

## ISSUES IN DRAFTING WILLS AND TRUST AGREEMENT

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### A. PRINCIPLES IN WILL DRAFTING

Precision and clarity are crucial when an attorney drafts a will. A will speaks at the death of the testator, and any ambiguities or mistakes in the will are often difficult to handle at that time.

In North Carolina, the guiding principle of will construction is to honor the intent of the testator. In drafting a will or revocable trust, it is your job to make sure that the testator's intent is accurately expressed in the document. It is your job to chase down potential ambiguities and ensure that you have made provision for the testator's estate to be handled in such a way that the testator's intent will be carried out.

An important piece of the estate planning puzzle is the "executive" piece. That is, who will carry out the testator's intent? Do not give this piece short shrift. Although fiduciaries have a well established legal duty to act appropriately, it is important to appoint a capable, honest fiduciary who will be able to carry out his or her duties to the beneficiaries without causing problems for himself or herself.

#### 1. FIDUCIARIES

The term "fiduciary" is a general term used to describe a person in whom another person has placed special faith, confidence and trust. Because of the trust and confidence placed in him by another person, a fiduciary is required to act honestly, in good faith and in the best interests of that person.<sup>1</sup> When wills and trusts are being drafted, the selection of fiduciaries is one of the most important decisions the client makes. The fiduciaries selected by the client will be tasked with carrying out the client's wishes at a time when the client is unable to do so. In addition, fiduciaries must often navigate tricky family

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<sup>1</sup> *Moore v. Bryson*, 11 N.C. App. 260 (1971).

situations while carrying out what can be complex duties. There are several kinds of fiduciaries which may be appointed by a client in his or her will or trust.

a. Executor.

An executor's duties are set out in Article 13 of Chapter 28A of the North Carolina General Statutes. The executor's duties commence upon the executor's appointment by the clerk of superior court, which is memorialized by the issuance of letters testamentary.<sup>2</sup> Section 28A-13-2 sets out a general statement of the executor's duties:

A personal representative is a fiduciary who, in addition to the specific duties stated in this Chapter, is under a general duty to settle the estate of his decedent as expeditiously and with as little sacrifice of value as is reasonable under all of the circumstances. He shall use the authority and powers conferred upon him by this Chapter, by the terms of the will under which he is acting, by any order applicable to fiduciaries, for the best interests of all persons interested in the estate and with due regard for their respective rights.

The statute refers to a "personal representative," which includes an administrator - a person appointed to handle an intestate estate - as well as an administrator C/T/A - a person other than the named executor who is appointed to administer an estate where there is a will.

A testator has the right to name in his or her will a person who shall administer his estate after his death, provided that the person designated is not disqualified by law.<sup>3</sup> The person named in a testator's will is the executor of the estate. The person the testator names as executor has the right to administer the estate and can only be deprived of that right by his refusal or neglect to probate the will or take out letters, or his inability or unsuitableness to execute the will or trust.<sup>4</sup> Courts will give deference to the person appointed by the testator<sup>5</sup>, but in some circumstances the person named by the testator may not be appointed as executor.

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<sup>2</sup> N.C. Gen. Stat. § 28A-13-1.

<sup>3</sup> *Matter of Moore's Estate*, 292 N.C. 58, 65, 231 S.E.2d 849, 853 (1977).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* At 65, 231 S.E.2d at 854.

North Carolina General Statutes Section 28A-4-1 states that “Letters testamentary shall be granted to the executor or executors designated in the will . . . [but] if the clerk of superior court upon hearing finds that none of the foregoing persons is qualified in accordance with G.S. 28A-4-2, the clerk shall grant letters of administration in accordance with subsection (b).” The statute then provides a list of persons who may serve as administrator in the order they are preferred: (1) surviving spouse of decedent; (2) devisee of testator; (3) heir of decedent; (4) next of kin, with a person who is of closer kinship having priority; (5) any creditor to whom the decedent became obligated prior to his death; (6) any person of good character residing in the county; and (7) any other person of good character not disqualified under G. S. 28A-4-2.

A person may be disqualified from acting as executor if: he is under 18 years of age; he has been adjudged incompetent and remains under such disability; he is a convicted felon and his citizenship has not been restored; he is a nonresident of this state and has not appointed an in-state agent to accept service of process; he was a resident of North Carolina at the time of appointment but then moved from the state without appointing an in-state agent; it is a corporation not authorized to act as an executor/personal representative in North Carolina; he has lost the right to serve as executor as provided by Chapter 31A (this includes a spouse who is divorced from the decedent, who abandoned the decedent, who is separated from the decedent and is living in un-condoned adultery, etc.); he is a person whom the clerk finds otherwise unsuitable; or he is a person who has renounced.<sup>6</sup>

Some of the reasons for which a person can be disqualified from being executor are obvious - an incompetent person cannot serve as executor. The general exception that a person may not serve as executor if “the clerk of superior court finds [such person] otherwise unsuitable” is more of a gray area. This reason for disqualification is often used and examined in situations in which there is an argument over who should be the executor. One of the most common reasons that is covered in this catch-all exception is a conflict of interest. Where an executor has a conflict of interest that will prevent him from impartially performing his fiduciary duties, he may be disqualified.<sup>7</sup> For example,

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<sup>6</sup> N.C. Gen. Stat. § 28A-4-2.

<sup>7</sup> *In re Moore's Estate*, 25 N.C. App. 36, 212 S.E.2d 184 (1975).

where the person appointed executor performed services as an accountant for a company, and one of the assets of the estate was a potential claim against the company, the person appointed had a conflict of interest such that he was properly disqualified from serving as executor. The court determined that “[e]specially when a decision to bring suit might endanger [the accountant’s] chances of future employment by the firm, the possibility that his decision to bring suit will be influenced by his own personal interests is great. One cannot represent his own interest and at the same time represent those of another which are in conflict with his own with fairness and impartiality to either.”<sup>8</sup>

When the person who has qualified as executor fails in his duties or has a conflict of interest, the clerk may upon his or her own motion remove the executor. Upon a verified complaint for removal filed by an interested party, the clerk may initiate a procedure to determine whether the executor should be removed. The clerk may remove the executor if he or she finds that the person appointed was originally disqualified or has become disqualified; if letters were obtained by false representation or mistake, if the person appointed has violated his or her fiduciary duty through default or misconduct; or if the person has a private interest that “might tend to hinder or be adverse to a fair and proper administration. The relationship upon which the appointment was predicated shall not, in and of itself, constitute such an interest.”<sup>9</sup> If an executor is removed because of bad acts, then the executor may not receive a commission for his or her services.<sup>10</sup>

In will drafting, it is important to help your client ensure that he or she chooses an executor who will be able to handle executor duties. In a fractious family, for example, it may be best to choose an independent third party to serve as executor.

When a will is being drafted, it is wise for the testator to name successor or alternative executors, to cover the possibility that the testator’s first choice for executor cannot serve. This allows the testator to remain in control of who will serve to administer the will. If no successor is named, the decision of who will administer the estate is left to the persons interested in the estate or the clerk of superior court. If, for example, the named executor renounces his right to serve as executor, he may name a person and ask

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<sup>8</sup> *Id.* At 40, 212 S.E.2d at 187.

<sup>9</sup> N.C. Gen. Stat. § 28A-9-1 (which also includes a description of the procedure for removal of an executor).

<sup>10</sup> N.C. Gen. Stat. § 28A-23-3.

that the clerk appoint that person, but those wishes are not binding upon the clerk of court.<sup>11</sup>

Sometimes, testators may want to appoint more than one person to serve jointly as executors. If a client wishes to appoint joint executors, it is important that the will set out how they will work together - the provisions of the will govern, but if the will is silent, then North Carolina General Statutes Section 28A-13-6 will determine how co-executors will function. The general rule is that acts and duties must be performed by both joint executors, if there are two, and if there are more than two, by a majority of the executors. One way to address the situation of co-executors is to provide for them to have joint and several powers, so that a single one of the executors may act on behalf of the estate without having to obtain the signature or joint action of the other executor(s). If the will does not provide for a division of powers, the executors may, by written agreement signed by all of the executors and approved by the clerk of court, provide that certain powers exercised by one executor can bind all executors.<sup>12</sup>

Sometimes, a testator may appoint a person who is not a resident of North Carolina to be executor. Generally an out-of-state resident may serve as executor of a North Carolina estate, but the person appointed must submit himself or herself to the jurisdiction of the North Carolina courts and appoint a person to serve as his or her agent for service of process within North Carolina.

A good practice in drafting wills is to waive the bond for an executor. If there is no express waiver of the bond, an executor must be bonded. Bonding can be difficult (depending on the person who is named as executor) and expensive. If the testator trusts the person being named as executor, then often it eases the administration process to also waive the bond.

b. Trustees

If a person's will establishes any trusts, then the will should also appoint a trustee for the trust. The trustee's fundamental duty is to "administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries and in

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<sup>11</sup> See AOC form E-200.

<sup>12</sup> N.C. Gen. Stat. § 28A-13-6.

accordance with [Chapter 36C of the North Carolina General Statutes].”<sup>13</sup> North Carolina has adopted a Uniform Trust Code, which is contained in Chapter 36C, and which presents a code governing the creation and administration of trusts, including testamentary trusts. Generally speaking, the Trust Code sets out default settings for a trust. The terms which are set forth in the document establishing a trust (whether it is a will or trust declaration or agreement) can override most of the provisions of the Trust Code.

Again, the decision of who is appointed as a trustee is an important one which should be carefully considered by the client.

In a trust established for minor children, for example, it is a good idea to choose a trustee who is someone other than the guardian named for the children. This can provide a system of checks and balances that can stem the risk of abuse of a trust by a guardian. Often in a situation where clients are in a second marriage, a marital trust is used to provide for the surviving spouse during his or her lifetime, with the remainder to the children of a prior marriage. In second marriage circumstances, an independent trustee can be quite valuable. The independent trustee can protect the interests of the surviving spouse and the children, while appointment of a family member has a high likelihood of leading to family conflict and even litigation.

In some circumstances, a corporate trustee will be the best choice, while in others an individual trustee will be a better choice. Often, corporate trustees require that a trust have assets of a certain threshold value before they will serve, whereas individual trustees are generally more flexible regarding the asset value of a trust.

