Documents: Wills

Estate Planning

- Wills are one part of the “documents” package that we offer to our clients.
  - Other documents (Advance Directives)
    - Power of Attorney
    - Health Care Power of Attorney
    - Living Will
Clinic estate planning process

- Our estate planning work involves several steps:
  - Meeting the client and gathering information about the
    - client
    - her/his property
    - family, other important people
    - Values and objectives
  - Determining the “plan” – how to accomplish the client’s goals
  - Drafting the documents
  - Making changes based on client review
  - Getting the documents executed
  - Distributing copies as needed

What can be accomplished in 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
- Problems passing property to minor children without court involvement
- Parent’s wishes for guardian not known

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

Who can make a will?

- Must be 18 or older (or emancipated)
- Must have mental capacity
- Testamentary Capacity – 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
Property passing outside will

- Important part of planning is knowing what property will pass outside the 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 – even from an insurance policy
- 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.

What happens to property for minors WITHOUT provision in a will

- Tangible personal property under $1500
  - With or without a Will, can be delivered to a parent or guardian with whom the child lives, for the child’s use/benefit, with permission of the Clerk of Court
- Tangible personal property over $1500, intangible property, and real property
  - can go to a guardian of estate appointed by the Clerk of Court
  - Otherwise will be held by Clerk of Court until minor turns 18
**With a Will: Ways to deal with property for children**

- Leave property to an adult with, instruction to use for child – but this has many disadvantages:
  - Instruction not binding - adult may use/spend the property for herself
  - Property will be subject to the adult’s creditors
  - If the adult dies, the property/money will be part of the adult’s estate
- Will can provide that tangible personal property **over $1500** can be delivered to a parent or guardian
  - If no provisions in the Will, passes as if there’s no will (see above)
- Will can create a trust to deal with intangible (eg money) & real property

**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?
  - How is money allocated between multiple children?
    - Pooled trust – “one pot”
    - Separate trusts for each child
  - When/how does the trust end? At what age?
  - Who gets what’s left over?
Other issues

- Does everyone need a will?
- Long lists of personal property
- Leaving people out
- Personal messages

Couples: Dual/Joint Representation

- Concerns ---
  - Confidentiality, conflicts of interest
- Clinic procedures
  - Discussion with clients separately
  - Dual representation agreement
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)

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
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

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

Clinic Procedures

- Wills generally done along with Advance Directives
- Read Protocols for Will and other documents
- By phone: 2-page intake; send info to client
  ▪ Brief Explanation of Wills (and other documents)
  ▪ What to bring if you want a Will
  ▪ Dual Representation letter, if appropriate
- In-person interview – Will Questionnaire
- 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