

2022 EDITION

Estate Planning in Virginia

Editor: Marie McKenney Tavernini



Continuing Legal Education
by the Virginia Law Foundation



Estate Planning in Virginia

Copyright © 1997, 2002, 2007, 2013, 2016, 2018, 2022
Virginia Law Foundation. All rights reserved.

This electronic book is licensed for use on a single personal computer only. It must be treated in the same way as the print edition. It may not be copied, made accessible on a computer network, or otherwise shared by electronic or optical means. No derivative works may be made, but the purchaser may electronically copy short passages to include in memoranda, briefs, and similar documents.

This publication is presented with the understanding that the authors, the reviewers, and the publisher do not render any legal, accounting, or other professional service. It is intended for use by attorneys licensed to practice law in Virginia. Because of the rapidly changing nature of the law, information contained in this publication may become outdated. As a result, an attorney using this material must always research original sources of authority and update information to ensure accuracy when dealing with a specific client's legal matters. In no event will the authors, the reviewers, or the publisher be liable for any direct, indirect, or consequential damages resulting from the use of this material. The views expressed herein do not necessarily represent those of the Virginia Law Foundation.

Citations to statutes, rules, and regulations are to the versions in effect at the time the material was written, unless otherwise noted. An effort has been made to ensure the material is current as of April 2022.

Click the left mouse button twice on the link below to view tips on using Virginia CLE Electronic Books (requires Adobe® Reader version 6 or later).



VIRGINIA LAWYERS PRACTICE HANDBOOK

ESTATE PLANNING IN VIRGINIA

SEVENTH EDITION

Editor:

Marie McKenney Tavernini

Marie McKenney Tavernini, P.C.

Alexandria, Virginia

 Virginia CLE[®]
Publications

TABLE OF CONTENTS

<i>Chapters and Authors</i>	iii
<i>About the Editor and Authors</i>	v
<i>Acknowledgments</i>	xi
<i>Preface</i>	xiii
<i>Electronic Forms: Instructions and Table</i>	xvii

Volume 1

CHAPTER 1: INTERVIEWING THE CLIENT

1.1	INTRODUCTION.....	1
1.2	STARTING THE PROCESS.....	2
	1.201 Initial Contact	2
	1.202 Scheduling the Interview.....	7
1.3	COLLECTING THE INFORMATION.....	7
	1.301 Data Collection.....	7
	1.302 How to Ask for Information	8
1.4	RECOGNIZING ETHICAL DILEMMAS.....	11
1.5	CONFIDENTIALITY AND CYBER SECURITY	11
1.6	PROPOSED METHODOLOGY FOR CONDUCTING THE INTERVIEW	12
	APPENDIX 1-1: INITIAL LETTER TO CLIENT	15
	APPENDIX 1-2: ENGAGEMENT LETTER.....	17
	APPENDIX 1-3: ENGAGEMENT LETTER—ALTERNATIVE FORM.....	19
	APPENDIX 1-4: LONG-FORM QUESTIONNAIRE.....	23
	APPENDIX 1-5: SHORT-FORM QUESTIONNAIRE.....	49

TABLE OF CONTENTS

CHAPTER 2: ETHICAL ISSUES

2.1	INTRODUCTION	53
2.2	RELATIONSHIP BETWEEN CLIENT AND LAWYER	54
2.201	Lawyer Competence – Rule 1.1	54
2.202	Scope of Representation – Rule 1.2	58
2.203	Diligence – Rule 1.3	62
2.204	Communication – Rule 1.4	63
2.205	Fees – Rule 1.5	67
2.206	Confidentiality of Information – Rule 1.6	75
2.207	Conflicts of Interest – Generally – Rule 1.7	87
2.208	Conflicts of Interest – Prohibited Transactions – Rule 1.8	95
2.209	Conflicts of Interest – Former Clients – Rule 1.9	105
2.210	Imputed Disqualification – Rule 1.10	108
2.211	Representing Client as Both Business Entity and Individual	109
2.212	Client With Diminished Capacity – Rule 1.14	111
2.213	Safekeeping Property – Rule 1.15	120
2.214	Retaining Client’s Original Documents	124
2.215	Declining or Terminating Representation – Rule 1.16	125
2.216	Duties to Prospective Client – Rule 1.18	128
2.3	LAWYER AS ADVISOR	133
2.301	Nonlegal Advice	133
2.302	Referrals to Other Professionals	134
2.4	LAWYER AS ADVOCATE	134
2.401	Candor Toward the Tribunal – Rule 3.3	134
2.402	Truthfulness in Statements to Others – Rule 4.1	135
2.403	Communication With Persons Represented by Counsel – Rule 4.2	136
2.404	Dealing With Unrepresented Persons – Rule 4.3	136
2.5	LAW FIRMS AND ASSOCIATIONS	136
2.501	Responsibilities Regarding Nonlawyer Assistants – Rule 5.3	136
2.502	Multi-Jurisdictional Practice of Law – Rule 5.5	138

TABLE OF CONTENTS

2.6	INFORMATION ABOUT LEGAL SERVICES.....	141
2.601	Communications Concerning a Lawyer’s Services – Rule 7.1	141
2.602	Solicitation of Clients – Rule 7.3	142
 CHAPTER 3: MAPPING THE PLAN		
3.1	INTRODUCTION.....	145
3.2	FORMS OF OWNERSHIP	147
3.201	Fee Simple	147
3.202	Tenants in Common	147
3.203	Joint Tenants with Right of Survivorship.....	148
3.204	Tenants by the Entirety	148
3.205	Community Property.....	148
3.206	POD Accounts	149
3.207	TOD Ownership of Securities	150
3.208	TOD Ownership of Real Estate	150
3.3	PROBATE PROCESS—A BRIEF OVERVIEW.....	150
3.301	Probating the Will	150
3.302	Qualifying the Personal Representative and the Trustee of a Testamentary Trust	151
3.303	Fiduciary Bond and Surety on the Bond.....	151
3.304	Filing the Inventory	152
3.305	Filing the Annual Accounting.....	152
3.306	Statement in Lieu of Accounting	152
3.307	Settling the Estate	152
3.4	THE AUGMENTED ESTATE.....	153
3.401	Surviving Spouse’s Right to Elect a Share of Decedent’s Estate	153
3.402	Description and Timing.....	154
3.403	Included Property	154
3.404	Excluded Property	155
3.405	Meaning of “Estate” and “Property”	156
3.406	How the Augmented Estate Is Satisfied	157
3.407	Effect on Federal Estate Taxes.....	159
3.5	OTHER RIGHTS.....	159
3.501	Family Allowance	159
3.502	Exempt Property	159
3.503	Homestead Allowance	160