A testator or settlor of a trust may appoint more than one person to serve as trustee. In this circumstance, the default rule is that if there are two trustees, trustee action must be unanimous. If there are more than two trustees, trustee action must be taken by a majority of the trustees.<sup>14</sup> If more than one trustee is appointed, it may be desirable for the general rule not to apply. For example, in some circumstances, it makes sense to appoint a family trustee and an independent trustee. The family trustee may have more personal contact with the beneficiary, while the independent trustee may be in

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<sup>13</sup> N.C. Gen. Stat. § 36C-8-801.

<sup>14</sup> N.C. Gen. Stat. § 36C-7-703.

charge of investments or have the final say-so as to distribution decisions, taking some of the pressure off of the family trustee. In such a situation, careful delineation of the role of each type of trustee is important.

The Trust Code sets out the duty of loyalty which a trustee owes to the beneficiaries of the trust and says that the trustee “shall administer the trust solely in the interest of the beneficiaries.”<sup>15</sup> This provision may be overridden by the terms of the trust, so if the client wants for the trustee to be able to engage in any self-dealing, then the instrument creating the trust may so provide. Use of an investment firm related to or affiliated with a corporate trustee is generally not considered to be self-dealing, so long as the investment complies with the prudent investor rules.<sup>16</sup>

The trustee has a duty to be impartial to multiple beneficiaries of a trust.<sup>17</sup> (This is where an independent trustee can be important, as explained above.) The trustee has a duty to exercise reasonable care, skill, and caution in dealing with a trust,<sup>18</sup> but a trustee with special skill or expertise must use that special skill or expertise in administering the trust.<sup>19</sup>

The Trust Code contains many default powers for the trustee.<sup>20</sup> These are a valuable resource of trustee powers, but they are also subject to the rule that the express terms of the trust can override them.

c. Guardians

The parents of minor children can appoint another kind of fiduciary in their wills. They can name a guardian for minor children. Parents may name a guardian or guardians in a writing signed in the presence of two witnesses who are at least 18 years of age other than the guardian being named.<sup>21</sup> A written attested will complies with the requirements for the appointment of a standby guardian for a minor child. The testator can appoint alternate guardians. The appointment may waive bond for the guardian. Before a guardian officially becomes guardian of a minor child, the clerk must make findings that the guardian was properly appointed, that the best interests of the minor child will be

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<sup>15</sup> N.C. Gen. Stat. § 36C-8-802.

<sup>16</sup> N.C. Gen. Stat. § 36C-8-802(f).

<sup>17</sup> N.C. Gen. Stat. § 36C-8-803.

<sup>18</sup> N.C. Gen. Stat. § 36C-8-804.

<sup>19</sup> N.C. Gen. Stat. § 36C-8-806.

<sup>20</sup> N.C. Gen. Stat. § 36C-8-815 and 8-816.

promoted by the appointment of the person designated as guardian, and that the guardian named is fit, among other findings.<sup>22</sup>

For families with minor children, the selection of a guardian can be one of the hardest decisions in the estate planning process. In wills or trusts in which appointment of a guardian is appropriate, it can be helpful to explain what can be distributed to the guardian and why. For example, you may provide that a guardian may receive funds to renovate a home so that the minor child can live with them

## 2. FORMS

In drafting wills and trusts, there are several good sources for forms that may serve as a starting point for a particular client's estate planning. Several banks have will and trust manuals, including BB&T. It can be helpful to find forms that are North Carolina specific. Several software systems are also available. Menu forms is available, and it uses forms produced by attorneys at Robinson Bradshaw and Hinson in Charlotte.<sup>23</sup> Other national providers often document assembly programs for estate planning such as Wealth Counsel<sup>24</sup> and Jonathan Blattmachr.<sup>25</sup> In using the systems of national providers, it is very important to customize forms to include North Carolina law.

As always, if you begin drafting with a form, it is critical to carefully proofread and ensure that the document you have prepared fits the client's needs and is specifically tailored to the client. Form books are a good starting point for estate planning, but the importance of proofreading and customizing drafts to your client's needs cannot be overstated.

## 3. CLAUSES

There are certain clauses and provisions that are included in all wills, and forms give you a good beginning place to draft these. Some of the important and common clauses in wills are:

a. Introductory paragraph. This paragraph usually states the testator's name, can state the testator's county of residence, and can give family information. Providing

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<sup>21</sup> N.C. Gen. Stat. § 35A-1374.

<sup>22</sup> *Id.*

<sup>23</sup> <https://www.rbh.com/onlinestore>

<sup>24</sup> [www.wealthcounsel.com](http://www.wealthcounsel.com)

family information in the will can help with the administration process and can help eliminate ambiguity. For example, if the testator wants to include stepchildren in the will and treat them as natural children, a family information section is very important in explaining how these beneficiaries are to be treated.

b. Revocation of prior wills. All wills should include a statement that the will being executed revokes any prior will. If the person is executing a codicil that is not intended to revoke a prior will, it is smart to recite that purpose in the introductory language of the will, and it is also smart to state that terms of the will that are not addressed in the codicil are ratified and affirmed. With word processors and with the likelihood that an attorney can easily alter terms of a will, as a general rule, it is better for a client to execute a new will rather than a codicil. This is because piecemeal modification in a codicil can be susceptible to inadvertent omission and other mistakes.

c. Tangible personal property. Tangible personal property can be lumped in with the residue of the estate or it can be treated separately. Tangible personal property includes items such as a testator's furniture, clothing, jewelry and automobiles, but does not include money or other intangibles, such as stocks and bonds. In some states, a memorandum or other writing may be incorporated in the will that directs that tangible personal property be distributed in a certain way. In those states, the memorandum approach to dealing with tangible personal property is useful, because it allows the testator to make provision for specific items of tangible personal property to be distributed to specific individuals without making a number of specific bequests in the will. In those states, the memorandum may be revised without having to go through the formalities of re-executing a will, and the memorandum is binding upon the executor. North Carolina does not have this rule, however. If a memorandum is incorporated by reference in a North Carolina will, it cannot be revised after the will has been executed unless it constitutes a codicil to the will. An option in North Carolina is to devise the tangible personal property to the executor of the estate, and include precatory language that states that the testator expects and trusts that the executor will follow the testator's directions as set forth in a memorandum or written note in distributing the tangible personal property.

d. Specific bequests/devisees. Wills may contain bequests or devisees of specific property. When specific devisees are used, it is important to be careful in describing the property devised and describing the beneficiary. The will should also provide what happens to the property if the devisee is deceased. North Carolina does have an anti-lapse statute that may apply, depending on the relationship of the devisee to the testator, but it is better practice to state what happens to specific devisees in the event that the devisee is deceased (because the anti-lapse statute will not apply to every specific devise, and because it is a lot easier to explain language you have drafted to a client than it is to explain the anti-lapse statute to a client! A specific devise may be made to a class of beneficiaries. For example, a testator may devise a sum to all of his or her grandchildren living at the time of his or her death.

e. Residuary estate. Every will should contain a clause that deals with the testator's residuary estate to avoid a situation of partial intestacy. Even if the testator is sure that in his specific bequests, he has devised every interest in any property that he owns, a residuary clause is necessary to deal with lapsed gifts and forgotten or unexpected property interests.

f. Fiduciary appointments. In this section, the testator should name an executor and possible successors to the executor. Again, the reason why it is desirable to name successors is so that the testator can control who is administering the estate rather than relying upon the clerk to name someone. If the testator establishes any trusts or if there is a possibility that any trusts may be established under the will (for example, under a catch-all "holdback" trust provision), the testator should name trustees in this section. If the testator has any minor children, then the testator can name guardians for minors in this section.

g. Debts and Expenses. The will should provide for the payment of the testator's debts and administration expenses. If the testator desires, he or she may include a provision that the testator's charitable pledges are to be paid, regardless of whether such pledges would be considered "enforceable" obligations of the testator's estate. In addition, it is smart to provide that the decedent's funeral expenses are to be paid, regardless of whether the costs of a funeral or cremation and suitable marker or memorial exceed the amount allowed by statute. Currently, funeral expenses that are authorized -

absent a specific provision in the will - are limited to \$2,500<sup>26</sup>, and the amount allowed for a gravestone is \$800 (if the estate exceeded \$25,000; if not, the amount allowed is \$400).<sup>27</sup> These amounts are not sufficient to pay for the costs of a funeral or often even a cremation, so it is important that the will itself authorize expenses in excess of these statutory amounts.

Generally, when property devised to a person is encumbered, the devisee takes the property subject to the encumbrance.<sup>28</sup> If the testator wishes for the secured obligation to be paid and for the property to pass free of encumbrances, there must be an express provision in the will which exonerates the devised property from the encumbrance.

h. Taxes. The testator should provide for how death taxes are to be paid. Tax allocation clauses are generally included in wills even if the estate will most likely not be a taxable estate. There are a few ways to address this. Sometimes, the testator may provide that death taxes are to be paid from the residuary estate. This means that no part of the tax burden on the estate will be expected to be paid from any specific devise or bequests. Sometimes, if the specific bequests and devises are a substantial portion of the estate, the testator may provide that every devise shall bear its *pro rata* share of the taxes. Carefully describing how taxes are to be paid has become even more important as non-probate assets such as IRAs, retirement plans and life insurance constitute larger portions of decedent's estates. For example, if the beneficiary of an IRA is different than the residuary beneficiary of the estate, it may be unfair to force the residuary beneficiary to foot the estate tax bill for the IRA.

Also, if part of an estate qualifies for the estate tax marital deduction or charitable deduction, a testator may want any taxes to be borne by the non-marital or non-charitable deduction, because the payment of taxes out of a marital or charitable share will cause a reduction of the marital or charitable deduction, which in turn would cause circular reductions to be calculated.

i. Executor's powers. It is wise to recite the powers given to the executor in the will. Often, the statutory powers given to an executor are incorporated by reference (N.C. General Statutes § 32-27, § 32-26). The section which recites the executor's

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<sup>26</sup> N.C. Gen. Stat. § 28A-19-6.

