed in the administration of the estate. If your office does not have an estate administration checklist, you and the attorneys with whom you work should prepare one, outlining the documents necessary for probate and the timeline for filing the Appraisement, Nonprobate Inventory, annual accountings, etc. Steps should be taken to complete the checklist as soon as possible following the initial client conference. If the client does not have all of the information requested or does not appear confident about the information provided, the attorney should take action to secure the missing information or to verify the information provided.

During the administrative process, the client should be provided with copies of all routine correspondence to third parties, as well as copies of all documents filed with the County Commission, Fiduciary Commissioner, or Fiduciary Supervisor and state and federal tax authorities. Moreover, the personal representative should be kept informed of any claims filed by creditors against the decedent's estate, all postmortem strategies which may be available to reduce costs, expenses, and taxes, elections made by third parties, and, in general, any significant developments which may affect the administration of the estate.

Dealing With Spouse's Elective Shares

Submitted by Andrew L. Ellis

VI. DEALING WITH SPOUSE'S ELECTIVE SHARES

By Andrew L. Ellis

Dinsmore & Shohl LLP

900 Lee Street, Huntington Square

Charleston, West Virginia 25301

October 6, 2014

Determining Alternatives for the Surviving Spouse: The Elective Share

1. The Elective Share Concept.

The West Virginia elective share and augmented estate system is based on similar provisions in the Revised Uniform Probate Code (“RUPC”), but with important modifications which will be discussed below. The elective share and augmented estate system is intended to protect a surviving spouse against disinheritance.

The West Virginia Elective Share law is primarily based on the Revised Uniform Probate Code (RUPC) Elective Share System which implements the marital-partnership theory by means of a mechanically determined approximation system which the drafters call an accrual type elective share. Under the accrual type elective share, there is no need to identify which of the couple’s property was earned during the marriage and which was acquired prior to the marriage or acquired during the marriage by gift or inheritance, except as hereinafter described.

a. Accrual of Elective Share. The RUPC’s accrual type elective share provides for an elective share percentage based upon the length of the marriage as follows:

If the decedent and the spouse
were married to each other:

The elective-share percentage is:

Less than 1 year	Supplemental Amount Only
1 year but less than 2	3% of the augmented estate
2 years but less than 3	6% of the augmented estate
3 years but less than 4	9% of the augmented estate
4 years but less than 5	12% of the augmented estate
5 years but less than 6	15% of the augmented estate
6 years but less than 7	18% of the augmented estate
7 years but less than 8	21% of the augmented estate
8 years but less than 9	24% of the augmented estate
9 years but less than 10	27% of the augmented estate
10 years but less than 11	30% of the augmented estate
11 years but less than 12	34% of the augmented estate
12 years but less than 13	38% of the augmented estate
13 years but less than 14	42% of the augmented estate
14 years but less than 15	46% of the augmented estate
15 years or more	50% of the augmented estate

b. Application to Augmented Estate. The elective share percentage is applied to the value of the augmented estate to determine the value of the elective share. As hereinafter discussed, the augmented estate includes the couple's combined assets, not merely the value of the assets nominally titled in the decedent's name.

c. Concept of Incremental Vesting. The "incremental vesting" scheme contained in the elective share statute avoids the tracing problem by using a combined

augmented estate which merges both the decedent's and the surviving spouse's augmented estates. The combined estate includes the decedent's net probate estate, the decedent's reclaimable or recapturable estate, and the value of the surviving spouse's estate, including the value of the surviving spouse's reclaimable estate. The surviving spouse's share is calculated from the combined augmented estate, but the spouse is charged with receipt of an appropriate amount of his or her own augmented estate. The share to which the surviving spouse is entitled in this system is 1/2 of the combined augmented estate, but this share vests incrementally over time.

d. Minimum Elective Share Amount. The elective share provisions provide for the decedent's support obligation to a surviving spouse by creating a minimum elective share amount. If the elective share amount otherwise payable to a surviving spouse is less than \$25,000.00, the surviving spouse is entitled to a supplemental elective share amount equal to the difference between the elective share amount determined and \$25,000.00. As enacted in 1992, the supplemental elective share was \$50,000.00, but was reduced to \$25,000.00 by the 1993 Legislature.

