

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Introduced

Senate Bill 127

BY SENATOR TRUMP

[Introduced January 10, 2018; Referred
to the Committee on the Judiciary]

1 A BILL to amend and reenact §44-1-1, §44-1-6, §44-1-7, §44-1-8, §44-1-14a, and §44-1-26 of
 2 the Code of West Virginia, 1931, as amended; and to amend and reenact §44-5-3 of said
 3 code, all relating generally to personal representatives of estates; waiving surety
 4 requirements for administrators of estates where grantee is sole beneficiary or sole
 5 distributee of the decedent; requiring county commission to hold hearing if application filed
 6 by interested party to compel nonresident executor otherwise exempt from bond
 7 requirements to post bond; requiring county commission to hold hearing if application filed
 8 by interested party to compel sole beneficiary to post surety; removing authority of clerk
 9 of county commission to require bond or surety upon knowledge; making executor or
 10 administrator not required to post surety liable upon his or her own personal recognizance
 11 in the event of default, failure, or misadministration; requiring interested parties objecting
 12 to the qualifications of a personal representative or venue to file notice with the county
 13 commission 60 days after the date of first publication; authorizing action against bond
 14 surety when execution on judgment or decree against personal representative is returned
 15 without being satisfied; and making technical corrections.

Be it enacted by the Legislature of West Virginia:

ARTICLE 1. PERSONAL REPRESENTATIVES.

§44-1-1. Executor has no powers before qualifying.

1 A person appointed by a will executor thereof shall not have the powers of executor until
 2 he or she qualifies as such by taking an oath and giving bond, unless not required to post bond
 3 by §44-1-8 of this code, before the county ~~court~~ commission in which the will, or an authenticated
 4 copy thereof, is admitted to record, or before the clerk thereof in vacation, except that he or she
 5 may provide for the burial of the testator, pay reasonable funeral expenses and preserve the
 6 estate from waste.

§44-1-6. Bond and oath; termination of grant in certain cases.

1 At the time of the grant of administration upon the estate of any intestate, the person to

2 whom it is granted shall, in the ~~court~~ county commission or before the clerk granting it, give bond,
 3 unless not required to post bond by §44-1-8 of this code, and take an oath that the deceased has
 4 left no will so far as he or she knows, and that he or she will faithfully perform the duties of ~~his~~ the
 5 office to the best of his or her judgment. If a will of the deceased be afterwards admitted to record,
 6 or if, after administration is granted to a creditor or other person than a distributee, any distributee
 7 who shall not have before refused shall apply for administration, there may be a grant of probate
 8 or administration, after reasonable notice to such creditor or other person theretofore appointed,
 9 in like manner as if the former grant had not been made, and such former grant shall thereupon
 10 cease.

§44-1-7. Penalty of bond.

1 (a) Every bond ~~of~~ required to be given by an executor or administrator shall be in a penalty
 2 equal, at the least, to the full value of the personal estate of the deceased to be administered; and
 3 where there is a will which authorizes the executor or administrator to sell real estate, or receive
 4 the rents and profits thereof, the bond shall be in a penalty equal, at the least, to the full value
 5 both of such personal estate and of such real estate, or of such personal estate and of such rents
 6 and profits, as the case may be.

7 (b) If on the filing of the ~~inventory or~~ appraisalment of the estate it shall appear that the
 8 penalty of the bond does not comply as to amount with the foregoing requirements, the ~~court~~
 9 county commission in which, or the clerk before whom, such bond was given, shall immediately
 10 notify such executor or administrator of such fact and require of him or her a new or additional
 11 bond, and the failure of such executor or administrator to give the same within a reasonable time
 12 shall be sufficient cause for his or her removal.

§44-1-8. When executor or administrate not to give bond; when surety not required.

1 (a) Subject to the provisions of §44-5-3 of this code governing the appointment of a
 2 nonresident of this state as an executor, where the will directs that an executor shall not give
 3 bond, it shall not be required of him or her, unless at the time the will is admitted to probate or at

4 any time subsequently, on the application of any person interested, ~~or from the knowledge of the~~
 5 ~~court~~ and after a hearing, it is required by the county commission ~~or clerk admitting the will to~~
 6 ~~probate, it is deemed proper~~ that bond ought to be given.

