STILL LAYING CLAIM: AN UPDATE TO DEVELOPMENTS IN WILL CONTEST LITIGATION IN WEST VIRGINIA

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I. INTRODUCTION

Family disputes over inheritance date back at least as early as Biblical times, when the younger brother Jacob, by use of deception, received the inheritance from his father Abraham over his elder brother Esau.[1] Probate litigation, which is commonly known as the "will contest," has changed, albeit slowly, in both ancient and modern times. It has been rightfully observed that "this area of practice is a melting pot of presumptions, exceptions, threshold hurdles, capacity qualms, evidentiary issues, strategic clauses, and countless other headache-inducing legal issues—yet attorneys must diligently juggle all of them while also maintaining their clients' confidence and trust."[2]

Since the publication of the authors' original law review article, *Laying Claim: A Practitioner's Guide to Will Contests in West Virginia*,[3] in 1993, several noteworthy statutory enactments and judicial decisions have occurred which affect this important area of law. In this article, the authors wish to supplement and update their original article in order to advise practitioners of developments in the probate arena and to make academic commentary on them.

II. ATTACKING THE WILL

A. The West Virginia Impeachment Statute

West Virginia Code section 41-5-11[4] is the main statutory provision that provides for an issue *devisavit vel non*[5] (called impeachment of a will, which is also called a will contest). The statute allows a contest to be filed in the circuit court of the county in which the will was admitted to or denied probate by the County Commission.[6] In commencing a will contest, the practitioner must be familiar with the applicable statute of limitations and issues of venue, standing, and parties defendant.

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1 *Genesis* 25:27–34. This represents a classic case of *fraud in the factum*.

2 Joyce Moore, *Will Contests: From Start to Finish*, 44 ST. MARY'S L.J. 97, 239–40 (2012).

3 96 W. VA. L. REV. 123 (1993).

4 W. VA. CODE ANN. § 41-5-11 (LexisNexis 2016).

5 Latin for "he (or she) devises or not." *Devisavit vel non*, BLACK'S LAW DICTIONARY (10th ed. 2014).

6 § 41-5-11.

1. Statute of Limitations

Determining the proper statute of limitations for the filing of a will contest in West Virginia can be tricky. Several different time periods may apply, the starting point may not be readily apparent, and in certain circumstances the period may even be extended.

i. Length of the Period

The general statute of limitations for a will contest in West Virginia is currently six months.[7] West Virginia Code section 41-5-11 provides as follows:

> If the judgment or order was entered by the circuit court on appeal from the county commission, such complaint shall be filed within six months from the date thereof, and if the judgment or order was entered by the county commission and there was no appeal therefrom, such complaint shall be filed within six months from the date of such order of the county commission. If no such complaint be filed within the time prescribed, the judgment or order shall be forever binding.[8]

After a long period of stability with a long limitation period, the modern trend has been for the Legislature to reduce the will contest statute of limitations. When the State of West Virginia was created, the period was five years.[9] In 1931, the period was reduced to two years.[10] Sixty-two years later, in 1993, the two-year period was lowered by the Legislature to one year.[11] One year later, in 1994, the Legislature again amended the statute, reducing the period to contest a will to only six months.[12] Six months is one of the shortest limitation periods provided in the West Virginia Code.[13] The downward trend is an indication that the Legislature believes that will contests are being abused.

While the general limitation period is six months, in some circumstances the statute provides for a longer period. West Virginia Code section 41-5-12 provides that a complaint to impeach a will may be filed by a person who was "at the time of the judgment or order" under age 18, a convict, or a mentally

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7 *Id.*

8 *Id.*

9 VA. CODE tit. 33, ch. 122, § 34 (1860).

10 W. VA. CODE § 41-5-11 (1931).

11 Act of Apr. 10, 1993, ch. 169, 1993 W. Va. Acts 1381, 1383.

12 Act of Mar. 2, 1994, ch. 180, 1994 W. Va. Acts 2179.

13 Other limitation periods that are six months include West Virginia Code section 44D-6-604 (limitation of action contesting validity of revocable trust) and West Virginia Code section 42-1-5(c) (determination of paternity after decedent's death). Since trust and paternity actions can also relate to probate issues, it is logical to apply the same limitation period.

incapacitated person within one year after becoming of age or the disability ceases.[14]

More significantly, section 41-5-12 sets forth a specific rule governing nonresidents which should not be overlooked:

> [A]ny person interested who, at that time, resided out of the State, or was proceeded against by publication, may, unless he actually appeared as a party or was personally summoned, file such complaint within one year after the entry of such judgment or order.[15]

The slightly longer period afforded for residents who do not appear or are not summoned mitigates possible due process challenges.[16] In analyzing the applicable statute of limitations in a West Virginia will contest, the practitioner must accordingly understand the residency, age, and penal and competency status of the interested parties who have standing to bring the action.

ii. When the Period Starts

Determining the applicable time period of the West Virginia statute of limitations for a will contest is only part of its complexity. Because of the constitutional and statutory nuances of West Virginia probate law, it may not be readily apparent to the practitioner when the limitation period commences.

In West Virginia, jurisdiction to probate wills lies in the County Commission.[17] It is important to note that probate jurisdiction does not lie with the County Clerk. The *County Clerk* is an elected official who is separate and distinct from the *County Commission*, which is a governmental body of elected officials.[18] The County Commission is the West Virginia "probate court."

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[14] W. VA. CODE ANN. § 41-5-12 (LexisNexis 2016). Section 41-5-12 specifically makes an exception to the general limitation period of six months and refers to "the two preceding sections," which would mean sections 41-5-10 and 41-5-11. *Id.* The Supreme Court of Appeals of West Virginia ("Supreme Court of Appeals"), however, has interpreted this obvious error to hold that the sections actually referred to are sections 41-5-9 and 41-5-11. Frye v. Norton, 135 S.E.2d 603, 608–09 (W. Va. 1964).

[15] § 41-5-12.

[16] *See generally* Chad S. Lovejoy, Note, Cary v. Riss*: Protecting Due Process Concerns in West Virginia Probate*, 98 W. VA. L. REV. 687 (1996). In *Cary v. Riss*, the Supreme Court of Appeals held that the probate code provision requiring the County Clerk to notify beneficiaries named in a will of the probate "by mail or otherwise" is satisfied by actual notice received by the beneficiary. 433 S.E.2d 546, 552–53 (W. Va. 1993).

[17] W. VA. CONST. art. IX, § 11; W. VA. CODE ANN. § 7-1-3 (LexisNexis 2016); *id.* § 41-5-4 ("The county court [now county commission] shall have jurisdiction of the probate of wills[.]").

[18] *See generally* W. VA. CONST. art. IX, § 12 (Clerk of the County Commission); W. VA. CODE ANN. § 7-1-1 (LexisNexis 2016) (County Commissions generally).

There are two ways in which a will may be probated in West Virginia: formal probate in solemn form and informal *ex parte* probate. Formal probate in solemn form is set out in West Virginia Code section 41-5-5.[19] To start the procedure, an interested person files a duly verified petition with the County Commission that has jurisdiction.[20] 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.[21] Ultimately, upon a final hearing, the County Commission enters an order admitting the will to probate or refusing it.[22]

A simpler procedure is known as *ex parte* probate. West Virginia Code section 41-5-10 allows any person to move the County Commission or the Clerk of the County Commission for probate of a will without notice to any other party.[23] The motion for *ex parte* probate is made orally—no formal written motion is required.[24] The informal, *ex parte* procedure is the usual method of probate used in West Virginia.[25] As allowed by the statute, the *ex parte* motion for probate is most often made to the Clerk of the County Commission and not to the County Commission itself.[26] When the County Clerk makes probate *ex parte*, the County Clerk enters an *ex parte* order.[27] Thereafter, the County Clerk must report the Clerk's order to the County Commission for confirmation by order.[28] Accordingly, for an *ex parte* probate, two orders will appear of record with two different dates: the probate order of the County Clerk (which is readily available and is attached to the probated will) and the confirmation order by the County Commission (which is often not readily available and is part of the County Commission's regular governmental proceedings).

As discussed above, the general statute of limitations for a will contest in West Virginia is "six months from the date of such order of the *county commission*."[29] For non-residents of West Virginia, the statute is extended to "one year after the entry of *such* judgment or order."[30] Accordingly, the "order"

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19 § 41-5-5.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.* § 41-5-10.

24 *See generally* Ropar v. Ropar, 88 S.E. 834 (W. Va. 1916).

25 *In re* Winzenrith's Will, 55 S.E.2d 897, 902 (W. Va. 1949).

26 *See id.*

27 § 41-5-10.

28 *Id.* ("The probate of, or refusal to probate, any will, so made by the clerk, shall be reported by him to the court at its next regular session, and, if no objection be made thereto, and none appear to the court, the court shall confirm the same.").

29 *Id.* § 41-5-11 (emphasis added).

30 *Id.* § 41-5-12 (emphasis added).

which starts the running of the statute of limitations in the West Virginia will contest is the order of the County Commission in confirmation, not the *ex parte* order of the County Clerk. The County Commission's confirmation order may be entered days, weeks, or even months after the entry of the County Clerk's *ex parte* probate order.[31]

The Supreme Court of Appeals of West Virginia ("Supreme Court of Appeals"), in the case of *Davey v. Estate of Haggerty*,[32] has specifically held that for an *ex parte* probate, the commencement of the statute of limitations "under West Virginia Code [section] 41-5-11 for impeaching such a will only operates 'after' a judgment or order is filed by the County Commission in conformity with West Virginia Code [section] 41-5-10."[33] This holding is consistent with the constitutional and statutory jurisdiction for probate lying with the County Commission, and not with the County Clerk.

In the case of a contest involving a will admitted to probate *ex parte*, the practitioner should secure and review the County Commission's confirmation order when determining the applicable statute of limitations.

iii. An Extended Period for Common Law Torts

The statute of limitation fixed in the West Virginia Code might not apply in all will contests or probate disputes. Under particular facts and circumstances, the Supreme Court of Appeals has effectively extended the duration of the statute, permitting what would otherwise be untimely contests to proceed.

