ESTATE PLANNING IN NORTH CAROLINA

Where there is a will, there is a way

Learn about the different types of wills, their purpose and preparation, when professional assistance is advised, and the pitfalls of self-prepared wills.

Actively planning for death is not a joyous task. But preparing a will can prevent potential financial, tax, and asset distribution problems for your family and other beneficiaries. A will is a legal document that describes how you want your property distributed at your death. It is a blueprint that guides the *executor* (male) or *executrix* (female) in distributing your estate. It names your executor or executrix, names who shall receive your property, and indicates what property or share each heir will receive. A person who makes a will is called a *testator* (male) or *testatrix* (female). When a person dies leaving a will, he or she is said to have died *testate*. A person who dies without a will dies *intestate*. (See the companion publication in the Estate Planning series.) In North Carolina, any person of sound mind who is at least 18 may make a will.

What a Will Does for You

A will is the supporting central part of your estate plan. It ensures that your decisions will be carried out upon your death:

- Transfers assets to the beneficiaries of your choice.
- Names a guardian for any minor children and provides for management of assets until a minor child reaches a responsible age.
- Provides for care of adult children with special needs.
- Names your chosen executor and controls how your estate is settled.
- Directs or gives discretion to your executor to make donations of conservation easements on your real property.

Why You Need a Will

If you do not have a will when you die, your property will be divided according to intestate succession rules, which may not distribute your assets as you would have desired.

Married couples often assume that they do not need a will because they own everything with a *right of survivorship*. At the death of one spouse, all property should transfer to the other. However, property can exist, such as a wrongful death award, that does not pass via survivorship. Such property will be distributed by the rules of intestate succession to all eligible heirs, not the spouse alone. Following the surviving spouse's death, the property will also be divided as per the rules of intestate succession. This may result in excessive taxes for the second spouse's estate when he or she dies.

If both spouses die simultaneously, their property will be probated. *Probate* is a court process to settle the estate. Where there has been inadequate estate planning or there are unresolved family disputes, probate can tie up property transfer and result in significant legal costs. Dying intestate can lead to some undesirable circumstances while the estate is being settled.

The rules don't provide for recommendations for choosing a guardian for a minor child. If a minor child inherits property worth $1,500 or more, the court will appoint a guardian to manage it until the child reaches age 18. The appointed guardian may not be to the liking of the parties involved.

If a beneficiary predeceases an *intestate decedent* (the property owner who dies) or renounces his/her interest, the property may pass to someone unintended by the decedent.

If a decedent dies intestate, the estate administrator must post a probate bond and may have to pay bond premiums. A *probate bond* guarantees that the estate's creditors, heirs, and beneficiaries receive the distributions to which they are entitled if an executor or administrator misappropriates funds. This expense could be avoided by waiving bonding through a provision in a will.

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If a person dies intestate without selecting an executor, the court chooses an administrator to settle the estate. The administrator may be less knowledgeable and less able to bring consensus among family members than an executor appointed by a will.

Many people assume that they don't have enough property to justify making a will. If the courts decide how your estate will be settled, the neediest beneficiaries may not get all they need because of intestate succession rules. Attempting to avoid these issues by giving property away before death can cause other problems. Heirs will be limited to the property's *tax basis* (the amount that you paid for the property with adjustments) and will lose provisions allowing a stepped-up basis in property after your death. Estate taxes may not be avoided on appreciation if the gift was structured incorrectly: for example, where you retained the right to revoke the gift or control the property. There may be liability for federal or state gift taxes, or both. A well-developed estate plan specified within a will can resolve all of these potential problems.

Preparing a Will

You can prepare your own will. However, self-made wills usually create problems. Many words have special legal meanings. When these words are used by a layperson, the results may not be as intended. An attorney is trained to avoid the legal pitfalls that result from a do-it-yourself will. Prepared wills available for sale do not include legal advice and may not match your situation or conform with every state's laws. Laws affecting taxation and estate planning have grown increasingly complex, so using an attorney fully competent in these fields is important.

Will preparation costs. Fees for legal assistance vary, depending on the estate's size and the will's complexity. Most law firms do not have a set fee for preparing a will. Attorneys usually base their fees on their conference time with the testator and the time it takes to draft the will. Do not hesitate to ask an attorney for an estimate of the fee for preparing a will, preferably at the first meeting.

Naming a personal representative. The term *personal representative* is a generic term for the person who settles your estate. If you name someone in your will to settle your estate, you name an *executor*. If the court appoints someone to settle your estate, the person is called an *administrator*. Duties of the personal representative include:

- Offering and proving the will in probate court.
- Collecting and inventorying property in the estate.
- Paying bills, collecting debts, and filing tax returns.
- Managing the estate for as long as it is in probate.
- Defending or bringing lawsuits on behalf of the estate.
- Distributing the assets of the estate to the people legally entitled to receive them, either under the terms of the will or under the rules of intestate succession.

