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Description of West Virginia's New Probate System

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DESCRIPTION OF WEST VIRGINIA'S NEW PROBATE SYSTEM

I. INTRODUCTION

The 1982 revisions to the West Virginia Probate System usher in a new era in estate administration. Surprising even long time advocates of change, the state legislature has created an entirely new system for settling estates. This new system addresses most of the time-consuming and outdated procedures that have plagued fiduciaries for decades. Among the new system's most important features is the summary settlement provision. With the advent of this provision, it is now possible to settle uncontested estates summarily, even when substantial sums are involved. This feature will likely reduce the costs of probate significantly and insure that beneficiaries need visit no bread-lines while waiting for administration to be completed.

Despite the obvious benefits of the new approach, the legislature made the system optional. Counties are given the choice of accepting the new system or voting to retain a revised version of the old system. To date, only five of the fifty-five counties have made the choice to accept the new approach to probate administration. The net effect of the "choice" approach is that West Virginia now has a dual system of estate settlement. Counties which adjoin each other can possibly have distinctly different systems of estate settlement.

Whether the legislature acted wisely when it gave counties a choice to maintain the old system is not the focus of this article. That judgment must wait until the actual operation of the dual system has been observed. This article will be concerned with the changes wrought by the 1982 Act. The article will proceed on three fronts. First, a detailed description of the new system of estate administration will be provided. Second, an attempt will be made both to identify the problem areas in the new system and to predict what approaches will be taken to rectify these problem spots. Finally, all major amendments to the old system will be explained.

II. THE NEW SYSTEM: HOW IT WORKS

The authors of this new system claim inspiration from the Uniform Probate Code and some Louisiana acts, but they also assure us that they are ultimately responsible for the finished product.¹

A. Counties Under the New System

As previously mentioned, the legislature gave counties the option of choos-

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¹ Senator Boettner explained that the sponsors of the bill felt that West Virginia's probate code should address conditions in West Virginia, rather than elsewhere. He said the part of the new system he was proudest of was the introduction of the office of fiduciary supervisor. It is the Senator's hope that the creation of this office will save much time and red tape in estate administration. Phone conversation with Senator Boettner; May, 1982.
ing the new system or retaining the old. Counties had until June 11, 1982 to take positive steps towards making that choice. If these steps were not taken, the counties would be automatically required to follow the new system.\(^2\) The one exception to the 'choice approach' is that counties which settled more than one thousand estates in 1981 were summarily placed under the new system.\(^3\) Since only Kanawha County fits that description, it is the only county denied the choice of which system to adopt. A suggestion has been made that the mandatory inclusion of Kanawha County is unconstitutional.\(^4\) Whether that proves to be the case, four\(^5\) other counties have adopted the new system and it is thus important to understand how it works.

B. The System

1. Fiduciary Officers

The new system changes the cast of characters responsible for estate settlement. The commissioner of accounts, the party primarily in charge of probate under the old system, has become the fiduciary commissioner, and the office of fiduciary supervisor has been created. The idea behind the change in offices was economy and procedural streamlining. The new fiduciary commissioner has been chosen to oversee disputes and to deal with especially difficult situations,\(^6\) which were essentially the same duties his predecessor, the commissioner of accounts performed. In contrast, responsibility for day-to-day management of estates has been given to the fiduciary supervisor,\(^7\) who is to act independently of the fiduciary commissioner, absent special circumstances.\(^8\) This arrangement can save time and red-tape, if handled properly, since it minimizes the involvement of the fiduciary commissioner.\(^9\) Both fiduciary officers possess 'judicial-like' powers to enable them to more completely supervise estates, including the authority to issue process, to summon witnesses, to administer oaths, and to take testimony.\(^10\)

Additionally, the fiduciary commissioner and supervisor have assumed the powers of clerks of county commissions\(^11\) for the purpose of settling probate matters more rapidly. Despite these broad powers, however, fiduciary officers

\(^{2}\) W. VA. CODE § 44-3A-1(a) (1982).
\(^{3}\) W. VA. CODE § 44-3A-1(g) (1982).
\(^{4}\) As of the writing of this article, no one has raised this challenge in the courts. The probable basis of any challenge would be a due process argument.
\(^{5}\) The counties that have adopted the new probate system are:

(1) Kanawha
(2) Putnam
(3) Marion
(4) Summers
(5) Braxton

\(^{7}\) W. VA. CODE §§ 44-3A-2 to 5 (1982).
\(^{9}\) W. VA. CODE § 44-3A-3 (1982).
\(^{10}\) W. VA. CODE § 44-3A-2 (1982).
\(^{11}\) W. VA. CODE § 44-3A-44 (1982).
are still handcuffed in their efforts to speed estate administration by the lack of enforcement authority. Under the new act, fiduciary officers must apply to the county commission or circuit court to compel the cooperation of beneficiaries in following the fiduciary instructions. This not only slows the process, but it also can result in a significant drain on the assets of the estate.

