



73rd Annual West Virginia Tax Institute

Estate & Trust Update

October 24, 2022

Presenter



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Developments in Estates & Trusts

- **Recent Developments**

- WV Revised Uniform Fiduciary Access to Digital Assets Act (2019)
- WV Ancillary Estate Administration (2019)
- WV Unprogressed Estates (2019)
- WV Uniform Decanting Act (2020)
- WV Uniform Directed Trust Act (2020)
- WV Revised Uniform Notarial Acts (2020)
- SECURE Act (Retirement Benefit Income Taxation) (January 1, 2020)
- Small Asset Administration and Small Estate Administration (July 1, 2021)
- **WV Health Care Decisions Act (2022) [Senate Bill 470]**

- **Prospective Developments**

- Revised Uniform Principal and Income Act
- Uniform Electronic Wills Act
- Reformation/Clarification of law govern real estate title shooting from decedent

Resource Materials

- Intestate Distributions – Pamphlet Private Administration of Small Assets Affidavit (2021)
 - Small assets not more than \$5,000
- Small Estate Administration Forms (2021)
 - Personal Property Not More than \$50,000 and Real Property Not More than \$100,000
- Ancillary Administration Forms (2019)
 - Out of State decedent with WV real property
- WV Center for End-of-Life Care Resources
 - Mental Health Advance Directive (2022)
- Healthcare Forms
 - Redlined Combined Medical Power of Attorney/Living Will Statutory Form (2022)
 - Other Forms (PHI Release, POST, etc.)
- General Durable Power of Attorney Statutory Form

Estate & Gift Taxes

- **Per Person 2022 Exclusion Amount**
 - Single: \$10 million (2010) exemption indexed for inflation (**\$12,060,000 in 2022**)
 - Married: \$20 million (2010) exemption indexed for inflation (**\$24,120,000 in 2022**)
- **Projected Per Person 2026 Exclusion Amount:**
 - Single: \$5 million 2010 exemption indexed for inflation (**estimated \$6,000,000 in 2026**)
 - Married: \$10 million 2010 exemption indexed for inflation (**estimated \$12,000,000 in 2026**)
- **Marginal Estate Tax & Gift Tax Rate: 40%**
- **Special Rules for non-US domiciled individuals**
- **Gift Tax Annual Exclusion: \$16,000 per donee**
 - Exclusions for medical and educational expenses paid directly to the provider.
- **Portability of Exclusion Amount:** the Deceased Spouse Unused Exclusion Amount (DSEAU) can be ported over to the surviving spouse if the portability election is made on time filed federal estate tax return.
- **Clawback Rules:**
 - If a taxpayer has cumulative taxable gifts of \$12,060,000 in 2022, then he will have a zero Exclusion Amount.
 - If taxpayer dies in 2026, the IRS cannot clawback a 2022 gift of \$12,060,000 to require the decedent's estate to pay estate taxes in 2026 on the taxable gifts in excess of the 2026 exclusion.
 - If the taxpayer has cumulative taxable gifts of \$6,000,000 in 2022, then he will have zero Exclusion Amount in 2026 if the Exclusion Amount is \$6,000,000 in 2026.

Federal Income Taxation of Estates & Trusts

- **Compressed estate and trust income tax rates**
 - Highest marginal income tax rate (37%) above \$13,450.
 - Distributions to beneficiaries carry out the distributable net income (DNI) in that tax year income to the beneficiaries (but not capital gains) and the beneficiaries report the income on their personal tax return.
 - Tax burden on the family is increased if the undistributed income of the trust is taxed at a higher tax rate than the beneficiary's income tax rate.
 - Capital gains are carried out to beneficiaries in last tax year.
 - WV highest income tax marginal rate is 6.5%.
 - There is proposed legislation to reduce or eliminate WV trust income taxes
- **Step up/down in tax basis of decedent's assets upon death**

WV Income Taxation of Non-Grantor Trusts

- **WV Resident Trust and Non-Resident Trust**
 - WV 11-21-7(c) will treat a trust as a Resident Trust if:
 - The trust was created by a will of decedent domiciled in WV
 - The trust was created by a grantor who was domiciled in WV at time of creation of trust
 - Resident Trust pays WV income taxes on all undistributed income (but there are potential credits for taxes paid to other states)
 - Non-Resident Trust pays WV income taxes only on WV “source income”
 - Trustee of a non-resident trust must withhold on certain trust income

Constitutionality of Non-Grantor Trust Income Taxation

- **Constitutionality of Taxing a Non-Grantor Trust If No Present Connection to the Trust:** North Carolina Dept of Rev. v. Kimberly Rice Kaestner 1992 Family Trust, 139 S. Ct. 2213 (2019)
 - Presence of in-state beneficiaries is not enough to tax **undistributed income of a non-grantor trust** if the beneficiary has no right to compel distributions
 - Minnesota has a similar trust income tax structure to WV and its court ruled that its law was unconstitutional. Fielding vs. Comm’r of Revenue, 916 N.W. 2nd 323 (2018)
 - The domicile of the grantor at the time of the creation of the trust is not a sufficient basis to permit Minnesota to tax the undistributed income. The State’s connection to the trustee, not the grantor is the relevant inquiry if the grantor no longer possesses or controls the trust property.
- **Constitutionality of WV Law:** If the trustee (and trust property) of the non-grantor trust is located outside of WV is the undistributed income subject to tax by WV as Resident Trust?

Retirement Plan Distribution Planning

- **Effective Date:** Applies to decedents who died on or after **January 1, 2020 (SECURE ACT)**.
- **In General.** Requires most beneficiaries of an IRA or qualified plan to receive distributions within 10 years after the owner's death rather than stretched over the life expectancy of the beneficiary.
- **Eligible Designated Beneficiaries: Life Expectancy Payment Rule Applies**
 - *Eligible Designated Beneficiaries:* Beneficiaries who are the surviving spouse, chronically ill, disabled, not more than 10 years younger or a minor (until the minor attains the age of majority) and certain Qualified Trusts for an Eligible Designated Beneficiary.
- **Designated Beneficiaries: Ten Year Payment Rule Applies**
 - *Designated Beneficiaries:* Beneficiaries who are individuals and Qualified Trusts for a Designated Beneficiary (See-Through Trusts that are treated as an individual).
- **Non-Designated Beneficiaries:**
 - **Five Year Payment Rule** - Death of Owner Before Required Beginning Date.
 - **Ghost Payment Rule** (Remaining Single Life Expectancy of Owner) – Death of Owner after Required Beginning Date.
 - *Non-Designated Beneficiaries:* Charities, Estates, Non-Qualified Trusts.

