Wills: West Virginia

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A Q&A guide to the law of wills in West Virginia. This Q&A addresses state laws and customs that impact wills, including the key statutes and rules related to wills, the rules of intestacy, the requirements for creating a valid will, common will provisions, information concerning fiduciaries, and information regarding making changes to wills after execution, special circumstances regarding gifts made under a will or gift recipients, and lost wills.

KEY STATUTES AND RULES

1. What are the key statutes and rules that govern wills in your state?

The rules and laws pertaining to wills and probate proceedings in West Virginia are found in:

- Chapter 41 of the West Virginia Code, "Wills," which sets out the laws applicable to wills (W. Va. Code §§ 41-1-1 to 41-5-20).
- Chapter 42 of the West Virginia Code, "Descent and Distribution," that defines which parties inherit in the absence of a will (W. Va. Code §§ 42-1-1 to 42-6-19).
- Chapter 44 of the West Virginia Code, where most of the relevant statutes pertaining to probate proceedings in West Virginia are found, which are often relevant to wills (W. Va. Code §§ 44-1-1 to 44-6A-10, 44-7-1 to 44-9-16, and 44-11-1 to 44-11-10).

When a will is probated, counsel should also check with the County Clerk of the county where probate is pending to ascertain local procedure. While West Virginia does not have statewide or local rules of probate outside of applicable statutes, the procedure and interpretation of the relevant statutes can sometimes vary from county to county.

WHO CAN CREATE A WILL

2. Is there a minimum age requirement to create a will?

A person must be at least 18 years of age to make a valid will in West Virginia (W. Va. Code § 41-1-2).

3. What is the standard of mental capacity required to create a will?

A person must be of sound mind to create a valid will in West Virginia (W. Va. Code § 41-1-2).

In West Virginia, to have sound mind for executing a will, it is not necessary that a person possess the highest qualities of mind or that the person have the same strength of mind that the person once had (Syl. Pt. 2, *Nicholas v. Kershner*, 20 W.Va. 251 (1882)).

It is sufficient if the person creating the will (the testator) understands:

- The nature of the testator's business.
- A recollection of the testator's property of which the testator intends to dispose.
- The objects of the testator's bounty.
- The way the testator wishes to distribute the property.

(Syl. Pt. 2, *Nicholas*, 20 W.Va. at 251.)

The threshold for having the required mental capacity to make a will in West Virginia is lower than the mental capacity required for a deed or contract (see Syl. Pt. 16, *Kerr v. Lunsford*, 8 S.E. 493 (1888)). Neither old age nor eccentricity alone are sufficient evidence of incapacity to make a will. Capacity is determined at the time the will was executed. (Syl. Pts. 17-18, *Kerr*, 8 S.E. at 507.)

4. Can an agent under a power of attorney create a will on behalf of a testator?

There is no authority in West Virginia for an agent acting under a power of attorney to execute or revoke a will or codicil for a principal. However, someone else may sign a will for an incapacitated testator if the signature is at the testator's direction and in the testator's

presence. (W. Va. Code § 41-1-3.) For more information on will execution requirements, see Question 6.

PERMISSIBLE FORM OF WILL

5. What form must the will take? In particular, please specify whether:

- Handwritten (holographic) wills are permitted.
- Oral (nuncupative) wills are permitted.
- Contractual wills are permitted.
- Statutory wills are permitted.
- Electronic wills are permitted.
- Out-of-state wills are binding.

HANDWRITTEN (HOLOGRAPHIC) WILLS

West Virginia generally understands a holographic will to be a handwritten will that is signed by the testator, but is not witnessed. Holographic wills are usually valid in West Virginia if the dispositive provisions of the will are wholly in the testator's handwriting. (W. Va. Code § 41-1-3.)

ORAL (NUNCUPATIVE) WILLS

West Virginia generally considers a nuncupative will to be an oral will. Nuncupative wills are not valid in West Virginia. (W. Va. Code § 41-1-3.)

CONTRACTUAL WILLS

West Virginia generally recognizes, contracts to make a will. The same rules and principles that govern other contracts govern will contracts. (*Bever v. Bever*, 364 S.E.2d 34, 36 (W. Va. 1987).)

An oral contract to make a will that is valid under general contract principles may be enforced against a decedent's estate. However, courts view oral contracts to make a will with suspicion and do not favor them. (*Lantz v. Reed*, 89 S.E.2d 612, 616 (W. Va. 1955).)

To be enforceable, an oral contract to make a will must be:

- Certain and definite in its terms.
- Equitable.
- Supported by sufficient consideration.
- Established by full, clear, and convincing proof.

(*Lantz*, 89 S.E.2d at 616.)

A contract to make a certain devise of real estate must be in writing, as it is subject to West Virginia's statute of frauds (W. Va. Code § 36-1-3).

STATUTORY WILLS

West Virginia does not provide a statutory will.

ELECTRONIC WILLS

West Virginia does not currently permit electronic wills or digital signatures to wills (W. Va. Code § 39A-1-3(b)(1)).