Among their other duties, the fiduciary officers are also responsible for insuring that personal representatives are properly bonded. If irregularities are uncovered, or conflicts of interest arise after estate administration is begun, the fiduciary commissioner and supervisor must bring the matter to the attention of the county commission. That body will then decide what corrective measures the personal representative must take to remain in charge of the estate. Presumably, the fiduciary officers could be liable to injured beneficiaries if they fail to discover defects in the personal representative's bonding.

Paradoxically, the fiduciary commissioner has greater authority than the supervisor; yet his role in the process of estate settlement is considerably narrower. In essence, he serves many of the same functions as an appellate court. Where a controversy of particular importance arises, it is referred to the fiduciary commissioner for investigation and decision. He can take evidence, hold hearings and make findings of fact and conclusions of law, all for the purposes of advising the county commission on the appropriate means of resolving the dispute. But his involvement outside of this 'appellate-like' function is limited. As a rule, the new act discourages the county commission, the fiduciary supervisor or the personal representative from referring general matters to the fiduciary commissioner. This 'discouragement' turns to outright prohibition in certain circumstances, for the code expressly prevents referrals where: (1) the estate is valued under $25,000; (2) the personal representative is also the sole beneficiary of the estate; (3) the spouse of the deceased is the sole beneficiary and does not request reference; (4) the estate possesses ample funds for payment of liabilities and all beneficiaries have no disputes; and (5) the fiduciary supervisor and county commission find the estate will be able to satisfy all liabilities. The last item on the list should be a substantial factor in avoiding general reference to estates to fiduciary commissioners.

It is important to note that the offices of fiduciary commissioner and fiduciary supervisor are like any other positions of public trust. These officers owe their charges a standard of conduct which is free from even the hint of impropriety. To ensure that the fiduciary officers meet this high standard of conduct, the legislature has mandated that office holders meet minimum educational standards prior to assuming their positions. It has also enacted sub-

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15 Id.
16 Id.
19 Id.
stantial penalties for those who run afoul of their responsibilities under the act. An officer who mingles public and private interests, for example, can be removed from office and fined $1,000.20 The code specifically provides that a fiduciary should be removed: (1) where the official would pass on his own acts; (2) when he serves as attorney or counselor to the estate; (3) where he is interested in the fees of the fiduciary; (4) where he is surety to the fiduciary; or (5) where a circuit court judge in similar instances would be disqualified.21

As stated previously, the legislature has attempted to prevent either deliberate or inadvertent misconduct by restricting the fiduciary offices to those who possess certain minimum qualifications. Fiduciary supervisors, for example, must be either attorneys22 at the time of appointment or present evidence that they have successfully completed a 'fiduciary test' devised by the state tax commissioner.23 For those in the latter category, attendance at an annual refresher course, conducted by the tax commissioner, is also mandatory.24 Interestingly, the old system expressly requires that the more powerful fiduciary commissioner be an attorney. However, the new probate system allows non-attorneys, who meet the qualifications outlined in § 44-3A-1 of the West Virginia Code, to assume the position of fiduciary commissioner.25

The final subject deserving comment in this section is fiduciary fees. Under the new system, the estate is subject to charges for the services of the fiduciary commissioner when the estate does not qualify for summary settlement. These fees are subject to the approval of the county commission under the following criteria: (1) the time and effort expended by the officers;26 (2) the difficulty of the work done; (3) the skill required to perform the task;27 (4) time limitations and other extraordinary demands made by the personal representative and others; and (5) the reasonableness of the fee.28 This fee schedule was one of the more controversial topics of discussion when the 1982 amendments were adopted. But, after extensive debate, the fee schedule described above was adopted for use under both the old and new systems.29