TABLE OF CONTENTS

3.6	REASONS FOR HAVING A WILL.....	160
3.601	To Dispose of Property.....	160
3.602	To Reduce Estate Taxes.....	161
3.603	To Name Fiduciaries.....	162
3.7	COMPARISON OF TESTACY AND INTESTACY.....	162
3.8	TYPES OF TRUSTS.....	164
3.801	In General.....	164
3.802	The Virginia Uniform Trust Code.....	164
3.803	Revocable Versus Irrevocable Trusts.....	164
3.804	Living Versus Testamentary Trusts.....	165
3.805	Grantor Versus Nongrantor Trusts.....	166
3.9	USES OF TRUSTS.....	166
3.901	Avoiding Probate.....	166
3.902	Managing Assets.....	167
3.903	Tax Savings.....	168
3.904	Providing for Minors and Other Persons Under a Disability.....	171
3.905	Providing for Spendthrifts.....	172
3.906	Providing for a Spouse, While Controlling the Disposition of the Remainder.....	172
3.10	ALTERNATIVES TO TRUSTS.....	175
3.1001	Uniform Transfers to Minors Act.....	175
3.1002	Uniform Custodial Trust Act.....	175
3.1003	POD Bank Accounts, Savings Accounts and United States Savings Bonds, TOD Investments, and Real Property.....	176
3.1004	Survivorship.....	176
3.1005	Simultaneous Death Act.....	177
3.1006	Limited Partnerships and Limited Liability Companies.....	177
3.11	OTHER DOCUMENTS.....	178
3.1101	Durable Powers of Attorney.....	178
3.1102	Advance Medical Directives.....	178
3.1103	Burial Instructions and Appointment of an Agent to Dispose of Body.....	179
3.1104	Anatomical Gifts.....	179

TABLE OF CONTENTS

3.12	TRANSFER TAX CONSIDERATIONS	180
3.1201	Overview of the Federal Gift Tax	180
3.1202	Overview of the Federal and Virginia Estate Tax.....	182
3.1203	Lifetime Versus Testamentary Gifts.....	186
3.1204	Estates Subject to the Federal Estate Tax.....	186
3.1205	Overview of the Generation-Skipping Transfer Tax	187
3.1206	Estates Subject to the Generation-Skipping Transfer Tax	188
3.13	PLANNING FOR MARRIED COUPLES	189
3.1301	Marital Agreements	189
3.1302	Surviving Spouse’s Elective Share of the Decedent’s Augmented Estate.....	189
3.14	IMPLEMENTING THE PLAN.....	190
3.1401	Need for Additional Information and Documents	190
3.1402	Checklist for Preparation of Documents	191
3.15	CONCLUSION	192
3.1501	Careful Review of All Information.....	192
3.1502	Coordination with Other Professionals.....	193
3.1503	Coordination with Existing Plan Documents and Transfers.....	193
3.1504	Coordination with Estate Plans of Other Family Members	193
3.1505	Following Up with the Client	194
 CHAPTER 4: DRAFTING THE WILL		
4.1	INTRODUCTION.....	195
4.2	WHAT CONSTITUTES A WILL?	195
4.201	Definition of a Will	195
4.202	“Will” Construed.....	195
4.203	Essential Elements.....	195
4.3	WILL SUBSTITUTES AND ALTERNATIVE PLANNING	196
4.301	General Considerations.....	196
4.302	Necessity of a Will	196
4.303	Coordinating Non-Probate Assets with the Estate Planning Documents	196

TABLE OF CONTENTS

4.4	FUNDAMENTAL WILL PROVISIONS	196
4.401	Exordium Clause.....	196
4.402	Tangible Personal Property.....	196
4.403	Specific and General Bequests	196
4.404	Real Property	197
4.405	Residuary Estate.....	197
4.406	Powers of Appointment.....	197
4.407	Trusts for Certain Beneficiaries.....	197
4.408	Guardians	197
4.409	Presumption of Survivorship.....	198
4.410	Debts and Expenses of Administration	198
4.411	Taxes.....	198
4.412	Appointment of Executor and Trustee.....	199
4.413	Testimonium	199
4.414	Attestation.....	199
4.5	BASIC CONSIDERATIONS	200
4.501	Clear Identifications	200
4.502	Limitations	200
4.503	Will Speaks as of Date of Death.....	200
4.504	References to Virginia Code Sections That Predate Enactment of Title 64.2	200
4.6	PREREQUISITES FOR A VALID WILL	201
4.601	Statutory Formalities for Drafting.....	201
4.602	Testamentary Capacity	201
4.603	Statutory Formalities for Execution	201
4.604	Multi-Jurisdictional Issues.....	201
4.605	Holographic and Nuncupative Wills	201
4.7	AMENDING THE PLAN: CODICIL OR NEW WILL	201
4.8	THE AMERICAN TAXPAYER RELIEF ACT OF 2012 AND THE TAX CUTS AND JOBS ACT OF 2017: ESTATE, GIFT, AND GST TAXES	202
4.801	American Taxpayer Relief Act of 2012.....	202
4.802	Tax Cuts and Jobs Act of 2017	202
4.9	MATCHING THE ESTATE PLANNING DOCUMENTS WITH THE CLIENT.....	203
4.901	Candidates for Simple Wills with No Trusts.....	203
4.902	Candidates for Simple Wills with Guardianship Provisions and Contingent Trusts for Children	204

TABLE OF CONTENTS

4.903	Separate Share or Single “Pot” Trust?	205
4.904	Marital Deduction Planning	206
4.905	Exemption Bypass Planning	207
4.906	Portability Versus Bypass Planning	207
4.907	Marital Deduction Planning Options	209
4.908	Funding the Marital Deduction	210
4.909	Providing for Postmortem Marital Deduction Tax Planning	212
4.910	Integrating Generation-Skipping Transfer Tax Planning with the Marital Deduction	213
4.911	Candidates for Pour-Over Wills and Living Trusts	214
4.912	Drafting Issues for Prior Marriages	215
4.10	SELECTED PROBLEM AREAS	215
4.1001	Troublesome Client Scenarios	215
4.1002	Checklist of Common Problem Areas in Drafting	216
4.1003	The Roots of Most Drafting Problems	217
4.11	COMMON CLAUSES AND UNCOMMON RESULTS	218
4.1101	Debts of the Decedent	218
4.1102	Death Taxes	219
4.1103	Tangible Personal Property	220
4.1104	Residuary Estate	220
4.1105	Real Property	221
4.1106	The Changing Fraction	221
4.1107	Spendthrift Clauses	221
4.1108	Marital Deduction Reduction	221
4.1109	Delayed Vesting or Postponed Enjoyment?	222
4.1110	Pour-Over to Inter Vivos Trust	222
4.1111	No Contest Clauses	222
4.1112	Doctrine of Equitable Election	223
4.12	MODERN TRUST LAW	223
	APPENDICES TO CHAPTER 4	225
	APPENDIX 4-1: NON-TAX WILL FOR SINGLE PERSON WITH TRUST FOR YOUNG BENEFICIARIES	227
	APPENDIX 4-2: NON-TAX WILL FOR MARRIED PERSON WITH TRUST FOR CHILDREN	233

