PROBATE, WILLS TRUSTS

ESTATE & GIFT TAX, POWERS OF ATTORNEY

PROBATE:

- PROBATE is the administration of a person's estate that is overseen by the clerk of Superior Court in the county in which the decedent lived at the time of his/her death (not necessarily the county in which the decedent died). All property passing to beneficiaries by WILL or by intestacy (when a person dies without a valid WILL) is subject to the PROBATE process.

- A PROBATE proceeding begins when a PERSONAL REPRESENTATIVE (referred to as an EXECUTOR when the decedent has a WILL and referred to as an ADMINISTRATOR when there is no WILL) files the decedent's WILL, or files paperwork declaring that the decedent had no WILL, and various other administrative documents with the Clerk of Superior Court. The PERSONAL REPRESENTATIVE must be "qualified" by the Clerk of Superior Court in order to act on behalf of the estate and receive Letters of Testamentary (or Letters of Administration in the case of an intestate estate). The Letters Testamentary evidence the PERSONAL REPRESENTATIVES's authority to act on behalf of the estate.

- The PERSONAL REPRESENTATIVE (EXECUTOR or ADMINISTRATOR) is responsible for settling the decedent's estate. This is done by gathering the decedent's assets, paying the decedent's debts (including taxes) and paying out the remaining assets to the decedent's beneficiaries, whether the beneficiaries are determined by WILL or by the intestacy laws.

- PROBATE fees: Not all property is subject to the probate fees, including real property and NON-PROBATE property (i.e. Retirement benefits and life insurance proceeds payable to named beneficiaries). The total fee is 40¢ for every $100 of property subject to probate fees, with a cap of $6,000. For example an estate with $100,000 of property subject to probate fees would owe $400 in fees. Additionally, there is a $120 fee to open an estate.

- The PROBATE process can take several months or even years to complete. The process ends when the PERSONAL REPRESENTATIVE files the appropriate forms with the Clerk of Superior Court showing that the estate's debts have been satisfied and that the remainder of the estate has been disbursed to the to the appropriate beneficiaries (this last filing is referred to as the Final Account). The PERSONAL REPRESENTATIVE will be discharged by the Clerk for Superior Court when the Final Account is approved.

The Personal Representative must follow the rules and guidelines of the Clerk of Superior Court (as provided by the North Carolina General Statutes) when administering the estate. For qualifying estates, North Carolina small estates law provides a means for heirs to receive the decedent's property with minimal or no probate administration. Asset transfers are facilitated through Collection by Affidavit. Bypassing probate offers a process that is less time-intensive and has fewer costs.

The North Carolina Administrative Office of the Courts provides an Estate Procedure Handbook that can be accessed at: http://www.nccourts.org/forms/documents/735.pdf

AVOIDING PROBATE:

Not all property is subject to the PROBATE process. NON-PROBATE property includes:

- Real property held as joint tenants with rights of survivorship or as tenants by the entirety (husband and wife holding title under certain circumstances);
- Life insurance payable to beneficiary other than the decedent's "estate";
- Retirement plans or IRAs payable to a named beneficiary;
- Jointly held bank or brokerage accounts with rights of survivorship;
- Bank or brokerage accounts that pay or transfer on death (POD or TOD);
- Property transferred to a trust prior to death

WILLS & TRUSTS:

- Anyone 18 years old or older may make a WILL. A WILL is a legal document that allows you to control how and to whom your real property and personal property passes at your death. A WILL also typically names an EXECUTOR who will act on behalf of the estate to ensure that it is administered correctly.

- A WILL validly executed in another state will be valid in North Carolina.

- A TRUST is an agreement between the creator of the TRUST (the Grantor or Settlor) and a TRUSTEE. The creator of the TRUST transfers assets to the TRUSTEE and the TRUSTEE holds and spends the assets as designated in the agreement for the benefit of the BENEFICIARIES named in the document. Depending on the reason for creating the Trust, it can be revocable (grantor retains the ability to revise the trust up until death) or irrevocable (cannot be modified or terminated without the permission of the beneficiary).

- A very common estate planning technique is to have a "pour-over WILL" which directs the EXECUTOR to transfer (pour-over) all of a person's property (after payment of debts and claims) to the TRUSTEE of a trust (can be a trust created at death or during the decedent's lifetime).