OUT-OF-STATE WILLS

The will of a testator domiciled outside of West Virginia at the testator's death is valid regarding the testator's personal property in West Virginia, if the will was validly executed under the law of the state or country in which the testator was domiciled (W. Va. Code § 41-1-5). A will executed under the laws of another jurisdiction that disposes of real estate in West Virginia must comply with the formalities of West Virginia law to validly dispose of that real estate (W. Va. Code §§ 41-1-3 and 41-1-5).

Similarly, the applicable statute only permits a will validly executed under another state's laws to be admitted to probate if the decedent was not domiciled in West Virginia on the decedent's death (W. Va. Code § 41-1-5). Thus, if a testator executes a will under the laws of another state, but then establishes West Virginia domicile, it is important to ensure the will complies with West Virginia formalities. If the existing will does not comply with West Virginia formalities, counsel should generally advise the testator to execute a new West Virginia will. For more information about will execution under West Virginia law, see Question 6.

WILL EXECUTION REQUIREMENTS

6. What are the execution requirements for a valid will? In particular, please specify:

- Requirements for the testator's signature.
- Any requirements for witnesses to a will.
- Any requirements for the will to be notarized.
- An example of an attestation clause.
- The requirements for a self-proving affidavit.
- If electronic wills are permitted, any different execution requirements.

TESTATOR'S SIGNATURE

Wills must generally be signed by the testator. However, the testator can have another person sign the will for the testator if the other person's signature is made both:

- At the testator's direction.
- In the testator's presence.

(W. Va. Code § 41-1-3.) If the testator is physically capable of signing the will, the testator should sign the will.

WITNESS REQUIREMENTS

Unless the will is in the testator's handwriting and otherwise qualifies as a holographic will (see Question 5: Handwritten (Holographic) Wills), the will must be signed by at least two competent witnesses. The will must be signed or acknowledged by the testator in the witnesses' presence and both witnesses must be present at the same time. The witnesses must sign the will in the testator's and each other's presence, but no specific form of attestation is necessary. (W. Va. Code § 41-1-3.)

A beneficiary or other interested person should generally not serve as a witness. A beneficiary or other interested person serving as a

witness does not by itself invalidate the will. However, any devise to the witness (or the witness' spouse) is void, provided that the witness or witness' spouse is entitled to receive a share of the estate that the witness receives in intestacy, if any. (W. Va. Code § 41-2-1.)

A creditor of the testator may serve as a witness (W. Va. Code § 41-2-2). The personal representative of the will may also serve as witness (W. Va. Code § 41-2-3).

NOTARY REQUIREMENTS

There is no requirement for a will to be notarized in West Virginia, unless the will contains a self-proving affidavit. The self-proving affidavit must be notarized (W. Va. Code § 41-5-15). For more information on self-proving affidavits, see Self-Proving Affidavit.

SAMPLE ATTESTATION CLAUSE

In West Virginia, no specific form of attestation is necessary when witnesses sign the will. Below is sample language that can be used as a witness attestation clause relating to the self-proving affidavit.

> "We certify that the above instrument was on the [DATE] day of [MONTH], [YEAR] thereof signed, sealed and declared by the Testator, [TESTATOR NAME], as the Testator's Last Will and Testament in our presence and that we, in the Testator's presence and in the presence of each other, have signed our names as witnesses thereto, believing the Testator to be of sound mind at the time of signing."

The witnesses generally sign the will and provide their addresses in the space directly below the attestation clause.

SELF-PROVING AFFIDAVIT

A self-proving affidavit permits a will to be admitted to probate without additional proof that it was executed under West Virginia law. The witnesses' signatures on a self-proving affidavit must be notarized. The self-proving affidavit can save substantial time in admitting a will to probate, as it permits the will to be probated without the subscribing witnesses appearing in person and testifying to the facts stated in the affidavit. The affidavit is not, however, admissible as evidence in any will contest case. (W Va. Code § 41-5-15.)

For more information on self-proving affidavits, see Standard Document, Signature Pages for Will and Self-Proving Affidavit (WV) (W-021-3942).

ELECTRONIC WILL EXECUTION REQUIREMENTS

West Virginia does not currently permit electronic or digital will execution (W. Va. Code § 39A-1-3(b)(1) and see Question 5: Electronic Wills).

LIMITATIONS ON GIFTS TO FIDUCIARIES AND ATTORNEY DRAFTSPERSON

7. Are there any limitations on beneficiaries a testator can name in a will? In particular, please specify if a will can provide for gifts to:

- Executors.
- Gifts to trustees named in the will.
- Gifts to guardians.
- The lawyer who drafted the will.

GIFTS TO EXECUTORS

A will in West Virginia can generally provide for gifts to executors.

GIFTS TO TRUSTEES NAMED IN THE WILL

A will in West Virginia can generally provide for gifts to testamentary trustees.