2. Components of the Augmented Estate. The "augmented estate" includes not only the decedent's probate estate, but also certain property transferred by the decedent during life and certain property passing by nonprobate means at the decedent's death, as well as property held by the surviving spouse. The augmented estate is outlined in §42-3-2(b) of the West Virginia Code and consists of the sum of the following:

a. Probate Estate. The value of the decedent's probate estate, reduced by funeral and administration expenses, homestead exemption, property exemption, and enforceable claims.

b. Reclaimable Estate. The decedent's reclaimable estate is composed of all property, whether real or personal, movable or immovable, wherever situated, not included in the decedent's probate estate, of any of the following types:

(1) Property to the extent the passing of the principal thereof to or for the benefit of any person, other than the decedent's surviving spouse, was subject to a presently exercisable general power of appointment held by the decedent alone, if the decedent held that power immediately before his or her death.

(2) Property, to the extent of the decedent's contribution during the marriage as a percentage of the whole, held by the decedent and any other person, except the decedent's surviving spouse, with right of survivorship, acquired during the marriage of the decedent and the surviving spouse, if the decedent held that interest immediately before his or her death.

(3) Property transferred by the decedent to any person other than a bona fide purchaser at any time during the decedent's marriage to the surviving spouse to or for the benefit of any person other than the surviving spouse, if the transfer is of any of the following types:

(A) Any transfer to the extent that the decedent retained at the time of his or her death the possession or enjoyment of or right to income from the property (two-year period next preceding death rule removed by 1995 Legislature);

(B) Any transfer to the extent that, at the time of the decedent's death, the income or principal was subject to a power, exercisable by the decedent alone or in conjunction with any other person or exercisable by a non-adverse party, for the benefit of the

decedent or the decedent's estate (two-year period next preceding death rule removed by 1995 Legislature);

(C) Any transfer made to a donee within two years before the decedent's death to the extent that the aggregate transfers to any one donee in either of the years exceed ten thousand dollars.

c. Property to Which Surviving Spouse Succeeds. The value of property to which the surviving spouse succeeds by reason of the decedent's death, other than by homestead exemption, exempt property, testate succession, or intestate succession, including the proceeds of insurance, accidental death benefits on the life of the decedent and benefits payable under a retirement plan in which the decedent was a participant, exclusive of the federal social security system.

d. Property of Surviving Spouse. The value of property owned by the surviving spouse at the decedent's death, reduced by enforceable claims against that property or that spouse, plus the value of amounts that would have been includible in the surviving spouse's reclaimable estate had the spouse predeceased the decedent.

e. Excluded Transfers. Any transfer is excluded from the decedent's reclaimable estate: (i) to the extent the decedent received adequate and full consideration in money or money's worth for the transfer, exercise or release; or (ii) if irrevocably made with the written consent or joinder of the surviving spouse. Life insurance, accident insurance, pension, profit sharing, retirement and other benefit plans payable to persons other than the decedent's surviving spouse or the decedent's estate is also excluded.

3. Petition for Elective Share.

The Code provisions are quite specific and must be followed with respect to who may petition the court for a determination of the elective share.

a. When a Surviving Spouse is Competent. W.Va. Code § 42-3-3(a) provides that only a surviving spouse who is living when the petition for elective share is filed can exercise the election to claim the elective share.

b. When Surviving Spouse is Incompetent. When the surviving spouse is living but incompetent at the time the petition for elective share is filed, the election may be exercised on the surviving spouse's behalf under W.Va. Code § 42-3-3(a) by his or her conservator, guardian, or agent, or under the authority of a durable power of attorney.

4. Where to file the Petition.

In order to claim the elective share, a petition must be filed by the appropriate person (as discussed below) in the County Commission within the requisite timeframe. Practitioners may also want to concurrently file a Petition for Declaratory Judgment in the Circuit Court. The Circuit Court may then stay the county commission proceeding until the Circuit Court enters its declaration.

