Your Will

Who may make a Will?

The maker of a Will must be at least 18 years old, of sound mind and free from improper influence.

How should a Will be Made?

The Will should be written, witnessed and signed strictly in accordance with North Carolina law. Neither a beneficiary under the Will nor the beneficiary's husband or wife should act as a witness. It is helpful to have the testator's and witnesses' signatures attested by a notary public. Handwritten Wills are recognized in North Carolina if certain statutory requirements are strictly fulfilled.

What Happens When You don't Make a Will?

When a person dies without a Will, or dies "intestate", the property of the deceased is distributed according to a formula fixed by law. In other words, if you don't make a Will, you don't have any say as to how your property will be distributed.

For example, if a person dies without a Will, leaving children, the surviving spouse would share the estate with the children. With no Will, the surviving spouse receives the first $30,000 in value of property other than real estate, and 1/3 of the remaining estate where there is more than one child or one-half of the remaining estate where there is only one child.

Usually a person would prefer that all of his estate, if it is not large, go to the surviving spouse. If there are any children under 18, the property cannot be delivered to them and a guardian must be appointed for them. A guardian will entail considerable expense and could create legal problems that might have been avoided with a Will.

Most important, however, for mothers and fathers is not the disposition of their property after death, but rather the proper care and custody of their minor children. Grandparents, other family members and godparents do not automatically receive custody of children who do not have a surviving parent. Your Will should specify the individuals, as well as alternatives, you would like to designate as guardians of your children. This decision on your part will be of great

assistance to the court in determining who will receive the custody of your children.

May a Will be Changed?

People may change their Wills as often as they desire. Changes can be simply and easily made by drafting a new Will or by the addition of an amendment called a "codicil." However, any change or codicil must comply with the same laws that apply to the making of a Will.

How Long is a Will Valid?

A properly drawn and executed Will remains valid until it is changed or revoked. However, changes in circumstances after a Will has been made, such as tax laws, marriage, divorce, birth of children or even a substantial change in the nature or amount of a person's estate, can affect the adequacy of the Will or change the manner in which the estate will be distributed.

All changes in circumstances require a careful analysis and reconsideration of all the provisions of a Will and may make it advisable to change the Will to conform to the new situation.

It is a good idea to review your Will at least every four or five years to be sure it is still appropriate.

Does a Will Increase Expenses at Death?

No. It usually costs less to administer an estate when a person leaves a Will than when the person does not.

A properly drafted Will may reduce the expense of administration in a number of ways. Provisions can be placed in Wills which take full advantage of the "Marital Deduction" section of the federal and North Carolina tax laws. This example illustrates only one of the ways a properly drafted Will can save money for you and your family.

How Large of an Estate is Necessary to Justify a Will?

Everyone who owns any real or personal property should have a Will regardless of the present amount of the estate. Your estate grows daily in value through the repayment of mortgages, appreciation of real estate, stocks and other securities, inheritances from relatives and

other factors.

May a Person Dispose of Property in Any Way?

Almost, but not quite. For example, a married person cannot completely exclude a spouse. Insurance proceeds, jointly owned property and retirement benefits may be controlled by other provisions of the law.

Who Will Manage Your Estate?

If you make a Will, you may name the person who you want to manage the administration of your estate. If you do not make a Will, then the Probate Court will appoint someone, whom you may or may not know, to handle the affairs of your estate.

Does a Will Avoid Estate Taxes?

A properly drafted Will after consulting with a Certified Financial Planner may reduce the amount of taxes that have to be paid. Many Wills written without consideration of recent federal and North Carolina tax laws should be re-examined.

What Happens to Property Held in the Names of Both Husband and Wife?

Joint bank accounts and real property held in the names of both husband and wife usually pass to the survivor by law and not by the terms of the deceased's Will.

There are many cases, however, in which it is not to your advantage to hold property in this manner.

Is a Life Insurance Program A Substitute for a Will?

No. Life Insurance is only one kind of property which a person may own. If a life insurance policy is payable to any individual, the Will of the insured has no effect on the proceeds.

If the policy is payable to the estate of the insured, the payment of the proceeds may be directed by a Will. The careful person will have a lawyer and life insurance counselor work together on a life insurance

program, particularly in the area of estate planning.

Who Should Draft a Will?

The drafting and signing of a Will is an important process and must be done in accordance with the requirements of North Carolina law. It requires professional judgment which can only be developed through years of training and a thorough study of your particular situation.

Life Insurance

Does a Will Control who gets my Life Insurance Proceeds?

By default Life Insurance is a non-probate asset, which means it does not pass by your Will. Instead the beneficiary designated on the Life Insurance policy is entitled to the proceeds.

What Happens if my Life Insurance Beneficiary is a Minor?

In many families we see a situation where the spouse is named the primary beneficiary, and the children are named secondary beneficiaries.

Unfortunately, under this arrangement the children will have full access to the money when they turn age 18. Typically in our Wills we draft a testamentary trust that specifies a later age for the children to have full access to the funds you leave them. If you would like a similar arrangement for life insurance proceeds there are several options:

- A simple, but risky way to achieve this is to name your estate as the beneficiary instead of the minor child. The existing trust in your Will then handles the insurance proceeds. This is risky because the life insurance proceeds become part of the estate and therefore are available to creditors.
- If you don't have a Will you can specify a UTMA custodial trust for the life insurance proceeds. A UTMA custodial

trust is a simple trust, defined by North Carolina statutes, in which you name a custodian for the funds, and those funds become payable to the beneficiary at age 21.

- If you have a Will that creates a testamentary trust you can bypass the estate and leave the funds directly to that trust.