The Supreme Court of Appeals has held that a will may be challenged under a common law tort allegation. In *Davey*, the challenged will of the decedent was probated five years after his death, and the heirs at law who were cut out did not receive notice from the County Clerk of the *ex parte* probate.[34] Twenty-one months after the *ex parte* probate, the heirs finally received notice of the will when they received an eviction letter from the purported beneficiary of the will that directed them to remove themselves from the decedent's property.[35] Less than two years after being informed of the will, the contestant heirs, who were West Virginia residents, filed a declaratory judgment action to invalidate the will as a forgery.[36] The circuit court dismissed the action as being barred by the six-month will contest statute of limitations.[37]

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31 Typically, the *ex parte* probate orders of the County Clerk will be accumulated over a time period and will then be periodically placed on the agenda of the County Commission for confirmation as a group.

32 637 S.E.2d 350 (W. Va. 2006).

33 *Id.* at 355.

34 *Id.* at 351–52.

35 *Id.* at 352.

36 *Id.*

37 *Id.*

The Supreme Court of Appeals reversed the ruling of the circuit court and held that the discovery rule[38] applies to the statute of limitations in a will contest of an allegedly forged will when the contestants did not have notice of the *ex parte* probate.[39] The court stated, "the Appellants' common law fraud claim [for forgery] was timely filed within the applicable two-year [tort] period of limitations[.]"[40] As to the discovery of a probated will, the court held that the heirs did not have "a duty to investigate the ex parte filings of documents with the County Clerk's office."[41]

iv. An Extended Period for Probate Settlement Objections

In a recent and unusual case, the Supreme Court of Appeals effectively converted a probate settlement objection into a will contest and allowed it to serve as an extension of the will contest statute of limitations.

In *Johnson v. Kirby*,[42] the decedent prepared a will that left everything to his wife.[43] Six months later, he divorced his wife, and the next year he died, leaving his mother as his sole heir at law.[44] The former wife probated the will *ex parte*, accurately reporting on the appraisement and the list of heirs that the decedent was divorced and that she was his former spouse.[45] Neither the County Clerk nor the County Commission recognized at this time that West Virginia Code section 41-1-6(a) revokes any disposition or appointment made in a will to the former spouse upon divorce.[46] The decedent's mother had gone to the County Clerk's office shortly after the will had been probated, had orally complained that the ex-wife had no right in her son's estate, and had been told "it was legal."[47] The mother, however, did not file a will contest in circuit court within six months after the order of probate of her son's will.[48]

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38 Syl. Pt. 3, *id.* ("[U]nder the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury." (quoting Syl. Pt. 4, Gaither v. City Hosp., Inc., 487 S.E.2d 901, 903 (W. Va. 1997))).

39 *Id.* at 353–56.

40 *Id.* at 355; *see* W. VA. CODE ANN. § 55-2-12 (LexisNexis 2016) (general tort statute of limitations).

41 *Davey*, 637 S.E.2d at 354.

42 739 S.E.2d 283 (W. Va. 2013).

43 *Id.* at 284.

44 *Id.* at 284–86.

45 *Id.* at 284.

46 W. VA. CODE ANN. § 41-1-6(a) (LexisNexis 2016); *Johnson*, 739 S.E.2d at 284–87.

47 *Id.* at 286 n.3.

48 *Id.* at 285–86.

Six months after the probate of the will, the ex-wife, as personal representative under the will and as the sole will beneficiary, sold the decedent's real estate to Mr. and Mrs. Johnson and delivered to them a deed.[49] Eight months after probate, the decedent's mother filed with the County Commission an "objection" to the final settlement of the estate filed by the ex-wife as personal representative.[50] Finally recognizing that the will had been statutorily revoked by the divorce, the County Commission ordered that the decedent's estate would pass to the mother as the sole heir at law and not to the ex-wife.[51]

Mr. and Mrs. Johnson, who had purchased the decedent's real estate from the ex-wife by virtue of her rights under the probated will, filed an action in circuit court against the mother to quiet title to the property.[52] The purchasers argued that they were bona fide purchasers for value and that the mother could not attack the probated will after the running of the six-month will contest statute of limitations set forth in West Virginia Code section 41-5-11.[53] The circuit court held in favor of the mother, and the purchasers appealed to the Supreme Court of Appeals.[54]

On appeal, the Supreme Court of Appeals upheld the ruling of the circuit court.[55] Essentially, the court found that revocation of the decedent's entire will occurred automatically by operation of law upon the divorce and that the will was void *ab initio*.[56] The court had to distinguish the holding of the 1949 case of *Cowan v. Cowan*,[57] in which a will had been admitted to probate even though it lacked attesting witnesses.[58] In *Cowan*, the heir at law was barred from claiming the decedent's land after the will contest statute of limitations had passed even though the will was clearly not valid.[59] The *Cowan* court held that the "proceeding [is] an attempted direct attack upon the validity of the will . . . [and] Code, 41-5-11, bars its entertainment after the lapse of two years."[60] In a weak analysis, the *Johnson* court held that *Cowan* was "readily distinguishable" because the Kirby will was automatically revoked and "was of no force and effect

49 *Id.* at 286.

50 *Id.* at 285–86.

51 *Id.* at 286–87.

52 *Id.*

53 *Id.* at 286–88.

54 *Id.* at 287.

55 *Id.* at 290.

56 *Id.* at 290 n.2.

57 54 S.E.2d 34 (W. Va. 1949).

58 *Id.* at 35.

59 *Id.* at 35–38.

60 *Id.* at 37.

when presented for probate."[61] Justice Allen Loughry, the author of the opinion, reasoned as follows:

> West Virginia Code [section] 41-5-11 "contemplates a test of the validity of the will" . . . the period of limitations set forth in [that section] simply does not apply to bar the [mother's] Objection to Settlement and the county commission had jurisdiction to order that the decedent's estate "should pass to his heirs as if he had no Last Will and Testament[.]"[62]

The message of the *Johnson* case is that a probate settlement objection before the County Commission, if properly crafted, may be able to be used as a substitute for a will contest even after the passage of the statute of limitations.[63]

2. Federal Venue

Among the longstanding exceptions to the jurisdiction of the federal courts is the so-called "probate exception."[64] "It is true that a federal court has no jurisdiction to probate a will or administer an estate."[65] It may still be a surprise to most practitioners that the West Virginia circuit court is not the only forum for a will contest—a will contest in West Virginia may be brought in a United States district court when all of the required elements for diversity jurisdiction are met, despite the so-called "probate exception."[66]

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[61] Johnson v. Kirby, 739 S.E.2d 283, 290 (W. Va. 2013). The will in *Cowan* may likewise be said to have no force and effect when presented for probate because without witnesses, the document was never really a will.

[62] *Id.* (quoting Mauzy v. Nelson, 131 S.E.2d 389, 392 (W. Va. 1963)).

[63] A careful reading of the opinion seems to show that the Supreme Court of Appeals was embarrassed by all of the legal errors committed by the County Commission and was motivated in this case to find some way to correct them. The court repeatedly highlights the errors, even pointing out legal citation errors made by the County Commission in its order. *See id.* at 286 n.7. The court quotes the respondent as saying that the County Clerk was a "real smart-aleck with me." *Id.* at 285 n.3. Finally, the court notes that "the argument posited by the petitioners would require this Court to perpetuate an error that first occurred when the county commission mistakenly admitted the decedent's will to probate." *Id.* at 290 n.18. Given the procedural complexity of the West Virginia probate system—with jurisdiction split between the County Commission and circuit court, and with the County Commission not being a legally trained adjudicatory body—errors and confusion in the probate process are understandable and common.

[64] *See generally* John F. Winkler, *The Probate Jurisdiction of the Federal Courts*, 14 PROB. L.J. 77 (1997).

[65] Markham v. Allen, 326 U.S. 490, 494 (1946) (citing Waterman v. Canal-La. Bank & Tr. Co., 215 U.S. 33, 43 (1909)); *see also* Sutton v. English, 246 U.S. 199 (1918).

[66] *See* Osborne v. Campbell, 37 F.R.D. 339 (S.D.W. Va. 1965) (accepting diversity jurisdiction without any discussion); *see generally* 3 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 26.21 (2004); Ronald I. Mirvis, Annotation, *Modern Status of Jurisdiction of*

In 2006, the United States Supreme Court clarified the legal confusion concerning the probate exception to federal jurisdiction (and the exceptions to the exception). In *Marshall v. Marshall*,[67] the Court analyzed the history of the probate exception (and the similar domestic relations exception), noting that confusion has arisen because prior judicial decisions were "not a model of clear statement."[68] The Supreme Court has clearly stated the current law:

> Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from disposing of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.[69]

A will contest is a matter outside those confines. Federal jurisdiction lies in a West Virginia will contest because the contest is brought in the state court of general jurisdiction as a suit *inter partes*. The circuit court proceeding does not involve the probate of the will or the administration of the decedent's estate, which are proceedings before the County Commission. The 1995 case of *Silling v. Erwin*[70] represents another citation to the availability of a federal forum for West Virginia will contests.

It should be noted that Congress has been restricting access to the federal courts in diversity cases by raising the jurisdictional amount in controversy. In 1997, Congress raised the amount in controversy requirement, which is necessary for diversity jurisdiction, to $75,000.[71] This amount applies in a West Virginia will contest brought in federal court.

3. Standing

To have standing to contest the will, the plaintiff must be a person whose interest is affected by the will.[72] From a basic standpoint, standing can be a question of identity: who is the plaintiff and how is the plaintiff connected to the decedent? In some circumstances, determining identity, and hence the standing of a person to contest a will, can be troublesome and disputed. Recent

Federal Courts, Under 28 U.S.C.A. § 1332(a), of Diversity Actions Affecting Probate or Other Matters Concerning Administration of Decedent's Estates, 61 A.L.R. Fed. 536 (1983).