<sup>27</sup> N.C. Gen. Stat. § 28A-19-9.

powers can be a good place to describe how joint executors are to exercise their powers (for example, giving joint executors joint and several powers). Beware: a personal representative in North Carolina has the powers set forth in N.C. Gen. Stat. § 28A-13-3 except as qualified by the express provisions of a will. The power to sell real property in § 28A-13-3(1) requires a personal representative to follow the procedures set out in subsection G.S. 28A-13-3(c) in selling real property, which requires a special proceeding in order to sell real property. If a testator wishes for real property to be sold following death, the personal representative can authorize the executor to sell the property at public or private sale in his discretion, with or without court order, but to be effective, such a direction should spell out which specific real property the executor may sell. Often property is devised to the executor, with instruction for the executor to sell. Most will forms contain a general authorization for an executor to handle (sell, lease) the real property of a testator, but these clauses, without more, are held to be ineffective and if such a clause is the only authorization for the sale or lease of real estate, then the clerk will require that the executor file a petition to take control and custody of the real property in order to sell it. In this section, the testator may waive the executor's bond as well.

j. Trustee powers. If the will establishes any trusts, it is important to set out the powers given to the trustee. N.C. Gen. Stat. § 36C-8-816 gives a trustee certain specific powers, but those powers may be modified by the terms of the trust, and the statutory powers of N.C. Gen. Stat. § 32-27 may be incorporated by reference, but additional powers may also be included. For example, if a trust will hold an ownership interest in a business, it would be wise to include powers allowing the trustee to deal with the stock or other ownership interest. If a family farm or business is included, and if the testator wants it to remain in trust, it would be smart to include a provision that the trustee does not have to diversify the trust's assets.

k. Custodianship/stand-by or holdback trusts. The will may include a provision for what happens if any property is to be distributed to a minor child or incompetent adult under the will. There are several options in making provision for this circumstance. A simple reference to the Uniform Transfers to Minors act may suffice, or

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<sup>28</sup> N.C. Gen. Stat. § 28A-15-3.

the testator may want to add provisions for a trust to be established for any distribution to a person under a certain age. A testator may give the executor the authority to determine how a devise is distributed. For example, a testator may provide that if a property is to be distributed to a minor child, the executor may decide whether to distribute the property to the child's guardian, a custodian of a UTMA account, or to hold the property in trust for the child. A provision like this one can give the executor flexibility to deal with varying circumstances, such as the size of the devise, the age of the beneficiary, and other relevant factors. Likewise, for incompetent or disabled individuals, a testator may want to establish a discretionary trust or simply have the funds held by a custodian or paid to a community trust.

l. Definitions and construction. Many wills contain a definitions and construction section. A common provision is that masculine and feminine pronouns may include each other as the context of the will requires. Many wills define the terms "children" and "issue." Many wills address how adopted persons are treated. The detail of the definition section often depends on the complexity of the will. For example, if the will contains generation-skipping transfer trust provisions, then "available exemption" may be a defined term.

m. Attestation clause. In written attested wills, it is usual to have a clause in which the testator acknowledges that the foregoing document is the testator's will, that the testator executes it freely and of his or her own will, that he or she is of sound mind, that he or she is 18 years of age or older, and that he or she executes the will free of undue influence and under no undue constraint. Likewise, there is a clause that the witnesses to the will sign. A sample attestation clause is:

We, \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his/her last will and that he/she signs it willingly, and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and to the best of our knowledge the testator is

eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Some practitioners use two witnesses, because that is the number of witnesses required in North Carolina for a valid written attested will. Some practitioners use three witnesses, because some states still require three witnesses, and by using three witnesses, the will is more likely to be valid in such a state, if circumstances arise in which the will is probated in such a state. Also, there would be an additional witness who could testify as to the proper execution of the will, in the event of a will caveat.

n. Notarization. The will should be notarized so that it is a self-proving will. The Notary Public confirms that the testator and the witnesses all duly signed the will. If the will is not self-proven, then for the will to be probated, you must find the witnesses at the time the will is presented to the court for probate, to prove that the will was properly executed.

o. Identification of Drafting Attorney. The statute requiring drafting attorneys to identify themselves and their business addresses in all written, attested wills in North Carolina executed January 1, 2010 or later was repealed by the General Assembly.<sup>29</sup>

p. Probate of Wills of Military Personnel. Wills of member of the armed services of the United States and members of the Merchant Marines military personnel may be probated in North Carolina upon verification of three credible witnesses who can identify the handwritten signature of the testator.<sup>30</sup> Due to the difficulty of locating witnesses upon the death of a service member, it is advisable use other methods of execution whenever possible to ease the burden on the personal representative.

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<sup>29</sup> N.C. Gen. Stat. § 31-4.2 (*repealed* 2010).

<sup>30</sup> N.C. Gen. Stat. §31-18.4

## B. REVOCABLE AND IRREVOCABLE TRUSTS

A trust is a fiduciary relationship with respect to property in which the trustee holds legal title to the trust property pursuant to agreement with the trust's grantor or settlor, subject to enforceable equitable rights in the beneficiary.

### 1. FUNDING THE TRUSTS

Revocable trusts are commonly used as will substitutes. A typical revocable trust (or "living trust") provides that during the settlor's lifetime, he or she may withdraw or direct the use of trust assets. The trust agreement may provide for how trust assets are to be used during the settlor's incapacity and therefore can be helpful in planning for a client's incapacity. Using a trust to plan for incapacity can have benefits over using a durable power of attorney. Generally, a trustee has an easier time dealing with financial institutions, because institutions are more familiar with trust arrangements and the law that applies to them. In some instances, financial institutions will give an attorney-in-fact a hard time. North Carolina has a statute to address difficulties in getting institutions to accept a durable power of attorney - N.C. Gen. Stat. § 32A-41. Even armed with this statute, this practitioner has had trouble with some out-of-state financial firms accepting a valid power of attorney. The settlor of a revocable trust usually retains sufficient power over the trust assets that the trust is disregarded for income tax purposes, and all of the trust's assets are deemed to belong to the settlor for income tax purposes, even if title is technically in a trustee. If one of the powers retained by the settler is listed in IRC §§ 671-677, then the trust will be considered a "Grantor" trust and will be disregarded for estate tax purposes.

If a revocable trust is used, the dispositive provisions of a client's estate plan can be kept private - a revocable trust is not filed with the clerk of court like a will is. The desire for privacy is a reason that many clients choose a revocable trust for estate planning. As public records become more and more accessible online, the likelihood of information in a will being viewed is higher.

One of the main benefits of a revocable trust is that, if it is properly funded, it can help a settlor avoid the probate process. If a person's assets are all held in a revocable trust at the time of that person's death, then none of those assets would be held in the person's individual name, so there would be no assets subject to probate. The key to

having a revocable trust help minimize probate is to have the trust be properly funded. Clients need detailed guidance in funding revocable trusts, and it is best if clients will allow their attorney to oversee the funding process.

*Certification of Trust.* A certification of trust sets out important information about a trust without disclosing the dispositive terms of the trust. Some financial institutions have their own certification of trust form, but preparation of a certification of trust form for clients is useful, because it allows them to provide the information that financial institutions require about a trust without having to turn over the entire trust agreement.

North Carolina allows for certifications of trust in N.C. Gen. Stat. § 36C-10-1013. That statute provides that “Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust. . .” The certification includes: the existence and date of the trust, the identity of the settlor (unless withheld under a specific provision in the trust), the identity and address of the current trustee, the powers of the trustee, the revocability or irrevocability of the trust, disclosure of who has power to revoke the trust, the authority of co-trustees to execute documents, the trust’s taxpayer identification number, and the manner of taking title to trust property.

Use of a certificate of trust can be helpful, especially for clients who are concerned about privacy. An institution may require copies of excerpts from the trust containing the information described in the trust, but the statute gives protection to institutions that rely upon certifications of trust.

*Identifying the Trust.* To put assets into a trust, the trust must be adequately identified. For example, the title of trust assets may be held in this form:

Haris Pilton, Trustee of the Haris Pilton Revocable Trust U/A dated  
September 22, 2007.

This title lists the trustee’s name, the name of the trust, and the date of the trust agreement. It supplies sufficient identifying information for the trust. Remember that title to assets is held by the trustee; the trust is a relationship, not an entity.

*Cash Accounts.* A client’s bank accounts should be re-titled in the name of the trust. A client may not wish to use small joint accounts to fund the trust. In fact, some

clients prefer to retain a small joint account to be used primarily for household expenses. An alternative would be to have a revocable trust as owner of an account but to have the checks printed in the client's name, instead of disclosing the trust relationship.

When changing bank accounts to fund the trust, remember that the client's social security number is the identification number for the account. The account withholding and reporting will essentially remain the same.

Before clients re-title certificates of deposit, they should consult with a bank officer to make sure that the bank will not consider the change in account name to be an early withdrawal that incurs a penalty.

If a trust has joint trustees, when re-titling bank accounts, be careful to give each trustee signature power over the account. New signature cards should be signed by the trustee(s) in his or her capacity as trustee.

*Investment Accounts.* If a client has a brokerage or investment account, a broker or custodian can help change the title of the account so that the account will belong to the trust. The procedure for changing the title of investment accounts is the same as it is for re-titling cash accounts.

*Stocks and Bonds Not Held in Investment Accounts.* There are two ways to deal with stock or bond certificates: A client can open a brokerage or investment account in the name of the trust and deposit the certificates in the account or the client can work with the transfer agent for the stock or bond and direct the agent to reissue the stock with the trustee as the new owner. Working with transfer agents generally takes longer than working with brokers.

*Tangible Personal Property.* If any tangible personal property has separate title documents, those should be used to transfer the property to the trust. Most tangible personal property does not have a "title," however. A declaration that the trust is the owner of the tangible personal property is often used. This is simply a signed statement by the settlor that he or she is transferring his or her tangible personal property to the trust. A declaration that the tangible personal property has been transferred can even be included in the terms of the trust agreement.

Vehicles are included in tangible personal property, but they frequently are not transferred to revocable trusts. Owning a vehicle in trust can give automobile insurance

companies pause, and sometimes can cause the insurance company to apply a business rating to the vehicle. In addition, title to a vehicle after the owner's death can often be transferred without formal probate proceedings.

*Retirement Plans.* This topic is included only to emphasize that a client should **NEVER** transfer the ownership of a qualified retirement or pension plan or individual retirement account to a living trust during the client's lifetime. Instead, the client should examine beneficiary designations to ensure that the beneficiary designations, in combination with the trust (or will, for that matter) will accomplish the client's goals in regard to the plan after the client's death. In dealing with beneficiary designation forms, it is wise to get a confirmation that the beneficiary change has been accepted from the plan administrator. More and more frequently, a large portion of clients' assets are held in qualified retirement plans. These assets require very careful planning, because of the income tax issues that apply to them. You must consider who will end up paying the income tax associated with these assets, when it will be payable, and at what rates. If a client wants to leave retirement plan assets in trust for a beneficiary, it is critical to review the Code and to draft the trust so that the tax-preferred status of the account will not be jeopardized.<sup>31</sup>

*Promissory Notes and Other Receivables.* Clients may assign interests in promissory notes and other receivables to their revocable trusts by endorsement or by a written document. The client should also notify the debtor of the assignment.

