1986

Why You Need A Will - A Pamphlet That Explains The Need To A Layperson

J. Rodney Johnson
University of Richmond, rjohnson@richmond.edu

Why You Need A Will — A Pamphlet That Explains The Need To A Layperson

BY J. RODNEY JOHNSON*

Editor's note: The education of clients and potential clients is an essential cornerstone to the practice of preventive law. A valuable tool that can be used in such education is printed material that explains, in approach and language that can be understood easily by laypersons, the how's and why's of the legal system.

The following material by Professor Johnson is an excellent example of the type of material a firm could prepare for distribution to its clients or potential clients. Obviously, this material is presented merely as an example, and each such pamphlet, of course, would have to be tailored to the law of a particular state. In this example, the law of the State of Virginia is used.

Author's Introduction

The following article was written for those consumers we seldom discuss in our estate planning literature — those who have no death tax problems because of the size (or non-size) of their estates. It evolved from a client education project that was based on the following assumptions: (1) Most of these clients come to a will interview with only a generalized desire for a short, "simple" will and, thus, they are not prepared to make some of the decisions that will be placed before them; (2) This knowledge gap requires the attorney to engage in a period of basic client education which, on occassion, can become quite lengthy; (3) Client decisions that are made in this context tend to be changed prior to document execution with much greater frequency than decisions that are made after a period of reflection and interspousal discussion, and this decision changing requires the attorney to prepare additional editions of the will; and (4) Even though hourly billing is the norm, there is a ceiling on the fee for a "simple" will that many firms believe cannot be exceeded regardless of the hours involved.

The project's primary premise was that, if the basic client education could precede the will conference, the total process would involve less time without any sacrifice in the quality of the final product or the relationship with the client. Not only has this goal been realized, the author's personal experience leads him to believe that (i) client satisfaction has measurably increased, and (ii) better client decisions are being made as a result of mailing basic informational material to the client ahead of the interview. Although the project was developed with small estate clients in mind, experience has further demonstrated that sending this material to large estate clients is also helpful because they have the same need for basic education concerning these non-tax matters. The final use of this writing (and the source of its title) has been as a response to those persons who pose the very familiar question, "Why do I Need a Will?"

J. Rodney Johnson is a professor of law at the University of Richmond Law School, Richmond, Virginia. He received a J.D. from William and Mary School of Law and an LL.M. from New York University School of Law. He is the editor of Virginia Trust and Will Manual, an Academic Fellow of the American College of Probate Counsel, a member of National College of Probate Judges, a member of the American Law Institute, and the author of numerous articles in the fields of estate planning and fiduciary administration.

Why You Need A Will

There are a number of reasons why you need a will. Perhaps you think that you do not have enough money or property to need a will. However, regardless of how much you have (or don't have), your family can very easily face the expenditure of more time and money in the settlement of your estate than should be required and, on occasion, they may also face far more serious complications if you die without a will. The purpose of this article is to emphasize the importance of wills by discussing five major reasons why you should have a will and then answering the twelve questions that are most often asked in connection with the writing of wills. The reference point for this article is the law of Virginia, as of January 1, 1986.

NEED FOR WILL PAMPHLET

Where Does My Property Go If I Have No Will?

Sometimes it is necessary to write a will in order to accomplish the most obvious objective — to make sure that your property will pass to the person or persons you wish to receive it. Under the Virginia law that became effective on July 1, 1982, when someone dies without a will all of his property passes to his surviving spouse.* If there is no surviving spouse, the entire estate will pass to his children (with the descendants of any deceased child taking that child's share). If a person leaves neither a spouse nor any descendants, his estate will pass to his parents (or to the survivor of them) or, in the absence of any parents, to his brothers and sisters (and to the descendants of deceased brothers and sisters). Beyond this, Virginia law provides for one-half of a person's estate to pass to his nearest relatives on his mother's side of the family and the other one-half of his estate to pass to his nearest relatives on his father's side of the family.

It might appear that this new Virginia law eliminates the need for husbands and wives to have wills. After all, it does provide that upon the death of the first all of his property will pass to the survivor and then, upon the death of the survivor, all of the survivor's property will pass to their children (and to the descendants of any deceased children) — and this, in fact, is what most couples desire. However, and belief that present law eliminates the need for husbands and wives to have wills is erroneous for several reasons. First of all, it will be the law in force at the time of a person's death that will determine who takes his property, and that law might be quite different from present law. Secondly, upon the death of both husband and wife (or anyone else for that matter), a person must be concerned with more than "who" will be the beneficiaries of his estate; he must also take into account "how" and "when" the property will pass to the beneficiaries in some cases.

