

THE WEST VIRGINIA STATE BAR  
PROBATE LAW SEMINAR  
JANUARY 29, 2020  
1:00 p.m. - 4:00 p.m.

**AGENDA**

**Starting probate and WV probate documents**

Presenter: JE White

**Simplified Ancillary Administration in West Virginia**

Presenter: Chris Winton

**Handling claims of creditors in probate**

Presenter: Joshua Rogers

**J.E. WHITE, JR., ESQ.**

**WVSB PROBATE LAW COMMITTEE SEMINAR**

**JANUARY 29, 2020**

J.E. White, Jr. is a member of Jackson Kelly PLLC in its Charleston office. J.E. graduated from West Virginia University College of Law (Order of the Coif) in 1993 and obtained an LL.M. in Taxation from New York University School of Law in 1994. J.E.'s practice is focused on estate planning, trust and estate administration, special needs trusts, federal and state tax issues, and closely held businesses. J.E. is a member of the Probate and Tax Committees of the West Virginia State Bar, and the Real Property, Probate and Trust Law Section of the American Bar Association. J.E. also serves on the Board of the Charleston Estate Planning Council and is a member of the Huntington Estate Planning Council.

J.E. has been selected and listed in *The Best Lawyers in America* in the fields of Closely Held Companies and Family Businesses Law and Tax Law. He is Peer Review Rated AV Preeminent by Martindale Hubbell.

J.E. is a frequent speaker on various estate planning, estate and trust administration and closely held business topics.

# STARTING PROBATE & WEST VIRGINIA PROBATE DOCUMENTS

WEST VIRGINIA STATE BAR  
PROBATE LAW COMMITTEE

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JANUARY 29, 2020

JACKSONKELLY<sup>PLLC</sup>

# What is Probate?

- **Process through which a decedent's estate is administered and settled**

# Probate Jurisdiction

- **County Commissions**
- **WV Constitution Article IX, Section 11: Powers of county commissions**
- **WV Code §7-1-3: Jurisdiction, powers and duties**

# Where to probate?

## WV Code §41-5-4

The county court shall have jurisdiction of the probate of wills according to the following rules:

- (a) In the county wherein the testator, at the time of his death, had a mansion house or known place of residence; or
- (b) If he had no such house or place of residence, then in the county wherein any real estate devised thereby is situated; or
- (c) If there be no real estate devised thereby, and the testator had no such house or place of residence, then in the county wherein he died, or in any county wherein he had any property at the time of his death; or
- (d) If he died out of this state, his will or an authenticated copy thereof, may be admitted to probate in any county in this state, wherein there is property devised or bequeathed thereby.

# West Virginia Probate

## Two Probate Systems for Proof and Allowance of Claims:

### 1) Fiduciary Commissioner Counties

- WV Code §44-2-1, et seq.

### 2) Fiduciary Supervisor Counties

- WV Code §44-3A-1, et seq.

# Who handles the probate process?

Personal Representative (WV Code §44-1-1, *et seq.*),

Executor/Executrix

or

Administrator/Administratrix



# Intestate v. Testate

## Intestacy:

Appointment of administrator?

- WV Code §44-1-4

To distributes who apply:

- 1) Surviving spouse
- 2) Such others as court/clerk deem fit
- 3) After 30 days – anyone, including creditor

# Intestate v. Testate

## Intestacy:

Who is entitled to assets?

- WV Code §42-1-1, *et seq.*

# Intestate v. Testate

## Intestacy:

### WV Code §42-1-3

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.

# Intestate v. Testate

## Intestacy:

### WV Code §42-1-3a

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.

# Intestate v. Testate

## Testacy:

- **Executor normally named**
- **Beneficiaries set forth in will**
- **Provisions Relating to Bond/Compensation for Executor**
- **Executor Designation & Executor Powers (Digital Assets)**
- **Specific Bequests/Beneficiaries**
- **Residuary Clause/Residual Beneficiaries**

# Probate of Will

## WV Code §41-5-1

A person having custody of a will shall, within thirty days after the death of the testator is known to him deliver such will to the clerk of the county court having jurisdiction of the probate thereof, or to the executor named in the will, who shall offer it for probate, or deliver it to the clerk, within a reasonable time. Any person who shall, without reasonable cause, neglect so to deliver a will shall be guilty of a misdemeanor, and, on conviction, be punished by a fine not exceeding \$200; and shall in addition be liable to any person interested in such will for all damages caused by such neglect.

# Probate of Will

## Two Probate Procedures:

### 1) Probate In Solemn Form

- WV Code §41-5-5
- Must file petition

### 2) Ex Parte probate

- WV Code §41-5-10
- No petition required
- Most commonly used procedure

## Death – what next?

- Locate will (obligations to produce will included in WV Code)
  - Proving the Will versus Self-Proving Affidavit
    - Who will be executor, etc.?



# How to qualify?

**Call Office of Fiduciary Supervisor or Fiduciary Commissioner to  
Verify What Process is in Particular County**

# General Steps for Qualification

- Usually need death certificate (but check w/ county)
- Need original will (if applicable)
- Need payment
- Listing of names/addresses of beneficiaries or heirs
- If intestate – also, bond
- Who may serve
- Take oath!