*Partnership Interest.* Partnership agreements often contain restrictions on the transferability of partnership interest. Attorneys may need to work with the partners in a partnership to allow for a transfer of partnership interest. If a transfer is permitted, partnership interests may be transferred through a written assignment of interest signed by the owners of the partnership interest and acknowledged by the other partners.

*Corporate Business or Professional Interests.* Corporate counsel should help with this transfer. Corporations will have to cancel certificates held in the settlor's name and issue new certificates in the name of the trust. If the business is a limited liability

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<sup>31</sup> A great resource for dealing with retirement plan assets is [Life and Death Planning for Retirement Benefits](#) by Natalie Choate. It is available at [www.ataxplan.com](http://www.ataxplan.com).

company, the way a transfer may be effected will depend on the terms of the company's operating agreement.

*Real Property.* A deed is required to transfer an interest in real property. It is important to remember that the title will be held by the trustee of the trust, not by the trust itself (because a trust is not an entity).

Helping clients to fully fund their revocable trusts is crucial to accomplishing the goals of most revocable trusts. If properly funded, revocable trusts are very useful in allowing for a way to help a client manage property if he or she is incapacitated, to ease administration following death, and to protect a client's privacy.

## 2. USING IRREVOCABLE TRUSTS TO PURCHASE LIFE INSURANCE

Irrevocable trusts have different purposes. Some common uses of irrevocable trusts include life insurance trusts, gifting ("*Crummey*") trusts, charitable remainder trusts, and retained interest trusts. A useful tax-planning tool is the use of an irrevocable trust to purchase life insurance.

Life insurance has a useful place in estate planning. In exchange for the payment of a fixed premium, usually in periodic payments, an insurance company agrees to pay a death benefit in a certain amount at the insured's death. There are many kinds of life insurance products, and it takes expertise to select the appropriate product for an individual. If a life insurance policy is owned by the insured on the date of his death or if it is payable to his estate, the insurance will be part of the insured's taxable estate. If owned by and payable to someone other than the insured, it is generally not subject to estate tax, unless the insured owned the policy and gave it away less than three years prior to the date of death.

It is not necessary to have an irrevocable life insurance trust in order to keep life insurance from being part of a decedent's taxable estate, but irrevocable trusts offer many advantages. An insurance policy may be owned by individuals or, sometimes, even business entities. Insurance policies owned by revocable trusts are deemed to belong to the grantor of the trust. Please note that an insurance policy has both an owner and a beneficiary, who are not necessarily the same. If someone wants to give away a life insurance policy in order to get the policy out of the insured's taxable estate, he should change both the owner and the beneficiary designation; a change of beneficiary without

an accompanying change of owner will not suffice to remove the policy out of the taxable estate. When an existing policy is transferred, the three-year rule discussed above is applicable.

The proceeds of a life insurance policy are included in a decedent's estate for estate tax purposes if the proceeds are receivable by the executor of the estate<sup>32</sup> or if the decedent died having "incidents of ownership" in the insurance policy.<sup>33</sup> Some examples of incidents of ownership include: (i) The rights to the economic benefits of the policy; (ii) The power to change the beneficiary of the policy; (iii) The power to cancel the policy; (iv) The power to assign the policy or revoke an assignment; (v) The power to pledge the policy as collateral for a loan; (vi) The right to borrow against the cash surrender value of the policy; (vii) The retention of a reversionary interest that exceeds 5% of the value of the policy immediately before the death of the decedent; (viii) The right to convert a policy from a whole life policy to a limited payment life policy or endowment life policy; (ix) The right to withdraw accumulated dividends or surrender paid up additions for their cash value; (x) The right to substitute a policy of equal value for the policy; or (xi) if the proceeds are payable to the creditors of the insured in satisfaction of the insured's debts.

Making a gift of a life insurance policy can be an effective estate planning tool, because life insurance has a lower present value than the death benefit. To make an effective gift of the life insurance, the donor cannot retain any incidents of ownership over the policy. Often, the donor wants to make the gift in trust, so that he or she can set parameters as to how the proceeds will be used, while giving the policy away and having the value of the policy's proceeds not be included in the donor's estate.

An irrevocable life insurance trust cannot be altered, amended, revoked, or terminated by the settlor of the trust once it is created and funded.<sup>34</sup> The settlor of the trust funds the trust either with cash, which is then used to purchase life insurance, or with an existing policy. If done properly, the irrevocable life insurance trust will not be

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<sup>32</sup> Internal Revenue Code §2042(1).

<sup>33</sup> Internal Revenue Code § 2042(2).

<sup>34</sup> Although the Uniform Trust Code does allow for the modification or termination of irrevocable trusts in certain circumstances.

included in the decedent's estate,<sup>35</sup> but the proceeds will be paid to the trust established by the decedent. The life insurance trust can then make loans to the decedent's estate or use the proceeds to purchase assets from the estate, which is a good way for the life insurance policy proceeds to supply liquidity for payment of estate taxes and debts. Or, the life insurance trust may provide a source of income for future generations of a decedent's family.

When the life insurance trust is set up, the funding of the trust is a gift to the beneficiaries of the trust. The trust itself can purchase a policy, or an existing policy can be transferred to the trust. If an existing policy is transferred to the trust, the value of the gift can be difficult to determine. If the policy is a paid-up policy or single premium, the value of the gift is the amount the insurance company would charge for a single premium contract of the same specified amount on the life of a person of the age and health of the insured. The measuring policy for determining the value of the gift must be identical to the original policy, including the same surrender value. If the policy is not new or is not paid up, then the value of the gift is the policy's interpolated terminal reserve, plus the policy's unearned premium.<sup>36</sup> This amount may be slightly different than the cash surrender value of the policy and the insurance company should furnish those values.

Once the trust owns a policy, the trustee is responsible for payment of premiums. Usually, the grantor makes contributions to the trust to cover the payment of the premiums, which results in a gift to the beneficiaries of the trust. Since the gift is to the trust instead of being an outright gift to the beneficiary and is not a gift of a present interest, the grantor generally cannot use his gift tax annual exclusion for the gift. There is an exception to this rule, however. The grantor can give "*Crummey*" withdrawal powers over the contributions to the trust, which makes those contributions present gifts. A *Crummey* power is a power given to a trust beneficiary to withdraw, for a limited period of time (often 30 days), any property transferred to the trust. The beneficiary's power to withdraw creates a sufficient present interest in the beneficiary that the gift is considered a gift of a present interest to the beneficiary for gift tax purposes.

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<sup>35</sup> The proceeds are not included because the decedent is deemed to have made a completed gift of the policy, so long as the decedent does not retain incidents of ownership over the property.

<sup>36</sup> Treasury Regulation § 25.2512-6(a).

The use of a right to withdraw to create a present interest was tested in the case of *Crummey v. Commissioner*, decided in 1968, so the power of withdrawal is often referred to as a “*Crummey*” power. The Internal Revenue Service has vigorously attacked *Crummey* powers, but the courts have generally allowed *Crummey* powers to create a present interest.

Use of a *Crummey* power requires written notice of gifts from the trustee of an irrevocable life insurance trust to the beneficiaries. Making sure that notices to a beneficiary of his or her right to withdraw property is important to show that the right given was a “real” right to withdraw. The IRS has ruled that beneficiaries cannot waive their right to receive future *Crummey* notices (instead, the trust agreement can provide that the *Crummey* right of withdrawal will lapse if not exercised within a certain amount of time)<sup>37</sup>. A beneficiary should not, upon receipt of a *Crummey* notice, waive his or her right of withdrawal prior to the end of the withdrawal period. Each time a contribution is made, the trustee should give to each beneficiary who has withdrawal rights notice of the contribution and preferably will receive from each beneficiary a written acknowledgment that the beneficiary is aware of the contribution and is aware of his or her right to withdraw the contribution. If premiums are due monthly or quarterly, the grantor may make a single contribution each year and the trust may make the periodic payments. A single *Crummey* notice can be sent, covering the full amount, and then the trustee can use the funds to pay the policy premiums as they come due.

The trustee should have broad power to satisfy any withdrawal rights that are exercised, including the right to borrow funds to satisfy such a withdrawal.

To protect the “present gift” aspect of the *Crummey* power, take care in drafting distribution or termination provisions so that distributions will not defeat an existing power of withdrawal that has not lapsed but is unexercised. If the amount of the *Crummey* withdrawal right is conditioned on whether the gift will be a split gift on a gift tax return, then the condition may be considered a condition subsequent to the gift, which makes the gift unascertainable until the condition subsequent occurs, which may defeat the whole point of having a *Crummey* withdrawal right.

The grantor of a life insurance trust may not exercise *Crummey* powers on behalf of a beneficiary. Likewise, the grantor should not be the trustee of the trust. Holding these powers may be considered a retained interest in the trust or an incident of ownership of the policy, so that the value of the trust would be considered part of the grantor's estate at the time of his death, defeating the purpose of the trust.

Often, "hanging" withdrawal powers are used in irrevocable life insurance trusts. The reason for this is that if the amount subject to a beneficiary's *Crummey* power in any year is greater than \$5,000 or 5% of the value of the trust, and the power lapses, then the person holding the *Crummey* power is deemed to have made a gift of the excess amount to the other beneficiaries of the trust. The hanging power cures this problem by allowing the power to hang until a year in which it can lapse and the amount subject to the withdrawal power does not exceed the \$5,000 or 5% limit. An alternative way to deal with this gift problem is to give the power holder limited testamentary power of appointment over the property which the beneficiary would be considered the grantor.

Please note that *Crummey* withdrawal powers may result in an irrevocable trust's having several grantors for income tax purposes in determining the trust to be a grantor trust. This can be confusing and may make the preparation of fiduciary income tax returns more difficult. Consequently, it is recommended that trusts with *Crummey* withdrawal powers hold only life insurance policies and not other income-producing assets. Normally if life insurance policies are the only assets of a trust, the trust will not be required to file fiduciary income tax returns.

Care must be exercised in the drafting, funding, and administering insurance trusts, but they are a valuable estate planning tool.