5. Requirements for Making the Election.

The West Virginia Code sets forth specific requirements for making the election to take the elective share.

a. Time for Making Election. W.Va. Code § 42-3-4(a) provides that the election must be made by filing in the court and mailing or delivering to the personal representative a petition for the elective share (1) within nine months after the date of the decedent's death, or (2) within six months after the probate of the decedent's will, or (3) within

the extension of time allowed by the court under W.Va. Code § 42-3-4(b), whichever limitation expires last.

b. Upon Whom Notice Must be Served. W.Va. Code § 42-3-4(a) requires that the surviving spouse's election be made by filing in the court and mailing or delivering to the personal representative, if any, a copy of the petition for the elective share. The surviving spouse must serve a copy of the petition for the elective share on, and must give written notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented estate whose interests may be adversely affected by the taking of the elective share.

6. Content of Petition. Although the West Virginia Code does not specify the information to be set forth in the petition of the surviving spouse for the elective share, it appears that at a minimum, the following should be included:

a. Factual Information. This section of the petition should set forth the name, address, domicile, date of death of the decedent, whether he or she died testate or intestate, and if testate, the date and place the will was probated, the name and address of the personal representative appointed, if any, and a listing of names and addresses of heirs of law and beneficiaries under the will, if any.

b. Showing that Petition Timely Filed. The petition should establish that the petition is timely filed within (1) nine months of decedent's death, (2) six months of probate of decedent's will, or (3) within an extension of time granted by the court on a petition for extension filed within the nine-month period (whichever last occurs). However, it is essential to maintaining the action against the reclaimable estate that the elective share petition be filed within the time allowed by (1) and (3) above.

c. Petitioner's Marital Situation. This section of the petition should include the date and place of the marriage, children born of the marriage, as well as prior marriages of both decedent and surviving spouse, children of those marriages, if any, the fact that there had been no divorce, and the homestead exemption and exempt property, if any, to which petitioner is entitled. (Abandonment will not bar a surviving spouse from exercising his or her right to take an elective-share percentage of the decedent spouse's augmented estate. Syl. Pt. 2, In re Shiflett, 200 W.Va. 813, 490 S.E.2d 902 (1997)).

d. Negate Pre-Marital Will. A paragraph should be included in the petition to negate the considerations set forth under W.Va. Code § 42-3-7.

e. Negate Waiver of Rights. Because a waiver of spousal rights could preclude the exercise of the surviving spouse's elective share, a paragraph should be included negating a waiver of spousal rights as set forth in W.Va. Code § 42-3-3a.

f. Determination of elective-share amount. It appears appropriate that petitioner's determination of the elective-share amount should be set forth, including the basis of that determination for comparison by the court and other interested persons.

g. Assets Charged to the Surviving Spouse. In order to comply with W.Va. Code § 42-3-6, a description of assets that have passed to the surviving spouse should be set forth which would include:

(1) Amounts included in the augmented estate which pass or have passed to the surviving spouse by testate or intestate succession.

(2) Amounts included in the augmented estate under W.Va. Code §42-3-2(b)(3).

(3) Amounts disclaimed by the surviving spouse that would have been included in the augmented estate.

(4) Amounts included in the augmented estate under W.Va. Code § 42-3-2(b)(4) and how the amounts were determined.

(5) Such additional information as is required under W.Va. Code §42-3-6(b) and (c).

h. Persons Affected and Assets Held. A listing of the persons who will be affected by the petitioner taking the elective share and the assets, if any, held by those persons which will be affected, including:

(1) A description of the assets in the probate estate and the value thereof, as well as any debts offsetting the same.

(2) A description of the reclaimable estate assets, who holds each asset, the value of such asset, and any indebtedness against the asset.

i. Demand for Relief. Since the court will have to determine if the elective share and the supplemental elective share, if applicable, of the surviving spouse have been satisfied by the assets charged against him or her and since the value of the amount charged could vary, depending on the evidence developed, it appears that a general demand for relief would be appropriate.

7. Petition for Extension.

Special provision is made in W.Va. Code § 42-3-4 for an extension beyond the nine-month period if the surviving spouse petitions the court for an extension of time to make an election. However, the surviving spouse must also give notice of the petition for extension.

a. Notice of Filing Petition For Extension. The surviving spouse must file the petition for extension with the court to obtain an extension of time for making an election within nine months from decedent's date of death. W.Va. Code § 42-3-4(b) also provides that within this same nine-month period, the surviving spouse must give notice of the filing of the

petition for extension to all persons interested in the decedent's reclaimable estate. The court, for cause shown, can then extend the time for the surviving spouse to make the election to claim the elective share.

b. Compliance Within the Extension Period. When an extension has been given, the surviving spouse must file the petition for elective share and mail or deliver a copy of it to the personal representative, if any, within the time prescribed in the extension.

