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LAYING CLAIM: A PRACTITIONER'S GUIDE TO WILL CONTESTS IN WEST VIRGINIA

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I. INTRODUCTION

Disputes among family members over the proceeds of estates can be among the most fractious and antagonistic of conflicts. In a typical case a lawyer is approached within weeks after the death of the decedent by a relative, angry because she has received less than expected. The lawyer retained by the executor to defend a will may often have a client who is similarly exasperated that the contestant would dare trample on the last wishes of the deceased. In this atmosphere the lawyers for both proponent and contestant must be able to properly assess the merits (and financial practicalities) of bringing and defending an action known as a will contest.¹

With this background in mind, this article addresses from a practical standpoint the substantive defects sufficient to invalidate a will, as well as related proceedings to establish rights in the proceeds of a decedent’s estate.² Part II provides a brief outline of the West Virginia probate system. Part III discusses the procedural, substantive, and strategic aspects involved in bringing will contests. Lastly, Part IV discusses related actions which the practitioner should recognize when evaluating a potential case.

¹ This article will use the term “will contest” to refer to both litigation involving the impeachment of a will and litigation concerning the validity of competing wills.
² This article is not intended to be an exhaustive compilation of the substantive law of this area, but rather it is intended to serve as a primer for the novice or infrequent practitioner in this area of law.
II. AN OVERVIEW OF THE WEST VIRGINIA PROBATE SYSTEM

In West Virginia, jurisdiction to probate wills lies in the County Commission. West Virginia Code section 41-5-4 specifies the venue for probate of the will of a resident decedent according to a hierarchy as follows: (1) the county where the decedent had his residence; (2) a county where any real estate is situated; (3) the county where the decedent died; or (4) a county where the decedent had any property at the time of his death. The probate of a non-resident's will lies in any county where the decedent had property. In West Virginia, there are two procedures for probating a will: solemn form and ex parte.

Formal probate is known as solemn form. To start the procedure, an interested person files with the County Commission having jurisdiction a duly verified petition which states: (1) when and where the testator died; (2) his last place of residence; (3) the nature of his estate; and, (4) the relationship to the decedent and the residence of all heirs at law, beneficiaries under the will, and the surviving spouse. Process is then issued by the County Clerk and served upon all the interested parties requiring them to appear at the scheduled hearing and to show cause why the will should not be admitted to probate. A guardian ad litem must be appointed for any parties under disability, such as minors. Before entry of a probate order, any interested party may file a notice of contest, and further process is then issued on this notice. At the final hearing, the County Commission enters an order admitting the will to probate or refusing it.

A simpler procedure for probate is known as ex parte. Any person may move the County Commission for probate of a will without notice.
to any other party.\textsuperscript{10} 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.\textsuperscript{11}

III. ATTACKING THE WILL

A. The West Virginia Impeachment Statute

1. Jurisdiction, Venue, Scope, and Parties

Interested persons who were not parties to an ex parte or solemn form probate proceeding may seek to impeach a will under the appeal provisions of West Virginia Code section 41-5-11.\textsuperscript{12} A proceeding filed under this section is known as an issue \textit{devisavit vel non},\textsuperscript{13} and jurisdiction is in the circuit court.\textsuperscript{14} An issue \textit{devisavit vel non} must be filed in circuit court within one year after the will was admitted to or denied probate by the County Commission.\textsuperscript{15} If the will was admitted to or denied probate upon appeal to the circuit court, the statute of limitations is one year from the entry of the circuit court order.\textsuperscript{16} Venue is proper in the county where the will was admitted or denied probate.\textsuperscript{17}

\textsuperscript{10} W. VA. CODE § 41-5-10 (1982).
\textsuperscript{12} The term "appeal" is a misnomer since the circuit court will entertain the action on a \textit{de novo} basis.
\textsuperscript{13} BLACK'S LAW DICTIONARY 407 (5th ed. 1979), defines \textit{devisavit vel non} as: The name of an issue sent out of a court of chancery, or one which exercises chancery jurisdiction, to a court of law, to try the validity of a paper asserted and denied to be a will, to ascertain whether or not the testator did devise, or whether or not that paper was his will.
\textsuperscript{14} W. VA. CODE § 41-5-11 (Supp. 1993).
\textsuperscript{15} \textit{Id}. Prior to July 10, 1993, the statute of limitations was two years.
\textsuperscript{16} \textit{Id}.
\textsuperscript{17} \textit{Id}.
West Virginia Code section 41-5-11 (1982) provides that the only issue the court may entertain is the validity of the purported will. In addition, the Code section authorizes the court to "require all other testamentary papers of the decedent to be produced" in order to try their validity as well.\(^\text{18}\) The Supreme Court of Appeals of West Virginia ("Supreme Court") has also held that, in an action filed under this section, the court may construe the provisions of the will.\(^\text{19}\) The circuit court will treat an issue of _devisavit vel non_ the same as any other civil action, so the Rules of Civil Procedure apply.\(^\text{20}\) Any party may demand a jury trial.\(^\text{21}\) As in any other civil action, the circuit court's judgment may be appealed to the West Virginia Supreme Court.\(^\text{22}\)

In a proper case which meets the requirements of diversity jurisdiction,\(^\text{23}\) a West Virginia will contest may be brought in the United States District Court.\(^\text{24}\) Federal jurisdiction lies because in West Virginia the will contest is brought in the state court of general jurisdiction as a suit _inter partes_.\(^\text{25}\) The proper party defendants to a will contest are all named beneficiaries under the contested will and all heirs at law.\(^\text{26}\) Furthermore, the will beneficiaries are indispensable parties.\(^\text{27}\)

\(^{18}\) _Id._

\(^{19}\) Miller v. Robinson, 301 S.E.2d 610, 612-13 (W. Va. 1983).