67 547 U.S. 293 (2006).

68 *Id.* at 296.

69 *Id.*

70 885 F. Supp. 881 (S.D.W. Va. 1995).

71 28 U.S.C. § 1332, as amended by the Federal Courts Improvement Act of 1996. The increase in the jurisdictional amount is specifically intended to "assist the Federal judiciary in reducing its increasing caseload." S. REP. NO. 104-366, at 29 (1996).

72 Childers v. Milam, 70 S.E. 118, 118 (W. Va. 1911).

developments in West Virginia law have helped to clarify the identity status of two classes of potential contestants to wills.

i. Children Born out of Wedlock

Children born out of wedlock[73] have historically faced both overt and subtle discrimination and often have had a difficult time in simply proving their status as a child and hence an heir of their deceased father.[74] In 1999, the West Virginia Legislature greatly clarified and enhanced the rights of children born out of wedlock. The West Virginia legitimization statute, section 42-1-5, provides that these children are entitled to inherit from their parents just like legitimate children who are born in wedlock and sets forth clear procedures for determining status as a child, both before and after the father's death. The general purpose of the legitimization statute is to provide equal treatment of all naturally born children, whether legitimate or illegitimate.

West Virginia Code section 42-1-5(a) provides that "[c]hildren born out of wedlock shall be capable of inheriting and transmitting inheritance on the part of their mother and father."[75] Subsection (b) of the statute provides three ways in which paternity may be established prior to the death of the father: (1) acknowledgment by the man that he is the child's father; (2) adjudication on the merits pursuant to the provisions of the West Virginia Domestic Relations Act;[76] or (3) "[b]y order of a court of competent jurisdiction issued in another state."[77]

If paternity is not established before death, it may be established after the death of the father by a proceeding in a West Virginia family court.[78] Venue is in the family court of the county where the administration of the decedent's estate has been filed or could be filed. There is a short statute of limitations for the filing of the legitimization proceeding. It must be filed within six months of the date of the final order of the County Commission admitting the decedent's will to probate or commencing intestate administration of the estate, or within

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73 *Children born out of wedlock* is the current term used in law. Formerly, these children were called *illegitimate children* or *extramarital children* or *nonmarital children*. The older term was *bastard*, which is now considered offensive.

74 In 1981, in the case of *Adkins v. McEldowney*, 280 S.E.2d 231 (W. Va. 1981), the Supreme Court of Appeals held that the prior bastardy statute unconstitutionally discriminated against illegitimate children by denying them the right to inherit from their fathers. In applying the doctrine of neutral expression, the court judicially reformed the statute and ruled that, "Code [§] 42-1-5 must be applied to permit illegitimate children to inherit from both father and mother." *Id.* at 233. The court also specifically recommended that the West Virginia Legislature take action in correcting the statute, which was finally done 18 years later. *Id.*

75 W. VA. CODE ANN. § 42-1-5(a) (LexisNexis 2016).

76 *Id.* §§ 48-4-101 to -104.

77 *Id.* § 42-1-5(b).

78 *Id.* § 42-1-5(c).

six months from the date of decedent's death if probate or intestate administration has not been commenced.[79]

The burden of proof to prove paternity under the statute is clear and convincing evidence,[80] which is the highest standard of civil proof. To avoid permitting a child born out of wedlock to be a "double heir" of two fathers, the statute does not apply where the putative child has been lawfully adopted by another man and stands to inherit property or assets through the child's adoptive father.[81] Furthermore, a father is still free to disinherit the child in an express provision contained in his will.[82]

ii. Same-Sex Spouses

With incredible rapidity in recent years, the concept of lawful civil marriage only being between one man and one woman has been rejected as unconstitutional and discriminatory in state after state. On June 26, 2015, the United States Supreme Court put the issue to rest and held, in the case of *Obergefell v. Hodges*,[83] that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed in another state. Justice Anthony Kennedy, writing the Court's majority opinion, stated the following:

> [T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now

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79 *Id.* The statute of limitations for a legitimization proceeding mirrors that for a will contest under West Virginia Code section 41-5-11. There is also a savings provision in the statute extending the time period for another six months after the removal of the legal disability for a putative child who at the time of the decedent's death is under the age of 18 years, a convict, or a mentally incapacitated person. *Id.* § 42-1-5(d).

80 *Id.* § 42-1-5(c). Also called clear, cogent, and convincing proof, it is defined as follows:

> [T]hat measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases.

Wheeling Dollar Sav. & Tr. Co. v. Singer, 250 S.E.2d 369, 374 (W. Va. 1978) (citing Cross v. Ledford, 120 N.E.2d 118, 123 (Ohio 1954)).

81 § 42-1-5(e).

82 *Id.* § 42-1-5(f). West Virginia law already provides that a testator may expressly exclude or disinherit any heir, whether an individual or a class, by doing a "negative will." *See id.* § 42-1-2(b).

83 135 S. Ct. 2584 (2015).

> holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.[84]

Same-sex marriages are now legal in all states including West Virginia.[85]

For will contests, the spouse of the decedent, including now a same-sex spouse, has standing because of the spousal status. Under West Virginia law, a surviving spouse can be an heir at law entitled to a share of the intestate estate.[86] The share of the surviving spouse depends on the status of descendants of the decedent and the spouse.[87] The surviving spouse is entitled to the entire intestate estate of the decedent if "no descendant of the decedent survives the decedent; or [if] all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent."[88] The surviving spouse gets three-fifths (3/5) of the intestate estate "if all of the decedent's surviving decedents are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent."[89] Finally, the surviving spouse receives one-half (1/2) of the intestate estate "if one or more of the decedent's surviving descendants are not descendants of the surviving spouse."[90]

Because the share of the intestate spousal inheritance in West Virginia is dependent on the existence and relationship of descendants (children) of the decedent and the surviving spouse, the connection of these children to the same-sex spouse will have significance but may be clouded. Legal adoption by the same-sex spouse of the natural children born to the other spouse will be important to make these children descendants of both spouses in the marital union for the purpose of calculating the spousal intestate share under the West Virginia statute. Alternately, the naming of the parent (either mother or father) on a child's birth certificate will have similar impact. A stepparent or foster parent relationship is legally insufficient in West Virginia and does not rise to the level of parent-child

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84 *Id.* at 2604–05.

85 Immediately prior to the Supreme Court's ruling on a national level, 37 states had recognized same-sex marriages by court decision, legislation, or ballot measure. By order entered on November 7, 2014, the United States District Court for the Southern District of West Virginia, in the case of *McGee v. Cole*, 66 F. Supp. 3d 747 (S.D.W. Va. 2014), struck down West Virginia's ban and allowed same-sex marriages.

86 § 42-1-1(16). ("'Heirs' means persons, including the surviving spouse and the state, who are entitled under the statutes of intestate succession to the property of a decedent.").

87 Descendant means descendants of all generations, with the relationship of parent and child determined under the definitions set forth in the Code. *Id.* § 42-1-1(5).

88 *Id.* § 42-1-3(a).

89 *Id.* § 42-1-3(b).

90 *Id.* § 42-1-3(c).

status for inheritance.[91] Same-sex spouses should therefore be concerned to arrange the legal status of their children.

4. Parties Defendant

West Virginia Code section 41-5-11 fails to specify who should be the defendants in the will contest. It is standard practice in West Virginia that the executor of the probated will should be joined as a defendant since the fiduciary has the duty under law to uphold the will.[92] In discussing the proper parties defendant, the Supreme Court of Appeals in the seminal case of *Powell v. Sayres*,[93] stated as follows:

> The heirs and distributees of [the] decedent should be made parties defendant to a bill in chancery to contest the validity of a will, as well as the parties who claim under an alleged will of a decedent, which has been probated in an *ex parte* proceeding. If such heirs and distributees are not made parties to a suit to contest the validity of a will, and no objection is made in the trial court on that account until the rendition of a verdict, a verdict and decree based thereon otherwise free from error should not be set aside by an appellate court because there was a failure to make proper parties defendants in the trial court.[94]

Going beyond the holding in *Powell*, the United States District Court for the Southern District of West Virginia, in the case of *Osborne v. Campbell*[95] held that, under Rule 19 of the Federal Rules of Civil Procedure, all named beneficiaries under a contested will are indispensable parties in a will contest. As indispensable parties, if the beneficiaries are not joined, the case may be dismissed.[96] Accordingly, the failure to join beneficiaries and heirs should be considered a serious procedural defect which can upset the finality of a judgment order or settlement agreement in a will contest. A will beneficiary who is not

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91 *See id.* § 42-1-1(26).

92 *See generally* 3 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 26.67 (2004); *see also* W. VA. R. CIV. P. 17(a) (a civil action shall be prosecuted in the name of the real party in interest). Although the executor should be joined as a defendant, the fiduciary may function in the litigation as a nominal or passive party. The case of *One Valley Bank, National Ass'n v. Hunt*, 516 S.E.2d 516 (W. Va. 1999), involved a dispute of whether a revocable living trust could be revoked by a will. The bank as trustee filed for a declaratory judgment, and once all interested parties were represented by counsel, the trustee took no position and filed no additional pleadings.

93 60 S.E.2d 740 (W. Va. 1950).

94 *Id.* at 744–45 (internal citations omitted).

95 37 F.R.D. 339 (S.D.W. Va. 1965).

96 Rule 19 of the Federal Rules of Civil Procedure is essentially the same as Rule 19 of the West Virginia Rules of Civil Procedure.

joined in the will contest is not bound by the decree.[97] In a Virginia case, the unjoined heirs in a will contest were permitted to re-open the case and overturn a settlement agreement amongst the executor and some of the heirs which had allowed the probated will to be upheld.[98]

Therefore, to avoid future problems, the probate litigator should join as defendants in the will contest (1) the executor, (2) all named beneficiaries under the will, and (3) all heirs at law of the decedent.

B. Grounds of Attack

There are still relatively few ways to successfully attack a will. Recent cases show the challenges and opportunities that can abound in probate litigation.