8. Notice and Hearing.

The notices referred to hereinbefore regarding the procedure for elective shares determination refer to the notice of the intention to file, or the notice of filing a petition for the elective share or the notice of filing a petition for extension of the time within which to make the election.

a. Notice of Hearing. W.Va. Code § 42-3-4(a) provides that the surviving spouse must give notice of the time and place of the hearing to (1) persons interested in the estate (see W.Va. Code § 42-1-1(18)), (2) the distributees, and (3) recipients of the augmented estate whose interests will be adversely affected by the taking of the elective share. The statute does not prescribe the time period of notice to be given or the procedure to be followed at the hearing.

b. Determinations by the Court. From the substantive provisions of the Elective Share Law, it appears that there are a number of determinations that need to be made by the court in the course of the hearing for the elective share. The determinations to be made are as follows:

(1) Right to Elect. The court must first determine that the surviving spouse has taken action within the prescribed time periods so as to preserve his or her right to make the election to receive the elective share.

(2) Value of the augmented estate. The value of the augmented estate of each spouse must be determined by the court, then the court combines the augmented estates of the deceased spouse and the surviving spouse to determine the amount the surviving spouse is entitled to receive as his or her elective share under the incremental vesting table set forth in W.Va. Code § 43-2-1.

(3) Supplemental Elective Share. The court also must determine if the surviving spouse is entitled to a supplemental elective share and, if so, the amount of the supplemental elective share.

(4) Satisfaction of Elective Share. The court first charges to the surviving spouse the items listed in W.Va. Code § 42-3-6(a) (1) through (4). The Court can then order payment to the surviving spouse from the assets of the augmented estate, in accordance with W.Va. Code § 42-3-6(b), (c) and (d) as follows:

(A) The portion of the augmented estate, consisting of the probate estate and that part of the decedent's reclaimable estate (the designated part), are next applied to the satisfied elective-share amount or supplemental elective-share amount, and equitably apportioned between the decedent's probate estate and the designated part of the reclaimable estate.

(B) If the elective share or supplemental elective-share amount is not satisfied by the payment described above, the remaining portion of the reclaimable estate is applied to the remaining unsatisfied amount, by requiring apportioned payment from the recipients of the remaining reclaimable estate in proportion to the value of the interest received.

(C) Only original recipients of the reclaimable estate as defined in W.Va. Code § 42-3-2(b)(2) and donees of the recipients, to the extent the original recipients or their donees have the property or proceeds, are liable for proportioned contribution.

(D) A person liable to make a contribution may choose to give up the proportionate interest in the reclaimable estate or pay the amount for which liability exists.

9. Notice of Intention to File or Filing.

Provision is made in the statutes for the surviving spouse to give a “written notice of intention to file a petition” or that a petition has been filed to third persons that are making payments in good faith reliance on the validity of the governing instrument.

a. How Notice Is Given. W.Va. Code § 42-3-2(e)(2) provides that the notice must be mailed to the payor’s or other third party’s main office or home by registered mail or certified mail, return receipt requested or served in the same manner as in a civil action.

b. Action By Third Parties. A payor or third party is liable for payments made or other actions taken after a written notice of intention to file or a notice of filing a petition for elective share has been served on him or her.

c. Action By Payor. Once the payor has been served with a written notice of intention to file a petition or that a petition has been filed by the surviving spouse, the payor is required under W.Va. Code § 42-3-2(e)(2), to pay any amount owed by payor to the deceased spouse to the court having jurisdiction over the probate proceeding, or, if no proceedings have been commenced, to the county commission in the county of the decedent’s residence.

10. Premarital Will. The purpose of W.Va. Code § 42-3-7 is to give a surviving spouse an intestate share in the amount the decedent spouse would have given the surviving spouse had the decedent spouse thought about the effect of a premarital will. This section does

not preclude the surviving spouse from taking an elective share of the decedent spouse's estate. Syl. Pt. 1, Mongold v. Mayle, 192 W.Va. 353, 452 S.E.2d 444 (1994).