\(^{20}\) _Id._ at 613.


\(^{22}\) See W. VA. R.A.P., Rule 1.


\(^{26}\) Osborne, 37 F.R.D. 339 (dealing with will beneficiaries); Thomas v. Best, 161 S.E.2d 803, 808 (Va. 1968) (holding that unjoined heirs at law are permitted to re-open issue _devisavit vel non_).

\(^{27}\) Osborne, 37 F.R.D. at 341 (explaining that the case was decided under Fed. R. Civ. P. 19 which is essentially the same as W. Va. R.C.P., Rule 19).
2. Standing

Only "interested" persons who were not parties to the prior ex parte proceeding or those parties to the solemn form proceeding who did not receive proper notice may bring an issue *devisavit vel non*. 28 A person is interested if her interest is affected by the will. 29 Thus, heirs at law have standing to bring the action. 30 Children of the decedent are interested parties 31 and include illegitimate children 32 and adopted children. 33 Distributees under a prior will are also interested persons with standing. 34 The factual basis for a party's interest must be affirmatively alleged in the complaint. 35

B. Grounds of Attack

There are relatively few ways to successfully attack a will. The simplest way to void a will results from the testator's failure to follow the formalities required by the will statute. If all formalities have been observed the will is said to have been "duly executed" and is valid unless the testator later revokes the will, lacked capacity to execute it,

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30. Id.; see also Jackson v. Jackson, 99 S.E. 259, 261 (W. Va. 1919).
31. Ropar v. Ropar, 88 S.E. 834, 837 (W. Va. 1916); see also W. VA. CODE § 41-4-1 to -2 (1982). Under W. VA. CODE § 41-4-1, an independent ground exists for a "pretermitted" child to lay claim to a share of an estate. If the testator executes a will when he has no child then living and a child is subsequently born, such pretermitted child succeeds to an intestate share if the child is "not provided for or mentioned" in the will. Similarly, under W. VA. CODE § 41-4-2, if the testator has a child living when he executes a will and another child is subsequently born, such after-born child or his descendants succeed to an intestate share "if not provided for by any settlement, and neither provided for nor expressly excluded by the will, but only pretermitted." The pretermitted child's share is paid by all devises and legatees who contribute ratably. Id. §§ 41-4-1 to -2.
34. Dower v. Church, 21 W. Va. 23, 49 (1882) (explaining that every person who will be affected by the will should have the opportunity to be heard).
35. Jackson v. Jackson, 99 S.E. at 261 (requiring that "the plaintiff's interest ought to be set forth in the bill.").
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or executed it because of fraud, mistake, or undue influence. This Part introduces each of these grounds in ascending order of their relative difficulty of proof.

1. Due Execution: The Formal Requirements

The practitioner wishing to attack a will should first determine if the formalities of execution were followed. A testator's failure to follow the formal requirements for execution of a will constitutes grounds to set aside the will. There are five basic formalities for a valid will in West Virginia:

(1) The testator must be of legal age;
(2) He must have testamentary intent;
(3) The will must be in writing;
(4) The testator must sign the will; and
(5) The will must have the proper number of competent witnesses. 36

a. Legal Age

The testator must be at least eighteen years of age to make a will. 37 The will statute makes no distinction between classes of property, and an eighteen year old may dispose of both real property and personal property by his will. 38

b. Testamentary Intent

The testator must execute the instrument with testamentary intent (animus testandi). 39 Testamentary intent means that the testator must intend for the instrument to be a will—that is, to dispose of property upon his death. 40 When a testator has used an attorney to prepare a will, the question of lack of testamentary intent normally will not

39. In re Brigg's Estate, 134 S.E.2d 737, 741 (W. Va. 1964) (holding that "testamen-
tary intent is essential to the validity of a will.").
The problem generally arises with informal, holographic acts of the alleged testator.42

c. In Writing

Except for one limited exception,43 a will must be in writing.44 Writing includes printing, typewriting, or writing with a lead pencil.45 If the physical "writing" cannot be located at the testator’s death, it may still be possible to probate a "lost will."46 To prove a lost will the proponent must establish by clear and convincing evidence (1) the due execution of the will; (2) the impossibility of producing the original; (3) its contents; and (4) its non-revocation by the testator.47

d. Signed by Testator

West Virginia Code section 41-1-3 (1982) requires that the will be "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." As long as the testator intends his name to be a signature, he may sign a will by his initials.48 Signing by mark is valid.49 In West Virginia, a will need not be signed at the end.50 Assistance by another in steadying the hand of an infirm testator will not invalidate the will.51 Surprisingly, the will statute permits a third person to sign for the testator at the testator’s direction and in his presence.52

