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Reflections of a Superior Court Clerk on the Drafting and Probate of Wills in North Carolina

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REFLECTIONS OF A SUPERIOR COURT CLERK ON THE DRAFTING AND PROBATE OF WILLS IN NORTH CAROLINA

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The administration of estates, both testate and intestate, constitutes a large field in the practice of law in North Carolina. As more and more laws are enacted by the Legislature affecting property of deceased persons, the volume of business for lawyers in this field will continue to grow. It is the purpose of this article to present a few of the many questions that arise in the drafting and execution of wills and some that are likely to arise in the administration of decedent's estates. In this article I will not attempt to cover the entire field of wills, but rather will call the attention of the reader to certain questions which I have been forced to meet as wills have been brought to my office for probate during the years that I have held the office of Clerk of the Superior Court for Forsyth County. I shall offer also a few suggestions for the drafting of wills.

A few of the many questions to be discussed in considering the subject of wills are as follows:

I. Is there a necessity for a will?
II. Who is the proper person to draft a will?
III. Do the age and physical condition of the testator, executor, or potential beneficiary affect the carrying out of the intentions of the testator?
IV. What should be the legal content of a will?
V. Is the execution of a will technical?
VI. Should there be a place of depository for a will?
VII. Is the probate of a will technical?

I. IS THERE A NECESSITY FOR A WILL?

From my observation of the many wills which have been offered for probate in my office, it is my opinion that too little consideration has been given, both by the public and the legal profession, to the detailed outlining of the content of wills as well as to the drafting of them.

There are two classes of persons who prepare wills. Wills are either written by the individual property owner who feels that he is capable of disposing of his property by will, which type is known as a holograph will; or written by some friend of the testator or by an attorney

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who holds himself out to the public as being a qualified person to render this service for his fellow man, which is known as a written will.

It appears that the average property owner who has undertaken to write his own will has not given proper consideration to the wording and content of his will. I feel this is due primarily to the fact that he has not been sufficiently informed as to the necessity for a will and as to the material which a will should contain. It appears that the average lawyer has not given full and detailed consideration to the drafting of his client's will because he is prone to regard the average will as being a simple instrument which is, in comparison with present business transactions, insignificant and inconsequential. Perhaps this is due primarily to the fact that the average client has not taken his attorney into his confidence; further because he is unwilling for his attorney to take the time needed for a thoughtful consideration of the problems pertaining to his estate and the drafting of his will to meet his property needs; and because he is unwilling to pay a reasonable fee for this service.

This is a typical example of what happens when a property owner drafts his own will:

Nov. 12, 1942

"We are willing our children our real estate Elsie Vance our two peices of land in guilford Co. or Clay Smith our two peices in forsyth Co. an our personal property equally devided if any money equally devided This our last will an testament

Seal C. R. S.
Seal N. C. S."

C.R.S. died leaving a widow, one son, and one daughter. The foregoing will was signed by both C.R.S. and his wife N.C.S., and C.R.S. deposited the will with his wife for safekeeping. One piece of property devised in the will is deeded to husband and wife. Question: Is the foregoing will effective as to the husband on his death, or does it only become effective to pass the property on the death of the wife? What is the status of the estate by the entirety? Does it pass under this will on the death of the husband to the devisee named in the will?

Also the following:

"(Second) I give, devise and bequeath to my beloved wife, G.K.C., all of my real and personal property of every description, to be used for the welfare and happiness of her and our children, S.E.C., G.W.C., Jr., and A.L.C., to have and to be used as she sees fit, as long as she is my widow."

The foregoing excerpt was taken from the will of a notary public who had been writing wills for his friends and neighbors for several years. After writing his own will, he called in G.W.C., Jr., his son, and A.L.C., his daughter, two of the beneficiaries named in the fore-

going paragraph, to attest the execution thereof. They were the only attesting witnesses to his will. It is obvious that the named beneficiaries, who served as witnesses, could not take under the will.

We owe to the public the duty of stressing the importance of making proper provision for the settlement of estates after death by executing intelligent and understandable wills; and there is no person or group of persons better qualified to perform this duty than the lawyers.

Since the primary purpose of executing a will is to provide for the distribution of one's property according to his desires after his death, it goes without saying that if a person has virtually no property at all, he need not worry, or seek the advice of counsel for the drafting of a will. While all of our citizens are not wealthy, there are many who have sufficient property to be concerned with the question, "To whom is my property going to pass and who will enjoy the fruits of my labors after my death?" When we consider that the average person spends a lifetime acquiring the assets which make up his estate, this renders important and makes very much alive the above statement.

As soon as the loved ones of a deceased person feel that they can take up their work anew, one of the first places to visit is the office of the clerk of the superior court in the county of the residence of the deceased. The first question which is asked by the clerk is the very important question, "Is there a will in this estate?" If there is a will, assuming it is properly executed and intelligible, this will or testamentary writing becomes the source of information and the controlling instrument for the entire administration of the deceased's property, both real and personal.

If the answer to the above question is that the deceased did not leave a will, then the clerk is compelled to rely upon the intestacy laws which are in effect in North Carolina at the time, even though these laws transfer the property of the deceased to some person or group of persons who are entirely outside of the choice or favor of the deceased.

It can be immediately observed that the clerk in the exercise of his duties is compelled to follow all of the statutes applicable to the particular case, whether they be old and outmoded, or not. It is obvious to the legal profession and laymen alike that laws which were put on our statute books in 1868 do not fit present-day needs in a modern industrial world. In this state of our law there is much to be done by those who are interested in new legislation for an industrial and greater North Carolina.

