"SIMPLE" WILLS

THE OXYMORON

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I. NON-TAXABLE ESTATES

The materials in this outline are appropriate only for estates not subject to Federal estate taxes. Based on the unified credit available for decedents dying as of the date of this outline, the materials may be used for single clients whose estates have a value for Federal estate tax purposes of less than $600,000, and for married clients whose combined estates have a value for Federal estate tax purposes of less than $600,000.[2] The practitioner should be aware, however, that the amount of assets that can be transferred tax free is subject to change by Congress.

In ascertaining the size of a client's estate, the practitioner must be careful to consider all of the assets that may be includable in the client's estate at his or her death. The types of assets that are often neglected include jointly held property, life insurance, retirement benefits, and potential inheritances. In addition, certain taxable gifts made after 1976 are accumulated and added to the client's gross estate for purposes of calculating estate taxes. Thus, before using the documents in this outline, it is important to determine whether a client has made any substantial lifetime gifts.

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[2] Although, in principle, each member of a married couple is entitled to pass up to $600,000 tax free (for a total of $1,200,000), if the total assets of the family exceed $600,000, poor planning may result in a taxable estate at the death of the surviving spouse. If the spouses together have more than $600,000, more sophisticated planning documents are needed to prevent the entire amount of the couple's assets from being included in the estate of the second spouse to die. Accordingly, if the total amount of a couple's assets exceeds $600,000, then in most circumstances the documents contained in this outline are not appropriate.

II. SIMPLE MAY BE NO WILL AT ALL.

1. Who takes? § 64.1-1.[3] Course of descents generally.

    a. First: To the surviving spouse of the intestate, unless the intestate is survived by children or their descendants, one or more of whom are not children or their descendants of the surviving spouse, in which case two-thirds of such estate shall pass to all the intestate's children and their descendants and the remaining one-third of such estate shall pass to the intestate's surviving spouse.

    b. Second. If there be no surviving spouse, then the whole shall go to all the intestate's children and their descendants.

    c. Third. If there be none such, then to his or her father and mother or the survivor.

    d. Fourth. If there be none such, then to his or her brothers and sisters, and their descendants.

    e. Fifth. If there be none such, then one-half to his or her paternal side and one-half to his or her maternal side.

    f. And so on ....

2. How do they take? § 64.1-3. When takers take per capita and when they take per stirpes. Whenever those entitled to partition are all in the same degree of kindred to the intestate, they shall take per capita or "by persons"; and when a part of them being dead and a part living, the issue of those dead have right to partition, such issue shall take per stirpes or "by stocks", that is to say, the shares of their deceased parents.

3. Who administers the estate? § 64.1-118. In the case of a person dying intestate, administration shall be granted to the distributees who apply therefor, preferring first the husband or wife and then such of the others entitled to distribution as the court or clerk shall see fit. But any of the distributees may at any time waive his right to qualify in favor of any other person to be designated by him. If no distributee apply for administration within thirty days from the death of the intestate, the court or clerk may grant administration to one or more of the creditors or to any other person, provided such creditor or other person shall certify that he has made diligent search to find an address for the husband or wife entitled to preference under the provisions hereof, and has given not less than thirty days notice by certified mail of his intention to apply for administration to the last known address or addresses of the husband or

[3] All references will be to the Code of Virginia (Michie 1950), unless otherwise indicated.

wife discovered or alternatively, that he has not been able to find any such address; and provided, further, that administration shall be granted to persons entitled to preference under the provisions hereof who apply therefor before the expiration of the thirty-day period. Administration shall not be granted to any person unless the court or clerk is satisfied that he or she is suitable and competent to perform the duties of his or her office.

4. Security on bond? § 64.1-121. If all distributees or all beneficiaries under the decedent's will are personal representatives, whether serving alone or with others who are not distributees or beneficiaries, the court or clerk shall not require security, nor shall security be required of an executor when the will waives security of an executor. However, in either case, upon the application of any person who has a pecuniary interest or upon motion of the court or clerk, such fiduciary may be required to provide security in an amount deemed sufficient. But see § 26-59 and discussion below of nonresident personal representatives.

5. Duty of every personal representative? § 64.1-139. Every personal representative shall administer, well and truly, the whole personal estate of his decedent. This section cannot properly be construed to mean more than that the personal representative shall administer faithfully the personal estate of his decedent, whether such estate is disposed of entirely by will or passes partially by intestacy. Grasty v. Clare, 210 Va. 21, 168 S.E.2d 261 (1969).