41. But see infra part III.B.4.
42. See Hunt v. Furman, 52 S.E.2d 816, 818 (W. Va. 1949) (explaining that writing on an envelope could be a will).
43. W. VA. CODE § 41-1-5 (1982) (providing that a soldier in actual military service or a seaman at sea may make an oral will).
44. W. VA. CODE § 41-1-3 (1982).
45. LaRue v. Lee, 60 S.E. 388, 390 (W. Va. 1908).
46. See Dower v. Seeds, 28 W. Va. 113 (1886).
47. 14 AM. JUR. PROOF OF FACTS, Lost and Destroyed Wills § 1 (1964).
48. In re Brigg’s Estate, 134 S.E.2d at 741.
49. Ferguson v. Ferguson, 47 S.E.2d 346, 351 (Va. 1948) (noting that “[w]here the testator puts his mark to the subscription of his name to his will . . . this is a sufficient signing within the meaning of our statute.
52. W. VA. CODE § 41-1-3 (1982); see Peake v. Jenkins, 80 Va. 293, 297 (1885) (noting that the will was signed “Anna L. Jenkins By Mary F. Holladay”).
e. Witnesses

Unless the will is wholly in the testator’s handwriting (a holograph), his signature must “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.” 53

The West Virginia will statute requires only two witnesses. 54 The witnesses must be present at the same time and must sign the will in the presence of both the testator and each other. 55 As used in the statute the word “presence” means “conscious presence,” and the testator need not see the actual signing but must merely be aware that it is happening. 56 The witnesses need not know the contents of the will, 57 but must intend to attest the will as witnesses. 58

Both witnesses to the will must be “competent.” 59 Competency is determined at the time of the execution of the will. 60 Creditors and executors may be witnesses to the testator’s will. 61 No minimum age for witnesses is specified in the West Virginia will statute. Prudence, however, requires that the witnesses should be at least eighteen years of age.

In West Virginia, beneficiaries under a will may be witnesses—but at their own peril. An attesting witness, or such witness’ spouse, who receives a beneficial interest in the estate is a competent witness, but

54. Id. Only two states require more than two witnesses. See LA. CIV. CODE ANN. art. 1579-1582 (West 1952) (requiring 2 to 7 witnesses depending on the type of will); VT. STAT. ANN. tit. 14, § 5 (1992) (requiring 3 witnesses). It is a common practice among some practitioners to have three witnesses to the will in case one witness is later determined to be disqualified.
60. Bruce v. Shuler, 62 S.E. 973, 975 (Va. 1908).
the devise or bequest to such witness will be void.\textsuperscript{62} If the witness is entitled to an intestate share, however, the devise or bequest will be saved to that extent.\textsuperscript{63}

The primary purpose of the witness requirement is to prevent fraud.\textsuperscript{64} Witnesses also serve the secondary function of providing evidence of the testator's mental capacity. Counsel for the testator should therefore ensure that the witnesses talk with the testator before the execution ceremony in order to assess his mental state.\textsuperscript{65} The drafting attorney may act as witness, and in a will contest, his testimony will be given great weight.\textsuperscript{66} The rules of legal ethics, however, may restrict the draftsman-witness from handling estate litigation. Rule 3.7(a) of West Virginia Rules of Professional Conduct provides that a lawyer shall not "act as advocate at a trial" where the lawyer is likely to be called as a witness.\textsuperscript{67}

2. Revocation and Revival of Wills

Even if the formalities of execution as discussed above have been followed, the practitioner should determine if the challenged will was revoked. West Virginia Code section 41-1-7 (1982) provides that a will is revoked

by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed, or by the testator, or some other person in his presence and by his direction, cutting, tearing, burning, obliterating, canceling or destroying the same, or the signature thereto, with the intent to revoke.

\textsuperscript{62} W. VA. CODE § 41-2-1 (1982).
\textsuperscript{63} Id.
\textsuperscript{64} Ferguson v. Ferguson, 47 S.E.2d 346, 352 (Va. 1948).
\textsuperscript{65} See Forehand v. Sawyer, 136 S.E. 683, 688 (Va. 1927).
\textsuperscript{67} The Rule represents a liberalization of the former Code of Professional Responsibility and merely restricts the attorney from acting as trial advocate. The former Code disqualified the lawyer-witness in all further representation. See Matter of Estate of Seegers, 733 P.2d 418, 424 (Okla. Ct. App. 1986) (holding that an attorney who witnessed the will cannot represent an estate when the attorney will be called as a witness).
This Code section provides the only methods for revoking a will.68

A will may be revoked by an express revocation executed in the same manner required to make a valid will.69 A separate instrument of revocation is uncommon since easier methods of revocation exist. Generally, a new will will contain the express recital that the testator “hereby revokes any and all other wills and codicils previously made.” A second will revokes a prior will without express terms when the provisions of the second instrument make a different disposition of the estate from that made by the first will.70

Physical acts by the testator coupled with intent will revoke a will.71 To revoke, the act of the testator in cutting, tearing, burning, obliterating, canceling, or destroying must be conscious and purposeful as opposed to mistaken or accidental.72 If the physical act of destruction is not done by the testator, revocation only occurs if the act is done in testator’s presence and at his direction.73 A rebuttable presumption that the testator revoked his will arises when the mutilated instrument is found in the testator’s possession at the time of his death.74