20 W. VA. CODE § 44-3A-3(e) (1982).
22 W. VA. CODE § 44-3A-3(c) (1982).
23 Id.
24 Id.
26 This is calculated to the nearest tenth of an hour. W. VA. CODE § 44-3A-42(c) (1982).
27 Presumably, this factor involves an evaluation of whether specialized legal knowledge was required to perform the task. Charging legal rates for duties a layman could perform would obviously present ethical problems.
28 W. VA. CODE § 44-3A-42(c) (1982).
29 The parallel code section is W. VA. CODE § 59-1-9 (1982), which applies to both the new and old probate systems. Changes in this section were some of the more hotly debated amendments of the 1982 act. The criteria for payment of fiduciary commissioners were greatly changed by the act. Under the old system, fees for fiduciary commissioners were such as the county commission might from time to time prescribe. See W. VA. CODE § 59-1-9 (1943). Now fees are specifically prohibited from being entirely based on the gross value of estates. A set of factors has been provided by the legislature for setting fiduciaries' fees. These factors are: (1) the time and labor expended by the fiduciary; (2) the difficulty of the questions raised by administration of the estate; (3) the skill
When the estate meets the requirements for 'summary settlement,' the charges for the services of fiduciary officers are dramatically reduced. The fiduciary commissioner plays no role in summary settlement; therefore, the estate is free of all of his charges. Moreover, the fiduciary supervisor is statutorily limited to a charge of forty dollars when handling the normal matters surrounding the summary settlement of an estate.

2. Personal Representatives

Personal representatives are qualified under the new system in exactly the same manner in which they were qualified previously. Once qualified, they must submit certain documentation to the fiduciary supervisor. These documents must be prepared and submitted in the following order:

1. Prior to actually handling funds from an estate, the representative must submit proof of personal bonding to the fiduciary officer. The supervising officer may require that additional security be provided. No personal representative may proceed with administration until this requirement has been met.

2. A fee of forty dollars must be paid to the fiduciary supervisor. This fee will pay both the state tax commissioner and the County Fiduciary Fund.

3. The personal representative must decide whether to qualify the appraisers to act throughout the entire state or not. With the advent of dual systems of estate settlement, statewide qualifications of appraisers may be a wise step. Conflicts of jurisdictions between counties with differing systems could be avoided in this manner.

4. The personal representative must inspect the inventories of the estate submitted to him by the appraisers. Once the personal representative determines the inventories are complete, he turns them over to the fiduciary supervisor.

required of the fiduciary to perform the services rendered; (4) the customary fee for like work; and (5) any time limitations established by parties. These changes should make fees more reflective of actual work done and principles of equity.


32 W. Va. Code § 44-3A-42 (1982). Five dollars of this fee is allocated to the state tax commissioner who deposits it in the Inheritance Tax Administration Fund. The other thirty-five dollars is used to help pay the fiduciary supervisor's salary.

33 W. Va. Code § 44-1-14 (1982) allows the estate appraisers to act in all counties of the state, if that is requested. Otherwise, a separate set of appraisers must be appointed for each county where property is located.

34 Id. The personal representative must certify the completeness of the appraiser's inventories.
3. Notification and Presentation of Claims

The fiduciary supervisor publishes an advertisement each month, identifying the estates that have begun administration in the last thirty days. The advertisement must show the name of the decedent and the name and address of the personal representative. Additionally, the ad must notify anyone interested in the estate that they have seventy-five days to present claims to the personal representative and one hundred twenty-five days to present claims to the fiduciary supervisor.

Anyone presenting claims to the fiduciary supervisor must provide:

1. A specific description of the nature of the claim;
2. Evidence of any interest due and amounts to be credited; and
3. A voucher for the claim which has been verified by affidavit.

Unless these claims are disputed by a counter affidavit, they are deemed proven. Should a counter affidavit be filed with the fiduciary supervisor the matter will be referred to the fiduciary commissioner for a hearing. That hearing will resolve issues of both fact and law. The personal representative must defend the estate during the hearing by presenting offsets to claims, or pleading a bar to the claim by the statute of limitations. The personal representative may ask that several claims be heard in one proceeding for reasons of economy.

Certain undisputed claims may be paid in advance of the normal one hundred twenty-five day waiting period specified in the published notification to creditors. Generally, these claims will be funeral costs, medical expenses from the last illness, and, of course, debts owed the government.

4. Handling Estate’s Tax Liabilities

The personal representative should formulate a plan to distribute the tax liabilities of the estate among the beneficiaries. If the testator has had the foresight to plan for taxes, the personal representative is bound to use that plan. Otherwise, the code mandates several specific procedures for the pay-
ment of estate taxes. Where the testator has left no instructions, the taxes are to be prorated among the beneficiaries in the same proportion that their share bears to the total estate.\(^{47}\) If there are divisions of interests in property created, or temporary interests provided, taxes are to be paid out of the corpus of the property alone.\(^{48}\) The personal representative is obliged to collect the taxes on the property of the gross estate, whether it comes into his possession or not.\(^{49}\) To fulfill this obligation, the personal representative should not turn over any asset of the estate to a beneficiary until all federal estate taxes are paid.\(^{50}\)