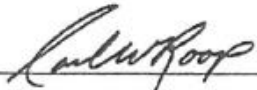
# Letter of Administration


Estate of [REDACTED]

I, Carl W. Roop, Fiduciary Supervisor of Raleigh County, in the State of West Virginia, do hereby certify that [REDACTED] was on the [REDACTED] day of [REDACTED], 2019, appointed by the Fiduciary Supervisor of the Raleigh County Commission as co executrix and co executor(s) of the Estate of [REDACTED] [REDACTED] duly qualified as such by taking oath prescribed by law, and by giving approved bond in the sum of \$0.00, as required by law.

NOW THEREFORE, be it known that said appointment is now in full force and effect and that full faith and credit are due and should be given to all the acts of the said [REDACTED] as such co executrix and co executor(s) of the Estate of [REDACTED] as well in all jurisdictions, as elsewhere.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Raleigh County Commission at my office in said County on the [REDACTED] day of [REDACTED], 2019.

  
\_\_\_\_\_  
Carl W. Roop  
Fiduciary Supervisor of Raleigh County

By   
\_\_\_\_\_  
Dawn L. Bass  
Deputy Clerk

## Next Steps:

- Obtain FEIN
- Open bank account
- Collect/marshal/protect assets
- Many other items to handle

## Preparing & Filing

- 1) Form 6.01 (*Appraisement of the Estate*)
- 2) Form 6.02 (*Nonprobate Inventory of the Estate*)

[within 90 days from qualification]

# Typical Probate Assets

## IN DECEDENT'S NAME

- **Tangible Personal Property**
- **Real Estate**
- **Stocks/Bonds/Securities**
- **Bank Accounts/CDs**
- **Notes/Accounts Receivable**
- **Business interests**

# Typical Non-probate Assets

- JTWRORS Real Property
- Jointly Owned Property like Bank Accounts
- Life Insurance
- Retirement Plans
- Personal Property Payable On Death to Others
- Assets moved to Revocable Trust

**PART 1: GENERAL INFORMATION QUESTIONNAIRE**

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 Married <input type="checkbox"/> Single, Widow(er) or Divorced <input type="checkbox"/>	Name of Surviving Spouse	H. West Virginia Counties Where Decedent Held Real Estate.	
I. Will this estate be required to file a Federal Estate Tax Return <b>FORM 706</b> (see instructions on page 2)?		YES <input type="checkbox"/>	NO <input type="checkbox"/>
J. Will this estate be required to file the <b>Nonprobate Inventory Form ET 6.02</b> (see instructions on page 3)?		YES <input type="checkbox"/>	NO <input type="checkbox"/>
K. Did the Decedent leave a <b>WILL</b> ?		YES <input type="checkbox"/>	NO <input type="checkbox"/>
L. Fiduciary's Name and Mailing Address (include zip code)		M. Preparer's Name and Address CPA <input type="checkbox"/> Attorney <input type="checkbox"/>	
Fiduciary's Phone Number:		Preparer's Phone Number:	

**PART 2: QUESTIONNAIRE OF NONPROBATE REAL ESTATE**

Answer each of the following questions concerning the decedent's interest in NONPROBATE REAL ESTATE.

**If you answer "YES" to any question below, you must complete the attached Inventory of Nonprobate Real Estate provided with this form which shows:**

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

	MARKET VALUE
1. Did the decedent own an interest in any real estate as joint tenant with right of survivorship?.....YES <input type="checkbox"/> NO <input type="checkbox"/>	1
2. Did the decedent transfer an interest in any real estate without adequate consideration within three years prior to date of death?.....YES <input type="checkbox"/> NO <input type="checkbox"/>	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 <input type="checkbox"/> NO <input type="checkbox"/>	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 <input type="checkbox"/> NO <input type="checkbox"/>	4
5. Did the decedent own an interest in any real estate as a life estate including a dower interest?.....YES <input type="checkbox"/> NO <input type="checkbox"/>	5
6. Did the decedent own an interest in any real estate transferable by a transfer on death deed?.....YES <input type="checkbox"/> NO <input type="checkbox"/>	6
7. <b>TOTAL VALUE OF NONPROBATE REAL ESTATE</b> (add lines 1 through 6 above).....	7

**PART 3: SUMMARY OF PROBATE ASSETS**

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. <b>TOTAL VALUE OF PROBATE ASSETS</b> (add lines 1 through 6 above).....	7



**PART 4: INVENTORY OF PROBATE ASSETS – TRANSFERS BY WILL OR INTESTACY**  
 After completing PART 4, enter the total from each schedule on the appropriate line in PART 3.

