

WEST VIRGINIA STATE BAR PROBATE COMMITTEE

**Basic Guidelines on the Unauthorized Practice of Law
in Probate Administration**

West Virginia Supreme Court of Appeals by order promulgated effective July 1, 1961 created a general Definition of the Practice of Law. In West Virginia, it is the practice of law to "advise another in any matter involving the application of legal principles to facts, purposes or desires." In the case of West Virginia State Bar v. Early, 109 S.E.2d 420 (W. Va. 1959), the Court stated that "three principal types of legal activity" constitute the practice of law:

1. "legal advice and instructions to clients to inform them of their rights and obligations";
2. "preparation for clients of documents requiring knowledge of legal principles which is not possessed by an ordinary layman"; and
3. "appearance for clients before public tribunals"

In the area of probate administration in West Virginia, there are seven potential actions or proceedings which may involve the practice of law. It must be remembered that in all situations a party may always represent himself or herself and will not be practicing law.

1. Ex parte Probate of a Will

West Virginia Code § 41-5-10 allows any person to move the County Commission for probate of a will *ex parte* without notice to any other party. The motion for *ex parte* probate is made orally, and no formal written motion is required. The informal, *ex parte* procedure is the usual method of probate used in West Virginia. In re Winzenrith's Will, 133 W. Va. 267, 55 S.E.2d 897 (1949).

Ex parte probate does not generally involve the application of legal principles to facts, preparation of complex documents, or the appearance before a tribunal on contested matters and therefore should not generally constitute the practice of law. The Virginia State Bar has opined that the similar *ex parte* procedure in Virginia is not the practice of law. "A non-lawyer may offer to the proper clerk of court a will for probate or qualify as a fiduciary in any uncontested proceeding." Va. U.P.L. Rule 4-104(C)(1).

2. Probate in Solemn Form of a Will

Formal probate is known as probate in solemn form and is set forth in West Virginia Code § 41-5-5. To start the formal procedure, an interested person files with the County Commission having jurisdiction a duly verified petition which must contain certain information specified by statute, and legal process then issues.

As a formal judicial proceeding in a court of record,

probate in solemn form generally involves the application of legal principles to facts and the preparation of documents beyond the scope of knowledge of a layperson and therefore should constitute the practice of law. Probate in solemn form is generally filed when there are contested issues among the parties. In general, representation of an estate in contested probate proceedings is the practice of law. See generally Annot., Necessity that Executor or Administrator be Represented by Counsel in Presenting Matters in Probate Court, 19 A.L.R.3d 1104 (1968). The Virginia State Bar has ruled that in their probate proceedings which are similar to ours "A nonlawyer may present facts, figures or factual conclusions, but may not represent the estate in advancing or defending its interests before a tribunal." Va. U.P.L. Opin. No. 156 (March 12, 1992).

3. Contested Creditors Claims

The manner for creditors to file claims against a West Virginia estate depends on whether the county has adopted the Fiduciary Supervisor system which is set out in West Virginia Code § 44-3A-1 or has retained the old Fiduciary Commissioner system of West Virginia Code § 44-2-1. In all events, hearings may be held on any disputed claims. Id. at §§ 44-2-6, 44-3A-7. In either system, the claims would by definition be in dispute and would be the subject of a judicial hearing. Since it would be necessary for the representative of the estate to apply legal

principles to facts, prepare documents beyond the scope of knowledge of a layperson, and appear before a tribunal, it should be the practice of law for a layperson to represent an estate on a contested creditor claim.

4. Preparation and Filing of the Appraisement

The personal representative is required to file an "Appraisement" of all property in which the decedent had an interest at the time of his or her death. W. Va. Code. § 44-1-14. The current Appraisement is a preprinted form issued by the West Virginia Department of Tax and Revenue. The preparer of the Appraisement is required to sign the form, and the form on its face allows it to be signed by a "CPA."

In Advisory Opinion 93-003, the West Virginia State Bar Committee on Unlawful Practice opined that a layperson is not involved in the unlawful practice of law by "merely assisting individuals in filling out preprinted appraisement and inventory forms as supplied by the county commissions throughout the State of West Virginia." It is noted that the Appraisement form is similar to the estate tax return which may be prepared by accountants and enrolled preparers. In general, it should not be the practice of law for a layperson to assist in the completion of an ordinary Appraisement since the document does not require knowledge beyond the scope of a layperson. However, if the preparation of the Appraisement involves the application of legal

principles to facts concerning the ownership of disputed assets, the practice of law should be implicated.

5. Preparation and Filing of Short Form Settlement

The beneficiaries of an estate may waive a formal, final accounting by agreeing to a "short form settlement." W. Va. Code §§ 44-2-29, 44-3A-4a. The Waiver and Application for Short Form Settlement are preprinted forms which are simpler than the Appraisement form. In general, preparation of the preprinted forms is not beyond the scope of knowledge of a layperson, and it should not involve the practice of law for a layperson to assist in preparing a short form settlement.

6. Preparation and Filing of Annual Accountings and Final Accounting (Long Form Settlement)

Unless waived by all beneficiaries, the fiduciary of the estate must file annual accountings and a final accounting. See W. Va. Code § 44-4-1 *et seq.* In general, the accountings report all receipts and disbursements by the fiduciary of the estate. Accountings are documents of a financial type which were traditionally prepared by accountants and should not normally involve the application of legal principles to facts. Although potentially requiring more detail than other probate administration documents, the accounting should normally not be beyond the scope of knowledge of a layperson. In general, it should not be the practice of law for a layperson to assist in

the preparation an annual or final accounting as long as it is not necessary to apply legal principles to facts.

7. Objections to Annual or Final Accounting

Beneficiaries of an estate are entitled to file exceptions to an annual or final accounting within ten days of filing. W. Va. Code § 44-4-15. When exceptions are filed, a judicial hearing is held before the Fiduciary Supervisor or Commissioner and ultimately the County Commission. Since contested matters will be held before a court of record, it would be the practice of law for a layperson to represent the fiduciary of an estate on exceptions to accountings.

Respectfully submitted on December 4, 1998 by Special Subcommittee of the West Virginia State Bar Probate Committee.

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