Perhaps no person in North Carolina knows better than a clerk of a superior court the disappointment which can befall loved ones when it is necessary to comply with some outmoded statute which is recognized as law in North Carolina. Many a clerk has sought to explain in vain

and has had to bear the resentment of many a beneficiary by reason of the necessity of following some statute which should have been changed years before. At this stage of the administration of estates the necessity for a will carrying out the intention of the deceased to provide for his loved ones is perhaps more clearly exhibited than at any other point in the difficult task of the administration of estates. At this point a surviving widow or some other loved one can be heard to exclaim over and over again, "If we only had a will, for I know that the deceased intended for the property to go the way in which he explained it to me."

If a property owner desires to provide for his loved ones according to the plan which to him seems best and in the proportions which appear to him wise, he has no other way under the laws of North Carolina than by the execution of a properly written will. It can be seen immediately that if there is no will to control and dictate the administration of a decedent's estate, then the intestacy statutes of North Carolina must be relied upon to fill the gap.[1]

If it is difficult to conduct the business affairs of a going concern when the head of that concern is regularly at his desk and in a position to give a helping hand, it goes without saying that it will be more difficult to operate that business when the chair at his desk is vacant and there are no written instructions available for the carrying on or the dissolution of that business. A last will and testament is the last written word which a property owner will ever leave in his lifetime for the disposition of his property. Any undertaking is simplified if there are instructions for the benefit of those who are assigned the task of carrying out that undertaking.

A lifetime of earnings should not be left to be distributed by laws which might be far from adequate to provide for the needs of loved ones.

II. Who Is the Proper Person to Draft a Will?

The right to draft a will and thereby dispose of one's property has been handed down from the days of early English law. It is one of our fundamental rights created by statute. Property itself, as well as the succession to it, is the creature of positive law. The legislative power declares what objects in nature may be held as property; it provides by what forms and on what conditions it may be transmitted from one person to another; it confines the right of inheriting to certain persons whom it defines as heirs; and on the failure of such it takes the property to the State as an escheat. The right to give or take property is not one of those natural and inalienable rights which are supposed to precede all government, and which no government can rightfully im-

[1] N. C. Gen. Stat. (1943) c. 29.

pair.[1a] While it is not a correct statement to say that no one should ever attempt to write his own will, it is a true statement that the average layman should never attempt to write his own will if he plans a very complicated one, or if there is a great deal of property to be disposed of.

If a man has a very small estate consisting primarily of personal property and his financial affairs are in order, he may perchance draft a will which will suffice and thus escape employing the services of a competent attorney. If, on the other hand, he has a great deal of property or even a modest estate, and he desires to leave bequests and devises to certain persons other than members of his immediate family, or desires to create one or more testamentary trusts or that a specific thing to be done such as refinancing, or desires certain conditions lifted or imposed on the ownership of property, he had better employ the services of a competent attorney.

The following illustration will indicate what happens when a property owner, unfamiliar with legal language, attempts to draw his own will:

> "To whom it may concern
> this is my will In
> case I have anything to
> give my friend or relative
> Mrs. Bettie Elrow is the one
> to share in it first she gets
> $500. dollars then I have a
> son Tommie Trickle gets
> $500 dollars if he can be found
> and his mother to $100 dollars.
> I have a nephew and a niece and
> one great niece which I want $500
> dollars to be devised between Ethelbert
> Kretmyer, Miss Patsy Quincoe and Miss
> Sadie Hoping. The remainder to
> Mrs. Bettie Elrow whom I look forward
> to be my wife some sweet day if not she
> gets as mention if no change is written.
> Signed Frank Trickle".

If he is unwilling to employ an attorney to assist him under any of these conditions and many more too numerous to relate, he is likely to find himself in a maze of laws and statutes both ancient and modern and faced with questions and counter-questions, plus an unexpected share of confusing legal terms. Far more important, he is likely to dispose of his property in a manner entirely different from what had been his intention or leave a will which is incapable of interpretation.

[1a] Peace v. Edwards, 170 N. C. 64, 86 S. E. 807 (1915).

While this sounds like a rather severe indictment, suffice it to say that the files in many a clerk's office are thick with wills which are causing trouble since they do not make clear what the testator meant to say. The dockets of our superior courts are dotted with will cases which have come before them for construction, and in our North Carolina State Reports are found many will cases which have gone before the Supreme Court for final decision.

A will is a highly technical instrument which must contain certain essential features if it is ever to be probated and be given legal significance by a probate court. Since it is a testamentary disposition of property, it must contain sufficient legal language to carry out the intentions of its author and it should be complete in its provisions to prevent the necessity for court orders to perform certain tasks needful for the proper administration of the estate, and free from unintelligible and ambiguous language which must eventially require court construction. It has been said that a will is one of the most technical and difficult instruments which a lawyer is called upon to draft.

Technical language, if properly used, will make the provisions of a will clear. A devise of real estate in a will should be specific and should employ technical legal language to prevent ambiguity, the lack of which is shown in the following excerpt from a will offered for probate, which will did not contain a residuary clause.

"Second. I give and devise to my brothers, J.W.Z. and E.S.Z. and Lula Z., wife of E.S.Z., the tract of land on which I now live, located near D.——, N. C., containing 112½ acres, to have and to hold for their own use and benefit during their natural lives."

The following bequest of personal property is confusing and could have been clarified if technical legal language had been employed. This wording in this will leaves one in doubt as to what personal property the wife of the deceased is to have and for what period of time.

"SIXTH:—I will that my personal property—consisting of rents, goods and chattels and all personal property that I may own at the time of my death—except moneys on hand or in banks, notes and any and all other debts and obligations due me by any and all persons whatsoever, shall go to my said beloved wife, B.D.—and it is my wish and desire that as much of said property shall remain—as near as possible—intact at the homeplace—as long as my said beloved wife B.D. shall live."