NOTE: There is one exception to this rule that the surviving spouse inherits the entire estate. If the deceased person is survived by children (or descendants of deceased children) who are not also the children (or descendants of deceased children) of the surviving spouse, the surviving spouse will receive only one-third of his estate and the other two-thirds will pass to his children (or descendants of deceased children).

How (And When) Does My Property Go If I Have No Will?

The problem of a Guardianship of Property. Any person under the age of eighteen years is considered legally incompetent under Virgina law, and thus such a person is unable to deal with or manage any property that he might inherit. The possibility of a minor person receiving an inheritance can arise (i) in the case of a married couple with young children, if both parents die prematurely; (ii) in the case of the older married couple whose children are all adults where, due to the premature death of a child, that child's share passes to his minor children (the decedant's grandchildren); as well as (iii) in any other case where a minor receives property, whether it be as a direct beneficiary or as an indirect beneficiary taking the share of his deceased parent. If, in any of these cases, a minor does become entitled to any property, the only procedure the law provides for the management of this property is through a court-appointed guardian.

Guardianship of a minor's property is a cumbersome and expensive form of property management because of an undue emphasis on the protection of the minor's property and the continuing supervision by the court that is required in order to provide this protection. Each time it becomes necessary to spend some of the principal for the child's benefit the guardian must retain an attorney to institute legal proceedings in order to obtain the court's permission; and the first step that the court takes in such a proceeding is to appoint another attorney to represent the child in order to insure that the proposed expenditure is, in fact, in the child's best interests. All of the costs associated with this proceeding, including the fees of both attorneys, are paid out of the minor's assets. When one adds to this cost factor (i) the time lag that is necessarily involved in any legal proceeding (i.e., the period of time from that point when a personal determination is made that certain action is required up to the point when a court decree is entered authorizing that action to be taken), and (ii) the rule that the guardianship must come to an end when the minor child reaches the age of eighteen (regardless of the amount of money involved or the child's maturity or ability to handle this amount of money), it becomes clear that the guardianship of a minor's property is not a satisfactory arrangement in the typical case.

A Solution to the Guardianship Problem: A Contingent Trust. The problems associated with the guardianship of property may be easily avoided by providing for a contingent child's trust in one's will. The word "contingent" means that this trust will come into operation *only* if there actually is a child under the age specified by the person writing the will. In that event, the trust will be a very efficient, flexible, and economical form of property management, expecially when contrasted with a guardianship of property. By way of illustration — Husband may provide in his will that (i) if Wife survives, she receives everything, but (ii) if Wife fails to survive, everything shall be divided equally

among the children (with the children of any deceased child to receive that child's share). Then comes the contingent trust, providing as follows:

> If any such beneficiary is under the age of X, his share shall be paid over to T to hold for his benefit until he reaches the age of X. During the course of this trust, T shall pay over whatever income may be required (as well as principal, if the income is not sufficient) in order to provide for the support, maintenance and education (including college) of the beneficiary until he reaches the age of X, at which time the trust will come to an end and the balance on hand will be paid over to him.

In the above example, "X" is an age to be chosen by the person writing the will (e.g., 21, 22, 25, etc.), and "T" is the trustee (a personal friend, a family member, or a bank) who will also be chosen by the person writing the will. As can easily be seen, this trust is a very simple, straightforward device for holding and using a young person's property for his benefit. If and when there is a need, the trustee can promptly respond to this need by the simple act of writing a check or, if it is necessary to sell property, by simply signing the same documents that any owner of property would sign. The problems necessarily involved in the guardianship of property — the time delay involved in obtaining a court's permission to spend principal, the legal fees and costs incident to obtaining this permission and the required turnover of all property and money when the child reaches the age of eighteen — have been totally eliminated.

A person may appreciate the concept of a child's trust but believe that it has no application in his situation (i) because all of his children are grown, or (ii) because he has no children and is leaving his estate to relatives and friends, all of whom are adults. These are common misconceptions. What this person is overlooking is the possibility that one or more of his intended beneficiaries may die before (or along with) him, and that these beneficiaries may leave young children who will take the share of the estate that was intended for their parent. Due to this possibility, a contingent child's trust or some equivalent should be included in every will.