Irrevocable Trusts Are Modifiable

- **Trust Agreement Power to Modify Trust:** The trust agreement can grant to a trustee or a trust director the power to modify the terms of the trust (other than certain mandatory requirements set forth in the WV Uniform Trust Code).
- **Statutory Fiduciary Power to Modify Trust:** Unless the trust instrument expressly provides otherwise, the trust instrument is modifiable in accordance with several WV statutes by:
 - **Non-Judicial Settlement Agreement (NJSa) by Interested Persons:** WV Code §44D-1-111.
 - NJSa must not violate a material purpose of the trust
 - **Judicial Modifications by Petition of Interested Persons:** WV Code §44D-4-411 and §44D-4-412.
 - **Judicial Modifications to Reform Trusts:** WV Code §44D-4-415 (mistakes) and §416 (achieve tax objectives)
 - **Termination by Trustee of Uneconomic Trusts:** §44D-4-414 (\$200,000 or Less)
 - **Decanting by Trustee of Original Trust into New Trust:** WV Code §44D-8B Limited Decanting Authority if the trustee distribution power is limited to an ascertainable standard **(July 2020)**
 - **Limited Decanting Authority if trustee has limited distribution power**
 - Distribution for health, education, support and maintenance
 - **Expanded Decanting Authority if the trustee distribution is a broad power**
 - Trustee distribution power for best interest, general welfare, etc.

Consequences: Consider legal and tax consequences of holding and exercise power to modify trust (shift beneficial interest)

Trust Directors and Protectors

- **Trust Directors:** WV Directed Trust Act (**July 2020**) provides that a trust agreement can **grant to a trust director (trust protector) the power to direct the trustee (the direct trustee)**.
 - The power of direction can be to veto a trustee action, consent to a trustee action or direct a trustee action.
 - The Trust Director can also exercise an independent power granted in the trust agreement.
- **Trust Director (Holds Power of Direction to Direct Trustee)**
 - Trust Director possesses a Power of Direction **to direct the Directed Trustee or exercise and independent power**
 - Trust Director is a fiduciary **unless provided otherwise**
- **Directed Trustee (Complies with Power of Direction)**
 - Directed Trustee has duty to reasonably comply with the direction
 - Directed Trustee has minimum responsibility not to comply if:
 - WV: Direction would knowingly violate applicable law
 - UDTA: Direction directs trustee to engage in willful misconduct
- **Examples of Trust Director Power to Direct the Directed Trustee:**
 - Vote shares of a closely held company in a certain manner
 - Veto the trustee decision to sell the closely held company
 - Suspend distributions to an addicted beneficiary
 - Approve trustee compensation or trust accountings
- **Examples of Trust Director/Protector Independent Powers**
 - Amend the trust /Change place of administration of trust/ Resolve a dispute

Medical Decisions and Ancillary Estate Plan Documents

- **Medical Power of Attorney/Living Will** (Modified by WV Healthcare Decisions Act amendments in 2022)
 - **Living Will Advanced Directive** – Direction related to withdrawal of Life Prolonging Intervention
 - **Medical Representative:** Power of medical representative to make medical decisions and access protected health information
 - **Statutory Form** – Modified effective 6/7/2022; Healthcare facilities must update forms by 01/01/23
- **The Protected Health Information Release**
 - Authorizes your representative to access to your medical records, to assist you in your medical care and assist you in your health care decisions even though you are not mentally incompetent.
- **Estate Plan Instructions Letter**
 - Instructions on the administration of the estate and post-mortem matters (list of assets, list and location of estate plan documents, contact information of professional advisors, safe deposit contents, how to access assets, etc.)
 - Letter of instructions for fiduciaries about care of minor children, care of pets, administration of the business, etc.
- **Legacy Letter (Ethical Will)**
 - Letter of the decedent to family members to share stories about his/her life, values, wishes, insights, life lessons

WV Health Care Decisions Act (2022)

- **Advance Directive for Terminal Condition**
 - Refuse CPR, breathing machine (ventilator), dialysis, medical administered fluids and liquids (feeding tube) but oral foods shall be offered if can be tolerated,
- **Other Advance Directives or Limitations on this Power**
 - Mental health treatment, funeral arrangements, autopsy, organ donation
- **Elimination of Provisions for Advance Directives for Persons in a Vegetative State**
- **Advance Directives for Dementia or End Stage Cognitive Disease**
 - Some states (Washington) expressly permit it
- **Assisted Suicide and Mercy Killing is Illegal**
 - §16-30-15 – Withholding of Life-prolonging intervention from a person in accordance with decision of a medical representative pursuant to this Article does not consist assisted suicide or murder.
- **Mental Health Advance Directive**
 - Psychiatric advance directive that permits a person with mental illness to state their preferences if they are incapacitated (medications, type of therapy, choice of therapist, ECT, facility choice, persons allowed to visit)
- **POST Forms** – Portable Orders for Scope of Treatment (applies all healthcare practitioners). Example: Do Not Resuscitate Order