1. Lack of Testamentary Formalities

Despite the apparent simplicity of the few statutory requirements for a valid will,[99] technical precision required in the preparation and execution of the document can lead to errors. These errors can in turn lead to successful challenges on grounds for failure to comply with testamentary formalities.

i. Signing by Witnesses: Ware v. Howell *(2005)*

The 2005 case of *Ware v. Howell*[100] highlights the problems which can occur when the attorney does not supervise and handle the preparation and execution of a will. There, the decedent's daughter drove her to the attorney's office, where she became the sole beneficiary of her 100-year-old mother's will. The decedent never met the attorney because she never got out of the car. The daughter conveyed all of the information about the new will to the attorney's legal assistant. After the will was drafted, the legal assistant took the will to the decedent who was still sitting in the car. After the contents were explained to her, the decedent signed the document while in the car and two disinterested witnesses saw her sign it. One witness later testified that she "believed" that she placed her signature on the document in the decedent's presence. The other witness, however, was clear and testified that she signed the document out of the presence of the decedent after she returned to the law office. Her testimony contradicted the recitation in the attestation clause of the will that stated that the witnesses subscribed their names "in the presence of the Testatrix and in the presence of each other." At trial, the jury concluded that the will had not been

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97 McArthur v. Scott, 113 U.S. 340, 390 (1885) (deciding the case under Ohio law).

98 Thomas v. Best, 161 S.E.2d 803 (Va. 1968).

99 *See* W. VA. CODE ANN. § 42-1-3 (LexisNexis 2016).

100 614 S.E.2d 464 (W. Va. 2005).

executed in conformity with law. An appeal followed after the circuit court granted a new trial to the proponent.

The Supreme Court of Appeals reversed the order for a new trial and reinstated the jury's verdict rejecting the will. While the case deals primarily with procedural rules and the laws of evidence,[101] the technicalities of testamentary formalities won the case for the contestant. One testamentary requirement, which can be easily missed by a layperson but which should never be missed by the supervising attorney, is that the "witnesses shall subscribe the will in the presence of the testator, and of each other."[102] Here, since one witness signed the will in the office while the testator was still in the car, the will failed.[103]

ii. Signing by the Testator: Brown v. Fluharty *(2013)*

In the 2013 case of *Brown v. Fluharty*,[104] the problem was not with the witnesses' signatures but with the testator's signature. There, the testator, while physically incapacitated and living in a nursing care facility, dictated a will to his nephew, who typed the document.[105] Two health care providers signed the document as witnesses after the testator stated to them that the "new last will and testament contained his final desires."[106] Unfortunately, the testator never signed the document.[107] After an earlier will of the testator (which was fully signed and witnessed) was probated, the proponents of the "new will" commenced an action in circuit court to revoke the earlier probated document.[108] The circuit court concluded that since the decedent did not sign the document anywhere, it was not a valid will.[109] On appeal, the Supreme Court of Appeals upheld the rejection of the unsigned will.[110]

The *Brown* court noted that the law only requires "substantial compliance" with respect to the statutory requirement of a signature by the testator.[111] "A testator may sign his name by writing it out in full, or by

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101 The jury resolved the factual issue concerning the signing in the presence of the testator, and the circuit judge granted a new trial simply because he disagreed and doubted the witness's testimony. *Id.* at 468. The Supreme Court of Appeals found this to be error because it is improper for the court to substitute its opinion for that of the jury. *Id.*

102 § 41-1-3.

103 *Ware*, 614 S.E.2d at 469. Whether witnesses sign in the presence of the testator and of each other is a question of fact for the jury. Syl. Pt. 2, Wade v. Wade, 195 S.E. 339, 339 (W. Va. 1938).

104 748 S.E.2d 809 (W. Va. 2013).

105 *Id.* at 810–11.

106 *Id.* at 811.

107 *Id.* at 810–11.

108 *Id.* at 811.

109 *Id.*

110 *Id.* at 812–13.

111 *Id.* at 812.

abbreviating it, or by writing his initials only, and the first name of the testator may be by itself . . . sufficient[.]"[112] Under the statute, the signature can even be made by "some other person in his presence and by his direction."[113] Here, the decedent did none of that.[114] "This Court cannot find substantial compliance . . . where there was no compliance whatsoever."[115]

2. Revocation and Revival of Wills

A contestant to a will should always explore whether the challenged will has somehow been revoked. A proponent of a will should correspondingly determine whether an apparently revoked will has been revived. Like the testamentary formalities, revocation and revival issues can be technically complex and will often present opportunities (or risks) in will contest litigation.

i. Dependent Relative Revocation

In 1994, the Supreme Court of Appeals finally resolved an unsettled doctrine in West Virginia probate law. In *Miller v. Todd*,[116] the court pronounced recognition of the doctrine of dependent relative revocation. The doctrine holds that when a testator revokes a will with present intent to make a new will and the new will is not made, the law presumes that the testator preferred the old will to intestacy.[117] In the 1952 case of *Nelson v. Ratliffe*,[118] the Supreme Court of

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112 *Id.* (internal quotation and citation omitted).

113 W. VA. CODE ANN. § 41-1-3 (LexisNexis 2010).

114 *Brown*, 748 S.E.2d at 810–11.

115 *See id.* at 810–13. Some states have statutorily adopted the concept of substantial compliance with testamentary formalities, permitting some defective documents to be probated as wills. For example, Code of Virginia Annotated section 64.2-404(A) provides the following:

> Although a document, or a writing added upon a document, was not executed in compliance with § 64.2-403, the document or writing shall be treated as if it had been executed in compliance with § 64.2-403 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.

VA. CODE ANN. § 64.2-404A (2016); *see also In re* Prob. of Will & Codicil of Macool, 3 A.3d 1258, 1265–67 (N.J. Super. Ct. App. Div. 2010) (signature is not necessary if will complies with other requirements and proponent can prove by clear and convincing evidence).

116 447 S.E.2d 9 (W. Va. 1994) (per curiam).

117 Also called *conditional revocation*, the doctrine "applies to invalidate the revocation of a will where it is shown that the revocation was conditioned on the occurrence of certain facts which never came to pass or upon the existence or nonexistence of circumstances which were either absent or present contrary to the condition." 2 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 26.21 (2003).

118 Syl. Pt. 3, Nelson v. Ratliffe, 69 S.E.2d 217, 218 (W. Va. 1952).

Appeals apparently accepted the doctrine. Two decades later, in 1972, in the case of *In re Estate of Siler*,[119] the majority of the court found that dependent relative revocation was not applicable to the factual situation of the case at bar, but the author of the decision, Justice John E. Carrigan, stated his personal opinion that the doctrine was "fallacious and untenable."[120] In *Miller*, Justice Richard F. Neely cleared the air and stated the following:

> We disagree with the appellant's contention that the doctrine of dependent relevant revocation is not recognized in this jurisdiction. While in the case of *In re Estate of Siler*, Justice Carrigan expressed his personal disdain for that doctrine, the majority of this Court did not find it to be invalid.[121]

Dependent relative revocation needs to be understood in the context of the law of revocation and revival of wills. West Virginia Code section 41-1-7 provides the following:

> [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.[122]

It has been held that this Code section provides the only ways in which a will can be revoked.[123] The companion statute, West Virginia Code section 41-1-8, is an "anti-revival" provision which 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 re-revive the same is shown."[124] Dependent relative revocation appears to alter this statute and provide a nonstatutory method to "revive" a revoked will: a will is revived, even though it has been revoked, when the court determines that the testator conditioned the revocation on the execution of another new will.[125] The doctrine of dependent relative revocation, however,

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119 187 S.E.2d 606, 615 (W. Va. 1972).

120 *Id.*

121 Miller v. Todd, 447 S.E.2d at 13 n.18 (per curiam) (citation omitted).

122 W. VA. CODE ANN. § 41-1-7 (LexisNexis 2016).

123 Syl. Pt. 1, Maynard v. Maynard, 209 S.E.2d 58, 58 (W. Va. 1974); Syl. Pt. 2, Swann v. Swann, 48 S.E.2d 425, 425 (W. Va. 1948).

124 § 41-1-8.

125 *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.3 (AM. LAW INST. 1999).

does not revive a revoked will; rather, it finds that the revocation was ineffective.[126] In this regard, the doctrine is an attempt to discern and enforce the intent of the testator.[127] Revocation requires a statutory act (either in writing or physical) together with the testator's intent to revoke, called the *animus revocandi*.[128] Under dependent relative revocation, the *animus revocandi* is absent because the testator has placed a dependency or condition on the revocatory act which is not fulfilled.

Dependent relative revocation is not a rule of law, but a presumption: it is presumed that the testator preferred the old, revoked will to intestacy. This presumption can conflict with other presumptions. For example, a rebuttable presumption exists that the testator revoked his will when the mutilated instrument has been found in the testator's possession at the time of his death.[129]

The *Miller* decision invites litigation since evidence can be gathered and presented in court to prove the intent of the testator concerning any conditions (dependencies) which are relative to the revocation. Practitioners can now assert dependent relative revocation to attempt to undo a revocation and force a will that might otherwise have been revoked.[130]

ii. Revocation by Change in Marital Status

West Virginia's adoption of the Uniform Probate Code provisions concerning the "augmented estate"[131] altered the law regarding when a change in marital status may act as a revocation of a will. The effective date of the change in this law can be critical in determining whether a will has been revoked. Prior

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[126] *Id.* Dependent relative revocation is "[a] common-law doctrine that undoes an otherwise effective revocation of a will when there is evidence that the testator's revocation was conditional rather than absolute." *Dependent Relative Revocation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[127] *See* 79 AM. JUR. 2D *Wills* § 515 (2013) (the doctrine promotes the general policy of giving effect to a testator's intent). "The paramount rule in construing or giving effect to a will is that the intention of the testator must be given effect[.]" Goetz v. Old Nat'l Bank of Martinsburg, 84 S.E.2d 759, 766 (W. Va. 1954).

