



WEST VIRGINIA WILLS LAW OUTLINE

2016

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WEST VIRGINIA WILLS LAW TRAINING OUTLINE

1. Capacity to Make a Will

- a. **W. Va. Code §41-1-2**
- b. Any person may make a will so long as they are:
 - i. Of sound mind; and
 - ii. At least 18 years old.

2. Requirements for a Valid Will

- a. The testator (person who is creating the will) must have capacity to write a will pursuant to **W.Va. Code §41-1-2**.
- b. The will must be in writing.
 - i. Can a will be handwritten?
 1. Yes. A handwritten, or holographic, will is valid in the state of West Virginia, so long as the entire will is written in the testator's handwriting and signed.
 2. See, **In re Estate of Teubert, 171 W. Va. 226 (1982)** and **Charleston National Bank v. Thru the Bible Radio Network, 203 W. Va. 345 (1998)**.
- c. Signature of Testator.
- d. Two persons to witness the testator signing the will.
- e. Signature of two witnesses to the testator's signature.
- f. The testator and both witnesses must all be present in the same place at the same time to witness each other's signatures on the will.

3. Excluding People from a Will

- a. In most cases, a testator can exclude people from their will who would inherit if the testator had died without a will-such as a child.
- b. If a testator wishes to exclude someone from a will, the will should clearly state that such person is being intentionally excluded.
- c. Public policy of inheritance law discourages such exclusions, so if the will does not clearly state the intent to exclude, a court may allow such person a share of the estate if the will is contested.

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- d. When excluding a child, a testator may want to announce such an exclusion in front of witnesses and explain the reason for the exclusion. This will protect the validity of the exclusion should the will be contested.
- e. A former spouse can be excluded from a will, however a current spouse will be entitled to an elective share of the estate, even if the testator expresses a desire to exclude the current spouse from the will.
 - i. If the will was written while the testator was married and the parties are now divorced, any gift to the now ex-spouse will automatically be revoked pursuant to **W. Va. Code §41-1-6**.

4. Elective Share

- a. **W. Va. Code §42-3-1**
- b. The surviving spouse of a decedent who was domicile in West Virginia has the right to an elective share of the decedent's estate, despite the contents of a will.
- c. The percentage of the decedent's elective share is determined by how many years the decedent and spouse had been married at the time of the decedent's death.
 - i. The chart of the percentage of the estate the surviving spouse is entitled to receive as an elective share is found in **W. Va. Code §42-3-1** and ranges from a supplemental amount, for being married less than one year to 50% for 15 years or more of marriage.
- d. The surviving spouse is entitled to an elective share of the estate even if the decedent clearly and expressly excludes the spouse from the will.
- e. If a testator does not want their spouse to receive more than the elective share, the will provision should clearly state that the spouse shall receive only the elective share in which they are entitled under **W. Va. Code §42-3-1**.

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5. Revoking a Will

- a. **W. Va. Code §41-1-7**
- b. A will can be revoked by writing a new will and having it properly witnessed and signed.
- c. A will can be revoked by writing and signing a document stating the intent to revoke the will.
- d. The testator can also tear up, shred, burn, or otherwise destroy the written will with the intent to revoke the will.
- e. Pursuant to **W. Va. Code §41-1-6**, any provision of a will written when the testator was married to a person who is now an ex-spouse is automatically revoked at the time the divorce is final.

6. Writing a Will

- a. Elements for construction of a will:
 - i. The will needs to state that it is the last will and testament of the testator and the county in which the testator resides.
 - ii. An executor/executrix of the estate needs to be identified. It is beneficial to name a successor executor/executrix in the case that the first named pre-deceases the testator or is unable or unwilling to act as executor/executrix.
 1. A clause can be included to allow the executor/executrix to waive any bond or surety that is typically required of an executor/executrix.
 - iii. The will should list the testator's spouse's name, date of birth, and date of marriage.
 - iv. Any children of the testator should be listed along with date of birth.
 1. If there are minor children, a guardian should be appointed.
 - a. A clause can be included to allow the guardian to waive any bond or surety that is typically required of a guardian.
 - v. Provision for payment of debts and funeral expenses.

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- vi. Any specific bequests that the testator wishes to make should be clearly stated.
- vii. The will should clearly state whether any child or other person is intentionally being excluded from the will.
- viii. A residuary clause should be included to dispose of any property that was not specifically bequeathed.
- ix. Page numbers should appear on each page of the will. It may want to state how many total pages are included in the will.
- x. The testator should sign or initial each page.
- xi. This can be placed in the footer of the document.
- xii. A signature line for the testator
- xiii. Signature lines for 2 witnesses
- xiv. Notary statement and signature.
- xv. Name and contact information of attorney preparing the will.

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7. Timeline

Capacity

- Under W. Va. Code §41-1-2, a person must be of sound mind and age 18 or older in order to have capacity to write a will.

Validity

- For a will to be valid, the following components must be present:
 - Capacity of testator.
 - Will must be in writing.
 - Testator's signature.
- Two witnesses to the testator's signature.
 - The signature of the witnesses.

Elective Share

- A surviving spouse has a right to an elective share of the decedent's estate even if it is against the will.
- The percentage of the estate that the surviving spouse is entitled to is based on the number of years the decedent and spouse has been married.
- The chart of percentages is found in W. Va. Code §42-3-1.

Revocation

- A will can be revoked by writing a new will, or a signed statement revoking the will.
- A testator can also tear, burn, or otherwise destroy a will with the intent to revoke.

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- Appoint an executor/executrix.
- List spouse and children.
- Appoint a guardian for minor children.
- Clear bequests of property.
- Clearly stated intent to exclude person from will.
- Residuary clause.
- Page numbers.
- Signatures of testator and witnesses.
- Notary .
- Contact information of attorney preparing the will.