TABLE OF CONTENTS

APPENDIX 4-3: WILL WITH SPECIAL NEEDS TRUST FOR
DISABLED CHILD..... 241

APPENDIX 4-4: TAX WILL WITH OUTRIGHT DISPOSITION OF
MARITAL SHARE..... 251

APPENDIX 4-5: TAX WILL WITH QTIP OR GENERAL POWER OF
APPOINTMENT MARITAL TRUST 263

APPENDIX 4-6: POUR-OVER WILL..... 277

APPENDIX 4-7: CODICIL..... 283

APPENDIX 4-8: DRAFTING SUGGESTIONS FOR CLAUSE TO
ELECT PORTABILITY 285

CHAPTER 5: DRAFTING THE TRUST

5.1 INTRODUCTION AND SCOPE 287

5.2 VIRGINIA UNIFORM TRUST CODE 287

 5.201 Overview..... 287

 5.202 Drafting Considerations 288

 5.203 Default Provisions; Mandatory Provisions 289

 5.204 Default Provisions That May Be Overridden 290

5.3 REVOCABLE LIVING TRUST: WHAT IS IT?..... 293

5.4 OVERVIEW OF THE POUR-OVER WILL AND LIVING
TRUST ARRANGEMENT..... 293

5.5 ON FORMS 294

 5.501 Length and Complexity 294

 5.502 Obtaining and Using Forms 295

5.6 ONE APPROACH, WITH PRACTICE POINTERS 295

5.7 BASIC REVOCABLE TRUST PROVISIONS 297

 5.701 Preamble: Declaration or Agreement..... 297

 5.702 Identification of Assets 297

 5.703 Provisions During Grantor’s Life 297

 5.704 Distribution at Grantor’s Death..... 298

 5.705 Revocation and Amendment Provisions 298

TABLE OF CONTENTS

5.706	Trustee Provisions.....	299
5.707	Spendthrift Provision.....	299
5.708	Survivorship Provision.....	300
5.709	Rule Against Perpetuities Clause.....	300
5.710	Savings Clauses.....	300
5.711	Division, Consolidation, and Termination of Trust.....	301
5.712	Governing Law.....	301
5.713	Execution Provisions.....	301
5.714	Amendment to the Trust.....	301
5.715	Joint Revocable Trusts.....	301
5.8	REASONS FOR USING A REVOCABLE TRUST.....	302
5.801	Management.....	302
5.802	Probate Avoidance.....	302
5.803	Privacy.....	302
5.804	Challenges.....	303
5.805	Disability Protection.....	303
5.806	Expenses.....	303
5.807	Contractual Benefits.....	303
5.808	Flexibility.....	304
5.809	Choice of Law and Situs.....	304
5.9	LIVING TRUST AS A WILL SUBSTITUTE.....	304
5.901	Contrast to the Law of Wills.....	304
5.902	State Law Discrepancies Between Wills and Trusts.....	304
5.903	Review of Virginia Statutes.....	305
5.904	Federal Tax Law Discrepancies Between Probate and Non-Probate Estates.....	313
5.10	GENERAL CONSIDERATIONS IN DRAFTING AN IRREVOCABLE TRUST.....	315
5.1001	Introduction.....	315
5.1002	Powers and Rights That the Grantor Should Not Have.....	315
5.1003	Powers and Rights That Beneficiaries May Safely Hold.....	315
5.1004	General Gift Tax Issues.....	316
5.1005	State Income Taxation of Multi-Jurisdictional Trusts.....	316
5.1006	Rule Against Perpetuities.....	317
5.1007	Coordination with the Grantor's Estate.....	317
5.1008	Self-Settled Spendthrift Trusts.....	317
5.1009	Intentionally Defective Grantor Trusts.....	318

TABLE OF CONTENTS

5.11	ESTATE, GIFT, AND GST TAXES	321
5.1101	Overview	321
5.1102	Key Provisions of the Tax Cuts and Jobs Act	321
5.1103	Portability	322
5.12	IRREVOCABLE LIFE INSURANCE TRUST.....	323
5.1201	Reasons for Using an Irrevocable Life Insurance Trust	324
5.1202	Drafting Considerations for the Irrevocable Life Insurance Trust.....	324
5.1203	<i>Crummey</i> Rights of Withdrawal.....	325
5.1204	Family Trust Provisions	327
5.1205	Single Trust (Pot Trust) for Descendants	328
5.1206	Separate Trusts for Descendants	328
5.1207	Contingent Marital Trust	329
5.1208	Default Remainder Beneficiaries	329
5.1209	Divorce and Remarriage	329
5.1210	Adopted Persons.....	330
5.1211	Insurance Policies	330
5.1212	Maximum Duration of Trusts.....	330
5.1213	Spendthrift Trust	330
5.1214	Payments to Minors	330
5.1215	Irrevocability	330
5.1216	Trustee Provisions	330
5.1217	Survivorship Provision	331
5.1218	Savings Clauses	331
5.1219	Choice of Law and Situs	331
5.1220	Trust Advisor.....	331
5.1221	Dealings with the Insured's Estate.....	331
5.13	CHARITABLE REMAINDER TRUST	332
5.1301	Generally	332
5.1302	Statutory Requirements	332
5.1303	Governing Instrument Requirements of CRTs	334
5.1304	Funding CRTs	336
5.1305	Trustees of CRTs.....	336
5.1306	Noncharitable Beneficiaries	337
5.14	DECANTING TRUST ASSETS	337
5.1401	Statutory Authority	337
5.1402	Decanting Power	337
5.1403	Procedure.....	339
5.1404	Other Decanting Rules	340

TABLE OF CONTENTS

5.15	CREATION OF TRUST BY CONSERVATOR OF ESTATE OF INCAPACITATED PERSON.....	341
5.16	MODERN TRUST STRUCTURE AND GOVERNANCE	341
5.1601	Entrusting Non-Trustees with Trustee Responsibilities.....	341
5.1602	Co-trustees and “Delegated” or “Directed” Trustees	342
5.1603	Trust Director Liability.....	342
5.1604	Directed Trusts.....	343
5.1605	Modern Trust Design	344
	APPENDICES TO CHAPTER 5	347
	APPENDIX 5-1: STATUTORY FRAMEWORK OF AUTHORITIES FOR TRUSTS	349
	APPENDIX 5-2: NON-TAX TRUST WITH TRUST FOR CHILDREN	351
	APPENDIX 5-3: TAX TRUST WITH QTIP OR GENERAL POWER OF APPOINTMENT MARITAL TRUST	357
	APPENDIX 5-4: TAX TRUST WITH GST PROVISIONS	371
	APPENDIX 5-5: AMENDMENT TO TRUST AGREEMENT.....	389
	APPENDIX 5-6: LIFE INSURANCE TRUST	391
	APPENDIX 5-7: GRANDCHILD’S TRUST	403
	APPENDIX 5-8: I.R.C. § 2503(c) TRUST	411
	APPENDIX 5-9: INITIAL “PERPETUAL” WITHDRAWAL RIGHT NOTIFICATION LETTER	417
	APPENDIX 5-10: ANNUAL WITHDRAWAL RIGHT NOTIFICATION LETTER.....	419
	APPENDIX 5-11: <i>CRUMMEY</i> TRUST FOR THE BENEFIT OF A CHILD OF THE GRANTOR.....	421
	APPENDIX 5-12: ANNUAL WITHDRAWAL RIGHT TRUSTEE/GUARDIAN NOTIFICATION LETTER FOR <i>CRUMMEY</i> TRUST FOR THE BENEFIT OF A CHILD OF THE GRANTOR.....	429