<b>SCHEDULE A:</b> 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.	<b>ASSESSED VALUE</b>	<b>APPRAISED VALUE</b>
<b>TOTAL</b> (enter the total appraised value on line 1 of PART 3)		

<b>SCHEDULE B:</b> Tangible personal property of every kind. See page 3 of the instructions.	<b>APPRAISED VALUE</b>
<b>TOTAL</b> (enter the total appraised value on line 2 of PART 3)	

<b>SCHEDULE C:</b> Bonds and securities of every kind. See page 3 of the instructions.	<b>APPRAISED VALUE</b>
<b>TOTAL</b> (enter the total appraised value on line 3 of PART 3)	

**PART 4** (continued)

<b>SCHEDULE D:</b> Corporate stock of any kind. See page 3 of the instructions.				
<b>NAME OF THE COMPANY</b>	<b>CLOSELY HELD</b>	<b>NUMBER OF SHARES</b>	<b>MARKET VALUE PER SHARE</b>	<b>TOTAL MARKET VALUE</b>
	<input type="checkbox"/>			0
	<input type="checkbox"/>			0
	<input type="checkbox"/>			0
	<input type="checkbox"/>			0
	<input type="checkbox"/>			0
	<input type="checkbox"/>			0
	<input type="checkbox"/>			0
	<input type="checkbox"/>			0
<b>TOTAL</b> (enter the total market value on line 4 of PART 3)				0

<b>SCHEDULE E:</b> Money, bank accounts, certificates of deposits, notes, accounts receivable, etc. Show dates of notes. See page 3 of instructions.	<b>APPRAISED VALUE</b>
<b>TOTAL</b> (enter the total appraised value on line 5 of PART 3)	

<b>SCHEDULE F:</b> All other assets, not hereinbefore mentioned, including insurance payable to the estate. See page 3 of the instructions.	<b>APPRAISED VALUE</b>
<b>TOTAL</b> (enter the total appraised value on line 6 of PART 3)	

**PART 5: BENEFICIARIES.** List the names and relationships of all beneficiaries or heirs of the estate. Show the age of any life tenant after their name. See page 3 of the instructions.

BENEFICIARY OR HEIR	RELATIONSHIP	BENEFICIARY OR HEIR	RELATIONSHIP

**PART 6: OATH OF FIDUCIARY**

State of \_\_\_\_\_ County of \_\_\_\_\_, To-wit:

I, \_\_\_\_\_, fiduciary for the estate of \_\_\_\_\_ after diligent effort to ascertain the taxable property of this estate, have made answers to each of the questions and have completed, in detail, the schedules for each category of property and believe each item thereof to be correct. I thereby believe the foregoing to be the true and lawful appraisal of ALL real estate and probate property of the estate of the above named decedent.

\_\_\_\_\_

Fiduciary

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_

\_\_\_\_\_

Notary Public

My Commission expires \_\_\_\_\_, 20\_\_\_\_\_

**PART 7: APPROVAL OF FIDUCIARY COMMISSIONER/FIDUCIARY SUPERVISOR**

I, \_\_\_\_\_, Fiduciary Commissioner/Fiduciary Supervisor of \_\_\_\_\_ County, West Virginia, to whom the estate of the above named decedent was referred, do hereby approve the foregoing appraisal of such estate.

Given under my hand this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_

\_\_\_\_\_ By \_\_\_\_\_

Fiduciary Commissioner/Fiduciary Supervisor Deputy

**PART 8: CLERK OF THE COUNTY COMMISSION**

STATE OF WEST VIRGINIA

COUNTY OF \_\_\_\_\_, To-wit:

In the Clerk's office of \_\_\_\_\_ County on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the forgoing appraisal of the above named decedent was presented and upon motion admitted to record.

Attest \_\_\_\_\_, Clerk

By \_\_\_\_\_, Deputy

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
- e. description of the real estate including assessed value.



**PART 1: GENERAL INFORMATION QUESTIONNAIRE**

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 Married <input type="checkbox"/> Name of Surviving Spouse _____ Single, Widow(er) or Divorced <input type="checkbox"/>			
H. Fiduciary's Name and Mailing Address (include zip code)		I. Preparer's Name and Address CPA <input type="checkbox"/> Attorney <input type="checkbox"/>	
Fiduciary's Phone Number: _____		Preparer's Phone Number: _____	

**PART 2: QUESTIONNAIRE OF NONPROBATE PERSONAL PROPERTY**

Answer each of the following questions concerning the decedent's interest in NONPROBATE PERSONAL PROPERTY. Nonprobate personal property means all property which does not pass by operation of the decedent's will or by the laws of intestate descent and distribution or is otherwise not subject to administration in a decedent's estate.

Note: All real estate and probate property are to be reported on the Appraisal of the Estate (ET 6.01) filed with the County Commission.

If you answer "YES" to any question below, you must complete PART 3 of this form which shows:

- the type of transfer(s) with reference to the question number below;
- name(s) of the person(s) with an interest in the property as joint tenant or transferee;
- relationship to the decedent of ALL above named persons;
- market value at the death; and
- description of the property.

