

ADVISORY OPINION NO. 2009-07

Issued On July 9, 2009 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commissioner** requests guidance on several issues relating to the drafting of wills and administration of estates through his private law practice.

- (1) May a County Commissioner who is also an attorney prepare wills which may later be probated in the County in which he serves as a County Commissioner? If so, is he required to recuse himself from any probate matters coming before the County Commission when he has prepared the will which is being probated?
- (2) May a County Commissioner who is also an attorney represent a party in a probate proceeding when it involves an uncontested estate if he recuses himself from voting?
- (3) If an attorney who is also a County Commissioner prepared a will which is later challenged and is called as a witness to the validity of the will, may the remaining two County Commissioners hear the evidence, or must they recuse themselves and transfer the matter to Circuit Court?

FACTS RELIED UPON BY THE COMMISSION

In West Virginia, as in other states, there are specific statutory provisions that govern the administration of a decedent's estate.¹ If there is a will, the custodian must file the original will in the County Clerk's Office within thirty days of the testator's death, or deliver it to the Executor who must file it within a reasonable period of time. W. Va. Code§ 41-5-1. Then, the County Clerk appoints a personal representative to serve as the Fiduciary of the estate. This person is referred to as the Executor or Executrix, if the person has been designated as such in the will, or the Administrator or Administratrix, if he or she was not specifically designated in the will. For purposes of this opinion, the Fiduciary of the estate will be referred to as the Executor.

The Executor is responsible for completing an inventory and appraisal of the estate. At times, normally for more complex estates, the Executor retains an attorney to assist in this process. Once this process has been completed, potential creditors of the estate are put on notice. The Executor files a final settlement report of the estate with the

¹ See generally, "Overview of the estate Administration Process" published by Kanawha County Commission Office of the Fiduciary. Further note that the process varies from County to County as some counties have a Fiduciary Supervisor. W.Va. Code§ 44-3A-1 *et seq.*

County Clerk. W. Va. Code§ 44-4-14a. The County Clerk sends the final report to the County Commission for approval. W. Va. Code§ 44-4-18. Once approved, the final settlement is binding and conclusive upon creditors and beneficiaries of the estate.

Some estates may be contested. For example, a potential beneficiary may claim that the will was not properly executed or that the testator was not competent. In contested cases, the County Commission may appoint a Fiduciary Commissioner to hear evidence. W. Va. Code§ 44-3-7. See *also* W. Va. Code§ 44-3A-41. Fiduciary Commissioners may also be appointed for larger estates.

The Fiduciary Commissioner makes a recommended decision to the County Commission regarding controversies arising during the course of probate. Normally, although the Fiduciary Commissioner hears testimony and reviews evidence, the County Commission may elect to allow witnesses to testify at a hearing before the County Commission. W. Va. Code§ 44-2-19. Parties have the right to appeal findings of the County Commission to Circuit Court.

The Requester is a County Commissioner. He is also a licensed attorney. Through his private law practice, he drafts wills which may later be probated in the County in which he serves. He has also represented estates in uncontested probate matters.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) reads in relevant part:

A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person.

W. Va. Code § 6B-2-5(g) reads in relevant part:

Except as otherwise provided in section three, four or five, article two, chapter eight-a of this code: (1) No elected ... public official ... shall, during his or her public service ... with a governmental entity authorized to hear contested cases or promulgate or propose rules, appear in a representative capacity before the governmental entity in which he or she serves ... in the following matters:

- (A) A contested case involving an administrative sanction, action or refusal to act;
- (B) To support or oppose a proposed rule;
- (C) To support or contest the issuance or denial of a license or permit;
- (D) A rate-making proceeding; and
- (E) To influence the expenditure of public funds.

(2) As used in this subsection, "represent" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person: *Provided*, That nothing contained in this subsection shall prohibit, during any period, a former public official or employee from being retained by or employed to represent, assist or act in a representative capacity on behalf of the public agency by which he or she was employed or in which he or she served....

W. Va. Code § 6B-2-5U) reads in relevant part

U) *Limitations on Voting.*

(1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, may not vote on a matter:

(A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

W. Va. Code§ 29A-1-2 defines "Contested Case" as:

[A] proceeding before an agency in which the legal rights, duties, interests or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing, but does not include cases in which an agency issues a license, permit or certificate after an examination to test the knowledge or ability of the applicant where the controversy concerns whether the examination was fair or whether the applicant passed the examination and shall not include rule making.