The proper person to draft a will, therefore, is the well-trained lawyer—a person who has had legal training and who is thoroughly familiar with the law relating to the requirements of a proper will; who is positive of the meaning of legal words and phrases used in wills; who understands the law governing the execution of wills, as well as the ad-

ministration of estates, and is thus able to anticipate questions and situations which are likely to arise after the testator's death.

"ITEM I. I direct that all estate, inheritance, succession, transfer and other taxes, by whatever name called, levied against my estate as a whole, or against any legacy or devise, or against any legatee or devisee, whether levied by the Federal Government or by any State Government or political subdivision of any State, shall be paid by my Executor out of my general estate."

The question raised under the foregoing provisions was whether or not the testator intended to include street assessments in taxes mentioned. A skillful attorney, knowing the problems that will arise in the administration of estate, should have anticipated this question and clarified it in the will.

The following illustration will serve to show the importance of knowing the true meaning of legal words and phrases. Just how strong is the word "desire" when used as follows:

"Fourthly, I hereby give, devise and bequeath to my loving and devoted wife, Mrs. A.C., all my real estate and the out-houses and buildings thereon to have and to hold unto herself and her said heirs in fee simple forever.

"Fifthly, it is my desire and I do hereby request my executrix hereinafter named to give my mother, M.C., a lifetime where she may have proper shelter during her declining years."

Having selected an attorney who is qualified, the admonition, "See that your attorney is instructed to use the proper amount of time in the drafting of your will," cannot be over-stressed. Adequate wills cannot be drawn in haste. A will must be first written, studied, and re-written. To serve a client properly, the lawyer should first know exactly what his client's needs are. He should gain the confidence of his client, raise pertinent and thought-provoking questions relative to the estate and the administration of the estate. Then he should transpose the language of the client into a final draft of his will which should clearly, accurately, and without contradictions effectively express the wishes of the testator in the disposition and administration of all of his life's savings, both real and personal.

Notwithstanding the fact that a will is a very important and difficult instrument to draw, and if properly written, is the best insurance a property owner can buy, the average citizen is unwilling to pay his attorney a commensurate fee for his services. The average person wishes to spend but very little more time and money for the drafting of his will than he spends in one visit to a barber shop. Yet, he spends his energy and all of his lifetime to acquire an estate which he is willing to toss away by means of a "fifteen-minute" or so-called "form will."

It is my opinion that if the attorney is conscientious and explains the importance of a will and the difficulties involved, the client will—if he has a proper conception of the value of the assets of his estate, of the efforts put forth to acquire same, and the needs of his family—appreciate the efforts of his attorney and adequately compensate him for his services. Even if an attorney is employed, unless he devotes a sufficient amount of time to the drafting of his client's will, the will which the attorney prepares is likely to be ambiguous and cause considerable trouble, as is illustrated in the following case:

"Second, I give, devise, and bequeath to my beloved wife, M.S., for and during the term of her natural life, all of my property, of whatever nature and kind, and wheresoever situated, real, personal, and mixed, to use and enjoy during the term of her natural life, and at her death, the rest, residue, and remainder of same shall be equally divided among my children, and those that legally represent any one of my said children, that may die during the life of my said wife, share and share alike."

III. Do the Age and Physical Condition of the Testator, Executor, or Potential Beneficiary Affect the Carrying Out of the Intentions of the Testator?

The medical profession is not alone in its position that it has a special interest in minors, and in persons who are physically ill, or incompetent due to a mental deficiency. All walks of life realize that these persons require special treatment. In the drafting of a will, the draftsman must never lose sight of the fact that his client or his client's family may be represented in this class of persons.

It is well settled in our law that a minor or an incompetent person lacks the capacity to draft a will which will be accepted by a probate court. The draftsman should be very sure of the age of his client and that his client is of sufficient mental capacity to know positively how he wishes to dispose of his property.[2]

Each will must be carried into effect by either an executor, named therein, or an administrator *cum testamento annexo* appointed by the probate court. The draftsman should be very careful to advise his client of the type of duties this fiduciary will be called upon to execute. He should assist his client in selecting a person who is of proper age, has sufficient business experience, and is mentally capable to prevent untold trouble which can arise in the administration of his client's estate.

The draftsman should also be particularly interested in determining if his client has a member in his family, or a beneficiary who is or will

[2] Davis v. Davis, 223 N. C. 36, 25 S. E. (2d) 181 (1944); Hemphill v. Hemphill, 13 N. C. 291 (1831).

probably become mentally deficient, or who is suffering from some physical condition which is likely to cause his death prior to the death of the testator. If this legatee or devisee is likely to predecease the testator, the draftsman should make provision for this contingency and name someone to take the particular bequest or devise in the event this possibility becomes a reality, so that the bequest or devise will not lapse.[3]

If a beneficiary is a mental case, the draftsman should be in a position to advise his client of the possibilities and advantages of a testamentary trust which, if properly considered, can give unexcelled protection for this type of beneficiary. While we do not class illiteracy under the same heading as mental disease insofar as a will is concerned, if an executor is named in a will who is illiterate and cannot read and write, he is as readily disqualified as if he were a mental case.[4] A prudent businessman is not likely in his lifetime to assign a business undertaking to an incompetent person. It is obvious that it is poor judgment to name an incompetent person to handle his business affairs after his death.

IV. What Should Be the Legal Content of a Will?

Having accepted and complied with some of the many technical features pertaining to wills, the vitally important question, "What should be the legal content of a will," crosses the path of the draftsman.