5. Summary Settlement

Assuming no problems arise—such as unsettled disputes, the need for advance payments or the inability of the estate to cover its liabilities—the estate may be summarily settled one hundred twenty-five days from the time administration notice is published. To proceed with summary settlement, the personal representative must give the fiduciary supervisor several documents. The first document is a proposed plan for settlement of the estate. This plan should include: (1) proof of payment of any claims; (2) an affidavit that there are no other claims; (3) a verified accounting of income received for the estate; (4) provisions for payment of taxes; (5) a plan for distribution; and (6) whatever else the fiduciary supervisor deems necessary.\(^{51}\) The second document, if feasible, should be a return of state inheritance taxes.\(^{52}\) If the supervisor rejects the plan it must be amended within forty-five days.\(^{53}\) After accepting the report, the fiduciary supervisor prepares a report of his findings and recommendations for the county commission.\(^{54}\) The supervisor’s report includes findings of: (1) the propriety of the appraisal; (2) whether creditors are paid and if not, what arrangements have been made to pay them; (3) whether a proper tax return has been made; (4) whether the assessor has been notified about transfers of real property; (5) whether the beneficiaries will receive a proper distribution; (6) whether minors and disabled persons have been protected; and (7) other matters the supervisor deems important.\(^{55}\) Upon completion of the report, the fiduciary supervisor provides written notice to interested parties and their attorneys.\(^{56}\) He must also publish this notice\(^{57}\) so that all parties with a claim against the estate have an opportunity to perfect their interest. After receipt of notice, parties have ten days to examine the report and to make

\(^{47}\) W. VA. CODE § 44-3A-18(b) (1982).
\(^{48}\) Id.
\(^{49}\) W. VA. CODE § 44-3A-18(c) (1982).
\(^{50}\) W. VA. CODE § 44-3A-18(d) (1982).
\(^{51}\) W. VA. CODE § 44-3A-19(a) (1982).
\(^{52}\) W. VA. CODE § 44-3A-19(c) (1982).
\(^{53}\) W. VA. CODE § 44-3A-19(d) (1982).
\(^{54}\) W. VA. CODE § 44-3A-19(e) (1982).
\(^{56}\) W. VA. CODE § 44-3A-19(f) (1982).
\(^{57}\) Id.
their objections. The fiduciary supervisor examines these objections and makes comments. Then the supervisor submits his report, along with objections and comments, to the county commission. Parties may make further objections to the proposed settlement until it is presented to the commission. The county commissioners may pass upon these exceptions themselves, or send the exceptions to a fiduciary commissioner for separate hearing, who, in turn, will produce his own supplemental report on disputed matters. Upon confirmation by the commission, the representative may pay the creditors.

Summary settlement is one of the most important features of the new system because of its potential to save time, effort and money in the settlement of estates. Because a fiduciary commissioner is not involved, summary settlement saves on his fees. Similarly, summary settlement will also shorten the time span from death to distribution of the estate. By avoiding formal hearings and notice periods, a personal representative may accomplish distribution of an estate in a matter of a few months instead of years, saving on both legal fees and diminution of the assets through the inflation factor. The most significant feature of summary settlement procedure is that it may be applied whenever there is no dispute, regardless of the size of the estate — a true advantage over the old system.

C. Reports for Estates Not Qualifying for Summary Settlement

Estates which cannot be summarily settled go through a somewhat tedious formal report and ratification system. The process begins when the supervising fiduciary officer files either a formal, or summary report, on disputed claims. That report should include: (1) a verification of the claims by affidavit of the claimant; (2) how much of the claim was allowed, or disallowed; and (3) the final balance of the claim.

The draft report should also include an accounting of the assets of an estate, how the claims will be paid, and, the order of payment of claims when a pro rata distribution is required. When the report of claims is ready, the fiduciary officer must give notice to all interested parties.

Once the notice of proposed settlement is given, the ratification system begins. The proposed settlement is first left in the fiduciary supervisor's office for inspection and the filing of exceptions. The county commission then holds

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58 W. VA. CODE § 44-3A-19(g) (1982).
60 W. VA. CODE § 44-3A-19(g) (1982).
62 Id.
63 Id.
64 W. VA. CODE §§ 44-3A-17, -21, -22, -23 (1982).
65 W. VA. CODE § 44-3A-17 (1982).
66 Id.
67 Id.
68 W. VA. CODE § 44-3A-21 (1982). Notice may be personal, or by mail.
69 Id.
a hearing on the proposed settlement, at which time, it may hear interested parties' objections. After the hearing, the county commission may ratify, amend, or refer the matter to the fiduciary commissioner.\textsuperscript{70} Once the county commission has completed its report, parties may appeal any objections to the circuit court.\textsuperscript{71} After all appeals have been made and all reports have been confirmed by the county commission, no further exceptions may be made.\textsuperscript{72} The now inviolate report is recorded by the clerk of the county commission.\textsuperscript{73} At that time the personal representative may distribute the estate without liability.\textsuperscript{74} Naturally, the time these procedures take varies according to (1) the number of objections registered; (2) the complexity of identified problems; and (3) the time required to take an appeal. The whole process might take as little as 140 days, which makes the new system much faster than the older approach.