GIFTS TO GUARDIANS

A will in West Virginia generally can provide for gifts to guardians.

GIFTS TO LAWYER DRAFTSPERSON

In West Virginia, a lawyer cannot:

- Solicit any substantial gift from a client, including a testamentary gift.
- Prepare an instrument giving the lawyer or any person related to the lawyer a substantial gift unless the lawyer or the other recipient of the gift is related to the lawyer.

(WV R RPC Rule 1.8(c).)

If the client wants to make a substantial gift to counsel or any person related counsel in the client's will or otherwise, counsel should refer the client to independent counsel to prepare the necessary paperwork to effectuate the gift. The only exception to this rule is if the client is related to the person making the gift (WV R RPC Rule 1.8(c) and cmt. 7). For purposes of this rule, a person related to the client includes a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship (WV R RPC Rule 1.8(c)).

The rule and the comments to the applicable rule do not provide a clear definition of substantial gift. A simple gift, such as a holiday present or as a token of appreciation, may not qualify as a substantial gift. Counsel should proceed with caution any time the preparation of a legal instrument to effectuate a gift is involved. (WV R RPC Rule 1.8(c), cmt. 6).

RIGHTS OF FAMILY MEMBERS TO INHERIT

8. Are a testator's will bequests affected by community property laws, elective share laws, or other local laws that prohibit a testator from excluding a beneficiary from taking a share in the estate? In particular, please specify if a will can disinherit:

- The testator's spouse.
- A child of the testator.

In West Virginia, the testator is not required to provide for any family members in the testator's estate plan, but a surviving spouse can claim an elective share, absent a waiver from the surviving spouse.

DISINHERITING A TESTATOR'S SPOUSE

In West Virginia the surviving spouse of a decedent has the right to claim an elective share against the deceased spouse's will, absent a waiver of that right by the surviving spouse. The amount of the elective share is a set percentage of the deceased spouse's augmented estate that ranges from 3% to 50% based on the length of the marriage. (W. Va. Code § 42-3-1.)

The augmented estate includes the decedent's probate estate, as well as decedent's:

- Jointly titled assets.
- Transfer on death accounts.
- Revocable trust assets.
- Annuities.
- Assets gifted by the decedent to a third party within two years of death.

(W. Va. Code § 42-3-2.)

The right to claim all or any part of the elective share can be waived by the surviving spouse by a written:

- Contract.
- Agreement.
- Waiver signed by the spouse.

(W. Va. Code § 42-3-3a.) A surviving spouse can waive the right to claim an elective share in a prenuptial or postnuptial agreement.

A surviving spouse may also be entitled to a share of the decedent's estate if the surviving spouse is not included in the will and married the decedent after the decedent executed a will. A spouse that meets these criteria is sometimes referred to as a pretermitted (or omitted) spouse. For additional information regarding the pretermitted spouse's share, see Question 14: Effect of Marriage.

DISINHERITING A CHILD OF THE TESTATOR

A child generally has no right under West Virginia law to inherit from a parent. If a child is born or adopted after a will is signed and is not provided for by the will, that child may be entitled to a pretermitted child's share (W. Va. Code § 41-4-1). West Virginia does not provide for a family, homestead, or similar share for the child as in some jurisdictions.

For more information about the inheritance rights of after-born children, see Question 14: After-Born Child.

COMMON WILL PROVISIONS

9. Discuss specific provisions commonly found in a will and the rules that apply to these provisions in your state. In particular, please discuss the following provisions and their effect:

- Incorporation by reference.
- Disposition of remains or for funeral wishes.
- No-contest clause.
- Rule against perpetuities.
- Sample rule against perpetuities clause.

INCORPORATION BY REFERENCE

The doctrine of incorporation by reference allows a testator to refer to outside documents and incorporate their provisions into a will. Incorporation by reference is generally not recognized in West Virginia regarding wills unless the outside documents are executed with the same formalities required for a will or codicil. However, there are exceptions in the case of:

- **Pour-over wills**. A pour-over will can leave the testator's assets to a trustee to be governed and disposed of under a separately created trust instrument (W. Va. Code § 41-3-8).
- **Disposing of tangible personal property**. West Virginia testators frequently reference in a will a separate writing that disposes of the testator's tangible personal property, such as household goods and family heirlooms. An outside list that is referred to in a will is not binding under West Virginia law unless it is executed with the same formalities as a will or codicil. However, the personal representative and the beneficiaries typically follow these lists as the testator's instructions. Counsel should include dispositions of valuable or sentimental items of tangible personal property in the will itself to ensure that the provisions are binding.

DISPOSITION OF REMAINS OR FUNERAL WISHES

In West Virginia, a testator may include specific burial, cremation, or other funeral directions in the will, although this is optional. Individuals sometimes include these directions in a medical power of attorney or living will (W. Va. Code § 16-30-6).