The content or body of a will is likely to cause trouble. The content of a will is either adequate or inadequate. The draftsman will either have rendered a service to his client by preparing a helpful and intelligent instrument, or he will have laid the plans for untold trouble and disappointment in the days that lie ahead, with a strong possibility that he has planted the seed for future litigation, to the expense and hurt of heirs and beneficiaries. The draftsman of every will should see that it contains a residuary clause.

The following will, which was offered for probate within the last few months, raises so many questions and the content is so ambiguous that I have specified a few questions regarding the will, which will appear at the end of this quoted section thereof:

"Second: My executor herein named shall give my remains a burial suitable to the wishes of my friends and relatives, and pay all expenses of the funeral, together with all my just debts, if any, there being none at this time, out of the money which will come into his hands, belonging to my estate. The cost of the funeral to be approximately $600.00, also, to place a monument to cost $1000.00 approximately, suitable for four graves.

"Third: I hereby constitute and appoint my Trustees, the same are

[3] N. C. Gen. Stat. (1943) §34-42.

[4] N. C. Gen. Stat. (1943) §28-6; *In re* Saville, 156 N. C. 172, 72 S. E. 220 (1911).

F.D.E. and R.C.P., operating as ——— Company, my true and lawful Trustees to act as Trustees and managers of my property for five years; they, with my Executor, are given full power to hold, exchange, invest, reinvest, sell, and convey the property, and/or make leases, in their own discretion and according to their own judgment, without jurisdiction of the courts, but according to law. . . .

"FOURTH: I give and devise unto the following persons, church, and those named herein, certain properties, amounts of money stipulated, the same to be handled by my Executor herein named.

"FIFTH: To my wife, A.R.W., I leave in trust the following:

(1) The brick home where we now reside, together with all the furnishings therein and on the premises.

(2) Four brick store buildings in Southside on East side of Old Lexington Road between Waughtown and Sprague Sts.

(3) Seven acres of land located on Old Thomasville Rd. across the road from the home place of the F.Z.W. estate.

(4) Stock in the Piedmont Federal Building and Loan Association in the amount of $5000.00. This stock is her protection for the stores, against taxes, upkeep, and insurance in case they should not be kept fully rented because of conditions. She is to have the income from the stock as it matures, as well as from the real estate.

(5) Also, that she may not be embarrassed for lack of funds, I hereby give and leave for her $500.00 in cash to be paid immediately, if possible.

"All of the above, except the $500.00 in cash, is to be held in trust and the income is to be hers as long as she lives and remains as my widow. If she should cease to be my widow or die, this property shall revert to my estate.

"SIXTH: To M.E.W., my son, I hereby give my old homeplace on the Old Thomasville Road, containing 175 acres more or less, which was formerly the lands of Snider and Tesh.

"SEVENTH: To my daughter, E.W.C., I hereby give $5000.00.

"EIGHTH: To my daughter, E.W.B., I hereby give $5000.00.

"NINTH: To my daughter, L.W.S., I hereby give $5000.00.

"TENTH: To my step granddaughter, D.A.P., I give stock in the Piedmont Federal Building and Loan Association in the amount of $1000.00. This stock shall be held in Trust for her until she becomes 18 years of age at which time she is to receive this stock. Until she becomes 18 years of age she is to receive the income as dividends are paid by the Piedmont Federal Building and Loan Association. In case she should die before reaching 18 years of age, this stock shall go to my stepdaughter, M.E.M.P.

"ELEVENTH: To my stepdaughter, M.E.M.P., I give ($500.00) Five Hundred Dollars.

TWELFTH: To the Trustees of the New Friendship Baptist Church, I hereby leave in Trust ($5000.00) Five Thousand Dollars in First Federal Building and Loan Association. . . .

"THIRTEENTH: When the Estate is settled at the end of the 5 year period, which I have set for settlement, the entire sum is to be divided equally among my heirs, who are, M.E.W., E.W.C., E.W.B., L.W.S., except the above named Trusts."

The widow of the deceased testator dissented from the above will, and filed a special proceeding for a special widow's year's allotment. The personal property was valued at $132,008.53, and the real estate valued at $35,360.00, making a total value for the entire estate of $168,868.53. The family purchased a funeral exceeding the amount provided in the will. What can be done about the payment of same, since it exceeded the amount fixed by the testator? The testator left quite a lot of valuable real estate, and since he named trustees to administer a trust and provided for the executor to administer the trust with the trustees, it is necessary for the executor and trustees to file similar reports after the administration of the estate has been completed, as it happens to be a joint management of property between the executor and trustees. At what time should the executor pay the bequests? At what time does the son take charge of the 175-acre farm? On the death of the testator, or at the expiration of the five-year period provided in the will? Did the testator intend that the trustees of the New Friendship Bapist Church file reports on the administration of the $5,000 trust?

Here is another example:

"First: I direct that all just debts of and claims against my estate be paid as soon as may be practicable."

The testatrix from whose will the foregoing excerpt is taken left surviving a husband who was amply solvent. She did not provide that her funeral expenses and expenses of last illness be paid from her estate; that is, she did not direct such payment. Since the husband is liable for the necessaries of the wife, he is primarily liable for her funeral expenses and other debts not specifically contracted for by her, and her estate is secondarily liable.[5]

This mistake could have been easily corrected by using the following language:

"I hereby declare and direct that my just debts, expenses of last illness and my funeral expenses shall, regardless of any provision of the laws of North Carolina to the contrary, be a first charge against my estate, and I specifically direct that such debts, expenses of last illness and funeral expenses shall be paid by my executors out of my general estate. After the payment thereof, I dispose of my estate as follows: . . ."