Separate Trusts or a Single Family Trust? The contingent child's trust illustrated above is referred to as a "separate-share" trust. It provides for the division of the surviving parent's estate into equal shares for the children and then holding the shares of the underage children in trust until they reach a specified age. The disadvantage of this separate-share trust is the possibility that a child may have a need large than the size of his share. For example, a $75,000 estate left to three minor children will give each one a separate-share trust of $25,000. What will happen if one of the children develops a medical problem that requires the expenditure of $45,000? Obviously the child does not have enough in his trust fund and, if his brothers or sisters are also minors, they will not be permitted to give or loan him a portion of their trust funds because, as minors, they are legally incompetent to do so. Some parents of young children may choose to eliminate this potential problem by creating one "family" trust for the benefit of all of their children instead of a "separate-share" trust for each child. Whereas the separate-share trust provides for a division into shares upon the death of the surviving parent, the family trust does not provide for a division of the estate until the youngest child has reached a specified age. Thus, under the family trust approach, the entire estate remains available to meet the needs of every child in order to insure that they all have whatever support may be required until each one has reached the specified age. When the youngest child reaches this specified age, the trust comes to an end and the amount then remaining is divided equally among the children. In addition to providing this form of "insurance" for each of the children, the single "family" trust will also be simpler and more economical to operate than multiple "separate-share" trusts would be.

Who Will Raise My Children?

The word "guardian" has been used several times thus far and each time with a negative connotation because it was being used in connection with the *property* of a minor. However, putting property matters aside for a moment, what about the most precious "possession" of parents, the children themselves. If both parents die prematurely, who is to take charge of the children and become their substitute parents? Virginia law gives the last surviving parent the right to nominate a "guardian of the person" for any minor children and this right is typically exercised in a person's will. Parents may believe that there are several well-qualified persons on each side of the family and that, rather than specifying one of them to serve as guardian of the person, it would be better to wait and allow the one who seems best situated at the necessary time to step forward and request the court's appointment as guardian of the person. This approach can create a problem because more than one person may step forward and the result may be a bitter fight to gain custody of the children. The children, who have just experienced the traumatic loss of their parents, are thus faced with the possible additional trauma of a custody battle, or perhaps they are faced with feelings of rejection because no one steps forward immediately to serve as their guardian. Accordingly, it is imperative that parents provide for a "guardian of

the person" of any minor children in order to minimize the possibility of any problems in this important area and to insure that the children will be raised by persons who possess the desired religious background, as well as the appropriate moral and character values.

Who Will Settle My Estate?

The generic name for the person who settles a decedent's estate is "personal representative." When someone dies without a will, the personal representative appointed by the court is referred to as an "administrator." Virginia law provides a preference for appointment of the surviving spouse as administrator and, thereafter, it provides that administration may be granted to the first competent beneficiary who requests it. If neither the spouse nor any beneficiary applies for administration within thirty days from a person's death, his creditors or any other person that the court finds competent becomes eligible for appointment as administrator.

When one writes a will, he has the privilege of nominating the person or bank whom he wishes to serve as his personal representative (who is now referred to as an "executor" because a will is involved). Although the actual appointment of a personal representative is always made by the court, a person can rest assured that the one he has nominated to serve as his executor will be appointed by the court unless, for some reason, that person is found to be incompetent.

How Long (and How Much) Will It Take To Settle My Estate?

It is impossible to estimate the length of time or the costs that will be involved in the settlement of a decedent's estate because they are both a function of (i) the composition of the estate, (ii) the claims against the estate, and (iii) the takes of the estate. One thing that can be said with certainty, however, is that the Virginia laws dealing with the administration of a decedent's estate are in part incomplete and in part obsolete. Accordingly, the administrator of a decedent's estate may not always have the necessary powers to fulfill the duties of his office, and he might therefore need to apply to the court for assistance, which always involves additional time and greater expense. On the other hand, if a person writes a will, he can give his executor additional administrative powers which are designed to facilitate the administration of his estate and thereby reduce these time and cost factors as much as possible.

Some Frequently Asked Questions

1. How much do I need to worry about death taxes? In much the same way that the federal government allows taxpayers a certain personal exemption on their income taxes each year, it also allows an "exemption equivalent" against the federal estate tax payable by a decedent's estate. The Economic Recovery Tax Act of 1981 provided for this exemption equivalent to be $225,000 in 1982; $275,000 in 1983; $325,000 in 1984; $400,000 in 1985; $500,000 in 1986; and $600,000 in 1987 and thereafter. If an estate is below the exemption equivalent in the year of death, there is no need to even file a federal death tax return.