Select an executor with experience, sense, and attention to detail. It also helps if they can keep peace among family members. Select someone who lives nearby and can efficiently administer your estate. Ask permission and get concurrence before your final selection. Finally, select an individual who *qualifies* as a personal representative. To qualify as a personal representative in North Carolina, the person you name in your will must *not* be:

- under 18 years of age, illiterate, or a convicted felon;
- declared legally incompetent nor remain under such disability;
- a nonresident of North Carolina, unless he or she has appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate;
- a corporation not authorized to act as a personal representative in North Carolina;
- barred or have lost property rights under N.C. law;
- a person whom the clerk of superior court finds otherwise unsuitable; or
- a person who has renounced the right to as act executor.

Name alternates in the event your first choice cannot or will not serve as your personal representative.

Special concerns. Certain conditions or concerns warrant inclusion in your will or comprehensive estate plan:

- provisions for minor children and children born or adopted after the will is executed;
- designation of alternate beneficiaries;
- definition of the powers of the executor and trustee;
- designation of alternate executors;
- issues that may arise in case joint executors are named;
- apportioning death-related taxes;
- survivorship clauses;
- multiple marriages and children from prior marriages;
- disabled or handicapped family members;
- pending divorce;
- heavy personal or business debt;
- land owned outside North Carolina;
- long-term care;
- value of gross estate exceeding the amount sheltered from tax by the *applicable exclusion amount*;
- life insurance policies that increase the value of the taxable estate; and
- family-owned business or farming operation.

Changing a Will

A will has no legal effect during the testator's lifetime. It is effective only at death. A will can be freely changed, and it can even be revoked. If changes need to be made, a codicil or a new will must be prepared by an attorney. A *codicil* is a legally recognized supplement to an existing will that must be executed and attested to with the same formalities as a will. If you want to make major changes to a will, it is better to revoke it and make a new one than to prepare a codicil. A will is revoked when you execute a new will or destroy an existing one. With modern software, it is usually easier to pre-

pare and execute a new will than a codicil. A will should be reviewed periodically, especially when there are changes in law or in family or financial situations. Such circumstances include, but are not limited to:

- marriage, remarriage, or divorce occurring after the will was written;
- birth of a child or death of a beneficiary;
- a move to another state;
- acquisition of additional property or substantial increase in the value of property; and
- amendment of federal or state laws affecting death taxes.

Do not try to change a will yourself. Doing so will not accomplish the desired changes and may make your will invalid. Don't draw a line through a paragraph or write the word "omit." Don't write extra words on lines. Instead, revoke a will by executing a new one that states all prior wills are invalid. Or destroy your will with the intent to revoke it. Someone with no interest in your estate who can attest to your mental competence and intention should witness the will's destruction.

Marriage. Marriage does not automatically revoke a prior will. If you marry and do not create a new will, your surviving spouse may not be included in the will because it was made prior to marriage. He or she may be left with no option other than seeking an elective share of the estate.

Birth or adoption. The subsequent birth or adoption of a child or entitlement of an after-born illegitimate child does not automatically revoke a will. Any of these beneficiaries would, however, have the right to share in your estate to the same extent as they would have shared had you died intestate unless any of the following is true:

- You made some provisions for the child in your will or through a trust that takes effect after death.
- You intentionally made no provision for the child.
- You had living children when the will was executed and all were disinherited under the will.
- Your surviving spouse receives all the estate under the will.

A will or a part of it that has been revoked cannot be revived unless the will is re-executed or another will is executed that incorporates the revoked part or parts.

Divorce. A divorce after a will has been written does not revoke the will. The divorce does, however, revoke all provisions in the will in favor of the divorced spouse. If the testator wants to make the divorced spouse a beneficiary, he or she should write a new will after the date upon which the divorce becomes final. If any provisions for the divorced spouse are revoked under this section, they are revived if and when the testator remarries the former spouse.

Remember this with caution: Before the final decree of divorce has been entered, each spouse retains his or her rights to the other spouse's property, unless the parties have entered into a property agreement settling those rights. If you are involved in a divorce proceeding, ask your attorney how you can protect your property in the event you die before the final decree of divorce has been entered.

Restrictions That Apply to a Will

Disinheriting. In North Carolina, a spouse cannot be disinherited under a will. (See the companion publications in the Estate Planning series.) Generally, the testator has the right to disinherit persons, including children, who would otherwise inherit property had he/she died without a will. Children have no vested interest in either parent's property.