A change in marital status may act as a partial revocation of a will. After June 5, 1992, if a testator is divorced or the marriage is annulled after execution of a will, the divorce or annulment revokes the will but only to the extent of any disposition of property to the former spouse, any provision conferring a power of appointment on the former spouse, and any nomination of the former spouse as a fiduciary.75 Provisions revoked by divorce or annulment are revived by the testator’s remarriage to the former spouse.76 Prior to June 5, 1992, the West Virginia Code provided that a will was revoked by the

69. W. VA. CODE § 41-1-7 (1982).
71. W. VA. CODE § 41-1-7 (1982).
73. See W. VA. CODE § 41-1-7 (1982).
75. W. VA. CODE § 41-1-6(a) (Supp. 1993).
76. Id.
testator's subsequent marriage, annulment, or divorce unless such will "makes provision therein for such contingency."\(^77\)

An invalid will can be validated by a duly executed codicil.\(^78\) West Virginia Code section 41-1-8 (1982) provides that a will or codicil which has been revoked shall not be revived except "by the re-execution thereof, or by a codicil executed in the manner hereinabove required, and then only to the extent to which an intention to revive the same is shown." Accordingly, a will which has been revoked by a subsequent will is not revived by the testator's later revocation of the second will.\(^79\)

Interlineations and erasures in an attested will are invalid.\(^80\) If the alterations are extensive enough, the entire instrument may be invalidated.\(^81\)

3. Lack of Testamentary Capacity

If the will has been duly executed and not subsequently revoked, the practitioner should next explore perhaps the most common ground for challenging a will—that the testator lacked testamentary capacity. A person of "unsound mind" is incapable of making a will.\(^82\) The test of testamentary capacity requires that the testator be capable of understanding (1) the nature and consequences of his act, (2) the property to be disposed, and (3) the objects of his bounty.\(^83\) In addition, the testator must hold such knowledge in his mind a sufficient length of time to be able to form some rational judgment in relation to them.\(^84\)

\(^77\) \textit{Id.}
\(^78\) Hatcher v. Hatcher, 80 Va. 169, 173 (1885).
\(^79\) West Virginia apparently does not recognize the doctrine of dependent relative revocation which permits a revoked will to be revived when the testator cancelled it with the present intention of creating a new will which he failed to do. \textit{See In re Estate of Siler}, 187 S.E.2d at 615 (Carrigan, J., finding the doctrine "untenable"); \textit{but cf.} Nelson v. Ratliffe, 69 S.E.2d 217, 222 (1952) (noting the existence of dependent relative revocation).
\(^80\) \textit{See generally,} 2 PAGE ON WILLS § 22.3 (1960).
\(^82\) \textit{W. Va. CODE} § 41-1-2 (1982).
\(^83\) Samuel v. Marshall, 30 Va. (3 Leigh) 567 (1832); Payne v. Payne, 125 S.E. 818 (W. Va. 1924); Kerr v. Lunsford, 8 S.E. 493 (W. Va. 1888).
\(^84\) \textit{Kerr}, 8 S.E. at 504.
In West Virginia, it requires less mental capacity to make a will than to make a deed or contract. Testamentary capacity is determined at the time the will is executed. The test of mental capacity is liberal, and the physical condition of the testator will usually not deprive him of the power to dispose of his property on death. Even an insane individual may execute a will during a "lucid period." Examples of particular infirmities that, standing alone, will not deprive a testator of mental capacity are noted in the footnote.

A will is invalid if executed while the testator is affected by an "insane delusion." To destroy testamentary capacity, the insane delusion must affect the will and influence the testator to dispose of his property in a manner which he would not do in the absence of the delusion. When the testator's false belief is not based on evidence, it amounts to an insane delusion, but if the belief is founded upon evidence, however slight or inconclusive, the delusion is not insane and the will will stand.

4. Fraud, Mistake and Undue Influence

After considering the testamentary capacity of the testator, the practitioner should investigate whether grounds of fraud, mistake, or undue influence exist to render the will void. Fraud and mistake

85. Id. at 508, n.2.
87. See generally 1 PAGE ON WILLS § 12.36 (1960).
88. Gilmer v. Brown, 44 S.E.2d 16 (Va. 1947) (recognizing that an individual under a guardianship is not deprived of the power to make a will); Boyd v. Cook, 30 Va. (3 Leigh) 32 (1831) (holding that a blind man may make a will); see Temple v. Temple, 11 Va. (1 Hen. & M.) 476 (1807) (holding that drug addiction is not sufficient to establish lack of testamentary capacity); Frye v. Norton, 135 S.E.2d 603 (W. Va. 1964) (indicating that alcoholism is not sufficient to establish lack of testamentary capacity); Montgomery v. Montgomery, 128 S.E.2d 480 (W. Va. 1962) (noting that old age, standing alone, does not invalidate the capacity to make a will); Nicholas v. Kershner, 20 W. Va. 251 (1882) (holding that physical infirmities or disease alone are not sufficient to invalidate testamentary capacity).
90. See generally 1 HARRISON ON WILLS AND ADMINISTRATION FOR VIRGINIA AND WEST VIRGINIA, § 123(11) (3d ed. 1985) [hereinafter HARRISON].
91. Fraud, mistake, or undue influence, however, may affect only a portion of the will and not the entire instrument, and in such a case only the affected portion will be held invalid, unless the valid portions cannot be carried out without the stricken portions. See,
affect testamentary intent, whereas undue influence affects testamentary capacity.