7 (b) No surety shall be required on the bond of the executor if he or she is also the sole
 8 beneficiary of the decedent, unless the will directs otherwise, and no surety shall be required on
 9 the bond of the administrator if he or she is the sole distributee of the decedent, unless at the time
 10 the will is admitted to probate or the administrator is appointed or at any time thereafter, on the
 11 application of any person interested, and after a hearing, it is required by the county commission
 12 that surety ought to be given.

13 (c) In all such cases where no surety is required of the executor or administrator, the
 14 executor or administrator shall nevertheless be liable upon his or her bond upon his or her own
 15 personal recognizance in the event of default, failure or misadministration by the executor or
 16 administrator.

§44-1-14a. Notice of administration of estate; time limits for filing of objections; liability of personal representative.

1 (a) Within thirty days of the filing of the appraisal of any estate or within one hundred
 2 twenty days of the date of qualification of the personal representative if an appraisal is not
 3 filed as required in §44-1-14 of this code, the clerk of the county commission shall publish, once
 4 a week for two successive weeks, in a newspaper of general circulation within the county of the
 5 administration of the estate, a notice, which is to include:

6 (1) The name of the decedent;

7 (2) The name and address of the county commission before whom the proceedings are
 8 pending;

9 (3) The name and address of the personal representative;

10 (4) The name and address of any attorney representing the personal representative;

11 (5) The name and address of the fiduciary commissioner, if any;

12 (6) The date of first publication;

13 (7) A statement that claims against the estate must be filed within sixty days of the date of
14 first publication in accordance with §44-2-1, et seq. and §44-3a-1, et seq. of this code;

15 (8) A statement that any person seeking to impeach or establish a will must make a
16 complaint in accordance with §41-5-11 through §41-5-13 of this code;

17 (9) A statement that an interested person objecting to the qualifications of the personal
18 representative or the venue or jurisdiction of the court must be filed with the county commission
19 within sixty days after the date of first publication or thirty days of service of the notice, whichever
20 is later; and

21 (10) If the appraisal of the assets of the estate shows the value to be \$200,000 or
22 less, exclusive of real estate specifically devised and nonprobate assets, or, if it appears to the
23 clerk that there is only one beneficiary of the probate estate and that the beneficiary is competent
24 at law, a statement substantially as follows: "Settlement of the estate of the following named
25 decedents will proceed without reference to a fiduciary commissioner unless within sixty days
26 from the first publication of this notice a reference is requested by a party in interest or an unpaid
27 creditor files a claim and good cause is shown to support reference to a fiduciary commissioner".
28 If a party in interest requests the fiduciary commissioner to conclude the administration of the
29 estate or an unpaid creditor files a claim, no further notice to creditors shall be published in the
30 newspaper, and the personal representative shall be required to pay no further fees, except to
31 the fiduciary commissioner for conducting any hearings, or performing any other duty as a
32 fiduciary commissioner. The time period for filing claims against the estate shall expire upon the
33 time period set out in the notice to creditors published by the clerk of the county commission as
34 required in this subsection (a). If an unpaid creditor files a claim, the fiduciary commissioner shall
35 conduct a hearing on the claim filed by the creditor, otherwise, the fiduciary commissioner shall
36 conclude the administration of the estate as requested by the interested party.

37 (11) This notice shall be published as a Class II legal advertisement in compliance with

38 the provisions of §59-3-1, et seq. of this code. The publication of such notice shall be equivalent
39 to personal service on creditors, distributees and legatees.

40 (b) If no appraisal is filed within the time period established pursuant to §41-1-14 of
41 this code, the county clerk shall send a notice to the personal representative by first class mail,
42 postage prepaid, indicating that the appraisal has not been filed.

43 (c) The personal representative shall promptly make a diligent search to determine the
44 names and addresses of creditors of the decedent who are reasonably ascertainable.

45 (d) The personal representative shall, within sixty days after the date of first publication,
46 serve a copy of the notice, published pursuant to §41-1-14a(a) of this code, by first class mail,
47 postage prepaid or by personal service on the following persons:

48 (1) If the personal representative is not the decedent's surviving spouse and not the sole
49 beneficiary or sole heir, the decedent's surviving spouse, if any;

50 (2) If there is a will and the personal representative is not the sole beneficiary, any
51 beneficiaries;

52 (3) If there is not a will and the personal representative is not the sole heir, any heirs;

53 (4) The trustee of any trust in which the decedent was a grantor, if any; and

54 (5) All creditors identified under §41-1-14a(c) of this code, other than a creditor who filed
55 a claim as provided in §41-2-1, et seq. of this code or a creditor whose claim has been paid in
56 full.

