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SECRETARY OF STATE

# WEST VIRGINIA LEGISLATURE

FIRST REGULAR SESSION, 1993



# ENROLLED

HOUSE BILL No. *2638*

(By Delegate *Kiss* )



Passed *April 10,* 1993

In Effect *Ninety Days From* passage

**ENROLLED**  
**H. B. 2638**

(By DELEGATE KISS)

[Passed April 10, 1993: in effect ninety days from passage.]

AN ACT to repeal section five, article three, chapter forty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact section six, article one, chapter forty-one of said code; to amend and reenact sections eleven, twelve and thirteen, article five of said chapter; to amend and reenact sections three and three-b, article one, chapter forty-two of said code; to amend and reenact sections one, two, three, three-a and four, article three of said chapter forty-two; to amend and reenact section fourteen, article one, chapter forty-four of said code; to amend and reenact section one, article three, chapter fifty-eight of said code; and to further amend said article by adding thereto a new section, designated section one-a, all relating to the probate of estates; effect of a divorce or annulment of a marriage on dispositions, appointments, conveyances or nominations made in testator's will with respect to former spouse; making certain technical corrections to statutory language; clarifying operative date of certain provisions; setting forth right of surviving spouse to an elective share in the case of intestacy; entitling a surviving spouse to the supplemental share if the amount provided by the will and other entitlements is less than the supplemental share; clarifying the source of payment of the supplemental elective share amount; eliminating need to notify persons against whom surviving spouse is not proceeding for elective share; reducing the time period to challenge certain probate

matters; providing for the intestate share of a decedent's surviving spouse when decedent is not survived by any descendants; removing requirement that appraisers be appointed to appraise decedents' estates; requiring personal representatives to appraise such estates; setting forth when personal representative is guilty of a misdemeanor; providing criminal penalties; and permitting and providing procedures for appeals of county commission final orders in cases involving the elective shares of surviving spouses.

*Be it enacted by the Legislature of West Virginia:*

That section five, article three, chapter forty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that section six, article one, chapter forty-one of said code be amended and reenacted; that sections eleven, twelve and thirteen, article five of said chapter be amended and reenacted; that sections three and three-b, article one, chapter forty-two of said code be amended and reenacted; that sections one, two, three, three-a and four, article three of said chapter forty-two be amended and reenacted; that section fourteen, article one, chapter forty-four of said code be amended and reenacted; that section one, article three, chapter fifty-eight of said code be amended and reenacted; and that said article three be further amended by adding thereto a new section, designated section one-a, all to read as follows:

## CHAPTER 41. WILLS.

### ARTICLE 1. CAPACITY TO MAKE; REQUISITES; VALIDITY.

#### §41-1-6. Revocation by divorce; no revocation by other changes of circumstances.

- 1 (a) If after executing a will the testator is divorced or
- 2 his marriage annulled, the divorce or annulment
- 3 revokes any disposition or appointment of property
- 4 made by the will to the former spouse, any provision
- 5 conferring a general or special power of appointment on
- 6 the former spouse, and any nomination of the former
- 7 spouse as executor, trustee, conservator, or guardian,
- 8 unless the will expressly provides otherwise. Property
- 9 prevented from passing to a former spouse because of

10 revocation by divorce or annulment passes as if the  
11 former spouse failed to survive the decedent, except that  
12 the provisions of section three, article three, chapter  
13 forty-one do not apply, and other provisions conferring  
14 some power or office on the former spouse are inter-  
15 preted as if the spouse failed to survive the decedent.  
16 If provisions are revoked solely by this section, they are  
17 revived by testator's remarriage to the former spouse.  
18 For purposes of this section, divorce or annulment  
19 means any divorce or annulment which would exclude  
20 the spouse as a surviving spouse. A decree of separation  
21 which does not terminate the status of husband and wife  
22 is not a divorce for purposes of this section. No change  
23 of circumstances other than as described in this section  
24 revokes a will.

25 (b) This section applies to all divorces, annulments or  
26 remarriages which become effective after the fifth day  
27 of June, one thousand nine hundred ninety-two.

