WEST VIRGINIA STATE BAR PROBATE COMMITTEE

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

The West Virginia Supreme Court of Appeals, by order promulgated effective January 1, 2020, updated the general Definition of the Practice of Law. In West Virginia,

[O]ne is deemed to be practicing law whenever (1) one undertakes, with or without compensation and whether or not in connection with another activity, to advise another in any matter involving the application of legal principles to facts, purposes or desires; (2) one undertakes, with or without compensation and whether or not in connection with another activity, to prepare for another legal instruments of any character; or (3) one undertakes, with or without compensation and whether or not in connection with another activity, to represent the interest of another before any judicial tribunal or officer, or to represent the interest of another before any executive or administrative tribunal, agency or officer otherwise than in the presentation of facts, figures or factual conclusions as distinguished from legal conclusions in respect to such facts and figures.

The estate of a decedent, through its personal representative, may be involved in litigation in court. In the case of <u>Gomez v. Smith</u>, 845 S.E.2d 266 (W. Va. 2020), the West Virginia Supreme Court of Appeals directly addressed the issue of the practice of law in litigation. In Syllabus Point 7, the Supreme Court held:

A non-attorney executor or administrator of an estate who undertakes, with or without compensation and whether or not in connection with another activity, to prepare pleadings or legal instruments of any character on behalf of the estate for submission in judicial proceedings, or represents the interests of the estate before any judicial tribunal or office, is engaged in the unlawful practice of law. Any pleading or legal instrument filed by the non-attorney executor on behalf of the estate, including a complaint, answer, counterclaim, third-party complaint, or cross-claim, requires no response by any party other than a motion to strike, which shall be granted by the court.

Beyond litigation in court, in the area of probate administration, it can be difficult to determine whether certain advice or services constitute the "practice of law" and each situation will depend upon its own specific facts. In 1998, the West Virginia State Bar Probate Committee issued its "Basic Guidelines on the Unauthorized Practice of Law in Probate Administration," in which the Committee identified potential activities or engagements which may involve the practice of law and which should be analyzed to determine whether a layperson, including the personal representative, may act without the assistance of counsel and not be practicing law. Many of the

Committee's basic guidelines from 1998 still hold true today, but there have been significant statutory and case law developments since the original issuance of the basic guidelines which merit further analysis.

The West Virginia State Bar Probate Committee is hereby offering the following Updated Guidelines for the practice of law in probate practice.

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 or appearance before the County Commission or Clerk 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). Effective July, 2021, the personal representative may now initiate the *ex parte* probate process and take the oath without personally appearing before the county clerk. W. Va. Code § 44-1-31. *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 which should be proceeding 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. The Supreme Court of Appeals of West Virginia has held that representing an estate before a public tribunal is the unauthorized practice of law. Syl. Pt. 7, Gomez v. Smith, 845 S.E.2d 266 (W. Va. 2020). The Virginia State Bar has also ruled that in their probate proceedings, which are similar to West Virginia's proceedings, "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. The Supreme Court of Appeals of West Virginia has held that a non-lawyer executor's representation of an estate before a public tribunal is the unauthorized practice of law. Gomez, 845 S.E.2d at Syl. Pt. 7. 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 is the practice of law for a layperson to represent an estate on a contested creditor claim. If the creditor's claim is filed in circuit court, the holding of the Gomez case would control and require engagement of an attorney for the estate.

4. <u>Preparation and Filing of the Appraisement and Inventory</u>

The personal representative is required to file an Appraisement and a Nonprobate Inventory 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 Appraisement and Inventory are preprinted forms issued by the West Virginia Department of Tax and Revenue. The preparer of the forms is to be listed on the forms, and the forms on their face indicated that they may be prepared 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 these probate forms are 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 or Inventory since the documents do not normally require knowledge beyond the scope of a layperson. However, if the preparation of the forms involves the application of legal principles to facts concerning the ownership of disputed assets, or the classification of a disputed asset as probate or nonprobate, the practice of law could be implicated.

5. Preparation and Filing of Waiver of Final Settlement or Short Form Settlement

The beneficiaries of an estate may waive a formal, final accounting by agreeing to a "waiver of final settlement" (in Fiduciary Commissioner counties) or a "short form settlement" (in Fiduciary Supervisor counties). W. Va. Code §§ 44-2-29, 44-3A-4a. This simplified procedure is by far the most common method for closing an estate in West Virginia. The Waiver and Application for Short Form Settlement are preprinted forms which are simpler than the Appraisement and Inventory forms. 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. <u>Preparation and Filing of Annual Accountings and Final Accounting (Long Form Settlement)</u>

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

7. <u>Defending Objections to Annual or Final Accounting</u>

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, it would be the practice of law for a layperson to represent the fiduciary of an estate in defense of exceptions to accountings. See Gomez, 845 S.E.2d at 266.

8. <u>Ancillary Administration Proceedings</u>

When a non-resident of West Virginia dies owning real estate in West Virginia, it may be necessary to perform an ancillary administration to clear title to the non-resident's West Virginia real estate. W. Va. Code §§ 41-5-13 (testate estates) and 44-1-4 (intestate estates). The process

was developed to provide a simplified alternative from full probate for proceedings that just involve the administration of a non-resident's real estate. The applicable statutes only require the completion of affidavits, as opposed to all the steps required for a formal probate. The form affidavits are supplied in the applicable statutes and most county clerk offices have them available as pre-printed forms. In general, the preparation of these pre-printed ancillary administration affidavits is not beyond the knowledge of a layperson, and assisting another with the preparation of these forms should not constitute the practice of law. The applicable statutes do, however, provide for notice to interested parties and a process which allows interested parties to object to the ancillary administration process. When an objection is filed, a judicial hearing may be required before a Fiduciary Supervisor or Commissioner and ultimately the County Commission. It would be the practice of law for a layperson to represent an estate in defense of objections to the ancillary administration process.

9. <u>Small Estates Proceedings</u>

Effective July 1, 2021, West Virginia now offers a simplified procedure for certain "small estates" with probate personal property valued less than \$50,000 and probate real estate valued less than \$100,000. W. Va. Code §§ 44-1A-1, et seq. The small estate process generally involves the preparation of an affidavit and is intended to provide an alternative for smaller estates without the cost and delay of full, formal probate. The form of the small estate affidavit is provided in the applicable statute, and most county clerk's offices provided the affidavit as a pre-printed form. The preparation of a small estate affidavit is generally not beyond the knowledge of a layperson, and assisting another with the preparation of the affidavit should not be the practice of law. If, however, the preparation of the affidavit involves the application of legal knowledge to facts, such as when there is a dispute over whether an asset is probate or nonprobate, the practice of law could be implicated. The applicable statutes also provide interested parties with the ability to object to a small estate proceeding, and it would be the practice of law for a layperson to represent an estate in defense of objections to the small estates process.

10. Unprogressed Estates

West Virginia provides a method for "unprogressed" estates to be administratively closed. W. Va. Code §§ 44-2-19A. The statutory framework permits counties to close estates that have been open for longer than three years without good cause as to why the estate remains open. The process requires issuance of notices and orders by the County Commission and a potential hearing

before the County Commission. Interested parties may appear in the proceeding to represent their interests or to show good cause as to why the estate should be closed. A layperson could generally appear in such a proceeding to represent his or her own interests. However, consistent with the holding in Gomez, 845 S.E.2d at 266, it would be the practice of law for a layperson to represent an estate at a hearing to show good cause in an unprogressed estates proceeding.

Adopted: December 2 2021.