The surviving spouse is entitled to receive, as an intestate share no less than the value of the share of the estate he or she would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is devised or passes to a descendant of such a child unless:

- (1) It appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;
- (2) The will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or
- (3) The testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

In satisfying the share provided by § 42-3-7, devises made by will to the testator's surviving spouse, if any, are applied first, and other devises, other than a devise to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse or a devise or substitute gift to a descendant of such a child, abate.

Understanding The Laws Of Intestacy

Submitted by Andrew L. Ellis

VII. UNDERSTANDING THE LAWS OF INTESTACY

By Andrew L. Ellis

Dinsmore & Shohl LLP

900 Lee Street, Huntington Square

Charleston, West Virginia 25301

October 6, 2014

LAWS OF INTESTACY

Article 1 of Chapter 42 of the West Virginia Code provides for the disposition of any part of a decedent's estate not effectively disposed of by will. W.Va. Code § 42-1-2 (2010).

A. Share of Surviving Spouse.

In accordance with W.Va. Code § 42-1-3 (2010), the intestate share of a decedent's surviving spouse is illustrated in the following chart:

SHARE OF SPOUSE:	IF:
Entire Intestate Estate	No descendant of the decedent survives the decedent.
Entire Intestate Estate	All of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent.
3/5 of the Intestate Estate	All of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent.
1/2 of the Intestate Estate	One or more of the decedent's surviving descendants are not descendants of the surviving spouse.

B. Share of Heirs Other Than Surviving Spouse.

Under W.Va. Code § 42-1-3a (1997), any part of the intestate estate not passing to the decedent's surviving spouse under W. Va. Code § 42-1-3, or the entire intestate estate if

there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:

1. To the decedent's descendants by representation;
2. If there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;
3. If there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation;
4. If there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and the other half passes to the decedent's maternal relatives in the same manner; but, if there is no surviving grandparent or descendant of a grandparent on either the paternal or maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half.

Under W.Va. Code § 42-1-3b (2010), an individual who fails to survive the decedent by one hundred twenty hours is deemed to have predeceased the decedent for purposes of intestate succession, and the decedent's heirs are determined accordingly. If the time of death of a decedent or of an individual who would otherwise be an heir, or the times of the death of both, cannot be determined, and it is not established that the individual who would otherwise be an heir survived the decedent by one hundred twenty hours, it is deemed that the individual failed to survive for the required period. This section is not to be applied if its application would result in a taking of intestate estate by the state under § 42-1-3c.

If there are no takers, or surviving heirs, under Article 1, the intestate estate passes, or escheats, to the State of West Virginia. W.Va. Code § 42-1-3c (2010).

C. Appointment of Administrator.

The administrator or administratrix of a decedent's estate is the person who is appointed by the county commission to serve as the personal representative of the decedent's estate where there is no will or no person named in the will that can be appointed as executor or executrix. W. Va. Code § 44-1-4 provides that administration shall be granted to the distributees who apply, preferring first the husband or wife, and then such others as are entitled to distribution of the estate as the county commission or clerk shall see fit. The administrator or administratrix will be required to post bond in accordance with W. Va. Code § 44-1-7 in an amount equal to the personal estate coming into the personal representative's hands. When the inventory or appraisal is filed and if insufficient bond has been posted, the county commission or the clerk will require that additional bond be posted.

W. Va. Code § 44-1-11 provides that after an elapse of two months without there being a personal representative of a decedent's estate appointed, the county commission may appoint the sheriff of the county to administer the estate.

How To Prepare And File The Inventory

Submitted by Melanie Hicks

How to Prepare and File the Inventory

MELANIE HICKS, CP

Basic Checklist



Information about the Decedent

- Date of Death
- Address
- Social Security #
- Administrator(rix) or Executor(rix)

List of Personal Property of value

- Motor vehicles, stocks, bonds, certificates of deposit

List of Probate Real Estate

- Property owned solely by the decedent
- Property held with another person but not with rights of survivorship