### Conclusion

While wills and trusts are an important part of an estate plan, it is equally important to make sure that you have an understanding of your client's assets, priorities, and planning goals. Once you have met with your client, then you can develop a plan, keeping in mind that a will addresses probate assets, that a revocable trust can act as a

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<sup>37</sup> Internal Revenue Code § 2514(e) provides that a lapse of the power is not equivalent to an exercise of the power, whereas a waiver of the power by the beneficiary may be deemed an exercise of the power which

will substitute, but can do even more than a will by providing for how assets will be handled during incapacity and by providing privacy. Many assets may be controlled by beneficiary forms or contractual arrangements (such as pay-on-death accounts or assets held jointly with right of survivorship), and these assets must be addressed. Irrevocable trusts, like life insurance trusts, may be used to add additional layers of planning. Underlying the use of any of these documents, however, is the need to be careful and thorough in providing an estate plan.

Drafted by: Rebecca Smitherman, J.D.  
Craig Brawley Liipfert & Walker LLP  
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transfers the amount the beneficiary could have withdrawn to the trust.

**Authorization to Consent to Health Care for Minor**  
\_\_\_\_\_ County, North Carolina

We, \_\_\_\_\_ of \_\_\_\_\_ County, North Carolina, are the custodial parents having legal custody of \_\_\_\_\_, a minor child, age \_\_\_\_\_, born \_\_\_\_\_, \_\_\_\_\_. We authorize \_\_\_\_\_, an adult in whose care the minor child has been entrusted, and who resides at \_\_\_\_\_, to do any acts which may be necessary or proper to provide for the health care of the minor child, including, but not limited to, the power (i) to provide for such health care at any hospital or other institution or the employing of any physician, dentist, nurse, or other person whose services may be needed for such health care, and (ii) to consent to and authorize any health care, including administration of anesthesia, X-ray examination, performance of operations, and other procedures by physicians, dentists, and other medical personnel except the withholding or withdrawal of life sustaining procedures.

[OPTIONAL: This consent shall be effective from the date of execution to and including \_\_\_\_\_, \_\_\_\_\_.]

By signing here, we indicate that we have the understanding and capacity to communicate health care decisions and that we are fully informed as to the contents of this document and understand the full import of this grant of powers to the agent named herein.

\_\_\_\_\_(SEAL) \_\_\_\_\_  
Custodian Parent Date

\_\_\_\_\_(SEAL) \_\_\_\_\_  
Custodian Parent Date

NORTH CAROLINA )  
 )  
\_\_\_\_\_ COUNTY )

ACKNOWLEDGMENT

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated: \_\_\_\_\_.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Official Signature of Notary

\_\_\_\_\_  
Notary's printed or typed name, Notary Public

(Official Seal)

My commission expires:  
\_\_\_\_\_

## **SPECIAL NEEDS ESTATE PLANNING FOR PERSONS WITH DISABILITIES FROM MILITARY FAMILIES<sup>1</sup>**

One of the greatest fears that parents and other caregivers have is the possibility that they will die without having arranged for the care of a disabled son, daughter, relative or friend. Most families only have to be concerned about this issue until a child reaches an age when he or she is self-supporting. However, many individuals with disabilities will never be fully capable of self-support, and their parents and caregivers will have to plan for the day when they will not be available to provide assistance and oversight. For these families, the failure to properly plan can cause tremendous hardship for the person with the disability at precisely the time when he or she most needs help: when the primary source of support, often a family member or close friend, is no longer available for companionship, assistance, and help. "Special Needs Estate Planning" is the practice of ensuring that services and support will continue for the life of the person with the disability when the caregivers are no longer able to help.

The type and level of assistance that will be needed vary according to the nature of the disability, the disabled person's age and family circumstances, and many other factors. For example, parents of a minor with a severe developmental disability are often most concerned with identifying a Guardian who is willing to undertake the task of caring for a special needs child. Caregivers dealing with mental illness understand that the illness can bring loneliness and isolation, and they want to ensure that there will always be an advocate willing to step in and assist in a time of crisis. On the other hand, many people with disabilities live very independent lives, and need nothing more than some basic assistance in their day to day affairs.

Comprehensive Special Needs Estate Planning ensures that the question, "Who will take care of my loved one when I am gone" is answered in the most cost-effective and efficient manner possible, and in a fashion that considers not only the needs of the disabled individual, but also on the ongoing financial and health care needs of the caregivers themselves.

### **Begin With a Comprehensive and Honest Assessment**

Special Needs Estate Planning requires a working knowledge of a broad range of issues, including government benefits eligibility, trust and estate law, estate and income tax rules, guardianship, and others. In all cases, the planner must understand the nature of the particular disability and must have a sense of what the future care and oversight requirements will be. In turn, the care needs will determine the resources that will be required to support a comprehensive care plan.

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<sup>1</sup>This manuscript was adapted from one written by Edward V. Wilcenski, a friend and colleague in the Special Needs Alliance. Any errors or omissions are my responsibility.

This last consideration, identifying the level and cost of the services that will be required to provide support to a loved one, is often the most difficult. Indeed, families and caregivers seldom add up the costs of the various forms of support they give to an individual with a disability. Those who contend that a disabled individual's financial needs are minimal often forget to add up the cash value of the many services they provide. These can include serving as advocate, social service coordinator, companion, guardian, chauffeur, money manager, and recreation director. These services enhance the quality of the disabled individual's life. If a parent or caregiver dies without planning for the continuation of these services, the quality of life that the person with a disability previously enjoyed is likely to be reduced substantially.

Some of these "quality of life" services are available through government funded programs designed for individuals with disabilities. These programs are generally designed to provide only a basic level of support, and the items and activities that make our lives enjoyable, those that truly provide "quality of life," are simply unavailable. Moreover, the eligibility thresholds for most of these programs are quite low, and living within these thresholds can be quite difficult. As a result, families and caregivers often seek to "supplement" the goods and services available through these public benefit programs with their own funds, but without jeopardizing benefit eligibility. This is where competent Special Needs Estate Planning becomes critical.

### **The Elements of a Comprehensive Special Needs Estate Plan**

Each Special Needs Estate Plan is unique, and it should maximize the formal and informal supports that the individual with the disability received from government funded programs, family caregivers, community supports, and others. However, all Special Needs Estate Plans contain three basic components: a legal plan, a financial plan, and a life care plan.

#### **Legal Planning**

The legal planning component of a Special Needs Estate Plan will address many traditional Estate and Long Term Care Planning issues. Has the client considered how the estate will be divided among his or her intended heirs? What is the family's current estate and income tax exposure? Is there a Will in place, and, if so, has it been updated since the onset of the son's or daughter's disability? Will the appointment of a Guardian be necessary, and, if so, who will be the Guardian? Parents and caregivers who fail to make a plan in a Will or Revocable Trust accept the state's default estate plan called intestacy. Attached as Exhibit A is a description of intestacy in North Carolina called "The 'Statutory' Will of Jane Doe."

What if the *caregiver* needs assistance? Does he or she have a properly drafted Durable Power of Attorney, Living Will and Health Care Power of Attorney? Samples of a North Carolina Durable Power of Attorney, Living Will and Health Care Power of Attorney are attached.

If aging parents are serving as the primary caregivers for the person with the disability, have they considered how they will pay for *their own* long-term care needs without jeopardizing the inheritance of their children? Legal planning may include a trust under the Will to protect a surviving spouse as well as the child with a disability and a referral to an insurance agent to discuss long-term care insurance options.

Do the parents' respective estate plans include a properly drafted Special Needs Trust (also called Supplemental Needs Trusts), which is a trust instrument designed especially for individuals with disabilities? Who will serve as Trustee of the Special Needs Trust? Does the Trustee understand how these types of trusts are to be administered? While parents or other caregivers typically set up the Special Needs Trust, other family and friends can contribute to these trusts by making reference to them in their own wills or other estate planning.

What is the functional level of the individual with the disability? Is he or she capable of executing his or her own Durable Power of Attorney and Health Care Power of Attorney so as to preclude the need for a formal guardianship at some future time?

What are the federal and state benefit programs that support the person in the community, and have the eligibility requirements for those programs been factored into the Special Needs Estate Plan?

A sound legal plan will address these and other issues, and as with any type of planning, it is best developed early and comprehensively, considering the needs and intentions of all members of the disabled individual's circle of support.

### **Financial Planning**

A sound financial plan complements the legal component of a Special Needs Estate Plan. Whereas legal planning primarily involves the preservation and transmission of wealth, financial planning is primarily concerned with the enhancement of wealth and the selection of assets to ensure growth, diversification, liquidity and availability to meet a client's goals and objectives. The two areas are closely intertwined, and a comprehensive Special Needs Estate Plan will contain components of both disciplines.

Consider, for example, a family whose primary asset is the family home. Many families hope that the value of the home will be available as an inheritance for a disabled son or daughter and other heirs. Indeed, many parents and other caregivers contemplate that the disabled son or daughter will be able to continue to reside in the home after they are gone. But have they considered what will happen if *they themselves* reach an age when they will no longer be able to reside in the home and need assistance with their own health care needs? If the caregivers have not considered how *their own* long term care costs will be met, there is a risk that the home would need to be sold to satisfy these obligations, and may never be available for the son or daughter. One solution may be to use other assets to generate the income that would be necessary to pay these costs. Another possibility may be the purchase of a long-term care insurance policy. In the end, the most

appropriate planning route may be to restructure assets so that long-term care costs would be paid for through the Medicaid system. Legal and financial professionals participating in the development of a Special Needs Estate Plan should expect to share their ideas on the pros and cons of each strategy, and arrive at the most appropriate solution for the family.

More traditional financial planning considerations include planning to ensure that a family will have sufficient funds for a comfortable retirement, investing in assets that will minimize income tax liability, and consolidating assets to minimize the cost and effort of overseeing a diverse portfolio. These issues are best addressed with a competent and knowledgeable financial professional who understands the heightened importance of proper planning for individuals with disabilities and their families.

### Life Care Planning

The final step in developing a Special Needs Estate Plan is often the most overlooked. At least in theory, people appreciate the need to address the legal and financial issues discussed above. But once the parents and caregivers are gone and the assets have been protected for the benefit of the individual with the disability, many questions still remain. "How should the funds that the family has worked so hard to protect be used to truly enhance the life of the person with the disability?" "To whom should I, as Trustee or Guardian, look to for advice and suggestion when the person with the disability cannot speak on his or her behalf?"

"Life Care" planning is the process of providing answers to these and similar questions for the family members, friends and advocates who will provide assistance and oversight after the primary caregivers are gone. It begins with ensuring that as much personal, financial, and other pertinent information concerning the person with the disability is stored in a single place and accessible for future reference. Many advocates use workbooks designed specifically for this purpose. The workbooks usually request background medical information, financial information, family history, community contacts, and recreational preferences of the person with the disability. The workbooks also often request that the caregivers provide similar information about *their own* finances and family supports.

