

1 **H. B. 4612**

2
3 (By Delegates Boggs, Ellem, Ferro and Miley)
4 [Introduced February 17, 2012; referred to the
5 Committee on the Judiciary.]
6
7
8
9

10 A BILL to amend and reenact §41-1-6 of the Code of West Virginia,
11 1931, as amended, and to amend and reenact §42-1-1 of said
12 code, all relating to automatic revocation of a will upon
13 legal separation and excluding from the definition of
14 "surviving spouse", for purposes of descent and distribution,
15 a person who is a party to a decree of legal separation.

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

17 That §41-1-6 of the Code of West Virginia, 1931, as amended,
18 be amended and reenacted; and that §42-1-1 of said code be amended
19 and reenacted, all to read as follows:

20 **CHAPTER 41. WILLS.**

21 **ARTICLE 1. CAPACITY TO MAKE; REQUISITES; VALIDITY.**

22 **§41-1-6. Revocation by divorce, annulment and legal separation; no**
23 **revocation by other changes of circumstances.**

1 (a) If after executing a will the testator is divorced,
2 legally separated or his or her marriage annulled, the divorce,
3 legal separation or annulment revokes any disposition or
4 appointment of property made by the will to the former spouse, any
5 provision conferring a general or special power of appointment on
6 the former spouse and any nomination of the former spouse as
7 executor, trustee, conservator or guardian, unless the will
8 expressly provides otherwise. Property prevented from passing to
9 a former spouse because of revocation by divorce, legal separation
10 or annulment passes as if the former spouse failed to survive the
11 decedent, except that the provisions of section three, article
12 three, chapter forty-one do not apply and other provisions
13 conferring some power or office on the former spouse are
14 interpreted as if the spouse failed to survive the decedent. If
15 provisions are revoked solely by this section, they are revived by
16 testator's remarriage to the former spouse. For purposes of this
17 section, divorce, legal separation or annulment means any divorce,
18 legal separation or annulment which would exclude the spouse as a
19 surviving spouse. ~~A decree of separation which does not terminate~~
20 ~~the status of husband and wife is not a divorce for purposes of~~
21 ~~this section.~~ No change of circumstances other than as described
22 in this section revokes a will.

23 (b) This section applies to all divorces, legal separations,
24 annulments or remarriages which become effective after June 5,

1 1992.

2 **CHAPTER 42. DESCENT AND DISTRIBUTION.**

3 **ARTICLE 1. DESCENT.**

4 **§42-1-1. General definitions.**

5 Subject to additional definitions contained in the subsequent
6 articles that are applicable to specific articles, parts or
7 sections, and unless the context otherwise requires in this code:

8 (1) "Agent" includes an attorney-in-fact under a durable or
9 nondurable power of attorney, an individual authorized to make
10 decisions concerning another's health care and an individual
11 authorized to make decisions for another under a natural death act.

12 (2) "Beneficiary" as it relates to a trust beneficiary
13 includes a person who has ~~any~~ a present or future interest, vested
14 or contingent, and also includes the owner of an interest by
15 assignment or other transfer. As ~~it~~ "beneficiary" relates to a
16 charitable trust, it includes any person entitled to enforce the
17 trust. As ~~it~~ "beneficiary" relates to a "beneficiary of a
18 beneficiary designation", it refers to a beneficiary of an account
19 with POD designation, ~~of~~ to a security registered in beneficiary
20 form (TOD) or other nonprobate transfer at death. ~~and,~~ As ~~it~~
21 "beneficiary" relates to a "beneficiary designated in a governing
22 instrument", it includes a grantee of a deed, a devisee, a trust
23 beneficiary, a beneficiary of a beneficiary designation or a person
24 in whose favor a power of attorney or a power held in any

1 individual, fiduciary or representative capacity is exercised.

2 (3) "Court" means the county commission or branch in this
3 state having jurisdiction in matters relating to the affairs of
4 decedents.

5 (4) "Conservator" means a person who is appointed by a court
6 to manage the estate of a protected person.

7 (5) "Descendant" of an individual means all of his or her
8 descendants of all generations, with the relationship of parent and
9 child at each generation being determined by the definition of
10 child and parent contained in this code.

11 (6) "Devise" when used as a noun, means a testamentary
12 disposition of real or personal property and, when used as a verb,
13 means to dispose of real or personal property by will.

14 (7) "Devisee" means a person designated in a will to receive
15 a devise. In the case of a devise to an existing trust or trustee
16 or to a trustee on trust described by will, the trust or trustee is
17 the devisee and the beneficiaries are not devisees.

18 (8) "Distributee" means any person who has received property
19 of a decedent from his or her personal representative other than as
20 a creditor or purchaser. A testamentary trustee is a distributee
21 only to the extent of distributed assets or increment thereto
22 remaining in his or her hands. A beneficiary of a testamentary
23 trust to whom the trustee has distributed property received from a
24 personal representative is a distributee of the personal

1 representative. For the purposes of this provision, "testamentary
2 trustee" includes a trustee to whom assets are transferred by will
3 to the extent of the devised assets.

4 (9) "Estate" includes the property of the decedent, trust or
5 other person whose affairs are subject to this code as originally
6 constituted and as it exists from time to time during
7 administration.

8 (10) "Exempt property" means that property of a decedent's
9 estate which is provided ~~for~~ in section forty-eight, article VI of
10 the Constitution.

11 (11) "Fiduciary" includes a personal representative, guardian,
12 conservator and trustee.

13 (12) "Foreign personal representative" means a personal
14 representative appointed by another jurisdiction.

15 (13) "Formal proceedings" means proceedings conducted before
16 a judge with notice to interested persons.

