

Outline for Wills, Trusts, & Estates

I. What is a will?

- A. Def. “A legal declaration of a person's wishes regarding the disposal of his or her property after death.”
- B. Requirements to make a will.
 - 1. Of Sound Mind.
 - 2. Over 18 years old.

§ 64.1-47. Who may not make a will

No person (i) of unsound mind or (ii) under the age of eighteen years, unless emancipated pursuant to Article 15 (§ 16.1-331 et seq.) of Chapter 11 of Title 16.1, shall be capable of making a will.

B. Two Types – Attested & Holographic. (64.1-49)

- 1. Attested.
 - a. Must be signed by the decedent / testator
 - b. Must be attested by two *competent* witnesses
 - c. Witnesses must sign in the presence of the testator.
 - 2. Holographic
 - a. Must be wholly in the handwriting of the testator / decedent.
 - b. Signature must be proven by two disinterest witnesses.
- (*) Do not attempt to create a holographic will.

§ 64.1-49. Will must be in writing, etc.; mode of execution; witnesses, and proof of handwriting

No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly in the handwriting of the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. If the will be wholly in the handwriting of the testator that fact shall be proved by at least two disinterested witnesses

(*) Note Requirements vary from state to state.

II. What happens if I die without a will?

A. Dispelling the common myth – “the State takes my property”

(*) No. State does not take property. However, the State tells you who gets your property.

§ 64.1-1. Course of descents generally

When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to such of his kindred, male and female, in the following course:

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.

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

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

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

Fifth. If there be none such, then one moiety shall go to the paternal, the other to the maternal kindred, of the intestate, in the following course:

Sixth. First to the grandfather and grandmother or the survivor.

Seventh. If there be none, then to the uncles and aunts, and their descendants.

Eighth. If there be none such, then to the great grandfathers or great grandfather, and great grandmothers or great grandmother.

Ninth. If there be none, then to the brothers and sisters of the grandfathers and grandmothers, and their descendants.

Tenth. And so on, in other cases, without end, passing to the nearest lineal ancestors, and the descendants of such ancestors.

Eleventh. If there be no paternal kindred the whole shall go to the maternal kindred; and if there be no maternal kindred, the whole shall go to the paternal kindred. If there be neither maternal nor paternal kindred, the whole shall go to the kindred of

the husband or wife, in the like course as if such husband or wife had died entitled to the estate.

B. Examples of regulations by statute.

1. Half Bloods

§ 64.1-2. How collaterals of half blood inherit

Collaterals of the half blood shall inherit only half so much as those of the whole blood.

2. Per Stirpes / Per Capita

§ 64.1-3. When parties take per capita and when 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. Afterborn Heirs

§ 64.1-8.1. Afterborn heirs

Relatives of the decedent conceived before his death but born thereafter, and children resulting from assisted conception born after decedent's death who are determined to be relatives of the decedent as provided in Chapter 9 (§ 20-156 et seq.) of Title 20, shall inherit as if they had been born during the lifetime of the decedent.

C. Reasons to create a Will

1. You get to decide where your property goes.

- a. Testamentary Trusts.
- b. Money / property to non-family members and/or charitable organizations.

2. Can decide things that will prevent litigation after your death (i.e. guardianship of children).

3. Allows property to transfer more freely upon your death.
(* Ex. Giving Executor power to sell real estate.

III. What will not pass under a will. (Non-Probate Transfers)

- A. Life Insurance Policies.
- B. Jointly Titled Real Estate / Property.
(If Survivorship indicated)
- C. Jointly Titled Bank / Financial Accounts
(If Survivorship indicated)

IV. What Can't you do with a will.

- A. Cut out your spouse.

§ 64.1-16. Rights upon claiming an elective share

If claim for an elective share is made, the surviving spouse shall, if the decedent left surviving children or their descendants, have one-third of the decedent's augmented estate; or if no children or their descendants survive, the surviving spouse shall have one-half of such augmented estate. The surviving spouse shall be entitled to interest at the legal rate specified in § 6.2-301 from the date of the decedent's death to the date of satisfaction of the elective share.

Unless ...

- 1. Marital Rights Waived (either before or during marriage).
- 2. Divorce.
- 3. Desertion / Abandonment

§ 64.1-16.3. Statutory rights barred by desertion or abandonment

A. If a husband or wife willfully deserts or abandons his or her spouse and such desertion or abandonment continues until the death of the spouse, the party who deserted the deceased spouse shall be barred of all interest in the estate of the other by intestate succession, elective share, exempt property, family allowance, and homestead allowance.

B. If a parent willfully deserts or abandons his or her minor or incapacitated child and such desertion or abandonment continues until the death of the child, the parent shall be barred of all interest in the estate of the child by intestate succession unless the parent resumes the parental relationship and duties and such parental relationship and duties continue until the death of the child.