Are Life Insurance Proceeds Taxable?

Insurance agents frequently describe life insurance proceeds as "tax free", referring to the fact that the proceeds are usually not subject to income taxes. However, for estate taxes purposes life insurance proceeds are taxable if you have any incident of ownership in the policy. An example of such an "incident of ownership" is the ability to change the beneficiary.

In this case your life insurance proceeds, regardless of whether paid directly to a beneficiary or the estate, are included in the gross estate and thus should be considered when evaluating whether your estate is over the exclusion amount ($1,000,000 in 2002 and 2003).

Living Will

What is a Living Will?

A living will is a document which allows you to retain control over whether your life will be prolonged by certain medical procedures if you are diagnosed as being terminally and incurably ill or in a persistent vegetative state (i.e., a sustained complete loss of self-awareness). In North Carolina, this is called "A Declaration of A Desire for a Natural Death." A living will allows you to authorize the withholding of extraordinary means of keeping you alive (for example, respirator care) and may authorize the withholding or discontinuance of artificial nutrition of hydration. You may make different choices as the level of care to be withheld or discontinued depending whether your medical condition is terminal and incurable or you are in a persistent vegetative state.

How Should a Living Will or Health Care Power of Attorney Be Made?

The forms used to make a living will or health care power of attorney may be obtained from an attorney. A health care power of attorney may be a separate document or may be included in a broader durable power of attorney document addressing other matters than consent for and refusal of medical care.

A living will and a health care power of attorney must be witnessed and signed in accordance with North Carolina law and must be certified by a notary public. At least two witnesses are required for a living will and a health care power of attorney. Witnesses cannot be related to the person signing the documents or be potential heirs to the person's estate. Nor may an attending physician or employees of the physician or health care institution be witnesses for these documents; however, such employees may notarize the document. Because they are not employees of the physician or health care institution, volunteers may witness the execution of a living will or health care power of attorney. Witnesses can have no claim against the individual.

You should carefully consider the implications of executing these documents, both as to the course of your future medical care and as to the effect of your decisions on your loved ones.

It is strongly suggested that you consult with family members prior to executing these documents.

Can I Have Both a Living Will and a Health Care Power of Attorney?

Yes. You may have a living will indicating your choice of health care in the event you are unable to make those decisions in the future, and you also may have a health care power of attorney designating an individual to act on your behalf. In fact, you may even have a living will and health care power of attorney in the same document. By addressing these issues in a single document, the risk of any inconsistency in separate documents can be avoided. However, if you are in a condition not covered by your living will, then the health care power of attorney will govern. In the event of a conflict between the wishes expressed in your living will and a decision made by your health care agent, your living will takes precedence.

Can I Change My Mind Once I Sign a Living Will or Appoint a Health Care Agent?

Yes. You may revoke a living will at any time that you are able to communicate health care decisions. You may revoke a health care power of attorney if you are also capable of making health care decisions. You may do so by executing or acknowledging any instrument of revocation, executing a subsequent living will or health care power of attorney, or by any other manner by which you care able to communicate your intent to revoke. The revocation will become effective only upon communication to the attending physician and to each health care agent named if a health care power of attorney is to be revoked. These documents should be reviewed periodically, especially in the event of divorce or death or disability of a named agent, to ensure that they continue to reflect your desires about health care decisions.

If I Do Not Have a Living Will or Health Care Power of Attorney, Who Will Make These Decisions for Me?

If any individual does not have a living will or health care power of attorney, the decisions will be made by the patient's spouse or next of kin, unless a court has appointed a guardian. Under the provisions of North Carolina statutes, such individuals may consent to withdrawal of medical care of patients or terminally and incurably ill or in a persistent vegetative state after confirmation of this condition by physicians.

Durable Power Of Attorney

A power of attorney gives someone the legal authority to act for you. You are the "principal" and the person you give the power to is your "attorney-in-fact." You may name your spouse, an adult child, a relative or trusted friend to be your attorney-in-fact. Actions of your attorney-in-fact (authorized by your power of attorney) are legally your actions. A regular power of attorney ends if you become incapacitated or mentally incompetent. A durable power of attorney

usually becomes effective if you become incapacitated or mentally incompetent.

If you do not give someone your durable power of attorney, a court may need to appoint a guardian for you if you become incapacitated or mentally incompetent. A durable power of attorney avoids putting you and your family through a long and expensive guardianship proceeding.

Health Care Power Of Attorney

What is a Health Care Power of Attorney?

A health care power of attorney is a document by which you may appoint another person who may consent to or refuse medical care, including mental health treatment, on your behalf if a physician or eligible psychologist determines that you are unable to make or communicate these decisions yourself. You may authorize the designated person (the "health care agent") to consent to the withholding or withdrawal of life sustaining procedures in the event your are determined to be: (1) terminally ill, (2) permanently in a coma, (3) suffering from severe dementia, or (4) in a persistent vegetative state.

Life-sustaining procedures are those which only serve to artificially prolong the dying process and may include mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and any other medical treatment (other than care to provide comfort or alleviate pain). In addition to making decisions in "life and death" situations, your health care agent also may be authorized to make routine medical decisions for you (for example, to consent to X-rays or surgery). You may include instructions to your health care agent to refuse any specific types of treatment that unacceptable to you for religious or other reasons. In the event of death, you may authorize your health care agent to donate your organs and authorize an autopsy.

A health care power of attorney will not be effective if a court appoints a guardian to act on your behalf. However, you may indicate in the document your choice of guardian in the event guardianship

proceedings are commenced.

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