A POA is effective immediately when it is signed unless stated otherwise in the POA. For example, a Health Care Power of Attorney may take effect only when a doctor determines that the principal is unable to make or communicate his medical decisions. A Financial Power of Attorney is in effect only while the principal is alive and competent unless it is “springing,” which means it does not become effective until the principal is determined to be incapable of making financial decisions, or the POA states that it is “durable” and survives the incapacity of the principal. Most POAs are “durable” so that the POA can be used when the principal is not capable of making his or her own decisions. If the principal dies or revokes the POA, the POA is terminated.

Is it true that life insurance isn’t taxed at death? Generally, life insurance is not subject to income tax when the proceeds are received by your beneficiaries; however, any assets that you own or control, including life insurance, IRAs, houses, bank accounts, and other property are part of your estate for estate tax purposes, and may be subject to estate tax depending on the size of your estate.

What should I do if I think my estate may be worth over $1 million? You should see an attorney who regularly works with clients who have taxable estates. The attorney will be able to help you plan your estate to minimize or eliminate estate taxes.

POWERS OF ATTORNEY

What is a power of attorney? A power of attorney (“POA”) is a legal document in which a person, called the “principal,” gives authority to an agent to act for the principal.

What is a POA used for? There are two common POAs—one for financial matters, (sometimes called a “General” or “Financial Power of Attorney”) and one for health care decisions (usually referred to as a “Health Care Power of Attorney”). The Financial Power of Attorney allows you to name someone to pay bills and handle business or property transactions for you. The Health Care Power of Attorney allows you to name someone to make health care or medical decisions if you are unable to do so for yourself.

What powers and obligations does the agent have? The agent has the powers listed in the POA, as well as additional powers that are implied by law. An agent also has duties, which may or may not be spelled out in the document. If an agent acts under a POA, the agent must act in the principal’s best interest. The agent’s responsibility is to the principal, not the principal’s family. The agent may not act to benefit herself or others, except as specifically authorized in the POA. Sometimes a Financial Power of Attorney has a power that allows the agent to make gifts of the principal’s property. It is wise to consult with a knowledgeable attorney prior to making gifts because there may be federal or state gift tax issues and/or penalties imposed on the principal for Medicaid eligibility purposes.

ADDITIONAL RESOURCES

To learn more about wills, trusts, powers of attorney and general estate planning, please consult the following resources:

- Estate Planning & Fiduciary Law Section of the North Carolina Bar Association (http://estateplanningandfiduciarylaw.ncbar.org/)
- List of attorneys certified by the N.C. State Bar Board of Legal Specialization as specialists in Estate Planning and Probate Law (www.nclawspecialists.org)
- Internal Revenue Service (www.irs.gov)

For additional free pamphlets, please send a self-addressed stamped envelope to: North Carolina Bar Association Attention: Pamphlet Program P.O. Box 3688 • Cary, NC 27519 Visit www.ncbar.org

This pamphlet was prepared as a public service by the Communications Committee and is not intended to be a comprehensive statement of the law. North Carolina laws change frequently and could affect the information in this pamphlet. If you have specific questions with regard to any matters contained in this pamphlet, you are encouraged to consult an attorney.

If you need an attorney, please contact the North Carolina Lawyer Referral Service, a nonprofit public service project of the North Carolina Bar Association, via phone (1.800.662.7660) or online (www.ncbarlawyer.com).

The North Carolina Bar Association does not intend to signify approval or endorsement of their work or views of agencies and firms distributing this pamphlet. For other pamphlets check your local public library or, for additional free pamphlets, please send a self-addressed stamped envelope to:

North Carolina Bar Association Attention: Pamphlet Program P.O. Box 3688 • Cary, NC 27519 Visit www.ncbar.org

©2004 North Carolina Bar Association Revised 2017

Published as a Public Service by the Communications Committee of the North Carolina Bar Association
Wills

What is a will? • A will is a legal document that allows you to control how and to whom certain assets owned by you pass at your death. Your will can provide for the disposition of your property as well as personal property, such as personal effects, cash, and bank accounts, to loved ones. There are formal requirements established by N.C. law that must be met for a will to be valid.

Who may have a will? • Anyone 18 years of age or older may have a will. Under the law, a will determines how and to whom your property, and personal belongings will pass. If you already have a will and circumstances in your life have changed, review it to be certain that it still expresses your wishes and desires. If you have a will from another state, you should have your will reviewed by a North Carolina attorney to ensure that it meets the requirements of N.C. law.

