

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.