57 (e) Any person interested in the estate who objects to the qualifications of the personal
58 representative or the venue or jurisdiction of the court, shall file notice of an objection with the
59 county commission within ~~ninety~~ sixty days after the date of the first publication as required in
60 §41-1-14a(a) of this code or within thirty days after service of the notice as required by §41-1-
61 14a(d) of this code, whichever is later. If an objection is not timely filed, the objection is forever
62 barred.

63 (f) A personal representative acting in good faith is not personally liable for serving notice

64 under this section, notwithstanding a determination that notice was not required by this section.
 65 A personal representative acting in good faith who fails to serve the notice required by this section
 66 is not personally liable. The service of the notice in accordance with this subsection may not be
 67 construed to admit the validity or enforceability of a claim.

68 (g) The clerk of the county commission shall collect a fee of \$20 for the publication of the
 69 notice required in this section.

70 (h) For purposes of this section, the term “beneficiary” means a person designated in a
 71 will to receive real or personal property.

§44-1-26. Action on bond of personal representative.

1 Where an execution on a judgment or decree against a personal representative is returned
 2 without being satisfied, there may be forthwith brought and prosecuted an action against the
 3 obligors surety in any bond given by such personal representative for the faithful discharge of his
 4 or her duties.

ARTICLE 5. GENERAL PROVISIONS AS TO FIDUCIARIES.

§44-5-3. Appointment of nonresident; bond; service of notice and process; fees; penalty.

1 (a) Notwithstanding any other provision of law, no individual who is a nonresident of this
 2 state, nor any banking institution which does not maintain a main office or branch office within this
 3 state nor any corporation having its principal office or place of business outside this state, may be
 4 appointed or act as executor, administrator, curator, testamentary guardian, guardian or
 5 conservator in this state, except that:

6 (1) An individual who is a nonresident of this state may be appointed ancillary administrator
 7 of a nonresident decedent’s assets situate in this state if such nonresident individual is lawfully
 8 acting as executor in said decedent’s state of domicile and submits letters of probate
 9 authenticated by the probate authorities of the decedent’s state of domicile to the clerk of the
 10 county commission of any county of this state wherein ancillary administration is sought;

11 (2) An individual who is a nonresident of this state may be appointed ancillary administrator

12 of a nonresident decedent's assets situate in this state if such nonresident individual is acting as
13 administrator in said decedent's state of domicile and submits letters of administration
14 authenticated by the probate authorities of the decedent's state of domicile to the clerk of the
15 county commission of any county of this state wherein ancillary administration is sought;

16 (3) An individual who is a nonresident of this state may be appointed and act as
17 testamentary guardian of a nonresident infant and thereby exercise dominion and control over
18 such nonresident infant's assets situate in this state upon submission of authenticated
19 documentation that such nonresident testamentary guardian was so appointed at the place of
20 domicile of the nonresident infant. Such authenticated documentation shall be submitted to the
21 clerk of the county commission of any county of this state wherein assets belonging to such
22 nonresident infant are situate;

23 (4) An individual who is a nonresident of this state and who is named executor by a
24 resident decedent may qualify and act as executor in this state;

25 (5) An individual who is a nonresident of this state may be appointed and act as
26 administrator of a resident decedent's assets in this state if appointed in accordance with the
27 provisions of §44-1-4 of this code;

28 (6) An individual who is a nonresident of this state may be appointed as the testamentary
29 guardian of a resident infant if appointed in accordance with the provisions of §44-1-10 of this
30 code; and

31 (7) An individual who is a nonresident of this state may be appointed as guardian or
32 conservator of a resident incompetent: *Provided*, That such appointment is made in accordance
33 with the provisions of §44a-2-1, et seq. of this code and if such nonresident individual may
34 otherwise qualify as guardian or conservator.

