

WEST VIRGINIA STATE BAR PROBATE COMMITTEE

Will Executions and Alternatives During Coronavirus Pandemic

A. Recommended Safety Protocols on How Attested Wills Should Be Executed under Attorney Supervision

The West Virginia Statute of Wills, Code § 41-1-3, provides that:

No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly in the handwriting of the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, and of each other, but no form of attestation shall be necessary.

In light of the statutory requirement of the simultaneous “presence” of the testator with the witnesses and existing case law interpretation of this statute, the following guidelines are recommended as minimum safety protocols to reduce health risks if the attorney wishes to conduct in-person signing ceremonies for the execution of estate planning documents of clients:

1. All parties must self-screen prior to participating by ensuring his or her internal body temperature is below 100.4 degrees.
2. The meeting space must be disinfected before and after each signing.
3. All parties must wash hands before and after the meeting.
4. All parties must wear gloves and refrain from touching their faces. All parties must use appropriate technique in putting on, taking off, and disposing of gloves.
5. All parties must wear face masks.
6. All parties must bring and use their own pens.
7. Separation must be maintained with all parties being at least 6 feet apart.
8. Testator’s signature page is separate from the signature pages of the attesting witnesses in order to reduce interactive handling of pages.
9. Attesting witnesses’ page or pages may also be separate from the signature page of the testator.
10. All pages must be integrated into the single document by logical page controls.
 - a. Pages in the document should be numbered.
 - b. Separations of signing sections in the document may be noted by statement that “SIGNATURES OF WITNESSES APPEAR ON FOLLOWING PAGES.”

11. If the original, executed document is to be given to the testator and copies are to be made, delivery of the original and copying of the document may be made using one of the following recommended alternatives:
 - a. Alternative 1 (Temporary Attorney Control of Original): Executed pages of the original will are collected and collated by the attorney, sealed in an envelope, and held by the attorney for 72 hours. This is a temporary holding only for safety reasons to reduce possible contamination. The attorney may then copy the document and deliver the original and a copy to the testator (or other custodian who will retain the original document).
 - b. Alternative 2 (Immediate Delivery of Original with Conformed Copy): Once signed, the executed pages of the original will are given by the witnesses to the testator who collates them and seals the original will in an envelope. Two conformed copies of the will are made by the witnesses during the execution of the original. Duplicate photocopies of the testator's signature page are prepared in advance showing the typed (machine produced) date and signature style of the testator ("s/ John Q. Public"). Witnesses sign and date the photocopy duplicates of their pages. These are collated with the machine-produced pages showing the testator's signing and become the two "conformed copies." One conformed copy is given to the testator and one is retained by the attorney. The conformed copy contains original signatures of only the witnesses and does not have an original signature of the testator. The testator's signature is "conformed" by having it typed (machine produced) so that the copy is not a fully executed, valid will unto itself.
 - c. Alternative 3 (No Touch iPhone Scan Copy): The pages of the original, executed will may be scanned in the Notes App on an iPhone using the camera without touching pages. The Note is saved as a PDF file and can be immediately emailed to both the testator and the attorney as an electronic copy. The testator is given the original will.
12. Curbside document executions may be used to maintain safe separation of participants and avoids the need to clean the meeting space.
 - a. Testator remains in the vehicle, papers are passed through the window, and the window is rolled up during all signings.
 - b. Witnesses and attorney must be in safe proximity to observe actions and signing of the testator. The testator must be able to do the same for the actions of the witnesses.
 - c. Executed pages of the original will should be collected, collated, copied, and delivered by use of one of the Alternatives discussed above.
13. **IMPORTANT NOTE:** Notarization is NOT required for a valid will in West Virginia. A "Self-Proof Affidavit," which is signed by the attesting witnesses, assists with probate and is usually used. The affidavit is notarized, which means that the notary as another person must be present and handling pages.

B. Alternatives to Attested Wills

The attorney should consider whether alternatives to an attested will may properly serve the client and be easier and safer to accomplish, either in a remote manner or with reduced in-person interaction. Alternatives to consider are:

1. Holographic will which is entirely in testator's handwriting is valid in West Virginia.
 - a. Document should state that "This is my Will" or "This is my Will and I revoke all prior wills or codicils."
 - b. At a minimum, document should (i) name an executor and (ii) dispose of assets, preferably "all of my assets."
 - c. Will may "waive bond and security of my executor" in order to save probate costs.
 - d. Testator should date the document.
 - e. Testator must sign the document, preferably at the end of the document.
 - f. Typed or machine-printed forms, sentences, sections, or paragraphs should not be used in the holograph. Document must be "wholly in the handwriting of the testator."
2. *Inter vivos* or living Trust Agreement can be used. A Trust can receive assets from a "pour over will," or a Trust can hold assets for disposition after death as long as the assets have been transferred into the Trust during life.
 - a. Trust Agreement should be signed by the grantor and the trustee.
 - b. The grantor and trustee may be the same person. Successor trustees should be named.
 - c. Trust Agreement does not need to be notarized.
 - d. Trust Agreement does not need to be witnessed.
 - e. Trust Agreement is not required to hold assets during the grantor's lifetime but can be funded solely at the grantor's death from the grantor's "pour over will."
 - f. Unless expressly stated otherwise, a Trust Agreement in West Virginia is revocable by the grantor.
 - g. Trust Agreement may dispose of assets held in the Trust upon and after the death of the grantor (make "testamentary dispositions").
 - h. Trust Agreement may be used in *combination* with a holographic will. Testator can sign a short holograph which appoints an executor and gives all assets to the Trustee under the Trust Agreement which testator has just signed. Trust Agreement, which is prepared by the attorney and remotely delivered to client, can contain the dispositive or testamentary provisions that might otherwise be included in the testator's will. This way, the attorney can prepare an effective Trust Agreement for remote delivery to and execution by the grantor who is also the trustee. If being executed at the same time as a will, Trust Agreement should be signed *prior* to the execution of the will.

- i. **IMPORTANT:** Unless there is a “pour over will” which passes assets from the grantor’s probate estate into the Trust upon the grantor’s death, the Trust must be funded by the grantor during the grantor’s life by transferring or titling assets into the Trust. A Trust under a Trust Agreement which has no assets and receives no assets from a will or other transfer is not effective.
3. Client may be able to retitle assets in nonprobate forms, thereby passing assets directly to intended beneficiaries upon death. Many nonprobate assets can be created or transferred by remote means. Important types of nonprobate assets are:
 - a. Joint tenancy with right of survivorship.
 - b. Transfer on Death (TOD) registration for securities.
 - c. Transfer on Death (TOD) Deed for real estate.
 - d. Pay on Death registration for bank accounts.
 - e. Life insurance, annuities, and tax-qualified retirement accounts (IRA or 401(k)) requiring death beneficiary forms which may be changed.

IMPORTANT NOTE: Health guidelines can change rapidly, and attorneys should stay informed of any new developments or recommendations. In assisting a client, the attorney should evaluate the risks of taking action and doing a document as opposed to taking no action. The attorney should document what is being done and why it is being done for the protection of the client and the attorney. Estate planning and the execution of documents can be complex, and the attorney should in all events understand the law and act with legal knowledge, skill, thoroughness, and preparation reasonably necessary to achieve the client’s goals. Your Probate Committee is a resource in this area of law and willing to help practitioners in West Virginia.

Adopted at Charleston, West Virginia on April 21, 2020.

West Virginia State Bar Probate Committee