List of Non-Probate Real Estate

- Property held with another person with rights of survivorship

Identity of beneficiaries or heirs

Appraisal must be filed within 90 of appointment of personal representative

A. Decedent's Name		B. Social Security Number	C. Date of Death
D. Decedent's Residence at Death		E. State	F. County
G. Marital Status at Death Name of Surviving Spouse Married Single, Widow(er) or Divorced		H. West Virginia Counties Where Decedent Held Real Estate.	
I. Will this estate be required to file a Federal Estate Tax Return form 706 (see instructions on page 2)?		YES	NO
J. Will this estate be required to file the nonprobate inventory form et 6.02 (see instructions on page 3)?		YES	NO
K. Did the Decedent leave a Will ? <input type="radio"/>		YES	NO
L. Fiduciary's Name and Mailing Address (include zip code) _____ _____ _____ _____ Fiduciary's Phone Number:		M. Preparer's Name and Address CPA Attorney _____ _____ _____ _____ Preparer's Phone Number:	

Non-probate Real Estate

- Real estate owned jointly with rights of survivorship
- Interest in real estate transferred within last three years without adequate consideration
- Interest in real estate included in a living trust which the decedent retained the right to use
- Real estate in which the decedent had the power of appointment
- Life estate interests in real property

		Market Value	
1. Did the decedent own an interest in any real estate as joint tenant with right of survivorship?..... YES NO	1		
2. Did the decedent transfer an interest in any real estate without adequate consideration within three years prior to death?..... date of YES NO	2		
3. Did the decedent own an interest in any real estate in an inter vivos trust (living trust) arrangement or in which the decedent retained the right of use and enjoyment?.....YES NO	3		
4. Did the decedent own an interest in any real estate in which the decedent retained a power of appointment, whether special or general?..... YES NO	4		
5. Did the decedent own an interest in any real estate as a life estate including a dower interest?..... YES NO	5		
6. Total value of Nonprobate Real Estate (add lines 1 through 5 above).....	6		

Decedent's Name:

Inventory of Nonprobate Real Estate

If you answered "YES" to any question under PART 2: QUESTIONNAIRE OF NONPROBATE REAL ESTATE, show the following on this page:

- a. the type of transfer(s) with reference to the question number in PART 2;
- b. name(s) of the person(s) with an interest in the real estate as joint tenant or transferee;
- c. relationship to the decedent of ALL above named persons;
- d. market value at the date of death; and
description of the real estate including assessed value.

Probate Real Estate

- Real estate owned solely by the decedent
- Real estate owned as tenants in common
- Real estate owned without rights of survivorship

How do you determine the market value of probate real estate?

- Appraisal of property by an appraiser
- Tax assessment which is based on 60% of the fair market value



Probate Personal Property

- Vehicles title solely in decedent's name
- Bank accounts
- Stocks
- Bonds
- Mortgages owed to decedent
- Cash
- Life insurance policies with no designated beneficiary or payable to the estate

Common personal property questions:

Is furniture included in personal property?

Is clothing included in personal property?

Is Grandma's china place settings included in personal property?



Schedule A: Describe any real estate or any interest in real estate. Include description and appraised value of out of state property, but do not include this amount in the total. See page 3 of the instructions.	Assessed Value	Appraised Value
Total (enter the total appraised value on line 1 of PART 3)		
Schedule B: Tangible personal property of every kind. See page 3 of the instructions.		Appraised Value
Total (enter the total appraised value on line 2 of PART 3)		
Schedule C: Bonds and securities of every kind. See page 3 of the instructions.		Appraised Value
Total (enter the total appraised value on line 3 of PART 3)		

Schedule D: Corporate stock of any kind. See page 3 of the instructions.				
Name of the company	Closely held	Number of Shares	Market Value per share	Total Market Value
Total (enter the total market value on line 4 of PART 3)				
Schedule E: Money, bank accounts, certificates of deposits, notes, accounts receivable, etc. Show dates of notes. See page 3 of instructions.				Appraised Value
Total (enter the total appraised value on line 5 of PART 3)				
Schedule F: All other assets, not hereinbefore mentioned, including insurance payable to the estate. See page 3 of the instructions.				Appraised Value
Total (enter the total appraised value on line 3 of PART 3)				

Complete PART 4 first. Enter the total from each schedule of PART 4 on the appropriate line below.