Anatomical Gifts

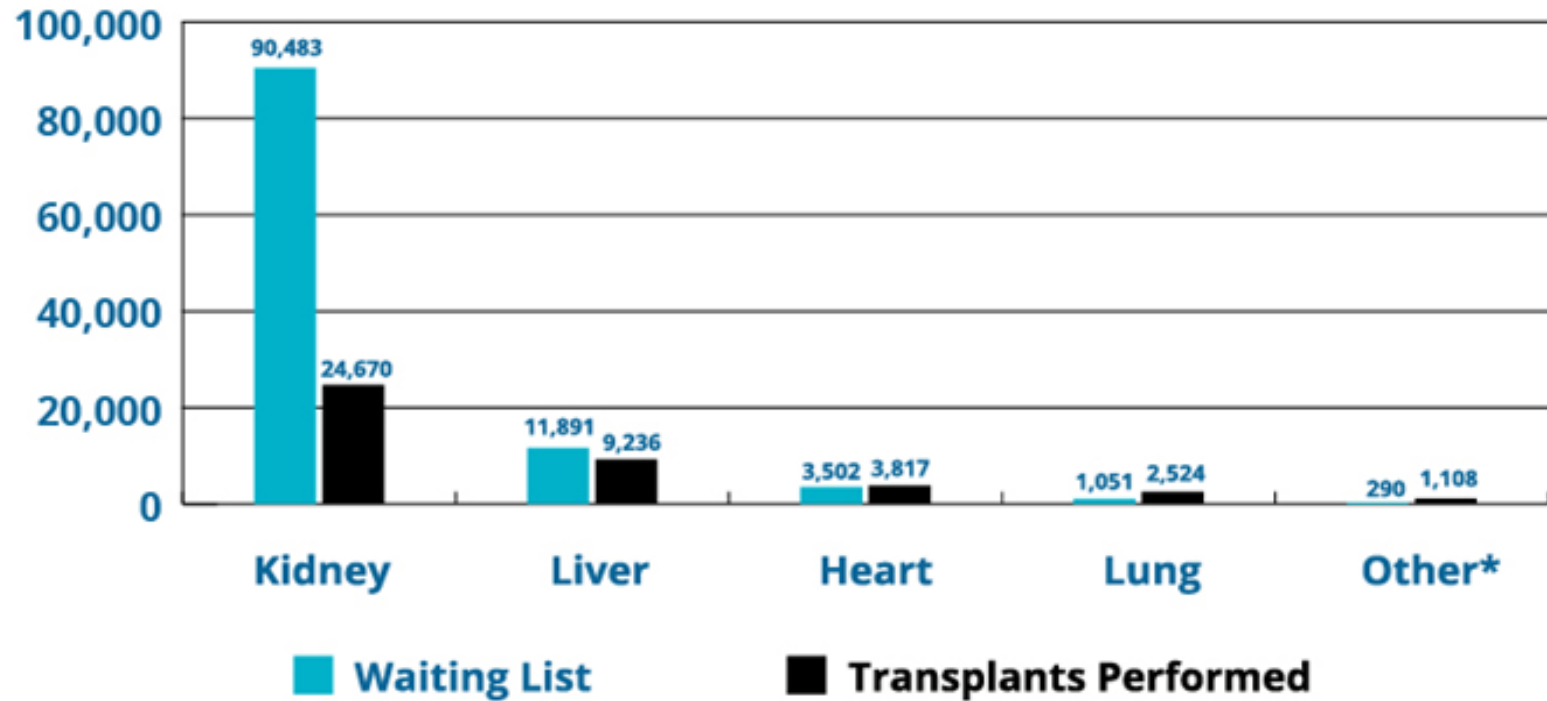
- **Anatomical Gifts** (West Virginia Uniform Anatomical Gift Act)
 - Organ and tissue transplantation can save those suffering from vital organ failure, bone defects, burns or blindness. The supply of donor organs falls short of the demand.
 - **Donor Card:**
 - If you are over age eighteen, you can donate organs upon your death by completing a donor card.
 - If you include a directive in your medical power of attorney of your wishes concerning the donation of your organs or body, this directive will control those wishes.
- **CORE**
 - Hospitals in West Virginia are served by the Center for Organ Recovery (CORE). CORE workers keep a database of people in their source area who are waiting for organs that includes their vital information, height, weight, blood type and medical history.
 - Staff members must work fast, since a heart or lung must be placed in the recipient within four to six hours after death. Other organs vary in the amount of time they remain viable after death.

Organ Donation

- [Organdonor.gov](https://organdonor.gov) (Health Resources and Services Administration)
- Over 105,000 people are on the waiting list for organs
- 17 people die each day waiting for an organ transplant
- Each donor can save 8 lives and enhance over 75 more
- 40,000 transplants were performed in 2021
- Every 9 minutes another person is added to the waiting list
- Kidneys, then livers are the most common transplants
- The easiest transplant is the transplant of the live
- Lungs are the most difficult to get
- Organ trafficking is prevalent in Israel, India, China, Pakistan, Turkey, Brazil, Philippines, Iran and former Soviet states

Patients on the Waiting List vs. Transplants Performed

By Organ in 2021



*Other includes allograft transplants like face, hands, and abdominal wall.

Selected Tax Hot Estate Planning Topics

- **Basic Exclusion Planning:** Planning to address outdated marital formula estate plans and the decrease in the Basic Exclusion in 2026.
- **Portability Election:** Filing of the federal estate tax return to elect portability to port over the Deceased Spouse Unused Exclusion Amount to the surviving spouse.
- **Retirement Benefit Planning:** Planning to address the SECURE ACT and the elimination of the life expectancy stretch for Designated Beneficiaries and to preserve the life expectancy stretch for Eligible Designated Beneficiaries.
- **State Income Tax Planning for Non-Grantor Trusts:** Addressing the issue as to whether a non-grantor trust established by a WV grantor or testator is subject to income tax in WV as a Resident Trust on account of the Kaestner case (2019).

Impact of Digital Age on Estate Planning

- **Environment**
 - Coronavirus
 - Pervasive Digital Asset Environment
 - On-Line Beneficiary Designations
 - Do-It Yourself Estate Planning
 - Commercial Vendors: Legal Zoom
- **Legislation**
 - Remote Online Notarization and Remote Inc. Notarial Acts
 - WV Revised Uniform Law on Notarial Acts **(2020)**
 - Administration of Digital Assets
 - WV Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) **(2018)**
 - Electronic Wills (Anticipated Future Legislation)
 - Uniform Law Commission: Uniform Electronic Will Act
 - Goal is to modernize and adopt law of wills for the digital age; provide wider access to legal services; allow licensed attorneys to offer on-line estate planning and provide safeguards to help prevent fraud and coercion

Administration of Digital Assets

- **Growth in Digital Assets:** Over the past decade the average number of digital accounts per person has increased from 10 to 200 digital accounts with online billing, shopping accounts, travel accounts, investments, data storage and social media.
- **Tangible digital property:** (CDs, DVDs, flash drives, computers, laptops) are considered tangible personal property.
- **Intangible digital property:** (electronic data, emails, texts, photographs, data, social media accounts, cryptocurrency, non-fungible assets, etc.) would be intangible personal property.
- **Compare:** Gift of Tangible Property (tangible digital property) versus Gift of Residuary Estate (intangible digital property).

Fiduciary Access to Digital Assets

- **RUFADAA:** Revised Uniform Fiduciary Access to Digital Assets Act was adopted in WV in **2019**
- **Tiered Priority System**
 - **Level 1: On-Line Instructions**
 - Designation of Beneficiary
 - **Level 2: Direction in Estate Planning Instrument**
 - Digital Asset Fiduciary Power of Agent in GDPOA
 - Digital Asset Fiduciary Power in Executor/Trustee of Will/Revocable Trust
 - **Level 3: Terms of Service Agreement (TOSA)**
 - Applies if Tier 1 and Tier 2 do not apply
 - Access is controlled by TOSA

Digital Asset Planning

- **Digital Asset Inventory**
 - List of Hardware
 - List of Usernames and Passwords
 - List of accounts
- **Segregation of Personal Digital Assets and Business Digital Assets**
 - If personal data is located on your business/employer computer the digital access, sharing and cyber protection may be problematic or complicated.
 - If personal data and business data are located on your personal computer the digital information, sharing and cyber protection could be problematic or complicated.
- **Digital Asset Authority**
 - Grant authority to your fiduciaries to access your digital assets in your financial power of attorney, will and revocable trust.
 - Consider a specific bequest of your digital assets to separate it from your other testamentary gifts.
- **Digital Asset Instructions Letter**
 - Digital Asset Inventory with instructions on how to access the digital asset and how the data should be shared or disposed of.
- **Digital Asset Special Executor/Financial Agent**
 - Consider appointing someone who has digital asset experience or is sensitive to your privacy issues if that person would be preferable to your financial agent or executor.