Fraud occurs when a testator is misled into executing a will which he does not know to be a will or which does not say what he thinks it says.92 Ordinarily, the party alleging fraud bears the burden of proof, and the standard is clear and convincing evidence.93 However, the burden may shift to the person accused of fraud where a trust or confidential relationship exists.94 If fraud is proven, the court may either set aside the will or, in appropriate cases, decree a constructive trust.95

A court may set aside a will on the grounds of mistake, but only if it is a mistake as to what the instrument contains, or as to the paper itself.96 In limited circumstances the court may also construe the will in accordance with the intentions of the testator.97 These situations are typically limited to "descriptions of property, designation of beneficiaries, and the like, which arise upon the construction to be given to the will."98 A mistake of fact or law upon which a testator relies in making his will cannot be corrected by the court.99 As with fraud, the burden of proof for mistake is clear and convincing evidence.100

Unlike fraud and mistake, the theory of undue influence is concerned not with the testator’s intentions, but with his very capacity to execute the will. The facts necessary to establish undue influence will

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92. See generally Hooper v. Kelsick, 2 Va. (Wythe) 190 (1793).
96. Couch v. Eastham, 27 W. Va. 796 (1887); Effinger v. Hall, 81 Va. 94 (1885).
97. Effinger, 81 Va. at 98.
98. HARRISON, supra note 90, § 115. For example, in Effinger v. Hall, the court corrected the testator’s mistake where the testator’s will divided certain property among seven persons when the testator intended the property to be divided among eight. But cf. Couch v. Eastham, 3 S.E. 23 (W. Va. 1887).
vary from case to case.\textsuperscript{101} Undue influence sufficient to invalidate a will is defined as "such influence as destroys the free agency of the testator and, in legal effect, amounts to force or coercion. Force and coercion necessary to invalidate a will, however, need not be physical or applied at any particular time."\textsuperscript{102} The burden of proving undue influence is upon the party who alleges it.\textsuperscript{103} As with fraud and mistake, the burden of proof is clear and convincing evidence.\textsuperscript{104}

In some circumstances a presumption of constructive fraud or undue influence may be raised. The West Virginia Supreme Court has adopted a presumption of undue influence in certain circumstances. In the case of \textit{Frye v. Norton},\textsuperscript{105} an attorney was accused of undue influence when the will of the testatrix left her estate to him. The trial court instructed the jury over the objection of the defendant that:

\[
\text{While the burden of proving fraud and undue influence in a contested will case ordinarily rests upon the contestants, this is not the rule if an attorney who represents the testatrix writes or procures the writing and execution of the will and is a beneficiary of a substantial amount under the will, and would not share in the estate except for the will, in which event there is a presumption and suspicion of fraud and undue influence which the burden of overcoming is upon the proponent of the will.} \textsuperscript{106}
\]

On appeal, the West Virginia Supreme Court implicitly approved of the presumption. The court in \textit{Frye} approved the above instruction but held that it constituted reversible error because it was not supported by the evidence in the case.\textsuperscript{107}

Our sister state of Virginia has also clearly adopted the presumption of undue influence. To raise the presumption, the evidence must show that:

\begin{itemize}
  \item \textsuperscript{101} See \textit{Harrison}, supra note 90, § 127.
  \item \textsuperscript{102} \textit{Ritz v. Kingdon}, 79 S.E.2d 123 (W. Va. 1953).
  \item \textsuperscript{103} \textit{Frye v. Norton}, 135 S.E.2d 603 (W. Va. 1964).
  \item \textsuperscript{104} See \textit{Ritz}, 79 S.E.2d at 144-45; see also \textit{Abstract, Wills—Weight of the Evidence in Proving Undue Influence}, 67 W. Va. L. Rev. 265 (1965) (citing 9 \textit{John Merry Wigmore, Evidence in Trials at Common Law}, § 2498 (1940)).
  \item \textsuperscript{105} 135 S.E.2d 603 (W. Va. 1964).
  \item \textsuperscript{106} \textit{Id.} at 611.
  \item \textsuperscript{107} \textit{Id.} (noting that the attorney-beneficiary in \textit{Frye} had not prepared the will. Another attorney had drafted it).
\end{itemize}
(1) The testator was enfeebled in mind when the will was executed;

(2) The will was procured or prepared by a person in a confidential or fiduciary relationship to the testator; and

(3) The testator had previously expressed a different testamentary intent.\textsuperscript{108}

Persons in a "confidential or fiduciary relationship" to the testator are typically family members, business partners, and attorneys. In addition, a power of attorney creates a fiduciary relationship between the grantor and grantee of the power.\textsuperscript{109}

Moreover, the presumption of undue influence (also called constructive fraud) is a general principle of fiduciary law in West Virginia. In \textit{Kanawha Valley Bank v. Friend}\textsuperscript{110} the West Virginia Supreme Court explained:

A corollary to the fiduciary principle is the rule that a presumption of fraud arises where the fiduciary is shown to have obtained any benefit from the fiduciary relationship, as stated in 37 Am. Jur. 2d \textit{Fraud and Deceit} § 441:

"... if he seeks to support the transaction, he must assume the burden of proof that he has taken no advantage of his influence or knowledge and that the arrangement is fair and conscientious."\textsuperscript{111}

The presumption of constructive fraud discussed in \textit{Friend} involved joint bank accounts. The court has also established the presumption in other situations.\textsuperscript{112} Once established, the burden is upon the will proponent to overcome the presumption of constructive fraud "by clear and satisfactory evidence."\textsuperscript{113}


\textsuperscript{110} \textit{Id.}

\textsuperscript{111} \textit{Id.} at 530.