[128] Thompson v. Royall, 175 S.E. 748, 749 (Va. 1934) (using "animo revocandi" in lieu of "animus revocandi"); Malone's Adm'r v. Hobbs, 40 Va. (1 Rob.) 346, 380 (1842); Dower v. Seeds, 28 W. Va. 113, 137 (1886).

[129] Syl. Pt. 5, Canterberry v. Canterberry, 197 S.E. 809, 809 (W. Va. 1938).

[130] The message for the probate litigator is to obtain all wills of the decedent no matter when executed in order to determine their relation one to the other, including potential revocation or revival.

[131] John W. Fisher, II, *Statutory Reform Revisited: Toward a Comprehensive Understanding of the New Law of Intestate Succession and Elective Share*, 96 W. VA. L. REV. 85, 110–11 (1993); Patricia J. Roberts, *The 1990 Uniform Probate Code's Elective-Share Provisions—West Virginia's Enactment Paves the Way*, 95 W. VA. L. REV. 55, 57 (1992); Bruce L. Stout & Audy M. Perry, Jr., *West Virginia Takes a Step Backward in Elective Share Law*, 99 W. VA. L. REV. 679, 679–82 (1997).

to June 5, 1992,[132] West Virginia Code section 41-1-6 provided that a will was completely revoked by the testator's subsequent marriage, annulment, or divorce unless the will "makes provision therein for such contingency."[133] Now, under the current law, marriage no longer revokes a will and divorce or annulment only partially revokes the will.[134]

In the case of *Foy v. County Commission*,[135] the decedent executed a will in 1986.[136] In 1990, the decedent married his wife and then died on June 22, 1992, when the new provisions of the Code were in effect.[137] The question before the court was whether the law at the date of marriage applied, which would revoke the will, or whether the law at the date of death applied, which would leave the will intact.[138] The Supreme Court of Appeals held that the new law applied prospectively only since its effective date of June 5, 1992, and ruled that the law in effect at the date of marriage controlled and acted immediately to revoke the will.[139] Accordingly, the court held that the will was revoked and invalid at the decedent's date of death.[140]

The *Foy* case opens a window period that may serve to invalidate wills that are seemingly valid on their face. If the decedent executed a will before marriage, married before June 5, 1992, and then died, the old law would still apply and would revoke the entire will. In such a case, the practitioner should review the marriage license to see if this narrow fact situation could apply.

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132 June 5, 1992, is the effective date of H.B. 4112, enacted on March 7, 1992, which amended West Virginia Code section 41-1-6. H.B. 4112, 70th Leg., 2d Reg. Sess., 1992 W. Va. Laws 75.

133 W. VA. CODE ANN. § 41-1-6 (LexisNexis 1991).

134 *See id.* Under current West Virginia Code section 41-1-6(a), the will is revoked 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. *Id.*

135 442 S.E.2d 726 (W. Va. 1994).

136 *Id.* at 727.

137 *Id.*

138 *Id.* at 728.

139 Syl. Pts. 2, 3, *id.*

140 *Id.* at 727.

3. Lack of Testamentary Capacity

The principal claim in attacking a will is usually lack of testamentary capacity.[141] The recent case of *James v. Knotts*[142] does not create any new law but serves as an excellent example of a typical will contest.[143]

In *James*, the Supreme Court of Appeals recites standards of testamentary capacity and undue influence that mainly come from the syllabi from the "long ago" case from 1903 of *Stewart v. Lyons*.[144] The syllabus points seem harsh and unfavorable to will contestants, and palliative and favorable to will proponents.[145] In *James*, the typical cast of characters in probate litigation makes their appearance: the drafting attorney, the notary, the witnesses to the will, and the decedent's neighbors, friends, business colleagues, and disputing family members.[146] After three days of trial, the jury returned a verdict in favor of the contestants, finding that the testator lacked testamentary capacity and was unduly influenced.[147] The Supreme Court of Appeals, however, reversed the jury verdict as against the weight of the evidence and directed the circuit court to direct a verdict in favor of the proponents.[148]

In *James*, the critical issue for the court was one of timing: testamentary capacity is to be determined at the time the will was executed.[149] "With respect to testamentary capacity, all of the witnesses who observed and talked with [the testator] when the will was executed, particularly the attesting witnesses and the attorney who drafted the will, testified that she was of sound mind and disposing

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141 To have capacity, a testator must be able to do four things at the moment he signs his will: (1) know and recollect the natural objects of his bounty, that is, those persons who were members of his family who normally would have some expectation of sharing in his property after his death; (2) know and intelligently understand the nature of the business in which he was engaged; (3) know in a general way what property belonged to him and what it was worth in a general way; and (4) hold such knowledge in his mind a sufficient length of time to be able to form some rational judgment in relation to them. *See* Syl. Pt. 19, Kerr v. Lunsford, 8 S.E. 493, 494 (W. Va. 1888).

142 705 S.E.2d 572 (W. Va. 2010) (per curiam).

143 *Id.*

144 47 S.E. 442 (W. Va. 1903).

145 *See* Syl. Pt. 6, *James*, 705 S.E.2d at 575 ("It is not necessary that a testator possess high quality or strength of mind, to make a valid will . . . . The mind may be debilitated, the memory enfeebled, the understanding weak, the character may be peculiar and eccentric . . . ." (quoting Syl. Pt. 3, *Stewart*, 47 S.E. at 442)); Syl. Pt. 11, *id.* ("The influence must amount to force or coercion destroying free agency. . . . [T]he motive [must be] tantamount to force and fear." (quoting Syl. Pt. 6, *Stewart*, 47 S.E. at 442)); Syl. Pt. 12, *id.* ("The will of a person of competent testamentary mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence." (quoting Syl. Pt. 7, *Stewart*, 47 S.E. at 442)).

146 *Id.* at 578–79.

147 *Id.* at 576.

148 *Id.* at 582.

149 *Id.* at 581; *see also* Syl. Pt. 3, Frye v. Norton, 135 S.E.2d 603, 604 (W. Va. 1964).

memory on July 29, 2005."[150] In contrast, the other witnesses for the contestants "were unable to say that they had actually observed [her] around the time that the will was executed."[151]

In handling a will contest, the practitioner may wish to refer to the syllabus points of *James* in determining how to develop the prosecution or defense of the case and in drafting jury instructions.[152]

4. Undue Influence

A claim of undue influence is generally always a companion to the claim of lack of testamentary capacity in a will contest. If the testator's physical or mental health is in question, he or she may also be in a more vulnerable state and more susceptible to undue influence.[153] Procurement of the will by the defendant is an important factor in a claim of undue influence.[154] Procurement basically means drafting the will or being in some way "connected with its preparation or execution."[155] Factors which show procurement include the following:

> (a) presence of the beneficiary at the execution of the will; (b) presence of the beneficiary on those occasions when the testator expressed a desire to make a will; (c) recommendation by the beneficiary of an attorney to draw the will; (d) knowledge of the contents of the will by the beneficiary prior to execution; (e) giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will; (f) securing of witnesses to the will by the beneficiary; and (g) safekeeping of the will by the beneficiary subsequent to execution.[156]

In rejecting a claim of undue influence, the Supreme Court of Appeals in *James v. Knotts* noted that the only evidence presented by the claimants was

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150 *James*, 705 S.E.2d at 581. The timing factor was similarly critical in the case of *Silling v. Erwin*, 885 F. Supp. 881, 886 (S.D.W. Va. 1995) ("Each individual involved with the preparation of the codicil and its execution testified Silling, Sr. was mentally competent on April 13, 1991.").

151 *James*, 705 S.E.2d at 579.

152 For "a conceptual framework and practice tips for addressing problems of client capacity," see COMM'N ON LAW & AGING, AM. BAR ASS'N & AM. PSYCHOLOGICAL ASS'N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS (2005).

153 "[Undue] influence is more easily shown to exist in cases where advanced age, physical or mental weakness is involved." Ebert v. Ebert, 200 S.E. 831, 837 (W. Va. 1938); *see also* Syl. Pt. 4, Cale v. Napier, 412 S.E.2d 242, 243 (W. Va. 1991).

154 *See* Vaupel v. Barr, 460 S.E.2d 431, 434 (W. Va. 1995) (per curiam).

155 *Id.* at 434.

156 *In re* Estate of Carpenter v. Carpenter, 253 So. 2d 697, 702 (Fla. 1971), *superseded by statute on other grounds*, Act effective Apr. 23, 2002, 2002 Fla. Laws ch. 2002-82 (Apr. 23, 2002), *as recognized in* Diaz v. Ashworth, 963 So. 2d 731, 734–35 (Fla. Dist. Ct. App. 2007).

the fact that the husband of a beneficiary under the challenged will drove the testator to the attorney's office when she executed the will.[157]

Presumptions can have a great impact on the outcome of a will contest case. The important legal ethics case of *Lawyer Disciplinary Board v. Ball*[158] created a new presumption concerning undue influence. In *Ball*, the lawyer was disbarred when he drafted three wills in which he gave himself excessive fees as executor, drafted two wills that improperly conveyed property to himself and his wife from unrelated clients, and assisted in changing a client's annuity to benefit his sons.[159] In syllabus point one of *Ball*, the Supreme Court of Appeals held as follows:

> A rebuttable presumption of undue influence by an attorney arises when (1) there is an attorney-client relationship with the testator at the time a will was prepared, (2) the attorney actively participated in preparation of the will, and (3) the attorney, or a person who is a parent, child, sibling or spouse to the attorney but not to the testator, receives a bequest under the will.[160]

The *Ball* case presents an issue of status or relationship. The presumption of undue influence arises when the beneficiary under the will is in the attorney-client relationship.[161] The presumption of undue influence (also called constructive fraud) exists in West Virginia in a will contest when the beneficiary is in a fiduciary or confidential relationship.[162] Fiduciary relationships and confidential relationships are different and distinct: a fiduciary relationship is generally based on a legal status such as attorney at law[163] or attorney in fact under a power of attorney;[164] a confidential relationship, however, need not involve a legal status between the testator and the overreaching beneficiary.