TABLE OF CONTENTS

APPENDIX 5-13: ANNUAL WITHDRAWAL RIGHT DONEE NOTIFICATION LETTER FOR <i>CRUMMEY</i> TRUST FOR THE BENEFIT OF A CHILD OF THE GRANTOR	431
APPENDIX 5-14: GENERAL DIAGRAM	433
APPENDIX 5-15: SAMPLE NONRECIPROCAL TRUST FORMS	435
APPENDIX 5-15A: SAMPLE NONRECIPROCAL TRUST CREATED FOR SOLE LIFETIME BENEFIT OF DONEE SPOUSE.....	437
APPENDIX 5-15B: SAMPLE NONRECIPROCAL TRUST CREATED FOR JOINT LIFETIME BENEFIT OF DONEE SPOUSE AND DESCENDANTS; DONEE SPOUSE HAS LIFETIME LIMITED POWER TO APPOINT.....	453
APPENDIX 5-16: MISCELLANEOUS TRUST PROVISIONS.....	469
 CHAPTER 6: TAX PLANNING	
6.1 OVERVIEW OF THE UNIFIED TRANSFER TAX SYSTEM	485
6.101 The Tax Cuts and Jobs Act of 2017.....	485
6.102 Federal Estate Tax.....	485
6.103 Federal Gift Tax.....	488
6.104 Generation-Skipping Transfer Tax.....	489
6.105 Unified Credit Against Federal Estate and Gift Tax.....	489
6.106 Virginia Estate Tax.....	495
6.2 DETERMINING PROPERTY SUBJECT TO ESTATE TAX	497
6.201 Property Owned at Death.....	497
6.202 Other Property Included in the Gross Estate.....	497
6.203 Valuation of Property Included in the Gross Estate	498
6.3 ESTATE TAX MARITAL DEDUCTION	499
6.301 Background	499
6.302 Requirements for the Marital Deduction.....	502
6.303 General Power of Appointment Trust.....	505
6.304 Estate Trust	507
6.305 QTIP Trust	508
6.306 Optimum Use of the Marital Deduction	510

TABLE OF CONTENTS

6.4	SELECTING AND FUNDING MARITAL DEDUCTION FORMULAS	513
6.401	General Purpose of Formula	513
6.402	Types of Formulas	513
6.5	OTHER DEDUCTIONS FROM THE GROSS ESTATE	520
6.501	Charitable Deductions	520
6.502	Funeral Expenses, Costs of Administration, and Claims Against the Estate	521
6.503	Qualified Conservation Easements	521
6.6	TAXATION OF GIFTS	522
6.601	Definition of Taxable Gift	522
6.602	Concept of Completed Gifts	522
6.603	Gifts Made Within Three Years of Death	522
6.604	Gifts Made More Than Three Years Before Death	522
6.605	Gift Tax Annual Exclusion	522
6.606	Gift Tax Marital Deduction	524
6.607	Valuation of Gifts	524
6.608	Income Tax Considerations	525
6.609	Benefits of Lifetime Transfers	526
6.7	GENERATION-SKIPPING TRANSFER TAX	527
6.701	In General	527
6.702	Definitions	528
6.703	Tax Base	530
6.704	Gift-Splitting	530
6.705	Reverse QTIP Election	530
6.706	Separate Share Rules	530
6.707	Tax Rates and Effective Dates	530
6.708	Generation-Skipping Transfer Tax Planning Principles	531
6.709	Postmortem Generation-Skipping Transfer Tax Planning	534
6.8	SPECIAL VALUATION RULES	540
6.801	In General	540
6.802	I.R.C. § 2702: Special Valuation Rules for Transfers of Interests in Trusts	541
6.803	Private Remainder Trusts (GRATs and GRUTs)	547
6.804	Personal Residence Trusts	548

TABLE OF CONTENTS

6.805	Proposed Treasury Regulations Affecting Valuation of Transferred Interests in Family-Owned Businesses and Partnerships.....	552
6.9	CONSISTENCY IN BASIS REPORTING.....	555
6.901	Legislation	555
6.902	Proposed Treasury Regulations	556
6.903	Time for Filing.....	558
6.904	Form 8971 and Instructions	559
6.905	Fiduciary Duties.....	560
6.10	DISCLAIMERS.....	560
6.1001	In General.....	560
6.1002	What May Be Disclaimed?.....	561
6.1003	Use of Disclaimers in Postmortem Estate Planning.....	561
6.1004	Use of Disclaimers in Inter Vivos Estate Planning.....	562
6.1005	Effect of State Law	562
6.1006	Requirements of a Qualified Disclaimer	563
6.1007	Writing Requirement	563
6.1008	Delivery Requirement.....	564
6.1009	Timing Requirement	564
6.1010	Timing Requirement for QTIP Trusts	566
6.1011	Timing Requirement for Joint Property	566
6.1012	Disclaimant Must Not Have Accepted Any Benefits of the Disclaimed Property	567
6.1013	Disclaimed Property Must Pass Without Direction by the Disclaimant.....	568
6.1014	Disclaimer of Less Than an Entire Interest	570
6.1015	Disclaimers That Reduce the Disclaimant's Estate.....	572
6.1016	Disclaimers That Increase the Marital Deduction.....	573
6.1017	Disclaimers by a Fiduciary	574
6.1018	Disclaimers Under the Generation-Skipping Transfer Tax.....	574
6.1019	Drafting a Disclaimer Trust	574
6.11	SAVING TAXES WITH CHARITABLE GIFTS.....	575
6.1101	Applicable Internal Revenue Code Sections	575
6.1102	Income Tax Charitable Deduction	575
6.1103	Estate and Gift Tax Rules	576
6.1104	Valuation Tables	576
6.1105	Methods of Giving and Tax Consequences	577
6.1106	Bargain Sales	579
6.1107	Bequests and Other Testamentary Transfers	579

TABLE OF CONTENTS

6.1108	Charitable Remainder Trusts.....	580
6.1109	Pooled Income Funds	580
6.1110	Charitable Gift Annuities	581
6.1111	Remainder Interests in Personal Residences and Farms	582
6.1112	Charitable Lead Trusts.....	582
6.1113	Techniques for Special Assets.....	583
6.1114	Private Foundations.....	585
6.1115	Techniques for Special Situations	586
INDEX	I-1