Accordingly, as the Virginia inheritance tax was repealed effective January 1, 1980, death taxes are no longer a consideration for the overwhelming majority of Virginians. Those persons who expect that their estate will exceed the exemption equivalent will find that there are a variety of deductions and legitimate estate planning devices available to minimize the impact of federal estate taxation. Federal estate tax law can be highly technical, however, and is important that such persons have the assistance of a competent estate tax attorney to guide them in their planning. Anyone seeking such an attorney can obtain a recommendation from the trust department of his bank.

2. Should my life insurance be made out in any special way? Many a person has provided for his life insurance to be payable to his spouse or, in the event that the spouse predeceases him, to his children. This designation of children (or descendants of deceased children) as contingent beneficiaries under an insurance policy can create the same undersirable problems that can arise when minor beneficiaries are entitled to a share of a decendent's estate. In order to eliminate this problem, and at the same time to provide for complete flexibility in the disposition of the insurance proceeds, a person may continue to specify his spouse as the primary beneficiary and then specify, as contingent beneficiary in the event that his spouse predeceases him, for the proceeds to be payable either (i) "to my estate" (this designation can be used whether the will creates separate share trusts or a single family trust) or (ii) "to the trustee names in my will." (This designation can only be used when the will creates a family trust.).

Either of these beneficiaty designations will eliminate the possible need for a guardianship of property. The use of the proper designation will also enable a person to integrate his insurance proceeds into the estate plan created by his will and thereby dispose of these proceeds in the same manner as his other property.

The use of the first alternative ("to my estate") can cause the executor's fee to be higher because the estate will be larger, and it will also result in a greater exposure of these insurance proceeds to the claims of the dece-

dent's creditors. The second alternative ("to the trustee named in my will") can cause a delay in the receipt of the insurance proceeds if no trust is actually created in the will (because the youngest child is above the age specified in the will for the creation of a contingent family trust). However, none of these objections is as significant as the alternative problem if the children are named as the contingent beneficiaries — a possible guardianship of the insurance proceeds.

3. What should I consider in selection an executor, trustee, or guardian? Although an executor is typically thought of as a short-term liquidator and a trustee is thought of as a long-term manager, the characteristics required of both are basically the same: objective business ability and preferably some experience in handling or investing the property of others. One may choose a family member, a friend, or the trust department of his bank to fill these roles. Sometimes a different person is chosen to fill each role but in most cases the one selected to serve as the executor or alternate executor will also be the preferred choice for trustee as well.

Virginia law does not allow a non-resident to serve as a trustee under a will. A non-resident may serve as a co-trustee, along with a resident, but this is not usually desirable because of the delay and the other problems typically created by any arrangement that requires the co-office holders to act jointly in fulfilling the duties of their office. Virginia law was changed in 1983 to permit certain non-residents (spouse, parent, child, child's spouse, descendant or, in some cases, some other persons) to serve as an executor if, upon qualification, the executor appoints a resident as his statutory agent to receive service of process in any suit that is filed in connection with the estate. Although the law now permits these non-residents to serve as executor, many persons will continue to nominate a resident as their executor in order to avoid the obvious problems presented by a non-residents' distance from the decedent's city during the period that the estate is being administered. Any non-resident may serve as co-executor, along with a resident, but the problems associated with co-office holders that were mentioned in connection with co-trustees would also be applicable to co-executors.

The personal requirements for the office of guardian of the person of a minor child become apparent when one thinks of his role as that of "substitute parent." It is possible to use a non-resident as guardian of the person of a minor.

On occasion, the one who is nominated to serve as executor, trustee, or guardian of the person (i) may die before the testator, or (ii) though surviving, may be unable to serve for a variety of reasons, or (iii) may begin to serve but, for some reason, may be unable to complete the duties of his office. Therefore, it is ordinarily desirable to nominate an alternate person to serve in case such a problem develops. These problems do not exist when one nominates a bank to serve as executor or trustee, due to the institution's perpetual existence, and thus there is no need for an alternate executor or trustee in such a case.

4. Can I change my will in the future? Yes. Unless a will is executed pursuant to a contract that prohibits future changes, it can be freely changed, revoked, or completely replaced by a new will at any time that the writer chooses.

5. How long does a will last? There is no set "life-span" for a will, but it is believed that a standard will (not involving any tax planning) should be reviewed at lease every five years in order to insure that it continues to reflect the writer's wishes in light of possible changes in Virginia law since its execution. If there is a significant change in a person's assets or within the group of his beneficiaries, the will should be reviewed immediately instead of awaiting the next regular review.