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157 James v. Knotts, 705 S.E.2d 572, 581 (W. Va. 2010).

158 633 S.E.2d 241 (W. Va. 2006).

159 *Id.* at 244–47.

160 Syl. Pt. 1, *id.* at 241.

161 Our sister state of Virginia has clarified and expanded its law on the presumption of undue influence. In *Friendly Ice Cream Corp. v. Beckner*, 597 S.E.2d 34, 39 (Va. 2004), the Virginia Supreme Court in a contract case held that a party is entitled to the presumption of undue influence if they establish either of the following: (1) a confidential relationship; or (2) weakness of mind and grossly inadequate consideration or suspicious circumstances. To the extent it is inconsistent, *Friendly* overruled the earlier case of *Martin v. Phillips*, 369 S.E.2d 397 (Va. 1988).

162 *See, e.g.*, Kanawha Valley Bank v. Friend, 253 S.E.2d 528, 531 (W. Va. 1979) (approving holding of *Nicholson v. Shockey*, 64 S.E.2d 813 (Va. 1951)); Frye v. Norton, 135 S.E.2d 603, 610 (W. Va. 1964); *see also* Silling v. Erwin, 885 F. Supp. 881, 890 (S.D.W. Va. 1995).

163 *See Ball*, 633 S.E.2d at 241; *Frye*, 135 S.E.2d at 603.

164 *Kanawha Valley Bank*, 253 S.E.2d at 528; *see also* Landin v. Lavriskiuk, No. 84893, 2005 WL 2304460, at *4 (Ohio Ct. App. Sept. 22, 2005) (finding that a fiduciary relationship can exist when the fiduciary "was already performing most of the powers granted in the formal power of attorney prior to its execution").

The Supreme Court of Appeals has defined a fiduciary or confidential relationship as one which "arises wherever a trust, continuous or temporary, is specially reposed in the skill or integrity of another, or the property or pecuniary interests, in the whole or in part, or the bodily custody, of one person, is placed in the charge of another."[165] In *Barnhart v. Redd*,[166] the court held that "custodial" assistance of the defendant to the decedent established fiduciary or confidential relationship, thereby giving rise to the presumption of constructive fraud concerning a joint bank account.[167] In *Vercellotti v. Bowen*,[168] the court found sufficient evidence of a confidential relationship in the case of a woman of advanced age with failing eyesight, and a limited ability to speak English who relied on the defendant to pay her bills and do her banking.[169] In *Dillon v. Dillon*,[170] sufficient evidence supported a finding of a confidential relationship in a case of an uneducated woman who relied upon another family member to assist her in the conduct of family business affairs, particularly in the signing of a deed.[171]

In prosecuting a will contest, the practitioner should explore the possibility of making a claim that a fiduciary or confidential relationship exists, thereby triggering a presumption of undue influence.[172]

III. STRATEGIC CONSIDERATIONS

A. Removing the Executor

If tortious actions have been exerted against a decedent to secure a benefit in the will, the tortfeasor will generally also insert himself or herself as the executor of the decedent's estate.

This means that in the usual will contest the principal defendant will also be the executor and in control of the assets in the estate. If the defendant can use the subject matter of the litigation (the estate's assets) to defend against the

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165 Koontz v. Long, 384 S.E.2d 837, 840 (1989) (quoting McKinley v. Lynch, 51 S.E. 4, 9 (W. Va. 1905)).

166 469 S.E.2d 1 (W. Va. 1996).

167 *Id.* at 6–7.

168 371 S.E.2d 371 (W. Va. 1988).

169 *Id.* at 375.

170 362 S.E.2d 759 (W. Va. 1987).

171 *Id.* at 763.

172 The authors have been involved with probate litigation in separate cases in which the principal beneficiary of the decedent's estate plan has been the decedent's insurance agent, the decedent's stock broker, and a short-time unrelated caregiver. West Virginia does not, unlike some other states, have any legislation restricting bequests or gifts to caregivers. *See generally* Robert Barton, Lisa M. Lukaszewski, & Stacie T. Lau, *Gifts to Caretakers: Acts of Gratitude or Disguised Malfeasance? New Statutes May Decide for Us*, 29 PROB. & PROP. (May/June 2015).

complaint, the plaintiff will be placed at a decided disadvantage. Removing the defendant from the fiduciary office can help level the playing field.

The executor of the West Virginia estate is appointed by the County Commission,[173] while the usual will contest is prosecuted in circuit court.[174] By statute, the County Commission has express jurisdiction to remove a personal representative whom it appoints[175] and to appoint a temporary fiduciary, called a curator, to administer the estate during the pendency of litigation.[176]

With the mixed and overlapping jurisdiction between the County Commission and the circuit court, removal of an executor in a will contest can be complex. Good practice is for the contestant to file simultaneously a petition for removal before the County Commission and a motion before the circuit court. While generally the court appointing the fiduciary has exclusive jurisdiction to remove the fiduciary from office, in West Virginia the circuit court also has jurisdiction to remove a personal representative upon a proper factual showing.[177] The County Commission, being a nonjudicial body that is not well-equipped to handle disputed cases requiring extensive legal analysis, will often "stay" its removal proceeding and defer to the decision of the circuit judge.[178]

West Virginia Code section 44-5-5 allows the County Commission to remove and replace the fiduciary of an estate for "any cause [which] is proper."[179] Reported court decisions provide little guidance clarifying the standard for removal: "[w]here a personal representative has been shown to have acted in violation of his or her fiduciary duties, he or she may be removed for cause."[180] Although the selection of an executor by a testator should be honored by the court and should not be set aside lightly,[181] the testator's expression "should not prevent the prompt removal of a personal representative who is

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173 W. VA. CODE ANN. § 7-1-3 (LexisNexis 2016); *see also* W. VA. CONST. art. VIII, § 6 (probate jurisdiction is vested in the County Commission until such time as the Legislature vests it in the circuit courts). *See generally* W. VA. CODE ANN. § 41-5-1 (LexisNexis 2016).

174 § 41-5-11.

175 *Id.* § 44-5-5.

176 *Id.* § 44-1-5.

177 *See, e.g.*, Jones v. Harper, 55 F. Supp. 2d 530 (S.D.W. Va. 1999); Richardson v. Kennedy, 475 S.E.2d 418 (W. Va. 1996); Sowa v. Huffman, 443 S.E.2d 262 (W. Va. 1994); McClure v. McClure, 403 S.E.2d 197 (W. Va. 1991).

178 Prior to 1974, the County Commission possessed additional judicial powers. The Judicial Reorganization Amendment to the West Virginia Constitution, ratified on November 5, 1974, redesignated the county courts as the County Commissions. The Amendment retained the "jurisdiction in all matters of probate" in the County Commission, but permits the legislature to vest this jurisdiction in the circuit courts or their officers. *See* W. VA. CONST. art. VIII, § 6. If the legislature implements this constitutional provision, County Commissions will no longer have any judicial powers.

179 W. VA. CODE ANN. § 44-5-5 (LexisNexis 2016).

180 Syl. Pt. 5, *McClure*, 403 S.E.2d at 197.

181 Haines v. Kimble, 654 S.E.2d 588, 595 (W. Va. 2007).

incompetent, or who fails or refuses to perform his clear duties."[182] At a minimum, the court must hold an evidentiary hearing and cannot remove a nominated executor upon a bare allegation of conflict of interest.[183]

B. Use of Summary Judgment

Will contests, like all litigated cases, can be resolved before a jury trial and be the subject of a motion for summary judgment.[184] The nonmoving party can oppose summary judgment by pointing out one or more disputed "material" facts.[185] Despite their factually intensive nature involving issues of mental capacity, financial transactions, family relationships, and technical legal rules, will contests have been and can be adjudicated on summary judgment.

Summary judgment can be granted in cases involving the unique and arcane aspects of will contests. In *Todd v. Miller*,[186] summary judgment was issued in a will contest because even if the two most recent wills would be invalidated, the contestant would still only get a small bequest under a third will, which was not challenged.[187] Estoppel by acceptance of benefits under the will allowed summary judgment in *Jones v. Jones*.[188] In *Brown v. Fluharty*,[189] the will unsigned by the testator was rejected by the court upon a judgment on the pleadings.[190] Summary judgment was entered in *Clark v. Studenwalt*[191] on the issue of whether a holographic will was validly signed by the testator.[192]

Because of the totality and complexity of the facts which can arise and be disputed in a will contest, this type of litigation would normally be considered inappropriate for summary judgment. For example, in *Cale v. Napier*,[193] the

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182 State *ex rel.* Johnson v. Reed, 633 S.E.2d 234, 239 (W. Va. 2006) (quoting Welsh v. Welsh, 69 S.E.2d 34, 42 (W. Va. 1952)).

183 *Id.* at 234.

184 Under Rule 56(c) of the West Virginia Rules of Civil Procedure, the court can enter judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." W. VA. R. CIV. P. 56(c).

185 Daniel v. United Nat'l Bank, 505 S.E.2d 711, 714 (W. Va. 1998).

186 447 S.E.2d 9 (W. Va. 1994).

187 *Id.* at 13. In a will contest, it is incumbent upon the contestant to determine what happens if the challenged will is successfully defeated. An earlier valid will could then be probated, or intestacy could arise. In either event, the contestant must still have a financial interest in the outcome to have standing.

188 551 S.E.2d 37 (W. Va. 2001).

189 748 S.E.2d 809 (W. Va. 2013).

190 *Id.* at 813.

191 419 S.E.2d 308 (W. Va. 1992).

192 *Id.* at 311.

193 412 S.E.2d 242 (W. Va. 1991).

