Probate, Wills, Trusts, Estate and Gift Tax, Power of Attorney

Probate

- What is probate?
    - Probate is the court process whereby the last will and testament is proved, meaning it is presented to a clerk of court for assessment of both its veracity and validity.
    - Except for specific actions provided in N.C. Gen. Stat. § 28A-2-4(b) and (c), the clerk of superior court of each county has original and exclusive jurisdiction over all proceedings regarding the probate of wills and administration of estates.
    - Jurisdiction over the decedent's estate vests in the county of the decedent's domicile at death. If the decedent was domiciled outside of North Carolina, venue is proper in any county where the decedent left property.
    - All property passing to beneficiaries by will or by intestacy (when a person dies without a valid will) is subject to the probate process
        - Small estates exception: If an estate has less than $20,000 of personal property, said personal property can be transferred through a collection by affidavit procedure
    - 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.
        - Updated probate forms and procedures as per the North Carolina Courts website, including new online filings
- What is a probate personal representative?
    - Includes both an executor and an administrator but does not include a collector.
        - Executor: the person named in the will by the decedent to manage and settle their estate
        - Administrator: a person appointed by the court when there is no will or when the named executor is unable or unwilling to serve.
    - This person has a fiduciary duty to act in the best interests of the estate.
- What are the responsibilities of the personal representative (executor or administrator)
    - 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.
    - Identifying and creating an inventory of the assets of the estate

        - Must be filed with the Clerk of Superior Court's office within three months from the date of qualification
    - Determining which, if any, assets fall under probate
    - Receiving any payments due to the estate
    - Opening an estate checking account
    - Appraising or valuing estate assets
    - Determining who will receive what from the estate
    - Giving notice to potential creditors
    - Investigating claims against the estate
    - Paying outstanding debts and claims
    - Paying expenses to administer the estate
    - Handling paperwork which includes notifying Social Security of the death, court documents, and discontinuing utilities
    - Distributing property and assets to beneficiaries
    - Filing final taxes
    - UPDATE: managing digital assets such as online accounts, social media, and cryptocurrency under the **Revised Uniform Fiduciary Access to Digital Assets Act** (RUFADAA). Enables fiduciaries to access and manage digital assets if authorized by the deceased's will or another legal document. Crypto assets like Bitcoin must be reported as part of the estate's value and may be subject to capital gains taxes depending on how they are managed posthumously
        - Digital asset: An electronic record in which an individual has a right or interest
- Probate fees
    - The probate court charges a fee of $0.40 for every $100 of property subject to probate, with a maximum cap of $6,000. Additional fees may include the $120 filing fee to open an estate, and a $20 facilities fee.
- How long will probate take?
    - 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.

Avoiding Probate

- How to avoid probate
- What does non-probate property include?
    - Not all estates are subject to probate:
        - If an estate has less than $20,000 of personal property, said personal property can be transferred through a collection by affidavit procedure
    - Not all assets are subject to probate:
        - When a decedent has executed a beneficiary designation for a bank account, a retirement account, or insurance policy, the proceeds will be distributed to the designated beneficiary without undergoing the probate process

- Property transferred by contract provision, including but not limited to payable on death or transfer on death account, insurance policies, transfer on death securities, individual retirement accounts, bonds, promissory notes, pension plans, and employee benefits where the payment or performance of which is the death of a person
- Real property owned as tenants by the entirety, joint tenancy with rights of survivorship, and other real property generally
- An inter vivos trust will also generally avoid probate to the extent that the decedent properly titled assets in the name of the trust and that the trust contains valid dispositive provisions to one or more surviving beneficiaries
- Unless the decedent's will devise real property to the estate or personal representative directly, real property generally does not pass through probate

Wills and Trusts

- Who can have a will drawn up?
  - A last will and testament is an estate planning tool that enables individuals to designate how their assets should be distributed after death and who should oversee that process. Any person of sound mind, and 18 years of age or over, may make a will.
- Will a will validly executed in another state be valid in North Carolina?
  - North Carolina continues to recognize valid wills executed in other states
  - If the will of a citizen or subject of another state or country is probated in accordance with the laws of that jurisdiction and a duly certified copy of the will and the probate proceedings are produced before a clerk of superior court of any county wherein the testator had property, the copy of the will shall be probated as if it were the original.
- What is a "pour-over will"?
  - 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).
- What is a revocable or inter vivos trust?
  - 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.

- Under § 36F-12, trustees who are not the original users of digital accounts transferred into a trust have the right to access electronic communications associated with those accounts, subject to specific requirements. A trustee, upon taking control of a digital account transferred to a trust, can access the content of electronic communications if they provide the custodian (an entity or individual that holds, manages, and controls digital or physical assets on behalf of the owner such as an email service provider or financial institution that stores or processes a user's data or communications) with the following:
  - A written request for disclosure
  - A verified copy of the trust instrument
  - A certification by the trustee
  - Additional information requested by the custodian
    - Username/account number
    - Evidence linking the account to the trust
- Section 12 addresses situations involving an inter vivos transfer of a digital asset into a trust, a transfer into a testamentary trust, or a transfer via a pour-over will. In those situations, a trustee becomes a successor user when the settlor transfers a digital asset into the trust.