It would be my suggestion to every draftsman that he have at least a rough inventory of the assets of his client's estate. This would seem to be fundamental if the draftsman is to complete a will that is to dis-

[5] Fertilizer Co. v. Bourne, 205 N. C. 337, 171 S. E. 368 (1933); Brown v. Brown, 199 N. C. 474, 154 S. E. 731 (1930); Batts v. Batts, 198 N. C. 395, 151 S. E. 868 (1929); Grocery Co. v. Bails, 177 N. C. 298, 98 S. E. 768 (1919); Bowen v. Daugherty, 168 N. C. 242, 84 S. E. 265 (1922).

pose of all and not just a part of his client's property. If the will omits certain property of the client, this property will pass by the terms of the intestacy statute applicable rather than the terms of the will.

The will should name an executor to administer the estate with a specific statement, if the testator so desires, that this fidicuary serve under bond.

The will should adequately provide for all of the heirs or beneficiaries contemplated by the client. In this connection the draftsman must be alert to cover the contingency of after-born children, born after the date of the execution of the will.[6] If after-born children are omitted and the will makes no reference to this contingency as having been considered at all, these after-born children will share in the estate irrespective of the will as if there were an intestacy, and perhaps to the point of materially altering the results intended under the will.

In this connection let's consider the following case:

"I, F.A., of Winston-Salem, North Carolina, now in actual military service of the United States and stationed at ———, ———, hereby revoking any and all prior wills or any part thereof, do devise and bequeath all of my estate to M.A., my wife, for her own use and benefit forever, and I hereby appoint her my executrix without bond, with full power to sell, mortgage, lease, or any way dispose of the whole or any part of my estate."

The foregoing excerpt was taken from a will used by a soldier, and I am sure the soldier thought his will did what he wished done with his property; however, he had a child born after the execution of the will and there was no provision made in his will for after-born children. The estate of the deceased consisted solely of personal property. Consequently, instead of his wife receiving all the property, she only received one-third, which was under the law on distribution, and his child received two-thirds of the property. This section of the distribution statute was amended by the 1945 General Assembly, effective February 3, 1945, and under the amendment a widow will receive one-half of the personal property and the child one-half.[7]

There are many estates where a simple disposition of the property will suffice to provide for heirs and loved ones. On the other hand there are many heads of families who are faced with complicated conditions peculiar to his household and to meet these uncertain conditions and needs, he should establish testamentary trusts, and leave explicit instruc-

[6] N. C. GEN. STAT. (1943) §31-45; *In re* Wall, 216 N. C. 805, 5 S. E. 837 (1939); Fawcett v. Fawcett, 191 N. C. 679, 132 S. E. 796 (1926); Christian v. Carter, 193 N. C. 537, 137 S. E. 596 (1927); Nicholson v. Nicholson, 190 N. C. 122, 129 S. E. 148 (1925); Rawl's v. Durham Realty Co., 189 N. C. 368, 127 S. E. 254 (1925); Thompson v. Julian, 133 N. C. 309, 45 S. E. 636 (1903); King v. Davis, 91 N. C. 142, 147 (1884).

[7] N. C. Session Laws 1945, H. B. No. 27 (Ratified Feb. 3, 1945).

tions which would not be available outside of a written will. Spendthrift trusts are available to care for disappointing sons and daughters. Trustees can render invaluable services when there is an adequate will to refer to for directions.

In disposing of real estate by means of a will the draftsman should inquire into the state of the title, certainly to the point of knowing how the property has been conveyed. If the deed to a particular piece of real estate has been prepared so that an estate by the entirety has been created, the property will belong in the event of the death of the testator to his surviving spouse. The will need not refer to this particular piece of property, unless the testator desires to name an alternative and thereby force an election on the surviving spouse as to whether she will take under the deed or by the will.[8]

To draft a will, name a fiduciary and to strip him of all power and authority to carry out the intentions of the testator is to execute a crippled instrument. A will contemplates the disposition of one's property and it should contemplate the bestowing of sufficient power upon the fiduciary to see that the intention of the testator is carried out.

What are the powers which should be entrusted to an executor named in a will? We must recognize the fundamental principle that change alone is permanent. While it might not have been necessary to sell assets to liquidate the estate in the lifetime of the testator, upon his death this may become a compelling fact. The draftsman should give the executor specific rather than just implied power and authority to sell assets of the estate in order to meet the needs of the estate.[9] He should be given power to sell in the exercise of a considerable amount of discretion, making it unnecessary to resort to the courts for permission to act. Courts are ready and eager to help executors, but there are limitations imposed by statute. Even though courts do all they can, it is necessary to make charges and this can prove to be expensive for the estate. The idea that courts are unfair to estates is the result of misinformation, for the court is the true guardian of every estate. However, they cannot perform their functions without making proper charges; and, since it is necessary for the estate to be represented in court by attorneys, additional expense must be incurred.

An executor is frequently faced with the duty of raising money to pay legacies and obligations filed against the estate. He has no other way than to turn to the assets of the estate. In the absence of a will, or in the absence of a statement in a will thus providing, an executor

[8] Randolph v. Edwards, 191 N. C. 334, 132 S. E. 17 (1926); Adams v. Wilson, 191 N. C. 392, 131 S. E. 760 (1926); Elmore v. Byrd, 180 N. C. 120, 104 S. E. 162 (1920); Pritchard v. Williams, 175 N. C. 319, 95 S. E. 570 (1918).