Volume 2

CHAPTER 7: PLANNING FOR CLOSELY HELD BUSINESSES

7.1	INTRODUCTION.....	589
7.101	Importance of Estate Planning.....	589
7.102	Lifetime Versus Postmortem Estate Planning	590
7.2	SELECTING A FORM OF OWNERSHIP	592
7.201	In General.....	592
7.202	Goals.....	592
7.3	SHAREHOLDER AGREEMENTS.....	595
7.301	Purpose	595
7.302	Types of Shareholder Agreements.....	596
7.4	VALUATION OF INTERESTS FOR ESTATE TAX PURPOSES.....	603
7.401	In General.....	603
7.402	Criteria for Valuation.....	603
7.403	Tangible and Intangible Assets	604
7.404	Making the Price Binding for Tax Purposes	608
7.405	Selecting the Method of Determining the Price.....	609
7.406	Paying the Purchase Price	610
7.407	Disadvantages of Buy-Sell Agreements	612
7.5	USE OF THE I.R.C. § 303 REDEMPTION	614
7.501	In General.....	614
7.502	Qualifying Under I.R.C. § 303	614
7.503	Unreasonable Accumulation of Surplus.....	615
7.504	Using I.R.C. § 303 Even if Liquidity Is Not Needed.....	615

TABLE OF CONTENTS

7.6	ELECTION TO DEFER PAYMENT OF ESTATE TAX.....	616
7.601	Introduction.....	616
7.602	General Rules.....	617
7.603	Pitfalls of Using Election.....	618
7.7	ESTATE TAX DEDUCTION FOR QUALIFIED FAMILY- OWNED BUSINESSES	618
7.8	DISPOSITION OF BUSINESS INTEREST BEFORE DEATH.....	619
7.801	In General.....	619
7.802	Outright Sale for Cash.....	619
7.803	Installment Sale.....	619
7.804	Tax-Free Merger	620
7.805	Transfer on a “Discounted” Basis.....	620
7.9	ESTATE FREEZES	620
7.10	NON-TAX CONSIDERATIONS OF BUSINESS SUCCESSION PLANNING.....	623
7.1001	Family Businesses Are Different	623
7.1002	Role of Family Members.....	624
7.1003	Overcoming Obstacles to Planning	625
7.1004	Formulating the Plan	626
7.1005	Fair Versus Equal Distribution.....	627
7.1006	Cash Flow	629
7.1007	Control.....	629
7.1008	Equity Ownership.....	630
7.1009	Employment	632
7.1010	Retention Versus Sale of Business.....	632
	APPENDIX 7-1: SHAREHOLDER AGREEMENT DRAFTING QUESTIONNAIRE.....	635
	APPENDIX 7-2: SHAREHOLDER AGREEMENT	641
	APPENDIX 7-3: BUSINESS SUCCESSION PLANNING QUESTIONNAIRE RELATING TO THE BUSINESS, ITS OPERATIONS, MANAGEMENT, AND OWNERSHIP STRUCTURE.....	659
	APPENDIX 7-4: BUSINESS SUCCESSION PLANNING QUESTIONNAIRE RELATING TO NON-BUSINESS ASSETS	661

TABLE OF CONTENTS

**CHAPTER 8: POWERS OF ATTORNEY, MINOR BENEFICIARIES,
AND ANCILLARY PROBATE**

8.1	POWERS OF ATTORNEY	663
8.101	In General.....	663
8.102	General Versus Limited Powers of Attorney	664
8.103	Capacity to Execute Power of Attorney; Breach of Duty; Presumption of Fraud; Actual Possession of Instrument.....	665
8.104	The “Durable” Language.....	668
8.105	Contingent or “Springing” Powers of Attorney Versus Delivery in Escrow	668
8.106	Ending the Power of Attorney	670
8.107	Relationship Between Other Fiduciaries and Agent Under Durable Power of Attorney.....	672
8.108	Suggested Provisions of a Power of Attorney	674
8.109	The Gifting Power of Attorney.....	680
8.110	Health Care Decisions.....	681
8.2	MINOR CHILDREN	691
8.201	Introduction	691
8.202	Choosing a Guardian.....	691
8.203	Property Transfers to Minors	701
8.204	Tax-Advantaged Transfers to Minors	714
8.3	ASSETS OWNED IN OTHER JURISDICTIONS.....	730
8.301	Introduction	730
8.302	Domicile and Actual Residency	731
8.303	Ancillary Administration	744
	APPENDIX 8-1: MEMORANDUM OF UNDERSTANDING ACCOMPANYING POWER OF ATTORNEY	749
	APPENDIX 8-2: MEMORANDUM OF ESCROW DELIVERY OF POWER OF ATTORNEY; AUTHORIZATION FOR RELEASE OF CONFIDENTIAL AND PROTECTED HEALTH INFORMATION.....	751
	APPENDIX 8-3: DURABLE GENERAL POWER OF ATTORNEY.....	753
	APPENDIX 8-4: DURABLE SPECIAL POWER OF ATTORNEY GRANTING AUTHORITY TO AGENT TO MAKE GIFTS	763

TABLE OF CONTENTS

APPENDIX 8-5: ADVANCE MEDICAL DIRECTIVE, APPOINTMENT OF AGENT FOR HEALTH CARE DECISIONS, APPOINTMENT OF PERSONAL REPRESENTATIVE TO OBTAIN HEALTH CARE INFORMATION, APPOINTMENT OF AGENT TO MAKE ANATOMICAL GIFTS	767
APPENDIX 8-6: DURABLE LIMITED POWER OF ATTORNEY FOR TAX MATTERS.....	773
APPENDIX 8-7: DESIGNATION OF INDIVIDUAL TO MAKE ARRANGEMENTS FOR FUNERAL AND DISPOSITION OF REMAINS	775
APPENDIX 8-8: GENERAL DURABLE POWER OF ATTORNEY— ALTERNATIVE FORM	777
APPENDIX 8-9: AGENT’S CERTIFICATION AS TO VALIDITY OF POWER OF ATTORNEY AND AGENT’S AUTHORITY	803
APPENDIX 8-10: REVOCATION OF POWER OF ATTORNEY.....	805
APPENDIX 8-11: POWER OF ATTORNEY FOR MINOR CHILD’S CARE.....	807
APPENDIX 8-12: CONSENT FOR MEDICAL TREATMENT OF MINOR CHILD.....	811
 CHAPTER 9: CHOOSING FIDUCIARIES	
9.1 FIDUCIARIES GENERALLY.....	815
9.101 Introduction.....	815
9.102 Types of Fiduciaries	815
9.103 Personal Representatives	816
9.104 Testamentary Trustees and Trustees of Inter Vivos Trusts to Which a Devise or Bequest Is Made	822
9.105 Guardians of Person and Estate of Minor Children.....	824
9.106 Agents or Attorneys-in-Fact and Trustees of Inter Vivos Trusts to Which No Testamentary Transfer Is Made	826

