

## **Introduction to Estate Planning and Administration**

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### I. Wills

A. In North Carolina, any person of sound mind who is age 18 or older may make a will.

B. Every person is presumed to have sufficient capacity to make a will. To have testamentary capacity, a person must:

- i. Comprehend the natural objects of his bounty;
- ii. Understand the nature and extent of his property; and
- iii. Understand the consequences of his actions.

Even a person who has been adjudicated incompetent (i.e., incapable of managing his own affairs) may have sufficient capacity to execute a will.

### C. Types of Wills

i. Attested Written Will – must be in writing, signed by the testator and attested to by at least two competent witnesses.

a. Another person may sign a will for the testator, but it must be in the testator's presence and at the testator's request.

b. The testator does not need to sign the will in the presence of the witnesses, but if they are not present then the testator must acknowledge his signature to the witnesses.

c. Probate of Attested Will. Probate, or proof of a written attested will, is made as follows:

(1) Testimony of at least two attesting witnesses;

(2) Testimony of one attesting witness, and proof of the handwriting of another attesting witness, proof of the testator's handwriting (unless only signed by a mark), and such other proof as will satisfy the Clerk of Superior Court that the will is genuine and duly executed.

(3) If no attesting witness is available to testify, then proof of the handwriting of two attesting witness, proof of the testator's handwriting (unless only signed by a mark), and such other proof as will satisfy the Clerk of Superior Court that the will is genuine and duly executed.

(4) Self-Proved Wills. A written will may be made self-proved, either at the time of execution or any time thereafter, through an acknowledgement by the testator and affidavits of the attesting witnesses before an officer authorized to administer oaths.

ii. Unattested Wills

a. Holographic Will – must be:

(1) Handwritten

(2) Signed by the testator, and

(3) Must be found among the testator's valuable papers.

b. Noncupative Will

(1) An oral will made by a person who is in his last sickness or in peril of death and who does not survive the sickness or peril.

(2) A nuncupative will may only dispose of personal property.

iii. A testator may execute a codicil to amend the terms of his will. A codicil must be executed with the same formalities as a will, although a will and its codicil(s) may be executed in different manners.

D. Intestate Descent and Distribution. The property of a decedent who leaves no valid will or who has not disposed of all of his property by will will pass according to intestacy statutes adopted by a state.

1. If the decedent leaves a spouse, the spouse takes as follows:

a. No parents or descendants – if the decedent died with no surviving lineal descendants and no parents, then the spouse takes the entire estate.

b. No descendants, but a parent – if the decedent leaves no descendants but a parent survives, then the spouse takes (i) 1/2 of the real property, and (ii) the first \$50,000 and 1/2 of the remaining personal property.

c. One child – if the decedent left one child (or by the lineal descendants of one deceased child), the spouse takes (i) 1/2 of the real property, and (ii) the first \$30,000 and 1/2 of the remaining personal property.

d. More than one child – If the decedent is survived by more than one child (or a child and lineal descendants of a deceased child, or the lineal descendants of more than one children), then the spouse takes (i) 1/3 of the real property, and (ii) the first \$30,000 and 1/3 of the remaining personal property.

2. The remaining property is distributed as follows:

a. To decedent's lineal descendants.

b. To the parent(s).

c. To the parents' issue (i.e. the siblings of the decedent) or their lineal descendants.

d. To grandparent or lineal descendants of grandparent – this is divided so that 1/2 of the estate goes to the decedent's parental grandparents (or their lineal descendants) and 1/2 of the estate goes to the decedent's maternal grandparents.

To accomplish this properly, you must read and follow the statutes carefully. In North Carolina, the Intestate Succession Act is found in Chapter 29 of the North Carolina General Statutes.

3. If the decedent is survived by none of the parties described in the intestate succession statutes, then the estate goes to the state of North Carolina.

#### E. Major Goals of Estate Planning

1. Direct the distribution of decedent's property in accordance with his or her intent.

2. Minimize confusion, thereby reducing the effort required to administer an estate.

3. Avoid taxes.

## II. Other Estate Planning Documents

### A. Power of Attorney

1. A Power of Attorney (POA) creates an agency relationship. Except where modified by statutes, the principles of agency apply to the relationships among the principal, the agent, and third parties.

2. A POA requires a writing, so the scope of the agent's authority is defined within the writing. The authority can be as broad or narrow as the principal request, and the principal can place a limit on the duration of the agent's authority.