Digital Asset Questionnaire

- If you are in an accident today, can your family and fiduciaries access your valuable and significant digital property while you are incapacitated?
- If you become incapacitated or die, who do you want to turn on your computer to find out and deal with what's there?
- If you died today, what valuable or sentimental digital property would you want your family or friends to have?
- If your computer is lost, stolen, or damaged today, what valuable or significant digital property would you lose?
- If all your online accounts and peripherals (i.e., backup drives and flash drives) were stolen, what valuable or digital assets would lose?
- How easy will it be for someone to sit down at your computer and find everything they need, especially if it's now a struggle for *you* to do so?
- Can you quickly and easily find all the valuable documents and files on your computers? Or, as is likely, are they scattered among many folders, several computers, flash drives and backup CDs, DVDs or tapes?
- If you use a thumbprint scanner, face scanner or other biometric device for access to your computer, how will your fiduciaries access your computer?
- Who has access to your password list? Where is it located?
- Is there anyone you want to be notified through your social media connections?
- Are there blog sites you wish to be closed or continued? And
- Do any of your digital assets have value?

Electronic Wills

- **Electronic Wills are Currently Not Valid in WV.** The E-signature of Wills does not satisfy the execution requirements for wills in WV. To be valid in WV, a will must be signed by the testator in the presence of two witness. The self-proving affidavit must be acknowledged by a notary.
- **Uniform Electronic Wills Act:** Adopted by the Uniform Law Commission in 2019 as mechanism for formalizing wills that testators create on a computer or other portable device and never print out on paper.
 - **Electronic Will Statutes have been passed in 4 states and introduced in 2 other states.**
- **Goal:** Goal is to modernize and adopt law of wills for the digital age; provide wider access to legal services; allow licensed attorneys to offer on-line estate planning and provide safeguards to help prevent fraud and coercion.
- **Electronic Wills fall into three categories**
 - **Offline Electronic Wills** - Created through a computer or electronic device stored locally on the same computer or device.
 - **Online Electronic Wills** – Created through a computer or electronic device but stored on the internet through third-party cloud storage.
 - **Custodian Electronic Wills** – Drafted with the assistance of third-party entities (typically for-profit companies) that store their document on their on-line platform.

Uniform Electronic Wills Act

- **Readable text Form:** The E-Will must be a readable text – audio and visual recording are not admissible in probate.
- **Signature of E-Will:** The testator can execute a will by signing it electronically (typing in their name).
- **Witnessing E-Will:** The E-will must be witnessed by two witnesses either in the physical presence of witnesses or the virtual presence of witnesses (remote witnesses via real-time audio-visual communication).
- **Self-Proving Affidavit of E-Will:** The notary can acknowledge signatures of the testator and witnesses and acknowledge the self-proving affidavit or use an online notarization procedure under RULONA if adopted by the State.
- **Storage of E-Will:** The testator can then store the will in a data file, or with a firm offering e-will storage services until the time of death of the testator.
 - The Uniform Act treats all copies of the e-wills a legally operative, including print copies of the e-wills.
- **Revocation of E-Will:** E-Will is revoked by:
 - Executing a subsequent will that expressly or by implication revokes the prior E-Will; or
 - A physical act the accomplishes revocation with proof by a preponderance of the evidence that the testator performed the act (or directed a person to perform the act) with the intention of revocation.
 - What about accidental deletion of a file or if the original is deleted but not the copies?

Concerns About Electronic Wills

- The driving force behind electronic will legislation is commercial firms hoping to create demand by marketing and advertising electronic wills.
 - Australia and Canada do not permit electronic wills but permit a court to hold a hearing to give effect to an e-will if the court concludes it is genuine and free from fraud. It is a remedial mechanism.
- The advocates of electronic wills assert that it will encourage people to make a will and allow qualified professionals to offer online estate planning services to persons who might not otherwise plan.
 - Others respond that electronic wills are not cheaper than do-it-yourself wills and online firms expressly disclaim they are offering legal advice.
- Electronic wills are subject to exploitation by unscrupulous wrongdoers.
- The electronic will may be difficult to locate, pass protected or can be inadvertently misplaced or deleted.
- Electronic wills may be subject to extrinsic fraud by potential successors or hackers.

Potential Effect of Electronic Wills

- **Potential Effect of Electronic Wills on Estate Planning**
 - Software companies and third-party providers will soon compete with law firms in the preparation of estate plan documents.
 - Estate planning attorneys will incorporate offline and on-line e-wills directly into their practices.
 - Document preparation and estate and trust administration through the use of artificial intelligence are also on the not-too-distant horizon.
 - Financial powers of attorney and medical powers of attorney will be able to be executed on-line.
 - Life insurance, retirement plan and annuity beneficiaries designations are already available on-line.
 - Legal industry is moving to document assembly software for estate planning documents.

Drivers of Change In Estate Planning

- **General Concerns**
 - Greying of Population
 - Change in Traditional Family to Complex Family Arrangements
 - Changes in Demographics and Culture
 - Increased Incapacity, Undue Influence and Elder Abuse Concerns
- **Increased Public Access to Information and Self-Service**
 - Do-it Your Self Estate Planning and Access to Information and Estate Planning Forms
 - Increase of Informal Estate Administration and Small Asset and Small Estate Administration
 - Increase in Non-Probate Assets and On-Line Estate Planning
- **Digitization of Professional Services**
 - Preparation, execution and storage of electronic documents
 - On-line Notarization and Electronic Document Signing
 - Electronic Beneficiary Designations, Contracts and Wills
 - Likelihood of Increased Estate Planning Errors and Litigation