The PROBATE PROCESS IN NORTH CAROLINA

What is probate? • Probate is the administration of a decedent’s estate that is supervised by the Superior Court. A person who has died is called the “decedent.” The person who settles the decedent’s estate is called the “executor” or “personal representative.” An “executor” is typically nominated under the terms of the decedent’s will although the court must approve the appointment of the nominated person or financial institution. When a person dies owning assets in his or her name alone, the probate process must be started by a personal representative to handle the decedent’s assets and take care of settling the decedent’s affairs.

What happens after probate is started? • The personal representative’s job is to “settle the decedent’s estate.” This includes notifying beneficiaries, gathering assets, paying debts, accounting for all property that comes into and goes out of the estate, and properly distributing the decedent’s property. The Clerk of Superior Court’s job is to make sure that the personal representative carries out its duties. The personal representative is authorized to deal with the assets of the estate and handle matters of estate administration.

Do all of a decedent’s assets go through probate? • No. Assets held with rights of survivorship pass automatically to the survivor and are not subject to probate. Assets with designated beneficiaries such as life insurance policies, 401(k)s, IRAs, and the proceeds of annuities, and retirement accounts pass to named beneficiaries and are usually not subject to probate. The assets held in trust are governed by the terms of the trust and usually pass outside the probate process as well.

How does the probate process end? • The probate process ends when the decedent’s debts, taxes and administrative expenses have been paid, all of the remaining assets of the estate have been distributed, and the Clerk of Superior Court releases the personal representative from further responsibility for the administration of the estate.

MINOR CHILDREN

As a parent you want your child to be loved and nurtured even after your death. Under the terms of your will, you may nominate a guardian for your child and set aside funds for his or her care and wellbeing.

What are the considerations in choosing a guardian? • Often it is best to choose a family member or a close friend you and your child know well, and who shares your values and beliefs. It is also important to consider the personal circumstances of the guardian. Where the guardian lives, as well as his or her financial, physical and emotional wellbeing, will affect your child. The Court will consider your recommendation (see N.C.G.S. 35A:1225) as a strong guide in appointing a guardian, but the Court is not bound by your recommendation if the Court finds that a different guardian is in the child’s best interest. You may choose to act as your child’s guardian even if appointed by the Court. Remember, the Court must consider your recommendation, but is not bound by it.

What is a Revocable Living Trust? • A revocable living trust (RLT) is an agreement between its maker (sometimes called the grantor or settlor) and a trustee. Under that agreement, the maker transfers assets to the trust and gives instructions to the trustee concerning the investment and management of the assets while held in the trust. The instructions specify how the assets are to be held and used during the maker’s lifetime, as well as how the assets are to be distributed following the maker’s death. A person can be both the maker and the trustee of a RLT. The term “revocable” refers to the fact that the maker has the power to change or revoke the trust at any time during his or her life. The maker’s power allows the maker to remove assets from the trust and control and direct all payments from the trust. If the maker is also the trustee, he or she can make all decisions concerning the assets in the trust. RLTs provide tax efficiency, estate planning and he or she is bound by ethical requirements to help a client determine if a trust is a suitable estate planning tool for the client’s particular situation.

ABUSIVE TRUST ARRANGEMENTS

What is an “abusive trust arrangement”? • “Pay no income tax!” “Pass your property to your children free of federal estate tax!” “We can help you shelter your income and your property from state and federal taxes forever!” These are examples of claims made about abusive trust arrangements. Trusts may usually promise tax benefits with no meaningful change in the taxpayer’s control or use of his or her income or assets. Abusive trust arrangements are trust arrangements that claim to reduce or eliminate federal taxes in ways that are not permitted by federal tax laws.

How will I know if a trust is an abusive trust? • Abusive trust arrangements may be marketed under the following names: Pure Trust, Constitutional Trust, Contractual Trust, Patriot Trust, Trust, Freedom Trust, Universal Trust, Freedom Trust, Complex Trust, and may carry other names referring to constitutional issues, fairness, equity, or patriotic themes. The promoters of abusive trusts may claim that “the wealthy have been doing this for years” or “Your attorney wouldn’t understand it.”

What can I do to protect myself? • Remember, if it sounds too good to be true, it probably is. Ask an attorney to review the materials provided by the promotor.

ESTATE TAXES

What is the estate tax? • The estate tax is a tax on the right to pass property to others at your death. While the federal service provides information on state and federal states of revenue assess an estate tax when a person dies, North Carolina repealed its estate tax effective for decedents dying on or after January 1, 2013.

Who is affected by the estate tax? • Fortunately, most people are not affected by the estate tax. A person who dies in 2013 or later can pass $5.49 million. It is important to note that the law may change at any point in time, resulting in a larger or smaller state tax exemption.