NO-CONTEST CLAUSE

A no-contest clause is designed to prevent a beneficiary from contesting the dispositive provisions of a testator's will. These clauses typically provide that a contesting beneficiary forfeits a bequest under the will if the contest is unsuccessful. In West Virginia, no-contest clauses are enforceable, unless a will contest is brought with good faith and probable cause. (*Dutterer v. Logan*, 137 S.E. 1, 2 (W. Va. 1927).)

RULE AGAINST PERPETUITIES

A non-vested property interest in West Virginia must vest within the longer of:

- Twenty-one years after the death of an individual alive at the time the interest was created.
- Ninety years after its creation.

(W. Va. Code § 36-1A-1.)

SAMPLE RULE AGAINST PERPETUITIES PROVISION FOR A TESTAMENTARY TRUST

> "**Maximum Duration of Trusts.** Notwithstanding any other provision of this Will to the contrary, unless sooner terminated in accordance with such provision, each trust created or provided for under this Will shall terminate within the later of: (1) twenty-one (21) years (plus any required period of gestation) after the death of the last survivor of (i) Testator and (ii) the descendants of Testator living on the date of Testator's death or (2) ninety (90) years after the date of Testator's death. If on the day preceding the expiration of any such period any property is still held in trust hereunder, such property shall immediately vest in and be distributed to and among the persons entitled to receive the properties thereof in the same manner and in the same proportion as such properties would be distributed from such trust upon its termination in accordance with the other provisions of this Will."

EXECUTORS

10. What are the rules regarding executor appointments in your state? In particular, please discuss:

- The terminology that is used to identify the person who is in charge of the estate (referred to here as the executor).
- Criteria for qualifying as an executor, including limitations on who a testator can name as executor.
- Rules regarding compensation of executors.
- Whether the drafting attorney can serve as executor.
- Priority rules for appointment of executor if the named executor fails to qualify.
- Who has authority to act when there are multiple executors.

TERMINOLOGY USED TO IDENTIFY PERSON IN CHARGE OF ESTATE

In West Virginia, the person in charge of an estate is often referred to generally as the personal representative. If the person is named as personal representative in the will, that person may be referred to as an executor or an executrix based on gender. If there is no will and the estate is proceeding intestate, the personal representative may be referred to as an administrator or administratrix based on gender. If there is a will but none of the persons named as executor is able or willing to serve, the personal representative may be referred to as an administrator *de bonis non*.

QUALIFICATION AS PERSONAL REPRESENTATIVE

A personal representative named in a will has no power to act as personal representative until the individual both:

- Takes the oath as personal representative. West Virginia provides the oath to be taken by the personal representative (W. Va. Code § 44-1-3).
- If required, posts bond. No bond is required if:
  - the will waives bond; or
  - the personal representative is also the sole representative of the estate.

(W. Va. Code § 44-1-8.)

(W. Va. Code § 44-1-1.) Otherwise, West Virginia does not provide specific requirements of any individual serving as personal representative or the specific statutory grounds for the personal representative's removal, as it does for trustees (see Question 11: Qualification as Trustee).

Both residents and nonresidents may qualify and serve as personal representative in West Virginia (W. Va. Code § 44-5-3).

COMPENSATION OF PERSONAL REPRESENTATIVES

Personal representatives appointed in West Virginia are entitled to receive a statutory compensation unless otherwise provided by the will. The statutory compensation is:

- Five percent on the first $100,000 of probate assets.
- Four percent on probate assets exceeding $100,000 up to $400,000.
- Three percent on probate assets exceeding $400,000 up to $800,000.
- Two percent on probate assets exceeding $800,000.

(W. Va. Code § 44-4-12a.)

The personal representative is also entitled to:

- A statutory fee of 1% on certain non-probate assets and real estate that is not required to be sold.
- Fees for extraordinary services on a determination by the county commission.

(W. Va. Code § 44-4-12a(b), (d).)

The county commission may decrease or deny a personal representative's commission if it determines the personal representative did not faithfully perform the personal representative's duties (W. Va. Code § 44-4-12a(d)).

DRAFTING ATTORNEY AS PERSONAL REPRESENTATIVE

An individual may name the attorney preparing the will as their personal representative, although counsel should proceed with caution because the attorney may be entitled to compensation for serving as the personal representative. While there is no prohibition under the West Virginia Rules of Professional Conduct for a drafting attorney to be named and serve as personal representative, the drafting attorney should disclose the potential amount of the compensation for serving as personal representative in writing to the client (WV R RPC Rule 1.8(a), (c)). When the personal representative is an attorney, the personal representative may not receive compensation for professional services in addition to a commission as personal representative (W. Va. Code § 44-4-12a(e)).

FAILURE OF NAMED PERSONAL REPRESENTATIVE TO QUALIFY

If there is no personal representative named in the will or none of the persons nominated can serve, the county commission or the commission's clerk during recess, may grant administration, with the will annexed, to the person entitled to qualify had there been no will (W. Va. Code § 44-1-2).

Administration is granted in order of priority to:

- A surviving spouse who is also a beneficiary under the will.
- Any other beneficiary under the will.
- Any other person the county commission or clerk deems appropriate, including creditors of the estate.