\textsuperscript{113} \textit{Friend}, 253 S.E.2d at 531 (approving the holding of Nicholson v. Shockey, 64
Because proof of fraud and undue influence are so fact dependent and since the burden of proof is by clear and convincing evidence, the ability to invoke the presumption of constructive fraud or undue influence can often be a critical factor in successfully challenging a will on either of these grounds.

C. Strategic Considerations

Once the decision to bring a will contest has been made, the contestant’s attorney may quickly realize that the parties’ relative financial positions are not on an equal footing, especially when the proponent-defendant is in control of the estate’s assets. Moreover, there may be a genuine fear that a party who is also the executor may lay waste to the estate before the case can wind its way through the courts. In addition, the size of the potential client’s inheritance if a contest is successful may be so small as to make the attorney’s acceptance financially impractical.

In light of these considerations, this section discusses some strategic moves the contestant’s attorney should consider as well as options for enlarging the pool from which the attorney can collect a fee if successful.

1. Removing the Executor

If the defendant in the will contest has been appointed executor, the contestant should consider removing him and having a neutral fiduciary appointed to control the estate. West Virginia Code section 44-1-5 (1982) provides that the County Commission “may appoint a curator of the estate of a decedent, during a contest about his will . . . taking from him a bond in a reasonable penalty.” The curator is in essence a temporary fiduciary who is empowered to control an estate during a will contest.114

S.E.2d 813 (Va. 1951)).

The West Virginia Supreme Court enunciated the standard for placement of a curator in the case of *Moore v. Thomas*.\(^{115}\)

In our opinion, the statute contemplates that, pending the contest and pending the determination of the rights of rival claimants, the administration of the estate is, by the appointment of a curator, to be placed in competent hands that will be impartial and even-handed as between the conflicting interests of the parties contesting the will.

The court in *Moore* ruled that "a proper case has been made out for the removal of a [fiduciary]" if the two averments in the plaintiff's petition were sustained by proof.\(^{116}\) The first averment in *Moore* was that the fiduciary was "one of the contesting parties in the contest of the will."\(^{117}\) The second averment was that the fiduciary "would be required to reduce to possession assets in his hands as attorney in fact."\(^{118}\) The court went on to hold that the mere fact that a party is a contestant of the will gives him standing to remove the executor.\(^{119}\) By removing the executor, the contestant may be able to remove the "war chest" from the proponent's hands by requiring him to fund his defense of the will contest out of his own pocket.

2. Requiring Bond

If the contestant does not wish to remove the executor or feels that the grounds for removal are weak, an alternative strategy is to petition the County Commission to require or enlarge the executor's fiduciary bond. Typically, the challenged will contains a clause waiving bond for the executor.\(^{120}\) West Virginia Code section 44-5-5 (1982), however, authorizes the County Commission to require or increase a bond of an executor. The purpose of the bond, of course, is to assure the proper performance of the fiduciary's duties to the estate.

\(^{115}\) 174 S.E. 876, 877 (1934).
\(^{116}\) *Id.* at 878.
\(^{117}\) *Id.* at 877.
\(^{118}\) *Id.* at 878.
\(^{119}\) *Id.*
\(^{120}\) See W. VA. CODE §§ 44-1-7 to -8 (1982).
3. Lis Pendens

If the estate contains valuable real estate, the executor or wrongful will beneficiary may be able to sell the property to a bona fide purchaser of value to the injury of the contestants. The practitioner should consider placing a lien on the estate’s real property. In order “to enforce any lien upon, right to, or interest in designated real estate,” a party in a lawsuit may record a *lis pendens* to afford notice to purchasers or encumbrancers of the real estate.\(^{121}\) The West Virginia Code provision is broad enough to allow a contestant in a will contest who is claiming to succeed to title to the decedent’s real property to record a *lis pendens* and thereby tie up title to the property until the will contest is settled or adjudicated.\(^{122}\)

4. Enlarging the Probate Estate Through Recovery of Joint Bank Accounts\(^{123}\)

An aspect of will contests often overlooked by the practitioner is whether the proceeds in bank accounts registered jointly in the name of the decedent and another person can be brought into the probate estate.\(^{124}\) West Virginia Code section 31A-4-33 (1988) provides generally that when a person deposits money into an account bearing the name of the depositor and another or others, the funds thus deposited are presumed to be the property of all persons whose names appear on the account as joint tenants. The statute further provides that any funds

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121. W. VA. CODE §§ 55-11-1 to -3 (1981). A *lis pendens* is recorded in the county where the real estate is located.

122. Under the common law in force in West Virginia, title to real estate descends to the heirs at law or will beneficiaries immediately upon death and does not pass through the hands of the personal representative. King v. Riffee, 309 S.E.2d 85 (W. Va. 1983); Gaylord v. Hope Natural Gas Co., 8 S.E.2d 189 (W. Va. 1940); see also McFaddin v. United States, 10 F. Supp. 286 (Cl. Ct. 1935).