This information can prove to be especially crucial for those who must step in and assist when the caregiver is seriously injured or dies unexpectedly.

It is difficult to overemphasize the importance of this step in the Special Needs Estate Planning process. Consider this. If you were to get up and leave town today, right this minute, completely unexpectedly and without advance notice to *anyone*, including your disabled family member or friend, who would step in to handle your affairs? Does this person know where all of your pertinent financial information is stored? Have you provided him or her with the legal authority to access your funds and act on your behalf? Who breaks the news to the person with the disability? Who will step in to do what *you* have been doing all these years? Who stays in contact with the service coordinator or social worker? Who double checks to be sure that medication is being taken as prescribed?

Who will make those calls when no one has heard from your son or daughter in days, and who will they call? And if you have someone in mind, have you provided this person with the information he or she needs to carry out your wishes? Does this person know what you know about your son's or daughter's needs, preferences and dislikes?

To those people who will step in and assist your disabled family member or friend when you are no longer able to do so, a well written Life Care Plan will be worth its weight in gold. And as uncomfortable as it is for many parents and other caregivers to face the subject, completing this piece of the Special Needs Estate Planning process often provides the most satisfaction and relief. Certainly the legal and financial components are equally as critical, but in most circumstances, competent counsel will be able to preserve some of the family's funds for the person with the disability, even if no planning whatsoever has been completed prior to the disability or death of the caregiver. The "crisis intervention planning" is always more expensive, time consuming, and will be conducted before a court as a matter of public record, but it can be done.

Once the parents or primary caregivers are gone, however, the ability to prepare a comprehensive and detailed Life Care Plan becomes quite limited. There may be an Individualized Service Plan to use as a reference, a dedicated service coordinator who might have some additional personal information, or some other family member or friends who could assist in compiling pertinent information, but none of these fallback references will ever replace the Life Care Plan prepared by the person who has taken care of the person with the disability all of his or her life.

### **Special Considerations for Military Families**

Special Needs Estate Planning for military families presents some unique obstacles and special challenges. Due to the nature of being a military family, moves across state lines are common and occur more often than for other families. The frequent moves make it harder for military families to learn about sources of support and care in a new state.

For example, children with severe developmental disabilities who live in a state may qualify for a Medicaid home and community based waiver program. These programs often have waiting lists that can delay participation for months or years. In North Carolina we call these waiver programs the Community Alternatives Programs. Children who qualify for one of the CAP programs can qualify for attendant care and other services enabling them to live at home without the parents and other children having to live in poverty. For many military families in North Carolina, the wait on the waiting list practically excludes children from military families from participation. Military families should investigate home and community based waiver programs as soon as feasible when moving to a new state, preferably even before the move takes place. Options available in a given state may vary greatly from the previous state.

Military families with members on active duty have better insurance options than most families through TRICARE, particularly if the family member with a disability can qualify for TRICARE Extended Care Health Option (TRICARE ECHO). Enrollment in TRICARE

ECHO requires enrollment in the service branch's exceptional family member program, medical/educational verification of the disability and approval of the TRICARE regional contractor. Unlike home and community based waiver programs, ECHO can be carried wherever the military family moves worldwide, so long as the service member remains on active duty.

While TRICARE ECHO offers greater services than most any employer-based health insurance, TRICARE in any form offers less limited coverage, even for military retirees. In some circumstances, military grandparents have opted to adopt grandchildren with disabilities to enable the grandchildren to have access to TRICARE services. In order to keep TRICARE, military families should consider the benefits of staying in military service long enough to retiring with benefits. TRICARE for Life is available to military retirees and veterans who were separated from service by medical retirement.

CHAMPVA is a medical program operated by the Veterans Administration for certain family members of veterans not eligible for TRICARE. CHAMPVA is available to spouses and dependent children of veterans who are rated totally and permanently disabled due to service related injuries or to surviving spouses and surviving dependent child of these veterans or veterans who actually died due to the disability for which they were rated. As with TRICARE, CHAMPVA may be lifetime medical insurance for children with disabilities, provided that the children are designated as incapacitated dependents.

For military families with children with disabilities, the decision of whether to choose the Survivor Benefit Plan retirement option (SBP) can be a trap. The service member may choose to protect up to 55% of his or her retirement pay for a spouse and/or a dependent child. Picking the SBP for a child with a disability may interfere with needed state Medicaid benefits and may cause the loss of a monthly SSI check. At least for now, there is no way to assign the SBP check to a Special Needs Trust to avoid the loss of benefits. Attached is the June 2009 Issue of The Voice, The Official Newsletter of the Special Needs Alliance which includes an article by member Kelly Thompson on "The Military Survivor Benefit Plan and the Disabled Child." You can subscribe to this newsletter and locate local special needs planning attorneys at [www.specialneedsalliance.com](http://www.specialneedsalliance.com).

### **Conclusion**

"Special Needs Estate Planning" is by necessity a dynamic process and even more so where planning is being done in a military family facing many moves over the years. It is common to hear financial professionals talk about the need to periodically "review a plan" to be sure that it still meets a family's needs. This admonition is equally as important, if not more so, in the context of planning for an individual with the disability, as many people with disabilities are unable to actively advocate on their own behalf once their primary caregivers are gone. Laws governing taxes, property rights, and government benefit programs that support a disabled individual in the community are changing constantly. And the resources, needs and preferences of the person with the disability as documented in the Life Care Plan will change with time.

The most important thing is to *begin the process*. Once you have built the foundation, small changes are easy to accommodate. Legal documents can be modified, assets can be restructured, and new information can be added to the Life Care Planning workbook with minimal effort. But if you wait too long to begin the process, you may never have the opportunity to answer the question, "Who will take care of my loved one when I am gone?"

At Craig Brawley Liipfert & Walker LLP, we have assisted hundreds of families and friends of persons with disabilities develop comprehensive estate and long term care plans that integrate traditional estate and long term care planning with the use of supplemental needs trusts. We have the experience and resources to aggressively advocate before the state and federal agencies that administer government benefit programs, and have developed a network of government, private, and non-profit professionals who provide advice and support when a comprehensive "Special Needs Estate Plan" is being developed. If you have a family member or friend with a disability and would like to discuss what you can do to help secure a stable future for that person's benefit, please do not hesitate to contact us. If you are moving and need a referral to an attorney in your new location, we can help as well.

# Health Care Power Of Attorney Of I. Amnot Well

NOTE: YOU SHOULD USE THIS DOCUMENT TO NAME A PERSON AS YOUR HEALTH CARE AGENT IF YOU ARE COMFORTABLE GIVING THAT PERSON BROAD AND SWEEPING POWERS TO MAKE HEALTH CARE DECISIONS FOR YOU. THERE IS NO LEGAL REQUIREMENT THAT ANYONE EXECUTE A HEALTH CARE POWER OF ATTORNEY.

**EXPLANATION:** *You have the right to name someone to make health care decisions for you when you cannot make or communicate those decisions. This form may be used to create a health care power of attorney, and meets the requirements of North Carolina law. However, you are not required to use this form, and North Carolina law allows the use of other forms that meet certain requirements. If you prepare your own health care power of attorney, you should be very careful to make sure it is consistent with North Carolina law.*

*This document gives the person you designate as your health care agent **broad powers** to make health care decisions for you when you cannot make the decision yourself or cannot communicate your decision to other people. You should discuss your wishes concerning life-prolonging measures, mental health treatment, and other health care decisions with your health care agent. Except to the extent that you express specific limitations or restrictions in this form, your health care agent may make any health care decision you could make yourself.*

*This form does not impose a duty on your health care agent to exercise granted powers, but when a power is exercised, your health care agent will be obligated to use due care to act in your best interests and in accordance with this document.*

*This Health Care Power of Attorney form is intended to be valid in any jurisdiction in which it is presented, but places outside North Carolina may impose requirements that this form does not meet.*

*If you want to use this form, you must complete it, sign it, and have your signature witnessed by two qualified witnesses and proved by a notary public. Follow the instructions about which choices you can initial very carefully. **Do not sign this form until** two witnesses and a notary public are present to watch you sign it. You then should give a copy to your health care agent and to any alternates you name. You should consider filing it with the Advance Health Care Directive Registry maintained by the North Carolina Secretary of State: <http://www.nclifelinks.org/ahcdr/>*

## Section 1 Designation of Health Care Agent.

I, I. Amnot Well, being of sound mind, hereby appoint the following person(s) to serve as my health care agent(s) to act for me and in my name (in any way I could act in person) to make health care decisions for me as authorized in this document. My designated health care agent(s) shall serve alone, in the order named.

- |               |                         |                    |              |
|---------------|-------------------------|--------------------|--------------|
| A. Name:      | Mary J. Well            | Home Telephone     | 336-123-4567 |
| Home Address: | 11 Nowhere Street       | Work Telephone     | 336-234-5678 |
|               | Anywhere, NC 00000      | Cellular Telephone | 336-876-5432 |
| B. Name:      | Feel Good               | Home Telephone     | 919-345-6789 |
| Home Address: | 11 Sunshiny Boulevard   | Work Telephone     | 919-456-7891 |
|               | Sunset, NC 00001        | Cellular Telephone | 919-987-6543 |
| C. Name:      | Summer Sunshine         | Home Telephone     | 919-876-5432 |
| Home Address: | 11 Clearwater Boulevard | Work Telephone     | 919-876-2345 |
|               | Sunset, NC 00001        | Cellular Telephone | 919-987-4321 |

Any successor health care agent designated shall be vested with the same power and duties as if originally named as my health care agent, and shall serve any time his or her predecessor is not reasonably available or is unwilling or unable to serve in that capacity.

## Section 2 Effectiveness of Appointment.

My designation of a health care agent expires only when I revoke it. Absent revocation, the authority granted in this document shall become effective when and if one of the physician(s) listed below determines that I lack capacity to make or communicate decisions relating to my health care, and will continue in effect during that incapacity, or until my death, except if I authorize my health care agent to exercise my rights with respect to anatomical gifts, autopsy, or disposition of my remains, this authority will continue after my death to the extent necessary to exercise that authority.

Thomas McDreamy, M.D.  
0001 Hospital Boulevard  
Sunset, NC 00001  
919-832-0000

Marcus Welby, M.D.  
0002 Hospital Boulevard  
Sunset, NC 00001  
919-832-0001

If I have not designated a physician, or no physician(s) named above is reasonably available, the determination that I lack capacity to make or communicate decisions relating to my health care shall be made by my attending physician.