Supreme Court of Appeals held that plaintiffs had met their burden of proof and that the question of undue influence should have been submitted to the jury when the facts were that an 87-year-old woman cut out several of her children in favor of the daughter with whom she resided after her husband died.[194] The testator rarely left her daughter's home, and her doctor observed her confused and disoriented both before and after the execution of the will.[195] However, there are numerous reported cases disposing of will contests by summary judgment. In *Vaupel v. Barr*,[196] summary judgment was granted in will contest where undue influence was alleged, despite the fact that the beneficiary first contacted the drafting attorney, cared for the testatrix, and used a power of attorney to a make loan to himself.[197]

A typical case of summary judgment for the proponent of the will emphasizes and focuses solely on the date of execution of the document and the testimony of the attesting witnesses to the will.[198] In opposing a motion for summary judgment which tries to validate the will and avoid the trial of a will contest, the plaintiff's attorney should consider the dissent in *Nugen v. Simmons*[199] written by Justice Larry Starcher: "Certain types of cases are especially ill-suited for resolution by summary judgment. Contests over transfers of substantial sums of money to caretakers by elderly people, especially just before their death, are in this category. Accordingly, I dissent."[200]

C. Estoppel to Contest the Will

The actions of the contestant during the probate of the challenged will can serve to foreclose the will contest. Under the West Virginia impeachment statute, an interested person "who was not a party to the [ex parte or solemn form] proceeding" may file the will contest.[201]Accordingly, someone who was a party and participated or assisted in the initial probate will not have standing and will be barred.

The doctrine of election or estoppel by will can also bar a will contest. The doctrine provides that "a beneficiary who accepts such benefits [under a

194 *Id.* at 246.

195 *Id.*

196 460 S.E.2d 431 (W. Va. 1995).

197 *Id.* at 435–46.

198 *See* Silling v. Erwin, 885 F. Supp. 881, 886 (S.D.W. Va. 1995).

199 489 S.E.2d 7 (W. Va. 1997).

200 *Id.* at 12 (Starcher, J., dissenting). The case involves a joint bank account claim, which is another unique species of probate litigation.

201 W. VA. CODE ANN. § 41-5-11 (LexisNexis 2016).

will] is bound to adopt the whole contents of that will and is estopped to challenge its validity."[202] There are two main elements for estoppel by will:

> In order for estoppel to bar a will contest, it must first be shown that acceptance occurred, and second it must be shown that the acceptance was of such a nature as to give rise to equitable considerations which prevent the accepting party from later negating the instrument through which he received benefits.[203]

In a typical case, the executor of the decedent's estate may lure the potential contestant into accepting a distribution under the will in order to set up an estoppel. There are some important exceptions when the equitable doctrine will not apply. A party to a transaction can only be estopped when he or she accepts the benefits "with full knowledge of all the essential facts."[204] It is well settled that "one cannot be estopped by reason of accepting that which he is legally entitled to receive in any event."[205] For estoppel to apply, other parties must suffer detriment or prejudice from the acceptance of the benefit.[206] "The underlying principle of estoppel is that someone must have been injured or prejudiced by the action or conduct of the one asserting a right against him."[207] Finally, returning the benefits before filing the contest can undo the estoppel.[208]

The case of *Jones v. Jones*[209] illustrates the dangers of estoppel by will. Before her death, the decedent transferred two grocery stores that she owned to two of her sons who were especially attentive and assisted her.[210] To effect the transfer, she gave her sons stock and loaned them $236,000.[211] She also executed a will that forgave the balance of the loan to the two sons, but divided the residue of her estate into equal shares among all of her children, including the two sons who received the stores.[212] When she died, her will was probated, and her two

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202 Tennant v. Satterfield, 216 S.E.2d 229, 232 (W. Va. 1975); *see also Silling*, 885 F. Supp. at 886; Moore v. Harper, 27 W. Va. 362, 362 (1886).

203 *Tennant*, 216 S.E.2d at 232.

204 Marshall v. McDermitt, 90 S.E. 830, 833–34 (W. Va. 1916); *see also Tennant*, 216 S.E.2d at 233 ("[A] beneficiary will not be estopped from later attacking or contesting a will when he has accepted benefits without full knowledge of his rights or the facts and circumstances.").

205 Cook v. Ball, 144 F.2d 423, 438 (7th Cir. 1944); *see also Tennant*, 216 S.E.2d at 229.

206 Alleman v. Sayre, 91 S.E. 805, 808 (W. Va. 1917) (acceptance of partial payment of a claim by one entitled to full payment "manifestly injured no one").

207 Thiry v. Banner Glass Co., 93 S.E. 958, 960 (W. Va. 1917).

208 Jones v. Jones, 551 S.E.2d 37 (W. Va. 2001); *Tennant*, 216 S.E.2d at 229.

209 551 S.E.2d 37 (W. Va. 2001).

210 *Id.* at 39.

211 *Id.*

212 *Id.*

sons were appointed as co-executors.[213] Near the end of the estate administration, the co-executors prepared to make distributions and the attorney for the estate expressly informed the beneficiaries, in writing, that by cashing the distribution checks they might waive any right to challenge the will.[214] After they had received and cashed their distributions, five of the decedent's children filed a will contest and also alleged tortious interference, fraud in acquiring the stores, conversion of estate assets, and breach of fiduciary duties.[215]

On these facts, the trial court in *Jones* entered summary judgment in favor of the defendants, and on appeal, the Supreme Court of Appeals upheld the ruling.[216] The court found that "this case clearly falls within the 'doctrine of election' and that the trial court properly concluded that the appellants, by accepting benefits under the will of [the decedent], and by failing to return those benefits prior to bringing their action, were estopped from challenging the will."[217] Furthermore, the court held that the plaintiffs could not challenge the transfer of the store, which occurred before the decedent's death.[218] "[A] plaintiff estopped from challenging a benefit conferred upon a defendant under a document is also precluded from challenging or raising an outside transaction which might upset the benefit conferred under the document."[219] The Supreme Court of Appeals indicates that returning the benefits before filing suit could have "resurrected" the plaintiffs' claims, but they failed to do so.[220]

To avoid application of the doctrine of estoppel by will, the practitioner must understand the distributions occurring during the administration of the estate and may need to take remedial action in advising the client to decline or return an estopping payment.

D. Evidentiary Issues

Evidentiary rules can be critical in developing the prosecution or defense of a will contest, especially since the principal actor (the testator) will be deceased and unavailable. Evidence from the testator is affected by the "Dead Man's statute," which has now been judicially replaced, and privilege and

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213 *Id.*

214 *Id.*

215 *Id.*

216 *Id.* at 40, 42.

217 *Id.* at 41.

218 *Id.* at 42.

219 *Id.*

220 *Id.* at 41 n.4. One of the plaintiffs had endorsed his check "under protest." The Supreme Court of Appeals rejected this as a defense to estoppel: "Courts which have addressed the 'under protest' situation have said that merely expressing a protest, without returning benefits, does not prevent estoppel from arising." *Id.* (citing Randy R. Koenders, Annotation, *Estoppel to Contest Will or Attack its Validity by Acceptance of Benefits Thereunder*, 78 A.L.R.4th 90, 134 (1990)).

qualification issues can complicate the evidence to be received from attorneys acting as witnesses.

1. Dead Man's Statute

The West Virginia Dead Man's statute,[221] which prohibits a party to an action or an interested person from testifying concerning transactions with the deceased, has had a particularly strong application in probate litigation. The last two decades, however, have shown continuous erosion and finally an abolition of the statute.

In *Meadows v. Meadows*,[222] the Supreme Court of Appeals ruled that the Dead Man's statute does not bar the testimony of a surviving spouse concerning the mental capacity of a testator in a will contest.[223] In *Hicks v. Ghaphery*,[224] the Dead Man's statute was further weakened when the court held that it does not bar any party in a wrongful death medical malpractice action from testifying about conversations with the deceased patient.[225] In short, from these and other cases, the statute became riddled with complex statutory and case-law exceptions, its application was inconsistent from case to case and from judge to judge, and it was severely criticized by legal commentators.[226]

With most states having already abolished their local Dead Man's statutes, West Virginia finally did so in 2013. In *State Farm Fire & Casualty Co. v. Prinz*,[227] a case dealing with insurance coverage, the Supreme Court of Appeals invalidated the West Virginia Dead Man's statute. The court held the following:

> Because it addresses evidentiary matters that are reserved to and regulated by this Court pursuant to the Rule-Making Clause, Article VIII, § 3 of the West Virginia Constitution, West Virginia Code § 57-3-1 (1937), commonly referred to as the

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221 W. VA. CODE ANN. § 57-3-1 (LexisNexis 2016).

222 468 S.E.2d 309 (W. Va. 1996).

223 *Id.* at 318.

224 571 S.E.2d 317 (W. Va. 2002).

225 *Id.* at 330.

226 1 FRANKLIN D. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS § 601.02(4)(a) (5th ed. 2012); Mason Ladd, *The Dead Man Statute: Some Further Observations and a Legislative Proposal*, 26 IOWA L. REV. 207 (1941); Roy R. Ray, *Dead Man's Statutes*, 24 OHIO ST. L.J. 89 (1963); Ed Wallis, *An Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and A Proposal for Change*, 53 CLEV. ST. L. REV. 75 (2005); Wesley P. Page, Note, *Dead Man Talking: A Historical Analysis of West Virginia's Dead Man's Statute and A Recommendation for Reform*, 109 W. VA. L. REV. 897 (2007).

227 743 S.E.2d 907 (W. Va. 2013).