6. How can I locate an attorney who is knowledgeable in wills law? The best source for an informed recommendation of a competent wills lawyer is the trust department of your bank.

7. What about funeral instructions and anatomical gift provisions? As a will is ordinarily not probated until some period after a person's death (if at all), it is not a satisfactory place to deal with funeral instructions or anatomical gifts. Ordinarily a simple letter to your family, religious leader, or the funeral home of your choice is an effective method of dealing with funeral instructions. Anyone possessing a Virginia driver's license will find that it contains a form for making anatomical gifts. Similar forms are available from many health organizations, such as the National Kidney Foundation.

8. Does the law prohibit me from writing my own will? No. However, it should be obvious that (i) you cannot reasonably expect to duplicate the work of a competent wills lawyer, and (ii) when a will is not drawn correctly, the decedent's family often suffers a high penalty (i.e., delay or excess cost in the settlement of the estate or even the loss by some of the beneficiaries of all or a portion of their intended inheritance).

9. Where should I keep my will? Where a person keeps his will is not of great importance as long as it is in a safe place. What is most important is that a person not hide his will. Several persons should know the will's location so that it can be pro-

duced without any undue delay when it is needed. Virginia law provides that a bank may permit a decedent's spouse, next of kin, or other person having an interest in locating any will of the decedent to enter his safety deposit box to look for a will and to remove the will for transmission to the appropriate clerk of the court.

10. If a couple owns everything with survivorship, do they still need a will? Yes. Even in the highly unlikely case of everything being owned with survivorship, this would respond to only one of couples' needs — passing everything to the survivor upon the death of the first. They still need wills to determine who will receive their property upon the survivor's death, regardless of which one happens to be the survivor (and also to say when and how this property will pass to their ultimate beneficiaries). It is no answer to say that the survivor can write a will after the death of the first, because the survivor may be unable to write a will at that time for any number of reasons.

11. What is a "living will"? The term "living will" usually refers to a written statement in which a person expresses his wish to not have his life artifically prolonged by some "machine" or other heroic method after all regular life processes have ended. Such statements had no legal status in Virginia until quite recently. In 1983, however, the General Assembly concluded that all competent adults have the fundamental right to control the decisions relating to their own medical care, including the decision to have medical or surgical means or procedures calcualted to prolong their lives withheld or withdrawn. Following up on this finding, the legislature passed Virginia's Natural Death Act which extends legal recognition to a person's written declaration of his desire that his dying not be artificially prolonged if he has a terminal condition from which his attending physician has determined (i) that there can be no recovery, and (ii) that death is imminent. A specific form for such a declaration is contained in the Code of Virginia; the use of any other form carries with it the risk that the other form will not be recognized as legally sufficient at a time when steps can no longer be taken to correct it.

12. Do I need a power of attorney? As the statistical lifespan of the average American continues to increase, so also the incidence of mental incompetence can be expected to increase in the future. It should be noted, however, that although incompetence is regularly thought of in connection with the elderly, it is not confined to this group. It can come at any age, due to illness or accidental injury, and it can come without any warning. When an adult becomes incompetent the same basic problems are faced in dealing with his property as have previously been discussed in connection with the property of a minor.

In order to eliminate the possibility of these problems, a person may elect to give a general power of attorney to another (who is referred to as an "agent") in order to authorize the agent (i) to sign legal documents on his behalf and, generally, (ii) to exercise the same authority in all matters relating to his property as the person granting the power could himself exercise. One note of caution, however — the standard general power of attorney is ordinarily drafted to become effective immediately upon delivery to a person's agent instead of becoming effective "if and when" one becomes incompetent; and, just as a handgun or narcotic drug can be abused instead of being used only for its intended purpose, so also can a general power of attorney. Consequently, a person should not grant a general power of attorney to another as a casual matter; it should only be done as a thoughtful, deliberate act.

Why Do I Need A Will?

As the foregoing should illustrate, many persons need a will for a number of reasons: (1) to insure that their estate will pass to the intended persons, (2) to eliminate the possible need for a guardianship of property, (3) to nominate a guardian of the person for any minor children, (4) to nominate the preferred person or bank to serve as the executor and contingent trustee, and (5) to provide the executor with additional administrative posers in order to enable the estate to be administered as quickly and economically as possible. It is clear that not all of these reasons will be applicable in every case but it is submitted that (i) several of these reasons will be applicable to everyone and (ii) that any one of these reasons provides sufficient cause to write a will.

* * * * *