124. The discussion here of joint bank accounts is not limited solely to the contestant in a will contest. Executors, administrators, will beneficiaries, and, in appropriate cases, intestate heirs, all have incentive to explore whether the probate estate can be enlarged. In that respect, this section is equally applicable to them.
in the joint account "may be paid to any one of [the joint tenants] during the lifetime of them, or to the survivor or survivors after the death of any of them."\textsuperscript{125}

In addition to one narrow exception contained within the statute itself,\textsuperscript{126} the Supreme Court of Appeals of West Virginia has judicially created limited exceptions to the statutory "joint tenancy" created by Code section 31A-4-33 (1988). In \textit{Dorsey v. Short},\textsuperscript{127} the court construed Code section 31A-4-33 (1988) to mean that "in the absence of fraud, mistake or other equally serious fault, a conclusive presumption that the donor depositor of a joint and survivorship bank account intended a \textit{causa mortis} gift of the proceeds remaining in the account after his death to the surviving joint tenant."\textsuperscript{128}

Furthermore, a presumption of constructive fraud may arise if the parties to the joint account occupy a fiduciary\textsuperscript{129} or confidential\textsuperscript{130} relationship. The constructive fraud presumption requires the person who benefits from the account to bear the burden of proving that the funds were a \textit{bona fide} gift.\textsuperscript{131} In attacking the joint bank account, which is otherwise a non-probate asset, the practitioner can enlarge the pool of the contestant's potential recovery as well as the fund for the potential attorney's fee.

\textsuperscript{125} W. VA. CODE § 31A-4-33(b) (1988). A bank that pays money to a person in accordance with this statute is released from any liability for the payment of such sums. \textit{Id.} at § 31A-4-33(c), (f). The practitioner should also note that the survivorship language on the bank signatory card may be stricken if the depositor does not want to create an account with survivorship.

\textsuperscript{126} W. VA. CODE § 31A-4-33(c) (1988) strips a bank of protection from liability if the bank pays money over to a joint tenant when a depositor to a joint bank account tenders written notice to the bank that funds in the account are not to be paid out in accordance with the terms thereof.

\textsuperscript{127} 205 S.E.2d 687 (W. Va. 1974).

\textsuperscript{128} \textit{Id.} at 688 (emphasis supplied). The court's use of the term "\textit{causa mortis}" has been criticized. See Fisher, supra note 123. If a gift to the survivor is not intended by the depositor, the account is sometimes called "an account of convenience."

\textsuperscript{129} \textit{Friend}, 253 S.E.2d at 530.


\textsuperscript{131} \textit{Friend}, 253 S.E.2d at 531; Vercellotti, 371 S.E.2d at 375.
5. Getting Paid: Common Fund Litigation

Many attorneys have excitedly begun investigating a potential will contest on behalf of a disgruntled would-be contestant only to find that the potential client's share of the estate if a contest is successful is insufficient to support the time and expense involved in bringing a case to trial. However, before rejecting a case as impractical on a financial basis, the attorney should consider whether similarly situated additional claimants exist. If so, the attorney's representation of the potential client may be possible in spite of the small share the client may receive.

If similarly situated heirs exist, the attorney may be able to invoke the common fund doctrine to collect a fee from each heir benefitted by the litigation whether that heir consented to the contest or not. The doctrine permits a court to "order an allowance of counsel fees to a [party] who at his own expense has maintained a successful suit for the preservation, protection, or increase of a common fund or of common property, or who has created at his own expense, or brought into court, a fund in which others may share with him." West Virginia recognizes the common fund doctrine.\(^{132}\)

A court may award attorney's fees "when the other parties have 'stood by without counsel' and would reap the benefit of the services rendered by the attorney conducting the proceeding."\(^{134}\) Fees may also be awarded when the legal services were "beneficial to the estate, or necessary to its settlement."\(^{135}\) There is no set formula in West Virginia for determining the amount of fees which an attorney may


\(^{133}\) Beuter v. Beuter, 7 S.E.2d 505 (W. Va. 1940); Woods v. McClain, 166 S.E. 279 (W. Va. 1932); Weigand v. Alliance Supply Co., 28 S.E. 803 (W. Va. 1897).

\(^{134}\) Woods, 166 S.E. at 280 (quoting Roach v. Collieries Co., 160 S.E. 860 (W. Va. 1931)).

\(^{135}\) Syllabus, Beuter v. Beuter, 7 S.E.2d 505 (W. Va. 1940); see also Security Nat'1 Bank & Trust Co. v. Willim, 168 S.E.2d 555 (W. Va. 1969). In Wheeling Dollar Savings and Trust Co. v. Leedy, 216 S.E.2d 560 (W. Va. 1975), attorney's fees were denied in a suit to construe a testamentary trust when the services were adversarial to the trust estate.
recover. The court granting the fees has discretion to award the attorney "reasonable compensation."\textsuperscript{136}

IV. RELATED ACTIONS INVOLVING ESTATES

In a will contest the central inquiry is the validity of the instrument itself. Not all probate litigation, however, necessarily requires an attack on a will. This Part provides a sampling of actions which are not true will contests but which are so related to the distribution of estate proceeds that discussion here is warranted in order to afford a complete picture of counsel's litigation options in this area of law.