	Market Value	
1. Schedule A: Real estate or any interest therein.....	1	
2. Schedule B: Tangible personal property of every kind.....	2	
3. Schedule C: Government bonds and securities of every kind.....	3	
4. Schedule D: Shares of corporate stock of every kind.....	4	
5. Schedule E: Money, certificates of deposit, notes, accounts, etc.	5	
6. Schedule F: All other assets not hereinbefore mentioned.....	6	
7. Total value of Probate Assets (add lines 1 through 6 above).....	7	

Beneficiaries

Intestate – Law of Descent and Distribution

§42-1-2. Intestate estate.

(a) Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this code, except as modified by the decedent's will.

(b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his or her intestate share.

§42-1-3. Share of spouse.

The intestate share of a decedent's surviving spouse is:

(a) The entire intestate estate if:

(1) No descendant of the decedent survives the decedent; or

(2) All of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;

(b) Three fifths of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(c) One half of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

Beneficiaries

§42-1-3a. Share of heirs other than surviving spouse.

Any part of the intestate estate not passing to the decedent's surviving spouse under section three of this article, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:

- (a) To the decedent's descendants by representation;
- (b) If there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;
- (c) If there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation;
- (d) If there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and the other half passes to the decedent's maternal relatives in the same manner; but, if there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half.

Testate – Last Will and Testament
Beneficiaries as determined by decedent's will

Beneficiary or heir	Relationship	Beneficiary or heir	Relationship

The Jones Family



Administration Of The Estate

Submitted by Melanie Hicks

Administration of the Estate

MELANIE HICKS, CP

Creditor's claims

- Medical bills
- Ambulance service
- Credit cards
- Unsecured loans

Claims filed must have an itemized statement, be verified by affidavit and be accompanied by a proper voucher



CLAIM AGAINST DECEDENT'S ESTATE

CLAIM FILED BY: _____

ADDRESS: _____

AGAINST THE ESTATE OF: _____ SOCIAL SECURITY #: _____

Before _____ Fiduciary Supervisor of _____ County

State of West Virginia, County of _____, to-wit:

This day personally appeared before me, the undersigned claimant, _____

_____, who being by me first duly sworn deposes and says that the Estate of

_____ is indebted in the sum of \$_____ with interest thereon at _____% per annum

until paid upon [circle one: Open Account, Note, Bond, Bill, Invoice, Judgment, Decree, Other evidence of debt]

The proper voucher* therefore being attached hereto and made a part of this proof of claim, that the same is a just and true claim against the estate: that the said Estate is entitled to no offsets or counter claims against the same and that this claimant, as any prior owner of said claim, has not received any part of the money stated to be due, nor any security or satisfaction for the same, except what is credited.

_____ Date _____ Creditor or Authorized Agent

Taken, subscribed and sworn to before me this _____ day of _____, 20____.

My Commission expires _____.

_____ (

Fiduciary duties

Fiduciary supervisor

- o Person appoint by the County Commission to manage probate documents
- o Supervises estates valued at \$100,000 or less
- o Receive claims
- o Publish notices
- o Facilitates final settlement of the estate

Fiduciary commissioner

- o Local attorney appointed by fiduciary supervisor
- o Supervises estates valued at \$100,001 or more
- o Maintains estates if claims are disputed
- o Holds hearings to determine validity of claims if necessary
- o Files a report of claims with the fiduciary supervisor
- o Facilitates final settlement of the estate

Personal representative's duties

- Qualify as representative of the estate
- File appraisalment
- Make payments for taxes, funeral expenses and medical expenses
- Sell real estate is authorized by will
- Produce documentation of offsets to creditor's claim
- Object to the validity of a claim
- Collect debt due and owing to decedent
- Make final distribution of estate assets
- File final accounting of the estate

Disclaimer

- Executor(s)/Executrix(es) may refuse to perform duties in writing with notarization and filed with the fiduciary supervisor allowing a willing party to qualify as personal representative
- Any person can disclaim interest in property of decedent including future interests
- Property will then be distributed as directed by will or Laws of Descent and Distribution as though disclaimant died immediately prior to distribution or if entity as if entity did not exist
- Disclaimer of rights of survivorship
- Disclaimer of interests of trustee
- Disclaimer of power of appointment upon default by person initially appointed



§44-2-21. Order in which debts of decedent are to be paid.