The personal representative need not wait until the final report is approved to pay out the estate, but premature payment does heighten the risk of his personal liability. Thus, the better course is to await the county commission's final approval before paying claims.\textsuperscript{75} In any event, the personal representative must either pay claims against the estate, or make provision for their payment, within three months from the time he is authorized to do so. Failure to abide by these time requirements will subject the personal representative to suit by any interested party.\textsuperscript{76} The fiduciary officer may also take action against the personal representative when he files a delinquent report.\textsuperscript{77} In most instances, this action is limited to a type of "mandamus" suit in the appropriate circuit court.\textsuperscript{78}

III. Troublespots In The New System

At this writing, the West Virginia Supreme Court of Appeals has not considered the 1982 amendments to the probate system. This section will not attempt to predict how the court will interpret these changes in the Code, but it will point out some possible problem areas with the new system. As with any new product or idea, the revised probate system has some flaws. This is by no means an indictment that the new estate settlement system is ill-conceived or that it will fail to meet the concerns of those who sought reform in West Virginia's estate settlement procedures. These are judgments which must be deferred until the system has been in operation for a few years. For now we are concerned with simply pointing out where the system may prove difficult for the inexperienced attorney.

\textsuperscript{70} W. VA. CODE § 44-3A-22 (1982).
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} W. VA. CODE § 44-3A-25 (1982).
\textsuperscript{74} W. VA. CODE § 44-3A-29 (1982).
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} W. VA. CODE § 44-3A-24 (1982).
\textsuperscript{78} Id.
A. Contingent Claims

Contingent, unliquidated and unmatured claims present special problems to the personal representative. If he plays it safe and delays distribution until these claims are perfected, he denies other beneficiaries the use of their inheritances. Additionally, assets of the estate would continue to need management while the claims mature. Watching inflation eat away at the assets of an estate while contingencies are removed is not an ideal occupation for personal representatives. Early distribution, however, implicates a contending set of considerations. If the estate is distributed before contingent claims are perfected, there may be nothing left with which to pay future claimants. Hence, the intent of the testator would be defeated and a class of beneficiaries would be denied their legal rights, creating potential liability problems for the personal representative.

West Virginia's new probate code has tackled these competing interests by providing a system to deal with contingent, unliquidated and unmatured claims. Under the new system, the personal representative and fiduciary officer estimate what assets are needed to cover future claims against the estate. The assets deemed necessary to cover these claims are then remitted to the general receiver at the circuit court. To protect against the possibility that retained funds will not be sufficient to meet contingent claims, all beneficiaries of the estate are required to post bonds. After the general receiver has received the funds and the beneficiaries have posted bond, distribution may commence. At this point, persons holding contingent claims may collect their claims from the funds in the hands of the general receiver. If these funds are insufficient, the claimants may collect the remainder from the bonds of the beneficiaries. If debts remain unpaid after the bonds are used, these unsatisfied creditors have no further recourse against beneficiaries. Nor is the personal representative liable to these claimants. As is evident, calculating the appropriate level of reserves to cover contingent claims is one of the personal representative's biggest headaches.

B. Estates Where Liabilities Exceed Assets

Like the old system, the new probate code ranks creditors in order of preference. Should the assets of an estate be exceeded by the debts of an estate,

81 Id.
84 Id.
85 W. Va. Code § 44-3A-30 (1982). The personal representative is not immune if the county commission fails to approve the fiduciary officer's final report.
these ranks become important. The members of the highest rank of creditors are fully paid before the next rank is paid anything, and so on. If the assets of the estate are not sufficient to fully pay a class of creditors, payment is pro-rated among the entire class. This system of creditor ranking and pro-rated payment applies to all types of debts. Even those creditors who are paid in advance come under the aegis of this ranking. Therefore, care should be taken when advance distributions are made to insure that preferred creditors are not passed over. Such an oversight would result in liability against the personal representative.