**ARTICLE 5. PRODUCTION, PROBATE AND RECORD OF WILLS.**

**§41-5-11. Impeachment or establishment of will — By person who was not party to prior proceeding; trial by jury.**

1 After a judgment or order entered as aforesaid in a  
2 proceeding for probate ex parte, any person interested  
3 who was not a party to the proceeding, or any person  
4 who was not a party to a proceeding for probate in  
5 solemn form, may proceed by complaint to impeach or  
6 establish the will, on which complaint, if required by  
7 any party, a trial by jury shall be ordered, to ascertain  
8 whether any, and if any, how much, of what was so  
9 offered for probate, be the will of the decedent. The  
10 court may require all other testamentary papers of the  
11 decedent to be produced, and the inquiry shall then be  
12 which one of all, or how much of any, of the testamen-  
13 tary papers is the will of the decedent. If the judgment  
14 or order was entered by the circuit court on appeal from  
15 the county commission, such complaint shall be filed  
16 within one year from the date thereof, and if the  
17 judgment or order was entered by the county commis-  
18 sion and there was no appeal therefrom, such complaint

19 shall be filed within one year from the date of such order  
20 of the county commission. If no such complaint be filed  
21 within the time prescribed, the judgment or order shall  
22 be forever binding. Any complaint filed under this  
23 section shall be in the circuit court of the county wherein  
24 probate of the will was allowed or denied.

**§41-5-12. Impeachment or establishment in court — By person under disability or nonresident.**

1 Notwithstanding the two preceding sections, any  
2 person interested who, at the time of the judgment or  
3 order is under the age of eighteen years, or is a convict  
4 or a mentally incapacitated person, may file a complaint  
5 to impeach or establish the will, within one year after  
6 he becomes of age, or other disability ceases; and any  
7 person interested who, at that time, resided out of the  
8 state, or was proceeded against by publication, may,  
9 unless he actually appeared as a party or was personally  
10 summoned, file such complaint within one year after the  
11 entry of such judgment or order.

**§41-5-13. Probate of foreign will.**

1 Where a will relative to an estate within this state has  
2 been proved without the same, an authenticated copy  
3 thereof and the certificate of probate thereof, may be  
4 offered for probate in this state. When such copy is so  
5 offered, the county commission, or the clerk thereof in  
6 the vacation of the commission, to which or to whom it  
7 is offered, shall presume, in the absence of evidence to  
8 the contrary, that the will was duly executed and  
9 admitted to probate as a will of personalty in the state  
10 or country of the testator's domicile, and shall admit  
11 such copy to probate as a will of personalty in this state;  
12 and if it appears from such copy that the will was  
13 proved in the foreign court of probate to have been so  
14 executed as to be a valid will of land in this state by  
15 the laws thereof, such copy may be admitted to probate  
16 as a will of real estate. But any person interested, may,  
17 within one year from the time such authenticated copy  
18 is admitted to record, upon reasonable notice to the  
19 parties interested, have the order admitting the same set  
20 aside, upon due and satisfactory proof that such

21 authenticated copy was not a true copy of such will, or  
22 that the probate of such will has been set aside by the  
23 court by which it was admitted to probate, or that such  
24 probate was improperly made.

**CHAPTER 42.  
DESCENT AND DISTRIBUTION.**

**ARTICLE 1. DESCENT.**

**§42-1-3. Share of spouse.**

1 The intestate share of a decedent's surviving spouse  
2 is:

3 (a) The entire intestate estate if:

4 (1) No descendant of the decedent survives the  
5 decedent; or

6 (2) All of the decedent's surviving descendants are also  
7 descendants of the surviving spouse and there is no other  
8 descendant of the surviving spouse who survives the  
9 decedent;

10 (b) Three fifths of the intestate estate, if all of the  
11 decedent's surviving descendants are also descendants of  
12 the surviving spouse and the surviving spouse has one  
13 or more surviving descendants who are not descendants  
14 of the decedent;

15 (c) One half of the intestate estate, if one or more of  
16 the decedent's surviving descendants are not descend-  
17 ants of the surviving spouse.

**§42-1-3b. Requirement that heir survive decedent for one  
hundred twenty hours.**

1 An individual who fails to survive the decedent by one  
2 hundred twenty hours is deemed to have predeceased  
3 the decedent for purposes of intestate succession, and the  
4 decedent's heirs are determined accordingly. If the time  
5 of death of a decedent or of an individual who would  
6 otherwise be an heir, or the times of death of both,  
7 cannot be determined, and it is not established that the  
8 individual who would otherwise be an heir survived the  
9 decedent by one hundred twenty hours, it is deemed that  
10 the individual failed to survive for the required period.

11 This section is not to be applied if its application would  
12 result in a taking of intestate estate by the state under  
13 section three-c of this article.

ARTICLE 3. PROVISIONS RELATING TO HUSBAND OR WIFE OF  
DECEDENT.

§42-3-1. Right to elective share.