TABLE OF CONTENTS

9.2	STANDARDS OF JUDGMENT, DUTIES, AND OBLIGATIONS	826
9.201	Standards of Judgment for Fiduciaries Generally	826
9.202	Specific Duties and Obligations.....	832
9.3	FIDUCIARY CHOICES AVAILABLE	857
9.301	Individual.....	857
9.302	Corporation.....	859
9.303	Co-Fiduciaries.....	860
9.4	CONSIDERATIONS IN SELECTING PERSONAL REPRESENTATIVES AND TRUSTEES	861
9.401	Professional Versus Non-Professional Fiduciary.....	861
9.402	Individual Versus Corporate Fiduciary	862
9.403	Trustees of QDOTS	862
9.404	Ethical Considerations: The Attorney-Draftsman as Fiduciary	864
9.405	Tax Considerations.....	866
9.406	Compliance with Uniform Trust Code Requirements and Powers.....	869
9.5	CONSIDERATIONS IN SELECTING GUARDIANS OF MINOR CHILDREN	869
9.501	In General.....	869
9.502	Guardian as Trustee	869
9.6	CONSIDERATIONS IN SELECTING AGENT UNDER POWER OF ATTORNEY.....	870
9.601	In General.....	870
9.602	Tax Consequences to Agent	870
9.603	Conflicts of Interest.....	870
9.7	SELECTING AGENTS UNDER HEALTH CARE POWERS OF ATTORNEY AND ADVANCE MEDICAL DIRECTIVES.....	870
9.8	SELECTION AND APPOINTMENT OF SUCCESSOR FIDUCIARIES	871
9.9	COMPENSATION OF FIDUCIARIES	871
9.901	Court-Supervised Fiduciaries.....	871
9.902	Under Governing Instrument.....	876
9.903	Timing of Payment of Commission.....	877
9.904	Forfeiture of Commission.....	877

TABLE OF CONTENTS

9.905	Compensation of Fiduciary Serving Both as Executor and as Trustee.....	877
9.906	Attorney Fees and Other Expenses	878
APPENDIX 9-1: ATTORNEY/FIDUCIARY DISCLOSURE AND CLIENT CONSENT		879
CHAPTER 10: TRANSFERRING ASSETS OUTSIDE OF PROBATE		
10.1	INTRODUCTION	883
10.2	NATURE OF NONPROBATE ASSETS	883
10.201	Distinction Between Probate and Nonprobate Assets	883
10.202	Common Examples of Nonprobate Assets	885
10.203	Advantages of Nonprobate Assets.....	886
10.204	Disadvantages of Nonprobate Assets.....	889
10.3	ESTATE PLAN INTEGRATION	892
10.301	Will.....	892
10.302	Tax Planning	893
10.303	Asset-by-Asset Review	894
10.304	Information-Gathering	894
10.4	JOINTLY OWNED PROPERTY	894
10.401	Introduction.....	894
10.402	Types of Joint Ownership.....	895
10.403	How Created.....	898
10.404	Multiple-Party Depository Accounts.....	899
10.405	Advantages of Joint Ownership	902
10.406	Federal Estate and Gift Tax.....	904
10.407	Income Tax	910
10.408	Estate Plan Coordination	912
10.5	POD AND TOD ACCOUNTS.....	915
10.501	Payable on Death Accounts	915
10.502	Transfer on Death Accounts.....	916
10.503	Reasons to Use	918
10.6	LIFE INSURANCE.....	919
10.601	Introduction.....	919
10.602	Types of Insurance	919

TABLE OF CONTENTS

10.603	Reasons to Use.....	921
10.604	Taxation	927
10.605	Estate Plan Coordination.....	937
10.7	QUALIFIED PLAN AND IRA RETIREMENT BENEFITS	942
10.701	Introduction	942
10.702	Types of Plans.....	944
10.703	Plan Distributions	954
10.704	Taxation	970
10.705	Naming a Beneficiary.....	985
10.8	POWERS OF APPOINTMENT	997
10.801	Introduction	997
10.802	Reasons to Use Powers of Appointment.....	1006
10.803	Federal Estate and Gift Tax	1011
10.9	AUGMENTED ESTATE.....	1014
10.901	Statutory Summary.....	1014
10.902	Planning.....	1016
10.10	UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT.....	1020
10.1001	In General	1020
10.1002	Requirements for a Transfer on Death Deed.....	1021
10.1003	Revocation.....	1022
10.1004	Notice, Delivery, Acceptance, or Consideration Not Required.....	1023
10.1005	Effect of Deed During Transferor's Life	1023
10.1006	Effect of Deed at Transferor's Death.....	1023
10.1007	If Transferor Is a Joint Owner.....	1024
10.1008	No Covenant or Warranty of Title.....	1025
10.1009	Disclaimer	1025
10.1010	Liability for Creditor Claims and Statutory Allowances	1025
10.1011	Federal Electronic Signatures in Global and National Commerce Act.....	1025
10.11	DESIGNATION OF BENEFICIARY ON MOTOR VEHICLE CERTIFICATE OF TITLE	1026
APPENDIX 10-1: REVOCABLE TRANSFER ON DEATH DEED PURSUANT TO SECTION 64.2-635 OF THE VIRGINIA CODE.....		1027

TABLE OF CONTENTS

APPENDIX 10-2: REVOCATION OF TRANSFER ON DEATH DEED
PURSUANT TO SECTION 64.2-636 OF THE VIRGINIA
CODE 1031

**CHAPTER 11: EXECUTION AND SAFEKEEPING OF
DOCUMENTS**

11.1 OVERVIEW..... 1033

11.2 REVIEW OF DOCUMENTS BEFORE EXECUTION..... 1033
11.201 By Client..... 1033
11.202 By Corporate or Professional Fiduciary..... 1034
11.203 By Attorney 1034

11.3 LEGAL REQUIREMENTS FOR EXECUTION OF A WILL 1034
11.301 Legal Capacity of the Testator 1034
11.302 Statutory Requirements for Execution of Will 1041

11.4 PROOF OF EXECUTION OF WILLS 1046
11.401 In General..... 1046
11.402 Self-Proving Wills 1046
11.403 Persons in Military Service 1049
11.404 Holographic Wills..... 1049
11.405 International Wills..... 1050

11.5 DOCUMENT EXECUTION CEREMONY 1050
11.501 In General..... 1050
11.502 Place of Execution 1050
11.503 Redetermination of Legal Capacity..... 1050
11.504 Execution Procedure 1051

11.6 EXECUTION OF OTHER ESTATE PLANNING
DOCUMENTS..... 1054
11.601 Trusts..... 1054
11.602 Powers of Attorney 1055
11.603 Advance Medical Directives 1055
11.604 Anatomical Gift Forms 1055

11.7 SAFEKEEPING OF DOCUMENTS 1056
11.701 In General..... 1056
11.702 Originals of Documents 1056
11.703 Copies of Documents 1059