		MARKET VALUE
1.	Did the decedent possess any powers of appointment?..... YES <input type="checkbox"/> NO <input type="checkbox"/>	1
2.	Did the decedent make any gifts or transfers without adequate consideration within three years prior to the date of death?..... YES <input type="checkbox"/> NO <input type="checkbox"/>	2
3.	Did the decedent make any transfers in Trust which passed to others upon his death?..... YES <input type="checkbox"/> NO <input type="checkbox"/>	3
4.	Did the decedent own any stock, bonds, bank accounts, certificates of deposit or other personal property as a joint tenant with the right of survivorship?..... YES <input type="checkbox"/> NO <input type="checkbox"/>	4
5.	Did the decedent own any life insurance policies to named beneficiaries?..... YES <input type="checkbox"/> NO <input type="checkbox"/>	5
6.	Did the decedent own any annuities?..... YES <input type="checkbox"/> NO <input type="checkbox"/>	6
7.	Did the decedent own an interest in any personal property as a life tenant?..... YES <input type="checkbox"/> NO <input type="checkbox"/>	7
8.	Did the decedent own any personal property which was payable on death to others?..... YES <input type="checkbox"/> NO <input type="checkbox"/>	8
9.	Did the decedent file any Federal Gift Tax Returns with the IRS or make any taxable gifts under Federal Gift Tax law or regulations?..... YES <input type="checkbox"/> NO <input type="checkbox"/>	9
10.	Did the decedent own any other nonprobate personal property includible in the federal gross estate of a decedent?..... YES <input type="checkbox"/> NO <input type="checkbox"/>	10
11.	<b>TOTAL VALUE OF NONPROBATE PERSONAL PROPERTY</b> (add lines 1 through 10 above).....	11

**PART 3: INVENTORY OF NONPROBATE PERSONAL PROPERTY (attach additional sheets if needed)**

- 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 property as joint tenant or transferee;
- c. relationship to the decedent of ALL above named persons;
- d. market value at the date of death; and
- e. description of the property.

Question No.	DESCRIPTION OF PROPERTY AND TRANSFER	MARKET VALUE
<b>TOTAL VALUE OF NONPROBATE PERSONAL PROPERTY (this total must equal total of line 11 on PART 2)</b>		

**PART 4: OATH OF FIDUCIARY**

State of \_\_\_\_\_  
 County of \_\_\_\_\_, To-wit:

I, \_\_\_\_\_, fiduciary for the estate of \_\_\_\_\_, after diligent effort to ascertain the taxable property of this estate, have made answers to each of the questions and have completed, in detail, the list for each category of property and believe each item thereof to be correct. I thereby believe the foregoing to be the true and lawful inventory of ALL nonprobate personal property of the estate of the above named decedent.

\_\_\_\_\_  
Fiduciary

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
Notary Public

My Commission expires \_\_\_\_\_, 20\_\_\_\_

# Creditors

- Form 6.01 – published upon filing
- 60 days to file claims after date of first publication

## Possible Issues:

- **Will contest**
- **Difficult Family Relations**
- **Construction of will**
- **Surviving spouse files a claim for an elective share**



# Taxes

- File final income tax returns (federal, state)
- File estate income tax returns (federal, state)
  - Can elect fiscal year
- 706 (due within 9 months of death)
  - 2020 exemption amount is \$11,558,000
  - Should executor elect portability?

## Entitled to compensation?

### W.V. Code §44-4-12a

- From \$0 to \$100,000 – 5%
- From \$100,000 to \$400,000 – 4%
- From \$400,000 to \$800,000 – 3%
- Above \$800,000 – 2%

Also, 1% of value of real estate not sold and on property not subject to administration that is includable for computing the federal estate tax.

# Closing the Estate

- 1) Short Form Settlement
- 2) Long Form Settlement

In the County Commission of Kanawha County, West Virginia, in the Matter of

\_\_\_\_\_, Social Security #: \_\_\_\_\_, deceased.

### **Waiver and Application for Short Form Settlement**

Pursuant to the requirements set forth in Section 4, Article 3A, Chapter 44, of the West Virginia Code as amended, we, the distributees and beneficiaries of the above-referenced estate, hereby make application for the acceptance of the attached short form settlement of this estate, thereby waiving any and all rights we may have to inspect, approve, affirm, or object to a complete and comprehensive statement of settlement of this estate as otherwise set forth in Article 3A, Chapter 44 of the West Virginia Code as amended.

\_\_\_\_\_  
**(Signature of Beneficiary)**

State of \_\_\_\_\_, County of \_\_\_\_\_, to-wit:

The foregoing Waiver and Application for Short Form Settlement was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_ **(Name of Beneficiary)**.

My Commission expires, \_\_\_\_\_.

\_\_\_\_\_  
**(Notary Public)**

In the County Commission of Kanawha County, West Virginia

**Short Form Settlement:**

**In the Matter of:** \_\_\_\_\_,

**Social Security #:** \_\_\_\_\_, deceased

**STATE OF WEST VIRGINIA**

**COUNTY OF KANAWHA, to-wit:**

\_\_\_\_\_, being first duly sworn, deposes and  
(Fiduciary)  
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. (if applicable)
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 the 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 distribute and beneficiary is entitled to the above distribution, each distribute and beneficiary has agreed to a different allocation, as follows:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
**Signature of Personal Representative (Exec. /Admin.)**

Taken, subscribed and sworn to before the undersigned authority by (**name of Exec. / Admin., not the Notary**) \_\_\_\_\_,  
in the county aforesaid this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

My commission expires, \_\_\_\_\_.