(W. Va. Code §§ 44-1-2 and 44-1-4.)

If no beneficiary applies within 30 days after the decedent's death, the county commission or clerk may appoint a creditor of the estate or any other person as administrator with the will annexed (administrator *de bonis non*) (W. Va. Code § 44-1-4).

MULTIPLE PERSONAL REPRESENTATIVES

West Virginia does not have a statute specifically governing authority to act when there are two or more personal representatives (whether multiple personal representatives must act jointly, by majority, or may act separately) in the absence of a related will provision. Where

there is disagreement among multiple personal representatives, the authority to act is determined by the language of the will or, if there is no applicable language in the will, the county commission can use its jurisdiction over probate matters to decide how the personal representatives may act.

TRUSTEES

11. What are the rules regarding appointment of trustees for testamentary trusts in your state? In particular, please discuss:

- Criteria for qualifying as a trustee.
- Rules regarding compensation of trustee.
- Priority rules for appointment of trustee if the named trustees fail to qualify.
- Who has authority to act when there are multiple trustees.

QUALIFICATION AS TRUSTEE

There are no statutory requirements for an individual to qualify as a trustee in West Virginia. However, a trustee may be removed if:

- The trustee committed a serious breach of trust, which determination is a fact-specific inquiry.
- There are multiple trustees and they fail to cooperate.
- The trustee is unfit, unwilling, or has failed to administer the trust effectively and removal is in the best interests of the beneficiaries.
- There has been a substantial change of circumstances or removal is requested by all the qualified beneficiaries and:
  - removal serves the best interests of the trust beneficiaries;
  - removal is not inconsistent with a material purpose of the trust; and
  - a suitable co-trustee or successor is available.

(W. Va. Code § 44D-7-706.)

Qualified Beneficiaries

A qualified beneficiary is a beneficiary that on the date of qualification is either:

- A distributee or permissible distributee of trust income or principal.
- Would be a distributee or permissible distributee of trust income or principal if either:
  - the interests of the distributees above terminated on that date without causing the trust to terminate; or
  - the trust terminated on that date.

(W. Va. Code § 44D-1-103(r).)

COMPENSATION OF TRUSTEE

If the terms of the trust do not specify a trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances (W. Va. Code § 44D-7-708). Counsel should discuss a defined formula or other compensation structure with the client.

Corporate trustees are often compensated under their own fee structure. When possible, a testator should consult with prospective corporate trustees before naming them in the will to confirm that they are willing to serve and the terms on which they are willing to serve.

If the terms of the trust specify the trustee's compensation, the trustee is entitled to that compensation. However, the court may on petition by an interested party adjust the compensation if either:

- The trustee's duties are substantially different from what was contemplated when the trust was created.
- The compensation is unreasonably high or low.

(W. Va. Code § 44D-7-708.)

A trustee is entitled to reimbursement for expenses properly incurred in the administration of the trust (W. Va. Code § 44D-7-709).

FAILURE OF NAMED TRUSTEE

The terms of the will typically govern the method for appointing a successor trustee if there is a vacancy in the testamentary trusteeship. However, if a vacancy in the trusteeship occurs for any reason and there is no mechanism provided in the governing instrument for filling the vacancy, the vacancy is filled in order by:

- A person or entity unanimously designated by written agreement of the qualified beneficiaries (see Qualified Beneficiaries).
- The circuit court having jurisdiction over the trust.

(W. Va. Code § 44D-7-704.)

For more information on persons that may serve as testamentary trustee, see Qualification as Trustee.

MULTIPLE TRUSTEES

Unless otherwise required by the governing instrument, co-trustees unable to reach a unanimous decision may act by majority vote. If co-trustees cannot reach a majority decision, court involvement may be required. (W. Va. Code § 44D-7-703.)

If a vacancy occurs in a co-trusteeship, the remaining co-trustees may act for the trust unless otherwise provided in the governing instrument (W. Va. Code § 44D-7-703).

A co-trustee must participate in the management of the trust unless the co-trustee is unavailable due to either:

- Absence.
- Illness.
- Disqualification under other law.
- Any other temporary incapacity.
- The co-trustee having properly delegated the function to another co-trustee.

(W. Va. Code § 44D-7-703.)

A co-trustee not joining in an action of another co-trustee is typically not liable for that action. However, each co-trustee must exercise reasonable care to:

- Prevent a co-trustee from committing a serious breach of trust.
- Compel a co-trustee to redress a serious breach of trust.

(W. Va. Code § 44D-7-703.)

GUARDIANS

12. What are the rules regarding appointment of guardians for minor children by will in your state? In particular, please discuss:

- Criteria for qualifying as a guardian.
- Whether a guardianship nomination in the will is binding or persuasive.
- At what age the guardianship terminates.