- (a) If the applicable assets of the estate are insufficient to pay all claims against the estate in full, the personal representative shall make payment in the following order:
- (1) Costs and expenses of administration;
 - (2) Reasonable funeral expenses;
 - (3) Debts and taxes with preference under federal law;
 - (4) Unpaid child support which is due and owing at the time of the decedent's death;
 - (5) Debts and taxes with preference under other laws of the state of West Virginia;
 - (6) Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation for persons attending the decedent during his or her last illness; and
 - (7) All other claims.

Sale of Real Estate or Assets

If personal estate of decedent not sufficient to satisfy debts:

- Personal representative if authorized by will
- All heirs as designated by Laws of Descent and Distribution
- Personal representative may file suit against all known creditors to sell real estate
- Creditor may file suit if after 6 months of qualification of personal representative no distribution has been made or suit been filed by personal representative
- Claims of the estate attach to the real estate



Closing The Estate

Submitted by Melanie Hicks

Closing the Estate

MELANIE HICKS

Short Form Settlement

- A short form settlement can be filed if the following conditions are met:
- Deadline for filing claims has expired
- No claims have been filed
- A estate tax release has been received for estates over \$1,000,000.00
- Distribution has been made according to the will or Laws of Descent and Distribution

In the Matter of _____, Social Security # _____, deceased

SHORT FORM SETTLEMENT

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, to-wit

_____, being first duly sworn, deposes and says that:

- (1) I am the duly appointed and acting personal representative of the estate of _____, deceased.
- (2) A "Release" for the West Virginia Inheritance and Transfer taxes **has been** filed with the Clerk of the County Commission of Kanawha County, WV.
- (3) More than ninety (90) days have elapsed since the filing of notice required by WVC 44-3A-4, (newspaper publication for claims in an estate).
- (4) The time for filing claims against this estate has expired.
- (5) No known and unpaid claims exist against this estate.
- (6) The allocation to which each distribute and beneficiary is entitled in the distribution of this estate is as follows:

Cross out Section that **does not** apply and initial

- (7a) All property to which each distribute is entitled has been or, upon approval of this settlement, will be delivered to said distribute and beneficiary in conformity with the above allocation.
- (7b) although, each distributee and beneficiary is entitled to the above distribution, each distribute and beneficiary has agreed to a different allocation, as follows:

Signature of the Fiduciary

Taken, subscribed and sworn to before the undersigned authority by

_____, in the county aforesaid this _____ day of _____, 20__.

My commission expires, _____.

Notary Public

In the County Commission of Kanawha County, West Virginia In the Matter of _____, Social Security # _____ deceased

Final Settlement

- Detailed listing of all receipts including cash, bank accounts, insurance policies, sale of real estate, and sale of personal property
- Detailed listed of all distributions including bills paid, taxes paid, funeral expenses, costs of administration of the estate and distribution of balance to heirs

Approval of Final Settlement

- A complete final settlement must be filed within 5 years of appointment of the fiduciary with the Clerk of the County Commission
- The final settlement must be filed and held for 10 days by Clerk of the County Commission
- The fiduciary supervisor shall provide notice to all interested parties that a final settlement has been filed and any objection must be filed within the 10 day period
- Upon proper notice to interested parties and expiration of the 10 day holding period, the report will be presented at the next regularly scheduled County Commission meeting
- The County Commission will review the settlement and if no issues are outstanding approve the final settlement of the estate and order the estate be closed

Distribution After Final Settlement

- Funds may be escrowed from the sale of property for distribution to heirs or beneficiaries
- Claims must be paid prior to final settlement and distribution to heirs or beneficiaries
- Release of escrowed funds shall be immediate upon approval of the County Commission of the final settlement
- Funds distributed after final settlement shall be listed in distributions on the settlement form as they will be remitted upon release of escrow



Melanie Hicks, CP

PARALEGAL SOLUTIONS, LLC
159 GRANBY CIRCLE
BEAVER, WV 25813
PARALEGALSOLUTIONSLLC@GMAIL.COM

THANK YOU

for choosing IPE for your
continuing education needs.

Please visit our website at
www.ipe-sems.com
for a complete list of
upcoming learning opportunities.

IPE
INSTITUTE *for*
PARALEGAL EDUCATION™