1 (a) The surviving spouse of a decedent who dies  
2 domiciled in this state has a right of election, against  
3 either the will or the intestate share, under the  
4 limitations and conditions stated in this part, to take an  
5 elective-share amount equal to the value of the elective-  
6 share percentage of the augmented estate, determined  
7 by the length of time the spouse and the decedent were  
8 married to each other, in accordance with the following  
9 schedule:

10	If the decedent and the spouse	The elective-share
11	were married to each other	percentage is:
12	Less than 1 year . . . . .	Supplemental Amount Only
13	1 year but less than 2 years . . . . .	3% of the augmented estate.
14	2 years but less than 3 years . . . . .	6% of the augmented estate.
15	3 years but less than 4 years . . . . .	9% of the augmented estate.
16	4 years but less than 5 years . . . . .	12% of the augmented estate.
17	5 years but less than 6 years . . . . .	15% of the augmented estate.
18	6 years but less than 7 years . . . . .	18% of the augmented estate.
19	7 years but less than 8 years . . . . .	21% of the augmented estate.
20	8 years but less than 9 years . . . . .	24% of the augmented estate.
21	9 years but less than 10 years . . . . .	27% of the augmented estate.
22	10 years but less than 11 years . . . . .	30% of the augmented estate.
23	11 years but less than 12 years . . . . .	34% of the augmented estate.
24	12 years but less than 13 years . . . . .	38% of the augmented estate.
25	13 years but less than 14 years . . . . .	42% of the augmented estate.
26	14 years but less than 15 years . . . . .	46% of the augmented estate.
27	15 years or more . . . . .	50% of the augmented estate.

28 (b) If the sum of the amounts described in subdivisions  
29 (3) and (4), subsection (b) of section two, and subdivisions  
30 (1) and (3), subsection (a), section six of this article, and  
31 that part of the elective-share amount payable from the  
32 decedent's probate and reclaimable estates under  
33 subsections (b) and (c), section six of this article, is less  
34 than twenty-five thousand dollars, the surviving spouse

35 is entitled to a supplemental elective-share amount  
36 equal to twenty-five thousand dollars, minus the sum of  
37 the amounts described in those sections. The supplemen-  
38 tal elective-share amount is payable from the decedent's  
39 probate estate and from recipients of the decedent's  
40 reclaimable estate in the order of priority set forth in  
41 subsections (b) and (c), section six of this article.

42 (c) The right, if any, of the surviving spouse of a  
43 decedent who dies domiciled outside this state to take  
44 an elective share in property in this state is governed  
45 by the law of the decedent's domicile at death.

**§42-3-2. Augmented estate.**

1 (a) Definitions.

2 (1) In this section:

3 (i) "Bona fide purchaser" means a purchaser for value  
4 in good faith and without notice of an adverse claim. The  
5 notation of a state documentary fee on a recorded  
6 instrument is prima facie evidence that the transfer  
7 described therein was made to a bona fide purchaser.

8 (ii) "Nonadverse party" means a person who does not  
9 have a substantial beneficial interest in the trust or  
10 other property arrangement that would be adversely  
11 affected by the exercise or nonexercise of the power that  
12 he or she possesses respecting the trust or other property  
13 arrangement. A person having a general power of  
14 appointment over property is deemed to have a benefi-  
15 cial interest in the property.

16 (iii) "Presently exercisable general power of appoint-  
17 ment" means a power of appointment under which, at  
18 the time in question, the decedent by an exercise of the  
19 power could have created an interest, present or future,  
20 in himself or herself or his or her creditors.

21 (iv) "Probate estate" means property, whether real or  
22 personal, movable or immovable, wherever situated,  
23 that would pass by intestate succession if the decedent  
24 died without a valid will.

25 (v) "Right to income" includes a right to payments  
26 under an annuity or similar contractual arrangement.



27 (vi) "Value of property owned by the surviving spouse  
28 at the decedent's death" and "value of property to which  
29 the surviving spouse succeeds by reason of the dece-  
30 dent's death" include the commuted value of any present  
31 or future interest then held by the surviving spouse and  
32 the commuted value of amounts payable to the surviving  
33 spouse after the decedent's death under any trust, life  
34 insurance settlement option, annuity contract, public or  
35 private pension, disability compensation, death benefit  
36 or retirement plan, or any similar arrangement,  
37 exclusive of the federal social security system.

38 (2) In subsections (b)(2)(iii) and (iv), "transfer"  
39 includes an exercise or release of a power of appoint-  
40 ment, but does not include a lapse of a power of  
41 appointment.

