



# Property Decisions for Estate Planning

Developing an estate plan requires important decisions about your property. Before you begin, take a complete inventory: non-titled personal property, real property, and financial assets.

Often your attorney's office will provide you with a financial data questionnaire to help you with this task. You may need to create a separate list of items to ensure your plan includes heirlooms, jewelry, and other items important to your family history. Considering titled and non-titled property in a comprehensive approach to estate planning can provide a means of recognizing a broad range of relationships. Using categories of property can simplify matters because some heirs will be interested in one class but not another. For example, one child may be interested in antiques while another is not. Categories can be used to avoid giving heirs property in which they have no interest and, conversely, denying them property in which there is an interest.

Questions to consider for any titled property—anything with a certificate or deed indicating ownership—include:

- How is your property owned?
- Can you identify your spouse's share?
- How do you want your property divided?
- Will it go to your heirs or to a charity?
- Will you give full or limited ownership rights to your beneficiaries?
- What happens if a beneficiary dies before you?

Non-titled personal property involves both different and similar questions, such as:

- How do you want your property divided?
- Do your goals include preserving family history?

## EXAMPLE 1

John owns 100 acres of farm and timber land. He plans to leave 50 percent to his surviving spouse and 25 percent to each of his two children. If John's spouse and two children are all simultaneously killed by a random act of terrorism, which also renders John legally incompetent to change his will, that property will be distributed according to state intestate succession laws at his death if the will contains no other provision.

- Do items have financial as well as emotional value?
- What information do you want to transfer with the item(s)?
- Is it important that a certain person receive a specific item?
- Can family harmony be promoted through equitable distribution of both titled and non-titled property?
- Which items will have meaning for particular persons? Example: A painting by one child given to you as a gift.

## How is your property owned?

The way you own property affects how it is distributed at your death. Property owned with a *right of survivorship* automatically passes to the surviving co-owner or co-owners regardless of what is written in

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your will. Understanding how you own your property is essential to develop an appropriate estate plan. You may need to change the form of ownership to achieve the desired results. Deeds and other title documents are the best source of information for determining how you own your property.

If you are married, your estate plan should take into account your spouse's share of your separately owned property. Many couples simply make the surviving spouse the sole beneficiary in the will. For many estates, this plan works well and has the added advantage of simplifying probate.

But there are some situations where someone may want to give his or her spouse less than the entire estate:

- Large estates may be taxed if the surviving spouse inherits everything outright. Ask your attorney about the soundness of leaving everything to your spouse or of owning everything with a right of survivorship.
- People who have had multiple marriages, and children from a prior marriage, may want to limit the share of the surviving spouse.
- You want to ensure grandchildren or other persons receive certain property.
- You have charitable giving goals.

Your surviving spouse may be entitled to a certain amount of your separately owned property, regardless of your will or intent. North Carolina law prohibits the use of a will to disinherit your spouse. Limiting your spouse's share—whatever the justification—requires careful planning.

## Bequests and devises

A *bequest* is a gift by will of personal property. A *devise* is a gift by will of real property (land). A *general* bequest or devise does not name specific items of personal property or specific parcels of land.

A specific bequest or devise may need to be updated often as the listed items are sold, given away, damaged, lost, or stolen. A general bequest or devise simplifies the drafting of a will because the attorney need not spend time writing detailed descriptions of property. If you are paying your attorney by the hour, this may make a difference in the legal fees.

A limitation of a general bequest or devise is that you can't direct specific items of value to different people. The specific bequest or devise remedies this problem. If you want to make specific bequests of personal property, either affix the list to your will or include it separately. You should avoid making detailed provisions to dispose of personal property by individual item because of the length and the changing composition of personal prop-

erty. Specific bequests should be limited to valuable or unique items. Most lawyers recommend including a separate list in a memorandum called a *letter of last instruction* or *letter of instruction*. For the memorandum to be legally enforceable in North Carolina, it must meet three requirements:

- The will must specifically refer to the memorandum.
- The will must refer to the memorandum as being in existence at the time the will is signed.
- The memorandum must exist.

The memorandum should not be the only provision disposing of personal property. The will should contain a provision disposing of all personal property not covered by the memorandum. To change or update the memorandum, you must add a codicil (amendment) to your will that refers to the new memorandum.

## Dividing property among children

If you have children, you will need to decide how to divide your property among them. Many parents automatically divide their property equally among their children; however, there may be reasons to divide the property unequally.

- Some children may have received their share during their lifetime.
- Children may have expressed preferences for certain properties.
- There may be varied capabilities among children.
- There may be differences in economic needs of children.

Family circumstances will ultimately influence property division within your family. Discuss your decisions and your reasoning with your children. Failure to do so can lead to friction caused by a misinterpretation or misunderstanding of your wishes. Open and candid family discussion about your will can reduce suspicions and avoid future disputes.

## Physically dividing the property

It is easier to divide some types of property than others. Cash is perhaps the easiest to divide. Land may also be divided. But how do you divide a diamond ring, Grandma's pearls, an antique desk, or the fine china? You can make specific bequests of these items, but suppose you decide to make general bequests rather than trying to maintain a list. How will your executor divide your property? You can give your executor directions in your will and in a letter of instruction. Here are some options, and your attorney may suggest others.