Abusive Trusts

- What is an abusive trust?
  - Promoters of abusive trusts try to convince the general public that they must have a trust to shelter their property from taxes and avoid probate. Abusive trust arrangements usually promise benefits that do not actually change the taxpayer's status or create any benefit for the taxpayer. Or they claim to eliminate federal taxes in ways not allowed under federal tax laws.
- Does an attorney need to look over an abusive trust?
  - 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

- Surviving spouses right to claim estate
  - 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.
- What happens when surviving spouses has been married less than 5 years?

    - 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;
- What happens when surviving spouses has been married more than 5 years and less than 10 years?
    - 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;
- What happens when surviving spouses has been married more than 10 years but less than 15 years?
    - 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;
- What happens when surviving spouses has been married more than 15 years?
    - 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.
- What are "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

- Nominating a guardian for children under the age of 18
    - 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.
    - "Guardian" means a person appointed or qualified by a court to act as general, limited, or temporary guardian of a minor's property or a person legally authorized to perform substantially the same functions.
    - The recent clarifications regarding guardian nominations and the **Uniform Transfers to Minors Act (UTMA)** focus on the procedural and practical aspects of guardianship and financial management for minors:
        - **Guardian Nominations**:
            - While the basic principles of nominating a guardian remain unchanged, there is now added emphasis on electronic filings for guardianship documents, where applicable. This modernization allows for easier submission of nominations and related documents online, streamlining the process, especially in counties that have adopted electronic filing systems.

        - Guardianship nominations made through wills or trusts continue to serve as a non-binding recommendation to the court. However, courts increasingly rely on electronic filings to process these nominations more efficiently. The nominee must still meet the legal qualifications, and the court retains discretion in appointing the guardian.
    - **Uniform Transfers to Minors Act (UTMA)**:
        - Clarifications on the UTMA have highlighted its role in managing financial transfers to minors, including digital assets. Under the UTMA, custodians can manage assets on behalf of minors without the need for formal guardianship, provided that the transfer aligns with the minor's best interest.
        - The UTMA allows for flexibility in managing different types of assets, including digital accounts or investments, until the minor reaches the age of 18. The clarification ensures that custodians of digital assets have the authority to manage online accounts, cryptocurrencies, and other digital property in accordance with the trust's provisions

- 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.
    - Recent updates in financial provisions for minors focus on enabling more efficient management of digital inheritances through trusts and online accounts. These updates include:
        - **Incorporation of Digital Assets**: Trustees and custodians can now handle digital assets such as cryptocurrency or online accounts left to minors more effectively. Digital assets can be placed into a trust or managed via custodial accounts that conform to the minor's best interest, following the trustee's instructions under specific regulations like the **Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)**. This ensures that assets like social media, digital property, or even gaming accounts can be transferred to minors in a legally compliant manner.
        - **Online Account Management**: Platforms such as PayPal, Venmo, and digital wallets can be linked to a minor's trust, providing fiduciaries the ability to oversee funds or assets earmarked for the minor. Special provisions allow for automatic transfers of digital wealth when the minor reaches legal age.
        - **Simplified Trustee Oversight**: Trustees are provided with clearer guidelines for managing digital assets through uniform fiduciary laws. This includes handling e-commerce or investment accounts without needing separate court orders,

streamlining the asset transfer process to minors and ensuring compliance with privacy laws

Estate and Gift Tax

- What is estate and 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.
- The estate tax exemption
    - 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.
        - In addition to the deductions for marital and charitable transfers, there is a **$13.99 million exemption for 2025 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 ($19,000 for 2025, 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.
- Estate tax rates
    - The tax rate on funds in excess of the exemption amount is 40%.
- Gift tax exemption
    - Each person may gift up to **$19,000 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 **$38,000** 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 $18,000 per year is **$13.99 million for 2025**. A person must file a gift tax return if he/she makes gifts in excess of **$19,000 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 **(2025)** a husband and wife can together pass **$27.98 million** to beneficiaries free of the federal ESTATE TAX. Individuals should consult with an attorney on how to best accomplish this.

Power of Attorney

- Durable Power of Attorney
    - A power of attorney is a 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 of execution. **Revised statutes reflect increased digital authorization. Agents can now manage not only physical assets but also a principal's online presence and digital assets** under the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), provided that this authority is included in the document.
    - Effective Date. The power can be drafted so that it is a "springing power" that does not become effective until the principal is incompetent.
    - Gifting. Special provisions may be included in the document to give the agent the power to make gifts from the principal's property.
    - 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.
    - 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.
- 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 to 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. **Updated to reflect expanded telemedicine laws and electronic health care directives that now support remote notarization**, ensuring that health care powers of attorney can be executed remotely and electronically.
- North Carolina's Statutory forms – where can they be found?
    - 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
    - NORTH CAROLINA's Statutory form for the health care power of attorney may be found at: http://www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter_32A/GS_32A-25.1.HTML
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- Advanced Directives
    - What are advanced directives?
        - With an Advance 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. **In 2024, the form for Advance Directives has been further modernized to allow electronic signatures and simplified access through an online state portal**, providing an easier method for individuals to create, store, and manage their advance directives online.

- Are advanced directives 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 Advance 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.