**Purposes of a will**

- Transfer property
- Name an executor to handle transfer of property
- Name a guardian for minor children
- Create trusts
- Direct disposition of remains

**If there’s no will**

- **Decedent dies “intestate”**
  - Property passes by statute to closest relatives (except property that passes outside a will, e.g. life insurance, 401(k))
  - Clerk of court appoints personal representative, who will have to post bond
  - Property in excess of $1,500 cannot pass to children without court involvement
  - Parent’s wishes for guardian not known

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Statutory sources

- Wills are controlled by state law
  - may have different requirements for number of witnesses, notarization, revocation, etc.

Kinds of Wills

- Attested will (G.S. § 31-3.3)
  - signed in the presence of two witnesses
- Holographic Will (G.S. § 31-3.4)
  - Can transfer both real and personal property
- Nuncupative will (G.S. § 31-3.5)
  - Can only transfer personal property

Characteristics of a valid will

- Testator is at least 18 years old
- Testator has mental capacity to make a will
- The will is signed by testator
- Testator’s signature is witnessed by two witnesses
  - This is called an “attested will” (G.S. § 31-3.3)
Testamentary capacity
- The testator must understand
  - the “natural objects of his [her] bounty”
  - the nature and extent of his/her property
  - the manner in which he or she desires to dispose of his/her
  - the effect of the disposition of his/her estate

Requirements of witnesses
- Must be at least 18 years old
- Must be mentally competent
- May not be a beneficiary or spouse of testator
- Must watch testator sign or have testator acknowledge previously affixed signature

Self-Proved Wills
- An attested will can be made “self-proved” (G.S. § 31-11.6)
- Saves necessity of having witnesses testify later
- Testator and witnesses sign acknowledgments in front of notary
Witnesses attest that . . .

- Testator signed the will
- Testator was at least 18 years old and of sound mind
- Testator understood that document was his/her last will
- Testator signed will willingly, and was under no undue influence

Revocation of Will

- Only by these means:
  - By subsequent written will or codicil or other writing executed in manner provided in statute
  - Testator or another person in her/his presence and under her/his direction:
    - “By being burnt, torn, canceled, obliterated, or destroyed”
    - With the purpose of revocation

Property passing outside will

- Named beneficiary, e.g.:
  - Life insurance
  - IRA, 401(k), annuity, etc.
  - Joint property with right of survivorship
Rights of Spouses

- Can't completely disinherit a spouse
  - Spouse entitled to an "elective share" (G.S. § 30-3.1)
    - a share of the total net assets of the estate, less expenses, taxes, taking into account bequests to the surviving spouse.
    - Amount depends on how many other descendants. If none, spouse entitled to half of net assets.
  - All spouses are entitled to “Year's Allowance” of $10,000 out of personal property, before debts (G.S. § 30-15)

Marital Status Issues:

- **Divorce:**
  - Cuts off rights of spouse
    - To inherit
    - To be executor
  - Doesn’t necessitate new will, but probably a good time to reassess estate plan
- **Separation:** Does NOT cut off spouse’s rights, including right to elective share.

Unmarried Partners

- Estate planning especially important for unmarried couples
- Will - can pass property to partner, subject to right of spouse
- Property can pass outside estate
- Be especially cautious about testamentary capacity, undue influence
Property to Minors

- Tangible personal property can’t go directly to minor
- Money can’t go directly to minor
- Real estate can’t go directly to minor
- Other intangibles can’t go directly to minor
- SO: you need to find out if any beneficiary or alternate is a minor.

Options for Minors:

- Tangible personal property under $1500 – can go to custodian of child (e.g. parent).
- Tangible personal property over $1500 can go to guardian of estate
- Leave property to an adult with, instruction to use for child (but will not be binding; also, subject to adult’s creditors)
- Create a trust

Trusts:

- Other reasons for trust:
  - beneficiary receives needs-based public benefits (e.g. SSI, Medicaid). Receipt of inheritance may cause termination of benefits.
- Issues:
  - Who’s the trustee? Alternate?
  - Purpose of the trust?
  - When/how does the trust end?
  - Who gets what’s left over?
- Note: A trust is needed to receive insurance proceeds for a minor.
Avoiding a long list of tangible personal property bequests

“I may leave a writing which, although not a part of my will, expresses my desires concerning the disposition of my tangible personal property. I request, but do not require, that my wishes as set forth in any such writing be observed.”

Clinic Procedures

- Read Will Protocols (Ex. C)
- By phone: 2-page intake; send info to client
  - Brief Explanation of Wills (Ex. A-1)
  - What to bring if you want a Will (Ex D)
  - Dual Representation letter, if appropriate (Ex. E).
- In-person interview – Will Questionnaire (Ex. F)
- Write detailed opening memo
- Discuss estate plan with supervising attorney and resolve any outstanding questions.

Procedures - 2

- Draft documents
- Supervising attorney reviews
- Client reviews Make necessary changes
- Arrange for signing
  - witnesses
  - notary
- Execute documents (ask the 5 questions in the presence of witnesses)
- Distribute copies