42 (b) The augmented estate consists of the sum of:

43 (1) The value of the decedent's probate estate, reduced  
44 by funeral and administration expenses and enforceable  
45 claims;

46 (2) The value of the decedent's reclaimable estate. The  
47 decedent's reclaimable estate is composed of all prop-  
48 erty, whether real or personal, movable or immovable,  
49 wherever situated, not included in the decedent's  
50 probate estate, of any of the following types:

51 (i) Property to the extent the passing of the principal  
52 thereof to or for the benefit of any person, other than  
53 the decedent's surviving spouse, was subject to a  
54 presently exercisable general power of appointment  
55 held by the decedent alone, if the decedent held that  
56 power immediately before his or her death, or if and to  
57 the extent the decedent, while married to his or her  
58 surviving spouse and during the two-year period next  
59 preceding the decedent's death, released that power or  
60 exercise that power in favor of any person other than  
61 the decedent or the decedent's estate, spouse or surviv-  
62 ing spouse;

63 (ii) Property, to the extent of the decedent's unilater-  
64 ally severable interest therein, held by the decedent and  
65 any other person, except the decedent's surviving

66 spouse, with right of survivorship, acquired during the  
67 marriage of the decedent and the surviving spouse, if  
68 the decedent held that interest immediately before his  
69 or her death or if and to the extent the decedent, while  
70 married to his or her surviving spouse and during the  
71 two-year period preceding the decedent's death, trans-  
72 ferred that interest to any person other than the  
73 decedent's surviving spouse;

74 (iii) Proceeds of insurance, including accidental death  
75 benefits, on the life of the decedent payable to any  
76 person other than the decedent's surviving spouse, if the  
77 decedent owned the insurance policy, had the power to  
78 change the beneficiary of the insurance policy, or the  
79 insurance policy was subject to a presently exercisable  
80 general power of appointment held by the decedent  
81 alone immediately before his or her death or if and to  
82 the extent the decedent, while married to his or her  
83 surviving spouse and during the two-year period next  
84 preceding the decedent's death, transferred that policy  
85 to any person other than the decedent's surviving spouse;  
86 and

87 (iv) Property transferred by the decedent to any  
88 person other than a bona fide purchaser at any time  
89 during the decedent's marriage to the surviving spouse,  
90 to or for the benefit of any person, other than the  
91 decedent's surviving spouse, if the transfer is of any of  
92 the following types:

93 (A) Any transfer to the extent that the decedent  
94 retained at the time of or during the two-year period  
95 next preceding his or her death the possession or  
96 enjoyment of, or right to income from the property;

97 (B) Any transfer to the extent that, at the time of or  
98 during the two-year period next preceding the dece-  
99 dent's death, the income or principal was subject to a  
100 power, exercisable by the decedent alone or in conjunc-  
101 tion with any other person or exercisable by a nonad-  
102 verse party, for the benefit of the decedent or the  
103 decedent's estate;

104 (C) Any transfer of property, to the extent the  
105 decedent's contribution to it, as a percentage of the

106 whole, was made within two years before the decedent's  
107 death, by which the property is held, at the time of or  
108 during the two-year period next preceding the dece-  
109 dent's death, by the decedent and another, other than the  
110 decedent's surviving spouse, with right of survivorship;  
111 or

112 (D) Any transfer made to a donee within two years  
113 before the decedent's death to the extent that the  
114 aggregate transfers to any one donee in either of the  
115 years exceed ten thousand dollars.

116 (3) The value of property to which the surviving  
117 spouse succeeds by reason of the decedent's death, other  
118 than by testate succession, or intestate succession,  
119 including the proceeds of insurance, including accident-  
120 tal death benefits, on the life of the decedent and  
121 benefits payable under a retirement plan in which the  
122 decedent was a participant, exclusive of the federal  
123 social security system; and

124 (4) The value of property owned by the surviving  
125 spouse at the decedent's death, reduced by enforceable  
126 claims against that property or that spouse, plus the  
127 value of amounts that would have been includible in the  
128 surviving spouse's reclaimable estate had the spouse  
129 predeceased the decedent. But amounts that would have  
130 been includible in the surviving spouse's reclaimable  
131 estate under subsection (b)(2)(iii) are not valued as if he  
132 or she were deceased.

133 (c) Any transfer or exercise or release of a power of  
134 appointment is excluded from the decedent's reclaima-  
135 ble estate (i) to the extent the decedent received  
136 adequate and full consideration in money or money's  
137 worth for the transfer, exercise or release, or (ii) if  
138 irrevocably made with the written consent or joinder of  
139 the surviving spouse.

140 (d) Property is valued as of the decedent's death, but  
141 property irrevocably transferred during the two-year  
142 period next preceding the decedent's death which is  
143 included in the decedent's reclaimable estate under  
144 subsections (b)(2)(i), (ii) and (iv) is valued as of the time  
145 of the transfer. If the terms of more than one of the

146 subparagraphs or sub-subparagraphs of subsection  
147 (b)(2) apply, the property is included in the augmented  
148 estate under the subparagraph or sub-subparagraph  
149 that yields the highest value. For the purposes of this  
150 subsection, an "irrevocable transfer of property"  
151 includes an irrevocable exercise or release of a power  
152 of appointment.