- **Desire for More Flexibility, Protection and Adaptability**
 - Ability of trustees, Trust Protectors or beneficiaries to modify trust for changes in tax laws, beneficiary circumstances or trust administration needs
 - Special Needs beneficiary; addiction; state income taxation;
 - Power to change place of administration and to forum shop for favorable tax and trust laws
 - Grant to a Trust Director or Trust Protector the power to supervise, control and replace trustee
 - Create Dynasty Trusts for the long-term benefit family members to maintain property in bloodline, tax savings and asset protection
- **Changes in the Financial Services and Legal Marketplace**
 - Uniform Trust Laws adopted in states provide a national trust law framework
 - Desire of financial service providers to provide services to the next generation and in different jurisdictions across the US
 - Consolidation of the financial services and trust services industry
 - National competition for financial services

Generations

Start Year	End Year	Generation	Age Range in 2022
1901	1927	Greatest Generation	95+
1928	1945	Silent Generation	77-94
1946	1964	Baby Boomers	58-76
1965	1980	Generation X	42-57
1981	1995	Generation Y (Millennials)	27-41
1996	2010	Generation Z (Centennials)	12-26
2011	2026	Generation Alpha	0-11

Greatest, Silent and Baby Boom Generation

- **The Greatest Generation or GI Generation: Born 1901 – 1924**
 - **GI as individuals:** This generation survived the Great Depression and then went off to fight in WWII. Notably, they popularized jazz and swing music but don't be fooled by the wild provocations of the music of the times.
 - **GI parents:** For GI Generation parents who lived through the Great Depression, raising a family put a premium on traits like hard work and grit.
- **The Silent Generation: Born 1928 – 1945**
 - **Characteristics:** They famously got their name for being so conformist that they were silent through the MacCarthy era when the fear of Communism swept the country.
 - **Silent Generation Parents** The parenting style of the day was similar to that of their parents; kids were expected to earn their way through life using a strong work ethic.
- **Baby Boom Generation: Born 1946 – 1964 (Age 58-76)**
 - **Characteristics:** Boomers are so named after their parents came home from WWII and the American population exploded. Baby Boomers defied their parents, protested the Vietnam War, and created the "Summer of Love".
 - **Boomer as parents:** Boomer parents notably redefined parenting by being the first generation to look at their kids' perspective of growing up, and they stated the concept of having family meetings. They also created a generation of latch key kids due to both parents having jobs or single parent families.

Generation X and Millennials

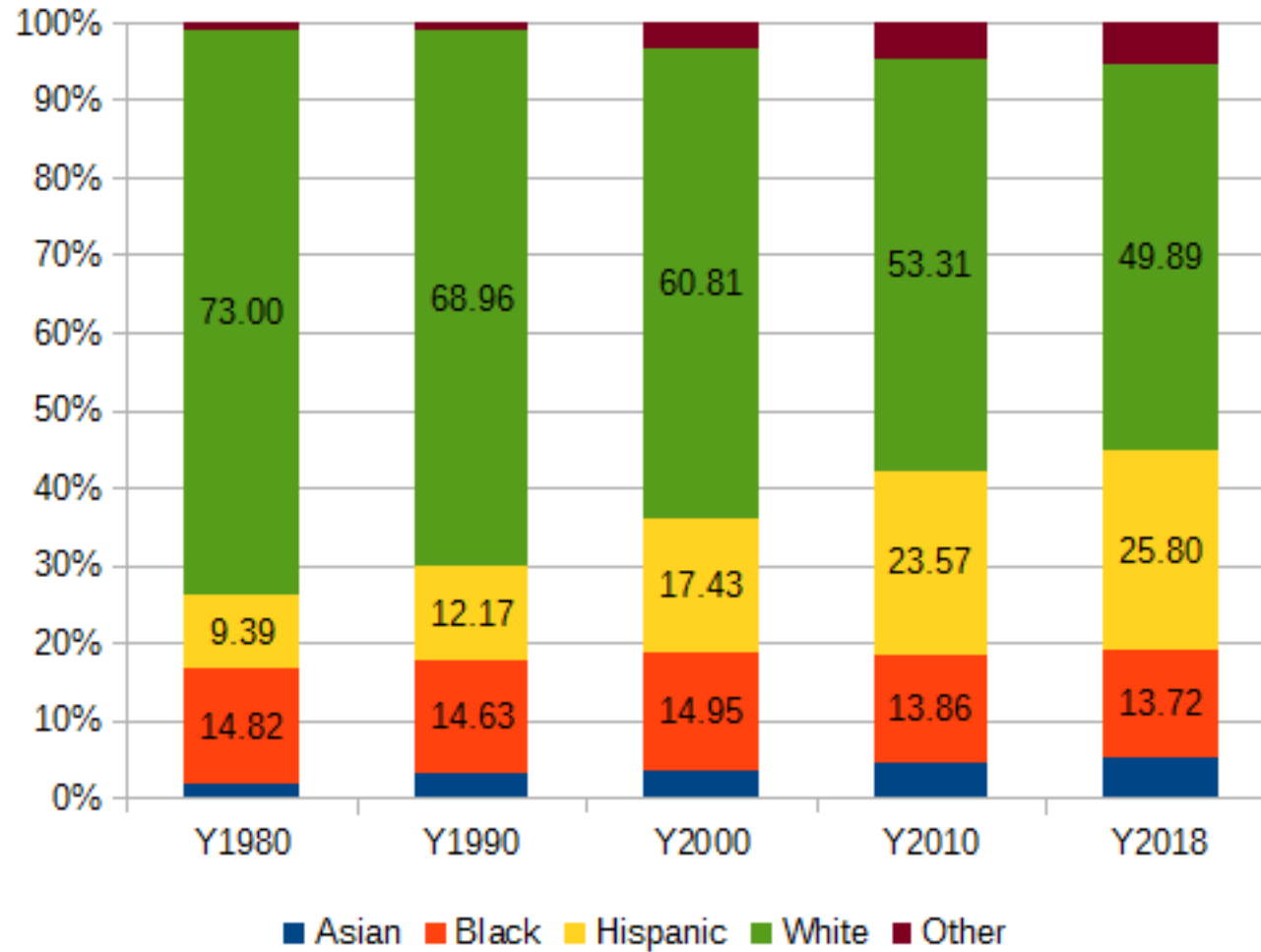
- **Generation X: Born 1965 – 1980; Ages 42-57**
 - **Environment:** Generation X was called the **latch key generation** and had reduced supervision. They lived through the AIDS epidemic, MTV culture, and a shifting cultural landscape that would give rise to LGBTQ+ rights. The first children to have access to computers.
 - **Characteristics:** Often dismissed as the slacker generation and apathetic but that was reconsidered due to a reputation for entrepreneurship and achieving a better life work balance.
 - **Gen X as Parents** - Generation X parents were the first to use **helicopter parent styles** and be far more involved with their children's social and educational development.
- **Millennial Generation: Born 1981 – 1996; Ages 27 to 41 (Generation Y)**
 - **Environment:** The first generation to know a childhood both with and without the Internet, which currently plays a significant role in their personal lives.
 - **Characteristics:** While Boomers may accuse Millennials of being self-centered and entitled due to their excessive use of technology, this generation has proven to be community oriented and environmentally-conscious, which are traits that are being picked up by their children in the next generation.
 - **Millennial Parents:** They are open-minded. They are raising their kids in diverse family forms. "They are more likely than prior generations to allow their children to freely express who they are. They are leading the movement in helping gender non-conforming kids to be happy with who they are.
 - Some millennial parents, who were 'helicoptered over' in their youth, are taking on a freer approach to parenting.