Location. Location of property affects a will. Generally, a will that disposes of land (*real property*) located in North Carolina must be signed and witnessed in accordance with North Carolina law to be valid. In contrast, a will disposing of personal property is determined by the laws of the state or country where the decedent was domiciled (living) at the time of death and is valid even though the personal property is located in North Carolina. See *How Do You Own Your Property?* (AG-688-01).

If you own land in another state and your domicile (legal residence) is in North Carolina, the land must be probated in the state where it is located. North Carolina does not have the legal jurisdiction to probate land located elsewhere. Your will can include provisions for dealing with land located in another state that will make it easier for your executor. Your attorney can also discuss options for avoiding the second probate.

If you own *personal property* located in another state, North Carolina has jurisdiction because you are domiciled in North Carolina and your personal property elsewhere can be relocated to North Carolina.

Exempt property. A will cannot dispose of property owned by a husband and wife in *tenancy by entirety*. Such land is owned, after the death of one, solely by the survivor. See *How Do You Own Your Property?* (AG-688-01). If property is owned by two or more persons in *joint tenancy with right of survivorship*, the survivor takes all. Proceeds of insurance policies, pension funds, U.S. Savings Bonds, payable-on-death (POD) deposits, or other assets where a beneficiary is named cannot be disposed of by a will unless the estate is named as beneficiary.

Executing a Will

A properly executed will (or codicil) must be signed by at least two persons (preferably three) who witnessed the testator signing the will. The witnesses need not and usually do not read the will. Avoid using the beneficiaries named in the will as witnesses. All gifts by will made to witnesses or their spouses are void unless there are two other witnesses such that the witnessing beneficiary is not needed. Wills that are not executed in the above manner are legal in North Carolina if they meet certain conditions.

A *holographic will* is handwritten by the testator and does not have to be signed by witnesses. To be valid in North Carolina, a holographic will must be entirely in the testator's handwriting and signed by the testator. In addition, it must be found among his or her personal effects or in the hands of a person entrusted with its safekeeping.

Before a holographic will can be probated, the personal representative appointed by the will must have three witnesses identify the decedent's handwriting and one witness testify that the will was found among valuable papers or effects, in a safe-deposit box or other place of safekeeping, or in the hands of a person entrusted with its safekeeping. Holographic wills are not recommended for many reasons, including the difficulty of proving them in court.

Nuncupative wills are made orally by a person who is sick or in imminent peril of death and who does not survive the sickness or peril. Such a will must be witnessed by two competent disinterested witnesses during its making. These witnesses must be specifically requested by the will's maker to act as witnesses.

North Carolina's *self-proving will* provision calls for sworn affidavits and notarization of the testator's signature and witnesses' signatures (two or preferably three witnesses) when they sign as witnesses. When the will is later probated, it is not necessary to locate the witnesses. This provision can save time and money in settling the estate.

Storing a Will

After your will is prepared and executed, store the original in a safe place where it can be found by your designated representative. Your original will—the one you signed—must be offered for probate at your death. It should *not* be stored in a desk drawer or other storage place around the home. It could be stolen or destroyed by an heir who would receive more under North Carolina law of intestacy than under the will. Store your will safely in one of these places:

- The depository in the office of the clerk of superior court in your county. If you move to another county or another state, retrieve your will and move it with you.
- A safe-deposit box in a bank or other institution. Your family may be delayed in retrieving it if the bank is closed or they haven't thought to look there. A safe deposit box is no longer frozen on the death of the person who has access, so the main disadvantage of storing your will there no longer exists.
- An attorney's office. Ask your attorney what will happen to it if he or she should die, quit practice, or move away.
- A bank or trust company named as executor.

In all these circumstances, the will must remain private and not disclosed to anyone until the maker's death.

If you store your will at home, you risk having it lost or inadvertently destroyed. Also, someone who might not be happy with your will may alter, destroy, or conceal it. While doing so is illegal, proving this occurred can be difficult, if not impossible. Keeping your will in a fireproof safe that your executor knows about is one way to avoid these risks.

Regardless of where you choose to store your will, make sure that your executor or attorney knows where it can be found at your death. Always review your will periodically to ensure that it stays current. Keeping a copy of your original will in a secure but accessible place makes it easier to review on a regular basis.

A Will Provides Certainty

A will is a written document that dictates the distribution of your property after your death. By making a will, you can decide who shall receive your property, how much each shall receive, when they shall own it, and, to some degree, what they can do with it. The drafting of a will and other estate plans involves decisions requiring professional skill and judgment. Be sure that you employ professionals with sufficient training, study and experience. Use an attorney to draft a will suited for your unique situation.

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