TABLE OF CONTENTS

11.704	Documentation of Location of Originals and Copies	1060
11.705	Disposition of Prior Documents	1060
APPENDIX 11-1: SAMPLE LETTER SENDING NON-TAX DOCUMENT DRAFTS TO CLIENTS		
		1063
APPENDIX 11-2: SAMPLE LETTER SENDING TAX-ORIENTED DOCUMENT DRAFTS TO CLIENTS		
		1065
APPENDIX 11-3: SAMPLE LETTER TO CORPORATE OR OTHER PROFESSIONAL FIDUCIARY SENDING DOCUMENT DRAFTS FOR REVIEW		
		1069
APPENDIX 11-4: SIGNING FOR TESTATOR FORM		
		1071
APPENDIX 11-5: PROCEDURE FOR NOTARIES IN THE USE OF SELF-PROVING CERTIFICATES		
		1073
APPENDIX 11-6: SELF-PROVING CERTIFICATE WITH TESTATOR AND WITNESS SIGNATURES		
		1075
APPENDIX 11-7: SELF-PROVING CERTIFICATE WITHOUT TESTATOR AND WITNESS SIGNATURES		
		1077
APPENDIX 11-8: LEGAL ETHICS OPINION 1283.....		
		1079
APPENDIX 11-9: CLIENT DOCUMENT EXECUTION MEMORANDUM		
		1081
APPENDIX 11-10: LOG FOR ORIGINAL CLIENT DOCUMENTS RETAINED BY LAW FIRM		
		1083
APPENDIX 11-11: SAMPLE LETTER TO PRIOR ATTORNEY OR CORPORATE FIDUCIARY REQUESTING RETURN OF PRIOR ORIGINALS TO CLIENT		
		1085
 CHAPTER 12: TERMINATING THE REPRESENTATION		
12.1	OVERVIEW	1087
12.2	COMPLETION OF WORK	1087
12.3	IMPORTANCE OF TERMINATING THE REPRESENTATION ...	1087

TABLE OF CONTENTS

12.4	HOW TO TERMINATE THE REPRESENTATION.....	1088
12.401	Termination at Completion	1088
12.402	Termination of an Incomplete Matter.....	1088
12.5	RETRIEVAL SYSTEM	1089
12.501	Importance of Access to Closed Files	1089
12.502	Importance of Being Able to Contact Clients in the Future	1089
12.6	ETHICAL ISSUES REGARDING CONTACTING FORMER CLIENTS	1089
12.601	Solicitation.....	1089
12.602	Affirmative Duty to Contact Former Clients.....	1090
12.7	ETHICAL ISSUES REGARDING CLOSED ESTATE PLANNING FILES.....	1090
APPENDIX 12-1:	LEGAL ETHICS OPINIONS 312, 973, 1519, AND 1305.....	1093
APPENDIX 12-2:	SAMPLE LETTER TERMINATING REPRESENTATION WITH ESTATE PLANNING CLIENT UPON COMPLETION.....	1097
APPENDIX 12-3:	SAMPLE LETTER TO CORPORATE OR OTHER PROFESSIONAL FIDUCIARY SENDING EXECUTED DOCUMENTS FOR SAFEKEEPING	1099
APPENDIX 12-4:	SAMPLE FIRST LETTER TO CLIENT WHO FAILS TO RE-CONTACT ATTORNEY	1101
APPENDIX 12-5:	SAMPLE LETTER TERMINATING RELATIONSHIP WITH CLIENT WHO FAILS TO RE-CONTACT ATTORNEY.....	1103
	TABLE OF AUTHORITIES.....	1105
	INDEX.....	I-1

CHAPTER 4

DRAFTING THE WILL

4.1 INTRODUCTION

This chapter discusses simple wills, wills creating testamentary trusts, and pour-over wills in order to help the attorney determine the appropriate vehicle for each client. The chapter is intended to be read in conjunction with Chapter 5 on Drafting Trusts. Sample forms for wills and suggested language for common variations are included in the appendices to this chapter. The forms cover a wide range of scenarios from drafting for families of modest means with young children to tax planning for the wealthy.

4.2 WHAT CONSTITUTES A WILL?

4.201 Definition of a Will. A will is defined as the “legal declaration of a person’s mind as to the manner in which he would have property or estate disposed of after his death; the written instrument legally executed, by which a man makes disposition of his estate, to take effect after his death.”¹

4.202 “Will” Construed. The word “will” is construed by statute in Virginia to extend to “any testament, codicil, exercise of a power of appointment by will or by a writing in the nature of a will, or any other testamentary disposition.”²

4.203 Essential Elements. A will must be a declaration in legal form as to the disposition of property, or the appointment of an executor, or the nomination of a testamentary guardian for children. It cannot be a document of mere negative words, and it is to take effect only after one’s death. It must be ambulatory and revocable during life, although revocation could result in breach of a contract or imposition of a constructive trust upon estate property.

¹ *Smith v. Smith*, 112 Va. 205, 70 S.E. 491 (1911).

² Va. Code § 64.2-100.

4.3 WILL SUBSTITUTES AND ALTERNATIVE PLANNING

4.301 General Considerations. Property can pass at death by will, or intestacy, or by any one of several non-probate methods of transfer, such as joint ownership with right of survivorship, beneficiary designations, or the use of a revocable or “living” trust.

4.302 Necessity of a Will. While it is possible to eliminate most estate administration through the use of such non-probate transfers, a will is still necessary to: (i) dispose of property that may not be otherwise transferred as a result of the decedent’s death and (ii) address nondispositive matters, such as naming an executor and guardian and designating the source for payment of death taxes.

4.303 Coordinating Non-Probate Assets with the Estate Planning Documents. The will only controls property subject to estate administration, such as (i) assets in the decedent’s sole name with no beneficiary or other non-probate designation named or (ii) benefits payable to the estate. It is imperative therefore that non-probate assets be coordinated with the dispositive scheme contained in the will.

4.4 FUNDAMENTAL WILL PROVISIONS

Although a will’s format and contents will vary according to the client’s needs and the drafting attorney’s style, the following provisions constitute an overview of provisions that are ordinarily included.

4.401 Exordium Clause. This opening clause of the will (i) identifies the testator; (ii) establishes his or her domicile; (iii) declares the instrument to be a will; and (iv) revokes all other prior wills and codicils. Sometimes this clause will also identify the testator’s family and other beneficiaries under the will.

4.402 Tangible Personal Property. This clause will (i) define and segregate tangible personal property; (ii) provide specifically for its disposition; and (iii) may make specific reference to either a separate writing or list disposing of tangible personal property under section 64.2-400 of the Virginia Code or a non-legally binding precatory statement of intent.

4.403 Specific and General Bequests. This clause will (i) make special and limited disposition of cash or other personal property to persons

and organizations of the testator's choice and (ii) cover the possibility of ademption or lapse of any such legacy.

4.404 Real Property. This clause will (i) identify and make special disposition of particular parcels of real estate and (ii) address the possibility of ademption or lapse of any such devise. This clause also normally addresses the disposition of tangible personal property customarily used with the real property that is not otherwise disposed of in the will.

4.405 Residuary Estate. This essential clause is used to (i) transfer in absolute ownership all assets not otherwise disposed of by specific bequest or devise; (ii) add assets to an existing living trust under a pour-over will; and (iii) provide for alternative disposition in the event the primary beneficiaries predecease the testator or the living trust is not in existence. If the testator is married, the formula type of marital or credit shelter disposition, whether outright or in trust, would be covered in the residuary clause when a pour-over is not used.