Generation Z and Alpha

- **Generation Z: Centennial Generation Born 1997 – 2010; Ages 12 to 26**
 - Generation Z kids are the first to be born into a world where they know nothing else besides being constantly connected to one another, albeit through phones, screens, and tablets.
 - Mastery of technologies may result in neglect of personal relationships; they like to get everything they want immediately, which is reinforced by the digital world; they multitask but their attention span is limited; the internet and social media is part of their DNA.
 - Most ethnically diverse: 52% - Non-Hispanic; 25% - Hispanic; 14% - White; 6% Asian; 4% Mixed.
 - Gen Z may think of Baby Boomers as their out of touch grandparents ("Ok, Boomer").
- **2011-2025 – Generation Alpha – Age 12 or younger**
 - The first generation born into the COVID-19 pandemic.
 - They're more diverse than any other generation.
 - They're more likely to be in a single-parent household.

Ethnic Composition of Americans Under the Age of 15

Brookings Institution (2018)



Family Concerns

- **Blended Family Concerns**
 - Treatment of our children, his children, her children
 - Favoritism of surviving spouse for his/her birth children over step-children
 - Animosity between children and step-parent
 - Keeping “Separate Property” separate after marriage (pre-marital property and inheritances) for divorce purposes
 - Pre-marital agreements (Waiver of Elective Share)
 - Elective Share
- **Dysfunctional Family Concerns**
 - Treatment of advancements, gifts, loans to beneficiaries
 - Disparity in financial resources of children
 - Caretaker burden/control of local child versus out of state child
 - Undue Influence of caretaker family member
 - Planning for likelihood of a will contest
- **Concerns Regarding Delayed Maturity and Financial Independence of Children**
 - Children still living with parents
 - Lack of Financial Independence: student loan debt
 - Change in retirement planning for children due to elimination of the life expectancy stretch for designated beneficiaries.

Family Concerns (Continued)

- **Domestic Partners**

- US Supreme Court struck down federal ban on same sex marriages (2013) and state level bans on same sex marriage as unconstitutional.
- Legally married domestic partners are treated same under law as traditional marriages.
- Gives spousal rights to insurance, tax status (joint return; marital deduction); elective share; intestate share; government benefits (social security, veteran's benefits).

- **LGBTQ family members**

- Privacy and disclosure
- Transgender treatment
- Co-habitation agreements

- **Substance Abuse**

- Triggering the placement of property in trust
- Suspending trust distributions during addiction other than minimal distributions
- Addiction treatment and drug testing
- Alcohol, marijuana, gambling treated as an addiction?
- Opioids, heroine and hard drugs

Elective Share of Surviving Spouse

- **Elective Share Petition:** Filed Within 9 months at Circuit Court
- **Elective Share Percentage**
 - 3% to 4% per year up to 50%
 - 50% after 15 years
- **Simple Example:** Elective Share of Combined Gross Estate
 - H has \$2 million of securities
 - W has \$500,000 securities and House of \$500,000
 - H and W have been married for 15 years
 - \$3 million x 50% - \$1.5 million
 - W's Elective share: \$500,000 (\$1.5 million - \$500,000)
- **Assets Excluded from Elective Share**
 - Life Insurance
 - Retirement Plans
 - IRAs
 - Exception: Qualified Plan - Unless QJSA Waived (ERISA applies)

Special Needs Beneficiary

- **Government Benefits**
 - **Eligibility is Resource Based:** Social Security Supplemental Income (SSI) and Medicaid
 - **Eligibility is Not Resource Based:** Social Security Disability Income (SSDI) and Medicare
- **Special Needs Trust**
 - **Purpose:** The trust property will not be counted as a resource of the beneficiary in the determination of the eligibility for SSI or Medicaid of the beneficiary
 - **Distribution Standard:** Trustee has the discretion to make distributions for the “special” or “supplemental” needs of the beneficiary (those distributions that do not include those funded by SSI such as food, shelter, etc.)
- **Self-Settled (First Party) Special Needs Trust**
 - Requires a Medicaid Lien provision included in the trust agreement
 - State can recoup government benefits paid upon death of the special needs beneficiary
- **Third Party Special Needs Trust**
 - No Medicaid Lien provision is included in the trust agreement

Pet Care Options

- **Authority:** Direct your agent under your general durable power of attorney and the personal representative of your estate to provide for the care, custody and disposition of your pets;
- **Pet Caretaker:** Give your pets to a friend (caretaker) with informal instructions as to the care of the pet;
- **Pet Care Agreement:** Create a pet care agreement with a designated pet caretaker for the care of the pet;
- **Pet Trust:** Create a pet trust for the benefit of your pets (if permitted under state law); or give your pet to a pet retirement home (horses).
 - §44D-4-408. Trust for care of animal.
 - Court can determine if the value of property exceeds the amount required for its intended use.
- **Funding:** In each of these cases, you can also give money to the pet caretaker or pet trustee to care for the pet.
- **Ancillaries:** You should also identify other property that will be given to the caretaker along with your pets, such as the bird cage and items used for the care of the bird.