6. Trust for minors? Usually none, property delivered to a guardian with the property of the minor to be delivered to the minor when he is eighteen (18). § 64.1-57.1.

    a. A circuit court may grant to all personal representatives or trustees all or a part of such powers as may be incorporated by reference pursuant to § 64.1-57. Such motion may be *ex parte*; however, the court, in its discretion, may require such notice to and the convening of interested parties as it may deem proper in each case.

    b. Note that paragraph 1(p) of § 64.1-57 allows for distribution of property to a custodian under the Uniform Transfer to Minor's Act until the minor is twenty-one (21) if designated appropriately or to a custodial trustee under the Uniform Custodial Trust Act. Please see § 31-37 *et seq.* and 55-34.1 *et seq.*
    c. Problem with separate trusts? Each minor beneficiary will have a separate trust, therefore, no pot trusts.

III. WHO NEEDS A WILL? Clients need wills for a variety of non-tax planning reasons:

1. Intestacy may not achieve the client's objectives. For example, a client in a second marriage with children from a previous marriage may wish for his or her spouse to receive more than the statutory one-third share. A spouse may lack acumen to care for substantial assets. In such a case, that spouse's share of the estate may be placed in trust with an independent person managing the assets for that spouse's benefit.

2. If minors may receive property (for example, if the client's spouse predeceases him or her), a trust under a will avoid the need for guardianship of assets.

3. Young adults (ages 18 to 25) may not be suitable recipients of outright gifts. Many clients prefer to postpone their children's inheritances.

4. A will gives a client with young children the opportunity to name a guardian of the person of each minor child.

5. A will names executors and trustees of any testamentary trusts the client wishes to establish, and can provide for no security on a fiduciary bond.

IV. WILL EXECUTIONS - Witnesses to a self-proving will do not have to testify in court to probate the will. Under § 64.1-92, a will becomes "self-proved" when acknowledged by the testator and witnesses and is admitted to probate on the basis of the acknowledgment. The procedure for the execution of a self-proved will is as follows:

1. The client, the attorney, two witnesses (who may include the attorney), and a notary public should be assembled in one room (and should remain there during the entire execution ceremony). The witnesses must be adults and competent to make the observations set forth below. Please note that Virginia law allows interested parties to be competent witnesses for wills. No person shall be incompetent to testify for or against the will solely by reason of any interest in the will or the estate of the testator. §§ 64.1-51, 64-53, 64-54. However §§ 54.1-2982 and 2983 require two witnesses for an advance medical directive, none of whom are the spouse or a blood relative of the declarant of the advanced medical directive. Accordingly, to be safe, if not entirely required, try to have two disinterested witnesses (witnesses who are neither the spouse nor the blood relative of the testator) witness all of the documents. In this way, a trap for the unwary in executing the advance medical directive will be avoided.

2. In the presence of the witnesses, the attorney should ask the testator the following three questions:

(a) Is this your will?

(b) Does it dispose of your estate as you wish?

(c) Do you ask these witnesses to witness your signature to this will?

3. After the testator has affirmatively answered these three questions, he or she should fill in the date in the space provided above his or her name and sign his or her name on the signature page in the body of the will. The testator may initial or sign the will. Some practitioners also have the testator date each page.

4. With the witnesses and the testator still present, the witnesses should sign their names in the two spaces provided at the end of the will, and each may write his or her place of residence, although the residence is not required.

5. The notary public should then ask the testator the following questions under oath:

   (a) Is this your will and does it dispose of your estate as you wish?
   (b) Did you ask these people to witness your will and did they do so in your presence and in the presence of each other?
   (c) Did you do this willingly and without force from anyone?

6. The notary public should then ask the witnesses the following question:

   Were you asked to witness this will and does [testator's name] appear to be over the age of 18 and of sound and disposing mind?

7. If the testator and witnesses answer all of these questions affirmatively, the testator and the witnesses should each sign the self-proving affidavit. The notary public should then complete the affidavit.

8. It is imperative that no one leave the room during the execution ceremony. It is interesting to note that under § 64.1-49, the testator does not actually have to sign his will in the presence of two witnesses. It is sufficient that the testator *acknowledge* that the will is signed by him in the presence of two witnesses both of whom are present at the same time. But note, the self-proving affidavit forms prescribed in § 69.1-87.1 and § 69.1-87.2 require that for the self-proving affidavit to be effective, both witnesses must be present when the will is *signed*.