[9] Dulin v. Dulin, 187 N. C. 215, 148 S. E. 175 (1929); Lumber Co. v. Swain, 161 N. C. 566, 77 S. E. 700 (1913); Council v. Averitt, 95 N. C. 131 (1886).

must first turn to the personal property and offer it for sale. Only after the personal property has been exhausted has he the right to call upon the real estate to be answerable for the debts of the deceased.[10] There are many instances when it is to the advantage of the estate for the executor to sell the personal property first. On the other hand there are many instances when it is an advantage to sell the real estate and keep at least some of the personal property. If there is a small debt which could be adequately satisfied by the sale of a vacant lot or some relatively poor income producing rent property rather than bonds or stocks which are suffering from a depressed market, the estate can immediately profit thereby.[11] Unless power is given in the will so that the executor can make this choice he is powerless to help an estate under these circumstances.

I would like to mention, with considerable caution, another feature which can be written into a will. The power to borrow, if exercised prudently, can be a healthy thing for any business. If this power is recklessly used, insolvency is surely to be found at the end of the road. If the estate warrants granting a power to borrow and if this power is given with limitations, it can prove to be invaluable in the administration of certain types of estates.

A careful draftsman can identify the particular property in an estate which is to bear the costs of administration. For reasons peculiar to the testator this can be a wise and prudent thing to do. If this direction is omitted from a will, a certain amount of guess work immediately enters into the picture.

The following state of facts relate to the estate of a deceased testator:

About six months prior to the death of the testator, his wife died intestate leaving no property except personal property; and, not leaving any children or issue of a child, the husband inherited all of her personal property.[12] At the time the testator died, he had not received from the administrator of his wife's estate all the personal property of which she died possessed. By the terms of his will he left all the property that he owned, which had not been received from his wife's estate, to a sister. He bequeathed property left in his estate at the time of

[10] N. C. GEN. STAT. (1943) §28-81; Moseley v. Moseley, 192 N. C. 243, 134 S. E. 645 (1926); Chambers v. Byers, 214 N. C. 373, 199 S. E. 398 (1938); Parker v. Porter, 208 N. C. 31, 179 S. E. 28 (1935); Mahoney v. Stewart, 123 N. C. 106, 31 S. E. 384 (1898).

[11] Clark v. Holmes, 189 N. C. 703, 128 S. E. 20 (1925).

[12] N. C. GEN. STAT. (1943) §§28-7, 28-149; Bank of U. S. v. Beverly, 1 Howard 134, 157 (U. S. 1843); Reid v. Corrigan, 143 Ill. 402, 32 N. E. 387 (1892); Duncan v. Wallace, 114 Ind. 169, 16 N. E. 137 (1887); Howard v. Howard, 85 N. Y. 142 (1881); Smith v. Creech, 186 N. C. 187, 119 S. E. 3 (1923); Crouse v. Barham, 174 N. C. 460, 93 S. E. 979 (1917); 2 WOERNER, AMERICAN LAW OF ADMINISTRATION (3rd ed., 1923) §490.

his death or to be received by his estate from the administrator of his wife's estate to the heirs of his wife. The attorney who drafted the will for this testator apparently did not take sufficient time to draft the will needed by this person, as the testator made no provision as to which property from which the costs of administration of his estate and his debts would be paid. It, therefore, became necessary for the executor to bring an action in the Superior Court of Forsyth County so that the court might instruct him as to what property should be used for these purposes. This testator's attorney also failed to advise him about the witnessing of the will, and the testator called in to attest the execution of his will a son of the sister to whom he had willed property and a son of the brother-in-law of the testator. The question might be raised as to what effect, if any, did the witnessing of this will by the two nephews have on the disposition of the property?

In this day of high taxes, a thoughtful draftsman will be sure to give directions on this point, as certain assets might be salvaged or exempt if proper provision is made for the payment of taxes.

A will in its simplest form is a diffcult instrument, and the average draftsman will do well to serve adequately the needs of one testator at a time. While few have appeared during my term of office, I strongly counsel against the drafting of joint wills. The needs of individuals vary widely. Circumstances surrounding the individual estates vary widely. This is true even in the case of husband and wife. Theoretically husband and wife are one, but, insofar as wills are concerned, they continue to remain two separate and distinct persons having separate and distinct property rights.

The following is taken from a joint will offered for probate in my office. Even the most casual study of this will raises numerous questions which must be answered for the proper administration of this estate.

"We, A.B. and C.B. of the County and State aforesaid being of sound mind and memory but considering the uncertainty of our earthly existence do make and declare this our last will and testament, that is to say:

"1st. It is our will that the one of us that may live longest shall be the sole owner of all our property both real and personal to do with as she sees fit.

"2nd. If at the death of the last one of us she still has the home place then we devise give and bequeath to our beloved nephew, B.C., during his natural life then to his heirs at law. 2 acres of land on which is located our home, the same being bounded as follows: . . .

"3rd. We give and devise to our beloved nephew, S.P., and our beloved niece, A.P., the remainder of our real estate during the period of their natural lives and after that to their heirs at law."

Form wills should never be used. Every individual is entitled to separate consideration. As long as we are dealing with human beings, we must taken into account the characteristics of a testator. We should make a point to see that each will rests upon the needs of the person it is supposed to serve.

V. Is the Execution of a Will Technical?

After the will has been carefully prepared, the draftsman must see that the will is properly executed. For the purpose of discussing the execution of wills, I must remind the reader that there are three kinds of wills in North Carolina—the nuncupative, the holographic, and the written will; but for the purpose of this article I will not discuss a nuncupative will, but will discuss only the holographic and written will. There are certain circumstances attending the execution of these two wills which are important. The holographic will, which is a will in the handwriting of the testator, need not be witnessed. It is sufficient for the author to sign or subscribe his name. He has the privilege of calling in witnesses if this is a source of comfort to him. The execution of the written will calls for special attention. After the will has been prepared, in order to execute properly this will so that it can be probated, the testator should sign or subscribe his name in the presence of two or more witnesses whom he has invited to witness his signature, who in turn subscribe their names as witnesses in his presence and in the presence of each other.[13] It might be added that custom and usage have multiplied the duties and technicalities in the execution of wills. Since many wills are lengthy and it is easy for one page to be misplaced, I have found that it is wise to suggest that a testator should sign or subscribe each page of his will and it might be well also to ask the witnesses to sign or initial each page of the will.