153 (e) (1) Although under this section a payment, item of  
154 property, or other benefit is included in the decedent's  
155 reclaimable estate, a payor or other third party is not  
156 liable for having made a payment or transferred an item  
157 of property or other benefit to a beneficiary designated  
158 in a governing instrument, or for having taken any other  
159 action in good faith reliance on the validity of a  
160 governing instrument, upon request and satisfactory  
161 proof of the decedent's death, before the payor or other  
162 third party received written notice from the surviving  
163 spouse or spouse's representative of an intention to file  
164 a petition for the elective share or that a petition for the  
165 elective share has been filed. A payor or other third  
166 party is liable for payments made or other actions taken  
167 after the payor or other third party received written  
168 notice of an intention to file a petition for the elective  
169 share or that a petition for the elective share has been  
170 filed.

171 (2) The written notice of intention to file a petition for  
172 the elective share or that a petition for the elective share  
173 has been filed must be mailed to the payor's or other  
174 third party's main office or home by registered or  
175 certified mail, return receipt requested, or served upon  
176 the payor or other third party in the same manner as  
177 a summons in a civil action. Upon receipt of written  
178 notice of intention to file a petition for the elective share  
179 or that a petition for the elective share has been filed,  
180 a payor or other third party may pay any amount owed  
181 or transfer or deposit any item of property held by it  
182 to or with the court having jurisdiction of the probate  
183 proceedings relating to the decedent's estate, or if no  
184 proceedings have been commenced, to or with the court  
185 having jurisdiction of probate proceedings relating to  
186 decedents' estates located in the county of the decedent's

187 residence. The court shall hold the funds or item of  
188 property and, upon its determination under subsection  
189 (d) of section four of this article, shall order disburse-  
190 ment in accordance with the determination. If no  
191 petition is filed in the court within the specified time  
192 under subsection (a) of section four of this article or, if  
193 filed, the demand for an elective share is withdrawn  
194 under subsection (c) of section four of this article, the  
195 court shall order disbursement to the designated  
196 beneficiary. Payments, transfers, or deposits made to or  
197 with the court discharge the payor or other third party  
198 from all claims for the value of amounts paid to or items  
199 of property transferred to or deposited with the court.

200 (3) Upon petition to the probate court by the benefi-  
201 ciary designated in a governing instrument, the court  
202 may order that all or part of the property be paid to  
203 the beneficiary in an amount and subject to conditions  
204 consistent with this section.

205 (f) (1) A person who purchases property from a  
206 recipient for value and without notice, or who receives  
207 a payment or other item of property in partial or full  
208 satisfaction of a legally enforceable obligation, is neither  
209 obligated under this part to return the payment, item  
210 of property, or benefit nor is liable under this part for  
211 the amount of the payment or the value of the item of  
212 property or benefit. But a person who, not for value,  
213 receives a payment, item of property, or any other  
214 benefit included in the decedent's reclaimable estate is  
215 obligated to return the payment, item of property, or  
216 benefit, or is personally liable for the amount of the  
217 payment or the value of the item of property or benefit,  
218 as provided in section six of this article.

219 (2) If any section or part of any section of this part  
220 is preempted by federal law with respect to a payment,  
221 an item of property, or any other benefit included in the  
222 decedent's reclaimable estate, a person who, not for  
223 value, receives the payment, item of property, or any  
224 other benefit is obligated to return that payment, item  
225 of property, or benefit, or is personally liable for the  
226 amount of that payment or the value of that item of  
227 property or benefit, as provided in section six of this

228 article to the person who would have been entitled to it  
229 were that section or part of that section not preempted.

**§42-3-3. Right of election personal to surviving spouse.**

1 (a) The right of election may be exercised only by a  
2 surviving spouse who is living when the petition for the  
3 elective share is filed in the court under subsection (a),  
4 section four of this article. If the election is not exercised  
5 by the surviving spouse personally, it may be exercised  
6 on the surviving spouse's behalf by his or her conserva-  
7 tor, guardian, or agent under the authority of a power  
8 of attorney.