4.406 Powers of Appointment. This clause is used when the testator is a donee of a power of appointment to (i) identify the source and date of the power and property subject to the power; (ii) avoid inadvertent exercise or non-exercise of the power; and (iii) provide expressly for the exercise, non-exercise, limited exercise, or disclaimer of a power. Virginia adopted a version of the Uniform Powers of Appointment Act in 2016.³

4.407 Trusts for Certain Beneficiaries. A contingent trust provision should be in all wills because it can cover any beneficiary, not just children who are under a certain age. For minor or incapacitated beneficiaries, this clause helps avoid the need to have a guardian for the property appointed. This clause will (i) identify the trustee who is to hold and manage the property; (ii) authorize and direct the payment of income and invasion of principal for the beneficiary; and (iii) provide for ultimate distribution of undistributed income and principal of the trust. Typically, this type of "standard contingent trust" is drafted so as to postpone enjoyment, but not vesting, of the property.

4.408 Guardians. This provision will appoint either a guardian of the person of a minor child or a guardian of the property of a minor child, or both. If a contingent trust for minors is otherwise used in the will, the less desirable property guardianship can be avoided. It should be noted that a will

³ See Va. Code § 64.2-2700 *et seq.*

can only nominate a guardian for minor children but that the court actually makes the appointment after considering the best interests of the child. In some circumstances, such as when the parent of a minor child is ill or otherwise can anticipate the likelihood of incapacity, a standby guardian could also be appointed before the death or adjudicated incapacity of that parent to avoid a possible court proceeding in which the parent would no longer be available to participate.⁴

4.409 Presumption of Survivorship. This clause allows the testator to establish presumptions of survivorship and survival periods that are different from the Uniform Simultaneous Death Act provisions as adopted in Virginia.⁵

4.410 Debts and Expenses of Administration. Although debts of the decedent created before death cannot be unilaterally altered by the testator's will, the will can provide for the source of payment of debts by altering the order of abatement and express the testator's intent as to whether encumbered property should pass subject to the secured indebtedness. However, if this direction is not expressly set forth in the will, the presumption is that property passes subject to the indebtedness with no right of exoneration from the estate; a general directive in the will to pay debts does not change this outcome.⁶ Although the will cannot abrogate the duty to pay legally enforceable debts of the testator, the will can waive rights of contribution, such as against a surviving spouse who may be liable on a joint mortgage.

4.411 Taxes. As in the case of legally enforceable debts, the testator cannot alter the tax liability, but can direct how the taxes are to be apportioned.⁷ By will or inter vivos instrument, a person may designate any property interest included in that person's estate for estate tax purposes as the fund for payment of estate taxes, whether the property is a probate or non-probate asset. Non-probate property may not, as a general rule, be charged with more than its proportionate share of estate tax. Because Virginia's enforcement statute basically charges each asset with its pro rata share of estate tax liability, most tax clauses provide that taxes are to be paid from the residue as a cost of

⁴ See Va. Code § 64.2-2013.

⁵ Va. Code § 64.2-2200 *et seq.*

⁶ See Va. Code § 64.2-531. Section 64.2-531(B) details the procedure for the personal representative to use in giving notice to a creditor that specific property passes without the right of exoneration. This transfer could cause a default in some deeds of trust.

⁷ See Va. Code § 64.2-540.

administration without apportionment. This will obviously cause the residuary beneficiaries to bear the burden of any tax generated by any pre-residuary bequest. Further, if the residue would include any qualifying marital or charitable deduction gifts, then the amount of the deductions must be reduced by the amount of the tax, which results in an algebraic computation and a much higher effective rate. Also, a general direction to “pay all taxes” will exclude certain specified taxes, unless a clear intent is expressly manifested.⁸ The taxes excluded include taxes on general power of appointment property, qualified terminable interest property (QTIP), qualified domestic trust property, and most generation-skipping transfer taxes.

4.412 Appointment of Executor and Trustee. This provision will designate the individuals or corporations with trust powers to administer the estate and any trust created by the will. This provision can (i) provide for compensation; (ii) waive surety or other security on a bond; (iii) waive the requirement for a trustee to file annual accounts with the commissioner of accounts; (iv) provide adequate powers for the fiduciary, such as through the incorporation by reference of section 64.2-105 of the Virginia Code; and (v) alter the legal standard of care with respect to assets that the decedent held that would not meet the standard in Virginia as suitable investments for a fiduciary. Chapter 9 of this book provides guidance on selecting a fiduciary.

4.413 Testimonium. This clause (i) establishes that the testator has executed the instrument with full knowledge and intention that it is his or her last will; (ii) places the testator’s signature at the logical end of the will; and (iii) establishes the date of execution.

4.414 Attestation. This clause (i) raises a presumption that all of the facts of execution recited were in fact accomplished; (ii) discourages possible hostile testimony of an attesting witness at probate of the will; (iii) ensures that the witnesses are aware of the formalities; and (iv) if the will contains a self-proving certificate pursuant to section 64.2-452 of the Virginia Code, permits proof of the will at probate without a requirement that the witnesses appear before the court.

⁸ See Va. Code § 64.2-544.

4.5 BASIC CONSIDERATIONS

4.501 Clear Identifications. There must be clear identification of beneficiaries, including survival requirements and contingent beneficiaries, beneficial shares, specific property, fiduciaries, and the terms of any trust.

4.502 Limitations. The client must understand what a will can and cannot do. A will normally can pass only probate assets. Organs and body parts are best disposed of under the Revised Uniform Anatomical Gifts Act,⁹ such as through the form contained on a Virginia driver's license. Because of the delay that can occur in locating and probating a will, instructions as to other time-sensitive matters, such as funeral arrangements, are best left with those to whom such duties have been entrusted.

4.503 Will Speaks as of Date of Death. It is paramount to remember that, as a general rule, the will speaks as of the date of death.

4.504 References to Virginia Code Sections That Predate Enactment of Title 64.2.¹⁰ Virginia Acts 2013, chapter 89, effective July 1, 2013, enacted the following provision:

When any will, trust instrument, power of attorney, or other instrument refers to a section of the Code that, at the time the reference was made in the will, trust instrument, power of attorney, or other instrument, had been repealed and transferred in the same or a modified form to a new section, article, or chapter in Title 64.2, the reference shall be construed to refer to the latter in the absence of any intent to the contrary.¹¹

While the statute cures the reference in older wills to repealed statutes, it is good practice when drafting a codicil for substantive changes to update outdated statutory references at that time, as the codicil republishes the will and may nullify this statutory protection. Drafting an entirely new will with the appropriate statutory references can avoid this potential oversight.

⁹ Va. Code § 32.1-291.1 *et seq.*

¹⁰ One of the most frequently encountered examples of such a reference in wills and trust instruments is the incorporation by reference of statutory powers granted to fiduciaries by former section 64.1-57 of the Virginia Code. Those powers are now found in section 64.2-105.

¹¹ Va. Code § 64.2-108.1.