In the selection of witnesses for the purpose of attesting the execution of a written will there is a warning which must be issued. The draftsman must not allow a beneficiary named in the will or a blood relation or a spouse of a beneficiary named in a will to subscribe his or her name as a witness. If this is allowed, the rights accruing under the will to the interested beneficiary, or to the beneficiary who is the spose of the witness, are automatically defeated.[14] This has proven in many a case to be a source of great disappointment; and when it is learned by a beneficiary when he has lost a bequest or a devise, it is indeed a hard lesson. As a practical matter, one should select disinterested witnesses who are both young and who are likely to be available

[13] N. C. Gen. Stat. (1943) §§31-3, 31-18; *In re* Thomas, 111 N. C. 409, 16 S. E. 226 (1892).

[14] N. C. Gen. Stat. (1943) §31-10; Boone v. Lewis, 103 N. C. 40, 9 S. E. 644 (1889).

when the time for probate of the will arrives. A person who is planning to move away from the city would not make a good witness, for this person very likely cannot be present to testify in the probate court as to the execution of the will. While our law requires only two witnesses, it is well to have the signatures of at least three persons, for, if one person should be ill or not able to appear in the probate court, there still would be two witnesses and the probate of the will would not be delayed.

VI. Should There Be a Depository for a Will?

After the will has been drafted and executed, it becomes one of the most important instruments a person will ever execute in his lifetime. It is a valuable paper. It is the last written word that the testator is likely to leave directing a disposition of his property. It should be carefully put away so that the will can be produced for probate upon the death of the testator.

As the execution of a holographic and a written will varies, the need for a depository for these two classes of wills likewise varies. The holographic will, in order to be accepted for probate, must have been placed by the testator in his lifetime either among his valuable papers or have been entrusted with someone other than a beneficiary named in said will for safekeeping, as it must be shown by competent evidence that the holograph will was found among the valuable papers of the testator or entrusted with someone for safekeeping.[15] There are no other alternatives. The most skillfully drawn holographic will will never serve its author unless at least one of these conditions has been complied with.

A depository is essential for the written will but not for the same reason as in the case of the holographic will. The written will may be placed for safekeeping quite apart from valuable papers, and it is not necessary for it to be entrusted with a person for safekeeping. The reason a written will should have a depository is because it is a valuable instrument and should be found after the testator's death. Lost wills are valueless to any one. Even though we might suppose that once a will is prepared it would be carefully placed so that it could be found upon the testator's death, cases continue to appear in the offices of Clerks in North Carolina where the will of a testator—even after a diligent search—cannot be found, and the estate must be administered therefore according to the laws of intestacy.

[15] N. C. Gen. Stat. (1943) §§8-51, 31-10, 194 N. C. 583, 140 S. E. 706 (1927); McDowell v. Railroad, 186 N. C. 565, 120 S. E. 221 (1933); *In re* Will of Harrison, 183 N. C. 457, 111 S. E. 867 (1922); McEwan v. Brown, 176 N. C. 249, 97 S. E. 20 (1918); McLean v. Rogers, 113 N. C. 171, 18 S. E. 117 (1893).

VII. Is the Probate of a Will Technical?

It will doubtless come as a surprise to the average reader to learn that there are no standard forms available to Clerks in the different counties in North Carolina. As each Clerk in each county takes office, he has the choice of either using the forms which his predecessor used, or of setting about to draw improved forms of his own.

Since I have been serving as Clerk of Superior Court in Forsyth County, it has been a particular hobby of mine to try to improve the forms which have been used in that county. Trial and error have played a large part in the process of producing the forms we now use. It is not my intention to state that the following forms which we use in Forsyth County should be used throughout North Carolina, but rather it is my idea to pass the content of these forms on to the reader with the idea of clarifying the problems of probate of a will; for this is not only a fundamental branch of the law but is in many instances a confusing one. Every attorney sooner or later is confronted with the problem, "How do I go about securing the probate of my client's will?"

* * * * * *

Certificate C.S.C. as to Filing of Will and Application for Probate

State of North Carolina — In the Superior Court
County of Forsyth — Before the Clerk

In the Matter of the Probate of the Purported Last Will and Testament of ....., Deceased

I, ..., Clerk of the Superior Court, do hereby certify that the purported last will and testament of ....., deceased, dated the ..... day of ....., 19....., marked exhibit ....., and purportedly signed or subscribed by ....., the alleged testat....., was this day delivered to me by[a] .....

This the ..... day of ....., 19.....

....., Clerk Superior Court.

[a] Name of person who presented the will to the clerk and whether executor, devisee, legatee, or other interested party.

* * * * * *

State of North Carolina — In the Superior Court
County of Forsyth — Before the Clerk

Application for Probate by Executor[16]

To W. E. Church, Clerk Superior Court:

I, ..., being named executor in the purported last will and testament of ....., deceased, dated the ..... day of ....., 19....., and marked exhibit ....., do hereby make application to have said will admitted to probate as provided by law.

This the ..... day of ....., 19.....

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* * * * * *

[16] N. C. Gen. Stat. (1943) §31-12.