### **Section 3 Revocation.**

Any time while I am competent, I may revoke this power of attorney in a writing I sign or by communicating my intent to revoke, in any clear and consistent manner, to my health care agent or my health care provider.

### **Section 4 General Statement of Authority Granted.**

Subject to any restrictions set forth in Section 5 below, I grant to my health care agent full power and authority to make and carry out all health care decisions for me. These decisions include, but are not limited to:

- A. Requesting, reviewing, and receiving any information, verbal or written, regarding my physical or mental health, including, but not limited to, medical and hospital records, and to consent to the disclosure of this information.
- B. Employing or discharging my health care providers.
- C. Consenting to and authorizing my admission to and discharge from a hospital, nursing or convalescent home, hospice, long-term care facility, or other health care facility.
- D. Consenting to and authorizing my admission to and retention in a facility for the care or treatment of mental illness.
- E. Consenting to and authorizing the administration of medications for mental health treatment and electroconvulsive treatment (ECT) commonly referred to as "shock treatment."
- F. Giving consent for, withdrawing consent for, or withholding consent for, X-ray, anesthesia, medication, surgery, and all other diagnostic and treatment procedures ordered by or under the authorization of a licensed physician, dentist, podiatrist, or other health care provider. This authorization specifically includes the power to consent to measures for relief of pain.
- G. Authorizing the withholding or withdrawal of life-prolonging measures.
- H. Providing my medical information at the request of any individual acting as my attorney-in-fact under a durable power of attorney or as a Trustee or successor Trustee under any Trust Agreement of which I am a Grantor or Trustee, or at the request of any other individual whom my health care agent believes should have such information. I desire that such information be provided whenever it would expedite the prompt and proper handling of my affairs or the affairs of any person or entity for which I have some responsibility. In addition, I authorize my health care agent to take any and all legal steps necessary to ensure compliance with my instructions providing access to my protected health information. Such steps shall include resorting to any and all legal procedures in and out of

courts as may be necessary to enforce my rights under the law and shall include attempting to recover attorneys' fees against anyone who does not comply with this health care power of attorney.

I. To the extent I have not already made valid and enforceable arrangements during my lifetime that have not been revoked, exercising any right I may have to authorize an autopsy or direct the disposition of my remains.

J. Taking any lawful actions that may be necessary to carry out these decisions, including, but not limited to: (i) signing, executing, delivering, and acknowledging any agreement, release, authorization, or other document that may be necessary, desirable, convenient, or proper in order to exercise and carry out any of these powers; (ii) granting releases of liability to medical providers or others; and (iii) incurring reasonable costs on my behalf related to exercising these powers, provided that this health care power of attorney shall not give my health care agent general authority over my property or financial affairs.

## Section 5 Special Provisions and Limitations.

(Notice: The authority granted in this document is intended to be as broad as possible so that your health care agent will have authority to make any decisions you could make to obtain or terminate any type of health care treatment or service. If you wish to limit the scope of your health care agent's powers, you may do so in this section. If none of the following are initialed, there will be no special limitations on your agent's authority.)

### (a) Limitations about Artificial Nutrition or Hydration:

In exercising the authority to make health care decisions on my behalf, my health care agent:

\_\_\_\_\_  
(Initial)

shall NOT have the authority to withhold artificial nutrition (such as through tubes) OR may exercise that authority only in accordance with the following special provisions:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
(Initial)

shall NOT have the authority to withhold artificial hydration (such as through tubes) OR may exercise that authority only in accordance with the following special provisions:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

NOTE: If you initial either block but do not insert any special provisions, your health care agent shall have NO AUTHORITY to withhold artificial nutrition or hydration.

**(b) Limitations Concerning Health Care Decisions.**

In exercising the authority to make health care decisions on my behalf, the authority of my health care agent is subject to the following special provisions (Here you may include any specific provisions you deem appropriate, such as: your own definition of when life-prolonging measures should be withheld or discontinued, or instructions to refuse any specific types of treatment that are inconsistent with your religious beliefs, or are unacceptable to you for any other reason.)

\_\_\_\_\_  
*(Initial)*

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

NOTE: DO NOT initial unless you insert a limitation.

**(c) Limitations Concerning Mental Health Decisions.**

In exercising the authority to make mental health decisions on my behalf, the authority of my health care agent is subject to the following special provisions: (Here you may include any specific provisions you deem appropriate such as: limiting the grant of authority to make only mental health treatment decisions, your own instructions regarding the administration or withholding of psychotropic medications and electroconvulsive treatment (ECT), instructions regarding your admission to and retention in a health care facility for mental health treatment, or instructions to refuse any specific types of treatment that are unacceptable to you.)

\_\_\_\_\_  
*(Initial)*

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

NOTE: DO NOT initial unless you insert a limitation.

**(d) Advance Instruction for Mental Health Treatment.**

(Notice: This health care power of attorney may incorporate or be combined with an advance instruction for mental health treatment, executed in accordance with Part 2 of Article 3 of Chapter 122C of the General Statutes, which you may use to state your instructions regarding mental health treatment in the event you lack capacity to make or communicate mental health treatment decisions. Because your health care agent's decisions must be consistent with any statements you have expressed in an advance instruction, you should indicate here whether you have executed an advance instruction for mental health treatment):

\_\_\_\_\_  
(Initial)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

NOTE: DO NOT initial unless you insert a limitation.

**(e) Autopsy and Disposition of Remains.**

In exercising the authority to make decisions regarding autopsy and disposition of remains on my behalf, the authority of my health care agent is subject to the following special provisions and limitations. (Here you may include any specific limitations you deem appropriate such as: limiting the grant of authority and the scope of authority, or instructions regarding burial or cremation):

\_\_\_\_\_  
(Initial)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

NOTE: DO NOT initial unless you insert a limitation.

**Section 6 Organ Donation.**

To the extent I have not already made valid and enforceable arrangements during my lifetime that have not been revoked, my health care agent may exercise any right I may have to:

\_\_\_\_\_  
(Initial)

donate any needed organs or parts; or

\_\_\_\_\_  
(Initial)

donate only the following organs or parts:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

NOTE: DO NOT INITIAL BOTH BLOCKS ABOVE.

\_\_\_\_\_  
(Initial)

donate my body for anatomical study if needed.

\_\_\_\_\_  
(Initial)

In exercising the authority to make donations, my health care agent is subject to the following special provisions and limitations: (Here you may include any specific limitations you deem appropriate such as: limiting the grant of authority and the scope of authority, or instructions regarding gifts of the body or body parts.) \_\_\_\_\_  
\_\_\_\_\_

NOTE: DO NOT initial unless you insert a limitation.

NOTE: NO AUTHORITY FOR ORGAN DONATION IS GRANTED IN THIS INSTRUMENT WITHOUT YOUR INITIALS.

### **Section 7 Guardianship Provision.**

If it becomes necessary for a court to appoint a guardian of my person, I nominate the persons designated in Section 1, in the order named, to be the guardian of my person, to serve without bond or security. The guardian shall act consistently with G.S. 35A-1201(a)(5).

### **Section 8 Reliance of Third Parties on Health Care Agent.**

A. No person who relies in good faith upon the authority of or any representations by my health care agent shall be liable to me, my estate, my heirs, successors, assigns, or personal representatives, for actions or omissions in reliance on that authority or those representations.

B. The powers conferred on my health care agent by this document may be exercised by my health care agent alone, and my health care agent's signature or action taken under the authority granted in this document may be accepted by persons as fully authorized by me and with the same force and effect as if I were personally present, competent, and acting on my own behalf. All acts performed in good faith by my health care agent pursuant to this power of attorney are done with my consent and shall have the same validity and effect as if I were present and exercised the powers myself, and shall inure to the benefit of and bind me, my estate, my heirs, successors, assigns, and personal representatives. The authority of my health care agent pursuant to this power of attorney shall be superior to and binding upon my family, relatives, friends, and others.

## **Section 9 Miscellaneous Provisions.**

### **(a) Revocation of Prior Powers of Attorney.**

I revoke any prior health care power of attorney. The preceding sentence is not intended to revoke any general powers of attorney, some of the provisions of which may relate to health care; however, this power of attorney shall take precedence over any health care provisions in any valid general power of attorney I have not revoked.

### **(b) Jurisdiction, Severability, and Durability.**

This Health Care Power of Attorney is intended to be valid in any jurisdiction in which it is presented. The powers delegated under this power of attorney are severable, so that the invalidity of one or more powers shall not affect any others. This power of attorney shall not be affected or revoked by my incapacity or mental incompetence.

### **(c) Health Care Agent Not Liable.**

My health care agent and my health care agent's estate, heirs, successors, and assigns are hereby released and forever discharged by me, my estate, my heirs, successors, assigns, and personal representatives from all liability and from all claims or demands of all kinds arising out of my health care agent's acts or omissions, except for my health care agent's willful misconduct or gross negligence.

### **(d) No Civil or Criminal Liability.**

No act or omission of my health care agent, or of any other person, entity, institution, or facility acting in good faith in reliance on the authority of my health care agent pursuant to this Health Care Power of Attorney shall be considered suicide, nor the cause of my death for any civil or criminal purposes, nor shall it be considered unprofessional conduct or as lack of professional competence. Any person, entity, institution, or facility against whom criminal or civil liability is asserted because of conduct authorized by this Health Care Power of Attorney may interpose this document as a defense.

### **(e) Reimbursement.**

My health care agent shall be entitled to reimbursement for all reasonable expenses incurred as a result of carrying out any provision of this directive.

By signing here, I indicate that I am mentally alert and competent, fully informed as to the contents of this document, and understand the full import of this grant of powers to my health care agent.

This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
(SEAL)

I. Amnot Well

I hereby state that the principal, I. Amnot Well, being of sound mind, signed (or directed another to sign on the principal's behalf) the foregoing health care power of attorney in my presence, and that I am not related to the principal by blood or marriage, and I would not be entitled to any portion of the estate of the principal under any existing will or codicil of the principal or as an heir under the Intestate Succession Act, if the principal died on this date without a will. I also state that I am not the principal's attending physician, nor a licensed health care provider or mental health treatment provider who is (1) an employee of the principal's attending physician or mental health treatment provider, (2) an employee of the health facility in which the principal is a patient, or (3) an employee of a nursing home or any adult care home where the principal resides. I further state that I do not have any claim against the principal or the estate of the principal.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Date

\_\_\_\_\_  
Witness

North Carolina            )  
  )  
\_\_\_\_\_ County            )

Sworn to (or affirmed) and subscribed before me this day by I. Amnot Well and \_\_\_\_\_ and \_\_\_\_\_.