C. Late Claimants

Those persons who have not presented their claims against an estate within the 125-day period may still collect their money, although this collection is subject to some restrictions. The first restriction is that late claimants may not collect their claims from the personal representative; he is not liable for their omission, provided proper notice was given. The second restriction is a limitation on how late the claims may be. Claims against the distributees of an estate must be brought within two years from the date of distribution. This applies equally to personalty and realty. With a few exceptions, claims later than two years are forever barred. The final restriction requires that the liability of distributees to late creditors be pro-rated. Also, beneficiaries are liable to late claimants only to the extent of their distribution. In the event that there is a surplus of assets after all timely creditors have been paid, a reserve fund is established to meet the requests of late-filing creditors. However, making late claims against estates is discouraged. Late creditors bear the burden of proving that they had neither notice nor actual knowledge of settlement of the estate. Late claims are also subject to any statute of limitations that might apply independently.

D. Release of Liens

Another impediment to distribution of estates are liens against assets of the estate. Normally, creditors holding these liens are paid before the assets may be distributed. This is not always the case and the Code has provided a scheme for clearing estate property of unclaimed liens. Under this scheme,

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*8 Id.
*9 Id.
*11 Id.
*15 Id.
*17 Id. No specific standard of proof is set forth.
*18 W. Va. Code § 44-3A-12 (1982). This section applies to all types of liens. It does not affect any statutory order of precedence of liens or creditors.
persons due to receive property subject to a lien may instruct the personal representative to pay the lienholder. He is then paid out of the general assets of the estate\(^9\) and clear title to the property may then be given to the beneficiary.

E. *Actions By and Against the Personal Representative*

The new probate system specifically empowers the personal representative to bring suit on behalf of the estate.\(^{100}\) It is also the case that the personal representative must defend suits brought against the estate.\(^{101}\) Any party opponent to the personal representative must "set off by way of counterclaim any claim he may have had against the deceased..."\(^{102}\) This means that claims already asserted against the estate must be litigated by the creditor involved. This proviso may save time and expense by consolidating actions when many claims are outstanding. But, it may also cause somewhat protracted and useless litigation when only one claim among many is in dispute.

F. *Possible Confusion Generated By Dual Systems*

The fact West Virginia now has a dual system of estate management may cause both confusion and an upsurge in litigation. The potential problems created by the co-existing approaches to estate settlement are best illustrated by example. Suppose a farmer dies intestate owning land in counties A & B, which have the old and new probate systems, respectively. The farm contains valuable natural gas reserves and the heirs are hostile toward each other. The county where probate is to be granted becomes a central issue, because of the relative advantages of having the estate administered under the new system. But the competing heirs see their interests as threatened by any quick settlement. Hence, they engage in costly litigation to decide which is the appropriate forum to supervise the estate, the county under the old system or the county under the new. While these conflicts of law questions are being resolved, the costs of administering the estate mount, bona fide heirs go without a source of income, and a gaggle of lawyers collect significant fees.

The authors of the 1982 revisions to the probate system must have anticipated these types of problems. The questions become: Why then did the legislature retain the old system, even to the point of updating it? Why not bring the whole state under a uniform system of estate administration? A possible explanation would be political pressure, but this may not completely explain the legislature's action. Another explanation might be that inertia is not only a physical law, but a law of human nature as well. The lawmakers may have simply been hesitant to trade a proven system for a bold, yet untested, approach. Whatever the explanation, the dual system creates needless problems. Perhaps the best way to solve the problems is by total elimination of one of the

\(^9\) *Id.*

\(^{100}\) W. VA. CODE § 44-3A-16 (1982).

\(^{101}\) *Id.*

\(^{102}\) *Id.*
two systems. Another approach would be to encourage clients to include instructions in their wills concerning the county which should probate their estates.\footnote{103}

G. Failure to Give the Fiduciary Supervisor Directions

The advent of the Fiduciary Supervisor is intended to bring about a substantial savings in estate settlement. The informality inherent in the office encourages less paper work by personal representatives. Expenses should be saved because personal representatives need not spend as much time in hearings and preparing documentation. However, these salubrious effects are not mandated by the legislature. It is entirely possible that overly cautious fiduciary supervisors could require as much documentation and formality as fiduciary commissioners did under the old system. Nothing in the Code prevents such an occurrence. While there is no simple solution to this problem, the fact that many supervisors will be lawyers, or will have special training,\footnote{104} should do much to alleviate the concern. In any event, a Code section mandating informality by fiduciary supervisors would appear ludicrous.