\_\_\_\_\_  
**(Notary Public)**

IN RE: ESTATE OF \_\_\_\_\_

**WAIVER OF FINAL SETTLEMENT**

STATE OF WEST VIRGINIA,  
COUNTY OF \_\_\_\_\_, to-wit:

In accordance with the provisions of W. Va. Code §44-2-29 (\_\_\_\_),  
\_\_\_\_\_, in his/her capacity as Executor/Executrix of the Estate of  
\_\_\_\_\_ (hereinafter the "Estate"), by and through counsel \_\_\_\_\_,

Esq., and [Firm Name], being first duly sworn, deposes and says that:

- (1) I am the duly appointed and acting personal representative of the Estate.
- (2) More than ninety (90) days have elapsed since the filing of any notice required by Section 2, Article 2, Chapter 44, of the West Virginia Code as amended (publication for claims).
- (3) The time for filing claims against this Estate has expired.
- (4) No known and unpaid claims exist against this Estate.
- (5) All beneficiaries have been advised of the share or shares to which each is entitled from the Estate, which will be allocated according to the provisions of the Last Will and Testament of \_\_\_\_\_, and the allocations are as follows: 25% to \_\_\_\_\_, 25% to \_\_\_\_\_, 25% to \_\_\_\_\_, 12.5% to \_\_\_\_\_, and 12.5% to \_\_\_\_\_.
- (6) All property to which the distributee and beneficiary is entitled has been or, upon the approval of this settlement, will be delivered to said distributee and beneficiary in conformity with the above allocation.

Pursuant to the requirements set forth in Section 29, Article 2, Chapter 44, of the West Virginia Code, as amended, \_\_\_\_\_, as a beneficiary of the above-referenced Estate, hereby makes application for the acceptance of this Waiver of Final Settlement, thereby waiving any and all rights said beneficiary may have to inspect, approve, affirm, or object to the complete and comprehensive statement of settlement of this Estate as otherwise set forth in Article 2, Chapter 44, of the West Virginia Code, as amended.

\_\_\_\_\_  
[Name]

STATE OF WEST VIRGINIA,  
COUNTY OF \_\_\_\_\_, to-wit:

The foregoing Waiver of Final Settlement was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 201\_\_, by \_\_\_\_\_.

My Commission expires \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

And further the affiant sayeth naught.

\_\_\_\_\_  
[Name], Executor of the  
Estate of \_\_\_\_\_

STATE OF WEST VIRGINIA,  
COUNTY OF \_\_\_\_\_, to-wit:

The foregoing Waiver of Final Settlement was acknowledged before me this \_\_\_\_ day  
of \_\_\_\_\_, 2015, by \_\_\_\_\_, as Executor of the Estate of  
\_\_\_\_\_.

My Commission expires \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

EXAMPLE

# Questions?





BIOGRAPHICAL INFORMATION  
on  
**Christopher J. Winton**

Christopher J. Winton is the managing member of the Charleston, West Virginia law firm of Ray, Winton & Kelley, PLLC, where he practices in the areas of estate planning and administration, business planning, taxation, and civil litigation. He received his B.A. degree with High Distinction and his J.D. degree from the University of Virginia and was elected to Phi Beta Kappa.

Admitted to practice in West Virginia and Virginia, Mr. Winton is the Chair of the West Virginia State Bar Probate Committee. He is an elected Fellow of the American College of Trust and Estate Counsel (ACTEC). Mr. Winton has been selected and listed in *The Best Lawyers in America* in the field of Trusts and Estates and is a *West Virginia Superlawyer* in the field of Estate Planning and Probate. He is also a member of National Academy of Elder Law Attorneys, Million Dollar Advocates Forum, Charleston Estate Planning Council, and the Real Property, Probate and Trust Law Section of the American Bar Association.

Mr. Winton serves as special corporation counsel to the Kanawha County Public Library, the largest library system in the State of West Virginia. He is also a personal trustee of the Jacobson Foundation, a charitable trust which provides grants to exempt organizations in the greater Kanawha Valley, and the Minor Foundation, which awards college scholarships to deserving West Virginia students.

A frequent lecturer for professional and business groups on wills and trusts, ethics, and litigation, Mr. Winton is the co-author of the articles "Laying Claim" and "Still Laying Claim" published in the *West Virginia University Law Review* which analyze will contests. Mr. Winton is nationally published as the contributing author of the West Virginia chapter on domestic asset protection trusts which appears in the recognized treatise *Bogert on Trusts and Trustees*. He is also the author of the series known as "Probate Happens" which has been published in the *West Virginia Lawyer*.

A student of genealogy, Mr. Winton is the 23rd great-grandson of England's King John, who signed the Magna Carta in 1215.