Date:  
\_\_\_\_\_

Official Seal

\_\_\_\_\_  
Notary Public  
Printed name: \_\_\_\_\_  
My commission expires: \_\_\_\_\_

**Advance Directive For A Natural Death**  
**("Living Will ")**  
**Of**  
**I. Amnot Well**

NOTE: YOU SHOULD USE THIS DOCUMENT TO GIVE YOUR HEALTH CARE PROVIDERS INSTRUCTIONS TO WITHHOLD OR WITHDRAW LIFE-PROLONGING MEASURES IN CERTAIN SITUATIONS. THERE IS NO LEGAL REQUIREMENT THAT ANYONE EXECUTE A LIVING WILL.

**GENERAL INSTRUCTIONS:** *You can use this Advance Directive ("Living Will") form to give instructions for the future if you want your health care providers to withhold or withdraw life-prolonging measures in certain situations. You should talk to your doctor about what these terms mean. The Living Will states what choices you would have made for yourself if you were able to communicate. Talk to your family members, friends, and others you trust about your choices. Also, it is a good idea to talk with professionals such as your doctors, clergypersons, and lawyers before you complete and sign this Living Will.*

*You do not have to use this form to give those instructions, but if you create your own Advance Directive you need to be very careful to ensure that it is consistent with North Carolina law.*

*This Living Will form is intended to be valid in any jurisdiction in which it is presented, but places outside North Carolina may impose requirements that this form does not meet.*

*If you want to use this form, you must complete it, sign it, and have your signature witnessed by two qualified witnesses and proved by a notary public. Follow the instructions about which choices you can initial very carefully. **Do not sign this form until** two witnesses and a notary public are present to watch you sign it. You then should consider giving a copy to your primary physician and/or a trusted relative, and should consider filing it with the Advanced Health Care Directive Registry maintained by the North Carolina Secretary of State: <http://www.nclifelinks.org/ahcdr/>*

**My Desire for a Natural Death**

I, I. Amnot Well, being of sound mind, desire that, as specified below, my life not be prolonged by life-prolonging measures:

## Article One

### When My Directives Apply

My directions about prolonging my life shall apply *IF* my attending physician determines that I lack capacity to make or communicate health care decisions and:

NOTE: YOU MAY INITIAL ANY AND ALL OF THESE CHOICES.

\_\_\_\_\_  
(Initial)

I have an incurable or irreversible condition that will result in my death within a relatively short period of time.

\_\_\_\_\_  
(Initial)

I become unconscious and my health care providers determine that, to a high degree of medical certainty, I will never regain my consciousness.

\_\_\_\_\_  
(Initial)

I suffer from advanced dementia or any other condition which results in the substantial loss of my cognitive ability and my health care providers determine that, to a high degree of medical certainty, this loss is not reversible.

## Article Two

### These are My Directives about Prolonging My Life:

In those situations I have initialed in Section 1, I direct that my health care providers:

NOTE: INITIAL ONLY IN ONE PLACE.

\_\_\_\_\_  
(Initial)

may withhold or withdraw life-prolonging measures.

\_\_\_\_\_  
(Initial)

shall withhold or withdraw life-prolonging measures.

**Article Three**  
**Exceptions – "Artificial Nutrition or Hydration"**

NOTE: INITIAL ONLY IF YOU WANT TO MAKE EXCEPTIONS TO YOUR INSTRUCTIONS IN Article Two.

EVEN THOUGH I do not want my life prolonged in those situations I have initialed in Section 1:

\_\_\_\_\_  
(Initial) I *DO* want to receive BOTH artificial hydration AND

\_\_\_\_\_  
(Initial) artificial nutrition (for example, through tubes) in those situations.

NOTE: DO NOT INITIAL THIS BLOCK IF ONE OF THE BLOCKS BELOW IS INITIALED.

\_\_\_\_\_  
(Initial) I *DO* want to receive ONLY artificial hydration (for example, through tubes) in those situations.

NOTE: DO NOT INITIAL THE BLOCK ABOVE OR BELOW IF THIS BLOCK IS INITIALED.

\_\_\_\_\_  
(Initial) I *DO* want to receive ONLY artificial nutrition (for example, through tubes) in those situations..

NOTE: DO NOT INITIAL EITHER OF THE TWO BLOCKS ABOVE IF THIS BLOCK IS INITIALED.

**Article Four**  
**I Wish to be Made as Comfortable as Possible**

I direct that my health care providers take reasonable steps to keep me as clean, comfortable, and free of pain as possible so that my dignity is maintained, even though this care may hasten my death.

**Article Five**  
**I Understand my Advance Directive**

I am aware and understand that this document directs certain life-prolonging measures to be withheld or discontinued in accordance with my advance instructions.

**Article Six**  
**If I have an Available Health Care Agent**

If I have appointed a health care agent by executing a health care power of attorney or similar instrument, and that health care agent is acting and available and gives instructions that differ from this Advance Directive, then I direct that:

\_\_\_\_\_  
(Initial)

Follow Advance Directive: This Advance Directive will **override** instructions my health care agent gives about prolonging my life.

\_\_\_\_\_  
(Initial)

Follow Health Care Agent: My health care agent has authority to **override** this Advance Directive.

NOTE: DO NOT INITIAL BOTH BLOCKS. IF YOU DO NOT INITIAL EITHER BOX, THEN YOUR HEALTH CARE PROVIDERS WILL FOLLOW THIS ADVANCE DIRECTIVE AND IGNORE THE INSTRUCTIONS OF YOUR HEALTH CARE AGENT ABOUT PROLONGING YOUR LIFE.

**Article Seven**  
**My Health Care Providers May Rely on this Directive**

My health care providers shall not be liable to me or to my family, my estate, my heirs, or my personal representative for following the instructions I give in this instrument. Following my directions shall not be considered suicide, or the cause of my death, or malpractice or unprofessional conduct. If I have revoked this instrument but my health care providers do not know that I have done so, and they follow the instructions in this instrument in good faith, they shall be entitled to the same protections to which they would have been entitled if the instrument had not been revoked.

**Article Eight**  
**I Want this Directive to be Effective Anywhere**

I intend that this Advance Directive be followed by any health care provider in any place.

**Article Nine**  
**I have the Right to Revoke this Advance Directive**

I understand that at any time I may revoke this Advance Directive in a writing I sign or by communicating in any clear and consistent manner my intent to revoke it to my attending physician. I understand that if I revoke this instrument I should try to destroy all copies of it.

This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
(SEAL)

I. Amnot Well

I hereby state that the principal, I. Amnot Well, being of sound mind, signed (or directed another to sign on the principal's behalf) the foregoing Advance Directive for a Natural Death in my presence, and that I am not related to the principal by blood or marriage, and I would not be entitled to any portion of the estate of the principal under any existing will or codicil of the principal or as an heir under the Intestate Succession Act, if the principal died on this date without a will. I also state that I am not the principal's attending physician, nor a licensed health care provider or mental health treatment provider who is (1) an employee of the principal's attending physician or mental health treatment provider, (2) an employee of the health facility in which the principal is a patient, or (3) an employee of a nursing home or any adult care home where the principal resides. I further state that I do not have any claim against the principal or the estate of the principal.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Date

\_\_\_\_\_  
Witness

North Carolina            )  
  )  
\_\_\_\_\_ County            )

Sworn to (or affirmed) and subscribed before me this day by I. Amnot Well and \_\_\_\_\_ and \_\_\_\_\_.

Date:  
\_\_\_\_\_

Official Seal

\_\_\_\_\_  
Notary Public  
Printed name: \_\_\_\_\_  
My commission expires: \_\_\_\_\_

**STATUTORY "WILL" OF JANE DOE (the "will" the State of North Carolina provides for a married woman who dies without having executed her own will)**

I, Jane Doe, of Winston-Salem, North Carolina, according to Chapter 29 of the General Statutes of North Carolina, make this my "will," by failing to have a will of my own choice.

1. If I am survived by my husband and no children:
  - a. If either or both of my parents survive me, I leave \$50,000 of my personal property to my husband and my remaining estate one-half to my husband and one-half to my parents.
  - b. If neither of my parents survives me, I leave all my property to my husband.
2. If I am survived by my husband and one child, I leave \$30,000 of my personal property to my husband and my remaining estate one-half to my husband and one-half to my child, subject to the provisions of #4 below.
3. If I am survived by my husband and two or more children, I leave \$30,000 of my personal property to my husband and my remaining estate one-third to my husband and two-thirds to be divided equally among my children, subject to the provisions of #4 below.
4. I appoint my husband as guardian of the property of our minor children, if he survives me, but, as a safeguard, I require that:
  - a. My husband must make a written account, every year, to the Clerk of Court, explaining exactly how and why he spent the money for the proper care of our children, and requesting court approval of such expenditures;
  - b. My husband must give bond with surety to be approved, to guarantee that he will properly handle our children's money;
  - c. Each year my husband must file a complete, itemized and written account of all income received and all disbursements made with our children's money, listing end-of-year investments. The account must be approved by the Clerk of Court;
  - d. When a child attains 18 years of age, his or her share of the estate will be given to him or her, free and discharged of adult supervision, and no one, including my husband, may question how the child spends his or her share after attaining age 18.
  - e. If my husband does not survive me, I hope the court will

appoint a proper and responsible person to manage our minor children's money.

5. If my husband does not survive me, I do not care to nominate a guardian of the person for our minor children, but hope that my family and my husband's family will agree to a proper guardian, and that the court will approve such person to be guardian.

6. I do not care to appoint an executor for my estate and hope the Clerk of Court will appoint a personal representative of whom I would approve.

7. If my husband remarries, his next wife will have all spousal rights to any property which he inherits from me. I understand that my husband may leave his entire estate to his next wife and that she need not spend her share of his estate on my children, even if they need support, and that she can give her share to anyone she chooses, including her next husband or her children by a prior marriage, without giving a penny to my children.

8. If my husband is disabled and unable to manage his own affairs on the date of my death, I hope the Clerk of Court appoints someone suitable as guardian of my husband's estate.

9. I do not care to learn whether there are ways to save money for my family by simplifying procedures or lowering my death taxes. I understand that this may mean that unnecessary amounts will go to pay court costs and taxes, instead of to my husband and children.

IN WITNESS WHEREOF, I have completely failed to make a will of my choice, with the advice of a qualified attorney, because I really did not care to go to all that trouble, and therefore I adopt this, by default, as my "will."

No signature required  
Jane Doe