ADVISORY OPINION

First, it is the opinion of the Ethics Commission that the Requester in his private law practice may prepare wills. There is nothing in the Ethics Act which prohibits this practice. If the Requester has prepared a will, then he should recuse himself from any matters coming before the County Commission involving the probate of the subject estate. The Ethics Commission recommends full recusal in all such situations. Full recusal requires, when the Commission addresses the agenda item requiring it to consider probating wills, including one or more prepared by the Requester, that the Requester discloses the fact that he has prepared one or more of the wills now pending before the Commission, and then physically removes himself from the room during the discussion, deliberation, and disposition of all such wills that he has prepared.

Second, the Ethics Commission must consider whether the Requester may represent a party in a probate proceeding when it involves an uncontested estate. The Ethics Act prohibits a public official from appearing before his or her agency in a contested proceeding involving an administrative sanction, action or refusal to act. See W. Va. Code § 6B-2-5(g)(A).

Normally, an uncontested estate matter generally refers to a probate matter wherein there are no heirs who dispute the accounting of the Estate and proposed distribution. In these matters, normally the County Commission signs-off on the final order as a matter of course. However, while a will may be "uncontested" as that term is used in the probate process, that does not necessarily mean that the proceeding is an uncontested case for purposes of the Ethics Act.

The Ethics Act does not contain a definition for the term "contested case." As such, the Commission elects to rely upon the definition provided in the Administrative Procedure Act which reads:

[A] proceeding before an agency in which the legal rights, duties, interests or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing, but does not include cases in which an agency issues a license, permit or certificate after an examination to test the knowledge or ability of the applicant where the controversy concerns whether the examination was fair or whether the applicant passed the examination and shall not include rule making.

W. Va. Code§ 29A-1-2.

The above cited definition for a contested case states that it involves legal rights which must be determined after an agency hearing. The Ethics Commission finds that while a County Commission does not hold a hearing in the traditional sense when it signs off on final orders in uncontested matters, still, the meeting at which this occurs constitutes a hearing for purposes of the Ethics Act. In reaching this conclusion, the Commission relies in part upon the definition of "contested case" in the Administrative Procedures Act as well as language in the code relating to the Administration of Estates wherein the code states, "The hearing on the report of claims returned by a fiduciary commission shall be had at the first term of the county commission." W.Va. Code§ 44-2-19 and W.Va. Code§ 44-3A-22. In essence, the County Commission acts as a quasi-judicial body, even in estate matters that are not in dispute. The Commission finds that what constitutes a contested case for purposes of the Ethics Act is not determined by whether there is or is not someone who takes exception to a matter pending before an agency, but whether it is a matter requiring quasi-judicial action by an agency.

As such, the Ethics Commission finds the Requester **may not** appear in a representative capacity in a probate proceeding, contested or uncontested, before the

County Commission. An appearance, as defined by the Ethics Act, includes any "formal or informal appearance before, or any written or oral communications with, any public agency on behalf of any person." W. Va. Code § 68-2-5(g)(2). This limitation further precludes the Requester from communicating for purposes of effecting the administration of an Estate with a County Clerk, Fiduciary Supervisor, Fiduciary Commissioner, the County Commission or the staff of any of these persons or entities involved in probating a will.

Finally, the Requester asks whether, if he is called as a witness to the validity of a will, the remaining County Commissioners may still hear the case. There appears to be no procedure in the Code which allows a County Commission to transfer its ultimate responsibility in probate matters to the Circuit Court or to another county agency. In such a case, however, the Ethics Commission finds that the County Commission should, as permitted by the Code, appoint a Fiduciary Commissioner to hear any evidence and to make a recommended decision to the remaining County Commissioners since the Code provides no alternative venue. The code provision allowing for this states, "Any party may except to the [fiduciary] commissioner's finding of fact and law, and the [county] commission shall hear the case on the [fiduciary] commissioner's report and the exceptions thereto, without taking any additional evidence." W. Va. Code §§ 44-3-7 and 44-3A-41. Any County Commissioner who is a witness in a probate matter shall recuse himself from any decisions made by the County Commission in rendering a decision in the case. *See also*, W. Va. Code § 7-1-5a entitled "Excusal of commissioner from voting where conflict of interest involved."

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et. seq.*, and does not purport to interpret other laws or rules. In accordance with W. Va. Code § 68-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

/s/ Drema Radford, Vice Chair
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