17 (14) "Governing instrument" means a deed, will, trust,
18 insurance or annuity policy, account with POD designation, security
19 registered in beneficiary form (TOD), pension, profit-sharing,
20 retirement or similar benefit plan, instrument creating or
21 exercising a power of appointment or a power of attorney or a
22 donative, appointive or nominative instrument of any other type.

23 (15) "Guardian" means a person who has qualified as a guardian
24 of a minor or incapacitated person pursuant to testamentary or

1 court appointment but excludes one who is merely a guardian ad
2 litem.

3 (16) "Heirs" means persons, including the surviving spouse and
4 the state, who are entitled under the statutes of intestate
5 succession to the property of a decedent.

6 (17) "Informal proceedings" mean those conducted without
7 notice to interested persons by an officer of the court acting as
8 a registrar for probate of a will or appointment of a personal
9 representative.

10 (18) "Interested person" includes heirs, devisees, children,
11 spouses, creditors, beneficiaries and any others having a property
12 right in or claim against a trust estate or the estate of a
13 decedent, ward or protected person. It also includes persons
14 having priority for appointment as personal representative and
15 other fiduciaries representing interested persons. The meaning as
16 it relates to particular persons may vary from time to time and
17 must be determined according to the particular purposes of, and
18 matter involved in, any proceeding.

19 (19) "Issue" of a person means descendant as defined in
20 subdivision (5) of this section.

21 (20) "Joint tenants with the right of survivorship" and
22 "community property with the right of survivorship" includes
23 coowners of property held under circumstances that entitle one or
24 more to the whole of the property on the death of the other or

1 others, but excludes forms of coownership registration in which the
2 underlying ownership of each party is in proportion to that party's
3 contribution.

4 (21) "Lease" includes an oil, gas or other mineral lease.

5 (22) "Letters" includes letters testamentary, letters of
6 guardianship, letters of administration and letters of
7 conservatorship.

8 (23) "Minor" means a person who is under eighteen years of
9 age.

10 (24) "Mortgage" means any deed of trust, conveyance, agreement
11 or arrangement in which property is encumbered or used as security.

12 (25) "Nonresident decedent" means a decedent who was domiciled
13 in another jurisdiction at the time of his or her death.

14 (26) "Parent" includes any person entitled to take, or who
15 would be entitled to take if the child died without a will, as a
16 parent under this code by intestate succession from the child whose
17 relationship is in question and excludes any person who is only a
18 stepparent, foster parent or grandparent.

19 (27) "Payor" means a trustee, insurer, business entity,
20 employer, government, governmental agency or subdivision or any
21 other person authorized or obligated by law or a governing
22 instrument to make payments.

23 (28) "Person" means an individual or an organization.

24 (29) "Personal representative" includes executor,

1 administrator, successor personal representative, special
2 administrator and persons who perform substantially the same
3 function under the law governing their status. "General personal
4 representative" excludes special administrator.

5 (30) "Petition" means a written request to the court for an
6 order after notice.

7 (31) "Proceeding" includes action at law and suit in equity.

8 (32) "Property" includes both real and personal property or
9 any interest therein and means anything that may be the subject of
10 ownership.

11 (33) "Security" includes any note, stock, treasury stock,
12 bond, debenture, evidence of indebtedness, certificate of interest
13 or participation in an oil, gas or mining title or lease or in
14 payments out of production under such a title or lease, collateral
15 trust certificate, transferable share, voting trust certificate or,
16 in general, any interest or instrument commonly known as a security
17 or any certificate of interest or participation, any temporary or
18 interim certificate, receipt or certificate of deposit for, or any
19 warrant or right to subscribe to or purchase, any of the foregoing.

20 (34) "Settlement" in reference to a decedent's estate,
21 includes the full process of administration, distribution and
22 closing.

23 (35) "State" means a state of the United States, the District
24 of Columbia, the Commonwealth of Puerto Rico or any territory or

1 insular possession subject to the jurisdiction of the United
2 States.

3 (36) "Successor personal representative" means a personal
4 representative, other than a special administrator, who is
5 appointed to succeed a previously appointed personal
6 representative.

7 (37) "Successors" means persons, other than creditors, who are
8 entitled to property of a decedent under his or her will or this
9 code.

10 (38) "Survive" means that an individual has neither
11 predeceased an event, including the death of another individual,
12 nor is deemed to have predeceased an event. The term includes its
13 derivatives, such as "survives", "survived", "survivor" and
14 "surviving".

15 (39) "Surviving spouse" means the person to whom the decedent
16 was married at the time of the decedent's death except that a
17 person who is a named party to a decree of legal separation is not
18 deemed a surviving spouse.

19 (40) "Testacy proceeding" means a proceeding to establish a
20 will or determine intestacy.

21 (41) "Testator" includes an individual of either sex.

22 (42) "Trust" includes an express trust, private or charitable,
23 with additions thereto, wherever and however created. The term
24 also includes a trust created or determined by judgment or decree

1 under which the trust is to be administered in the manner of an
2 express trust. The term excludes other constructive trusts and
3 excludes resulting trusts, conservatorships, personal
4 representatives and custodial arrangements including that relating
5 to gifts or transfers to minors, dealing with special custodial
6 situations, business trusts providing for certificates to be issued
7 to beneficiaries.

8 (43) "Trustee" includes an original, additional or successor
9 trustee, whether or not appointed or confirmed by court.

10 (44) "Will" includes codicil and any testamentary instrument
11 that merely appoints an executor, revokes or revises another will,
12 nominates a guardian or expressly excludes or limits the right of
13 an individual or class to succeed to property of the decedent
14 passing by intestate succession.

NOTE: The purpose of this bill is to automatically revoke a will following a legal separation and to exclude from the definition of "surviving spouse", for purposes of descent and distribution, a person who is a party to a decree of legal separation.

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