- A person who has a pour-over WILL will also create a revocable or inter vivos trust during their lifetime. The revocable trust can be changed by the grantor during his/her lifetime and becomes irrevocable at the grantor's death. The grantor may title assets in the name of the trust during his/her lifetime. The purposes of using a revocable trust include: privacy, savings on probate fees (the assets titled in the name of the trust during the grantor's lifetime will not be subject to PROBATE), controlling the distribution of assets after death and tax planning. A WILL becomes a part of the public record during PROBATE, but a TRUST does not because it does not need to filed with the Clerk of Superior Court. A testamentary TRUST (a trust created at death) can also be used for tax planning or asset control purposes.

ABUSIVE TRUSTS:

Promoters of abusive trusts try to convince the general public that they must have a trust to shelter their property form taxes and avoid probate. Abusive trust arrangements usually promise benefits that do not actually change the tax payer's status or create any benefit for the taxpayer. Or, they claim to eliminate federal taxes in ways not allowed under federal tax laws. The old adage that "if it seems too good to be true, it probably is" applies here. You should ask an attorney to review the materials provided by the promoter.

SPOUSE'S ELECTIVE SHARE:

Typically, a person has the right to dispose of his or her property at death however he or she may choose. Under North Carolina law, however, a surviving spouse (husband or wife), regardless of a decedent's WILL, has a right to claim a certain minimum portion of the decedent's entire estate, reduced by the net value of assets, if any, passing to a surviving spouse from the decedent. The actual amount that the surviving spouse can claim is called the ELECTIVE SHARE, and is determined by a statutory formula based on the length of marriage. The formula is GENERALLY summarized as follows:

- If the surviving spouse was married to the decedent for less than 5 years, the surviving spouse may claim 15% of the decedent's Total Net Assets;

- If the surviving spouse was married to the decedent at least 5 years but less than 10 years, the surviving spouse may claim 25% of the decedent's Total Net Assets;

- If the surviving spouse was married to the decedent at least 10 years but less than 15 years, the surviving spouse may claim 33% of the decedent's Total Net Assets;

- If the surviving spouse was married to the decedent for 15 years or longer the surviving spouse's elective share is 50% of the decedent's Total Net Assets.

"Total Net Assets" is a statutorily defined term. A spouse wishing to claim an elective share should consult with an attorney to compute the amount that he/she would receive and if that amount is in fact more than what he/she is receiving under the WILL or otherwise.

MINOR CHILDREN

Under the provisions of a will, one may nominate a guardian for his/her children and set aside funds for the child's care and wellbeing.

GUARDIAN. A person may nominate a guardian to care for his/her child or children upon the decedent's death. The nomination is not legally binding on the court who appoints the guardian, but is a suggestion by the decedent. Note that the nomination of a guardian will also not work to terminate a surviving parent's parental rights. Ideally, the person nominated should know the child well and share the parents' values and beliefs. The guardian can be a family member, but does not have to be. You should ask the guardian if he or she is willing to serve before naming them in a WILL. A minor child only has a guardian until he/she reaches 18 years of age. A child found bythe Court to be legally incompetent can have a guardian appointed beyond age 18.

FINANCES. A child under age 18 GENERALLY cannot receive property passing from an estate outright. Therefore, a person wishing to pass assets to a minor should make financial arrangements for a minor in his/her WILL. In the WILL, one can provide that his/her assets will pass into a trust for the minor's benefit, appoint a trustee for the trust, and determine at what age the trust funds will be distributed to the minor. For example, instead of an 18 year old receiving a large distribution from an estate the decedent can require that the minor be 25 or 30 before receiving the inheritance outside of the trust. The trustee and guardian can be the same person, but that is not required. In the absence of creating a trust for the benefit of the minor, the assets may be passed in accordance with North Carolina's Uniform Transfers to Minors Act, which allows the decedent to name a custodian to oversee the investment and distribution of the funds until the child is either 18 or 21 years of age.

ESTATE & GIFT TAX

The Federal government taxes the right to pass property to others at the decedent's death. This is commonly referred to as the ESTATE TAX. North Carolina repealed its ESTATE TAX as of January 1, 2013. In assessing the ESTATE TAX, the Internal Revenue Service looks at the fair market value of ALL the decedent's assets (including life insurance, retirement pans and assets in the decedent's revocable/inter vivos trust) at death.