- B. Does not only apply to probate transfers, also applies to other things:

§ 64.1-16.1. Augmented estate; exclusions; valuation

A. The augmented estate means the estate passing by testate or intestate succession, real and personal, after payment of allowances and exemptions elected under Article 5.1 (§ 64.1-151.1 et seq.) of Chapter 6 of this title, funeral expenses, charges of administration which shall not include federal or state transfer taxes, and debts, and to which is added the sum of the following amounts:

1. The value of property, other than tangible personal property received by gift and the proceeds thereof, owned or acquired by the surviving spouse at the decedent's death, to the extent the property is derived from the decedent, by any means other than testate or intestate succession, without a full consideration in money or money's worth;

2. The value of property, other than tangible personal property received by gift and the proceeds thereof, derived by the surviving spouse from the decedent without a full consideration in money or money's worth, other than by testate or intestate succession, and transferred by the surviving spouse at any time during the marriage to a person other than the decedent, which would have been includible in the surviving spouse's augmented estate if the surviving spouse had predeceased the decedent; and

3. The value of property transferred to anyone other than a bona fide purchaser by the decedent at any time during the marriage to the surviving spouse, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

a. Any transfer under which the decedent retained for his life, for any period not ascertainable without reference to his death or for any period which does not in fact end before his death, the possession or enjoyment of, or right to income from, the property;

b. Any transfer to the extent that the decedent retained for his life, for any period not ascertainable without reference to his death or for any period which does not in fact end before his death, a power, either alone or in conjunction with any other person, to revoke or to consume, invade, or dispose of the principal for his own benefit;

c. Any transfer whereby property is held at the time of the decedent's death by the decedent and another with right of survivorship; or

d. Any transfer made to or for the benefit of a donee within the calendar year of the decedent's death or any of the five preceding calendar years to the extent that the aggregate value of the transfers to the donee exceeds \$ 10,000 in that calendar year.

B. Nothing herein shall cause to be included in the augmented estate (i) the value of any property transferred by the decedent during marriage with the written consent or joinder of the surviving spouse; (ii) the value of any property, its income or proceeds, received by the decedent by gift, will, intestate succession, or any other method or form of transfer to the extent it is received without full consideration in

money or money's worth, before or during the marriage to the surviving spouse, from a person other than the surviving spouse to the extent such property, income, or proceeds were maintained by the decedent as separate property; or (iii) any transfer made to anyone other than the surviving spouse prior to January 1, 1991, to the extent that such transfer is irrevocable on that date.

C. Property is valued as of the decedent's death except that property transferred irrevocably during the lifetime of the decedent is valued as of the date the transferee came into possession or enjoyment if that occurs first.

1. Life estates and remainder interests are valued in the manner prescribed in Article 2 (§ 55-269.1 et seq.) of Chapter 15 of Title 55, and deferred payments and estates for years are discounted to present value using the interest rate specified in § 55-269.1.

2. The value of an insurance policy that is irrevocably transferred during the lifetime of a decedent is the cost of a comparable policy on the date of transfer or, if such a policy is not readily available, the policy's interpolated terminal reserve. The value of any premiums paid on an insurance policy owned by another person is the amount of the premiums only and not the insurance purchased or maintained with such premiums.

3. An initial interest in property owned as a joint tenant with survivorship is valued at the time the interest is acquired, and a further interest received upon the death of a cotenant is valued at the cotenant's death. Property owned jointly by persons married to each other shall be rebuttably presumed to have been acquired with contributions of equal value by each tenant. The mere creation of an indebtedness secured by jointly owned property is not a contribution to its acquisition, but any satisfaction of an indebtedness is a contribution. An interest in a tenancy by the entirety shall be valued as if it were an interest in a joint tenancy with survivorship. Joint accounts in financial institutions shall be valued in accordance with the provisions of Article 2 (§ 6.2-604 et seq.) of Chapter 6 of Title 6.2.

D. As used in this section, the terms "estate" and "property" shall include insurance policies, retirement benefits exclusive of federal social security benefits, annuities, pension plans, deferred compensation arrangements, and employee benefit plans to the extent owned by, vested in, or subject to the control of the decedent on the date of his death or the date of an irrevocable transfer by him during his lifetime. All such insurance policies and other benefits are included in the terms "estate" and "property" notwithstanding the presence of language contained in any statute otherwise providing that neither they nor their proceeds shall be liable to attachment, garnishment, levy, execution, or other legal process or be seized, taken, appropriated, or applied by any legal or equitable process or operation of law or any other such similar language.

V. Trusts

A. Non-Probate Transfer

B. Parting from ownership of property during lifetime

1. Revocable

2. Irrevocable

C. Usually created in conjunction with CPA to deal with tax issues.

VI. Other Documents – Power of Attorneys & Living Wills

A. Power of Attorney – Document that allows another person to act on your behalf during your lifetime and if you become incapacitated (if POA is durable).

B. Living Will – Document that allows you to make medical care decisions in the document (i.e. Advanced Directive) and appoint another person to make decisions (Health Care Proxy).