Date: September 30, 2019

PROBATE LAW SEMINAR

West Virginia State Bar, Charleston, West Virginia

January 29, 2020

- I. The Regular Session of the 2019 West Virginia Legislature was noteworthy in passing significant probate reform bills.
  - A. Starting in 2016, a state-wide probate reform initiative was started by the West Virginia Law Institute at West Virginia University College of Law, involving:
    1. County Clerks Association; and
    2. West Virginia State Bar Probate Committee.
  - B. A “Wish List” of reform issues has been developed from ongoing discussions with the County Clerks Association.
  - C. Three bills were simultaneously introduced in the House and the Senate in the 2019 Regular Session.
    1. All three bills were successfully passed, with minor revisions during the legislative process.
    2. House Bill 2759 allows Ancillary administration by affidavit and is discussed in detail below.
    3. The other two probate bills are:
      - a. House Bill 2740 (Children’s rights in inheritance).
        - (1) Overturns decision of Hall v. Hall, 818 S.E.2d 838, 2018 WL 2186545 (WV 2018).
        - (2) Definition of “parent” is revised to add that “a parent is barred from inheriting from or through a child of the parent pursuant to the provisions of § 42-1-11 of this code.” W. Va. Code § 42-1-1(26).
      - b. House Bill 2746 (Closing stale estates).
        - (1) There is a massive backlog of unclosed estates in every county in West Virginia.
        - (2) County Clerk and County Commission now have a semi-annual procedure to close stale or unprogressed estates.
        - (3) County can now administratively close a stale or unprogressed estate.
        - (4) New Code § 44-2-19a is added (for Commissioner counties), and revisions are made to Code § 44-3A-24 (for Supervisor counties).

- II. Analysis of House Bill 2759 (Ancillary administration by affidavit).
  - A. Background to the Problem.
    - 1. The only statutorily-authorized procedure for administration of the West Virginia real estate of a nonresident decedent is full ancillary administration.
      - a. Personal representative must qualify in person in the local courthouse.
      - b. All administration documents must be filed.
    - 2. Many nonresidents own fractional mineral interests with de minimis value, and costs of full administration can exceed the value of the interest.
    - 3. Given these burdens, some county clerk's offices or practitioners designed local procedures or practices for ancillary administration *not authorized by statute*, including:
      - a. Foreign heirship affidavits; and
      - b. Foreign wills attached as exhibit to a deed.
    - 4. Local procedures or practices vary greatly, and without standardization there is a risk that titles to real estate will be disputed or rejected by title attorneys.
    - 5. Real estate titles are important, and the probate procedure should allow such titles to be cleared and made marketable.
  - B. Vitals of H.B. 2759.
    - 1. Introduced in House on January 30, 2019.
    - 2. Completed legislative action when House concurred to Senate floor amendment on March 1, 2019.
    - 3. Signed by governor on March 25, 2019.
    - 4. In effect 90 days from passage (May 30, 2019).
    - 5. Code § 41-5-13 (dealing with testacy) and § 44-1-4 (dealing with intestacy) are amended, and new Code § 44-1-14b (dealing with publication and notice to parties) is added.
    - 6. New statewide Ancillary Administration Affidavit forms are included in the statute. WOW! TALK ABOUT REFORM!
  - C. There are now two statutory options for ancillary administration of West Virginia real estate of a nonresident decedent:
    - 1. Full ancillary administration can still be done for both testate and intestate estates, if desired.
      - a. With a will, the personal representative (PR) may appear and file an authenticated copy of the foreign will in the County Commission.
      - b. Without a will, an interested person may appear and open an intestate estate by filing an affidavit of heirs.
      - c. Person desiring appointment as PR, with or without will, must appear in person in West Virginia before the County Commission and qualify.
      - d. Normal administration will be done with filing of

- Appraisal and Inventory, annual accountings, and a long or short form settlement.
2. Ancillary administration can now be done by affidavit and without appointment of any personal representative in West Virginia, which applies to:
    - a. Testate estates (with a will); and
    - b. Intestate estates (without a will).
- D. Ancillary Testate administration by Affidavit and without appointment of a fiduciary.
1. Applies only if:
    - a. Decedent was a nonresident of West Virginia;
    - b. A will has been probated in another state;
    - c. There is only real estate in West Virginia; and
    - d. No appointment of PR to administer real estate in West Virginia is necessary.
  2. Authenticated copy of the foreign will is recorded in the county.
  3. Foreign PR or other interested person executes and files an Affidavit, set forth in the statute, establishing:
    - a. Description of the real estate in West Virginia with assessed value and fair market value;
    - b. Decedent died testate a nonresident of West Virginia;
    - c. Authenticated copy of the foreign will is recorded in the county; and
    - d. Names and addresses of:
      - (1) PR; and
      - (2) Devisees or beneficiaries under the Will.
  4. County Clerk records and indexes the Affidavit and collects fee.
  5. No bond, security, or oath is required of the foreign PR.
  6. No fiduciary is appointed in West Virginia.
  7. If original foreign will does not need to be probated under foreign law, the original will can be probated or recorded in West Virginia.
  8. Notice by publication and by mail is made for the ancillary testate administration without appointment (further described below).
- E. Ancillary Intestate administration by Affidavit and without appointment of a fiduciary.
1. Applies only if:
    - a. Decedent was a nonresident of West Virginia;
    - b. Decedent died without any will;
    - c. There is only real estate in West Virginia;
    - d. No appointment of PR to administer real estate in West Virginia is necessary; and
    - e. More than 60 days have passed since the decedent's death and no PR has been appointed in West Virginia.
  2. Interested person, including the appointed foreign PR, executes and files an Affidavit, set forth in the statute, establishing:

- a. Description of the real estate in West Virginia with assessed value and fair market value;
  - b. Decedent died intestate a nonresident of West Virginia without any will probated in West Virginia or any other state;
  - c. More than 60 days have passed since the decedent's death and no PR has been appointed in West Virginia; and
  - d. Names and addresses of the decedent's heirs at law under West Virginia law.
3. County Clerk records and indexes the Affidavit and collects fee.
  4. No bond, security, or oath is required of the foreign PR.
  5. No fiduciary is appointed in West Virginia.
  6. Notice by publication and by mail is made for the ancillary intestate administration without appointment (further described below).
- F. Notice of the ancillary testate or intestate filing without administration.
1. Within 30 days of the filing of the foreign will or affidavit, County Clerk publishes a Notice as class II legal advertisement in local paper.
  2. Notice states:
    - a. Name and address of decedent;
    - b. Name and address of County Commission of the filing;
    - c. Name and address of the party filing the foreign will or affidavit and relationship to the decedent;
    - d. Date of first publication; and
    - e. Statement that interested persons may object to the filing or the absence of administration within 60 days after first publication or 30 days after service of notice, whichever is later.
  3. Party filing the foreign will or affidavit must serve within 30 days of the first publication a Notice by mail or personal service to:
    - a. Surviving spouse, if any;
    - b. PR under the will, if any;
    - c. Devisees or beneficiaries under the will, if any;
    - d. West Virginia heirs at law; and
    - e. Any known creditors residing or located in West Virginia or who may claim a lien against the West Virginia real estate.
  4. Interested persons may file an objection with the County Commission within 60 days after first publication or 30 days after service of notice, whichever is later.
    - a. Untimely objections are barred.
    - b. If timely objection is filed, County Commission schedules a hearing and can order relief, including directing full ancillary administration.
  5. County Clerk collects cost of the publication.
  6. After the publication deadline passes, objections are barred and the ancillary process is complete.

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Josh is the office managing partner of the Morgantown office. His practice focuses on family wealth planning, asset protection planning, probate, profit and nonprofit business formation and organization, business succession planning, and litigation. He also has experience representing both individual and institutional clients in various types of civil litigation, including will contests, will and trust construction actions, family and probate disputes, real property rights, action to quiet title to minerals, corporate and partnership disputes, and federal and state taxation appeals. Josh is licensed and represents clients in West Virginia and Pennsylvania.

Outside of his practice, he is active developing talent within the firm. As a member of the Professional Development, Business Development and Associate Evaluation committees, he helps new associates reach their potential. He is also a former member of the Recruiting Committee and the former chair of the firm's Leadership Academy, a program designed for new associates.

Josh is a frequent speaker at continuing legal education and similar seminars on estate planning, taxation, and probate topics. He has also served as an adjunct lecturer for the West Virginia University College of Law's

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Entrepreneurship and Innovation Law Clinic and for the Nonprofit Organizations class.

## Education

- West Virginia University College of Law (J.D., 2005)
  - Order of the Coif
  - West Virginia Law Review, Volume 106, executive research editor
  - Thomas N. Chambers Award in Taxation
- West Virginia University (B.S.B.Ad., summa cum laude, 2002)
  - University Honors Scholar

## Bar Admissions

- West Virginia
- Pennsylvania

## Court Admissions

- U.S. Tax Court
- U.S. Court of Appeals for the Fourth Circuit
- U.S. District Court for the Southern District of West Virginia
- U.S. District Court for the Northern District of West Virginia

## Affiliations/Memberships

- West Virginia State Bar
- West Virginia State Bar Probate Committee



- Pennsylvania Bar Association
- American Bar Association
- Monongalia County Bar Association
- Monongalia County Literacy Volunteers
  - Board of Directors
  - President
- Leadership Monongalia
- North Central West Virginia Estate Planning Council
  - Board of Directors
  - President
- Leadership West Virginia, Class of 2015
- Senior Monongalias, Board of Directors
- The Foundation of Monongalia General Hospital, Board Member
- WVU College of Business and Economics, Young Professionals Network, Board Member
- American College of Trusts and Estates Counsel, fellow

## Distinctions

- West Virginia *Rising Stars*<sup>®</sup>
- Peer Review Rated AV Preeminent™ by *Martindale-Hubbell*
- *Chambers HNW Guide* for Private Wealth Planning
- *Best Lawyers*<sup>®</sup>
  - Closely Held Companies and Family Business Law

A low-angle, upward-looking photograph of several modern skyscrapers with glass facades, set against a clear blue sky. The perspective creates a strong sense of height and architectural scale. The buildings are arranged in a way that they appear to converge towards the top center of the frame.