***Leona Helmsley
Trouble (Maltese) - \$12 million
Reduced to \$2 Million***



***Miles Blackwell Estate
Gigoo (Hen) - \$10 Million***



***Gail Posner Estate
Pet: Conchita (Chihuahua), Lucia (Yorkshire terrier) and
April Marie (Maltese) - \$11 Million***



Patricia O'Neill Estate
Pet: Kalu (chimpanzee) \$70 Million



General Durable Power of Attorney

- **Statutory GDPOA Form:**
- **General Powers**
 - Administer property, insurance, benefits, taxes, claims, litigation, taxes, retirement plans, etc.
- **Superpowers (Estate Planning Powers)**
 - **Exercise Caution:** Power to amend a trust; create or change right of survivorship; change a beneficiary designation; **disclaim any property**
 - **Latest change: Access the content of electronic communications**
- **Springing vs. Immediate Powers**
 - Immediately Effective
 - Protection: Escrow of Immediately Effective Power of Attorney with Professional Advisor
 - Effective on Determination of Incapacity
- **Special Powers of Attorney:** Do Not Revoke Other Special Powers of Attorney You Wish to Remain Valid
- **Fully Funded Revocable Trust:** Replaces GDPOA for nearly all (but not all) necessary financial powers

Signs of Incapacity

- **Mental Incapacity**
 - May incur in stages for early dementia to end-stage dementia
 - Can fluctuate on good days and bad days
 - Can be different for different tasks
- **Signs of Incapacity**
 - Client has difficulty retracing steps, becomes lost in familiar surroundings (a walk in the neighborhood) or has trouble finding or remembering the location of your office
 - Client cannot remember recent occurrences, your last contact with them or big events
 - Client has significant trouble remembering names of family members
 - Client has mood swings or reacts with frustration or anger over innocuous situations
 - Client has difficulty following a conversation
 - Client has difficulty following simple documents or forms
 - Client wishes to make big changes or big decisions without any coherent explanation

Elements of Undue Influence

- **Existence of Confidential Relationship:** A confidential relationship existed between the testator and the influencer (a special confidence and trust between the parties).
 - Attorney-client; clergy-congregational member; doctor-patient; nurse-patient; care-taker patient;
 - Parent-child; Adult lovers; siblings.
- **Abuse of Confidential Relationship:** The influencer uses that relationship to secure a change in how the testator distributed his or her property or enters into a transaction.
- **Improper Actions:** The change made in the estate plan documents was unconscionable or do not reflect the true desires of the testator. There were unusual or sudden gifts to persons who are not the natural heirs or have had a close relationship.
- **Vulnerable Testator:** The testator was subject to being influenced.
 - Dying person; lonely elderly person; diminished mental capacity from dementia; depression, addiction that results in the person being mentally weakened.

Signs of Elder Abuse

- **Suspicious Transactions**

- There are financial transactions that the client does not remember or cannot explain.
- There are unpaid bills, missing financial information, or unusual transactions.
- Signatures on documents appear not to match the client's signature or are scribbled (financial power of attorney, deeds, checks, account transfers that do not appear to match the client's signature).
- A caregiver or family has received gifts or taken large amounts of funds for the care of the client that are above their costs with accountability (groceries, restaurants, etc.).
- Client is susceptible to being scammed or is being scammed.

Signs of Elder Abuse (Continued)

- **Isolation**

- Client has a new set of professional advisors chosen by the caregiver.
- A caregiver or family member continually refuses to allow you to speak to the client.
- A caregiver or family member won't let you see the client alone or seems to have brought the client to your office against your wishes.
- The client is isolated and never leaves the house or the presence of the caregiver.
- The client acts withdrawn or frightened.

- **Condition of Client**

- The client has lost weight, has poor hygiene, or appears unkept.
- The client has injuries, or a medical condition and the family member or caregiver will not take the client to a health care provider for treatment.

Profile of the Abuser of Elderly Persons

- **Profile of the Abuser**

- 57.9% are family members
- 16.9% are friends and neighbors
- 14.9% are home care aids
- 10.3% are scammers and other abusers

- **Abuser Risk Factors**

- Drug or alcohol addiction, mental health issues
- Behavior problems, history of theft or dishonesty
- Gambling problem, financial problems, unmanageable debt
- Unemployment or financial dependency on the abused
- Heightened senses of entitlement or overvaluation of caretaker contribution

Profile of the Abused Elder Person

- Suffers from some cognitive impairment
- Too trusting or not suspicious enough of others
- Dependent on others for care or social interaction
- Socially isolated (lives alone with little contact with family members or neighbors)
- Lonely

Supplementary Material

Estate Administration Overview

- **Probate Assets:** Estate Administration is the administration of the personal property of the decedent and also the real estate depending on the terms of the will.
 - **Real Estate Treated as Non-Probate Asset:** See slide on Real Estate Title Shooting
- **Opening of a Testate Estate** – Recording of the Will; Filing of Affidavit of Heirs; Appointment of Executor
- **Opening of an Intestate Estate (No Will)** – Appointment of Administrator; Filing of Affidavit of Heirs
- **Asset Inventory:** Filing of the Appraisal and Non-Probate Inventory Form
- **Expenses:** Payment of professional expenses; executor compensation
- **Death Taxes:** Federal estates taxes (if any); No WV estate or inheritance tax; **possibility of state inheritance tax of WV resident inherited out of state real property**
- **Claims:** Publication of Notice to Creditors; Sixty Days Claims Period; Proof of Claims
- **Settlement:** Filing of the Final Settlement
 - Short Form Settlement (Waiver of Accounting by All Beneficiaries)
 - Alternative: Formal Annual Accountings
- **Distribution of Property**
- **Closing of Estate**
- **Other Matters:** EIN; federal estate tax return; income tax returns, etc.

Intestate Estate Administration

- **Seventy Percent of Adults Die Intestate (Without A Will)**
- **Inapplicable to Non-Probate Assets:** Intestate distribution rules apply only to probate assets
 - Non-Probate Assets will pass to the beneficiary (or joint survivor of JWROS asset)
- **Distribution of Probate Assets to Distributees [WV 43-1-3 and 43-1-3a]:**
 - **Surviving Spouse - Traditional Family Descendants :** Surviving Spouse survives decedent with no children or only children of surviving spouse and decedent
 - Surviving Spouse receives the entire Estate
 - **Surviving Spouse - Blended Family Descendants:** Surviving Spouse With Blended Family (His/Her/Their Children)
 - Surviving Spouse receives a **60% share** if Spouse and Decedent have **descendants together** and Surviving Spouse has descendants from a prior marriage; 40% goes to children of prior marriage
 - Surviving Spouse Receives **50% share** if Spouse and Decedent have **no descendants together** and Surviving Spouse has a decedent from a prior marriage; 50% goes to children of prior marriage
 - **No Surviving Spouse- Descendants:** Distributed to Descendants by Representation
- **Administrator:** Appointed by Fiduciary Supervisor to administer the estate
 - Priority: Spouse, **then others as court deems fit, then after 30 days or more anyone**
- **Guardian of Minor Child:** Appointed by court
- **Other Matters:** Bond Required; Administration of Digital Assets

Private Administration of Small Assets

- **Optional process to transfer certain property to surviving spouse or distributee if no personal representative has been appointed.**
 - **Wages:** WV Code 44-1-28 (a) permits payment of final wages or salary of decedent of \$5,000 or less to the surviving spouse or distributees. Affidavit filed with employer.
 - **Unclaimed Property:** WV Code 44-1-28 (b) permits payment of unclaimed property of \$5,000 or less by the State Treasurer to the surviving spouse or distributees.
 - **Small Asset or Sum:** WV Code 44-1-28 (c) permits transfer of personal property of \$5,000 or less by the holder of an asset to the **surviving spouse or distributees (intestate heir of personal property)**. Affidavit filed with holder of asset.
- **Not Cumulative:** The \$5,000 limit per asset is not cumulative.
- **Procedure:** (1) Person related to decedent files affidavit with the holder of the asset more than 120 days after decedent's death and (2) there has been no qualification of appointment of personal representative of decedent in any jurisdiction.