- Give your executor discretion to distribute your property. This option is often used in wills. It can work ef-

fectively when your executor knows your wishes. However, it can place a heavy burden on your executor and potentially cause disputes between your executor and your heirs.

- Direct your executor to sell your property and divide the cash among your heirs. Be sure to include special provisions for family heirlooms.
- Direct your executor to hold a lottery among your heirs for specific items. The lot they receive may disappoint heirs, but blame is placed on random chance rather than family or executor.

Deciding who gets your possessions can be difficult, especially for the most valuable or treasured items, and among multiple heirs.

### **Giving a beneficiary full or limited ownership rights**

If a beneficiary inherits your property outright, he or she can sell it, give it away, or squander it. Full ownership rights entitle beneficiaries to dispose of or divide the property within legal bounds. However, you may choose to limit the beneficiary's rights in the property. Possible reasons to limit ownership rights include:

- Concern that your spouse will remarry, and a desire to preserve your assets for your children.
- Concern that your child will die before his or her spouse, and a desire to preserve assets for your grandchildren.
- Beneficiary is unable or unwilling to manage property, and you're concerned that the inheritance may be squandered.

#### **EXAMPLE 2**

Husband and Wife have three children. Husband owns and operates a small business that becomes successful and makes a fortune. Husband and Wife have wills that leave everything to the other if one survives, and if not, the will passes the estate to their children. Husband dies, and Wife inherits the fortune outright. She remarries a man with children from a prior marriage. Wife and Husband #2 go to their lawyer for wills that leave everything to the other survivor, and if they both pass, then their estate passes to their respective children. Wife dies first, and Husband #2 inherits the fortune. When he dies, his (natural) children inherit the fortune through his will. The children of Husband #1 inherit nothing.

#### **EXAMPLE 3**

Mother and Father have one child, Danny. Their wills leave everything to the surviving spouse, and Danny inherits their property after they both pass away. Danny's will leaves everything to his spouse, if she survives him, and if not, then to his children. Danny dies, and his wife (daughter-in-law) inherits Mother and Father's property through Danny's will. She remarries and her will leaves everything to her second husband. She dies, and her second husband inherits Mother and Father's property. Mother and Father's (natural) grandchildren inherit nothing.

These are only two examples of why someone may want to put limits on the ownership rights of a beneficiary. You may have other reasons. Therefore, you should discuss this issue with your attorney if you have concerns about giving full ownership rights to a beneficiary. Two alternatives to full property ownership are listed below. Your attorney may have other suggestions that suit your situation.

- 1) Put the property in trust. The trustee has the right to control the property, and the terms of the trust determine who gets the property or the income stream that the property creates. A trust can offer other protections including preservation of the assets against poor financial management.
- 2) Grant the beneficiary a life estate in the property. With the creation of a life estate, there are two types of beneficiaries: a *life tenant* and a *remainderman*. The life tenant has the right to use and possess the property for life. When granting a life estate in a property, you will also need to identify one or more remaindermen; those who will come into possession of the property at the life tenant's death *by operation law*. Shares of ownership will need to be stated if there is more than one remainderman. At the life tenant's death, the property automatically goes to the remainderman. The remainderman has vested future ownership of the property; however, the life tenant has present ownership that includes use and responsibility for the property during his or her lifetime.

A trust is more flexible than a life estate and is the preferred option in most cases.

### **Plan for contingencies should your beneficiary precede you in death**

Your estate plan should cover the possibility that you may outlive some or all of your beneficiaries. In the event a beneficiary dies before you do, provide for the distribution of the deceased beneficiary's share. The following list offers several options to discuss with your attorney.

- Name another person to inherit in the place of the deceased beneficiary.
- Allow the heirs of the deceased beneficiary to inherit. This is a fine option for relatives but may be undesirable if the beneficiary is unrelated to you. If your will specifies a bequest to a dear friend who dies before you, the bequest will go to your friend's heirs, not your relatives.
- You make no provision and allow the property to pass either under the residuary clause of your will or as if you had died without a will. (A residuary clause is the part of a will that disposes of property not expressly disposed of by other provisions in the will).

"I give all of my personal property to \_\_\_\_\_" is an example of a general bequest.

"I give all my real property to \_\_\_\_\_" is an example of a general devise.

A *specific* bequest or devise names specific items of personal property or specific parcels of land.

"I give my diamond necklace to \_\_\_\_\_" is an example of a specific bequest.

"I give my undeveloped bayside lot in Emerald Isle, NC 34, Book 39, Page 149" is an example of a specific devise of land, and contains the legal description of the land.

### Additional Resources

*Estate Planning and Farm Transition*. Available at <http://www.ag-econ.ncsu.edu/faculty/feitshans/estate.html>.

*Estate Planning in North Carolina — How Do You Own Your Property?* Available at <http://www.ag-econ.ncsu.edu/faculty/feitshans/AG-688-01Accessible.pdf>.

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