APPLICATION FOR PROBATE BY PERSON OTHER THAN EXECUTOR[17]

To W. E. Church, Clerk Superior Court:

Being interested in the estate of ....., deceased, and * ..... I do hereby make application to have admitted to probate, as provided by law, the purported last will and testament of the above-named deceased, which is dated the ..... day of ....., 19....., and marked exhibit .....

This the ..... day of ....., 19.....

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*1. The executor named in h..... will having renounced;
2. The executor named in h..... will having failed to make application for the probate thereof and notice having been given said executor as required by law;
3. No executor having been named in h..... will.

* * * * * *

The following questions are propounded to some member of the family, or if not to a member of the family to any one that has sufficient knowledge of the facts to answer them.

STATE OF NORTH CAROLINA
COUNTY OF FORSYTH IN THE PROBATE COURT

1. When did the death of ..... occur?
2. Was the said deceased DOMICILED in Forsyth County, North Carolina, on the date of death?
3. To the best of your knowledge and belief, is exhibit ..... the ORIGINAL of the purported last will and testament made and published by the above-named deceased?
4. In your opinion is exhibit ..... the LAST will and testament made and published by the said deceased?
5. Did the alleged testator marry AFTER the execution of exhibit ————, h—— purported last will and testament?
6. Did the alleged testator obtain a divorce from h..... spouse after the execution of exhibit ....., h..... purported last will and testament?
7. If so, did the deceased execute a CODICIL or ANOTHER will?
8. Did said deceased have a child or children born AFTER the execution of the above described will?
9. Is there an unborn child of said deceased?
10. Was the deceased on the date of h..... death married? ..... widow? ..... widower? ..... single? ..... divorced? .....

* * * * * *

The following questions are propounded to attesting witnesses to a will:

1. Is it your opinion that exhibit ....., the paper-writing now exhibited to you and every part thereof, purporting to be the last will and testament of ....., deceased, dated the ..... day of ....., 19....., is the last will and testament and the same paper-writing the deceased requested you to witness as h..... will?
2. Was the testat..... more than twenty-one years of age on the date of the execution of said will?

[17] N. C. GEN. STAT. (1943) §31-13.

3. Did the testat..... request you to subscribe said will as a witness
   (a) by expressed words?
   (b) by implication from h..... acts and attending circumstances?
   (c) by acquiescence in the request by another?

4. Did you subscribe said will as a witness in the presence of the testat..... or where the testat..... could see you were subscribing the same paper-writing .....he had signed or subscribed as h..... will?

5. Are you interested in the distribution of the property in this will as
   (a) a beneficiary?
   (b) husband—wife of a beneficiary?
   (c) issue of a beneficiary?
      (1) What is the name of said husband—wife—beneficiary?

6. Did ....., subscribing witness....., sign said will
   (a) in your presence?
   (b) in the presence of the testat..... or where .....he could see said witness sign name?

7. Did the testat..... SIGN—SUBSCRIBE said will
   (a) in your presence BEFORE you signed name?
   (b) immediately AFTER you signed same, thus constituting the act as one and the same transaction?
   (c) before you APPEARED to witness said will?
      (1) Did the testat..... acknowledge and identify h..... will and signature thereto at the time you signed same as a witness?

8. If you subscribed said will on a sheet of paper other than the sheet on which the testat..... signed or subscribed, were said sheets physically connected at the time you subscribed same as a witness?

9. IF THE WILL WAS SUBSCRIBED BY MARK, OR BY SOMEONE FOR THE TESTAT....., THE FOLLOWING APPLIES:

Did the testat..... subscribe h..... will by making h..... mark thereon
   (a) in your presence BEFORE you subscribe same as a witness?
   (b) immediately AFTER you subscribed it, thereby constituting the act as one and the same transaction?
   (c) before you APPEARED to witness said will?
      (1) Did the testat..... acknowledge and identify h..... will and signature thereon at the time you signed same as a witness?

Did the testat..... declare to you that exhibit ..... was signed or subscribed
   (a) by someone for h..... at h..... direction?

* * * * * *

The following order of probate is the form order used in probating a will when two attesting witnesses prove the execution of a will as provided by law.

"This cause coming on to be heard and being heard before the undersigned, Clerk Superior Court, upon the application for probate of

the purported last will and testament of ....., deceased, late of Forsyth County, N. C., filed by ....., and from the evidence of the witnesses proving the due execution of said will and other evidence necessary for the probate thereof, the court finds the following facts:

1. That ....., deceased, was domiciled in Forsyth County, N. C., on ....., the date of death.

2. That exhibit ....., the purported last will and testament of said deceased, was filed for probate with the undersigned on .....

3. That application dated ....., for the probate of said last will and testament was filed by ....., the person entitled to make such application.

4. That two of the subscribing witnesses to said will, namely, ... and ..... appeared before the court and testified as to the due execution of same by the said deceased as provided by law.

5. That from the depositions of the said witnesses, the said last will and testament was duly executed in accordance with the laws of North Carolina, which depositions are attached and made a part of this order of probate.

6. That the will above referred to date ..... is the last will and testament of the above-named deceased.

NOW, THEREFORE, IT IS ORDERED that exhibit ..... be and the same is hereby admitted to probate and further that it be recorded in the Record of Wills in the office of the Clerk of Superior Court of Forsyth County, North Carolina.

This the ..... day of ....., 19.....

_____, Clerk Superior Court."

Of course, when a holograph will is presented for probate affidavits for witnesses to prove the due execution of same, together with a special order of probate, is drawn.

When a written will with attesting witnesses is presented for probate but only one witness is available, and proof of the handwriting of the testator and proof of the handwriting of the absent witness is given, an order is drawn to fit the facts in that particular case.