QUALIFICATION AS GUARDIAN

In West Virginia, the appointment of a guardian of a minor child is governed by W. Va. Code §§ 44-10-1 to 44-10-16 and the West Virginia Rules of Practice and Procedure for Minor Guardianship Proceedings (WV R Minor Guard. P. Rule 1 to 17).

Any suitable person may be appointed as a minor's guardian, however:

- The minor's parents or the parents stated desires are given priority.
- Certain screening factors set out in the applicable rules relating to conviction of crimes may prevent a person from being appointed as guardian.
- The appointment must be in the minor's best interest.

In West Virginia, the circuit court and the family court have concurrent jurisdiction to appoint a guardian for a minor. (W. Va. Code § 44-10-3.)

GUARDIANSHIP BINDING OR PERSUASIVE

Every parent may, by last will and testament, nominate a guardian for that parent's child. Where parents appoint different guardians, the guardian appointed by the last parent living generally has priority to serve as guardian of the minor. (W. Va. Code § 44-10-1.) However, the circuit court or family court retains jurisdiction over guardianship and can change the appointment if evidence is shown that deviation from the parent's preferences is in the minor's best interests.

TERMINATION OF GUARDIANSHIP

A guardianship ends when the child attains the age of 18 years (W. Va. Code § 44-10-3 and WV R Minor Guard. P. Rule 15).

CHANGES TO WILL AFTER EXECUTION

13. What are the rules regarding changes to a will after it is executed? In particular, please specify:

- How a will can be modified after it is executed.
- How a will can be revoked after it is executed.
- Whether a previously revoked will can be reinstated, and if so, how.

MODIFICATION OF A WILL

In West Virginia, wills are fully revocable and amendable if the testator is alive and competent, unless there is a contractual obligation to make a certain testamentary bequest or devise. For more information on contractual wills, see Question 5: Contractual Wills.

A will may be amended by a codicil or an entirely new will. (W. Va. Code § 41-1-1.)

A codicil amends an existing will, but does not completely replace or revoke the existing will. A codicil must be executed with the same formalities as a will to be valid in West Virginia (W. Va. Code § 41-1-3).

Codicils are typically appropriate where an existing will needs only a few simple changes. If more significant changes are needed, the practitioner should consider drafting an entirely new will to avoid potential complications with inconsistencies between the two dispositive documents and the client's obligations to retain multiple documents.

REVOCATION OF A WILL

To revoke an existing will or codicil, the testator must execute a later will or codicil or some other writing executed in the same manner as a will declaring an intention to revoke the document (W. Va. Code § 41-1-7). For more on will execution requirements, see Question 6.

A will or codicil may also be revoked by the testator or someone at the testator's direction and in the testator's presence, cutting, tearing, burning, obliterating, canceling, or destroying the document or the signature on the document, with the intent to revoke the document (W. Va. Code § 41-1-7).

Where a will is found in the testator's possession at the testator's death with the signature cancelled, obliterated, or otherwise mutilated, it is presumed that the testator intended to revoke the will (Syl. Pt. 1, *In re Estate of Siler*, 187 S.E.2d 606 (W. Va. 1972)).

Any disposition made in a will to a former spouse also is automatically revoked on a divorce or annulment of the marriage. The automatic revocation does not apply, however, in instances of separation or other changes in circumstances, as the applicable statute requires a judgement of divorce or annulment. (W. Va. Code § 41-1-6.)

REINSTATEMENT OF A WILL

Once a will is revoked, West Virginia law permits revival of the will by either:

- Re-executing the will.
- Executing a codicil that expressly shows an intention to revive the will.

(W. Va. Code § 41-1-8.)

West Virginia also adopted the doctrine of dependent relative revocation, which provides that if a testator revokes an existing will with the intent to substitute a new will for the revoked one, but does not make a new will, it is presumed that the testator prefers the old will over intestacy and the old will is revived (*Miller v. Todd*, 447 S.E.2d 9, 13 n. 18 (W. Va. 1994)). The doctrine has, however, been questioned by at least one former justice of the Supreme Court of Appeals of West Virginia (see *In re Estate of Siler*, 187 S.E.2d at 615-16).

If a testator intends to execute a new will or codicil in place of a prior will or codicil, the testator must create and execute that new document with appropriate formalities. Otherwise, the testator's

assets may be disposed of in a way the testator does not desire. For more information regarding the required execution formalities, see Question 6.

SPECIAL CIRCUMSTANCES REGARDING GIFTS OR RECIPIENTS

14. Please describe what happens if:

- A beneficiary does not survive the testator.
- A gift is not owned by the testator at the testator's death.
- There are not enough assets passing through the will to satisfy all the gifts.
- The gifted property is encumbered.
- The testator and a beneficiary or fiduciary to which the testator was married when the will was executed are no longer married when the testator dies.
- The testator gets married after the will is executed.
- A child is born after the will is executed.
- A beneficiary causes the testator's death.
- The testator and a beneficiary die at the same time.