3. The agent is a fiduciary. The relationship between the principal and agent is one that implies that the principal has placed special trust and confidence in the agent.

4. Incapacity of the principal. The general rule is that the principal's incapacity terminates the agent's authority. In North Carolina, Chapter 32A of the North Carolina General Statutes changes this rule when the instrument states that it is a durable power of attorney.

5. Durable POA. A Durable POA is one that is not revoked by the incapacity or incompetence of the principal.

6. After a principal has become incapacitated or incompetent, a Durable POA, to be effective, must be registered in the office of the Register of Deeds.

### B. Health Care Power of Attorney (HCPOA) and Living Will (or Declaration of a Desire to Die a Natural Death).

1. A HCPOA allows a principal to appoint a health care agent to make health care decisions on behalf of the principal when the principal is unable to make those decisions.

2. A Living Will allows a person to express what type of medical care he will receive in the end-of-life situation.

3. North Carolina laws regarding HCPOAs and Living Wills changed significantly on October 1, 2007. Using North Carolina's existing framework for advanced directives, the changes allow a person to more effectively exercise his right of self-determination with respect to end-of-life situations.

a. The law allows a person to select whether the authority of a Health Care Agent or the instructions contained in a Living Will will prevail.

b. The law allows a person to require that the terms of his Living Will be honored.

c. The law brings consistency to the terms used in HCPOA and Living Will statutes.

### III. Estate Administration

A. Jurisdiction – The Clerk of Superior Court has exclusive and original jurisdiction in probate of wills, granting of letters, and all other matters of administration, settlement, and distribution of estates.

B. Venue – The proper county for probate of a decedent’s will is the county of the decedent’s domicile at the time of his death.

#### C. Qualification of Personal Representative

1. Executor – If a decedent dies testate, priority is given to a personal representative named in the will.

2. Administrator – If a decedent dies intestate, priority for the issuance of Letters of Administration is given to:

- a. the surviving spouse;
- b. any devisee;
- c. any heir;
- d. any next of kin;
- e. any creditor of the decedent;
- f. a person of good character residing in the county who applies; or
- g. any other person of good character who applies.

If parties are equally entitled to serve as Administrator, the Clerk shall determine which is most likely to administer the estate advantageously, or the Clerk may appoint two or more to serve jointly.

#### D. Duties of the Personal Representative

1. Prior to appointment, a person named as executor may carry out written instructions from the decedent regarding to the body and funeral and burial arrangements. Under a recently enacted North Carolina law, a health care agent authorized in a valid health care power of attorney to make arrangements for funeral, burial, and disposition of remains shall have precedence in making those arrangements.

2. General duty. A personal representative has a general duty to settle the estate as expeditiously and with as little sacrifice of value as is reasonable.

3. Powers of Personal Representative. The personal representative has the power to perform in a reasonable and prudent manner every act incidental to the collection, preservation, liquidation and distribution of the decedent's estate.

4. Publish Notice to Creditors. Every personal representative must publish a notice to creditors to present claims on or before a day at least three months from the date of the first publication. The personal representative also must send by first class mail a similar notice to all persons, firms, or corporations having an unsatisfied claim against the estate.

5. Opening decedent's safety-deposit box. A financial institution having possession of a safety-deposit box that decedent had access to must seal the box. The Clerk of Superior Court, or a representative, is not required to attend the opening of the box, so long as a "qualified person" (one who possesses a letter of authority or who is a lessee or cotenant of the box) opens the box and makes an inventory of its contents. In all other cases, the box must be inventoried in the presence of the Clerk or the Clerk's representative.

6. Inventory. A personal representative must file with the Clerk, within three months after qualification, an inventory of the real and personal property of the deceased. Supplemental inventories are to be filed if other property is discovered later. The personal representative is required to file an annual account within 30 days after the

7. Instituting an action. Upon the death of a decedent, the right to prosecute or defend any action or special proceeding in favor of or against the decedent is the responsibility of the personal representative (except for a few types of actions). If the death of a person is caused by the wrongful act, neglect, or default of another, the personal representative may asset an action for damages.

8. Paying claims. The personal representative is responsible for determining if a claim is valid. Claims must be in writing, state the amount or item claimed, the basis for the claim, and the name and address of the claimant. Claims must be presented to the personal representative or the Clerk of Superior Court in the county in which the administration is pending.

9. Distribution. After paying costs of administration, taxes, and other valid claims, the personal representative must distribute the remaining assets in accordance with the terms of the will or the law of intestate succession.