35 (b) Nonresident individuals enumerated in §44-5-3(a) of this code shall give bond with
36 corporate surety thereon, qualified to do business in this state, and the amount of such bond shall
37 not be less than double the value of the personal assets and double the value of any real property

38 authorized to be sold or double the value of any rents and profits from any real property which the
39 nonresident individual is authorized to receive, except that:

40 (1) Any nonresident individual enumerated in §44-5-3(a) of this code who is the spouse,
41 parent, sibling, lineal descendent or sole beneficiary of a resident or nonresident decedent shall
42 give bond with corporate surety thereon qualified to do business in this state, with such penalty
43 as may be fixed pursuant to the provisions of §44-1-7 or §44-1-8 of this code, as approved by the
44 clerk of the county commission;

45 (2) Where the terms of a decedent's will directs that a nonresident individual enumerated
46 in §44-5-3(a)(1), §44-5-3(a)(3), §44-5-3(a)(4) and §44-5-3(a)(6) of this code named in a
47 decedent's will shall not give bond or give bond at a specified amount, it shall not be required or
48 shall be required only to the extent required under the terms of the will, unless at the time the will
49 is admitted to record or at any time subsequently, on the application of any person interested, or
50 from the knowledge of the commission or clerk admitting the will to record, it is deemed proper
51 that greater bond be given.

52 (c) When a nonresident individual is appointed as executor, administrator, testamentary
53 guardian, guardian or conservator pursuant to the provisions of §44-5-3(a) of this code, said
54 individual thereby constitutes the clerk of the county commission wherein such appointment was
55 made as his or her true and lawful attorney-in-fact upon whom may be served all notices and
56 process in any action or proceeding against him or her as executor, administrator, testamentary
57 guardian, guardian or conservator or with respect to such estate, and such qualification shall be
58 a manifestation of said nonresident individual's agreement that any notice or process, which is
59 served in the manner hereinafter provided in this subsection, shall be of the same legal force and
60 validity as though such nonresident was personally served with notice and process within this
61 state. Service shall be made by leaving the original and two copies of any notice or process
62 together with a fee of \$5 with the clerk of such county commission. The fee of \$5 shall be
63 deposited with the county treasurer. Such clerk shall thereupon endorse upon one copy thereof

64 the day and hour of service and shall file such copy in his or her office and such service shall
65 constitute personal service upon such nonresident: *Provided*, That the other copy of such notice
66 or process shall be forthwith sent by registered or certified mail, return receipt requested, deliver
67 to addressee only, by said clerk or to such nonresident at the address last furnished by him or her
68 to said clerk and either: (1) Such nonresident's return receipt signed by him or her; or (2) the
69 registered or certified mail bearing thereon the stamp of the post office department showing that
70 delivery therefore was refused by such nonresident is appended to the original notice or process
71 filed therewith in the office of the clerk of the county commission from which such notice or process
72 was issued. No notice or process may be served on such clerk of the county commission or
73 accepted by him or her less than thirty days before the return date thereof. The clerk of such
74 county commission shall keep a record in his or her office of all such notices and processes and
75 the day and hour of service thereof. The provision for service of notice or process herein provided
76 is cumulative and nothing herein contained shall be construed as bar to service by publication
77 where proper or the service of notice or process in any other lawful mode or manner.

78 (d) The personal estate of a resident decedent, infant or incompetent may not be removed
79 from this state until the inventory or appraisal of that resident decedent's, infant's or
80 incompetent's assets have been filed and any new or additional bond required to satisfy the
81 penalty specified in §44-5-3(b) of this code has been furnished. The liability of a nonresident
82 executor, administrator, testamentary guardian, guardian or conservator and of any such surety
83 shall be joint and several and a civil action on any such bond may be instituted and maintained
84 against the surety, notwithstanding any other provision of this code to the contrary, even though
85 no civil action has been instituted against such nonresident.

86 (e) Any such nonresident who removes from this state assets administered in and situate
87 in this state without complying with the provisions of this section, the provisions of §44-11-1, et
88 seq. or any other requirement pertaining to fiduciaries generally, shall be guilty of a misdemeanor
89 and, upon conviction thereof, shall be fined not more than \$1,000 or confined in the county jail for

90 not more than one year, or, in the discretion of the court, by both such fine and confinement.

91 (f) If a nonresident appointed pursuant to §44-5-3(a) of this code fails or refuses to file an
92 accounting required by this chapter, and the failure continues for two months after the due date,
93 he or she may, upon notice and hearing, be removed or subjected to any other appropriate order
94 by the county commission, and if his or her failure or refusal to account continues for six months,
95 he or she shall be removed by the county commission.

NOTE: The purpose of this bill is to require potential administrators of intestate estates to give bond and take oath in the county commission before being granted the administration; waive bond requirements for administrators of intestate estates where the grantee is sole beneficiary or sole distributee of the decedent; and require interested parties objecting to the qualifications of a personal representative or venue to file notice with the county commission sixty days after the date of first publication.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.