BENEFICIARY DOES NOT SURVIVE

Under West Virginia's anti-lapse statute, unless a different disposition is made under the will:

- If any beneficiary under a will does not survive the testator and the beneficiary has surviving issue, the surviving issue take the interest of the deceased beneficiary.
- If the will makes a devise or bequest to two or more beneficiaries jointly and one or more of the beneficiaries predeceases the testator without descendants, the deceased beneficiary's share is not distributed to the other joint beneficiaries, but rather, in the case of:
  - a devise of real property, the deceased beneficiary's share passes to the deceased beneficiary's heirs at law; or
  - a bequest of personal property, the deceased beneficiary's share passes as though the testator died intestate.

(W. Va. Code § 41-3-3.)

The West Virginia anti-lapse statute is broad. Counsel and the testator should discuss this when drafting the will and provide for the contingency of beneficiaries not surviving if desired.

GIFT NOT OWNED BY TESTATOR AT DEATH

If a testator makes a specific devise or bequest of an item, but the testator disposed of the item before the testator's death, the devise or bequest is generally void (the bequest adeems) (Syl. Pt. 3, *Claymore v. Wallace*, 120 S.E.2d 241 (W. Va. 1961)).

If a testator converts the property devised or bequeathed into different property during the testator's lifetime, the devise or bequest is generally adeemed as well. However, slight and immaterial changes in form, such as a stock split do not adeem the legacy (Syl. Pt. 4, *Watson v. Santalucia*, 427 S.E.2d 466 (W. Va. 1993)).

NOT ENOUGH ASSETS

If an estate does not have sufficient assets to pay its obligations and all devises or bequests made under the will, absent any contrary language in the will, the gifts are reduced or eliminated (abate) in the following order:

- Intestate shares in property not disposed of by will.
- Residuary bequests.
- General bequests.
- Specific bequests.

(*Claymore*, 120 S.E.2d at 247.)

West Virginia has two distinct probate procedures for handling creditor claims, depending on the county in which the probate is pending. Most counties in West Virginia operate under the fiduciary commissioner system set out in Article 2, Chapter 44 of the West Virginia Code (W. Va. Code §§ 44-2-1 to 44-2-29). Some counties, however, have adopted the optional fiduciary supervisor system set out in Article 3A, Chapter 44 of the West Virginia Code (W. Va. Code §§ 44-3A-1 to 44-3A-44)). The order in which estate debts are paid under each system is provided by statute in:

- W. Va. Code § 44-2-21 in fiduciary commissioner counties.
- W. Va. Code § 44-3A-26 in fiduciary supervisor counties.

GIFTED PROPERTY ENCUMBERED

The language and construction of the will is examined to determine any question regarding a debt against a devise or bequest under the will. However, West Virginia follows the common law doctrine of exoneration providing that beneficiaries are entitled to have encumbrances on real property paid by the estate's personal property, unless the will expressly provides otherwise. (Syl. Pt. 4, *Estate of Fussell v. Fortney*, 730 S.E.2d 405 (W. Va. 2012)). A directive that the beneficiary is entitled to all the testator's right, title, and interest in property is not sufficient to negate exoneration. (*Estate of Fussell*, 730 S.E.2d at 410-11)

If a beneficiary is entitled to exoneration, the testator's real estate is exonerated by applying the income and then the principal of the testator's residuary estate (*Estate of Fussell*, 730 S.E.2d at 411).

A practitioner should keep in mind the law of exoneration when preparing testamentary documents and specify how to treat encumbrances of specific property.

EFFECT OF DIVORCE

On divorce or annulment of the testator's marriage, the following will provisions are revoked unless the will expressly provides otherwise:

- Any disposition or appointment of property by the will to the former spouse.
- Any general or special power of appointment granted to the former spouse.
- Any nomination of the former spouse as executor, trustee, conservator, or guardian.

(W. Va. Code § 41-1-6.)

The automatic revocation does not apply in instances of separation or other changes in circumstances, only on a judgment of divorce or annulment (W. Va. Code § 41-1-6).

EFFECT OF MARRIAGE

Under West Virginia's pretermitted spouse statute, if a testator's surviving spouse married the testator after the testator executed the testator's will, the surviving spouse is generally entitled to receive the same share the surviving spouse receives if the testator dies intestate. However, any portion of the estate devised to testator's child or descendant of the testator, that is not also a child of the surviving spouse, is exempt from the pretermitted spouse's share. (W. Va. Code § 42-3-7.)

The surviving spouse is also not entitled to the pretermitted spouse's share, if:

- There is contrary language in the will.
- The will was in contemplation of marriage.
- The surviving spouse is provided for outside of the will with the intent that the transfer be instead of a testamentary provision.

(W.Va. Code § 42-3-7.)

The surviving spouse of the decedent is, alternatively, entitled to take an elective share against the decedent's estate, unless the surviving spouse waived that right. The elective share varies in amount depending on the length of the marriage. (W. Va. Code § 42-3-1.)

For more information on the rights of a surviving spouse to inherit, see Question 8: Disinheriting a Testator's Spouse.