IV. The Old System—As Amended\footnote{105}

For those counties that do not opt for a new system of settling estates, the legislature updated the old system. However, it did not fundamentally change the mechanism for probate. The amendments were more in the nature of streamlining and speeding up the old probate system. Hence, those persons using the old system need not relearn how to probate estates. This portion of the article will merely explain what the 1982 amendments were and how they affect the Code.

A. Reference of Decedent's Estates

Under the old system, an estate was referred to a fiduciary official at the time the personal representative was qualified.\footnote{106} Now, with the 1982 amendments, estates are referred to fiduciary officers at the time the estate appraisal is returned to the clerk.\footnote{107} This change is significant because it will actually save time where there are delays in the qualification of the personal representative.

Another important change is that the value of an estate that may be ad-

\footnote{103} This approach has several flaws. Testator's wishes in matters of venue are factors to consider, but location of an estate is a matter of law, not intent.

\footnote{104} W. VA. CODE § 44-3A-3 (1982).

\footnote{105} Changes common to both systems. W. VA. CODE § 44-1-4 now allows appraisers to be paid up to $100.00 per day out of the estate. This measure should attract competent people to the field and provide that those already working as appraisers will be fairly compensated. W. VA. CODE § 44-4-2 fiduciaries now have only two months to make records public. There were many other changes to the code that affect both the old and the new probate systems. These changes are not major changes and most of the changes are clerical in nature only.

\footnote{106} W. VA. CODE § 44-2-1 (1982).

\footnote{107} Id.
ministered without reference to a fiduciary commissioner has been raised. Previously, only estates valued under $10,000 could be settled without the participation of the fiduciary commissioner. That limit was raised to $25,000 by the 1982 amendment. Raising the ceiling for informal disposition of estates should save time and money. Estates under $25,000 will never be seen by a fiduciary commissioner and hence will be relieved of the costs of his review. This may not be of tremendous benefit to a large number of estates because inflation has driven property values up to the point that even the smallest estates exceed $25,000. However, any savings in administration costs to small estates is a boon.

Another provision of the estate reference section may further limit the number of estates that utilize the services of fiduciary commissioners. This amendment provides that single beneficiary estates need not be referred to fiduciary commissioners. A publication notice is included in this subsection. It states that these estates will be settled in 90 days unless someone demands administration, or a creditor presses a demand. This statute further provides that, after six months, real property may be sold free of liens to a bona fide purchaser without notice. This change should also save time and costs in estate administration. It has the advantage of applying to any estate with a single beneficiary. The value of the estate is not a limitation to its application.

B. Publication of Notice By Fiduciary Commissioner

Amendments to the public notice requirements will shorten the time creditors will have to present their claims. The time for presentation of claims is now between two and three months. This has halved the old period of four to six months for presentation of claims. An amendment such as this has few adverse effects and can speed estate settlement greatly.

C. Proof of Claims

A West Virginia Supreme Court case, In re Estate of Hardin, may have been the catalyst for this substantive amendment. In Hardin, the court denied the claim of a former spouse against an estate, holding that the old sec-

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108 Id.
109 Id.
110 Estates are not referred to a fiduciary commissioner until the appraisement is returned to the clerk. W. VA. CODE § 44-2-1 (1982).
111 W. VA. CODE § 44-2-1(b) (1982).
112 Id.
113 Id.
114 Id.
115 The six month period in which to bring claims against the decedent's estate runs from the publication of notice. W. VA. CODE § 44-2-1(b) (1982).
116 Id.
118 Id.
120 Id.
tion 44-2-5\textsuperscript{120} of the West Virginia Code required claims to be accompanied by an affidavit and proper vouchers:

The Florida divorce decree attached to the claimant's affidavit was the only matter filed with that instrument and purported to be the voucher upon which the claim was based. . . . The trial court . . . held that by reason of the failure of the claimant to present an authenticated copy of the Florida divorce decree . . . no proper voucher accompanied the claim as required by W.Va. Code 1981, § 44-2-5. We are in agreement with that holding.\textsuperscript{121}

The result in Hardin apparently seemed inequitable to the legislature, so it amended the section to change the result. Now, claims against estates need not be verified by affidavits or by the fiduciary commissioner.\textsuperscript{122} The amendment will eliminate some unnecessary formalities of presenting claims against estates. It may also, however, allow some unauthentic claims to be proven and collected. The legislature balanced savings in red tape against a slight risk of bogus claims and opted for a savings in red tape. In all likelihood, bogus claims will be as readily rejected as they were in the past.