Dinsmôre

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**Handling Creditor Claims  
in Probate - 2020**



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## WV Probate

- **2 different systems – fiduciary commissioner and fiduciary supervisor**
- **Fiduciary Commissioner Procedure – W.Va. Code § 44-2-1 *et seq.***
- **Optional Fiduciary Supervisor Procedure – W.Va. Code § 44-3A-1 *et seq.***
  - **Berkeley, Braxton, Greenbrier, Jackson, Kanawha, Marion, Putnam, Raleigh, and Summers Counties**

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## Reference to Fiduciary Commissioners

### ➤ **Fiduciary Commissioner Counties – 44-2-1**

- Threshold is \$200,000 or more in probate assets, exclusive of specifically devised real estate and nonprobate assets, and more than one beneficiary
- If unpaid creditor files a claim, and p/r does not approve the claim within 20 days, reference must be made
- Fiduciary Commissioners may only charge \$300 unless approved by the p/r or the county commission

### ➤ **Fiduciary Supervisor Counties - 44-3A-5**

- Threshold is \$100,000 in probate assets, but several exceptions to referral such as the p/r is the sole beneficiary or if there are sufficient assets to cover all creditors and there are no disputed questions of law or fact



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## Creditor Claims

- **Claims of creditors must be proved by vouchers and affidavits in both fiduciary commissioner and fiduciary supervisor counties – W. Va. Code §§ 44-2-5 and 44-3A-6**
- **Objections to Claims – p/r must file a “counter affidavit” objecting to the validity of the claim**
  - In fiduciary commissioner counties, the p/r must comply with W. Va. Code § 44-2-6
  - In fiduciary supervisor counties, the p/r must comply with W. Va. Code § 44-3A-7
  - Claims taken as proper unless objection is made before commissioner makes up his report of claims



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## Provisions for Contingent and Unliquidated Claims

- **Direction to Withhold to the P/R Sufficient Assets to Take Care of Such Claims**
  - W. Va. Code § 44-2-17
  - W. Va. Code § 44-3A-9
- **Filing the Claim Tolls the Statute of Limitations**
  - W. Va. Code § 44-2-13
  - W. Va. Code § 44-3A-14
  - Common Practice – File lawsuit in Circuit Court, but file a “protective claim” in the probate proceeding



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## Providing Creditors With Notice

- **Common complaint about the WV probate system – inadequate notice for creditors**
  - County clerk (or fiduciary commissioner/supervisor) publishes notice, but is that enough?
  - W. Va. Code § 44-1-14a(d) – p/r must serve a copy of the “notice of administration” issued by the clerk to all known creditors
  - W. Va. Code § 44-2-4 – for estates referred to fiduciary commissioners, P/R is supposed to provide the FC with a list of known creditors who need notice
  - These statutes do not contain much “teeth” or help a creditor who has missed the deadline much unless it can be shown that the p/r failed to give notice in bad faith





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## Creditor Claims

- **Order of Priority – W. Va. Code §§ 44-2-21 and 44-3A-26**
    - Cost and expenses of administration (includes attorney and accountant fees)
    - Reasonable funeral expenses
    - Debts and taxes with preference under federal law
    - Unpaid child support
    - Debts and taxes with preference under state law
    - Reasonable and necessary medical and hospital expenses for last illness
    - All other claims
    - **But Note – Secured Claims Always Have Priority (i.e., Deeds of Trust or UCC)**
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## What about Insolvent Estates?

**Personal Observation – the #1 reason why “unprogressed” estates in WV are not closed**

**My personal take on the procedure (if we cannot get releases):**

- **Must use the long form settlement**
- **Reference to Fiduciary Commissioner in Most Instances**
- **FC issues a “report of claims” – W. Va. Code § 44-2-16 (FC counties) or 44-3A-17 in FS counties (fiduciary supervisor issues the report if no FC appointed)**
- **Exceptions to the report of claims – W. Va. Code § 44-2-18 and 44-3A-21**

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## What about Insolvent Estates?

- **Hearing on the report of claims and exceptions before county commission – 44-2-19 and 44-3A-22**
- **Appeal to circuit court and, if necessary, Supreme Court – 44-2-19 and 44-3A-22**
- **Report of claims to be recorded once confirmed by the county commission – 44-2-20 and 44-3A-25**
- **After appeal, becomes final and binding and estate proceeds to closure**



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## What about Insolvent Estates?

### Some Practical Solutions for P/R's or their counsel

- Show the creditor the insolvency and convince creditor to release claim
- Speak with family about using nonprobate property to make a “pennies on the dollar” payment in exchange for release
- File long form settlement and push fiduciary commissioner towards estate closure (put the burden on the creditor to object)
  - Works in some counties, not in others, and fiduciary commissioner dependent
- Wait for New Unprogressed Estates Statute to administrative close the estate
  - W. Va. Code § 44-2-19a



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## Subjecting Real Property to Creditor Claims

- **What if probate estate has no personal assets to pay claims, but the decedent died owning real estate (and the real estate is not specifically devised to be sold)?**
  - If real estate was not owned in a nonprobate form (JTWROS or TOD deed), p/r or creditor (after 6 months of qualification) can file suit in circuit court to subject the real estate to debts – W. Va. Code § 44-8-7
  - Purchasers for value are protected if no suit or claim is filed within one year of death – W. Va. Code § 44-8-5
  - TOD Deed – nontestamentary transfer and therefore not subject to estate claims – W. Va. Code §§ 36-12-1, *et seq.*
    - *But the protection does not apply to secured claims or liens against the property already in place as of decedent's death*



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## Subjecting Beneficiaries to Claims

- **Common Misconception – After the Estate is Closed, the Claim is barred**
  - **W. Va. Code §§ 44-2-27 and 44-3A-33 provides the creditor with opportunity to pursue the distributees or legatees for payment within two years of distribution**
  - **Recovery limited to the amount the distributee or legatee actually received from the estate**





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