Most estates will not be subject to ESTATE TAX because of the exemptions discussed below.

Transfers at death to charitable organizations or to the surviving spouse (with some exceptions) are usually deductible (provided the spouse is a citizen of the United States). In

addition, deductions are allowed for some administrative expenses, funeral expenses, debts of the decedent, and charitable bequests.

The Estate Tax Exemption. In addition to the deductions for marital and charitable transfers, there is a **$11.4 million exemption for 2019 for all other transfers**. This exemption may also be used during a person's lifetime to cover lifetime gifts that exceed his/her annual GIFT TAX exclusion ($15,000 for 2019, as discussed below). To the extent it is not used for lifetime transfers, the exemption is available at death to shelter transfers to beneficiaries that do not qualify for the charitable or marital deduction. If an election is made on the estate tax return of the first spouse to die, the unused estate tax exemption may be carried over to the surviving spouse.

The ESTATE TAX exemption will increase according to inflation rates in future years.

ESTATE TAX Rates. The top federal ESTATE TAX rate is currently 40%.

The GIFT TAX Exemption. Each person may gift up to $15,000 per year to any number of individuals that he/she chooses, free of gift tax (no gift tax return is necessary for these amounts but a gift tax return may be desirable in certain circumstances). This referred to as the annual exclusion amount. A husband and wife may elect to split their gifts (which election is made on a gift tax return) and transfer up to $30,000 to each person. Gifts in excess of these amounts will use a portion of the person's GIFT TAX exemption.

The federal GIFT TAX exemption that is available to shelter lifetime transfers in excess of $15,000 per year is $11.4 million for 2019. A person must file a gift tax return if he/she makes gifts in excess of $15,000 to a person, even if he/she is going to use their lifetime gift tax exemption to avoid paint the GIFT TAX. There is no GIFT TAX imposed by the state of North Carolina.

Under current federal law (2019) a husband and wife can together pass $22.8 million to beneficiaries free of the federal ESTATE TAX. Individuals should consult with an attorney on how to best accomplish this.

POWER OF ATTORNEY:

The Durable Power of Attorney. A power of attorney is written instrument by which one person as principal, appoints another person as his or her agent and grants the designated person the power to handle his or her affairs and property. The person executing the power of attorney must have the capacity to understand the nature and significance of the act at the time execution.

1. Effective Date. The power can be drafted so that it is a "springing power" that does not become effective until the principal is incompetent.

2. Gifting. Special provisions may be included in the document to give the agent the power to make gifts from the principal's property.

3. Durability. A power can be drafted so that it will be effective even if the principal becomes physically or mentally disabled. This usually avoids the need for the appointment of a conservator or guardian.

4. Termination of Power. The power of attorney can be revoked by the principal, and it automatically terminates upon the death of the principal. The powers of a guardian will trump the powers of an agent under a power of attorney.

The statutory short form for the durable power of attorney in North Carolina may be found at: https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_32C/GS_32C-3-301.html

Health Care Power of Attorney. North Carolina law allows an agent under a power of attorney to make any health care decision on behalf of an incapacitated person, including the right to consent or withhold consent to health care if such authority is specified in the document. With this type of document, you designate an agent to make decisions on your behalf if you become unable to make the decisions yourself. This document does not authorize your physician or hospital to act without the consent of your agent.

NORTH CAROLINA's Statutory form may be found at:

http://www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter_32A/GS_32A-25.1.HTML

Advance Directive. With an Advanced Directive, you may authorize your physician to withhold life support and feeding tubes if you are terminally ill or in a permanent coma. You may make different choices as to the level of care to be withheld or discontinued (for example, respirator care only, or also the withholding or discontinuance of artificial nutrition or hydration). A statutory form Advance Directive (also known as a Declaration of a Desire for a Natural Death) has been adopted by the North Carolina General Assembly.

https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_90/GS_90-321.html

Are they revocable? Yes. You may revoke at any time that you are able to communicate health care decisions. You may do so by executing a new Advanced Directive and/or new health care power of attorney, or by executing a document that revokes the living will and/or health care power of attorney.