AFTER-BORN CHILD

A child born after the decedent executed the decedent's will (sometimes called a pretermitted child or an after-born child) is entitled to the intestate share the child receives if the decedent dies without a will, whether or not the decedent had other children when the decedent executed the will. The pretermitted child's share is funded *pro rata* from the existing beneficiaries' shares as the court in the specific case deems most proper. (W. Va. Code §§ 41-4-1 and 41-4-2.)

If any pretermitted child dies before reaching the age of 18 (unmarried and without issue), any remaining portion of the child's share not spent on support or education reverts to the original beneficiary under the will (W. Va. Code §§ 41-4-1 and 41-4-2). These West Virginia statutes authorize the appointed guardian for the pretermitted child to expend the inheritance only on the child's support and education until the child reaches age 18. However, West Virginia statues provide little guidance in this matter. Practitioners sometimes convert a minor's inheritance into a Uniform Transfers to Minors Act custodial account because this statute has a clearer set of rules for a custodian to follow. (W. Va. Code §§ 36-7-1 to 36-7-24).

A child is only treated as a pretermitted child for these purposes if the testator did not either:

- Otherwise provide for the child.
- Expressly exclude the child from the will.

(W. Va. Code §§ 41-1-1 and 41-4-2 and *Ramsey v. Saunders*, 172 S.E. 798, 799 (W. Va. 1934).)

BENEFICIARY CAUSES TESTATOR'S DEATH

A beneficiary convicted of feloniously killing or of conspiring to kill another person may not receive any property from the one killed or conspired against, either by will, in intestacy, or otherwise. Under West Virginia's slayer statute, that beneficiary is treated as if the beneficiary predeceased the decedent. (W. Va. Code § 42-4-2.)

SIMULTANEOUS DEATH

In West Virginia, wills commonly contain survivorship provisions for beneficiaries. When a will does not contain a survivorship provision and title to property depends on whether a person survived the testator, and if there is insufficient evidence to determine whether the person died before or after the testator, the property is distributed as if the testator survived the person (W. Va. Code § 42-5-1).

LOST WILLS

15. Please describe what happens if the original will is lost.

West Virginia does not have a proof of lost wills statute. However, in some circumstances a photocopy of a lost will can be admitted to probate, especially where there are no disputes about the will's veracity. The Supreme Court of Appeals of West Virginia has held that courts of equity and probate courts have concurrent jurisdiction to direct the probate of a lost will on production of evidence to confirm its contents (*Dower v. Seeds,* 28 W. Va. 113, 152-53 (1886)).

The procedure for admitting a photocopy of a will to probate varies greatly depending on the county. In some counties, the proponent of the will must seek an order from the Circuit Court under the West Virginia Uniform Declaratory Judgments Act (W. Va. Code §§ 55-13-1 to 55-13-16). In other counties, the proponent must commence a procedure for probate in solemn form before the County Commission under W. Va. Code § 41-5-5. Probate in solemn form is a formal procedure rarely used in West Virginia where a will must be reviewed by the County Commission before it can be admitted to probate, as opposed to having the will admitted to probate *ex parte* by the clerk of the County Commission as in most instances.

Counsel should consult with a local attorney or the County Clerk's office to determine the best procedure to use in each county.

RULES OF INTESTACY

16. Please describe how property passes if there is no will or if the terms of the will distribute assets according to the laws of intestacy in your state (who are the testator's heirs).

If there is no will or there are undistributed probate assets under the will, the decedent's remaining probate assets are distributed under West Virginia's laws of descent and distribution (W. Va. Code §§ 42-1-1 to 42-1-12).

Under the West Virginia intestacy statutes, if the decedent died leaving a surviving spouse, the surviving spouse is entitled to:

- The entire intestate estate, if the decedent has no descendants or if all the decedent's then living descendants are also descendants of the surviving spouse and there are no descendants only of the surviving spouse.

- Three-fifths of the intestate estate, if all the decedent's then living descendants are also descendants of the surviving spouse and the surviving spouse has descendants who are not descendants of the decedent.
- One-half of the intestate estate if one or more of the decedent's then living descendants are not descendants of the surviving spouse.

(W. Va. Code § 42-1-3.)

If the decedent does not have a surviving spouse, the estate is distributed to the descendants of the decedent, if any *per capita* at each generation (W. Va. Code §§ 42-1-3a and 42-1-3d).

If the decedent does not have a surviving spouse or surviving descendants, the order of priority for distribution of the estate assets is:

- To the decedent's parent or parents equally if both survive.
- To the descendants of the decedent's parents or either of them by representation.
- To the grandparents and descendants of the decedent's grandparents as described in W. Va. Code § 42-1-3a(d).

(W. Va. Code § 42-1-3a.)

West Virginia's intestacy law establishes a *per capita* at each generational level representation structure, rather than a straight *per stirpes* or *per capita* representation structure (W. Va. Code § 42-1-3d).

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