Small Estate Administration By Affidavit

- Administration of Small Estate by Authorized Successor
- **Eligible Small Estates:** Personal Property Under \$50,000 and Total Real Estate Under \$100,000 and No Direction in Will to Sell Real Estate [W.Va Code 44-1A-2]
- **Affidavit of Small Estate.** Authorized Successor (new type of Fiduciary) is appointed by County Clerk or Fiduciary Supervisor upon filing of Affidavit of Small Estate. The Authorized Successor is granted a Certificate **with authorization to act without further probate filings or supervision for six months.**
- **Authorized Successor: Testate Estate** - person nominated as executor in the will, then an estate beneficiary; **Intestate estate** – an heir at law.
- **Procedure:** Successor Fiduciary files an Affidavit of Small Estate and if the estate is a testate estate the decedent's will is attached to the Affidavit. The Authorized Successor collects the decedent's assets and after any estate debts are paid distributes the assets to the proper distributees. A distributee may object.
- **Time Frame:** If no other probate is opened:
 - The nominated Executor can start Small Estate administration within 30 days **after** decedent's death; and
 - Any person who can inherit can initiate the Small Estate Administration process 60 days **after** decedent's death.

Small Estate Administration (Continued)

- **Breach of Fiduciary Duty:** The decedent's successor can sue the Authorized Successor for breach of fiduciary duty within **three years of the issuance of the Completion Certificate**.
- **Creditor Claims:** Creditors can seek recovery from the Authorized Successor or recipient within **two years of the distribution to the recipient**.
- **Real Estate**
 - Fair market value of real estate is presumed to be 167% of assessed value.
 - Estate is not eligible for Small Estate Administration process if the will of decedent **directs** real estate to be sold (**not merely granting the executor a power to sell real estate**).

Closing of Unprogressed Estates

- **Unprogressed Estate:** An estate in which has not been closed within a period of three years from the date of the opening of the estate in which in the opinion of the Clerk/Fiduciary Supervisor in which there has been no progress, or in his or her opinion, unsatisfactory progress.
 - **Unsatisfactory progress:** means that there has been no progress in preceding 12 months.
- **Semi-Annual Report:** In general, §44-2-19a provides that the Fiduciary Supervisor/Clerk will report semi-annually to the County Commission of unprogressed estates:
 - **Order to Show Cause:** County Commission will issue an order to show cause against delinquent or progressed estates; order is mailed to personal representative and heirs;
 - **Response or Lack of Response to Order:** 30 days to respond to order; Estate heirs respond/do not respond as whether there is good cause; Clerk/Fiduciary Supervisor evaluates response or lack of response and reports to County Commission as to each specific estate – those with good cause show and those no good cause shown;
 - **Hearing:** hearing is scheduled for all estates;
 - **County Commission Action:** County Commission enters order either closing the estate; ordering continuing administration of estate; or removing and replacing personal representative; ruling may be appealed to Circuit Court.
- **Effective Date:** May 29, 2019

Non-Resident Ancillary Administration of WV Real Property

- **New Procedure:** Effective **May 30, 2019**, WV provided a new ancillary administrative procedure for administration of West Virginia real property owned by nonresidents under WV Code 44-1-4b.
- **Record Estate Administration Documents.** The domiciliary personal representative or other interested party will be able to record authenticated or exemplified copies of the estate administration documents in any county in which the nonresident decedent owned real property without personally qualifying as the ancillary personal representative.
- **File Affidavit of Ancillary Administration.** The personal representative will execute and tender an Affidavit for Ancillary Administration of West Virginia Real Estate Without Appointment.
 - The Affidavit sets forth a description of the real estate owned by the nonresident decedent and the names and addresses of the beneficiaries or heirs of the estate who are entitled to the property, either under the decedent's will or by intestate succession.
- **Public Notice:** a notice of the ancillary administration is published once a week for two consecutive weeks and the notice is served on the surviving spouse, beneficiaries under the will or heirs, and any known creditors of the estate.
 - Any objection against the estate must be filed within 60 days after the date of the first publication or 30 days after service of the notice, whichever is later.
 - If an objection is not timely filed, the objection is forever barred.
 - If there are no objections to the non-administration of the estate in West Virginia, the ancillary administration is completed and closed.

Ancillary Administration of Real Property Outside WV

- **Administration of Out of State Real Property.** If the decedent owns real property that is located outside West Virginia, the executor must complete the estate administration of the real property in that state in which the real property is located.
- **State Rules.** Each state has its own ancillary administration rules.
- **Revocable Trust**
 - The decedent can avoid the ancillary administration by transferring the real property to his revocable trust during his lifetime, but that real property will be subject to the inheritance tax of that state.
- **Inheritance Tax**
 - The states that impose either an inheritance tax or estate tax are Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, ***Kentucky***, Maine, ***Maryland***, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Oregon, ***Pennsylvania***, Rhode Island, Vermont and Washington. Delaware, Hawaii, Maine have death tax exemption that match the federal estate exemption (presently, \$5,490,000) and New York has a death tax exemption that is \$5,250,000. Kentucky, Pennsylvania and Maryland have inheritance taxes that impose the highest death tax burden.

Non-Probate Transfers at Death

- **Non-Probate:** Assets that are **transferred automatically** to the recipient at the decedent death pursuant to the terms of the governing instrument (contractual assets). These assets are not administered by the executor as part of the estate (the probate).
- **Beneficiary Designation Assets**
 - Annuities
 - Life Insurance
 - Qualified retirement Plans and IRAs
 - *Beneficiary Designation Issues:* Per Stirpes/Per Capita; Customized Forms
- **Joint Survivorship Accounts/Deeds**
 - **Distinguish: Convenience Joint Accounts**
- **Transfer on Death Accounts**
- **Transfer on Death Deeds**

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