D. Report By the Fiduciary Commissioner

The fiduciary commissioner now has half as much time to prepare his report of claims as his counterpart had under the old system. Reports must now be completed in five months.\textsuperscript{123} An even more important aspect of this amendment is that the fiduciary commissioner is no longer obliged to file a report at all, unless any interested party moves for such a report.\textsuperscript{124} Both of the amendments to the section should have positive effects on estate settlement. They encourage greater speed and less paperwork from fiduciaries.

Perhaps an even greater benefit could follow from allowing commissioners to file informal reports, for the option of making no report might not be exercised to any great extent. Commissioners might be called upon to justify their estate decisions at some point and will want documentation of their decisions. Giving commissioners the option of filing an informal report could fill this need and still save the time and expense of presenting reports to the county commission for approval. Where estates present only minimal problems, informal reports could be filed.

Other sections have been amended to cut short the process of estate settlement. The amendments place shorter time limits on actions within the process. Section 44-2-22,\textsuperscript{125} for example, allows a personal representative to pay creditors after six months,\textsuperscript{126} instead of a year.\textsuperscript{127} Section 44-2-23\textsuperscript{128} now comple-

\begin{itemize}
\item \textsuperscript{120} W. VA. CODE § 44-2-5 (1982).
\item \textsuperscript{121} Hardin, 212 S.E.2d 750.
\item \textsuperscript{122} W. VA. CODE § 44-2-5 (1982).
\item \textsuperscript{123} Compare, W. VA. CODE § 44-2-5 (1966) and the 1982 amended version. Also, the current five month time period runs from the time of qualification of the personal representative. W. VA. CODE § 44-2-5 (1982).
\item \textsuperscript{124} W. VA. CODE § 44-2-16 (1982).
\item \textsuperscript{125} W. VA. CODE § 44-2-22 (1982).
\item \textsuperscript{126} The current six month period runs from the qualification of the personal representative.
\end{itemize}
ments the above six month period by freeing personal representatives of liability for certain payments after six months has elapsed. The same six month period also now clearly attaches to intestate estates after the amendments of 1982.

E. Time for Payment of Claims

Changes have been made to the time payment provisions of the probate system as well. Personal representatives are now liable for any losses caused by late distribution which provides a great incentive to adhere to distribution timetables. Any distribution made more than a month after the provided time schedule creates a cause of action in favor of the injured party.

Interestingly, fiduciary commissioners are allowed greater latitude of action by other changes to the time payment provisions. Commissioners may now informally direct the order of payment of claims against an estate. They no longer need make a formal report on the order of distribution. This amendment is the kind of time saving amendment that could be added to section 44-2-16.

More kinds of property are now encompassed by the section on non-disposable property. This section formerly dealt with distribution of property when the claimant or distributee was unavailable. That category has now been expanded to include property which, "cannot be paid or distributed because the whereabouts of the claimant or distributee are unknown, or cannot be paid or distributed for any other reason. . . ." Disposition in such cases is now provided in a summary proceeding before the circuit court. All persons who may be entitled to funds are made defendants to the suit. They receive notice as the circuit court shall direct. Presumably, the notice is that required by the West Virginia Rules of Civil Procedure.

F. Limits on Recovery of Claims

Importantly, the amendment to the recovery of claims section now specifically includes the state tax commissioner within its regulations. The tax commissioner must now follow the same formal procedures as other creditors against estates. If state officials were allowed to sue, or collect against estates without following statutory procedures, due process might be violated. State officials are not immune to the requirements of due process and specific inclu-
sion of them as creditors can prevent possible confusion.

G. Fiduciary Commissioners

Commissioners of Accounts are now Fiduciary Commissioners because of changes in the Code. The requirements of the office have changed as well. The mandate that no more than two commissioners be from the same political party has spread to the entire state. More important to the Bar is the requirement that fiduciary commissioners be lawyers. This requirement is, in large part, a legislative response to the supreme court's ruling in Thorn v. Luff. There the West Virginia Supreme Court of Appeals held that, whatever custom might dictate, Commissioner of Accounts need not be lawyers. Apparently displeased with this result, the legislature amended the probate statute shortly after the decision to impose the more rigid educational requirement on the new office of fiduciary commissioner.

V. Conclusion

The old probate system has been considerably amended by the 1982 Act. Many of the amendments did not show up in this article because they were generally of a clerical nature and had no substantive effect on estate settlement. Other amendments have substantively affected estate settlement in West Virginia and have received treatment in this article. As is evident, the old system has been refurbished and modernized in many aspects, making the system of estate settlement faster and easier to apply. The only question remaining is whether dual systems operating in the state will work — a question beyond the scope of this paper.

Karl Warden

138 Id.
139 Current commissioner’s are “grandfathered in” and need not be attorneys. Id.