State of West Virginia
Office of the Attorney General

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Honorable Jeffrey L. Freeman
Prosecuting Attorney of Marion County
213 Jackson Street
Fairmont, WV 26554

Dear Prosecutor Freeman:

You have asked for an Opinion of the Attorney General regarding West Virginia's requirements for recording copies of wills probated in other jurisdictions in West Virginia county records. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General "shall give written opinions and advice upon questions of law . . . whenever required to do so, in writing, by. . . any . . . state officer." Where this Opinion relies on facts, it depends solely on the factual assertions in your correspondence with the Office of the Attorney General.

Your letter explains that Marion County regularly receives requests to record in the county records copies of wills probated in other jurisdictions. Based on its understanding of West Virginia Code § 57-1-13, Marion County has often declined to record these out-of-State wills when they do not include three separate attestations from the foreign State's county clerk, the presiding county judge, and the relevant "keeper of records." Your letter attaches an example from the Ohio Court of Common Pleas, in which a single individual acting as both presiding judge and court clerk purports to certify the authenticity of an Ohio probated will and its associated court records.

You have asked the following legal question:

Does a copy of a will from another State, with an attached triple seal signed only by a judge of a court of that State—without signatures from a separate clerk or keeper of

records—satisfy the requirements for authentication of public records set forth in the West Virginia Code?

We conclude that West Virginia Code § 57-1-12 decides this question. That statute explains how "records and judicial proceedings of any court" from other States are authenticated in West Virginia. Specifically, for a will probated in another State to be recorded in West Virginia, it must have been authenticated by signatures from the relevant clerk and "judge, chief justice, or presiding magistrate" from that State. Where the same individual acts as both the judge *and* clerk for a given county, however, one signature from that individual can satisfy the statute's terms.

Discussion

Your letter refers to West Virginia Code § 57-1-13, which governs authentication of public records "not appertaining to a court." Yet an out-of-state probated will and its associated court documents are "records and judicial proceedings" that *do* "appertain[] to a court." *Id.*; *see also*, *e.g.*, *In re Box's Will*, [JGH1]106 N.W. 1063, 1065 (1906) (finding that a will and probate was governed by a similar judicial-records statute); *Helm's Ex'r v. Rookesby*, 58 Ky. 49, 51 (1858) (same). We thus conclude that the prior code section applies to your question instead—West Virginia Code § 57-1-12, which governs the authentication of "records and judicial proceedings of any court of the United States."

Section 57-1-12 provides that out-of-State court documents "shall be provided or admitted" in West Virginia courts "by the attestation of the [out-of-State] clerk, and the seal of the [out-of-State] court annexed, if there be a seal, together with a certificate of the [out-of-State] judge, chief justice, or presiding magistrate, that the said attestation is in due form." W. Va. Code § 57-1-12. Once these sealing and signature requirements are met, West Virginia courts must give full "faith and credit" to the out-of-State records. *Id.*; *see also* U.S. Const. art. IV, § 1 (requiring States to give full faith and credit to "the public Acts, Records, and judicial Proceedings" of other States). The consequences of a defective attestation is that out-of-State court records "will not avail as evidence in any court of this state." *Cent. Tr. Co. of Ill. v. Hearne*, 78 W. Va. 6, 88 S.E. 450, 451 (1916).

Ordinarily, then, two people—a clerk and a judge—must sign out-of-State court records like probated wills before those records can be recorded in West Virginia.

But not always. In *Wilson v. Phoenix Powder Mfg.Co.*, 40 W. Va. 413, 21 S.E. 1035, 1037 (1895), the Supreme Court of Appeals considered a predecessor statute to West Virginia Code § 57-1-12. *See In re Hardin's Est.*, 158 W. Va. 614, 620, 212 S.E.2d 750, 753 (1975) (explaining that the statute at issue in *Wilson* was "basically the same" as West Virginia Code § 57-1-12). *Wilson* held that two signatures were not required to admit an out-of-State will under the former statute when a single individual, acting as *both* judge and clerk, signed an attestation. 40 W. Va., 21 S.E. at 1037[JGH2]. Based on that reasoning, the Court affirmed the use of an Ohio-probated will in a trespass case, explaining:

> By the constitution of Ohio and its statute law, the probate judge is also clerk of the probate court, and keeper of its books and papers. This same person could make two certificates, but that would seem useless. The object of the statute in requiring two certificates is to double the probability of truthful certification; but this cannot be done where one man fills both places, the statute requiring the judge of the same court to certify that the clerk's certificate is in due form. It has been held that, where one person is clerk and judge both, [one certificate] is sufficient.

Id. at 1036-37.

In the more than a century since *Wilson* was decided, the Supreme Court of Appeals has never revisited the issue. And the situation you describe in your letter—and sample Ohio probated will—appears to mirror *Wilson*'s facts. So when Marion County is presented with a will probated in another State and certified by a single individual that the document makes clear is acting as both judge and clerk, Marion County should not refuse to record that will just because it lacks a second signature.

To the extent that Marion County receives a will from another State which has not been probated, that would be a record "not appertaining to a court" and W. Va. Code §57-1-13 would apply. In that situation, the County should recognize the validity of a certification by the same person in multiple official capacities pursuant to the reasoning in *Wilson*.

Sincerely,

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Solicitor General

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Deputy Solicitor General