9 (b) If the election is exercised on behalf of a surviving  
10 spouse who is an incapacitated person, the court must  
11 set aside that portion of the elective-share and supple-  
12 mental elective-share amounts due from the decedent's  
13 probate estate and recipients of the decedent's reclaim-  
14 able estate under subsections (b) and (c), section six of  
15 this article and must appoint a trustee to administer  
16 that property for the support of the surviving spouse.  
17 For the purposes of this subsection, an election on behalf  
18 of a surviving spouse by an agent under a durable power  
19 of attorney is presumed to be on behalf of a surviving  
20 spouse who is an incapacitated person. The trustee must  
21 administer the trust in accordance with the following  
22 terms and such additional terms as the court determines  
23 appropriate:

24 (1) Expenditures of income and principal may be  
25 made in the manner, when, and to the extent that the  
26 trustee determines suitable and proper for the surviving  
27 spouse's support, without court order but with regard  
28 to other support, income, and property of the surviving  
29 spouse and benefits of medical or other forms of  
30 assistance from any state or federal government or  
31 governmental agency for which the surviving spouse  
32 must qualify on the basis of need;

33 (2) During the surviving spouses's incapacity, neither  
34 the surviving spouse nor anyone acting on behalf of the  
35 surviving spouse has a power to terminate the trust; but  
36 if the surviving spouse regains capacity, the surviving  
37 spouse then acquires the power to terminate the trust

38 and acquire full ownership of the trust property free of  
39 trust, by delivering to the trustee a writing signed by  
40 the surviving spouse declaring the termination;

41 (3) Upon the surviving spouse's death, the trustee shall  
42 transfer the unexpended trust property under the  
43 residuary clause, if any, of the will of the predeceased  
44 spouse against whom the elective share was taken, as if  
45 that predeceased spouse died immediately after the  
46 surviving spouse, or, if there was no residuary clause or  
47 no will of that predeceased spouse, to the persons and  
48 in such shares as would succeed to that predeceased  
49 spouse's intestate estate as if that predeceased spouse  
50 died immediately after the surviving spouse.

**§42-3-3a. Waiver of right to elect; other rights.**

1 (a) The right of election of a surviving spouse may be  
2 waived, wholly or partially, before or after marriage, by  
3 a written contract, agreement, or waiver signed by the  
4 surviving spouse.

5 (b) A surviving spouse's waiver is not enforceable if  
6 the surviving spouse proves that:

7 (1) He or she did not execute the waiver voluntarily;  
8 or

9 (2) The waiver was unconscionable when it was  
10 executed and, before execution of the waiver, he or she:

11 (i) Was not provided a fair and reasonable disclosure  
12 of the property or financial obligations of the decedent;

13 (ii) Did not voluntarily and expressly waive, in  
14 writing, any right to disclosure of the property or  
15 financial obligations of the decedent beyond the disclo-  
16 sure provided; and

17 (iii) Did not have, or reasonably could not have had,  
18 an adequate knowledge of the property or financial  
19 obligations of the decedent.

20 (c) An issue of unconscionability of a waiver is for  
21 decision by the court as a matter of law.

22 (d) Unless it provides to the contrary, a waiver of "all  
23 rights," or equivalent language, in the property or estate

24 of a present or prospective spouse or a complete  
25 property settlement entered into after or in anticipation  
26 of separation or divorce is a waiver of all rights of  
27 elective share by each spouse in the property of the other  
28 and renunciation by each of all benefits that would  
29 otherwise pass to him or her from the other by intestate  
30 succession or by virtue of any will executed before the  
31 waiver or property settlement.

**§42-3-4. Proceeding for elective share; time limit.**

1 (a) Except as provided in subsection (b), the election  
2 must be made by filing in the court and mailing or  
3 delivering to the personal representative, if any, a  
4 petition for the elective share within nine months after  
5 the date of the decedent's death, or with six months after  
6 the probate of the decedent's will, whichever limitation  
7 later expires. The surviving spouse must give notice of  
8 the time and place set for hearing to persons interested  
9 in the estate and to the distributees and recipients of  
10 portions of the augmented estate whose interests will be  
11 adversely affected by the taking of the elective share.  
12 Except as provided in subsection (b), the decedent's  
13 reclaimable estate, described in subdivision (2), subsection  
14 (b), section two of this article, is not included within  
15 the augmented estate for the purpose of computing the  
16 elective share, if the petition is filed more than nine  
17 months after the decedent's death.

18 (b) Within nine months after the decedent's death, the  
19 surviving spouse may petition the court for an extension  
20 of time for making an election. If, within nine months  
21 after the decedent's death, the spouse gives notice of the  
22 petition to all persons interested in the decedent's  
23 reclaimable estate, against whom the spouse chooses to  
24 proceed under subsection (d) of this section, the court for  
25 cause shown by the surviving spouse may extend the  
26 time for election. If the court grants the spouse's petition  
27 for an extension, the decedent's reclaimable estate,  
28 described in subdivision (2), subsection (b), section two  
29 of this article, in the hands of those persons against  
30 whom the spouse chooses to proceed under subsection (d)  
31 of this section, is not excluded from the augmented  
32 estate for the purpose of computing the elective-share



33 and supplemental elective-share amounts, if the spouse  
34 makes an election by filing in the court and mailing or  
35 delivering to the personal representative, if any, a  
36 petition for the elective share within the time allowed  
37 by the extension.