> Dead Man's Statute, is invalid, as it conflicts with the paramount authority of the West Virginia Rules of Evidence.[228]

The court went on to state that "[i]n actions, suits or proceedings by or against the representatives of deceased persons, witness testimony and documentary evidence pertaining to any statement of the deceased, whether written or oral, shall not be excluded solely on the basis of competency."[229]

On remand of the case to the circuit court, the Supreme Court of Appeals directed that at the retrial "the proffered testimony and evidence at issue must nevertheless be admissible under the remaining Rules of Evidence."[230] In his concurring opinion, Justice Menis Ketchum offered further guidance post-abolition of the statute: "In the meantime, judges should assess the admissibility of such evidence under the above guidelines and the 'catch-all' provision of Rule 804(b)(5)."[231]

Since the *Prinz* decision, the Supreme Court of Appeals has promulgated new Rules of Evidence, which became effective on September 2, 2014. New Rule 804(b)(5) concerning "Statement of a Deceased Person" provides as follows:

> In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased — whether oral or written — shall not be excluded as hearsay provided the trial judge shall first find as a fact that the statement: was made by the decedent; and was made in good faith and on decedent's personal knowledge; and was made under circumstances that indicate it was trustworthy.[232]

It should be noted that this rule is expressly limited to proceedings "by or against the representative of deceased persons," which would include will contests. The trial judge acts as the gatekeeper and may admit into evidence statements of the decedent that would otherwise be hearsay.[233]

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228 Syl. Pt. 6, *id.*

229 Syl. Pt. 7, *id.* Technically, the statute created witness incompetency. The interested party was incompetent under the statute to testify concerning a transaction with the deceased.

230 *Id.* at 918.

231 *Id.* at 919 (Ketchum, J., concurring).

232 W. VA. R. EVID. 804(b)(5) (2014).

233 *Id.* New Rule 804(b)(5) is modeled after a similar evidentiary rule passed in other states. The Comments to the new West Virginia Rules of Evidence specifically cite the case of *Chinburg v. Chinburg*, 660 A.2d 1127 (N.H. 1995). *See also* Hew v. Aruda, 462 P.2d 476 (Haw. 1969).

2. Attorney as a Will Contest Witness

Professionals will frequently appear in will contests. Doctors who have treated the testator may be fact witnesses, having objectively observed the testator at or about the time the will was signed in the course of treatment.[234] Other medical professionals, such as nurses, physician assistants, and medical staff, may similarly have factual evidence to give about their observations of the decedent. This observational evidence comes from fact witnesses and not experts. Medical professionals, however, may also be hired as *post-mortem* expert witnesses to help the trier of fact understand the physical and mental condition of the testator and how it relates to his or her testamentary capacity or susceptibility to undue influence.[235]

Likewise, attorneys will appear as witnesses in probate litigation. Generally, the lawyer will be a fact witness (and an important one at that) because he or she prepared the will or acted as an attesting witness or notary to the instrument.[236] As a matter of legal ethics, the attorney who prepared the will cannot act as trial counsel in the will contest.[237] The attorney-client privilege does not bar the testimony of the decedent's estate planning attorney in a will contest, it protects only the client, and only the client may invoke or waive it. Upon death, however, the client no longer exists. Courts have therefore held that, after the client's death, a personal representative of the estate or the decedent's heirs at law or will beneficiaries may waive the privilege on the decedent's behalf.[238] Professor Franklin Cleckley explains in his treatise that "[t]here is no

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234 Cale v. Napier, 412 S.E.2d 242, 254–56 (W. Va. 1991) (doctor was permitted to testify that he observed testatrix confused and disoriented before and after execution of the will); Hess v. Arbogast, 376 S.E.2d 333, 337 (W. Va. 1988) (physician testified that testator was disoriented when he last saw him two years before the execution of the challenged deed and will).

235 A *post-mortem* forensic exam is also called a "psychological autopsy," "psychiatric autopsy," "retrospective mental assessment," or "reconstructive psychological evaluation." Testimony of forensic medical experts in will contests is not new or novel and is generally admissible in evidence. *See In re* Estate of Hoover, 615 N.E.2d 736 (Ill. 1993). The law of evidence does not require an expert witness physically to examine or personally know the patient in order to render an expert opinion. *Id.*; *see also* W. Va. Dept. of Highways v. Thompson, 375 S.E.2d 585 (W. Va. 1988); Goldizen v. Grant Cnty. Nursing Home, 693 S.E.2d 346 (W. Va. 2010).

236 Syl. Pt. 3, Pritchard v. Pritchard, 65 S.E.2d 65, 66 (W. Va. 1951) ("Likewise great weight should be attached to the testimony of the scrivener of the will, who, as testator's attorney, prepared the will.").

237 Rule 3.7(a) of the West Virginia Rules of Professional Conduct generally prohibits a lawyer from acting as advocate at trial when the lawyer is likely to be a necessary witness. *See In re* Waters, 647 A.2d 1091, 1098 (Del. 1994) ("[T]he centrality of the [estate planning attorney's] testimony to the contested issues of undue influence and testamentary capacity mandated his withdrawal as trial attorney.").

238 *See generally* E.S. Stephens, Annotation, *Waiver of Attorney-Client Privilege by Personal Representative or Heir of Deceased Client or by Guardian of Incompetent*, 67 A.L.R.2d 1268, § 4 (1959).

privilege as to communication relevant to an issue between parties, all of whom claim through the same deceased client—regardless of whether the claims are by testate or intestate succession or by inter vivos transaction."[239]

Less frequently, an attorney may be used as a *post-mortem* expert witness in a will contest. In such a case, care must be taken concerning the scope of the attorney's testimony for it to be admissible. In the case of *James v. Knotts*,[240] a noted estate planning and probate attorney testified at trial as an expert and, among other things, he opined that the decedent's will was valid.[241] In a strongly-worded concurring opinion, Justice Menis Ketchum blasted this expert testimony as inadmissible under the catchphrase "[a]n expensive egg opines again[]":[242]

> Time and again, I see lawyers presenting "experts" who testify about matters that are easily within the everyday knowledge and experience of a lay juror. This unwarranted testimony adds great expense to the litigants, and lines the pockets of self-proclaimed experts. It is bad enough that litigants must pay exorbitant hourly rates to lawyers, much less pay fees for unnecessary expert testimony in their search for justice.
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> In this case, a lawyer was hired as a paid expert to testify as to the intent of the decedent, and whether undue influence was exerted upon the decedent. Are juries so dumb that they must hear a hired lawyer's expert opinion as to a person's "intent" or "undue influence"? Pretty soon expert lawyers will be paid to opine as to which car ran the red light in traffic accident cases, and what each car driver was thinking during the collision.[243]

To Justice Ketchum, the expert attorney's testimony was inadmissible under the rules of evidence because (1) the jury was as competent to reach an opinion as the attorney, (2) an expert opinion cannot be offered as to the subjective intent of an individual, and (3) an expert may not give his or her opinion on a question of law.[244] The restrictions from the *James* case should be

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239 1 CLECKLEY, *supra* note 226, § 5.4(E)(6)(b); *see also* Swidler & Berlin v. United States, 524 U.S. 399 (1998) ("The general rule with respect to confidential communications . . . is that such communications are privileged during the testator's lifetime and, also, after the testator's death *unless sought to be disclosed in litigation between the testator's heirs*." (emphasis added) (quoting United States v. Osborn, 561 F.2d 1334, 1340 (9th Cir. 1977))).

240 705 S.E.2d 572 (W. Va. 2010).

241 *Id.* at 580.

242 *Id.* at 582 (Ketchum, J., concurring) (emphasis omitted).

243 *Id.*

244 *Id.* at 582–83 (citing Syl. Pt. 7, Lawrence Adm'r v. Hyde, 88 S.E. 45 (W. Va. 1916); Syl. Pt. 3, State v. Mitter, 285 S.E.2d 376 (W. Va. 1981); Jackson v. State Farm Mut. Auto. Ins. Co., 600 S.E.2d 346 (W. Va. 2004)).

studied and considered when the litigator in a will contest wishes to use an attorney as an expert witness on the topics of testamentary capacity or undue influence.[245]

IV. CONCLUSION

The platitude that is generally argued by will proponents, and frequently accepted by the courts in upholding challenged wills, is that a testator is free to bequeath and devise the estate to whomever he or she desires. This simplistic statement, however, should not blind the courts to the profound demographic changes occurring in society that affect testators and hence probate litigation. The American population is growing older,[246] and with longevity comes the increased risk of debilitating medical problems, including Alzheimer's disease and other dementias.[247] The elderly still represent one of the most vulnerable segments of our society, and this segment possesses a great deal of wealth, which makes them a desirable target for less honorable segments of society.[248] The fact that an individual is autonomous and possesses the freedom of testation does not diminish the overall susceptibility of the elderly to manipulation or exploitation by opportunists, whether they are greedy family members or preying outsiders. The assumption of the Legislature in adopting the intestate statutes should be taken as a truth: that most individuals do wish to benefit their closest relations in equal shares as the true objects of their bounty. Practitioners should be prepared to argue, and the courts should be open to consider, these societal factors in reviewing the validity of wills when a person in a will contest lays claim.

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[245] Testimony of an attorney as an expert concerning estate planning practices or techniques and testamentary formalities should be admissible under Rule 702(a) of the West Virginia Rules of Evidence because it would be "technical, or other specialized knowledge [which] will assist the trier of fact to understand the evidence or to determine a fact in issue."

[246] JENNIFER M. ORTMAN ET AL., U.S. CENSUS BUREAU, AN AGING NATION: THE OLDER POPULATION IN THE UNITED STATES 2–3 (2014) ("By 2030, more than 20 percent of U.S. residents are projected to be aged 65 and over, compared with 13 percent in 2010 and 9.8 percent in 1970."). In 2010, the share of West Virginia's population that was 65 years and older was 16% and by 2030 that share is expected to rise to 22.9%. CHRISTIADI ET AL., W. VA. UNIV. BUREAU OF BUS. & ECON. RESEARCH, POPULATION TRENDS IN WEST VIRGINIA THROUGH 2030, at 9 (2014).

[247] *See* COMM'N ON LAW & AGING, *supra* note 152, at 1. There is an "aging demographic bulge," and dementia afflicts approximately 30% to 45% of persons 85-years-old.

[248] Financial elder abuse is now a crime. West Virginia Code section 61-2-29b (which was first passed in 2009) provides that any person who financially exploits an elderly person, protected person or an incapacitated adult is guilty of larceny. W. VA. CODE ANN. § 61-2-29b (LexisNexis 2016).