A. Tortious Interference

West Virginia recognizes the tort of tortious interference with a testamentary bequest.\textsuperscript{137} The Restatement (Second) of Torts at § 774B (1979) summarizes the tort as follows: "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift."

The elements of the tort do not require that the injured plaintiff be related to the decedent since it has been held that a non-heir may bring an action for tortious interference with a decedent's testamentary disposition.\textsuperscript{138} In order to recover, the plaintiff must show that (1) she had the expectancy of a bequest or inheritance; (2) the defendants intentionally interfered with her expectancy; (3) the interference involved conduct tortious in itself such as fraud, duress, or undue influence; (4) there was a reasonable certainty that the bequest or inheri-

\textsuperscript{136} Beuter, 7 S.E.2d at 507.
\textsuperscript{137} Barone v. Barone, 294 S.E.2d 260 (W. Va. 1982).
\textsuperscript{138} See Nemeth v. Banhalmi, 425 N.E.2d 1187 (Ill. 1981) (allowing the stepchild of a decedent to maintain an action for tortious interference against the natural daughter and son-in-law of decedent).
tance would have been received but for the defendants’ interference; and (5) she suffered damages.\(^{139}\)

In West Virginia, the tort is independent of the right to contest a will and is not within the probate jurisdiction of the county commission.\(^{140}\) Federal courts can have diversity jurisdiction over claims for tortious interference with a testamentary bequest.\(^{141}\)

**B. Specific Performance: Contracts to Make a Will**

In a contract to make a will, the testator agrees to make provision for another in his will.\(^{142}\) For the contract to be enforceable, it must be legally executed for valuable consideration.\(^{143}\) Contracts to make wills are controlled by the same rules as other contracts.\(^{144}\)

To enforce a contract to make a will, the frustrated beneficiary may file a suit for specific performance against the decedent’s personal representative. Technically, the relief granted is not specific performance, since a court cannot direct performance against the decedent. Equity, however, can compel the personal representative to convey the decedent’s property to the contract beneficiary.\(^{145}\) The statute of limitations on such an action begins to run at the date of death.\(^{146}\) The measure of damages is the sum stipulated or the value of the property specified in the contract.\(^{147}\) In determining the value of property such value is the market value at the date of death.\(^{148}\)

\(^{139}\) *Id.* at 1191.

\(^{140}\) *Barone*, 294 S.E.2d at 264.

\(^{141}\) Peffer v. Bennett, 523 F.2d 1323 (10th Cir. 1975).

\(^{142}\) A decedent may also make a contract not to make a will, i.e., to die intestate. Practitioners should also be aware that a testator may also make a “negative will.” *See*, e.g., W. VA. CODE § 42-1-1(44) (Supp. 1993). In a negative will, the testator specifies that a named person shall in no event receive any property from his estate.

\(^{143}\) HARRISON, *supra* note 90, § 94.


\(^{146}\) Ricks v. Sumler, 19 S.E.2d 889 (Va. 1942).


\(^{148}\) *In re* Murphy’s Estate, 85 S.E.2d 836 (W. Va. 1955).
A particular type of a contract to make a will is a "mutual will." Mutual wills are wills executed pursuant to an agreement between the testators to dispose of their property in a particular manner, each in consideration of the other.\footnote{149} Mutual wills require a contract between the parties.\footnote{150} If the survivor accepts the benefits provided by the will of the first decedent, the contract to make a will becomes enforceable and the survivor's will becomes "irrevocable."\footnote{151} Technically, since revocability is an essential element of a will, a mutual will is always revocable. Equity, however, will enforce the contract to make the will which in essence will be "irrevocable."\footnote{152}

V. CONCLUSION

Estate law reflects the policy that upon death a person should be permitted to bequeath one's property as he or she sees fit.\footnote{153} However whimsical or ill-advised a person's will may be, the law will carry out those wishes so long as the testator (1) followed the proper formalities, (2) knew what he had and what he was doing with it, and (3) was not doing it because of the fraud or undue influence of another.

This article has attempted to encapsulate the common grounds for attacking a will in such situations and to provide some strategic guidance and information on closely related actions. Each section herein could itself be the subject of a worthwhile article. These comments were designed as a starting gate, not the finish line, for the practitioner who may be asked to run in a legal race known as a will contest.

\begin{itemize}
\item \footnote{149} Davis v. KB&T Co., 309 S.E.2d 45 (W. Va. 1983). Mutual wills should not be confused with reciprocal wills. Reciprocal wills are separate instruments in which the testators name each other as beneficiaries under similar estate plans. Reciprocal wills do not necessarily have the contractual element required of mutual wills.
\item \footnote{150} Id. at 48.
\item \footnote{151} Wetzel v. Watson, 328 S.E.2d 526 (W. Va. 1985).
\item \footnote{152} Id. at 529 n.3.
\item \footnote{153} The one notable exception to this policy is the age-old effort to protect one spouse from disinheriting the other. "For every determined effort . . . to prevent [spousal] disinheritance, there have been equally determined efforts to accomplish exactly that." Scott A. Curnutte, Note, Preventing Spousal Disinheritance: An Equitable Solution, 92 W. Va. L. REV. 441 (1989-90).
\end{itemize}