38 (c) The surviving spouse may withdraw his or her  
39 demand for an elective share at any time before entry  
40 of a final determination by the court.

41 (d) After notice and hearing, the court shall determine  
42 the elective share and supplemental elective-share  
43 amounts, and shall order its payment from the assets of  
44 the augmented estate or by contribution as appears  
45 appropriate under section six of this article. If it  
46 appears that a fund or property included in the  
47 augmented estate has not come into the possession of the  
48 personal representative, or has been distributed by the  
49 personal representative, the court nevertheless shall fix  
50 the liability of any person who has any interest in the  
51 fund or property or who has possession thereof, whether  
52 as trustee or otherwise. The proceeding may be main-  
53 tained against fewer than all persons against whom  
54 relief could be sought, but no person is subject to  
55 contribution in any greater amount than he or she would  
56 have been under section two had relief been secured  
57 against all persons subject to contribution.

58 (e) An order or judgment of the court may be enforced  
59 as necessary in suit for contribution or payment in other  
60 courts of this state or other jurisdictions.

#### CHAPTER 44. ADMINISTRATION OF ESTATES AND TRUSTS.

##### §44-1-14. Appraisal of estates in triplicate; disposition; authority of appraisers to act throughout the state; hiring of experts.

1 The real and personal estate of every deceased person,  
2 or in which such deceased person had an interest at the  
3 time of his or her death, shall be appraised by the  
4 personal representative of such deceased person. Such  
5 personal representative, after first taking an oath for  
6 the purpose, shall list and appraise at its real and actual

7 value all the real estate and all the tangible property  
8 of every description owned by the deceased at the time  
9 of his or her death including, but not limited to, all real  
10 estate and tangible property in which the decedent had  
11 an interest as joint tenant or otherwise or in which any  
12 beneficial interest passes to another person by reason of  
13 the death of such decedent whose estate is being so  
14 appraised and irrespective of whether such real estate  
15 or tangible property is subject to administration and  
16 located in each county or the counties, as the case may  
17 be. The personal representative shall also list and  
18 appraise at its real and actual value all of the decedent's  
19 intangible property of every description, including  
20 moneys, credits, investments, annuities, life insurance  
21 policies, (irrespective of whether such policies are  
22 payable to named beneficiaries or in trust or otherwise),  
23 judgments and decrees for moneys, notes, bonds,  
24 accounts and all other evidences of debt, whether owing  
25 to him or her by persons or corporations in or out of the  
26 state, and the number and value, including both the par  
27 value, if any, and the actual value, of any shares of  
28 capital stock owned by the decedent in any corporation,  
29 and every other item of intangible property of what-  
30 soever nature or kind, including all intangible property  
31 in which the decedent had an interest as joint tenant or  
32 otherwise or in which any beneficial interest passes to  
33 another by reason of the death of such decedent, and  
34 irrespective of whether such intangible property is  
35 subject to administration and whether located in this  
36 state or elsewhere. Any real estate or interest therein  
37 so appraised shall be identified with particularity and  
38 description, shall identify the source of title in the  
39 decedent and the location of such realty for purposes of  
40 real property ad valorem taxation. In addition to all  
41 other information required by law, the appraisalment  
42 shall contain and include a questionnaire designed and  
43 formulated by the tax commissioner which is designed  
44 for the purpose of examining the personal representa-  
45 tive to determine that he or she has made a thorough  
46 and proper search and investigation as to the existence  
47 and value of each and every kind and species of property  
48 required to be included within, and subject to appraise-

49 ment by, the provisions of this or any other section of  
50 this code, which said questionnaire shall be completed  
51 and answered upon the oath or adjuration of the  
52 personal representative or fiduciary.

53 The appraisalment, list and questionnaire aforesaid  
54 shall be executed in triplicate and shall be signed by the  
55 personal representative and be forthwith returned to the  
56 clerk of the county commission by whom such personal  
57 representative was appointed or to the fiduciary  
58 supervisor. Such clerk or supervisor shall inspect such  
59 appraisalment, list and questionnaire, see that the same  
60 are in proper form, and that all property, if any,  
61 suggested by the questionnaire is included within the  
62 appraisalment. If such appraisalment, list and question-  
63 naire are returned to a fiduciary supervisor within ten  
64 days after they are received and approved by him or  
65 her, such supervisor shall deliver two copies of the same  
66 to the clerk of the county commission. Upon receipt of  
67 the appraisalment, list and questionnaire, the clerk of the  
68 county commission shall record the same, with the  
69 certificate of approval of the supervisor, and mail one  
70 copy of the same to the tax commissioner of West  
71 Virginia. The date of return of an appraisalment shall  
72 be entered by the clerk of the county commission in his  
73 or her record of fiduciaries. Every such appraisalment  
74 and list shall be prima facie evidence of the value of the  
75 property embraced therein, and that the personal estate  
76 embraced therein which is subject to administration  
77 came to the hands of the personal representative. No  
78 person shall be permitted by any means whatsoever to  
79 avoid the appraisalment and listing of his or her estate  
80 and of all property, real, tangible and intangible, of  
81 whatsoever nature and kind, in which a beneficial  
82 interest passes to another by reason of the death of the  
83 decedent and irrespective of whether such property is  
84 subject to administration as herein provided, nor shall  
85 his or her personal representative be permitted to do so.  
86 Any personal representative who fails, refuses or  
87 declines to comply with the provisions of this section  
88 shall be guilty of a misdemeanor, and, upon conviction  
89 thereof, shall be fined not less than twenty-five dollars  
90 nor more than five hundred dollars.

91 Every personal representative shall have authority to  
 92 retain or hire the services of such expert or experts as  
 93 may be deemed appropriate to assist and advise him or  
 94 her in and about his or her duties in appropriately and  
 95 accurately appraising all or any part of the assets or  
 96 property to be appraised according to the provisions of  
 97 this section. Such expert or experts so retained or hired  
 98 shall be compensated a reasonable sum by the personal  
 99 representative from the assets coming into his or her  
 100 hands or of which he or she is embraced, which  
 101 compensation and the reasonableness thereof shall be  
 102 subject to review and approval by the county commis-  
 103 sion, upon recommendation of the fiduciary supervisor.

#### CHAPTER 58. APPEAL AND ERROR.

##### ARTICLE 3. APPEALS FROM COUNTY COMMISSIONS.

##### §58-3-1. When appeal lies to circuit court.

1 An appeal shall lie to the circuit court of the county  
 2 from the final order of the county commission in the  
 3 following cases: (a) In cases of contested elections tried  
 4 and determined by such court; (b) in cases of contempt;  
 5 (c) the establishment and regulation of a road, way,  
 6 bridge, public landing, ferry or mill; (d) the probate of  
 7 a will; (e) the appointment and qualification of a  
 8 personal representative, guardian, including, but not  
 9 limited to, all fiduciaries made pursuant to article ten-  
 10 a, chapter forty-four of this code, or committee, and the  
 11 settlement of their accounts; (f) the disposition of  
 12 disputes arising from the provisions of article three,  
 13 chapter forty-two of this code, which appeal shall be de  
 14 novo; (g) in any other case by law specially provided.

##### §58-3-1a. Procedures for appeals.

1 Any interested person may appeal the final order of  
 2 the county commission described by the provisions of  
 3 subdivision (f), section one of this article to the circuit  
 4 court as a matter of right by requesting the appeal  
 5 within four months after the final order of the county  
 6 commission is rendered. The appeal shall be determined  
 7 by trial de novo. Upon receipt of the request for appeal,  
 8 the clerk of the county commission shall collect the

9 circuit court filing fee therefor and forward the same,  
10 together with the final order and the request, to the  
11 clerk of the circuit court. The court may require the  
12 clerk of the county commission to file with the circuit  
13 clerk all or any portion of the record of the proceedings  
14 which resulted in the final order. No bond may be  
15 required from any party to the appeal. The final order  
16 of the county commission shall be stayed pending the  
17 appeal proceedings. If, after the appeal is filed in the  
18 circuit court, the matter is not brought on for hearing  
19 before the end of the second term thereafter, the appeal  
20 shall be considered abandoned and shall be dismissed at  
21 the cost of the appellant unless sufficient cause is shown  
22 for a further continuance. Upon such dismissal, the final  
23 order of the county commission is affirmed. No appeal  
24 which has been so dismissed by the circuit court may  
25 be reinstated after the expiration of the next regular  
26 term following such dismissal.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

*[Handwritten Signature]*  
.....  
Chairman Senate Committee

*Ernest C Moore*  
.....  
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

*[Handwritten Signature]*  
.....  
Clerk of the Senate

*[Handwritten Signature]*  
.....  
Clerk of the House of Delegates

*[Handwritten Signature]*  
.....  
President of the Senate

*[Handwritten Signature]*  
.....  
Speaker of the House of Delegates

The within *is* approved this the *12<sup>th</sup>*  
day of *May*, 1993.

*[Handwritten Signature]*  
.....  
Governor

PRESENTED TO THE

GOVERNOR

Date 4/27/93

Time 2:23 PM